ST/LEG/SER.F/1/Add.3

SUMMARIES OF

Judgments, Advisory Opinions and Orders

OF THE

International Court of Justice

2003-2007

UNITED NATIONS

CONTENTS

FOREWORD

This publication contains summaries of 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 2003 to 31 December 2007. It is the continuation of three earlier volumes on the same subject (ST/LEG/SER.F/1 and Addenda 1 and 2), which covered the periods 1948-1991, 1992-1996 and 1997-2002, respectively.

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.

140. 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)

Judgment of 3 February 2003

In its Judgment on the admissibility of the Application filed by Yugoslavia for the 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*), the Court found that the Application was inadmissible.

The Court was composed as follows: President Guillaume; Vice-President Shi; Judges Ranjeva, Herczegh, Koroma, Vereshchetin, Parra-Aranguren, Rezek, Al-Khasawneh, Buergenthal, Elaraby; Judges *ad hoc* Dimitrijević, Mahiou; Registrar Couvreur.

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The text of the operative paragraph (para. 75) of the Judgment reads as follows:

"...

The Court,

By ten votes to three,

Finds that the Application submitted by the Federal Republic of Yugoslavia for revision, under Article 61 of the Statute of the Court, of the Judgment given by the Court on 11 July 1996, is inadmissible.

IN FAVOUR: President Guillaume; Vice-President Shi; Judges Ranjeva, Herczegh, Koroma, Parra-Aranguren, Al-Khasawneh, Buergenthal, Elaraby; Judge *ad hoc* Mahiou;

AGAINST: Judges Vereshchetin, Rezek; Judge *ad hoc* Dimitrijević."

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Judge Koroma appended a separate opinion to the Judgment of the Court; Judge Vereshchetin appended a dissenting opinion to the Judgment of the Court; Judge Rezek appended a declaration to the Judgment of the Court; Judge *ad hoc* Dimitrijević appended a dissenting opinion to the Judgment of the Court; Judge *ad hoc* Mahiou appended a separate opinion to the Judgment of the Court.

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On 24 April 2001, the Federal Republic of Yugoslavia (hereinafter referred to as the "FRY") instituted proceedings, whereby, referring to Article 61 of the Statute of the Court, it requested the Court to revise the Judgment delivered on 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 (I.C.J. Reports 1996 (II),* p. 595).

Since the Court included upon the Bench no judge of the nationality of either of the Parties, the FRY chose Mr. Vojin Dimitrijević and Bosnia and Herzegovina Mr. Sead Hodžić to sit as judges *ad hoc.* After Mr. Hodžić had subsequently resigned from his duties, Bosnia and Herzegovina designated Mr. Ahmed Mahiou to sit in his stead.

Bosnia and Herzegovina filed its written observations on the admissibility of the FRY's Application within the time-limit fixed by the Court. The Court decided that a second round of written pleadings was not necessary. Public hearings were held on 4, 5, 6 and 7 November 2002.

At the oral proceedings, the following final submissions were presented by the Parties:

On behalf of the Government of the FRY,

at the hearing of 6 November 2002:

"For the reasons advanced in its Application of 23 April 2001 and in its pleadings during the oral proceedings held from 4 to 7 November 2002, the Federal Republic of Yugoslavia respectfully requests the Court to adjudge and declare:

— that there are newly discovered facts of such a character as to lay the 11 July 1996 Judgment open to revision under Article 61 of the Statute of the Court; and

— that the Application for Revision of the Federal Republic of Yugoslavia is therefore admissible."

On behalf of the Government of Bosnia and Herzegovina,

at the hearing of 7 November 2002:

"In consideration of all that has been submitted by the representatives of Bosnia and Herzegovina in the written and oral stages of these proceedings, Bosnia and Herzegovina requests the Court to adjudge and declare that the Application for Revision of the Judgment of 11 July 1996, submitted by the Federal Republic of Yugoslavia on 23 April 2001, is not admissible."

*

The Court notes that in its Application for revision of the 1996 Judgment, the FRY relies on Article 61 of the Statute, which provides for revision proceedings to open with a judgment of the Court declaring the application admissible on the grounds contemplated by the Statute; Article 99 of the Rules makes express provision for proceedings on the merits if, in its first judgment, the Court has declared the application admissible.

Thus, the Court points out, the Statute and the Rules of Court foresee a "two-stage procedure". The first stage of the procedure for a request for revision of the Court's judgment should be "limited to the question of admissibility of that request". Therefore, at the current stage of the proceedings the Court's decision is limited to the question whether the request satisfies the conditions contemplated by the Statute. Under Article 61 of the Statute, these conditions are as follows:

(a) the application should be based upon the "discovery" of a "fact";

(b) the fact, the discovery of which is relied on, must be "of such a nature as to be a decisive factor";

(c) the fact should have been "unknown" to the Court and to the party claiming revision when the judgment was given;

(d) ignorance of this fact must not be "due to negligence"; and

(e) the application for revision must be "made at latest within six months of the discovery of the new fact" and before ten years have elapsed from the date of the judgment.

The Court observes that an application for revision is admissible only if each of the conditions laid down in Article 61 is satisfied. If any one of them is not met, the application must be dismissed.

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The Court then begins by ascertaining whether there is here a "fact" which, although in existence at the date of its Judgment of 11 July 1996, was at that time unknown both to the FRY and to the Court.

In this regard, it notes that in its Application for revision of the Court's Judgment of 11 July 1996, the FRY contended the following:

> "The admission of the FRY to the United Nations as a new Member on 1 November 2000 is certainly a new fact. It can also be demonstrated, and the Applicant submits, that this new fact is of such a nature as to be a decisive factor regarding the question of jurisdiction *ratione personae* over the FRY.
>
> After the FRY was admitted as a new Member on 1 November 2000, dilemmas concerning its standing have been resolved, and it has become an unequivocal fact that the FRY did not continue the personality of the SFRY [the Socialist Federal Republic of Yugoslavia], was not a Member of the United Nations before 1 November 2000, was not a State party to the Statute, and was not a State party to the Genocide Convention . . .
>
> The admission of the FRY to the United Nations as a new Member clears ambiguities and sheds a different light on the issue of the membership of the FRY in the United Nations, in the Statute and in the Genocide Convention."

The Court points out that in its oral pleadings, the FRY did not invoke its admission to the United Nations in November 2000 as a decisive "new fact", within the meaning of Article 61 of the Statute, capable of founding its request for revision of the 1996 Judgment. The FRY claimed that this admission "as a new Member" as well as the Legal Counsel's letter of 8 December 2000 inviting it, according to the FRY, "to take treaty actions if it wished to become a party to treaties to which the former Yugoslavia was a party" were

> "events which . . . revealed the following two decisive facts:
>
> (1) the FRY was not a party to the Statute at the time of the Judgment; and
>
> (2) the FRY did not remain bound by Article IX of the Genocide Convention continuing the personality of the former Yugoslavia".

The Court observes that it is on the basis of these two "facts" that, in its oral argument, the FRY ultimately founded its request for revision. The FRY further stressed at the hearings that these "newly discovered facts" had not occurred subsequently to the Judgment of 1996. In this regard, the FRY stated that "the FRY never argued or contemplated that the newly discovered fact would or could have a retroactive effect".

For its part, Bosnia and Herzegovina maintained the following:

> "there is no 'new fact' capable of 'laying the case open' to revision pursuant to Article 61, paragraph 2, of the Court's Statute: neither the admission of Yugoslavia to the United Nations which the applicant State presents as a fact of this kind, or in any event as being the source of such a fact, nor its allegedly new situation vis-à-vis the Genocide Convention . . . constitute facts of that kind".

In short, Bosnia and Herzegovina submitted that what the FRY referred to as "facts" were "the consequences . . . of a fact, which is and can only be the admission of Yugoslavia to the United Nations in 2000". It stated that "Article 61 of the Statute of the Court . . . requires that the fact was 'when the judgment was given, unknown to the Court and also to the party claiming revision'" and that "this implies that . . . the fact in question actually did exist 'when the judgment was given'". According to Bosnia and Herzegovina, the FRY "is regarding its own change of position [as to its continuation of the personality of the SFRY] (and the ensuing consequences) as a new fact". Bosnia and Herzegovina concluded that the "new fact" invoked by the FRY "is subsequent to the Judgment whose revision is sought". It noted that the alleged new fact could have "no retroactive or retrospective effect".

*

With a view to providing the context for the contentions of the FRY, the Court then recounts the background to the case.

In the early 1990s the SFRY, made up of Bosnia and Herzegovina, Croatia, Macedonia, Montenegro, Serbia and Slovenia, began to break up. On 25 June 1991 Croatia and Slovenia both

declared independence, followed by Macedonia on 17 September 1991 and Bosnia and Herzegovina on 6 March 1992. On 22 May 1992, Bosnia and Herzegovina, Croatia and Slovenia were admitted as Members to the United Nations; as was the former Yugoslav Republic of Macedonia on 8 April 1993.

On 27 April 1992 the "participants of the joint session of the SFRY Assembly, the National Assembly of the Republic of Serbia and the Assembly of the Republic of Montenegro" adopted a declaration. Expressing the will of the citizens of their respective Republics to stay in the common state of Yugoslavia, they stated that:

> "1. The Federal Republic of Yugoslavia, continuing the state, international legal and political personality of the Socialist Federal Republic of Yugoslavia, shall strictly abide by all the commitments that the SFR of Yugoslavia assumed internationally,
>
> . . .
>
> Remaining bound by all obligations to international organizations and institutions whose member it is . . ."

An official Note of the same date from the Permanent Mission of Yugoslavia to the United Nations stated *inter alia*

> "Strictly respecting the continuity of the international personality of Yugoslavia, the Federal Republic of Yugoslavia shall continue to fulfil all the rights conferred to, and obligations assumed by, the Socialist Federal Republic of Yugoslavia in international relations, including its membership in all international organizations and participation in international treaties ratified or acceded to by Yugoslavia." (United Nations doc. A/46/915. Ann. I.)

On 22 September 1992 the General Assembly adopted resolution 47/1, whereby, upon the recommendation contained in Security Council resolution 777 of 19 September 1992, it considered "that the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations; and therefore decides that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in the United Nations and that it shall not participate in the work of the General Assembly".

On 29 September 1992, in response to a letter from the Permanent Representatives of Bosnia-Herzegovina and Croatia requesting certain clarifications, the Under-Secretary-General and Legal Counsel of the United Nations addressed a letter to them, in which he stated that the "considered view of the United Nations Secretariat regarding the practical consequences of the adoption by the General Assembly of resolution 47/1" was as follows:

> "While the General Assembly has stated unequivocally that the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot automatically continue the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations and that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in the United Nations, the only practical consequence that the resolution draws is that the Federal Republic of Yugoslavia (Serbia and Montenegro) shall not *participate* in the work of the General Assembly. It is clear, therefore, that representatives of the Federal Republic of Yugoslavia (Serbia and Montenegro) can no longer *participate* in the work of the General Assembly, its subsidiary organs, nor conferences and meetings convened by it.
>
> On the other hand, the resolution neither terminates nor suspends Yugoslavia's *membership* in the Organization. Consequently, the seat and nameplate remain as before, but in Assembly bodies representatives of the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot sit behind the sign 'Yugoslavia'. Yugoslav missions at United Nations Headquarters and offices may continue to function and may receive and circulate documents. At Headquarters, the Secretariat will continue to fly the flag of the old Yugoslavia as it is the last flag of Yugoslavia used by the Secretariat. The resolution does not take away the right of Yugoslavia to participate in the work of organs other than Assembly bodies. The admission to the United Nations of a new Yugoslavia under Article 4 of the Charter will terminate the situation created by resolution 47/1." (United Nations doc. A/47/485; emphasis in the original.)

On 29 April 1993, the General Assembly, upon the recommendation contained in Security Council resolution 821 (1993) (couched in terms similar to those of Security Council resolution 777 (1992)), adopted resolution 47/229 in which it decided that "the Federal Republic of Yugoslavia (Serbia and Montenegro) shall not participate in the work of the Economic and Social Council".

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The Court recalls that between the adoption of General Assembly resolution 47/1 of 22 September 1992 and the admission of the FRY to the United Nations on 1 November 2000, the legal position of the FRY remained complex. As examples thereof, the Court cites several changes to the English text of certain relevant paragraphs of the "Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties", prepared by the Treaty Section of the Office of Legal Affairs, which was published at the beginning of 1996 (those changes were directly incorporated into the French text of the Summary published in 1997); it also referred to the letters sent by the Permanent Representatives of Bosnia and Herzegovina, Croatia, Slovenia and the former Yugoslav Republic of Macedonia which questioned the validity of the deposit of the declaration recognizing the compulsory jurisdiction of the International Court of Justice by the FRY dated 25 April 1999, and which set out their "permanent objection to the groundless assertion of the Federal Republic of Yugoslavia (Serbia and Montenegro), which has also been repudiated by the international community, that it represents the continuity of our common predecessor, and thereby continues to enjoy its status in international organizations and treaties".

The Court adds to the above account of the FRY's special situation that existed between September 1992 and November 2000, certain details concerning the United Nations membership dues and rates of assessment set for the FRY during that same period.

The Court then recalls that on 27 October 2000, Mr. Koštunica, the newly elected President of the FRY, sent

a letter to the Secretary-General requesting admission of the FRY to membership in the United Nations; and that, on 1 November 2000, the General Assembly, upon the recommendation of the Security Council, adopted resolution 55/12, by which it decided to admit the Federal Republic of Yugoslavia to membership in the United Nations.

The Court observes that the admission of the FRY to membership of the United Nations on 1 November 2000 put an end to Yugoslavia's *sui generis* position within the United Nations. It notes that, on 8 December 2000, the Under-Secretary-General, the Legal Counsel, sent a letter to the Minister for Foreign Affairs of the FRY, reading in pertinent parts:

> "Following [the admission of the Federal Republic of Yugoslavia to the United Nations on 1 November 2000], a review was undertaken of the multilateral treaties deposited with the Secretary-General, in relation to many of which the former Socialist Federal Republic of Yugoslavia (the SFRY) and the Federal Republic of Yugoslavia (FRY) had undertaken a range of treaty actions . . .
>
> It is the Legal Counsel's view that the Federal Republic of Yugoslavia should now undertake treaty actions, as appropriate, in relation to the treaties concerned, if its intention is to assume the relevant legal rights and obligations as a successor State." (Letter by the Legal Counsel of the United Nations, Application of Yugoslavia, Ann. 27.)

The Court further notes that at the beginning of March 2001, a notification of accession to the Genocide Convention by the FRY was deposited with the Secretary-General of the United Nations; and that, on 15 March 2001, the Secretary-General, acting in his capacity as depositary, issued a Depositary Notification (C.N.164.2001.TREATIES-1), indicating that the accession of the FRY to the 1948 Convention on the Prevention and Punishment of the Crime of Genocide "was effected on 12 March 2001" and that the Convention would "enter into force for the FRY on 10 June 2001".

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The Court, in order to complete the contextual background, also recalls the proceedings leading up to the delivery of the Judgment of 11 July 1996, as well as the passages in that Judgment relevant to the present proceedings.

It refers to its Order dated 8 April 1993, by which it indicated certain provisional measures with a view to the protection of rights under the Genocide Convention. It recalls that in this Order the Court, referring to Security Council resolution 777 (1992), General Assembly resolution 47/1 and the Legal Counsel's letter of 29 September 1992, stated *inter alia* that, "while the solution adopted is not free from legal difficulties, the question whether or not Yugoslavia is a Member of the United Nations and as such a party to the Statute of the Court is one which the Court does not need to determine definitively at the present stage of the proceedings"; and that it concluded that "Article IX of the Genocide Convention, to which both Bosnia-Herzegovina and Yugoslavia are parties, thus appears to the Court to afford a basis on which the jurisdiction of the Court might be founded to the extent that the subject-matter of the dispute relates to 'the interpretation, application or fulfilment' of the Convention, including disputes 'relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III' of the Convention." The Court further refers to its second Order on provisional measures, of 13 September 1993, by which it confirmed that it had *prima facie* jurisdiction in the case on the basis of Article IX of the Genocide Convention.

It finally observes that, in its Judgment of 11 July 1996, on the preliminary objections raised by the FRY, it came to the conclusion that both Parties were bound by the Convention when the Application was filed. In the operative part of its Judgment the Court, having rejected the preliminary objections raised by the FRY, found that "on the basis of Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, it has jurisdiction to adjudicate upon the dispute" and that "the Application filed by the Republic of Bosnia and Herzegovina on 20 March 1993 is admissible".

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In order to examine whether the FRY relies on facts which fall within the terms of Article 61 of the Statute, the Court observes first that, under the terms of paragraph 1 of that Article, an application for revision of a judgment may be made only when it is "based upon the discovery" of some fact which, "when the judgment was given", was unknown. These are the characteristics which the "new" fact referred to in paragraph 2 of that Article must possess. Thus both paragraphs refer to a fact existing at the time when the judgment was given and discovered subsequently. A fact which occurs several years after a judgment has been given is not a "new" fact within the meaning of Article 61; this remains the case irrespective of the legal consequences that such a fact may have.

The Court points out that, in the present case, the admission of the FRY to the United Nations occurred on 1 November 2000, well after the 1996 Judgment. It concludes accordingly that that admission cannot be regarded as a new fact, within the meaning of Article 61, capable of founding a request for revision of that Judgment.

The Court goes on to note that, in the final version of its argument, the FRY claims that its admission to the United Nations and the Legal Counsel's letter of 8 December 2000 simply "revealed" two facts which had existed in 1996 but had been unknown at the time: that it was not then a party to the Statute of the Court and that it was not bound by the Genocide Convention. The Court finds that, in advancing this argument, the FRY does not rely on facts that existed in 1996. In reality, it bases its Application for revision on the legal consequences which it seeks to draw from facts subsequent to the Judgment which it is asking to have revised. Those consequences, even supposing them to be established, cannot be regarded as facts within the meaning of Article 61. The Court finds that the FRY's argument cannot accordingly be upheld.

The Court furthermore notes that the admission of the FRY to membership of the United Nations took place more than four years after the Judgment which it is seeking to have revised. At the time when that Judgment was given, the situation obtaining was that created by General Assembly resolution 47/1. In this regard the Court observes that the difficulties which arose regarding the FRY's status between the adoption

of that resolution and its admission to the United Nations on 1 November 2000 resulted from the fact that, although the FRY's claim to continue the international legal personality of the Former Yugoslavia was not "generally accepted" (see Security Council resolution 777 of 19 September 1992), the precise consequences of this situation were determined on a case-by-case basis (for example, non-participation in the work of the General Assembly and ECOSOC). Resolution 47/1 did not *inter alia* affect the FRY's right to appear before the Court or to be a party to a dispute before the Court under the conditions laid down by the Statute. Nor did it affect the position of the FRY in relation to the Genocide Convention. To "terminate the situation created by resolution 47/1", the FRY had to submit a request for admission to the United Nations as had been done by the other Republics composing the SFRY. The Court points out that all these elements were known to the Court and to the FRY at the time when the Judgment was given. Nevertheless, what remained unknown in July 1996 was if and when the FRY would apply for membership in the United Nations and if and when that application would be accepted, thus terminating the situation created by General Assembly resolution 47/1.

The Court emphasizes that General Assembly resolution 55/12 of 1 November 2000 cannot have changed retroactively the *sui generis* position which the FRY found itself in vis-à-vis the United Nations over the period 1992 to 2000, or its position in relation to the Statute of the Court and the Genocide Convention. Furthermore, the letter of the Legal Counsel of the United Nations dated 8 December 2000 cannot have affected the FRY's position in relation to treaties. The Court also observes that, in any event, the said letter did not contain an invitation to the FRY to accede to the relevant conventions, but rather to "undertake treaty actions, as appropriate, . . . as a successor State".

The Court concludes from the foregoing that it has not been established that the request of the FRY is based upon the discovery of "some fact" which was "when the judgment was given, unknown to the Court and also to the party claiming revision". It finds that one of the conditions for the admissibility of an application for revision prescribed by paragraph 1 of Article 61 of the Statute has therefore not been satisfied. The Court finally indicates that it therefore does not need to address the issue of whether the other requirements of Article 61 of the Statute for the admissibility of the FRY's Application have been satisfied.

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Separate opinion of Judge Koroma

Judge Koroma, referring to the need to elucidate Article 61 and the rather scant jurisprudence on revision, points out that the revision procedure is essentially about newly discovered facts or arguments and not a legal challenge, as such, to the conclusion reached earlier by the Court based on the facts as then known, although the outcome of the challenge may have an effect on the Judgment.

According to the jurisprudence, the discovery of new facts is a strict condition on the availability of revision. This condition is also fundamental to the decision on the Application, whether the admission of the FRY to membership of the United Nations, which took place on 1 November 2000, is a newly discovered fact within the meaning of Article 61 of the Statute, which fact must have existed, but been unknown, at the time of the Judgment.

It is against this background that Judge Koroma has difficulty with some conclusions reached in the Judgment. The Court, he observes, without defining what in its opinion will be considered a "new" fact within the meaning of Article 61, stated that if the fact occurred several years after a judgment, this is not a new fact within the meaning of Article 61, irrespective of its legal consequences. In Judge Koroma's view, this is, as a position of law, correct as far as it goes; but the issue the Court has to determine involves the question as to whether or not Yugoslavia was a Member of the United Nations before 1 November 2000.

He recalls that the Court relied for the basis of its Judgment in 1996 on the FRY's declaration of 22 April 1992 that it remained bound by those treaties to which the former Socialist Federal Republic of Yugoslavia had been a party, and the Court assumed for this purpose that the FRY was a Member of the United Nations. Unless such assumption was made, the FRY's declaration alone should not and could not legally have been sufficient to serve as a basis for recognition of the FRY as a party to the Genocide Convention—the sole basis on which the Court founded its jurisdiction. Accordingly, the FRY's admission to membership of the United Nations on 1 November 2000 suggests that it was not a Member of the United Nations in 1996 and thus was not a party to the Genocide Convention; therefore, the basis of the Court's jurisdiction no longer exists. Unfortunately, the Court chose not to address these critical issues, which were raised in the Application and in the hearings, but rather stated that the consequences which the FRY sought to draw from the facts which occurred in 2000 even if established, "cannot be regarded as facts within the meaning of Article 61" (paragraph 69 of the Judgment). Far from the consequences not being established, it was because of the FRY's admission to membership of the United Nations that it acceded to the Genocide Convention in March 2001, after having received a letter from the Legal Counsel of the United Nations asking it to undertake any necessary treaty formalities in its capacity as successor State. In Judge Koroma's opinion, it is incontestable that, as the FRY stated in its Application, "[t]he admission of the FRY to the United Nations as a new Member clears ambiguities and sheds a different light on the issue of the membership of the FRY in the United Nations, in the Statute and in the Genocide Convention."

Judge Koroma grants that the issues raised by this case are not easy of solution, but fears that the answers provided beg the question and cannot withstand scrutiny. In his view, when an application for revision is submitted under Article 61 and where fresh facts have emerged and are of such importance as to warrant revising the earlier decision or conclusion, the Court should be willing to carry out such a procedure. Such an application is not to be regarded as impugning the Court's earlier legal decision as such, as that decision was based on the

facts as then known. He is of the view that the admission of the FRY to membership of the United Nations in November 2000 does have legal implications for the Judgment reached by the Court on this matter in July 1996.

In Judge Koroma's opinion, the Court's jurisdiction could have been founded on more legally secure grounds.

Dissenting opinion of Judge Vereshchetin

Judge Vereshchetin is of the view that the starting point of the Court's reasoning in the present Judgment should have been the question, lying at the core of the dispute between the Parties, as to whether or not the assumption that Yugoslavia was a Member of the United Nations at the time of the 1996 Judgment was necessary, and therefore "of such a nature as to be a decisive factor" (within the meaning of Art. 61, para. 1, of the Statute), for the Court's finding on its jurisdiction.

Having arrived at the conclusion that such an assumption was necessary since, "otherwise, it is inconceivable how the Court could have recognized the continuing participation of Yugoslavia in the Genocide Convention while the essential pre-condition of such participation [the membership of the United Nations] had ceased to exist", Judge Vereshchetin proceeds to examine whether United Nations membership status may fall within the legal notion of "fact" and if so, whether an assumption of such a fact later proved to be wrong can serve as a ground for revising a judgment, provided all other requirements of Article 61 of the Statute are satisfied.

Giving affirmative answers to both questions, Judge Vereshchetin further opines that Yugoslavia has shown that its non-membership of the United Nations was unknown to Yugoslavia and the Court when the Judgment was delivered and that such ignorance was not due to Yugoslavia's negligence.

"From the legal point of view", continues Judge Vereshchetin, "it cannot be denied that the fact of Yugoslavia's non-membership in the United Nations at the time of the 1996 Judgment could not have been established before the decision of the General Assembly on 1 November 2000, by which decision Yugoslavia was admitted as a *new* Member of the United Nations. This decision was taken pursuant to the recommendation of the Committee on the Admission of *New* Members and the recommendation of the Security Council. Like all other States which had formed the past Socialist Federal Republic of Yugoslavia, the new Yugoslavia is now listed in the official documents of the United Nations as a Member from the time of its admission, and not from the time when the former Yugoslavia became a Member of the United Nations.

On the other hand, the assumption of Yugoslavia's membership in the United Nations at the time of the Court's Judgment on its jurisdiction cannot be sustained after 1 November 2000. Residual elements of the membership of the former Yugoslavia, not denied to the new Yugoslavia after 1992, cannot frustrate this conclusion. Otherwise, we have to presume that the rules of elementary logic and common sense are not applicable to this case, and a State that already was a Member of an organization and whose membership had neither ceased nor was suspended at a certain time, can again be admitted to the same organization as a new Member, but with a different initial date of its membership. However", in the view of Judge Vereshchetin, "this is exactly what flows from the Judgment's holding that 'it has not been established that the request of the FRY is based upon the discovery of 'some fact' which was 'when the judgment was given, unknown to the Court and also to the party claiming revision' (para. 72 of the Judgment)."

In the concluding part of his opinion, Judge Vereshchetin says that, in his view, the request for revision of the Court's Judgment on its jurisdiction satisfies all the conditions contemplated by Article 61 of the Statute and therefore the Application of Yugoslavia is admissible and the Judgment of the Court of 11 July 1996 should have been laid open for revision. "Such a procedural decision would not have prejudged the ultimate result of the revision. *A fortiori,* it could not have been seen as a condoning of the behaviour of either side in the bloody conflict on the territory of the former Yugoslavia."

Declaration by Judge Rezek

Judge Rezek considers the Application for revision to be admissible. In his view, the Court's assertion in the Judgment of 11 July 1996 of jurisdiction over the Respondent, resulting from a misreading of the factual situation, should now be re-examined. Otherwise, he would have proposed denying *in limine* the Application for revision but for a reason diametrically opposed to those relied upon by the majority: the Federal Republic of Yugoslavia, one of the newest Members of the United Nations, is not the entity considered by the Court to be the Respondent in the Judgment of 11 July 1996. Accordingly, the new Yugoslavia does not have standing to seek revision. It is not a party to the dispute submitted to the Court by Bosnia and Herzegovina. It will be for the Court to decide at the appropriate time whether that dispute is extant in the absence of the Respondent.

Dissenting opinion of Judge Dimitrijević

Judge Dimitrijević believes that the two principal lines of reasoning of the majority are flawed, namely, *(a)* the attempt to dispose of the case by restrictively interpreting the meaning of the term "fact" as used in Article 61 of the Statute, and *(b)* the choice of only one interpretation of the legal situation which obtained on 11 July 1996 when the Judgment 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* was delivered. The proposition that the Federal Republic of Yugoslavia (FRY) was a continuator of the former Socialist Federal Republic of Yugoslavia (SFRY) was treated by the Court in 1996 as a fact (as is done by the majority in the present case); the admission of the FRY as a *new* Member to the United Nations on 1 November 2000 revealed that this fact had not existed at any time.

In the opinion of Judge Dimitrijević, the meaning of the term "fact" cannot be reduced to an event or an object existing in physical reality: a fact in law is part of *legal* reality. Being or not being a member of an international organization or a party to an international treaty is a legal fact. In Article 61, paragraph 1, of the Statute, reference is made to a fact which existed at the time when the Judgment was given, but

was unknown to the Court and to the party claiming revision, whilst paragraph 2 requires the Court expressly to record the existence of the "*new* fact" in order to declare an application for revision admissible. This implies a new understanding, as a result of the realization, after the judgment was delivered, that the "old" fact, which had been taken as existing at the time of the judgment, had never actually existed. Contrary to what the majority holds, the FRY does not rely "on the legal consequences which it seeks to draw from facts subsequent to the [1996] Judgment" (Judgment, para. 69), but claims that the fact on which the Court relied in its 1996 Judgment did not exist. The non-existence of a fact is as much a factual question as its existence.

In its Order of 8 April 1993 on the request for the indication of provisional measures in the case of *Bosnia and Herzegovina* v. *Yugoslavia,* the Court found that it had *prima facie* jurisdiction on the basis of Article IX of the Genocide Convention in conjunction with Article 35, paragraph 2, of the Statute and observed that the solution adopted was "not free from legal difficulties" (*I.C.J. Reports 1993,* p. 14, para. 18) and that "the question whether or not Yugoslavia is a Member of the United Nations and as such a party to the Statute of the Court is one which the Court does not need to determine *definitively* at the present stage of the proceedings" (*ibid.;* emphasis added). In its 1996 Judgment on the preliminary objections, the Court again did not find it necessary to determine definitively whether or not the FRY was a Member of the United Nations and a party to the Statute of the Court.

For Judge Dimitrijević it remains unclear to which "Yugoslavia" the Court referred as being party to the Genocide Convention. In failing to indicate that the FRY was bound by the obligations of the SFRY as a successor State, the Court must have assumed that there was continuity between the SFRY and the FRY and that the latter was a Member of the United Nations. These determinations were findings on facts. They were made by the Court in spite of admitted "legal difficulties", which were known to the Court in the form of possible options on how to decide on the presence of certain facts, as disclosed in a series of ambiguous or controversial decisions of States and various organs of the United Nations and other international organizations, such as Security Council resolution 757 (1992), which noted that the claim by the FRY "to continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations has not been generally accepted" (United Nations doc. S/RES/757 (1992)), its resolution 777 (1992) finding that the SFRY had ceased to exist and recommending to the General Assembly to decide that the FRY "should apply for membership in the United Nations and that it shall not participate in the work of the General Assembly" (United Nations doc. S/RES/777 (1992)), followed by the General Assembly resolution 47/1, which stated that the FRY "cannot continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations" (United Nations doc. A/RES/47/1 (1992)), and decided that the FRY "should apply for membership in the United Nations and that it shall not participate in the work of the General Assembly" *(ibid.).* After deciding, seven months later, that the FRY should not participate in the work of the Economic and Social Council either, the General Assembly adopted resolution 48/88, urging "Member States and the Secretariat in fulfilling the spirit of that resolution, to end the de facto *working status* of Serbia and Montenegro" (United Nations doc. A/RES/48/88, para. 19; emphasis added). How the addressees of this resolution acted must have been known to the Court.

The examples quoted in this regard by Judge Dimitrijević begin with the opinions of the Arbitration Commission established as an advisory body by the Peace Conference on Yugoslavia (the "Badinter Commission"). It found in July 1992 that the SFRY no longer existed and that "none of the successor States may thereupon claim for itself alone the membership rights previously enjoyed by the former SFRY" (Opinion 9, reproduced in *International Legal Materials,* 1992), and that the FRY was "a new State which cannot be considered the sole successor to the SFRY" (Opinion 10, reproduced in *International Legal Materials,* 1992). The European Community and its Member States, or the majority of other Members of the United Nations, have never accepted the automatic continuity of the FRY. On the other hand, there were statements by representatives of some other States, which supported the claim to continuity of the then government of the FRY. A third group of States stated that they failed to discern the basis in law of the resolutions of the United Nations principal organs on Yugoslavia, and in particular any reference to the provisions of the United Nations Charter governing membership.

The finding of the Court in 1996 "that it has not been contested that Yugoslavia was a party to the Genocide Convention" must, in the view of Judge Dimitrijević, now be seen in a different light. Bosnia and Herzegovina has been one of those States which have most vigorously contested the identity between the SFRY and the FRY, except only in relation to a specific case before the Court.

Judge Dimitrijević does not believe that the opinions of the legal services of the United Nations Secretariat overcame the inconsistencies and ambiguities of the decisions of the United Nations organs, especially of General Assembly resolution 47/1. All the actors at the time must have been aware that "Yugoslavia" in this particular and important context could have been taken as a short reference *both* to the SFRY and the FRY. What then, asks Judge Dimitrijević, is the difference between "old Yugoslavia" and "new Yugoslavia", referred to in the opinions? What was believed would happen to the old State once the new State was admitted to the United Nations? It can even be concluded that some actors kept alive the fiction that a phantom State existed, which was neither the SFRY nor the FRY, or that it was presumed that the SFRY had gone on existing. Paradoxically, the fanciful theory of the further existence of "Yugoslavia" seems to correspond best to the situation described by one writer as "limited survival after death . . . of the former Yugoslavia at the United Nations" (T. Treves, "The Expansion of the World Community and Membership of the United Nations", *The Finnish Yearbook of International Law,* Vol. VI (1995), p. 278).

The United Nations Under-Secretary-General opined in 1992 that resolution 47/1 did not "take away the right of Yugoslavia to participate in the work of organs other than Assembly

bodies" (United Nations doc. A/47/485). The implied "right" of the FRY to participate in other United Nations organs and to use the International Court of Justice, which is one of the main arguments of the majority in support of the jurisdiction of the Court in 1996, was in the eyes of Judge Dimitrijević very weak, because, seven months later, participation in the work of ECOSOC was denied by the General Assembly without adducing any further legal reasons. How could the Court then have concluded that the "right" of the FRY to appear before the Court was any stronger? If the measures against the FRY were very restricted and not decisive for the very important matter of the status of a State in the United Nations, was not the prescribed "admission to the United Nations of a new Yugoslavia under Article 4" too potent a remedy? Measures directed against the FRY could simply have been rescinded. If the membership of the FRY was not terminated, why did that State have to apply to be admitted as a new Member?

Judge Dimitrijević believes that the answer lay in the *punitive* nature of those measures. The FRY was at that time the target of gradually increasing restrictions aimed at reducing the limited scope in which it was allowed to play the role of "Yugoslavia" in the United Nations. The FRY was offered the prospect that it would receive better treatment if the competent United Nations organs become satisfied that the objections to the political conduct of the FRY no longer existed. One way of testing this was the procedure of admission under Article 4 of the United Nations Charter, which offered the opportunity to examine whether the FRY was "peace-loving" and "able and willing" to carry out the obligations contained in that Article. In the process, the repeated assertions that the SFRY had ceased to exist were conveniently forgotten and the fiction of its virtual existence prolonged. If the SFRY still survived under the name of "Yugoslavia", the conclusion could be drawn that the Judgment of 11 July 1996 did not concern the FRY but the still existing SFRY. When the FRY was finally admitted to the United Nations it became clear that the pragmatic temporary solution could not resolve the confusion in regard to the suggested admission to membership of the United Nations of a *new* State while pretending that it was at the same time an *old* State, the readmission of a State that had not previously been excluded from membership, the reconfirmation of a State's existing membership, etc.

Judge Dimitrijević concedes that there was a *claim* of the FRY to continuity. However, the decisive element was whether other States recognized this claim. The decision on continuity of States is one of the decentralized acts of the international community, similar to that on the recognition of States. In all cases of disintegration of a State, the general response has depended primarily on the attitude of the other States which emerged on the territory of the former State. If there was agreement, other members of the international community would generally follow suit. In the case of the SFRY there was no agreement. The continuation of the SFRY by the FRY was not a matter to be decided only by the FRY, or exclusively by the FRY and other successor States of the SFRY, but it remained in the hands of other actors. By admitting the FRY to the United Nations, the Security Council and the General Assembly finally determined the outcome of the debate which had shown that SFRY-FRY continuity had been an assumption or perception shared by *some* other international actors but not widely supported. If the FRY's claim was not "generally accepted" in 1992, it could have been accepted later, say in 1996, but the Court failed then to prove universal acceptance. It could not have proven it in 1996 or for the whole period between 11 July 1996 and 1 November 2000, when it finally became clear that general acceptance had not materialized.

That the FRY was not the sole continuator, but one of the successors of the SFRY, became established as a fact existing since the very creation of the FRY; the "fact" that the FRY was a continuator of the SFRY has not existed at any time. In its 1996 Judgment the Court espoused one of the existing views, rejected by the majority of States, including Bosnia and Herzegovina. The majority in the Court in the present case treats this view as the only known *fact* at the time. Judge Dimitrijević is convinced that later events demonstrated that reality differed from the "facts" which were relied on to establish the Court's jurisdiction in 1996.

Even if none of the interpretations advanced above are accepted, Judge Dimitrijević is sure that the follow-up to the relevant Security Council and General Assembly resolutions was known to the Court in 1996, and that it must have realized that this was inconclusive. The situation in 1996 had not developed to the degree that it allowed a final determination that the Court had jurisdiction on the basis of continuity. In view of the consistent opposition of Bosnia and Herzegovina to the claim of the FRY to continuity, the Court should have examined its jurisdiction *proprio motu* and not have been satisfied by the fact that Bosnia and Herzegovina did not dispute that jurisdiction *in this particular case*. The jurisdiction of the Court cannot be imposed on a State without its consent, which cannot be presumed and should be carefully examined and narrowly interpreted. The "*sui generis* position which the FRY found itself in vis-à-vis the United Nations over the period 1992 to 2000" (Judgment, para. 71), as the majority describes the status of the FRY, was, in the eyes of Judge Dimitrijević, insufficient to establish jurisdiction. The majority concedes that it was not known in 1996 whether the FRY would apply for membership in the United Nations and whether it would be admitted, but it still bases the whole argument on the curious assumption that the admission of a State as a Member of the United Nations does *not* necessarily result in the logical conclusion that it had *not* been a Member prior to admission. If for some reasons there is an exception to the rule, it must be strictly construed and unequivocally proven, which has not been done in this case.

According to Article 61, paragraph 2, of the Statute, the purpose of a judgment opening the proceedings for revision is limited to the initial determination of the existence of a new fact and of its nature. In the view of Judge Dimitrijević the Judgment in this case should have enabled the Court to go more deeply into the matter of its jurisdiction on the basis of facts that existed in July 1996, but acquired their real meaning only on 1 November 2000. Opening the proceedings for revision would not have precluded a possible finding that the facts were such as to enable the Court to entertain jurisdiction. Declaring the Application for revision inadmissible only by reference to the literal meaning of the word "fact" misses a serious opportunity to decide on important matters relat-

ing to the jurisdiction of the Court. Admittedly, there could have been other bases for the jurisdiction of the Court, but the Court dismissed them in the 1996 Judgment. They could have been examined had the case been opened for revision.

Separate opinion of Judge Mahiou

Judge Mahiou observes that, to found its Application for the revision of the 11 July 1996 Judgment, Yugoslavia relies on the fact that at the time of the Judgment it was not a Member of the United Nations, was not a party to the Statute of the Court and was not bound by the Genocide Convention, contending that this was a new fact and that it was discovered on 1 November 2000 when Yugoslavia was admitted to membership in the United Nations, thereby revealing that it had not previously been a Member. However, this claim cannot be established in terms of Article 61 of the Court's Statute because, while the admission of Yugoslavia in 2000 is certainly a new fact, this fact occurred after the Judgment and cannot therefore affect the previous situation. Further, the issue of Yugoslavia's legal status was being discussed before the various organs of the United Nations and was thus a fact known to everyone, in particular to Yugoslavia and to the Court, which thus rendered its Judgment with full knowledge of the facts. Lastly, the undertakings, statements and conduct of Yugoslavia show that it did nothing to clarify the situation, and this continues to be the case, as shown by the fact that it remains the Applicant in eight cases before the Court against members of NATO, concerning the legality of the use of force, precisely founding its claims on its declaration of acceptance of the compulsory jurisdiction of the Court and on the Genocide Convention.

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141. CASE CONCERNING AVENA AND OTHER MEXICAN NATIONALS (MEXICO *v.* UNITED STATES OF AMERICA) (PROVISIONAL MEASURES)

Order of 5 February 2003

In the case concerning *Avena and Other Mexican Nationals* (*Mexico* v. *United States of America*), the Court, exercising its power under Article 41 of its Statute, issued an Order on 5 February 2003, indicating provisional measures.

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The Court was composed as follows: President Guillaume; Vice-President Shi; Judges Oda, Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal, Elaraby; *Registrar* Couvreur.

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Paragraph 59 of the Order reads as follows:

" . . .

The Court

Unanimously,

I. *Indicates* the following provisional measures:

(a) The United States of America shall take all measures necessary to ensure that Mr. César Roberto Fierro Reyna, Mr. Roberto Moreno Ramos and Mr. Osvaldo Torres Aguilera are not executed pending final judgment in these proceedings;

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

Decides that, until the Court has rendered its final judgment, it shall remain seised of the matters which form the subject of this Order."

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Judge Oda appended a declaration to the Order.

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The Court begins by recalling that, on 9 January 2003, the United Mexican States (hereinafter "Mexico") instituted proceedings against the United States of America (hereinafter the "United States") for "violations of the Vienna Convention on Consular Relations (done on 24 April 1963)" (hereinafter the "Vienna Convention") allegedly committed by the United States. The Court notes that, in its Application, Mexico bases the jurisdiction of the Court on Article 36, paragraph 1, of the Statute of the Court and on Article I of the Optional Protocol concerning the Compulsory Settlement of Disputes, which accompanies the Vienna Convention on Consular Relations (hereinafter the "Optional Protocol").

The Court notes further that in its Application Mexico asks the Court to adjudge and declare:

"(1) that the United States, in arresting, detaining, trying, convicting, and sentencing the 54 Mexican nationals on death row described in this Application, violated its international legal obligations to Mexico, in its own right and in the exercise of its right of consular protection of its nationals, as provided by Articles 5 and 36, respectively of the Vienna Convention;

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

(3) that the United States is under an international legal obligation not to apply the doctrine of procedural default, or any other doctrine of its municipal law, to preclude the exercise of the rights afforded by Article 36 of the Vienna Convention;

(4) that the United States is under an international legal obligation to carry out in conformity with the foregoing international legal obligations any future detention of or criminal proceedings against the 54 Mexican nationals on death row or any other Mexican national in its territory, whether by a constituent, legislative, executive, judicial or other power, whether that power holds a superior or a subordinate position in the organization of the United States, and whether that power's functions are international or internal in character;

(5) that the right to consular notification under the Vienna Convention is a human right;

and that, pursuant to the foregoing international legal obligations,

(1) the United States must restore the *status quo ante,* that is, re-establish the situation that existed before the detention of, proceedings against, and convictions and sentences of, Mexico's nationals in violation of the United States international legal obligations;

(2) the United States must take the steps necessary and sufficient to ensure that the provisions of its municipal law enable full effect to be given to the purposes for which the rights afforded by Article 36 are intended;

(3) the United States must take the steps necessary and sufficient to establish a meaningful remedy at law for violations of the rights afforded to Mexico and its nationals by Article 36 of the Vienna Convention, including by barring the imposition, as a matter of municipal law, of any procedural penalty for the failure timely to raise a claim or defence based on the Vienna Convention where competent authorities of the United States have breached their obligation to advise the national of his or her rights under the Convention; and

(4) the United States, in light of the pattern and practice of violations set forth in this Application, must provide Mexico a full guarantee of the non-repetition of the illegal acts."

The Court further recalls that, on 9 January 2003, Mexico also submitted a request for the indication of provisional measures in order to protect its rights, asking that, pending final judgment in this case, the Court indicate:

"(a) That the Government of the United States take all measures necessary to ensure that no Mexican national be executed;

(b) That the Government of the United States take all measures necessary to ensure that no execution dates be set for any Mexican national;

(c) That the Government of the United States report to the Court the actions it has taken in pursuance of subparagraphs *(a)* and *(b);* and

(d) That the Government of the United States ensure that no action is taken that might prejudice the rights of the United Mexican States or its nationals with respect to any decision this Court may render on the merits of the case."

The Court finally notes that, by a letter of 20 January 2003, Mexico informed the Court that, further to the decision of the Governor of the State of Illinois to commute the death sentences of all convicted individuals awaiting execution in that State, it was withdrawing its request for provisional measures on behalf of three of the 54 Mexican nationals referred to in the Application: Messrs. Juan Caballero Hernández, Mario Flores Urbán and Gabriel Solache Romero. In that letter, Mexico further stated that its request for provisional measures would stand for the other 51 Mexican nationals imprisoned in the United States and that "[t]he application stands, on its merits, for the fifty-four cases".

The Court then summarizes the arguments put forward by the Parties during the public hearings held on 21 January 2003.

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The Court begins its reasoning by observing 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.

The Court goes on to note that Mexico has argued that the issues in dispute between itself and the United States concern Articles 5 and 36 of the Vienna Convention and fall within the compulsory jurisdiction of the Court under Article I of the Optional Protocol, and that Mexico has accordingly concluded that the Court has the jurisdiction necessary to indicate the provisional measures requested. The Court notes that the United States has said that it "does not propose to make an issue now of whether the Court possesses *prima facie* jurisdiction, although this is without prejudice to its right to contest the Court's jurisdiction at the appropriate stage later in the case". In view of the foregoing, the Court accordingly considers that, *prima facie*, it has jurisdiction under Article I of the aforesaid Optional Protocol to hear the case.

The Court then recalls that, in its Application, Mexico asked the Court to adjudge and declare that the United States "violated its international legal obligations to Mexico, in its own right and in the exercise of its right of consular protection of its nationals, as provided by Articles 5 and 36, respectively of the Vienna Convention"; that Mexico is seeking various measures aimed at remedying these breaches and avoiding any repetition thereof; and that Mexico contends that the Court should preserve the right to such remedies by calling upon the United States to take all necessary steps to ensure that no Mexican national be executed and that no execution date be set in respect of any such national.

The Court further recalls that the United States has acknowledged that, in certain cases, Mexican nationals have been prosecuted and sentenced without being informed of their rights pursuant to Article 36, paragraph 1 *(b),* of

the Vienna Convention, but that it argues, however, that in such cases, in accordance with the Court's Judgment in the *LaGrand* case, it has the obligation "by means of its own choosing, [to] allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in that Convention", and that it submits that, in the specific cases identified by Mexico, the evidence indicates the commitment of the United States to providing such review and reconsideration. According to the United States, such review and reconsideration can occur through the process of executive clemency—an institution "deeply rooted in the Anglo-American system of justice"—which may be initiated by the individuals concerned after the judicial process has been completed. It contends that such review and reconsideration has already occurred in several cases during the last two years; that none of the Mexicans "currently under sentence of death will be executed unless there has been a review and reconsideration of the conviction and sentence that takes into account any failure to carry out the obligations of Article 36 of the Vienna Convention"; that, under the terms of the Court's decision in the *LaGrand* case, this is a sufficient remedy for its breaches, and that there is accordingly no need to indicate provisional measures intended to preserve the rights to such remedies.

The Court also notes that, according to Mexico, the position of the United States amounts to maintaining that "the Vienna Convention entitles Mexico only to review and reconsideration, and that review and reconsideration equals only the ability to request clemency"; and that, in Mexico's view, "the standardless, secretive and unreviewable process that is called clemency cannot and does not satisfy this Court's mandate [in the *LaGrand* case]".

The Court concludes that there is thus a dispute between the Parties concerning the rights of Mexico and of its nationals regarding the remedies that must be provided in the event of a failure by the United States to comply with its obligations under Article 36, paragraph 1, of the Vienna Convention; that this dispute belongs to the merits and cannot be settled at this stage of the proceedings; and that the Court must accordingly address the issue of whether it should indicate provisional measures to preserve any rights that may subsequently be adjudged on the merits to be those of the Applicant.

The Court notes, however, that the United States argues that it is incumbent upon the Court, pursuant to Article 41 of its Statute, to indicate provisional measures "not to preserve only rights claimed by the Applicant, but 'to preserve the respective rights of either party'"; that, "[a]fter balancing the rights of both Parties, the scales tip decidedly against Mexico's request in this case"; that the measures sought by Mexico to be implemented immediately amount to "a sweeping prohibition on capital punishment for Mexican nationals in the United States, regardless of United States law", which "would drastically interfere with United States sovereign rights and implicate important federalism interests"; that this would, moreover, transform the Court into a "general criminal court of appeal", which the Court has already indicated in the past is not its function; and that the measures requested by Mexico should accordingly be refused.

The Court points out that, when considering a request for the indication of provisional measures, 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", without being obliged at that stage of the proceedings to rule on those rights; that the issues brought before the Court in this case "do not concern the entitlement of the federal states within the United States to resort to the death penalty for the most heinous crimes"; that "the function of this Court is to resolve international legal disputes between States, *inter alia,* when they arise out of the interpretation or application of international conventions, and not to act as a court of criminal appeal"; that the Court may indicate provisional measures without infringing these principles; and that the argument put forward on these specific points by the United States accordingly cannot be accepted.

The Court goes on to state that "provisional measures are indicated 'pending the final decision' of the Court on the merits of the case, and are therefore only justified if there is urgency in the sense that action prejudicial to the rights of either party is likely to be taken before such final decision is given". It further points out that the jurisdiction of the Court is limited in the present case to the dispute between the Parties concerning the interpretation and application of the Vienna Convention with regard to the individuals which Mexico identified as being victims of a violation of the Convention. Accordingly, the Court observes, it cannot rule on the rights of Mexican nationals who are not alleged to have been victims of a violation of that Convention.

The Court further states that "the sound administration of justice requires that a request for the indication of provisional measures founded on Article 73 of the Rules of Court be submitted in good time"; it recalls in this respect that the Supreme Court of the United States, when considering a petition seeking the enforcement of an Order of this Court, observed that: "It is unfortunate that this matter came before us while proceedings are pending before the ICJ that might have been brought to that court earlier". The Court further observes that, in view of the rules and time-limits governing the granting of clemency and the fixing of execution dates in a number of the states of the United States, the fact that no such dates have been fixed in any of the cases before the Court is not *per se* a circumstance that should preclude the Court from indicating provisional measures.

The Court finds that it is apparent from the information before it in this case that three Mexican nationals, Messrs. César Roberto Fierro Reyna, Roberto Moreno Ramos and Osvaldo Torres Aguilera, are at risk of execution in the coming months, or possibly even weeks; that their execution would cause irreparable prejudice to any rights that may subsequently be adjudged by the Court to belong to Mexico. The Court accordingly concludes that the circumstances require that it indicate provisional measures to preserve those rights, as Article 41 of its Statute provides.

The Court points out that the other individuals listed in Mexico's Application, although currently on death row, are not in the same position as the three persons identified in the preceding paragraph and that the Court may, if appropriate,

indicate provisional measures under Article 41 of the Statute in respect of those individuals before it renders final judgment in this case.

The Court finally observes that it is clearly in the interest of both Parties that their respective rights and obligations be determined definitively as early as possible; and that it is therefore appropriate that the Court, with the co-operation of the Parties, ensure that a final judgment be reached with all possible expedition.

The Court concludes by pointing out 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 Mexico and the United States to submit arguments in respect of those questions.

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Declaration of Judge Oda

While Judge Oda voted in favour of the present Order, in his declaration he states his doubts concerning the Court's definition of "disputes arising out of the interpretation or application" of the Vienna Convention, doubts previously expressed in connection with the *Breard* and *LaGrand* cases.

In Judge Oda's view, the present case is essentially an attempt by Mexico to save the lives of its nationals sentenced to death by domestic courts in the United States. As the United States has admitted its failure to provide consular notification, there is no dispute about the interpretation or application of the Vienna Convention. Judge Oda believes that Mexico has seized upon the Vienna Convention and the admitted violation as a means to subject the United States to the compulsory jurisdiction of the Court.

Judge Oda notes that the Mexican nationals were in most cases given consular assistance in the judicial processes that followed their initial sentencing. He stresses that this case cannot be about domestic legal procedure in the United States because that lies within the sovereign discretion of that country. Nor can it be about the interpretation or application of the Vienna Convention because the United States admits its violation. Nor can the case be about the appropriate remedy for the violation of the Convention because that is a matter of general international law, not the interpretation or application of the Convention. Judge Oda concludes that this case is really about abhorrence of capital punishment.

Judge Oda states that if the International Court of Justice interferes in a State's criminal law system, it fails to respect the sovereignty of the State and places itself on a par with the supreme court of the State. He recalls his observation from the *LaGrand* case that the International Court of Justice cannot act as a court of criminal appeal and cannot be petitioned for writs of *habeas corpus*. Further, the present case, having been brought under the Vienna Convention, is not the appropriate context to determine whether or not capital punishment would be contrary to Article 6 of the International Covenant on Civil and Political Rights.

Appreciating the significant issues raised by the death penalty from the perspective of the individuals condemned to die, Judge Oda reiterates his previous statement that if the rights of those accused of violent crimes are to be respected, then the rights of the victims should also be taken into consideration.

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142. CASE CONCERNING CERTAIN CRIMINAL PROCEEDINGS IN FRANCE (REPUBLIC OF THE CONGO *v.* FRANCE) (PROVISIONAL MEASURES)

Order of 17 June 2003

In the case concerning *Certain Criminal Proceedings in France* (*Republic of the Congo* v. *France*), the Court found by fourteen votes to one 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.

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The Court was composed as follows: President Shi; Vice-President Ranjeva; Judges Guillaume, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Al-Khasawneh, Buergenthal, Elaraby, Owada, Simma, Tomka; Judge *ad hoc* de Cara; Registrar Couvreur.

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Paragraph 41 of the Order reads as follows:

"...

The Court,

By fourteen 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 Shi; Vice-President Ranjeva; Judges Guillaume, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Al-Khasawneh, Buergenthal, Elaraby, Owada, Simma, Tomka;

AGAINST: Judge *ad hoc* de Cara."

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Judges Koroma and Vereshchetin appended a joint separate opinion to the Order; Judge *ad hoc* de Cara appended a dissenting opinion to the Order.

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Application and request for a provisional measure
(paras. 1–4, 22–24)

By Application filed in the Registry of the Court on 9 December 2002, the Republic of the Congo (hereinafter "the Congo") sought to institute proceedings against the French Republic (hereinafter "France") on the grounds, first, of alleged

> "violation of the principle that a State may not, in breach of the principle of sovereign equality among all Members of the United Nations, as laid down in Article 2, paragraph 1, of the Charter of the United Nations, exercise its authority on the territory of another State,
>
> by unilaterally attributing to itself universal jurisdiction in criminal matters
>
> and by arrogating to itself the power to prosecute and try the Minister of the Interior of a foreign State for crimes allegedly committed in connection with the exercise of his powers for the maintenance of public order in his country",

and second, alleged "violation of the criminal immunity of a foreign Head of State—an international customary rule recognized by the jurisprudence of the Court".

By the Application the Congo requested the Court

> "to declare that the French Republic shall cause to be annulled the measures of investigation and prosecution taken by the *Procureur de la République* of the Paris *Tribunal de grande instance,* the *Procureur de la République* of the Meaux *Tribunal de grande instance* and the investigating judges of those courts".

The Application further contained a "request for the indication of a provisional measure", directed to the preservation of the rights of the Congo under both of the categories mentioned above, and seeking "an order for the immediate suspension of the proceedings being conducted by the investigating judge of the Meaux *Tribunal de grande instance*"; upon receipt of the consent of France to the jurisdiction, the Court was convened for the purpose of proceeding to a decision on the request for the indication of a provisional measure as a matter of urgency; and that public hearings on the request were held on 28 and 29 April 2003.

Factual background
(paras. 10–19)

The Order outlines as follows the factual background of the case, as stated in the Application or by the Parties at the hearings:

A complaint was filed on 5 December 2001, on behalf of certain human rights organizations, with the *Procureur de la République* of the Paris *Tribunal de grande instance* "for crimes against humanity and torture allegedly committed in the Congo against individuals having Congolese nationality, expressly naming H.E. Mr. Denis Sassou Nguesso, President of the Republic of the Congo, H.E. General Pierre Oba, Minister of the Interior, Public Security and Territorial Administration, General Norbert Dabira, Inspector-General of the Congolese Armed Forces, and General Blaise Adoua, Commander of the Presidential Guard".

The *Procureur de la République* of the Paris *Tribunal de grande instance* transmitted that complaint to the *Procureur de la République* of the Meaux *Tribunal de grande instance,* who ordered a preliminary enquiry and then on 23 January 2002 issued a *réquisitoire* (application for a judicial investigation of the alleged offences), and the investigating judge of Meaux initiated an investigation.

It was argued by the complainants that the French courts had jurisdiction, as regards crimes against humanity, by virtue of a principle of international customary law providing for universal jurisdiction over such crimes, and as regards the crime of torture, on the basis of Articles 689–1 and 689–2 of the French Code of Criminal Procedure.

The *Procureur de la République* of the *Tribunal de grande instance* of Meaux, in his *réquisitoire* of 23 January 2002, requested investigation both of crimes against humanity and of torture, without mentioning any jurisdictional basis other than Article 689–1 of that Code.

The complaint was referred to the *parquet* of the *Tribunal de grande instance* of Meaux taking into account that General Norbert Dabira possessed a residence in the area of that court's jurisdiction; however, the investigation was initiated against a non-identified person, not against any of the Congolese personalities named in the complaint.

The testimony of General Dabira was first taken on 23 May 2002 by judicial police officers who had taken him into custody, and then on 8 July 2002 by the investigating judge, as a *témoin assisté* (legally represented witness). (It has been explained by France that a *témoin assisté* in French criminal procedure is a person who is not merely a witness, but to some extent a suspect, and who therefore enjoys certain procedural rights (assistance of counsel, access to the case file) not conferred on ordinary witnesses). On 16 September 2002 the investigating judge issued against General Dabira, who had by then returned to the Congo, a *mandat d'amener* (warrant for immediate appearance), which, it was explained by France at the hearing, could be enforced against him should he return to France, but is not capable of being executed outside French territory.

The Application states that when the President of the Republic of the Congo, H.E. Mr. Denis Sassou Nguesso "was on a State visit to France, the investigating judge issued a *commission rogatoire* (warrant) to judicial police officers instructing them to take testimony from him". However no such *commission rogatoire* has been produced, and France has informed the Court that no *commission rogatoire* was issued against President Sassou Nguesso, but that the investigating

judge sought to obtain evidence from him under Article 656 of the Code of Criminal Procedure, applicable where evidence is sought through the diplomatic channel from a "representative of a foreign power"; the Congo acknowledged in its Application that President Sassou Nguesso was never "*mis en examen,* nor called as a *témoin assisté"*.

It is common ground between the Parties that no acts of investigation *(instruction)* have been taken in the French criminal proceedings against the other Congolese personalities named in the Application (H.E. General Pierre Oba, Minister of the Interior, and General Blaise Adoua), nor in particular has any application been made to question them as witnesses.

Jurisdiction
(paras. 20–21)

After recalling the need for a *prima facie* basis of jurisdiction in order for provisional measures to be indicated, the Court notes that in the Application the Congo proposed to found the jurisdiction of the Court upon a consent thereto yet to be given by France, as contemplated by Article 38, paragraph 5, of the Rules of the Court; and that by a letter dated 8 April 2003 from the Minister for Foreign Affairs of France, France consented explicitly to the jurisdiction of the Court to entertain the Application on the basis of that text.

Reasoning of the Court
(paras. 22–40)

The Court takes note that the circumstances relied on by the Congo, which in its view require the indication of measures requiring suspension of the French proceedings, are set out as follows in the request:

> "The proceedings in question are perturbing the international relations of the Republic of the Congo as a result of the publicity accorded, in flagrant breach of French law governing the secrecy of criminal investigations, to the actions of the investigating judge, which impugn the honour and reputation of the Head of State, of the Minister of the Interior and of the Inspector-General of the Armed Forces and, in consequence, the international standing of the Congo. Furthermore, those proceedings are damaging to the traditional links of Franco-Congolese friendship. If these injurious proceedings were to continue, that damage would become irreparable."

It observes that at the hearings the Congo re-emphasized the irreparable prejudice which in its contention would result from the continuation of the French criminal proceedings before the *Tribunal de grande instance* of Meaux, in the same terms as in the request; and that the Congo further stated that the prejudice which would result if no provisional measures are indicated would be the continuation and exacerbation of the prejudice already caused to the honour and reputation of the highest authorities of the Congo, and to internal peace in the Congo, to the international standing of the Congo and to Franco-Congolese friendship.

The Court observes that the rights which, according to the Congo's Application, are subsequently to be adjudged to belong to the Congo in the present case are, first, the right to require a State, in this case France, to abstain from exercising universal jurisdiction in criminal matters in a manner contrary to international law, and second, the right to respect by France for the immunities conferred by international law on, in particular, the Congolese Head of State.

The Court further observes that the purpose of any provisional measures that the Court might indicate in this case should be to preserve those claimed rights; that the irreparable prejudice claimed by the Congo and summarized above would not be caused to those rights as such; that however this prejudice might, in the circumstances of the case, be regarded as such as to affect irreparably the rights asserted in the Application. The Court notes that in any event it has not been informed in what practical respect there has been any deterioration internally or in the international standing of the Congo, or in Franco-Congolese relations, since the institution of the French criminal proceedings, nor has any evidence been placed before the Court of any serious prejudice or threat of prejudice of this nature.

The Court observes that the *first question* before it at the present stage of the case is thus whether the criminal proceedings currently pending in France entail a risk of irreparable prejudice to the right of the Congo to respect by France for the immunities of President Sassou Nguesso as Head of State, such as to require, as a matter of urgency, the indication of provisional measures.

The Court takes note of the statements made by the Parties as to the relevance of Article 656 of the French Code of Criminal Procedure (see above), and of a number of statements made by France as to the respect in French criminal law for the immunities of Heads of State. It then observes that it is not now called upon to determine the compatibility with the rights claimed by the Congo of the procedure so far followed in France, but only the risk or otherwise of the French criminal proceedings causing irreparable prejudice to such claimed rights. The Court finds, on the information before it, that, as regards President Sassou Nguesso, there is at the present time no risk of irreparable prejudice, so as to justify the indication of provisional measures as a matter of urgency; and neither is it established that any such risk exists as regards General Oba, Minister of the Interior of the Republic of the Congo, for whom the Congo also claims immunity in its Application.

The Court then considers, as a *second question,* the existence of a risk of irreparable prejudice in relation to the claim of the Congo that the unilateral assumption by a State of universal jurisdiction in criminal matters constitutes a violation of a principle of international law; the Court observes that in this respect the question before it is thus whether the proceedings before the *Tribunal de grande instance* of Meaux involve a threat of irreparable prejudice to the rights invoked by the Congo justifying, as a matter of urgency, the indication of provisional measures.

The Court notes that, as regards President Sassou Nguesso, the request for a written deposition made by the investigating judge on the basis of Article 656 of the French Code of Criminal Procedure has not been transmitted to the person concerned by the French Ministry of Foreign Affairs; that, as regards General Oba and General Adoua, they have not been the subject of any procedural measures by the investigating

judge; and that no measures of this nature are threatened against these three persons. The Court concludes that therefore there is no urgent need for provisional measures to preserve the rights of the Congo in that respect.

As regards General Dabira, the Court notes that it is acknowledged by France that the criminal proceedings instituted before the *Tribunal de grande instance* of Meaux have had an impact upon his own legal position, inasmuch as he possesses a residence in France, and was present in France and heard as a *témoin assisté,* and in particular because, having returned to the Congo, he declined to respond to a summons from the investigating judge, who thereupon issued a *mandat d'amener* against him. It points out, however, that the practical effect of a provisional measure of the kind requested would be to enable General Dabira to enter France without fear of any legal consequences. The Congo, in the Court's view, has not demonstrated the likelihood or even the possibility of any irreparable prejudice to the rights it claims resulting from the procedural measures taken in relation to General Dabira.

The Court finally sees no need for the indication of any measures of the kind directed to preventing the aggravation or extension of the dispute.

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Joint separate opinion of Judges Koroma and Vereshchetin

Judges Koroma and Vereshchetin, in their joint separate opinion, expound the view that when considering a request for interim measures of protection, the Court should weigh all relevant aspects of the matter before it, including the extent of the possible harmful consequences of the violation of the claimed right. Therefore, they entertain some reservations in respect of the Court's having, in the circumstances of the present case, drawn a distinction between the harm to the rights which might subsequently be adjudged to belong to the Congo and the harm consequent upon the violation of those rights (Order, para. 29).

The harm attributable to the violation of the claimed rights may have much wider negative consequences and repercussions for legal and political interests of the State concerned, far transcending its adverse effect on the claimed rights as such. In these circumstances, the indication of provisional measures may become necessary not so much in view of the imminence of irreparable harm to the claimed rights, but rather because of the risk of grave consequences of their violation.

In the view of Judges Koroma and Vereshchetin, the Court appears not to have given sufficient weight to the risk of "irreparable harm", which could occur in the Congo as a result of the continuation of the criminal proceedings.

Dissenting opinion of Judge de Cara

In his dissenting opinion, Judge *ad hoc* de Cara emphasizes the distinctive features of the case before the Court. First, it is a case concerning an African State which implicates, in particular, the Head of State, who is the embodiment of the nation itself on that continent. Secondly, the current French law in such matters contrasts with the untimely measures taken or capable of being taken by the French prosecutors and judges. Lastly, it would seem that in this case, more than in others, there is a particularly close relationship between the proceedings on provisional measures and the proceedings on the merits; in making a distinction between the rights claimed to have been violated and the indirect prejudice that may be caused thereby, the Court appears to have adopted a formal approach which prevents the case from being considered as a whole. Article 41 of the Statute and Article 75 of the Rules of Court leave the Court considerable latitude to decide on provisional measures according to the *circumstances* of each case. In the present case, the Court did not see fit to grant the request for provisional measures and the judge *ad hoc* regrets that he was unable to vote in favour of the decision because he considers that the essential element of the case has been disregarded. At this stage it is not a matter of deciding whether, in abstract terms, French law guarantees the immunity of a foreign Head of State or whether it adopts a strict concept of universal jurisdiction, but of determining to what extent the *réquisitoire* (prosecutor's application for a judicial investigation) of 23 January 2002 derogates from such principles and violates the right to immunity, the attribution of criminal jurisdiction and the dignity of the Congolese President, thereby causing harm to the State itself. The *réquisitoire* and the annexed complaints, on the basis of which it was issued, govern the entire French criminal proceedings. As an act of prosecution, this *réquisitoire* already violates the immunity of the foreign Head of State and unduly seeks to substitute the jurisdiction of French courts for that of the Congolese courts already seised and having territorial jurisdiction by reason of the facts of the case and the individuals implicated. Prejudice has certainly been caused and there is a risk of additional prejudice, because at any time the French investigating judge may decide on any acts of judicial investigation, including the formal placing of suspects under examination *(mise en examen),* or on measures of detention, against any of the senior figures named but also against any Congolese citizen. The threat of coercion may well constitute irreparable prejudice, especially when it affects the inviolability of a Head of State. Furthermore, with the publicity that inevitably surrounds prosecution for crimes against humanity, the criminal proceedings initiated in violation of the Congo's rights are capable of causing harm not only to the honour of that country but to the stability of the government in a country marked by division after a long period of civil war. This is even more serious in Africa, a continent whose Heads of State occupy a special position in societies where ethnic solidarity prevails over inadequate national cohesion. The risk of the country being destabilized cannot be dismissed as a distinct prejudice from those directly related to the violation of the rights for which the Congo seeks protection. The Applicant has a legal interest which is worthy of preservation and which stems from a right to respect for its sovereignty.

Under these circumstances, the urgency remains for as long as the prosecutor's application is maintained, because there are no guarantees for the individuals named in the complaints, regardless of their status, and they have no right of appeal against that application unless they are formally placed under judicial examination. For the condition of urgency to

be met, is it really necessary for the President of the Republic of the Congo to be formally placed under examination, held in police custody, imprisoned or brought before the Assize Court? But in any event, urgent protection can be justified by the fact of having to wait until the Court rules on the merits, since any subsequent reparation for prejudice caused by the continuation of the judicial proceedings against the personalities concerned would be quite illusory.

The Court is entitled to indicate provisional measures in order to prevent any aggravation of the dispute when the circumstances so require; it can thus maintain the status quo. The representatives of the French Republic rejected the Congo's proposal to ask the Court "formally to place on record the scope which they ascribe to the [prosecutor's] originating application". The Agent of France simply gave a statement of current French law and refused to make any promises with respect to the situation or to the individuals concerned. The Court took note of his declarations without commenting on their scope and they fail to provide any guarantee capable of counterbalancing the decision to dismiss the request for provisional measures. The Court's solution is thus somewhat ambiguous. Either those declarations by the Agent of France constitute a statement of law, thus entitling the Court not only to take note of them but also to hold that the indication of provisional measures was pointless because it had no doubt that the French Government would comply with its own law: such declarations can thus have the effect of "creating legal obligations" as recognized in the *Nuclear Tests* case (1974). Or otherwise those declarations were simply tantamount to question-begging for dramatic effect, without any practical consequences, thus obliging the Court to take the view that France had no intention of committing itself and to draw appropriate conclusions from France's reluctance to make any promises. The refusal by the French Government's Agent to make any commitment thus leaves a risk of aggravation of the dispute whilst the *réquisitoire* at issue remains in force. That refusal cannot be explained by considerations relating to the separation of powers, for under international law the government represents the State in all its aspects. France should thus have been reminded of its duty to ensure compliance with its own laws, in so far as they enshrine the rules and norms of international law. Domestic statutes are not immune to the effects of a judgment of the Court. *A fortiori,* the execution of a decision of the Court may require the government of a State to take an administrative measure. In the Advisory Opinion concerning the immunity from legal process of a Special Rapporteur of the Commission on Human Rights, the Court held that governmental authorities had the obligation to inform domestic courts of the status of the official concerned and in particular of his entitlement to immunity from legal process. Similarly, in the present case, it was incumbent upon the French Government to give instructions to the *Procureur Général* (Principal State Prosecutor) to annul the *réquisitoire* which threatens the immunity of the Head of State and which encroaches upon the jurisdiction of Congolese courts. Accordingly, in the absence of any specific commitment by France with respect to the scope of that act of procedure, the suspension of the criminal proceedings currently pending would have precluded any aggravation of the dispute by maintaining the status quo, and without affecting the balance between the Parties' respective rights.

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143. CASE CONCERNING QUESTIONS OF INTERPRETATION AND APPLICATION OF THE 1971 MONTREAL CONVENTION ARISING FROM THE AERIAL INCIDENT AT LOCKERBIE (LIBYAN ARAB JAMAHIRIYA *v.* UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND) (DISCONTINUANCE)

Order of 10 September 2003

In the case concerning *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie* (*Libyan Arab Jamahiriya* v. *United Kingdom of Great Britain and Northern Ireland*), the President of the International Court of Justice issued an Order on 10 September 2003, recording the discontinuance of the proceedings and directing the removal of the case from the Court's list.

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The Order of the President of the Court reads as follows:

"The President of the International Court of Justice,

Having regard to Article 48 of the Statute of the Court and to Article 88 of the Rules of Court,

Having regard to the Application filed in the Registry of the Court on 3 March 1992, by which the Great Socialist People's Libyan Arab Jamahiriya instituted proceedings against the United Kingdom of Great Britain and Northern Ireland in respect of a "dispute between Libya and the United Kingdom concerning the interpretation or application of the Montreal Convention" of 23 September 1971 for the Suppression of Unlawful Acts against the Safety of Civil Aviation,

Having regard to the Order of 19 June 1992, by which the Court fixed 20 December 1993 and 20 June 1995 as the time-limits for the filing, respectively, of the Memorial of Libya and the Counter-Memorial of the United Kingdom,

Having regard to the Memorial filed by Libya and the preliminary objections submitted by the United Kingdom, within the time-limits thus fixed,

Having regard to the Judgment of 27 February 1998, by which the Court gave its decision on the preliminary objections,

Having regard to the Order of 30 March 1998, by which the Court fixed 30 December 1998 as the time-limit for the filing of the Counter-Memorial of the United Kingdom, and to the Order of 17 December 1998, by which the Senior Judge extended that time-limit to 31 March 1999,

Having regard to the Counter-Memorial filed by the United Kingdom within the time-limit thus extended,

Having regard to the Order of 29 June 1999, by which the Court, taking account of the agreement of the Parties and the special circumstances of the case, authorized the submission of a Reply by Libya and a Rejoinder by the United Kingdom and fixed 29 June 2000 as the time-limit for the filing of the Reply of Libya,

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

Having regard to the Order of 6 September 2000, by which the President of the Court fixed 3 August 2001 as the time-limit for the filing of the Rejoinder of the United Kingdom,

Having regard to the Rejoinder filed by the United Kingdom within the time-limit thus fixed;

Whereas by a letter dated 9 September 2003, filed in the Registry on the same day, the Agents of the two Parties jointly notified the Court that 'the Libyan Arab Jamahiriya and the United Kingdom have agreed to discontinue with prejudice the proceedings initiated by the Libyan Application filed on 3 March 1992',

Places on record the discontinuance with prejudice, by agreement of the Parties, of the proceedings instituted on 3 March 1992 by the Great Socialist People's Libyan Arab Jamahiriya against the United Kingdom of Great Britain and Northern Ireland; and

Directs that the case be removed from the List."

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144. CASE CONCERNING QUESTIONS OF INTERPRETATION AND APPLICATION OF THE 1971 MONTREAL CONVENTION ARISING FROM THE AERIAL INCIDENT AT LOCKERBIE (LIBYAN ARAB JAMAHIRIYA *v.* UNITED STATES OF AMERICA) (DISCONTINUANCE)

Order of 10 September 2003

In the case concerning *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie* (*Libyan Arab Jamahiriya* v. *United States of America*), the President of the International Court of Justice issued an Order on 10 September 2003, recording the discontinuance of the proceedings and directing the removal of the case from the Court's list.

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* *

The Order of the President of the Court reads as follows:

"The President of the International Court of Justice,

Having regard to Article 48 of the Statute of the Court and to Article 88 of the Rules of Court,

Having regard to the Application filed in the Registry of the Court on 3 March 1992, by which the Great Socialist People's Libyan Arab Jamahiriya instituted proceedings against the United States of America in respect of a "dispute between Libya and the United States concerning the interpretation or application of the Montreal Convention" of 23 September 1971 for the Suppression of Unlawful Acts against the Safety of Civil Aviation,

Having regard to the Order of 19 June 1992, by which the Court fixed 20 December 1993 and 20 June 1995 as the time-limits for the filing, respectively, of the Memorial of Libya and the Counter-Memorial of the United States,

Having regard to the Memorial filed by Libya and the preliminary objections submitted by the United States, within the time-limits thus fixed,

Having regard to the Judgment of 27 February 1998, by which the Court gave its decision on the preliminary objections,

Having regard to the Order of 30 March 1998, by which the Court fixed 30 December 1998 as the time-limit for the filing of the Counter-Memorial of the United States, and to the Order of 17 December 1998, by which the Senior Judge extended that time-limit to 31 March 1999,

Having regard to the Counter-Memorial filed by the United States within the time-limit thus extended,

Having regard to the Order of 29 June 1999, by which the Court, taking account of the agreement of the Parties and the special circumstances of the case, authorized the submission of a Reply by Libya and a Rejoinder by the United States and fixed 29 June 2000 as the time-limit for the filing of the Reply of Libya,

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

Having regard to the Order of 6 September 2000, by which the President of the Court fixed 3 August 2001 as the time-limit for the filing of the Rejoinder of the United States,

Having regard to the Rejoinder filed by the United States within the time-limit thus fixed;

Whereas by a letter dated 9 September 2003, filed in the Registry on the same day, the Agent of Libya and the Co-Agent of the United States jointly notified the Court that 'the Libyan Arab Jamahiriya and the United States of America have agreed to discontinue with prejudice the proceedings initiated by the Libyan Application filed on 3 March 1992',

Places on record the discontinuance with prejudice, by agreement of the Parties, of the proceedings instituted on 3 March 1992 by the Great Socialist People's Libyan Arab Jamahiriya against the United States of America; and

Directs that the case be removed from the List."

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145. CASE CONCERNING OIL PLATFORMS (ISLAMIC REPUBLIC OF IRAN *v.* UNITED STATES OF AMERICA)

Judgment of 6 November 2003

On 6 November 2003, the International Court of Justice, delivered its Judgment in the case concerning *Oil Platforms* (*Islamic Republic of Iran* v. *United States of America*).

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The Court was composed as follows: President Shi; Vice-President Ranjeva; Judges Guillaume, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal, Elaraby, Owada, Simma, Tomka; Judge *ad hoc* Rigaux; Registrar Couvreur.

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The operative paragraph 125 of the Judgment reads as follows:

" . . .

The Court,

(1) By fourteen votes to two,

Finds that the actions of the United States of America against Iranian oil platforms on 19 October 1987 and 18 April 1988 cannot be justified as measures necessary to protect the essential security interests of the United States of America under Article XX, paragraph 1 *(d),* of the 1955 Treaty of Amity, Economic Relations and Consular Rights between the United States of America and Iran, as interpreted in the light of international law on the use of force; *finds* further that the Court cannot however uphold the submission of the Islamic Republic of Iran that those actions constitute a breach of the obligations of the United States of America under Article X, paragraph 1, of that Treaty, regarding freedom of commerce between the territories of the parties, and that, accordingly, the claim of the Islamic Republic of Iran for reparation also cannot be upheld;

IN FAVOUR: President Shi; Vice-President Ranjeva; Judges Guillaume, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Buergenthal, Owada, Simma, Tomka; Judge *ad hoc* Rigaux;

AGAINST: Judges Al-Khasawneh, Elaraby;

(2) By fifteen votes to one,

Finds that the counter-claim of the United States of America concerning the breach of the obligations of the Islamic Republic of Iran under Article X, paragraph 1, of the above-mentioned 1955 Treaty, regarding freedom of commerce and navigation between the territories of the parties, cannot be upheld; and accordingly, that the counter-claim of the United States of America for reparation also cannot be upheld.

IN FAVOUR: President Shi; Vice-President Ranjeva; Judges Guillaume, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal, Elaraby, Owada, Tomka; Judge *ad hoc* Rigaux;

AGAINST: Judge Simma."

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Vice-President Ranjeva and Judge Koroma appended declarations to the Judgment of the Court; Judges Higgins, Parra-Aranguren and Kooijmans appended separate opinions to the Judgment of the Court; Judge Al-Khasawneh appended a dissenting opinion to the Judgment of the Court; Judge Buergenthal appended a separate opinion to the Judgment of the Court; Judge Elaraby appended a dissenting opinion to the Judgment of the Court; Judges Owada and Simma and Judge *ad hoc* Rigaux appended separate opinions to the Judgment of the Court.

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History of the proceedings and submissions of the Parties
(paras. 1–20)

On 2 November 1992, the Islamic Republic of Iran (hereinafter called "Iran") instituted proceedings against the United States of America (hereinafter called "the United States") in respect of a dispute "aris[ing] out of the attack [on] and destruction of three offshore oil production complexes, owned and operated for commercial purposes by the National Ira-

nian Oil Company, by several warships of the United States Navy on 19 October 1987 and 18 April 1988, respectively".

In its Application, Iran contended that these acts constituted a "fundamental breach" of various provisions of the Treaty of Amity, Economic Relations and Consular Rights between the United States and Iran, which was signed in Tehran on 15 August 1955 and entered into force on 16 June 1957 (hereinafter called "the 1955 Treaty"), as well as of international law. The Application invoked, as a basis for the Court's jurisdiction, Article XXI, paragraph 2, of the 1955 Treaty.

Within the time-limit fixed for the filing of the Counter-Memorial, the United States raised a preliminary objection to the jurisdiction of the Court pursuant to Article 79, paragraph 1, of the Rules of Court of 14 April 1978. By a Judgment dated 12 December 1996 the Court rejected the preliminary objection of the United States according to which the 1955 Treaty did not provide any basis for the jurisdiction of the Court and found that it had jurisdiction, on the basis of Article XXI, paragraph 2, of the 1955 Treaty, to entertain the claims made by Iran under Article X, paragraph 1, of that Treaty.

The United States Counter-Memorial included a counter-claim concerning "Iran's actions in the Gulf during 1987–88 which, among other things, involved mining and other attacks on U.S.-flag or U.S.-owned vessels". By an Order of 10 March 1998 the Court held that this counter-claim was admissible as such and formed part of the proceedings.

Public sittings were held between 17 February and 7 March 2003, at which the Court heard the oral arguments and replies on the claim of Iran and on the counter-claim of the United States. At those oral proceedings, the following final submissions were presented by the Parties:

On behalf of the Government of Iran,

at the hearing of 3 March 2003, on the claim of Iran:

"The Islamic Republic of Iran respectfully requests the Court, rejecting all contrary claims and submissions, to adjudge and declare:

1. That in attacking and destroying on 19 October 1987 and 18 April 1988 the oil platforms referred to in Iran's Application, the United States breached its obligations to Iran under Article X, paragraph 1, of the Treaty of Amity, and that the United States bears responsibility for the attacks; and

2. That the United States is accordingly under an obligation to make full reparation to Iran for the violation of its international legal obligations and the injury thus caused in a form and amount to be determined by the Court at a subsequent stage of the proceedings, the right being reserved to Iran to introduce and present to the Court in due course a precise evaluation of the reparation owed by the United States; and

3. Any other remedy the Court may deem appropriate";

at the hearing of 7 March 2003, on the counter-claim of the United States:

"The Islamic Republic of Iran respectfully requests the Court, rejecting all contrary claims and submissions, to adjudge and declare:

That the United States counter-claim be dismissed."

On behalf of the Government of the United States,

at the hearing of 5 March 2003, on the claim of Iran and the counter-claim of the United States:

"The United States respectfully requests that the Court adjudge and declare:

(1) that the United States did not breach its obligations to the Islamic Republic of Iran under Article X, paragraph 1, of the 1955 Treaty between the United States and Iran; and

(2) that the claims of the Islamic Republic of Iran are accordingly dismissed.

With respect to its counter-claim, the United States requests that the Court adjudge and declare:

(1) Rejecting all submissions to the contrary, that, in attacking vessels in the Gulf with mines and missiles and otherwise engaging in military actions that were dangerous and detrimental to commerce and navigation between the territories of the United States and the Islamic Republic of Iran, the Islamic Republic of Iran breached its obligations to the United States under Article X, paragraph 1, of the 1955 Treaty; and

(2) That the Islamic Republic of Iran is accordingly under an obligation to make full reparation to the United States for its breach of the 1955 Treaty in a form and amount to be determined by the Court at a subsequent stage of the proceedings."

Basis of jurisdiction and factual background
(paras. 21–26)

The Court begins by pointing out that its task in the present proceedings is to determine whether or not there have been breaches of the 1955 Treaty, and if it finds that such is the case, to draw the appropriate consequences according to the submissions of the Parties. The Court is seised both of a claim by Iran alleging breaches by the United States, and of a counter-claim by the United States alleging breaches by Iran. Its jurisdiction to entertain both the claim and the counter-claim is asserted to be based upon Article XXI, paragraph 2, of the 1955 Treaty.

The Court recalls that, as regards the claim of Iran, the question of jurisdiction has been the subject of its judgment of 12 December 1996. It notes that certain questions have however been raised between the Parties as to the precise significance or scope of that Judgment, which will be examined below.

As to the counter-claim, the Court also recalls that it decided by its Order of 10 March 1998 to admit the counter-claim, and indicated in that Order that the facts alleged and relied on by the United States "are capable of falling within the scope of Article X, paragraph 1, of the 1955 Treaty as interpreted by the Court", and accordingly that "the Court has jurisdiction to entertain the United States counter-claim in so far as the

facts alleged may have prejudiced the freedoms guaranteed by Article X, paragraph 1" (*I.C.J. Reports 1998,* p. 204, para. 36). It notes that in this respect also questions have been raised between the Parties as to the significance and scope of that ruling on jurisdiction, and these will be examined below.

The Court points out that it is however established, by the decisions cited, that both Iran's claim and the counter-claim of the United States can be upheld only so far as a breach or breaches of Article X, paragraph 1, of the 1955 Treaty may be shown, even though other provisions of the Treaty may be relevant to the interpretation of that paragraph. Article X, paragraph 1, of the 1955 Treaty reads as follows: "Between the territories of the two High Contracting Parties there shall be freedom of commerce and navigation."

The Court then sets out the factual background to the case, as it emerges from the pleadings of both Parties, observing that the broad lines of this background are not disputed, being a matter of historical record. The actions giving rise to both the claim and the counter-claim occurred in the context of the general events that took place in the Persian Gulf—which is an international commercial route and line of communication of major importance—between 1980 and 1988, in particular the armed conflict that opposed Iran and Iraq. In 1984, Iraq commenced attacks against ships in the Persian Gulf, notably tankers carrying Iranian oil. These were the first incidents of what later became known as the "Tanker War": in the period between 1984 and 1988, a number of commercial vessels and warships of various nationalities, including neutral vessels, were attacked by aircraft, helicopters, missiles or warships, or struck mines in the waters of the Persian Gulf. Naval forces of both belligerent parties were operating in the region, but Iran has denied responsibility for any actions other than incidents involving vessels refusing a proper request for stop and search. The United States attributes responsibility for certain incidents to Iran, whereas Iran suggests that Iraq was responsible for them.

The Court takes note that two specific attacks on shipping are of particular relevance in this case. On 16 October 1987, the Kuwaiti tanker *Sea Isle City,* reflagged to the United States, was hit by a missile near Kuwait harbour. The United States attributed this attack to Iran, and three days later, on 19 October 1987, it attacked two Iranian offshore oil production installations in the Reshadat ["Rostam"] complex. On 14 April 1988, the warship USS *Samuel B. Roberts* struck a mine in international waters near Bahrain while returning from an escort mission; four days later the United States employed its naval forces to attack and destroy simultaneously the **Nasr ["Sirri"]** and Salman ["Sassan"] complexes.

These attacks by United States forces on the Iranian oil platforms are claimed by Iran to constitute breaches of the 1955 Treaty; and the attacks on the *Sea Isle City* and the USS *Samuel B. Roberts* were invoked in support of the United States' claim to act in self-defence. The counter-claim of the United States is however not limited to those attacks.

The United States request to dismiss Iran's claim because of Iran's allegedly unlawful conduct
(paras. 27–30)

The Court first considers a contention to which the United States appears to have attributed a certain preliminary character. The United States asks the Court to dismiss Iran's claim and refuse it the relief it seeks, because of Iran's allegedly unlawful conduct, i.e., its violation of the 1955 Treaty and other rules of international law relating to the use of force.

The Court notes that in order to make the finding requested by the United States it would have to examine Iranian and United States actions in the Persian Gulf during the relevant period—which it has also to do in order to rule on the Iranian claim and the United States counter-claim. At this stage of its judgment, it does not therefore need to deal with this request.

Application of Article XX, paragraph 1 (d), of the 1955 Treaty
(paras. 31–78)

The Court recalls that the dispute in the present case has been brought before it on the jurisdictional basis of Article XXI, paragraph 2, of the 1955 Treaty, which provides that "Any dispute between the High Contracting Parties as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the High Contracting Parties agree to settlement by some other pacific means."

The Court further recalls that by its Judgment of 12 December 1996, it found that it had jurisdiction, on the basis of this Article, "to entertain the claims made by the Islamic Republic of Iran under Article X, paragraph 1, of that Treaty" (*I.C.J. Reports 1996 (II),* p. 821, para. 55 (2)). Its task is thus to ascertain whether there has been a breach by the United States of the provisions of Article X, paragraph 1; other provisions of the Treaty are only relevant in so far as they may affect the interpretation or application of that text.

In that respect, the Court notes that the United States has relied on Article XX, paragraph 1 *(d),* of the Treaty as determinative of the question of the existence of a breach of its obligations under Article X. That paragraph provides that

> "The present Treaty shall not preclude the application of measures:
>
> …
>
> *(d)* necessary to fulfil the obligations of a High Contracting Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests."

In its Judgment on the United States preliminary objection of 12 December 1996, the Court ruled that Article XX, paragraph 1 *(d),* does not afford an objection to admissibility, but "is confined to affording the Parties a possible defence on the merits" (*I.C.J. Reports 1996 (II),* p. 811, para. 20). In accordance with Article XXI, paragraph 2, of the Treaty, it is now for the Court to interpret and apply that subparagraph, inasmuch as such a defence is asserted by the United States.

To uphold the claim of Iran, the Court must be satisfied both that the actions of the United States, complained of by Iran, infringed the freedom of commerce between the ter-

ritories of the Parties guaranteed by Article X, paragraph 1, and that such actions were not justified to protect the essential security interests of the United States as contemplated by Article XX, paragraph 1 *(d)*. The question however arises in what order the Court should examine these questions of interpretation and application of the Treaty.

In the present case, it appears to the Court that there are particular considerations militating in favour of an examination of the application of Article XX, paragraph 1 *(d),* before turning to Article X, paragraph 1. It is clear that the original dispute between the Parties related to the legality of the actions of the United States, in the light of international law on the use of force. At the time of those actions, neither Party made any mention of the 1955 Treaty. The contention of the United States at the time was that its attacks on the oil platforms were justified as acts of self-defence, in response to what it regarded as armed attacks by Iran, and on that basis it gave notice of its action to the Security Council under Article 51 of the United Nations Charter. Before the Court, it has continued to maintain that it was justified in acting as it did in exercise of the right of self-defence; it contends that, even if the Court were to find that its actions do not fall within the scope of Article XX, paragraph 1 *(d),* those actions were not wrongful since they were necessary and appropriate actions in self-defence. Furthermore, as the United States itself recognizes in its Rejoinder, "The self-defense issues presented in this case raise matters of the highest importance to all members of the international community", and both Parties are agreed as to the importance of the implications of the case in the field of the use of force, even though they draw opposite conclusions from this observation. The Court therefore considers that, to the extent that its jurisdiction under Article XXI, paragraph 2, of the 1955 Treaty authorizes it to examine and rule on such issues, it should do so.

The question of the relationship between self-defence and Article XX, paragraph 1 *(d),* of the Treaty has been disputed between the Parties, in particular as regards the jurisdiction of the Court. In the view of the Court, the matter is one of interpretation of the Treaty, and in particular of Article XX, paragraph 1 *(d)*. The question is whether the parties to the 1955 Treaty, when providing therein that it should "not preclude the application of measures . . . necessary to protect [the] essential security interests" of either party, intended that such should be the effect of the Treaty even where those measures involved a use of armed force; and if so, whether they contemplated, or assumed, a limitation that such use would have to comply with the conditions laid down by international law. The Court considers that its jurisdiction under Article XXI, paragraph 2, of the 1955 Treaty to decide any question of interpretation or application of *(inter alia)* Article XX, paragraph 1 *(d),* of that Treaty extends, where appropriate, to the determination whether action alleged to be justified under that paragraph was or was not an unlawful use of force, by reference to international law applicable to this question, that is to say, the provisions of the Charter of the United Nations and customary international law.

The Court therefore examines first the application of Article XX, paragraph 1 *(d),* of the 1955 Treaty, which in the circumstances of this case, as explained above, involves the principle of the prohibition in international law of the use of force, and the qualification to it constituted by the right of self-defence. On the basis of that provision, a party to the Treaty may be justified in taking certain measures which it considers to be "necessary" for the protection of its essential security interests. In the present case, the question whether the measures taken were "necessary" overlaps with the question of their validity as acts of self-defence.

In this connection, the Court notes that it is not disputed between the Parties that neutral shipping in the Persian Gulf was caused considerable inconvenience and loss, and grave damage, during the Iran-Iraq war. It notes also that this was to a great extent due to the presence of mines and minefields laid by both sides. The Court has no jurisdiction to enquire into the question of the extent to which Iran and Iraq complied with the international legal rules of maritime warfare. It can however take note of these circumstances, regarded by the United States as relevant to its decision to take action against Iran which it considered necessary to protect its essential security interests. Nevertheless, the legality of the action taken by the United States has to be judged by reference to Article XX, paragraph 1 *(d),* of the 1955 Treaty, in the light of international law on the use of force in self-defence.

The Court observes that the United States has never denied that its actions against the Iranian platforms amounted to a use of armed force. The Court indicates that it will examine whether each of these actions met the conditions of Article XX, paragraph 1 *(d),* as interpreted by reference to the relevant rules of international law.

Attack of 19 October 1987 on Reshadat
(paras. 46–64)

The Court recalls that the first installation attacked, on 19 October 1987, was the Reshadat complex, which was also connected by submarine pipeline to another complex, named Resalat. At the time of the United States attacks, these complexes were not producing oil due to damage inflicted by prior Iraqi attacks. Iran has maintained that repair work on the platforms was close to completion in October 1987. The United States has however challenged this assertion. As a result of the attack, one platform was almost completely destroyed and another was severely damaged and, according to Iran, production from the Reshadat and Resalat complexes was interrupted for several years.

The Court first concentrates on the facts tending to show the validity or otherwise of the claim to exercise the right of self-defence. In its communication to the Security Council at the time of the attack, the United States based this claim on the existence of "a series of unlawful armed attacks by Iranian forces against the United States, including laying mines in international waters for the purpose of sinking or damaging United States flag ships, and firing on United States aircraft without provocation"; it referred in particular to a missile attack on the *Sea Isle City* as being the specific incident that led to the attack on the Iranian platforms. Before the Court, it has based itself more specifically on the attack on the *Sea Isle City,* but has continued to assert the relevance of the other attacks.

The Court points out that the United States has not claimed to have been exercising collective self-defence on behalf of the neutral States engaged in shipping in the Persian Gulf. Therefore, in order to establish that it was legally justified in attacking the Iranian platforms in exercise of the right of individual self-defence, the United States has to show that attacks had been made upon it for which Iran was responsible; and that those attacks were of such a nature as to be qualified as "armed attacks" within the meaning of that expression in Article 51 of the United Nations Charter, and as understood in customary law on the use of force. The United States must also show that its actions were necessary and proportional to the armed attack made on it, and that the platforms were a legitimate military target open to attack in the exercise of self-defence.

Having examined with great care the evidence and arguments presented on each side, the Court finds that the evidence indicative of Iranian responsibility for the attack on the *Sea Isle City* is not sufficient to support the contentions of the United States. The conclusion to which the Court has come on this aspect of the case is thus that the burden of proof of the existence of an armed attack by Iran on the United States, in the form of the missile attack on the *Sea Isle City,* has not been discharged.

In its notification to the Security Council, and before the Court, the United States has however also asserted that the *Sea Isle City* incident was "the latest in a series of such missile attacks against United States flag and other non-belligerent vessels in Kuwaiti waters in pursuit of peaceful commerce".

The Court finds that even taken cumulatively, and reserving the question of Iranian responsibility, these incidents do not seem to the Court to constitute an armed attack on the United States.

Attacks of 18 April 1988 on Nasr and Salman and "Operation Praying Mantis"
(paras. 65–72)

The Court recalls that the second occasion on which Iranian oil installations were attacked was on 18 April 1988, with the attacks on the Salman and Nasr complexes. Iran states that the attacks caused severe damage to the production facilities of the platforms; that the activities of the Salman complex were totally interrupted for four years, its regular production being resumed only in September 1992, and reaching a normal level in 1993; and that activities in the whole Nasr complex were interrupted and did not resume until nearly four years later.

The nature of the attacks on the Salman and Nasr complexes, and their alleged justification, was presented by the United States to the United Nations Security Council in a letter from the United States Permanent Representative of 18 April 1988, which stated *inter alia* that the United States had "exercised their inherent right of self-defence under international law by taking defensive action in response to an attack by the Islamic Republic of Iran against a United States naval vessel in international waters of the Persian Gulf", namely the mining of the USS *Samuel B. Roberts;* according to the United States, "This [was] but the latest in a series of offensive attacks and provocations Iranian naval forces have taken against neutral shipping in the international waters of the Persian Gulf."

The Court notes that the attacks on the Salman and Nasr platforms were not an isolated operation, aimed simply at the oil installations, as had been the case with the attacks of 19 October 1987; they formed part of a much more extensive military action, designated "Operation Praying Mantis", conducted by the United States against what it regarded as "legitimate military targets"; armed force was used, and damage done to a number of targets, including the destruction of two Iranian frigates and other Iranian naval vessels and aircraft.

As in the case of the attack on the *Sea Isle City,* the first question is whether the United States has discharged the burden of proof that the USS *Samuel B. Roberts* was the victim of a mine laid by Iran. The Court notes that mines were being laid at the time by both belligerents in the Iran-Iraq war, so that evidence of other minelaying operations by Iran is not conclusive as to responsibility of Iran for this particular mine. The main evidence that the mine struck by the USS *Samuel B. Roberts* was laid by Iran was the discovery of moored mines in the same area, bearing serial numbers matching other Iranian mines, in particular those found aboard the vessel *Iran Ajr.* This evidence is highly suggestive, but not conclusive.

Furthermore, no attacks on United States-flagged vessels (as distinct from United States-owned vessels), additional to those cited as justification for the earlier attacks on the Reshadat platforms, have been brought to the Court's attention, other than the mining of the USS *Samuel B. Roberts* itself. The question is therefore whether that incident sufficed in itself to justify action in self-defence, as amounting to an "armed attack". The Court does not exclude the possibility that the mining of a single military vessel might be sufficient to bring into play the "inherent right of self-defence"; but in view of all the circumstances, including the inconclusiveness of the evidence of Iran's responsibility for the mining of the USS *Samuel B. Roberts,* the Court is unable to hold that the attacks on the Salman and Nasr platforms have been shown to have been justifiably made in response to an "armed attack" on the United States by Iran, in the form of the mining of the USS *Samuel B. Roberts.*

Criteria of necessity and proportionality
(paras. 73–77)

The Court points out that in the present case a question of whether certain action is "necessary" arises both as an element of international law relating to self-defence and on the basis of the actual terms of Article XX, paragraph 1 *(d),* of the 1955 Treaty, already quoted, whereby the Treaty does "not preclude . . . measures . . . necessary to protect [the] essential security interests" of either party. The Court therefore turns to the criteria of necessity and proportionality in the context of international law on self-defence. One aspect of these criteria is the nature of the target of the force used avowedly in self-defence.

The Court indicates that it is not sufficiently convinced that the evidence available supports the contentions of the United States as to the significance of the military presence and activity on the Reshadat oil platforms; and it notes that

no such evidence is offered in respect of the Salman and Nasr complexes. However, even accepting those contentions, for the purposes of discussion, the Court finds itself unable to hold that the attacks made on the platforms could have been justified as acts of self-defence. In the case both of the attack on the *Sea Isle City* and the mining of the USS *Samuel B. Roberts,* the Court is not satisfied that the attacks on the platforms were necessary to respond to these incidents.

As to the requirement of proportionality, the attack of 19 October 1987 might, had the Court found that it was necessary in response to the *Sea Isle City* incident as an armed attack committed by Iran, have been considered proportionate. In the case of the attacks of 18 April 1988, however, they were conceived and executed as part of a more extensive operation entitled "Operation Praying Mantis". As a response to the mining, by an unidentified agency, of a single United States warship, which was severely damaged but not sunk, and without loss of life, neither "Operation Praying Mantis" as a whole, nor even that part of it that destroyed the Salman and Nasr platforms, can be regarded, in the circumstances of this case, as a proportionate use of force in self-defence.

Conclusion
(para. 78)

The Court thus concludes from the foregoing that the actions carried out by United States forces against Iranian oil installations on 19 October 1987 and 18 April 1988 cannot be justified, under Article XX, paragraph 1 *(d),* of the 1955 Treaty, as being measures necessary to protect the essential security interests of the United States, since those actions constituted recourse to armed force not qualifying, under international law on the question, as acts of self-defence, and thus did not fall within the category of measures contemplated, upon its correct interpretation, by that provision of the Treaty.

Iran's claim under Article X, paragraph 1, of the 1955 Treaty
(paras. 79–99)

Having satisfied itself that the United States may not rely, in the circumstances of the case, on the defence to the claim of Iran afforded by Article XX, paragraph 1 *(d),* of the 1955 Treaty, the Court turns to that claim, made under Article X, paragraph 1, of that Treaty, which provides that "Between the territories of the two High Contracting Parties there shall be freedom of commerce and navigation."

In its Judgment of 12 December 1996 on the preliminary objection of the United States, the Court had occasion, for the purposes of ascertaining and defining the scope of its jurisdiction, to interpret a number of provisions of the 1955 Treaty, including Article X, paragraph 1. It noted that the Applicant had not alleged that any military action had affected its freedom of navigation, so that the only question to be decided was "whether the actions of the United States complained of by Iran had the potential to affect 'freedom of commerce'" as guaranteed by that provision (*I.C.J. Reports 1996 (II),* p. 817, para. 38). After examining the contentions of the Parties as to the meaning of the word, the Court concluded that "it would be a natural interpretation of the word 'commerce' in Article X, paragraph 1, of the Treaty of 1955 that it includes commercial activities in general—not merely the immediate act of purchase and sale, but also the ancillary activities integrally related to commerce" (*ibid.,* p. 819, para. 49).

In that decision, the Court also observed that it did not then have to enter into the question whether Article X, paragraph 1, "is restricted to commerce 'between' the Parties" (*I.C.J. Reports 1996 (II),* p. 817, para. 44). However it is now common ground between the Parties that that provision is in terms limited to the protection of freedom of commerce "between the territories of the two High Contracting Parties". The Court observes that it is oil exports from Iran to the United States that are relevant to the case, not such exports in general.

In the 1996 Judgment, the Court further emphasized that "Article X, paragraph 1, of the Treaty of 1955 does not strictly speaking protect 'commerce' but '*freedom* of commerce'", and continued: "Unless such freedom is to be rendered illusory, the possibility must be entertained that it could actually be impeded as a result of acts entailing the destruction of goods destined to be exported, or capable of affecting their transport and storage with a view to export" (*ibid.,* p. 819, para. 50). The Court also noted that "Iran's oil production, a vital part of that country's economy, constitutes an important component of its foreign trade", and that "On the material now before the Court, it is . . . not able to determine if and to what extent the destruction of the Iranian oil platforms had an effect upon the export trade in Iranian oil . . ." (*ibid.,* p. 820, para. 51). The Court concludes by observing that if, at the present stage of the proceedings, it were to find that Iran had established that such was the case, the claim of Iran under Article X, paragraph 1, could be upheld.

Before turning to the facts and to the details of Iran's claim, the Court mentions that the United States has not succeeded, to the satisfaction of the Court, in establishing that the limited military presence on the platforms, and the evidence as to communications to and from them, could be regarded as justifying treating the platforms as military installations (see above). For the same reason, the Court is unable to regard them as outside the protection afforded by Article X, paragraph 1, of the 1955 Treaty, as alleged by the United States.

The Court in its 1996 Judgment contemplated the possibility that freedom of commerce could be impeded not only by "the destruction of goods destined to be exported", but also by acts "capable of affecting their transport and their storage with a view to export" (*I.C.J. Reports 1996 (II),* p. 819, para. 50). In the view of the Court, the activities of the platforms are to be regarded, in general, as commercial in nature; it does not, however, necessarily follow that any interference with such activities involves an impact on the freedom of commerce between the territories of Iran and the United States.

The Court considers that where a State destroys another State's means of production and transport of goods destined for export, or means ancillary or pertaining to such production or transport, there is in principle an interference with the freedom of international commerce. In destroying the platforms, whose function, taken as a whole, was precisely to produce and transport oil, the military actions made commerce in oil, at that time and from that source, impossible, and to that extent prejudiced freedom of commerce. While the

oil, when it left the platform complexes, was not yet in a state to be safely exported, the fact remains that it could be already at that stage destined for export, and the destruction of the platform prevented further treatment necessary for export. The Court therefore finds that the protection of freedom of commerce under Article X, paragraph 1, of the 1955 Treaty applied to the platforms attacked by the United States, and the attacks thus impeded Iran's freedom of commerce. However, the question remains whether there was in this case an interference with freedom of commerce "between the territories of the High Contracting Parties".

The United States in fact contends further that there was in any event no breach of Article X, paragraph 1, inasmuch as, even assuming that the attacks caused some interference with freedom of commerce, it did not interfere with freedom of commerce "between the territories of the two High Contracting Parties". First, as regards the attack of 19 October 1987 on the Reshadat platforms, it observes that the platforms were under repair as a result of an earlier attack on them by Iraq; consequently, they were not engaged in, or contributing to, commerce between the territories of the Parties. Secondly, as regards the attack of 18 April 1988 on the Salman and Nasr platforms, it draws attention to United States Executive Order 12613, signed by President Reagan on 29 October 1987, which prohibited, with immediate effect, the import into the United States of most goods (including oil) and services of Iranian origin. As a consequence of the embargo imposed by this Order, there was, it is suggested, no commerce between the territories of the Parties that could be affected, and consequently no breach of the Treaty protecting it.

Iran has asserted, and the United States has not denied, that there was a market for Iranian crude oil directly imported into the United States up to the issuance of Executive Order 12613 of 29 October 1987. Thus Iranian oil exports did up to that time constitute the subject of "commerce between the territories of the High Contracting Parties" within the meaning of Article X, paragraph 1, of the 1955 Treaty.

The Court observes that at the time of the attack of 19 October 1987 no oil whatsoever was being produced or processed by the Reshadat and Resalat platforms, since these had been put out of commission by earlier Iraqi attacks. While it is true that the attacks caused a major setback to the process of bringing the platforms back into production, there was at the moment of the attacks on these platforms no ongoing commerce in oil produced or processed by them.

The Court further observes that the embargo imposed by Executive Order 12613 was already in force when the attacks on the Salman and Nasr platforms were carried out; and that, it has not been shown that the Reshadat and Resalat platforms would, had it not been for the attack of 19 October 1987, have resumed production before the embargo was imposed. The Court must therefore consider the significance of that Executive Order for the interpretation and application of Article X, paragraph 1, of the 1955 Treaty.

The Court sees no reason to question the view sustained by Iran that, over the period during which the United States embargo was in effect, petroleum products were reaching the United States, in considerable quantities, that were derived in part from Iranian crude oil. It points out, however, that what the Court has to determine is not whether something that could be designated "Iranian" oil entered the United States, in some form, during the currency of the embargo; it is whether there was "commerce" in oil between the territories of Iran and the United States during that time, within the meaning given to that term in the 1955 Treaty.

In this respect, what seems to the Court to be determinative is the nature of the successive commercial transactions relating to the oil, rather than the successive technical processes that it underwent. What Iran regards as "indirect" commerce in oil between itself and the United States involved a series of commercial transactions: a sale by Iran of crude oil to a customer in Western Europe, or some third country other than the United States; possibly a series of intermediate transactions; and ultimately the sale of petroleum products to a customer in the United States. This is not "commerce" between Iran and the United States, but commerce between Iran and an intermediate purchaser; and "commerce" between an intermediate seller and the United States.

The Court thus concludes, with regard to the attack of 19 October 1987 on the Reshadat platforms, that there was at the time of those attacks no commerce between the territories of Iran and the United States in respect of oil produced by those platforms and the Resalat platforms, inasmuch as the platforms were under repair and inoperative; and that the attacks cannot therefore be said to have infringed the freedom of commerce in oil between the territories of the High Contracting Parties protected by Article X, paragraph 1, of the 1955 Treaty, particularly taking into account the date of entry into force of the embargo effected by Executive Order 12613. The Court notes further that, at the time of the attacks of 18 April 1988 on the Salman and Nasr platforms, all commerce in crude oil between the territories of Iran and the United States had been suspended by that Executive Order, so that those attacks also cannot be said to have infringed the rights of Iran under Article X, paragraph 1, of the 1955 Treaty.

The Court is therefore unable to uphold the submissions of Iran, that in carrying out those attacks the United States breached its obligations to Iran under Article X, paragraph 1, of the 1955 Treaty. In view of this conclusion, the Iranian claim for reparation cannot be upheld.

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The Court furthermore concludes that, in view of this finding on the claim of Iran, it becomes unnecessary to examine the argument of the United States (referred to above) that Iran might be debarred from relief on its claim by reason of its own conduct.

United States Counter-Claim
(paras. 101–124)

The Court recalls that the United States has filed a counter-claim against Iran and refers to the corresponding final submissions presented by the United States in the Counter-Memorial.

The Court further recalls that, by an Order of 10 March 1998 it found "that the counter-claim presented by the United States in its Counter-Memorial is admissible as such and forms part of the current proceedings."

Iran's objections to the Court's jurisdiction and to the admissibility of the United States counter-claim
(paras. 103–116)

Iran maintains that the Court's Order of 10 March 1998 did not decide all of the preliminary issues involved in the counter-claim presented by the United States; the Court only ruled on the admissibility of the United States counter-claim in relation to Article 80 of the Rules of Court, declaring it admissible "as such", whilst reserving the subsequent procedure for further decision. Iran contends that the Court should not deal with the merits of the counter-claim, presenting five objections.

The Court considers that it is open to Iran at this stage of the proceedings to raise objections to the jurisdiction of the Court to entertain the counter-claim or to its admissibility, other than those addressed by the Order of 10 March 1998. It points out that this Order does not address any question relating to jurisdiction and admissibility not directly linked to Article 80 of the Rules. The Court indicates that it will therefore proceed to address the objections now presented by Iran.

The Court finds that it cannot uphold the first objection of Iran to the effect that the Court cannot entertain the counter-claim of the United States because it was presented without any prior negotiation, and thus does not relate to a dispute "not satisfactorily adjusted by diplomacy" as contemplated by Article XXI, paragraph 2, of the 1955 Treaty. The Court points out that it is established that a dispute has arisen between Iran and the United States over the issues raised in the counter-claim; and that it is sufficient for the Court to satisfy itself that the dispute was not satisfactorily adjusted by diplomacy before being submitted to the Court.

The Court finds that the second objection of Iran, according to which the United States is in effect submitting a claim on behalf of third States or of foreign entities and has no title to do so, is devoid of any object and cannot be upheld. The Court recalls that the first submission presented by the United States in regard to its counter-claim simply requests the Court to adjudge and declare that the alleged actions of Iran breached its obligations to the United States, without mention of any third States.

In its third objection, Iran contends that the United States counter-claim extends beyond Article X, paragraph 1, of the 1955 Treaty, the only text in respect of which the Court has jurisdiction, and that the Court cannot therefore uphold any submissions falling outside the terms of paragraph 1 of that Article. The Court notes that the United States, in presenting its final submissions on the counter-claim, no longer relies, as it did at the outset, on Article X of the 1955 Treaty as a whole, but on paragraph 1 of that Article only, and, furthermore, recognizes the territorial limitation of Article X, paragraph 1, referring specifically to the military actions that were allegedly "dangerous and detrimental to commerce and navigation *between the territories of the United States and the Islamic Republic of Iran*" (emphasis added) rather than, generally, to "military actions that were dangerous and detrimental to maritime commerce". By limiting the scope of its counter-claim in its final submissions, the United States has deprived Iran's third objection of any object, and the Court finds that it cannot therefore uphold it.

In its fourth objection Iran maintains that "the Court has jurisdiction to rule only on counter-claims alleging a violation by Iran of freedom of commerce as protected under Article X (1), and not on counter-claims alleging a violation of freedom of navigation as protected by the same paragraph". The Court notes nevertheless, that Iran seems to have changed its position and recognized that the counter-claim could be founded on a violation of freedom of navigation. The Court further observes that it also concluded in 1998 that it had jurisdiction to entertain the United States counter-claim in so far as the facts alleged may have prejudiced *the freedoms* (in the plural) guaranteed by Article X, paragraph 1, of the 1955 Treaty, i.e., freedom of commerce and freedom of navigation. This objection of Iran thus cannot be upheld by the Court.

Iran presents one final argument against the admissibility of the United States counter-claim, which however it concedes relates only to part of the counter-claim. Iran contends that the United States has broadened the subject-matter of its claim beyond the submissions set out in its counter-claim by having, belatedly, added complaints relating to freedom of navigation to its complaints relating to freedom of commerce, and by having added new examples of breaches of freedom of maritime commerce in its Rejoinder in addition to the incidents already referred to in the counter-claim presented with the Counter-Memorial.

The Court observes that the issue raised by Iran is whether the United States is presenting a new claim. The Court is thus faced with identifying what is "a new claim" and what is merely "additional evidence relating to the original claim". It is well established in the Court's jurisprudence that the parties to a case cannot in the course of proceedings "transform the dispute brought before the Court into a dispute that would be of a different nature." The Court recalls that it has noted in its Order of 10 March 1998 in the present case that the counter-claim alleged "attacks on shipping, the laying of mines, and other military actions said to be 'dangerous and detrimental to maritime commerce'" *(I.C.J. Reports 1998,* p. 204, para. 36). Subsequently to its Counter-Memorial and counter-claim and to that Order of the Court, the United States provided detailed particulars of further incidents substantiating, in its contention, its original claims. In the view of the Court, the United States has not, by doing so, transformed the subject of the dispute originally submitted to the Court, nor has it modified the substance of its counter-claim, which remains the same. The Court therefore cannot uphold the objection of Iran.

Merits of the United States Counter-Claim
(paras. 119–123)

Having disposed of all objections of Iran to its jurisdiction over the counter-claim, and to the admissibility thereof, the Court considers the counter-claim on its merits. It points out that, to succeed on its counter-claim, the United States must

show that: *(a)* its freedom of commerce or freedom of navigation between the territories of the High Contracting Parties to the 1955 Treaty was impaired; and that *(b)* the acts which allegedly impaired one or both of those freedoms are attributable to Iran.

The Court recalls that Article X, paragraph 1, of the 1955 Treaty does not protect, as between the Parties, freedom of commerce or freedom of navigation in general. As already noted above, the provision of that paragraph contains an important territorial limitation. In order to enjoy the protection provided by that text, the commerce or the navigation is to be *between the territories* of the United States and Iran. The United States bears the burden of proof that the vessels which were attacked were engaged in commerce or navigation between the territories of the United States and Iran.

The Court then examines each of Iran's alleged attacks, in chronological order, from the standpoint of this requirement of the 1955 Treaty and concludes that none of the vessels described by the United States as being damaged by Iran's alleged attacks was engaged in commerce or navigation "between the territories of the two High Contracting Parties". Therefore, the Court concludes that there has been no breach of Article X, paragraph 1, of the 1955 Treaty in any of the specific incidents involving these ships referred to in the United States pleadings.

The Court takes note that the United States has also presented its claim in a generic sense. It has asserted that as a result of the cumulation of attacks on US and other vessels, laying mines and otherwise engaging in military actions in the Persian Gulf, Iran made the Gulf unsafe, and thus breached its obligation with respect to freedom of commerce and freedom of navigation which the United States should have enjoyed under Article X, paragraph 1, of the 1955 Treaty.

The Court observes that, while it is a matter of public record that as a result of the Iran-Iraq war navigation in the Persian Gulf involved much higher risks, that alone is not sufficient for the Court to decide that Article X, paragraph 1, was breached by Iran. It is for the United States to show that there was an *actual impediment* to commerce or navigation *between* the territories of the two High Contracting Parties. However, the United States has not demonstrated that the alleged acts of Iran actually infringed the freedom of commerce or of navigation between the territories of the United States and Iran. The Court also notes that the examination above of specific incidents shows that none of them individually involved any interference with the commerce and navigation protected by the 1955 Treaty; accordingly the generic claim of the United States cannot be upheld.

The Court has thus found that the counter-claim of the United States concerning breach by Iran of its obligations to the United States under Article X, paragraph 1, of the 1955 Treaty, whether based on the specific incidents listed, or as a generic claim, must be rejected; there is therefore no need for it to consider, under this head, the contested issues of attribution of those incidents to Iran. In view of the foregoing, the United States claim for reparation cannot be upheld.

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Declaration of Judge Ranjeva

Subscribing to the conclusions set out in the Judgment, Judge Ranjeva raises the distinction arising in respect of the same set of facts between the violation of freedom of commerce between the two Parties and the non-violation of freedom of commerce between those Parties' territories.

In his declaration Judge Ranjeva draws attention to the fact that the Judgment pierces the veil of the dispute: the Court sought to give priority to thorough consideration of the point of law to which the Parties ascribed the greatest importance: whether the use of force was justified under Article XX, paragraph 1, of the 1955 Treaty or the principle of self-defence under international law. The negative response given in the operative part itself reflects the Court's decision to adopt an approach grounded on an analysis of the elements of the claim: its cause *(cur)* and its subject *(quid)*. It would have been appropriate under these circumstances to look to Article 38, paragraph 2, of the Rules of Court and to refer directly to the concept of the *cause* of the claim. Another approach, masking the cause of the claim, would have affected the subject of the litigants' true intent and favoured wholly artificial considerations or purely logical ones, given the strategy employed in presenting the claims and arguments. In the present proceedings the Respondent's attitude helped to forestall the theoretical debate concerning the tension between the consensual basis of the Court's jurisdiction and the principle *jura novit curia*.

Declaration of Judge Koroma

In the declaration he appended to the Judgment, Judge Koroma stated that it was crucial and correct, in his view, that the Court had determined that measures involving the use of force and purported to have been taken under the Article of the 1955 Treaty relating to the maintenance or restoration of international peace and security, or necessary to protect a State party's essential security interests, had to be judged on the basis of the principle of the prohibition under international law of the use of force, as qualified by the right of self-defence. In other words, whether an action alleged to be justified under the Article was or was not an unlawful measure had to be determined by reference to the criteria of the United Nations Charter and general international law.

He agreed with the Court's decision, as reflected in the Judgment, that the actions carried out against the oil installations were not lawful as measures necessary to protect the essential security interests of the United States, since those actions constituted recourse to armed force not qualifying, under the United Nations Charter and general international law, as acts of self-defence, and thus did not fall within the category of measures contemplated by the 1955 Treaty. Judge Koroma maintained that that finding constituted a reply to the submissions of the Parties and, accordingly, the issue of *non ultra petita* did not arise.

He also subscribed to the Court's finding that the protection of freedom of commerce under the 1955 Treaty applied

to the oil installations and that the attacks, *prima facie*, impeded Iran's freedom of commerce within the meaning of that expression in the text of the Treaty, but did not violate the freedom of commerce. Judge Koroma considered this finding not devoid of significance.

Separate opinion of Judge Higgins

Judge Higgins has voted in favour of the *dispositif,* because she agrees that the claim of Iran that the United States has violated Article X, paragraph 1, of the Treaty of Amity cannot be upheld.

However, she believes that this determination makes it unnecessary for the Court also to address in its Judgment the question of whether the United States could justify its military attacks on the oil platforms under Article XX, paragraph 1 *(d),* of the same Treaty. This is because the Court itself has said, in its Judgment on Preliminary Objections in 1996, that Article XX, paragraph 1 *(d),* is in the nature of a defence. In the absence of any finding of a breach by the United States of Article X, paragraph 1, the issue of a possible defence does not arise.

Judge Higgins observes that there are two particular reasons why there should not have been a finding on Article XX, paragraph 1 *(d),* in the *dispositif.* The first is that the Court usually treats a defence as part of its reasoning in deciding whether a Respondent has acted contrary to an international legal obligation. It is its conclusion which normally constitutes the *dispositif,* and not its reasoning as to any possible defence or justification. The second reason is that, given the consensual basis of jurisdiction, the Court is limited in the *dispositif* to making findings upon matters that the Applicant has requested for determination. The final submissions of Iran do not include any request for a determination on Article XX, paragraph 1 *(d).*

Even if it had been correct for the Court to deal with that clause, Judge Higgins believes that it should then have interpreted the particular provisions in the light of general international law as to their specific terms. In her view, the Court has not interpreted the actual terms of Article XX, paragraph 1 *(d),* but has essentially replaced them, assessing the United States military action by reference to the law on armed attack and self-defence.

Finally, in Judge Higgins's opinion, in the handling of the evidence that would fall for consideration in any examination of Article XX, paragraph 1 *(d),* the Court has not specified the standard of evidence to be met; nor dealt with the evidence in sufficient detail; nor dealt with it in an even-handed manner.

Separate opinion of Judge Parra-Aranguren

Judge Parra-Aranguren declared that his vote for the operative part of the Judgment should not be understood as an expression of agreement with each and every part of the reasoning followed by the Court in reaching its conclusions. In particular he indicated his disagreement with the first sentence of paragraph 125 (1) stating that the Court: "*Finds* that the actions of the United States of America against Iranian oil platforms on 19 October 1987 and 18 April 1988 cannot be justified as measures necessary to protect the essential security interests of the United States of America under Article XX, paragraph 1 *(d),* of the 1955 Treaty of Amity, Economic Relations and Consular Rights between the United States of America and Iran, as interpreted in the light of international law on the use of force."

The reasons for his disagreement are the following:

The Court decided in its 12 December 1996 Judgment that: "it has jurisdiction, on the basis of Article XXI, paragraph 2, of the Treaty of 1955, to entertain the claims made by the Islamic Republic of Iran under Article X, paragraph 1, of that Treaty" (*Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II),* p. 821, para. 55 (2)).

In its first and main submission Iran requests the Court to reject all contrary claims and submissions and to adjudge and declare "That in attacking and destroying on 19 October 1987 and 18 April 1988 the oil platforms referred to in Iran's Application, the United States breached its obligations to Iran under Article X, paragraph 1, of the Treaty of Amity, and that the United States bears responsibility for the attacks."

Thus Judge Parra-Aranguren considered that the subject-matter of the dispute submitted by Iran to the Court was whether the military actions of the United States breached its obligations to Iran under Article X, paragraph 1, of the 1955 Treaty, in force between the parties. Therefore the task of the Court was to decide the claim presented by Iran, i.e., to examine and determine whether the United States violated its obligations under Article X, paragraph 1, of the 1955 Treaty. In his opinion it is only if the Court came to the conclusion that the United States breached its obligations under Article X, paragraph 1, of the 1955 Treaty that it would have jurisdiction to enter into the consideration of the defence advanced by the United States to justify its military actions against Iran, in particular whether they were justified under Article XX, paragraph 1 *(d),* of the 1955 Treaty as necessary to protect its "essential security interests".

In the Court's view there are particular considerations militating in favour of an examination of the application of Article XX, paragraph 1 *(d),* before turning to Article X, paragraph 1.

The first particular consideration militating in favour of reversing the order of examination of the Articles of the 1955 Treaty, as explained in paragraph 37 of the Judgment, is that: "It is clear that the original dispute between the Parties related to the legality of the actions of the United States, in the light of international law on the use of force"; "At the time of those actions, neither Party made any mention of the 1955 Treaty", the United States contending that "its attacks on the oil platforms were justified as acts of self-defence, in response to what it regarded as armed attacks by Iran"; and "on that basis it gave notice of its action to the Security Council under Article 51 of the United Nations Charter".

As the second particular consideration, paragraph 38 of the Judgment indicates that, in its Rejoinder, the United States itself recognizes that "The self-defense issues presented in this case raise matters of the highest importance to all members of

the international community"; and that Iran also stresses the great importance of those issues.

In the opinion of Judge Parra-Aranguren there can be no doubt that matters relating to the use of force and to self-defence are of the highest importance to all members of the international community. He also stated that, while being perfectly well aware at that time of the two particular considerations indicated above, the Court in its 1996 Judgment expressly interpreted Article XX, paragraph 1 *(d),* of the 1955 Treaty "as affording only a defence on the merits", concluding that it "is confined to affording the Parties a possible defence on the merits to be used should the occasion arise" (*Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II),* p. 811, para. 20).

Consequently, Judge Parra-Aranguren is convinced that there are no "particular considerations militating in favour of an examination of the application of Article XX, paragraph 1 *(d),* before turning to Article X, paragraph 1". On the contrary, there are strong considerations in favour of not doing so. The second sentence of paragraph 125 (1) of the Judgment dismisses the claim presented by Iran because the Court came to the conclusion that the United States had not violated Article X, paragraph 1, of the 1955 Treaty. In the opinion of Judge Parra-Aranguren, that is the end of the story. Therefore he concluded that the Court did not have jurisdiction to examine the defences advanced by the United States on the basis of Article XX, paragraph 1 *(d),* to justify its hypothetical violation of Article X, paragraph 1, of the 1955 Treaty.

Separate opinion of Judge Kooijmans

Judge Kooijmans has voted in favour of the *dispositif* since he agreed with its substance. He is, however, of the view that the Court's finding that the actions of the United States against the oil platforms cannot be justified as measures necessary to protect its essential security interests is not part of the decision on the claim and therefore should not have found a place in the *dispositif.* That creates the hazardous precedent of an *obiter dictum* in the operative part of a judgment.

In his separate opinion Judge Kooijmans first gives a more detailed overview of the factual context than is presented in the Judgment. He then deals with the substance of the dispute before the Court, which deals with the question whether the United States violated its obligation under Article X, paragraph 1, of the 1955 Treaty concerning freedom of commerce, and *not* whether it used force in breach of the United Nations Charter and customary law.

He is of the view that Article XX, paragraph 1 *(d),* of the 1955 Treaty enabling the parties to take measures necessary to protect their essential security interests, is not an exoneration clause but a freestanding provision and that the Court therefore correctly concluded that it was free to choose whether it would first deal with Article X, or with Article XX, paragraph 1 *(d).* But once the Court had found that the United States could not invoke Article XX, it had to decide the case on grounds material to Article X, paragraph 1, itself. Its conclusion with regard to Article XX, paragraph 1 *(d),* became irrelevant for the disposition on the claim and therefore should not have found a place in the operative part of the Judgment.

Judge Kooijmans also dissociates himself from the way in which the Court puts the measures, invoked by the United States as "necessary to protect its essential security interests", *directly* to the test of the general rules of law on the use of force including the right to self-defence, thereby misinterpreting the scope of its jurisdiction.

In the last part of his opinion, Judge Kooijmans indicates what in his opinion would have been the proper approach to deal with the legal aspects of Article XX, paragraph 1 *(d).* In this respect he follows the distinction made by the Court in its 1986 Judgment in the *Nicaragua* case between a test of reasonableness with regard to the assessment of the threat to the security risks and a legality test with regard to the necessity of the measures taken. Applying this method and using the rules of general international law on the use of force as a means to interpret the meaning of "necessary", Judge Kooijmans concludes that the actions against the oil platforms do not constitute measures which can be deemed *necessary* to protect the essential security interests of the United States.

Dissenting opinion of Judge Al-Khasawneh

Judge Al-Khasawneh felt that the formal structure of the *dispositif* amalgamating as it does two distinct findings in one paragraph was unorthodox and unfortunate. It also left Judge Al-Khasawneh with a difficult choice of accepting the paragraph as a whole or leaving it. He felt compelled to dissent because he disagreed with the finding that the United States was not in violation of its obligations under Article X, paragraph 1, of the 1955 Treaty on the freedom of commerce. That finding was arrived at by unpersuasive reasoning that draws an artificial distinction between protected commerce (direct commerce) and unprotected commerce (indirect commerce). He pointed out that international trade law thresholds were ill-suited as a yardstick for treaty-protected commerce, moreover the Judgment was unduly restrictive of the definition of freedom of commerce which included not only actual but also potential commerce. Judge Al-Khasawneh felt also that the approach could not be supported on the basis of textual analysis and was at variance with earlier jurisprudence.

Regarding the United States counter-claim which was rejected by the Court, Judge Al-Khasawneh felt this was a consequence of the Court's narrow interpretation of protected commerce and felt it would be better if the Court had upheld claim and counter-claim. The main difficulty with the United States claim was however the problem of attribution to Iran.

Judge Al-Khasawneh felt that the Court should have been clearer in its use of language when it came to rejecting United States claims that their actions against the oil platforms were justified by Article XX, paragraph 1 *(d),* of the 1955 Treaty as necessary measures to protect United States essential security interests. The use of force made it inevitable to discuss these criterion in the language of necessity and proportionality which form part of the concept of the non-use of force.

Separate opinion of Judge Buergenthal

Judge Buergenthal agrees with the Court's Judgment to the extent that it holds that the United States of America did not breach Article X, paragraph 1, of the 1955 Treaty between it and Iran. He also agrees with the Court's decision rejecting the counter-claim interposed by the United States against Iran. That decision of the Court is justified, in his view, for the very reasons, *mutatis mutandis,* that led the Court to find that the United States did not breach the obligations it owed Iran under Article X, paragraph 1, of the 1955 Treaty. But Judge Buergenthal dissents from the Court's conclusion that the actions of the United States, in attacking certain Iranian oil platforms, cannot be justified under Article XX, paragraph 1 *(d),* of the Treaty "as interpreted in the light of international law on the use of force". He considers that this pronouncement has no place in the Judgment, much less in the operative part thereof.

Judge Buergenthal believes that the Court's Judgment, as it relates to Article XX, paragraph 1 *(d),* is seriously flawed for the following reasons. First, it makes a finding with regard to Article XX, paragraph 1 *(d),* of the 1955 Treaty that violates the *non ultra petita* rule, a cardinal rule governing the Court's judicial process, which does not allow the Court to deal with a subject—here Article XX, paragraph 1 *(d)*—in the *dispositif* of its judgment that the parties to the case have not, in their final submissions, asked it to adjudicate. Second, the Court makes a finding on a subject which it had no jurisdiction to make under the dispute resolution clause—Article XXI, paragraph 2—of the 1955 Treaty, that clause being the sole basis of the Court's jurisdiction in this case once it found that the United States had not violated Article X, paragraph 1, of the Treaty. Third, even assuming that the Court had the requisite jurisdiction to make the finding regarding Article XX, paragraph 1 *(d),* its interpretation of that Article in light of the international law on the use of force exceeded its jurisdiction. Finally, Judge Buergenthal considers that the manner in which the Court analyses the evidence bearing on its application of Article XX, paragraph 1 *(d),* is seriously flawed.

Dissenting opinion of Judge Elaraby

Judge Elaraby voted against the first paragraph of the *dispositif,* essentially dissenting on three points.

First, the Court had jurisdiction to rule upon the legality of the use of force. Particularly that the Court held that the United States use of force cannot be considered as legitimate self-defence in conformity with the "criteria applicable to the question" which the Court identified as "the provisions of the Charter of the United Nations and customary international law". United States action amounted to armed reprisals and their illegality as such should have been noted. The Court missed an opportunity to reaffirm and clarify the law on the use of force in all its manifestations.

Second, the Court's refusal to uphold Iran's claim of a violation of Article X, paragraph 1, was based on unsound premises in facts and in law. What is relevant is not whether the targeted platforms were producing oil at the time of the attacks, but rather whether Iran as a whole was producing oil and exporting it to the United States. The test is whether the freedom of commerce between the territories of the two Parties had been prejudiced. Once the embargo was imposed, indirect commerce was allowed and in fact continued. The ordinary meaning of the Treaty in its context supports the argument that its purview covers commerce in a broad sense. Also, Article X, paragraph 1, does not exclude such indirect commerce. The ten days between the first attack and the imposition of the embargo would have sufficed to declare that the freedom of commerce was prejudiced. Hence, the obligation emanating from Article X, paragraph 1, was breached.

Third, the Court was right in examining Article XX, paragraph 1 *(d),* before Article X, paragraph 1. It had jurisdiction to enhance its contribution to the progressive development of the law by ruling more exhaustively on the use of force.

Separate opinion of Judge Owada

Judge Owada concurs in the final conclusion of the Court that neither the claims of the Applicant nor the counter-claim of the Respondent can be upheld, but he is not in a position to agree to all the points in the *dispositif* nor with all the reasons leading to the conclusions. For this reason Judge Owada attaches his separate opinion, focusing only on some salient points.

First, on the question of the basis of the decision of the Court, Judge Owada takes the view that the Court should have examined Article X, paragraph 1, prior to Article XX, paragraph 1 *(d).* Article XX, paragraph 1 *(d),* constitutes a defence on the merits of the claims of the Applicant on Article X, paragraph 1, and should for that reason be considered only if and when the Court finds that there has been a breach of Article X, paragraph 1. The Court cannot freely choose the ground upon which to pass judgment when its jurisdiction is limited to the examination of Article X, paragraph 1.

Second, on the question of the scope of Article X, paragraph 1, Judge Owada is in general agreement with the Judgment, but makes the point that the term "freedom of commerce", as used in the 1955 Treaty, refers to "unimpeded flow of mercantile transaction in goods and services between the territories of the Contracting Parties" and cannot cover the activities of the oil platforms. Apart from the factual ground on which the Judgment is based, the Court for this reason cannot uphold the claim that the "freedom of commerce" in Article X, paragraph 1, has been breached.

Third, on the question of the scope of Article XX, paragraph 1 *(d),* which in his view the Court does not have to take up in view of its finding on Article X, paragraph 1, Judge Owada is of the opinion that the interpretation and application of Article XX, paragraph 1 *(d),* and the question of the self-defence under international law in general are not synonymous and that the latter as such is not the task before the Court. The examination of the latter problem by the Court should be confined to what is necessary for the interpretation and application of Article XX, paragraph 1 *(d),* in view of the limited scope of the jurisdiction of the Court.

Finally, Judge Owada raises the question of asymmetry in the production of evidence in this case, which leads to a difficult situation for the Court in verifying the facts involved. While accepting the basic principle on evidence, *actori incumbit onus probandi,* Judge Owada would have liked to

see the Court engage in much more in-depth probing into the problem of ascertaining the facts of the case, if necessary *proprio motu.*

Separate opinion of Judge Simma

Judge Simma starts his separate opinion by explaining why he voted in favour of the first part of the *dispositif* of the Judgment even though he agrees with the Court's treatment of only one of the two issues dealt with therein, namely that of the alleged security interests of the United States measured against the international law on self-defence. As to the remaining parts of the *dispositif,* Judge Simma can neither agree with the Court's decision that the United States attacks on the oil platforms ultimately did not infringe upon Iran's Treaty right to respect for its freedom of commerce with the United States, nor does Judge Simma consider that the way in which the Court disposed of the so-called "generic" counter-claim of the United States was correct. Rather, in Judge Simma's view this counter-claim ought to have been upheld. Regarding the part of the *dispositif* devoted to this counter-claim, Judge Simma thus had no choice but to dissent. The reason why Judge Simma did not also dissent from the first part of the *dispositif* (and prefers to call his opinion a "separate" and not a "dissenting" one) even though he concurs with the Court's decisions on only the first of the two issues decided therein, is to be seen in a consideration of judicial policy: Judge Simma welcomes that the Court has taken the opportunity, offered by United States reliance on Article XX of the 1955 Treaty, to state its view on the legal limits on the use of force at the moment when these limits find themselves under the greatest stress. Although Judge Simma is of the view that the Court has fulfilled what is nothing but its duty in this regard with inappropriate restraint, Judge Simma does not want to disassociate himself from what after all does result in a confirmation, albeit too hesitant, of the *jus cogens* of the United Nations Charter.

Since matters relating to the United States use of force are at the heart of the case, Judge Simma finds the Judgment's approach of dealing with Article XX before turning to Article X of the 1955 Treaty acceptable. On the other hand, the Court should have had the courage to restate, and thus to reconfirm, the fundamental principles of the law of the United Nations as well as customary international law on the use of force in a way conforming to the standard of vigour and clarity set by the Court already in the *Corfu Channel* case of half a century ago. This, unfortunately, the Court has not done.

In Judge Simma's view the Court could have clarified what kind of defensive countermeasures would have been available to the United States: in Judge Simma's view, hostile military action not reaching the threshold of an armed attack within the meaning of Article 51 of the United Nations Charter, like that by Iran in the present case, may be countered by proportionate and immediate defensive measures equally of a military character. However, the United States actions against the oil platforms did not qualify as such proportionate countermeasures.

In Judge Simma's view, the Court's treatment of Article X on freedom of commerce between the territories of the Parties follows a step-by-step approach which he considers correct up to a certain point but which then turns into wrong directions: first, the platforms attacked in October 1987 could not lose their protection under Article X through being temporarily inoperative because, according to Judge Simma, the freedom under the Treaty embraces also the possibility of commerce in the future. Secondly, according to Judge Simma, the indirect commerce in Iranian oil going on during the time of the United States embargo is also to be regarded as protected by the Treaty.

Turning to the United States counter-claim, Judge Simma finds the way in which the Court has dealt with it blatantly inadequate, particularly with regard to the so-called generic counter-claim which, in Judge Simma's view, should have been upheld. Judge Simma then sets out to develop the arguments, put forward somewhat unpersuasively by the United States, in support of the generic counter-claim. The fact that in the present instance (unlike in the *Nicaragua* case), it was two States which created the situation adverse to neutral shipping in the Gulf, is not determinant. According to Judge Simma, all that matters with regard to the generic counter-claim is that Iran was responsible for a significant portion of the actions impairing the freedom of commerce and navigation between the two countries; it is not necessary to determine the particular extent to which Iran was responsible for them. Neither could it be argued that all the impediments to free commerce and navigation which neutral ships faced in the Gulf were caused by legitimate acts of war carried out by the two belligerents, and that therefore neutral shipping entered the maritime areas affected by the Gulf war at its own risk. In Judge Simma's view, Iran's actions constituted a violation of Article X of the 1955 Treaty; an impediment on the freedom of commerce and navigation caused by those actions is evidenced by the increase in labour, insurance, and other costs resulting for the participants in commerce between the countries during the relevant period.

Judge Simma then turns to refuting the argument that the acts alleged to have constituted an impediment to the freedom of commerce and navigation under the Treaty cannot be attributed to Iran with certainty and that therefore it is impossible to find Iran responsible for those acts. Judge Simma demonstrates that a principle of joint-and-several responsibility can be developed from domestic legal systems as a general principle of law by which the dilemma in the present case could have been overcome.

Finally, Judge Simma argues that the so-called "indispensable-third-party" doctrine, consecutively accepted and rejected by the Court's earlier jurisprudence, would not have stood in the way of accepting the United States counter-claim as well-founded.

Separate opinion of Judge Rigaux

The operative part of the Judgment comprises two points: in the second it is concluded that the counter-claim of the United States of America must be rejected; the first is divided into two parts, the second of which rejects the claim of the Islamic Republic of Iran for reparation while in the first the American attacks on the oil platforms are held not to have satisfied the requirements of the applicable provisions of the

1955 Treaty, as interpreted in the light of international law on the use of force.

Judge Rigaux voted in favour of the two points in the operative part, with some reservations as to the first. The two clauses constituting it would appear inconsistent: it is a contradiction both to hold that use of armed force against the oil platforms was unlawful and to reject the claim for reparation for the injury caused by the unlawful act. However, the Court's affirmation of the principle prohibiting the use of armed force except in those situations where contemplated by international law appeared to Judge Rigaux sufficiently important that he felt obliged to vote in favour of it, notwithstanding the refusal to uphold Iran's rightful claim.

The reasoning supporting the rejections of the two actions contains two elements common to them, i.e., the interpretation given to the notion of "indirect" commerce and the idea that "future" commerce falls outside the scope of freedom of commerce. Judge Rigaux finds those two elements debatable.

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146. 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)

Judgment of 18 December 2003

In its Judgment, the Chamber constituted by the Court in the case concerning 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), found by four votes to one, that the Application submitted by the Republic of El Salvador for revision, under Article 61 of the Statute of the Court, of the Judgment given on 11 September 1992, by the Chamber of the Court constituted in the case concerning the Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), was inadmissible.

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The Chamber was composed as follows: Judge Guillaume, President of the Chamber; Judges Rezek, Buergenthal; Judges *ad hoc* Torres Bernárdez and Paolillo; Registrar Couvreur.

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The final paragraph of the judgment of the Chamber of the Court reads as follows:

" . . .

The Chamber,

By four votes to one,

Finds that the Application submitted by the Republic of El Salvador for revision, under Article 61 of the Statute of the Court, of the Judgment given on 11 September 1992, by the Chamber of the Court formed to deal with the case concerning the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening),* is inadmissible.

IN FAVOUR: Judge Guillaume, *President of the Chamber; Judges* Rezek, Buergenthal; Judge *ad hoc* Torres Bernárdez;

AGAINST: Judge *ad hoc* Paolillo."

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Judge *ad hoc* Paolillo appended a dissenting opinion to the Judgment of the Chamber.

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History of the proceedings and submissions of the Parties
(paras. 1–14)

On 10 September 2002 the Republic of El Salvador (hereinafter "El Salvador") submitted a request to the Court for revision of the Judgment delivered on 11 September 1992 by the Chamber of the Court formed to deal with the case concerning the Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening) (I.C.J. Reports 1992, p. 351).

In its Application, El Salvador requested the Court "To proceed to form the Chamber that will hear the application for revision of the Judgment, bearing in mind the terms that El Salvador and Honduras agreed upon in the Special Agreement of 24 May 1986."

The Parties having been duly consulted by the President, the Court, by an Order of 27 November 2002, decided to grant their request for the formation of a special chamber to deal with the case; it declared that three Members of the Court had been elected to sit alongside two *ad hoc* judges chosen by the Parties: President G. Guillaume; Judges F. Rezek, T. Buergenthal; Judges *ad hoc* S. Torres Bernárdez (chosen by Honduras) and F. H. Paolillo (chosen by El Salvador).

On 1 April 2003, within the time-limit fixed by the Court, Honduras filed its Written Observations on the admissibility of El Salvador's Application. Public sittings were held on 8, 9, 10 and 12 September 2003.

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At the oral proceedings, the following final submissions were presented by the Parties:

On behalf of the Government of the Republic of El Salvador,

"The Republic of El Salvador respectfully requests the Chamber, rejecting all contrary claims and submissions to adjudge and declare that:

1. The application of the Republic of El Salvador is admissible based on the existence of new facts of such a nature as to leave the case open to revision, pursuant to Article 61 of the Statute of the Court, and

2. Once the request is admitted that it proceed to a revision of the Judgment of 11 September 1992, so that a new judgment fixes the boundary line in the sixth disputed sector of the land boundary between El Salvador and Honduras as follows:

'Starting at the old mouth of the Goascorán River at the entry point known as the Estero de la Cutú, located at latitude 13 degrees 22 minutes 00 seconds north and longitude 87 degrees 41 minutes 25 seconds west, the border follows the old bed of the Goascorán River for a distance of 17,300 metres up to the place known as Rompición de Los Amates, located at latitude 13 degrees 26 minutes 29 seconds north and longitude 87 degrees 43 minutes 25 seconds west, which is where the Goascorán River changed course.' "

On behalf of the Government of the Republic of Honduras,

"In view of the facts and arguments presented above, the Government of the Republic of Honduras requests the Chamber to declare the inadmissibility of the Application for Revision presented on 10 September 2002 by El Salvador."

Basis of jurisdiction and circumstances of the case
(paras. 15–22)

The Chamber begins by stating that, under Article 61 of the Statute, revision proceedings open with a judgment of the Court declaring the application admissible on the grounds contemplated by the Statute, and that Article 99 of the Rules of Court makes express provision for proceedings on the merits if, in its first judgment, the Court has declared the application admissible.

The Chamber observes that, at this stage, its decision is thus limited to the question whether El Salvador's request satisfies the conditions contemplated by the Statute. Under Article 61, these conditions are as follows:

(a) the application should be based upon the "discovery" of a "fact";

(b) the fact the discovery of which is relied on must be "of such a nature as to be a decisive factor";

(c) the fact should have been "unknown" to the Court and to the party claiming revision when the judgment was given;

(d) ignorance of this fact must not be "due to negligence"; and

(e) the application for revision must be "made at latest within six months of the discovery of the new fact" and before ten years have elapsed from the date of the judgment.

The Chamber observes that "an application for revision is admissible only if each of the conditions laid down in Article 61 is satisfied. If any one of them is not met, the application must be dismissed."

However, El Salvador appears to argue *in limine* that there is no need for the Chamber to consider whether the conditions of Article 61 of the Statute have been satisfied, since, by its attitude, "Honduras implicitly acknowledged the admissibility of El Salvador's Application".

In this respect, the Chamber observes that regardless of the parties' views on the admissibility of an application for revision, it is in any event for the Court, when seised of such an application, to ascertain whether the admissibility requirements laid down in Article 61 of the Statute have been met. Revision is not available simply by consent of the parties, but solely when the conditions of Article 61 are met.

The new facts alleged by El Salvador concern on the one hand the avulsion of the river Goascorán and on the other the "Carta Esférica" and the report of the 1794 *El Activo* expedition.

Avulsion of the river Goascorán
(paras. 23–40)

"In order properly to understand El Salvador's present contentions", the Chamber first recapitulates part of the reasoning in the 1992 Judgment in respect of the sixth sector of the land boundary.

The Chamber then indicates that in the present case, El Salvador first claims to possess scientific, technical and historical evidence showing, contrary to what it understands the 1992 decision to have been, that the Goascorán did in the past change its bed, and that the change was abrupt, probably as a result of a cyclone in 1762. El Salvador argues that evidence can constitute "new facts" for purposes of Article 61 of the Statute.

El Salvador further contends that the evidence it is now offering establishes the existence of an old bed of the Goascorán debouching in the Estero La Cutú, and the avulsion of the river in the mid-eighteenth century or that at the very least, it justifies regarding such an avulsion as plausible. These are said to be "new facts" for purposes of Article 61. According to El Salvador, the facts thus set out are decisive, because the considerations and conclusions of the 1992 Judgment are founded on the rejection of an avulsion which, in the Chamber's view, had not been proved.

El Salvador finally maintains that, given all the circumstances of the case, in particular the "bitter civil war [which] was raging in El Salvador" "for virtually the whole period between 1980 and the handing down of the Judgment on 11 September 1992", its ignorance of the various new facts

which it now advances concerning the course of the Goascorán was not due to negligence.

The Chamber states that Honduras, for its part, argues that with regard to the application of Article 61 of the Statute, it is "well-established case law that there is a distinction in kind between the facts alleged and the evidence relied upon to prove them and that only the discovery of the former opens a right to revision". Accordingly, in the view of Honduras, the evidence submitted by El Salvador cannot open a right to revision.

Honduras adds that El Salvador has not demonstrated the existence of a new fact. In reality, El Salvador is seeking "a new interpretation of previously known facts" and asking the Chamber for a "genuine reversal" of the 1992 Judgment.

Honduras further maintains that the facts relied on by El Salvador, even if assumed to be new and established, are not of such a nature as to be decisive factors in respect of the 1992 Judgment.

Honduras argues lastly that El Salvador could have had the scientific and technical studies and historical research which it is now relying on carried out before 1992.

Turning to consideration of El Salvador's submissions concerning the avulsion of the Goascorán, the Chamber recalls that an application for revision is admissible only if each of the conditions laid down in Article 61 is satisfied, and that if any one of them is not met, the application must be dismissed; in the present case, the Chamber begins by ascertaining whether the alleged facts, supposing them to be new facts, are of such a nature as to be decisive factors in respect of the 1992 Judgment.

In this regard, the Chamber first recalls the considerations of principle on which the Chamber hearing the original case relied for its ruling on the disputes between the two States in six sectors of their land boundary. According to that Chamber, the boundary was to be determined "by the application of the principle generally accepted in Spanish America of the *uti possidetis juris,* whereby the boundaries were to follow the colonial administrative boundaries" (para. 28 of the 1992 Judgment). The Chamber did however note that "the *uti possidetis juris* position can be qualified by adjudication and by treaty". It reasoned from this that "the question then arises whether it can be qualified in other ways, for example, by acquiescence or recognition". It concluded that "There seems to be no reason in principle why these factors should not operate, where there is sufficient evidence to show that the parties have in effect clearly accepted a variation, or at least an interpretation, of the *uti possidetis juris* position" (para. 67 of the 1992 Judgment).

The Chamber then considered "The contention of El Salvador that a former bed of the river Goascorán forms the *uti possidetis juris* boundary". In this respect, it observed that:

> "[this contention] depends, as a question of fact, on the assertion that the Goascorán formerly was running in that bed, and that at some date it abruptly changed its course to its present position. On this basis El Salvador's argument of law is that where a boundary is formed by the course of a river, and the stream suddenly leaves its old bed and forms a new one, this process of 'avulsion' does not bring about a change in the boundary, which continues to follow the old channel." (Para. 308 of the 1992 Judgment.)

The Chamber added that:

> "No record of such an abrupt change of course having occurred has been brought to the Chamber's attention, but were the Chamber satisfied that the river's course was earlier so radically different from its present one, then an avulsion might reasonably be inferred." *(Ibid.)*

Pursuing its consideration of El Salvador's argument, the Chamber did however note: "There is no scientific evidence that the previous course of the Goascorán was such that it debouched in the Estero La Cutú . . . rather than in any of the other neighbouring inlets in the coastline, such as the Estero El Coyol" (para. 309 of the 1992 Judgment).

Turning to consideration as a matter of law of El Salvador's proposition concerning the avulsion of the Goascorán, the Chamber observed that El Salvador "suggests . . . that the change in fact took place in the 17th century" (para. 311 of the 1992 Judgment). It concluded that "On this basis, what international law may have to say, on the question of the shifting of rivers which form frontiers, becomes irrelevant: the problem is mainly one of Spanish colonial law." (Para. 311 of the 1992 Judgment.)

Beginning in paragraph 312 of the 1992 Judgment, the Chamber turned to a consideration of a different ground. At the outset, it tersely stated the conclusions which it had reached and then set out the reasoning supporting them. In the view of the Chamber, "any claim by El Salvador that the boundary follows an old course of the river abandoned at some time *before* 1821 must be rejected. It is a new claim and inconsistent with the previous history of the dispute." (Para. 312 of the 1992 Judgment.)

In the present case, the Chamber observes that, whilst in 1992 the Chamber rejected El Salvador's claims that the 1821 boundary did not follow the course of the river at that date, it did so on the basis of that State's conduct during the nineteenth century.

The Chamber concludes that, in short, it does not matter whether or not there was an avulsion of the Goascorán. Even if avulsion were now proved, and even if its legal consequences were those inferred by El Salvador, findings to that effect would provide no basis for calling into question the decision taken by the Chamber in 1992 on wholly different grounds. The facts asserted in this connection by El Salvador are not "decisive factors" in respect of the Judgment which it seeks to have revised.

Discovery of new copies of the "Carta Esférica" and report of the 1794 El Activo *expedition*
(paras. 41–55)

The Chamber then examines the second "new fact" relied upon by El Salvador in support of its Application for revision, namely, the discovery in the Ayer Collection of the Newberry Library in Chicago of a further copy of the "Carta Esférica" and of a further copy of the report of the expedition of the *El Activo,* thereby supplementing the copies from the Madrid

Naval Museum to which the 1992 Chamber made reference in paragraphs 314 and 316 of its Judgment.

The Chamber points out that Honduras denies that the production of the documents found in Chicago can be characterized as a new fact. For Honduras, this is simply "another copy of one and the same document already submitted by Honduras during the written stage of the case decided in 1992, and already evaluated by the Chamber in its Judgment". The Chamber proceeds first, as it did in respect of the avulsion, to determine first whether the alleged facts concerning the "Carta Esférica" and the report of the *El Activo* expedition are of such a nature as to be decisive factors in respect of the 1992 Judgment.

The Chamber recalls in this regard that its predecessor in 1992, after having held El Salvador's claims concerning the old course of the Goascorán to be inconsistent with the previous history of the dispute, considered "the evidence made available to it concerning the course of the river Goascorán in 1821" (para. 313 of the 1992 Judgment). The 1992 Chamber paid particular attention to the chart prepared by the captain and navigators of the vessel *El Activo* around 1796, described as a "Carta Esférica", which Honduras had found in the archives of the Madrid Naval Museum. That Chamber concluded from the foregoing "that the report of the 1794 expedition and the 'Carta Esférica' leave little room for doubt that the river Goascorán in 1821 was already flowing in its present-day course" (para. 316 of the 1992 Judgment).

In the present case, the Chamber observes in this connection, that the two copies of the "Carta Esférica" held in Madrid and the copy from Chicago differ only as to certain details, such as for example, the placing of titles, the legends, and the handwriting. These differences reflect the conditions under which documents of this type were prepared in the late eighteenth century; they afford no basis for questioning the reliability of the charts that were produced to the Chamber in 1992. The Chamber notes further that the Estero La Cutú and the mouth of the Rio Goascorán are shown on the copy from Chicago, just as on the copies from Madrid, at their present-day location. The new chart produced by El Salvador thus does not overturn the conclusions arrived at by the Chamber in 1992; it bears them out.

As for the new version of the report of the *El Activo* expedition found in Chicago, it differs from the Madrid version only in terms of certain details, such as the opening and closing indications, spelling, and placing of accents. The body of the text is the same, in particular in the identification of the mouth of the Goascorán. Here again, the new document produced by El Salvador bears out the conclusions reached by the Chamber in 1992.

The Chamber concludes from the foregoing that the new facts alleged by El Salvador in respect of the "Carta Esférica" and the report of the *El Activo* expedition are not "decisive factors" in respect of the Judgment whose revision it seeks.

Final observations
(paras. 56–59)

The Chamber takes note of El Salvador's further contention that proper contextualization of the alleged new facts "necessitates consideration of other facts that the Chamber weighed and that are now affected by the *new facts*".

The Chamber states that it agrees with El Salvador's view that, in order to determine whether the alleged "new facts" concerning the avulsion of the Goascorán, the "Carta Esférica" and the report of the *El Activo* expedition fall within the provisions of Article 61 of the Statute, they should be placed in context, which the Chamber has done. However, the Chamber recalls that, under that Article, revision of a judgment can be opened only by "the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court and also to the party claiming revision, always provided that such ignorance was not due to negligence". Thus, the Chamber cannot find admissible an application for revision on the basis of facts which El Salvador itself does not allege to be new facts within the meaning of Article 61.

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Dissenting opinion of Judge Paolillo

In *ad hoc* Judge Paolillo's opinion, it is clear that the *ratio decidendi* of the 1992 Judgment in respect of the sixth sector of the land boundary between El Salvador and Honduras lies in the fact that El Salvador was unable to prove its allegations concerning an avulsion of the river Goascorán. In 1992, the Chamber, after having considered El Salvador's argument from the legal perspective, stated that no document proving a sudden change in the course of the Goascorán had been produced by El Salvador and that there was no scientific evidence proving that the river in its earlier course debouched in the Estero La Cutú. In the absence of proof of El Salvador's claim, the Chamber therefore upheld Honduras's submissions. The present Chamber has indicated—incorrectly, in Judge Paolillo's view—that the *ratio decidendi* of the 1992 Judgment related to the "novelty" of El Salvador's claim and to its "inconsistency" with the previous history of the dispute. Judge Paolillo notes, however, that it was only after considering El Salvador's claim and the evidence produced in support of it that the Chamber in 1992 referred to the previous history of the dispute, as an argument accessory to the main ground, rather than as a decisive conclusion concerning the course of the boundary in the sixth sector.

He points out that Honduras's conduct during the present proceedings shows that, in Honduras's view as well, the *ratio decidendi* of the 1992 Judgment related to the object of the dispute concerning the sixth sector and not its previous history. In the initial phase of the proceedings, Honduras opposed El Salvador's Application for revision on the ground that the new facts alleged by El Salvador did not meet the conditions laid down by Article 61 of the Statute of the Court. It was only during the last public sitting, at which stage El Salvador no longer had an opportunity to respond to Honduras's argu-

ment, that Honduras maintained that the historical considerations set out in paragraph 312 of the Judgment rendered in the original proceedings constituted the *ratio decidendi* of that decision.

In the present Judgment, the Chamber has concluded that the course of the boundary line in the sixth sector was decided in 1992 by the Chamber on the basis of reasoning analogous to that which it adopted in respect of the first sector, i.e., by application of the principle *uti possidetis juris,* as qualified by acquiescence or recognition by the parties. According to Judge Paolillo, there is however nothing in the 1992 Judgment to suggest that the Chamber adopted that approach; the Chamber did not say so explicitly, as it did in respect of the first sector, nor is there any evidence that El Salvador had "clearly accepted", by acquiescence or recognition, a modification of the position resulting from the *uti possidetis juris* in the sixth sector. The absence of any explicit reference to the old course of the Goascorán during the negotiations prior to 1972 can in no way be interpreted as a waiver by El Salvador of its claim that the boundary should be drawn along the old course of the river.

The new facts relied upon by El Salvador in support of its Application for revision consist of a group of documents containing scientific, technical and historical information produced or discovered after 1992 and proving the occurrence of an avulsion and the existence of an old bed of the river Goascorán, which, pursuant to the principle *uti possidetis juris,* should thus form the boundary line between the two Parties in the sixth sector. After considering these new facts, Judge Paolillo arrived at the conclusion that they satisfy the conditions laid down in Article 61 of the Statute, including the requirement that they must be of such a nature as to be a decisive factor. Given that a majority of the Members of the Chamber were of the view that the 1992 decision, as far as the sixth sector was concerned, was based on considerations relating to the previous history of the dispute and not to the object of the dispute, the Chamber concluded that the new facts relied upon by El Salvador were not of such a nature as to be a decisive factor in respect of the Judgment which it sought to have revised. As the requirements of Article 61 of the Statute of the Court are cumulative, the Chamber refrained from considering whether or not the new facts alleged by El Salvador satisfied the other conditions laid down. Judge Paolillo believes, however, that if the Chamber had so considered them, it would have concluded that the new facts met those conditions.

He observes that, as a result of the inadmissibility of the Application for revision, the second phase of the proceedings, during which the Chamber would have been called upon to rule on the merits of the request, cannot take place. He finds this unfortunate because a new consideration on the merits of the dispute would have enabled the Chamber to uphold or revise the 1992 Judgment in respect of the sixth sector and to do so on the basis of significantly more extensive and reliable information than that available to the Chamber in the original proceedings. He believes that the interests of justice could have been better served by a new decision on the merits than by the 1992 Judgment, since the better informed a court is, the greater the likelihood that it will adopt just decisions.

In Judge Paolillo's view, the Chamber has thus missed the opportunity to declare admissible, for the first time in the history of the Court, an application for revision which met all the conditions required by Article 61 of the Statute of the Court.

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147. CASE CONCERNING AVENA AND OTHER MEXICAN NATIONALS (MEXICO *v.* UNITED STATES OF AMERICA)

Judgment of 31 March 2004

On 31 March 2004, the International Court of Justice delivered a Judgment in the case concerning *Avena and Other Mexican Nationals* (*Mexico* v. *United States of America*).

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The Court was composed as follows: President Shi; Vice-President Ranjeva; Judges Guillaume, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal, Elaraby, Owada, Tomka; Judge *ad hoc* Sepúlveda; Registrar Couvreur.

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Subparagraphs 4 to 11 (on the merits) of operative paragraph 153 of the Judgment read as follows:

" . . .

The Court,

Finds, by fourteen votes to one, that, by not informing, without delay upon their detention, the 51 Mexican nationals referred to in paragraph 106 (1) above of their rights under Article 36, paragraph 1 (b), of the Vienna Convention on Consular Relations of 24 April 1963, the United States of America breached the obligations incumbent upon it under that subparagraph;

Finds, by fourteen votes to one, that, by not notifying the appropriate Mexican consular post without delay of the detention of the 49 Mexican nationals referred to in paragraph 106 (2) above and thereby depriving the United

Mexican States of the right, in a timely fashion, to render the assistance provided for by the Vienna Convention to the individuals concerned, the United States of America breached the obligations incumbent upon it under Article 36, paragraph 1 (b);

Finds, by fourteen votes to one, that, in relation to the 49 Mexican nationals referred to in paragraph 106 (3) above, the United States of America deprived the United Mexican States of the right, in a timely fashion, to communicate with and have access to those nationals and to visit them in detention, and thereby breached the obligations incumbent upon it under Article 36, paragraph 1 (a) and (c), of the Convention;

Finds, by fourteen votes to one, that, in relation to the 34 Mexican nationals referred to in paragraph 106 (4) above, the United States of America deprived the United Mexican States of the right, in a timely fashion, to arrange for legal representation of those nationals, and thereby breached the obligations incumbent upon it under Article 36, paragraph 1 (c), of the Convention;

Finds, by fourteen votes to one, that, by not permitting the review and reconsideration, in the light of the rights set forth in the Convention, of the conviction and sentences of Mr. César Roberto Fierro Reyna, Mr. Roberto Moreno Ramos and Mr. Osvaldo Torres Aguilera, after the violations referred to in subparagraph (4) above had been established in respect of those individuals, the United States of America breached the obligations incumbent upon it under Article 36, paragraph 2, of the Convention;

Finds, by fourteen votes to one, 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;

Unanimously *takes note* of the commitment undertaken by the United States of America to ensure implementation of the specific measures adopted in performance of its obligations under Article 36, paragraph 1 (b), of the Vienna Convention; and *finds* that this commitment must be regarded as meeting the request by the United Mexican States for guarantees and assurances of non-repetition;

Unanimously *finds* that, should Mexican nationals nonetheless be sentenced to severe penalties, without their rights under Article 36, paragraph 1 (b), of the Convention having been respected, the United States of America shall provide, by means of its own choosing, review and reconsideration of the conviction and sentence, so as to allow full weight to be given to the violation of the rights set forth in the Convention, taking account of paragraphs 138 to 141 of this Judgment."

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President Shi and Vice-President Ranjeva appended declarations to the Judgment of the Court; Judges Vereshchetin, Parra-Aranguren and Tomka and Judge *ad hoc* Sepúlveda appended separate opinions to the Judgment of the Court.

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History of the proceedings and submissions of the Parties (paras. 1–14)

The Court begins by recalling that on 9 January 2003 the United Mexican States (hereinafter referred to as "Mexico") instituted proceedings against the United States of America (hereinafter referred to as the "United States") for "violations of the Vienna Convention on Consular Relations" of 24 April 1963 (hereinafter referred to as the "Vienna Convention") allegedly committed by the United States.

In its Application, Mexico based the jurisdiction of the Court on Article 36, paragraph 1, of the Statute of the Court and on Article I of the Optional Protocol concerning the Compulsory Settlement of Disputes, which accompanies the Vienna Convention (hereinafter referred to as the "Optional Protocol").

On the same day, Mexico also filed a request for the indication of provisional measures.

By an Order of 5 February 2003, the Court indicated the following provisional measures:

"(a) The United States of America shall take all measures necessary to ensure that Mr. César Roberto Fierro Reyna, Mr. Roberto Moreno Ramos and Mr. Osvaldo Torres Aguilera are not executed pending final judgment in these proceedings;

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

It further decided that, "until the Court has rendered its final judgment, it shall remain seised of the matters" which formed the subject of that Order.

In a letter of 2 November 2003, the Agent of the United States advised the Court that the United States had "informed the relevant state authorities of Mexico's application"; that, since the Order of 5 February 2003, the United States had "obtained from them information about the status of the fifty-four cases, including the three cases identified in paragraph 59 (I) (a) of that Order"; and that the United States could "confirm that none of the named individuals [had] been executed". A Memorial by Mexico and a Counter-Memorial by the United States were filed within the time-limits extended by the Court.

The Court further recalled that, in order to ensure the procedural equality of the Parties, it had decided not to authorize a requested amendment by Mexico of its submissions so as to include two additional Mexican nationals, while taking note that the United States had made no objection to the withdrawal by Mexico of its request for relief in two other cases.

Since the Court included upon the Bench no judge of Mexican nationality, Mexico chose Mr. Bernardo Sepúlveda to sit as judge *ad hoc* in the case.

Public sittings were held between 15 and 19 December 2003.

At the oral proceedings, the following final submissions were presented by the Parties:

On behalf of the Government of Mexico,

"The Government of Mexico respectfully requests the Court to adjudge and declare

(1) That the United States of America, in arresting, detaining, trying, convicting, and sentencing the 52 Mexican nationals on death row described in Mexico's Memorial, violated its international legal obligations to Mexico, in its own right and in the exercise of its right to diplomatic protection of its nationals, by failing to inform, without delay, the 52 Mexican nationals after their arrest of their right to consular notification and access under Article 36 (1) (b) of the Vienna Convention on Consular Relations, and by depriving Mexico of its right to provide consular protection and the 52 nationals' right to receive such protection as Mexico would provide under Article 36 (1) (a) and (c) of the Convention;

(2) That the obligation in Article 36 (1) of the Vienna Convention requires notification of consular rights and a reasonable opportunity for consular access before the competent authorities of the receiving State take any action potentially detrimental to the foreign national's rights;

(3) That the United States of America violated its obligations under Article 36 (2) of the Vienna Convention by failing to provide meaningful and effective review and reconsideration of convictions and sentences impaired by a violation of Article 36 (1); by substituting for such review and reconsideration clemency proceedings; and by applying the "procedural default" doctrine and other municipal law doctrines that fail to attach legal significance to an Article 36 (1) violation on its own terms;

(4) That pursuant to the injuries suffered by Mexico in its own right and in the exercise of diplomatic protection of its nationals, Mexico is entitled to full reparation for those injuries in the form of *restitutio in integrum;*

(5) That this restitution consists of the obligation to restore the *status quo ante* by annulling or otherwise depriving of full force or effect the convictions and sentences of all 52 Mexican nationals;

(6) That this restitution also includes the obligation to take all measures necessary to ensure that a prior violation of Article 36 shall not affect the subsequent proceedings;

(7) That to the extent that any of the 52 convictions or sentences are not annulled, the United States shall provide, by means of its own choosing, meaningful and effective review and reconsideration of the convictions and sentences of the 52 nationals, and that this obligation cannot be satisfied by means of clemency proceedings or if any municipal law rule or doctrine inconsistent with paragraph (3) above is applied; and

(8) That the United States of America shall cease its violations of Article 36 of the Vienna Convention with regard to Mexico and its 52 nationals and shall provide appropriate guarantees and assurances that it shall take measures sufficient to achieve increased compliance with Article 36 (1) and to ensure compliance with Article 36 (2)."

On behalf of the Government of the United States,

"On the basis of the facts and arguments made by the United States in its Counter-Memorial and in these proceedings, the Government of the United States of America requests that the Court, taking into account that the United States has conformed its conduct to this Court's Judgment in the *LaGrand* Case (*Germany* v. *United States of America*), not only with respect to German nationals but, consistent with the Declaration of the President of the Court in that case, to all detained foreign nationals, adjudge and declare that the claims of the United Mexican States are dismissed."

The Court finally gives a short description of the dispute and of the facts underlying the case, and in paragraph 16 it lists by name the 52 Mexican nationals involved.

Mexican objection to the United States objections to jurisdiction and admissibility
(paras. 22–25)

The Court notes at the outset that the United States has presented a number of objections to the jurisdiction of the Court, as well as to the admissibility of the claims advanced by Mexico; that it is however the contention of Mexico that all the objections raised by the United States are inadmissible as having been raised after the expiration of the time-limit laid down by Article 79, paragraph 1, of the Rules of Court as amended in 2000.

The Court notes, however, that Article 79 of the Rules applies only to preliminary objections. It observes that an objection that is not presented as a preliminary objection in accordance with paragraph 1 of Article 79 does not thereby become inadmissible; that there are of course circumstances in which the party failing to put forward an objection to jurisdiction might be held to have acquiesced in jurisdiction; that, however, apart from such circumstances, a party failing to avail itself of the Article 79 procedure may forfeit the right to bring about a suspension of the proceedings on the merits, but can still argue the objection along with the merits. The Court finds that that is indeed what the United States has done in this case; and that, for reasons to be indicated below, many of its objections are of such a nature that they would in any event probably have had to be heard along with the merits. The Court concludes that it should not exclude from consideration the objections of the United States to jurisdiction and admissibility by reason of the fact that they were not presented within three months from the date of filing of the Memorial.

United States objections to jurisdiction
(paras. 26–35)

By its first jurisdictional objection, the United States suggested that the Mexican Memorial is fundamentally addressed to the treatment of Mexican nationals in the federal and state

criminal justice systems of the United States, and to the operation of the United States criminal justice system as a whole; for the Court to address such issues would be an abuse of its jurisdiction. The Court recalls that its jurisdiction in the present case has been invoked under the Vienna Convention and Optional Protocol to determine the nature and extent of the obligations undertaken by the United States towards Mexico by becoming party to that Convention. If and so far as the Court may find that the obligations accepted by the parties to the Vienna Convention included commitments as to the conduct of their municipal courts in relation to the nationals of other parties, then in order to ascertain whether there have been breaches of the Convention, the Court must be able to examine the actions of those courts in the light of international law. How far it may do so in the present case is a matter for the merits; the first objection of the United States to jurisdiction cannot therefore be upheld.

The second jurisdictional objection presented by the United States was addressed to Mexico's submission "that the United States in arresting, detaining, trying, convicting, and sentencing [to death] Mexican nationals, violated its international legal obligations to Mexico, in its own right and in the exercise of its right of diplomatic protection of its nationals, as provided by Article 36 of the Vienna Convention. The United States pointed out that Article 36 of the Vienna Convention "creates no obligations constraining the rights of the United States to arrest a foreign national"; and that, similarly, the "detaining, trying, convicting and sentencing" of Mexican nationals could not constitute breaches of Article 36, which merely lays down obligations of notification. The Court observes, however, that Mexico argues that depriving a foreign national facing criminal proceedings of the right to consular notification and assistance renders those proceedings fundamentally unfair. In the Court's view that is to argue in favour of a particular interpretation of the Vienna Convention. Such an interpretation may or may not be confirmed on the merits, but is not excluded from the jurisdiction conferred on the Court by the Optional Protocol to the Vienna Convention. The second objection of the United States to jurisdiction cannot therefore be upheld.

The third objection by the United States to the jurisdiction of the Court refers to the first submission concerning remedies in the Mexican Memorial, namely that Mexico is entitled to *restitutio in integrum,* and that the United States therefore is under an obligation to restore the *status quo ante*. The United States objects that this would intrude deeply into the independence of its courts; and that for the Court to declare that the United States is under a specific obligation to vacate convictions and sentences would be beyond its jurisdiction. The Court recalls in this regard, as it did in the *LaGrand* case, that, where jurisdiction exists over a dispute on a particular matter, no separate basis for jurisdiction is required by the Court in order to consider the remedies a party has requested for the breach of the obligation (*I.C.J. Reports 2001*, p. 485, para. 48). Whether or how far the Court may order the remedy requested by Mexico are matters to be determined as part of the merits of the dispute; the third objection of the United States to jurisdiction cannot therefore be upheld.

The fourth and last jurisdictional objection of the United States is that, contrary to the contentions of Mexico, "the Court lacks jurisdiction to determine whether or not consular notification is a 'human right', or to declare fundamental requirements of substantive or procedural due process". The Court observes that Mexico has presented this argument as being a matter of interpretation of Article 36, paragraph 1 (b), and therefore belonging to the merits. The Court considers that this is indeed a question of interpretation of the Vienna Convention, for which it has jurisdiction; the fourth objection of the United States to jurisdiction cannot therefore be upheld.

United States objections to admissibility
(paras. 36–48)

The Court notes that the first objection of the United States under this head is that "Mexico's submissions should be found inadmissible because they seek to have this Court function as a court of criminal appeal"; that there is, in the view of the United States, "no other apt characterization of Mexico's two submissions in respect of remedies". The Court observes that this contention is addressed solely to the question of remedies. The United States does not contend on this ground that the Court should decline jurisdiction to enquire into the question of breaches of the Vienna Convention at all, but simply that, if such breaches are shown, the Court should do no more than decide that the United States must provide "review and reconsideration" along the lines indicated in the Judgment in the *LaGrand* case (*I.C.J. Reports 2001,* pp. 513–514, para. 125). The Court notes that this is a matter of merits; the first objection of the United States to admissibility cannot therefore be upheld.

The Court then turns to the objection of the United States based on the rule of exhaustion of local remedies. The United States contends that the Court "should find inadmissible Mexico's claim to exercise its right of diplomatic protection on behalf of any Mexican national who has failed to meet the customary legal requirement of exhaustion of municipal remedies". The Court recalls that in its final submissions Mexico asks the Court to adjudge and declare that the United States, in failing to comply with Article 36, paragraph 1, of the Vienna Convention, has "violated its international legal obligations to Mexico, in its own right and in the exercise of its right of diplomatic protection of its nationals". The Court observes that the individual rights of Mexican nationals under subparagraph 1 (b) of Article 36 of the Vienna Convention are rights which are to be asserted, at any rate in the first place, within the domestic legal system of the United States. Only when that process is completed and local remedies are exhausted would Mexico be entitled to espouse the individual claims of its nationals through the procedure of diplomatic protection. In the present case Mexico does not, however, claim to be acting solely on that basis. It also asserts its own claims, basing them on the injury which it contends that it has itself suffered, directly and through its nationals, as a result of the violation by the United States of the obligations incumbent upon it under Article 36, paragraph 1 (a), (b) and (c). The Court finds that, in these special circumstances of interdependence of the rights of the State and of individual rights, Mexico may, in submitting a claim in its own name, request the Court to rule

on the violation of rights which it claims to have suffered both directly and through the violation of individual rights conferred on Mexican nationals under Article 36, paragraph 1 *(b)*. The duty to exhaust local remedies does not apply to such a request. The Court accordingly finds that the second objection by the United States to admissibility cannot be upheld.

The Court then turns to the question of the alleged dual nationality of certain of the Mexican nationals the subject of Mexico's claims. The United States contends that in its Memorial Mexico had failed to establish that it may exercise diplomatic protection based on breaches of Mexico's rights under the Vienna Convention with respect to those of its nationals who are also nationals of the United States. The Court recalls, however, that Mexico, in addition to seeking to exercise diplomatic protection of its nationals, is making a claim in its own right on the basis of the alleged breaches by the United States of Article 36 of the Vienna Convention. Seen from this standpoint, the question of dual nationality is not one of admissibility, but of merits. Without prejudice to the outcome of such examination, the third objection of the United States to admissibility cannot therefore be upheld.

The Court then turns to the fourth objection advanced by the United States to the admissibility of Mexico's claims: the contention that "The Court should not permit Mexico to pursue a claim against the United States with respect to any individual case where Mexico had actual knowledge of a breach of the [Vienna Convention] but failed to bring such breach to the attention of the United States or did so only after considerable delay." The Court recalls that in the case of *Certain Phosphate Lands in Nauru (Nauru* v. *Australia),* it observed that "delay on the part of a claimant State may render an application inadmissible", but that "international law does not lay down any specific time-limit in that regard" (*I.C.J. Reports 1992,* pp. 253–254, para. 32). It notes that in that case it had recognized that delay might prejudice the Respondent State, but fines that there has been no suggestion of any such risk of prejudice in the present case. So far as inadmissibility might be based on an implied waiver of rights, the Court considers that only a much more prolonged and consistent inaction on the part of Mexico than any that the United States has alleged might be interpreted as implying such a waiver. The Court notes, furthermore, that Mexico indicated a number of ways in which it brought to the attention of the United States the breaches which it perceived of the Vienna Convention; the fourth objection of the United States to admissibility cannot therefore be upheld.

The Court finally examines the objection of the United States that the claim of Mexico is inadmissible in that Mexico should not be allowed to invoke against the United States standards that Mexico does not follow in its own practice. The Court recalls in this respect that it is essential to have in mind the nature of the Vienna Convention. That Convention lays down certain standards to be observed by all States parties, with a view to the "unimpeded conduct of consular relations". Even if it were shown, therefore, that Mexico's practice as regards the application of Article 36 was not beyond reproach, this would not constitute a ground of objection to the admissibility of Mexico's claim; the fifth objection of the United States to admissibility cannot therefore be upheld.

The Court then turns to the merits of Mexico's claims.

Article 36, paragraph 1, of the Vienna Convention
(paras. 49–106)

The Court notes that in the first of its final submissions, Mexico asks the Court to adjudge and declare that,

> "the United States of America, in arresting, detaining, trying, convicting, and sentencing the 52 Mexican nationals on death row described in Mexico's Memorial, violated its international legal obligations to Mexico, in its own right and in the exercise of its right to diplomatic protection of its nationals, by failing to inform, without delay, the 52 Mexican nationals after their arrest of their right to consular notification and access under Article 36 (1) (b) of the Vienna Convention on Consular Relations, and by depriving Mexico of its right to provide consular protection and the 52 nationals' right to receive such protection as Mexico would provide under Article 36 (1) (a) and (c) of the Convention".

It recalls that it has already in its Judgment in the *LaGrand* case described Article 36, paragraph 1, as "an interrelated régime designed to facilitate the implementation of the system of consular protection" (*I.C.J. Reports 2001,* p. 492, para. 74). After citing the full text of the paragraph, the Court observes that the United States as the receiving State does not deny its duty to perform the obligations indicated therein. However, it claims that those obligations apply only to individuals shown to be of Mexican nationality alone, and not to those of dual Mexican/United States nationality. The United States further contends, *inter alia,* that it has not committed any breach of Article 36, paragraph 1 *(b),* upon the proper interpretation of "without delay" as used in that subparagraph.

Article 36, paragraph 1 (b)
(paras. 52–90)

The Court finds that thus two major issues under Article 36, paragraph 1 (b) are in dispute between the Parties: first, the question of the nationality of the individuals concerned; and second, the question of the meaning to be given to the expression "without delay".

Nationality of the individuals concerned
(paras. 53–57)

The Court begins by noting that the Parties disagree as to what each of them must show as regards nationality in connection with the applicability of the terms of Article 36, paragraph 1, and as to how the principles of evidence have been met on the facts of the cases.

The Court finds that it is for Mexico to show that the 52 persons listed in paragraph 16 of the Judgment held Mexican nationality at the time of their arrest. It notes that to this end Mexico has produced birth certificates and declarations of nationality, whose contents have not been challenged by the United States. The Court observes further that the United States has questioned whether some of these individuals were not also United States nationals. The Court takes the view that it was for the United States to demonstrate that this was so and to furnish the Court with all information on the matter in

its possession. In so far as relevant data on that matter are said by the United States to lie within the knowledge of Mexico, it was for the United States to have sought hat information from the Mexican authorities. The Court finds that, at no stage, however, has the United States shown the Court that it made specific enquiries of those authorities about particular cases and that responses were not forthcoming. The Court accordingly concludes that the United States has not met its burden of proof in its attempt to show that persons of Mexican nationality were also United States nationals. The Court therefore finds that, as regards the 52 persons listed in paragraph 16 of the Judgment, the United States had obligations under Article 36, paragraph 1 (b).

Requirement to inform "without delay"
(paras. 58–90)

The Court continues by noting that Mexico, in its second final submission, asks the Court to find that

> "the obligation in Article 36, paragraph 1, of the Vienna Convention requires notification of consular rights and a reasonable opportunity for consular access before the competent authorities of the receiving State take any action potentially detrimental to the foreign national's rights".

The Court notes that Mexico contends that, in each of the 52 cases before the Court, the United States failed to provide the arrested persons with information as to their rights under Article 36, paragraph 1 *(b),* "without delay". It further notes that the United States disputes both the facts as presented by Mexico and the legal analysis of Article 36, paragraph 1 *(b),* of the Vienna Convention offered by Mexico.

The Court first turns to the interpretation of Article 36, paragraph 1 *(b),* having found that it is applicable to the 52 persons listed in paragraph 16 of the Judgment. It begins by noting that Article 36, paragraph 1 *(b),* contains three separate but interrelated elements: the right of the individual concerned to be informed without delay of his rights under Article 36, paragraph 1 *(b);* the right of the consular post to be notified without delay of the individual's detention, if he so requests; and the obligation of the receiving State to forward without delay any communication addressed to the consular post by the detained person (this last element not having been raised in the case).

Beginning with the right of an arrested individual to information, the Court finds that the duty upon the arresting authorities to give the Article 36, paragraph 1 *(b),* information to the individual arises once it is realized that the person is a foreign national, or once there are grounds to think that the person is probably a foreign national. Precisely when this may occur will vary with circumstances.

Bearing in mind the complexities of establishing such a fact as explained by the United States, the Court begins by examining the application of Article 36, paragraph 1 (b), of the Vienna Convention to the 52 cases. In 45 of these cases, it finds that it has no evidence that the arrested persons claimed United States nationality, or were reasonably thought to be United States nationals, with specific enquiries being made in timely fashion to verify such dual nationality. It notes, however, that seven persons are asserted by the United States to have stated at the time of arrest that they were United States citizens.

After examination of those seven cases the Court concludes that Mexico has failed to prove the violation by the United States of its obligations under Article 36, paragraph 1 *(b),* in only one of these. As regards the other individuals who are alleged to have claimed United States nationality on arrest, the Court finds that the argument of the United States cannot be upheld.

The Court points out that the question nonetheless remains as to whether, in each of these 51 cases, the United States did provide the required information to the arrested persons "without delay". It is to that question that the Court then turns. The Court notes that in 47 cases the United States nowhere challenges the fact that the Mexican nationals were never informed of their rights under Article 36, paragraph 1 *(b),* but that in four cases some doubt remains whether the information that was given was provided "without delay"; for these, some examination of the term is thus necessary.

The Court notes that the Parties have very different views on this. According to Mexico, the timing of the notice to the detained person "is critical to the exercise of the rights provided by Article 36" and the phrase "without delay" in paragraph 1 *(b)* requires "unqualified immediacy". Mexico further contends that, in view of the object and purpose of Article 36**,** which is to enable "meaningful consular assistance" and the safeguarding of the vulnerability of foreign nationals in custody, "consular notification . . . must occur immediately upon detention and prior to any interrogation of the foreign detainee, so that the consul may offer useful advice about the foreign legal system and provide assistance in obtaining counsel before the foreign national makes any ill-informed decisions or the State takes any action potentially prejudicial to his rights".

The United States disputed this interpretation of the phrase "without delay". In its view it did not mean "immediately, and before interrogation" and such an understanding was supported neither by the terminology, nor by the object and purpose of the Vienna Convention, nor by its *travaux préparatoires.* According to the United States, the purpose of Article 36 was to facilitate the exercise of consular functions by a consular officer:

> "The significance of giving consular information to a national is thus limited . . . It is a procedural device that allows the foreign national to trigger the related process of notification . . . [It] cannot possibly be fundamental to the criminal justice process."

The Court begins by noting that the precise meaning of "without delay", as it is to be understood in Article 36, paragraph 1 (b), is not defined in the Convention. This phrase therefore requires interpretation according to the customary rules of treaty interpretation reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties. After examination of the text of the Vienna Convention on Consular Relations, its object and purpose, as well as its *travaux préparatoires,* the Court finds that "without delay" is not necessarily to be interpreted as "immediately" upon arrest, nor can it be interpreted to signify that the provision of the information

must necessarily precede any interrogation, so that the commencement of interrogation before the information is given would be a breach of Article 36. The Court observes, however, that there is nonetheless a duty upon the arresting authorities to give the information to an arrested person as soon as it is realized that the person is a foreign national, or once there are grounds to think that the person is probably a foreign national.

Applying this interpretation of "without delay" to the facts of the four outstanding cases, the Court finds that the United States was in breach of its obligations under Article 36, paragraph 1 *(b),* in respect of these individuals also. The Court accordingly concludes that, with respect to all, save one, of the 52 individuals listed in paragraph 16 of the Judgment, the United States has violated its obligation under Article 36, paragraph 1 (b), of the Vienna Convention to provide information to the arrested person.

Article 36, paragraph 1 (a) and (c)
(paras. 91–106)

The Court begins by recalling its observation above that Article 36, paragraph 1 *(b),* contains three elements. Thus far, it observes, it has been dealing with the right of an arrested person to be informed that he may ask for his consular post to be notified. The Court then turns to another aspect of Article 36, paragraph 1 *(b).* It finds the United States is correct in observing that the fact that a Mexican consular post was not notified under Article 36, paragraph 1 *(b),* does not of necessity show that the arrested person was not informed of his rights under that provision. He may have been informed and declined to have his consular post notified. The Court finds in one of the two cases mentioned by the United States in this respect, that that was the case. In two of three further cases in which the United States alleges that the consular post was formally notified without prior information to the individual, the Court finds that the United States did violate its obligations under Article 36, paragraph 1 *(b).*

The Court notes that, in the first of its final submissions, Mexico also asks the Court to find that the violations it ascribes to the United States in respect of Article 36, paragraph 1 *(b),* have also deprived "Mexico of its right to provide consular protection and the 52 nationals' right to receive such protection as Mexico would provide under Article 36 (1) *(a)* and *(c)* of the Convention".

The Court recalls that the relationship between the three subparagraphs of Article 36, paragraph 1, has been described by it in its Judgment in the *LaGrand* case (*I.C.J. Reports 2001,* p. 492, para. 74) as "an interrelated régime". The legal conclusions to be drawn from that interrelationship necessarily depend upon the facts of each case. In the *LaGrand* case, the Court found that the failure for 16 years to inform the brothers of their right to have their consul notified effectively prevented the exercise of other rights that Germany might have chosen to exercise under subparagraphs (a) and (c). The Court is of the view that it 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.

It first recalls that, in one case, when the defendant was informed of his rights, he declined to have his consular post notified. Thus in this case there was no violation of either subparagraph (a) or subparagraph (c) of Article 36, paragraph 1.

In the remaining cases, because of the failure of the United States to act in conformity with Article 36, paragraph 1 *(b),* Mexico was in effect precluded (in some cases totally, and in some cases for prolonged periods of time) from exercising its right under paragraph 1 *(a)* to communicate with its nationals and have access to them. As the Court has already had occasion to explain, it is immaterial whether Mexico would have offered consular assistance, "or whether a different verdict would have been rendered. It is sufficient that the Convention conferred these rights" (*I.C.J. Reports 2001,* p. 492, para. 74), which might have been acted upon.

The Court observes that the same is true, *pari passu,* of certain rights identified in subparagraph (c): "consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, and to converse and correspond with him . . .". Mexico, it notes, laid much emphasis in this litigation upon the importance of consular officers being able to arrange for such representation before and during trial, and especially at sentencing, in cases in which a severe penalty may be imposed. Mexico has further indicated the importance of any financial or other assistance that consular officers may provide to defence counsel, *inter alia* for investigation of the defendant's family background and mental condition, when such information is relevant to the case. The Court observes that the exercise of the rights of the sending State under Article 36, paragraph 1 *(c),* depends upon notification by the authorities of the receiving State. It may be, however, that information drawn to the attention of the sending State by other means may still enable its consular officers to assist in arranging legal representation for its national. The Court finds that has been so in 13 cases.

The Court concludes on this aspect of the case in paragraph 106 of the Judgment, where it summarizes its findings as to the violation of the different obligations incumbent upon the United States under Article 36, paragraph 1, in the cases before it.

Article 36, paragraph 2 of the Vienna Convention
(paras. 107–114)

The Court then recalls that in its third final submission Mexico asks the Court to adjudge and declare that "the United States violated its obligations under Article 36 (2) of the Vienna Convention by failing to provide meaningful and effective review and reconsideration of convictions and sentences impaired by a violation of Article 36 (1)". More specifically, Mexico contends that:

> "The United States uses several municipal legal doctrines to prevent finding any legal effect from the violations of Article 36. First, despite this Court's clear analysis in LaGrand, U.S. courts, at both the state and federal level, continue to invoke default doctrines to bar any review of Article 36 violations—even when the national had been unaware of his rights to consular notification and communication and thus his ability to raise their violation as an issue at trial,

due to the competent authorities' failure to comply with Article 36."

Against this contention by Mexico, the United States argues that:

"the criminal justice systems of the United States address all errors in process through both judicial and executive clemency proceedings, relying upon the latter when rules of default have closed out the possibility of the former. That is, the 'laws and regulations' of the United States provide for the correction of mistakes that may be relevant to a criminal defendant to occur through a combination of judicial review and clemency. These processes together, working with other competent authorities, give full effect to the purposes for which Article 36 (1) is intended, in conformity with Article 36 (2). And, insofar as a breach of Article 36 (1) has occurred, these procedures satisfy the remedial function of Article 36 (2) by allowing the United States to provide review and reconsideration of convictions and sentences consistent with *LaGrand*."

The Court observes that it has already considered the application of the so called "procedural default" rule in the *LaGrand* case, when the Court addressed the issue of its implications for the application of Article 36, paragraph 2, of the Vienna Convention. The Court emphasized that "a distinction must be drawn between that rule as such and its specific application in the present case" stating:

"In itself, the rule does not violate Article 36 of the Vienna Convention. The problem arises when the procedural default rule does not allow the detained individual to challenge a conviction and sentence by claiming, in reliance on Article 36, paragraph 1, of the Convention, that the competent national authorities failed to comply with their obligation to provide the requisite consular information 'without delay', thus preventing the person from seeking and obtaining consular assistance from the sending State." *(I.C.J. Reports 2001,* p. 497, para. 90.)

On this basis, the Court concluded that "the procedural default rule prevented counsel for the *LaGrands* to effectively challenge their convictions and sentences other than on United States constitutional grounds" (*ibid*., para. 91). The Court deems this statement to be equally valid in relation to the present case, where a number of Mexican nationals have been placed exactly in such a situation.

The Court further observes that the procedural default rule has not been revised, nor has any provision been made to prevent its application in cases where it has been the failure of the United States itself to inform that may have precluded counsel from being in a position to have raised the question of a violation of the Vienna Convention in the initial trial. The Court notes moreover that in several of the cases cited in Mexico's final submissions the procedural default rule has already been applied, and that in others it could be applied at subsequent stages in the proceedings. It also points out, however, that in none of the cases, save for the three mentioned below, have the criminal proceedings against the Mexican nationals concerned already reached a stage at which there is no further possibility of judicial re-examination of those cases; that is to say, all possibility is not yet excluded of "review and reconsideration" of conviction and sentence, as called for in the *LaGrand* case, and as explained in subsequent paragraphs of the Judgment. The Court finds that it would therefore be premature for the Court to conclude at this stage that, in those cases, there is already a violation of the obligations under Article 36, paragraph 2, of the Vienna Convention.

By contrast, the Court notes that in the case of three named Mexican nationals, conviction and sentence have become final. Moreover, in one of these cases, the Oklahoma Court of Criminal Appeals has set an execution date. The Court finds therefore that it must conclude that, subject to its observations below in regard to clemency proceedings, in relation to these three individuals, the United States is in breach of its obligations under Article 36, paragraph 2, of the Vienna Convention.

Legal consequences of the breach
(paras. 115–150)

Having concluded that in most of the cases brought before the Court by Mexico in the 52 instances, there has been a failure to observe the obligations prescribed by Article 36, paragraph 1 (b), of the Vienna Convention, the Court proceeds to the examination of the legal consequences of such a breach and of the legal remedies therefor.

It recalls that Mexico in its fourth, fifth and sixth submissions asks the Court to adjudge and declare:

"(4) that pursuant to the injuries suffered by Mexico in its own right and in the exercise of diplomatic protection of its nationals, Mexico is entitled to full reparation for these injuries in the form of *restitutio in integrum;*

(5) that this restitution consists of the obligation to restore the *status quo ante* by annulling or otherwise depriving of full force or effect the conviction and sentences of all 52 Mexican nationals; [and]

(6) that this restitution also includes the obligation to take all measures necessary to ensure that a prior violation of Article 36 shall not affect the subsequent proceedings."

The United States on the other hand argues:

"*LaGrand*'s holding calls for the United States to provide, in each case, 'review and reconsideration' that 'takes account of' the violation, not 'review and reversal', not across-the-board exclusions of evidence or nullification of convictions simply because a breach of Article 36 (1) occurred and without regard to its effect upon the conviction and sentence and, not . . . 'a precise, concrete, stated result: to re-establish the *status quo ante*'".

The Court points out that its task in the present case is to determine what would be adequate reparation for the violations of Article 36. The Court finds it to be clear from what has been observed above that the internationally wrongful acts committed by the United States were the failure of its competent authorities to inform the Mexican nationals concerned, to notify Mexican consular posts and to enable Mexico to provide consular assistance. It is of the view that it follows that the remedy to make good these violations should consist in an obligation on the United States to permit review and reconsideration of these nationals' cases by the United States courts,

with a view to ascertaining whether in each case the violation of Article 36 committed by the competent authorities caused actual prejudice to the defendant in the process of administration of criminal justice.

The Court considers that it is not to be presumed, as Mexico asserts, that partial or total annulment of conviction or sentence provides the necessary and sole remedy. In the present case it is not the convictions and sentences of the Mexican nationals which are to be regarded as a violation of international law, but solely certain breaches of treaty obligations which preceded them. Mexico, the Court notes, has further contended that the right to consular notification and consular communication under the Vienna Convention is a human right of such a fundamental nature that its infringement will *ipso facto* produce the effect of vitiating the entire process of the criminal proceedings conducted in violation of this fundamental right. The Court observes that the question of whether or not the Vienna Convention rights are human rights is not a matter that it need decide. It points out, however, that 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. The Court finds that for these reasons, Mexico's fourth and fifth submissions cannot be upheld.

In elaboration of its sixth submission, Mexico contends that "As an aspect of *restitutio in integrum,* Mexico is also entitled to an order that in any subsequent criminal proceedings against the nationals, statements and confessions obtained prior to notification to the national of his right to consular assistance be excluded". The Court is of the view that this question is one which has to be examined under the concrete circumstances of each case by the United States courts concerned in the process of their review and reconsideration. For this reason, the sixth submission of Mexico cannot be upheld.

Although rejecting the fourth, fifth and sixth submissions of Mexico relating to the remedies for the breaches by the United States of its international obligations under Article 36 of the Vienna Convention, the Court points out that the fact remains that such breaches have been committed, and that it is thus incumbent upon the Court to specify what remedies are required in order to redress the injury done to Mexico and to its nationals by the United States through non-compliance with those international obligations.

In this regard, the Court recalls that Mexico's seventh submission also asks the Court to adjudge and declare:

> "That to the extent that any of the 52 convictions or sentences are not annulled, the United States shall provide, by means of its own choosing, meaningful and effective review and reconsideration of the convictions and sentences of the 52 nationals, and that this obligation cannot be satisfied by means of clemency proceedings or if any municipal law rule or doctrine [that fails to attach legal significance to an Article 36 (1) violation] is applied."

On this question of "review and reconsideration", the United States takes the position that it has conformed its conduct to the *LaGrand* Judgment. In a further elaboration of this point, the United States argues that "[t]he Court said in *LaGrand* that the choice of means for allowing the review and reconsideration it called for 'must be left' to the United States".

The Court points out that, in stating in its Judgment in the *LaGrand* case that "the United States of America, by means of its own choosing, shall allow the review and reconsideration of the conviction and sentence" (*I.C.J. Reports 2001,* p. 516, para. 128; emphasis added), the Court acknowledged that the concrete modalities for such review and reconsideration should be left primarily to the United States. It should be underlined, however, that this freedom in the choice of means for such review and reconsideration is not without qualification: as the passage of the Judgment quoted above makes abundantly clear, such review and reconsideration has to be carried out "by taking account of the violation of the rights set forth in the Convention" (*I.C.J. Reports 2001,* p. 514, para. 125), including, in particular, the question of the legal consequences of the violation upon the criminal proceedings that have followed the violation.

The Court observes that the current situation in the United States criminal procedure, as explained by the Agent at the hearings, is such that a claim based on the violation of Article 36, paragraph 1, of the Vienna Convention, however meritorious in itself, could be barred in the courts of the United States by the operation of the procedural default rule. The Court is of the view that the crucial point in this situation is that, by the operation of the procedural default rule as it is applied at present, the defendant is effectively limited to seeking the vindication of his rights under the United States Constitution.

The Court takes note in this regard that Mexico, in the latter part of its seventh submission, has stated that "this obligation [of providing review and reconsideration] cannot be satisfied by means of clemency proceedings". Furthermore, Mexico argues that the clemency process is in itself an ineffective remedy to satisfy the international obligations of the United States. It concludes: "clemency review is standardless, secretive, and immune from judicial oversight".

Against this contention of Mexico, the United States claims that it "gives 'full effect' to the 'purposes for which the rights accorded under [Article 36, paragraph 1,] are intended' through executive clemency". It argues that "[t]he clemency process is well suited to the task of providing review and reconsideration". The United States explains that, "Clemency . . . is more than a matter of grace; it is part of the overall scheme for ensuring justice and fairness in the legal process" and that "Clemency procedures are an integral part of the existing 'laws and regulations' of the United States through which errors are addressed".

The Court emphasizes that the "review and reconsideration" prescribed by it in the *LaGrand* case should be effective. Thus it should "tak[e] account of the violation of the rights set forth in [the] Convention" *(I.C.J. Reports 2001,* p. 516, para. 128 (7)) and guarantee that the violation and the possible prejudice caused by that violation will be fully examined and taken into account in the review and reconsideration process. Lastly, review and reconsideration should be both of the sentence and of the conviction.

Accordingly, in a situation of the violation of rights under Article 36, paragraph 1, of the Vienna Convention, the defendant raises his claim in this respect not as a case of "harm to a particular right essential to a fair trial"—a concept relevant to the enjoyment of due process rights under the United States Constitution—but as a case involving the infringement of his rights under Article 36, paragraph 1. The rights guaranteed under the Vienna Convention are treaty rights which the United States has undertaken to comply with in relation to the individual concerned, irrespective of the due process rights under United States constitutional law. The Court is of the view that, in cases where the breach of the individual rights of Mexican nationals under Article 36, paragraph 1 *(b),* of the Convention has resulted, in the sequence of judicial proceedings that has followed, in the individuals concerned being subjected to prolonged detention or convicted and sentenced to severe penalties, the legal consequences of this breach have to be examined and taken into account in the course of review and reconsideration. The Court considers that it is the judicial process that is suited to this task.

As regards the clemency procedure, the Court points out that what is at issue in the present case is whether the clemency process as practised within the criminal justice systems of different states in the United States can, in and of itself, qualify as an appropriate means for undertaking the effective "review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention", as the Court prescribed in the *LaGrand* Judgment (*I.C.J. Reports 2001,* p. 514, para. 125). The Court notes that the clemency process, as currently practised within the United States criminal justice system, does not appear to meet the above-mentioned requirements and that it is therefore not sufficient in itself to serve as an appropriate means of "review and reconsideration" as envisaged by the Court in the *LaGrand* case.

Finally, the Court considers the eighth submission of Mexico, in which it asks the Court to adjudge and declare:

> "That the [United States] shall cease its violations of Article 36 of the Vienna Convention with regard to Mexico and its 52 nationals and shall provide appropriate guarantees and assurances that it shall take measures sufficient to achieve increased compliance with Article 36 (1) and to ensure compliance with Article 36 (2)."

The Court recalls that Mexico, although recognizing the efforts by the United States to raise awareness of consular assistance rights, notes with regret that "the United States program, whatever its components, has proven ineffective to prevent the regular and continuing violation by its competent authorities of consular notification and assistance rights guaranteed by Article 36". It also recalls that the United States contradicts this contention of Mexico by claiming that "its efforts to improve the conveyance of information about consular notification are continuing unabated and are achieving tangible results". It contends that Mexico "fails to establish a 'regular and continuing' pattern of breaches of Article 36 in the wake of *LaGrand*".

Referring to the fact that the Mexican request for guarantees of non-repetition is based on its contention that beyond 52 cases there is a "regular and continuing" pattern of breaches by the United States of Article 36, the Court observes that, in this respect, there is no evidence properly before it that would establish a general pattern. While it is a matter of concern that, even in the wake of the *LaGrand Judgment,* there remain a substantial number of cases of failure to carry out the obligation to furnish consular information to Mexican nationals. The Court notes that the United States has been making considerable efforts to ensure that its law enforcement authorities provide consular information to every arrested person they know or have reason to believe is a foreign national. The Court further notes in this regard that in the *LaGrand* case Germany sought, *inter alia,* "a straightforward assurance that the United States will not repeat its unlawful acts" (*I.C.J. Reports 2001,* p. 511, para. 120). With regard to this general demand for an assurance of non-repetition, the Court stated:

> "If a State, in proceedings before this Court, repeatedly refers to substantial activities which it is carrying out in order to achieve compliance with certain obligations under a treaty, then this expresses a commitment to follow through with the efforts in this regard. The programme in question certainly cannot provide an assurance that there will never again be a failure by the United States to observe the obligations of notification under Article 36 of the Vienna Convention. But no State could give such a guarantee and Germany does not seek it. The Court considers that the commitment expressed by the United States to ensure implementation of the specific measures adopted in performance of its obligations under Article 36, paragraph 1 (b), must be regarded as meeting Germany's request for a general assurance of non-repetition." *(I.C.J. Reports 2001,* pp. 512–513, para. 124.)

The Court believes that as far as the request of Mexico for guarantees and assurances of non-repetition is concerned, what the Court stated in this passage of the *LaGrand* Judgment remains applicable, and therefore meets that request.

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The Court then re-emphasizes a point of importance. It points out that in the present case it has been addressing the issues of principle raised in the course of the present proceedings from the viewpoint of the general application of the Vienna Convention, and there can be no question of making an *a contrario* argument in respect of any of the Court's findings in the present Judgment. In other words, the fact that in this case the Court's ruling has concerned only Mexican nationals cannot be taken to imply that the conclusions reached by it in the present Judgment do not apply to other foreign nationals finding themselves in similar situations in the United States.

The Court finally points out that its Order of 5 February 2003 indicating provisional measures mentioned above, according to its terms and to Article 41 of the Statute, was effective pending final judgment, and that the obligations of the United States in that respect are, with effect from the date of the Judgment, replaced by those declared in this Judgment. The Court observes that it has found in relation to the three persons concerned in the Order (among others), that the United States has committed breaches of its obligations under

Article 36, paragraph 1, of the Vienna Convention; and that moreover, in respect of those three persons alone, the United States has also committed breaches of Article 36, paragraph 2. The review and reconsideration of conviction and sentence required by Article 36, paragraph 2, which is the appropriate remedy for breaches of Article 36, paragraph 1, has not been carried out. The Court considers that in these three cases it is for the United States to find an appropriate remedy having the nature of review and reconsideration according to the criteria indicated in the Judgment.

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Declaration of President Shi

In voting in favour of operative paragraph 153 of the Judgment, President Shi makes it clear that he still maintains his views as expressed in his separate opinion annexed to the *LaGrand* Judgment (*I.C.J. Reports 2001,* pp. 518–524) with regard both to the Court's interpretation that Article 36, paragraphs 1 and 2, of the Vienna Convention on Consular Relations creates individual rights, and to the Court's ruling on "review and reconsideration of the conviction and sentence" as a form of remedy for breach by the receiving State of its obligations under Article 36 of the Convention.

Declaration of Vice-President Ranjeva

Judge Raymond Ranjeva, Vice-President, has attached a declaration primarily concerning the question of evidence and the request for diplomatic protection submitted by Mexico. The distinction between the burden of proof and the burden of evidence was rightly rebutted by the Judgment as it has no known relevance in international law; in the absence of the principle *nemo contra se edere tenetur,* the Corfu Channel case gives the Court jurisdiction to define the factual consequences of failure to produce documents likely to support an argument.

Concerning the Mexican request relating to diplomatic protection, the author of the declaration considers that the Vienna Convention on Consular Relations, in explicitly recognizing individual rights to foreign nationals in detention, does not provide for diplomatic protection. The interdependence between the rights set out in Article 36 of the Vienna Convention on Consular Relations points to the correlation between the initiative by the sending State to uphold the individual rights of its nationals and the lack of refusal by the national held in detention. This correlation makes it possible for a foreign national who has been arrested to object to the consular post of his State being informed. For its part, the sending State may demand observance of its own law once the foreign origin of the arrested person has been established.

Separate opinion of Judge Vereshchetin

In his separate opinion, Judge Vereshchetin puts on record his disagreement with that part of the Court's reasoning where it deals with the issues concerning the law of diplomatic protection and the related rule of the exhaustion of local remedies (para. 40 of the Judgment).

In rejecting the United States contention that Mexico's claims brought under the head of diplomatic protection of its nationals are inadmissible, the Court, in the view of Judge Vereshchetin, has resorted to reasoning which amounts to a highly problematic new legal proposition in respect of the law of diplomatic protection. In deviation from the general requirement of the exhaustion of local remedies where an international claim is brought by a State in espousal of the rights of its nationals, the Judgment finds that the duty to exhaust local remedies does not apply to the Mexican request because of the special circumstances of interdependence of the rights of the State and of individual rights under Article 36 of the Vienna Convention.

Having analysed the jurisprudence of the Court dealing with the law of diplomatic protection and the Draft Articles on Diplomatic Protection, recently elaborated by the International Law Commission (ILC), Judge Vereshchetin concludes that in the present case there were no compelling reasons to deviate from the "preponderance" standard applied in the former Court's jurisprudence and in the ILC Draft Articles with regard to "mixed" claims brought by a State in its own right and in the exercise of its right of diplomatic protection of its nationals.

The rule of exhaustion of local remedies does not apply here not because of the special character of Article 36 of the Vienna Convention on Consular Relations, which impliedly differs in kind from other treaty provisions creating rights of individuals, but rather because of the very special circumstances of the case at hand. At the time when the Application was filed, all the Mexican nationals concerned were already on death row. In those circumstances, to demand that all the local remedies should have been completely exhausted before Mexico could exercise its right of diplomatic protection of those nationals, could lead to the absurd result of this Court having to rule when its ruling could have no practical effect.

Separate opinion of Judge Parra-Aranguren

Judge Parra-Aranguren considers that the preliminary objections raised by the United States should have been disregarded for it gave its consent not to raise preliminary objections when agreeing to a single round of pleadings and not saying anything about preliminary objections. For this reason he voted against paragraph 153 (1) of the Judgment.

The United States "has chosen to vehemently deny any wrongdoing", as indicated by Mexico. Mexico acknowledged its obligation to demonstrate the Mexican nationality of each of the 52 persons identified in its Memorial. It presented to this end declarations of 42 of them stating their Mexican nationality and 52 birth certificates attesting that each one of them was born in Mexico, explaining that they automatically acquired *iure soli* Mexican nationality, as prescribed in Article 30 of the Mexican Constitution.

In the opinion of Judge Parra-Aranguren the declarations presented are *ex parte* documents which cannot demonstrate the nationality of the 42 persons concerned; and the birth certificates undoubtedly prove that each of the 52 persons mentioned in Mexico's Memorial were born in Mexico but not

that they are Mexican nationals. Mexico did not present the text of Article 30 of its constitution and "insofar as the International Court of Justice is called upon to express an opinion as to the effect of a rule of national law it will do so by treating the matter as a question of fact to be established as such rather than as a question of law to be decided by the court." (*Oppenheim's International Law, Ninth Edition, edited by Sir Robert Jennings, Q.C., and Sir Arthur Watts, K.C.M.G., Q.C.,* Vol. 1, "Peace", Introduction and Part 1, 1996, p. 83, para. 21.) This is a generally accepted rule, as indicated by Judge John E. Read when referring to a long series of decisions rendered by the Permanent Court of International Justice which applied the principle that "municipal laws are merely facts" (*Nottebohm, Second Phase, Judgment, I.C.J. Reports 1955, dissenting opinion of Judge Read,* p. 36). Consequently, Judge Parra-Aranguren considers that Mexico did not discharge its burden of proof by failing to present the text of Article 30 of its constitution. Consequently, this omission does not enable it to be established from the evidence presented by Mexico, that the 52 persons identified in its Memorial automatically acquired *iure soli* Mexican nationality. For this reason, unless one were to rely on extralegal considerations as the Judgment did, in his opinion there was no other way but to conclude that the claims presented by Mexico against the United States cannot be upheld since Mexican nationality of the 52 persons concerned was not demonstrated and it is, in the present case, a necessary condition for the application of Article 36 of the Vienna Convention and for Mexico's exercise of its right to diplomatic protection of its nationals. Therefore the failure of Mexico to prove the Mexican nationality of the 52 persons identified in its Memorial is the fundamental reason for his vote against paragraph 153, subparagraphs (4), (5), (6), (7), (8) and (9).

Paragraph 40 states that the exhaustion of the local remedies rule does not apply to the request contained in the first final submission of Mexico asking the Court to declare that the United States violated its international legal obligations to Mexico, in its own right and in the exercise of its right to diplomatic protection of its nationals. Judge Parra-Aranguren does not agree with such conclusion because in his opinion the exhaustion of the local remedies rule applies in cases in which the claimant State has been injured indirectly, that is, through its national and does not apply where it has been directly injured by the wrongful act of another State. As the International Law Commission has recently observed "[i]n practice it is difficult to decide whether the claim is 'direct' or 'indirect' where it is 'mixed', in the sense that it contains elements of both injury to the State and injury to the nationals of the State." This is the case in the present proceedings, as paragraph 40 acknowledges when indicating the "special circumstances of interdependence of the rights of the State and of individual rights", and for this reason the Court should have examined the different elements of the claim "to decide whether the direct or the indirect element is preponderant"; it also being possible to apply the *sine qua non* or "but for" test, which asks whether the claim comprising elements of both direct and indirect injury would have been brought were it not for the claim on behalf of the injured national (United Nations, Report of the International Law Commission, Fifty-Fifth Session (5 May–6 June and 7 July–8 August 2003), *Official Records of the General Assembly, Fifty-Eighth Session, Supplement No. 10* (A/58/10), pp. 89–90). Judge Parra-Aranguren considers that Mexico would not have presented its claim against the United States but for the injury suffered by its nationals and that therefore the local remedies rule applies to the claims "in its own right" submitted by Mexico in its first final submission. Accordingly, the Court should have examined each of the individual cases to determine whether the local remedies had been exhausted; if that were not the case, the corresponding claim presented by Mexico in the exercise of diplomatic protection of its nationals should have been dismissed, unless it was covered by any of the customarily accepted exceptions to the local remedies rule, taking into consideration Article 10 of the Draft Articles on Diplomatic Protection prepared by the International Law Commission.

Judge Parra-Aranguren wishes to emphasize that time constraints to present his separate opinion within the period fixed by the Court did not permit him to make a complete explanation of his disagreement with subparagraphs (4), (5), (6), (7), (8) and (9) of paragraph 153.

Separate opinion of Judge Tomka

In his separate opinion, Judge Tomka expresses the view that the Court could only arrive at the conclusion that the individual rights of Mexican nationals were violated if it accepted Mexico's submission claiming its right to exercise diplomatic protection.

In that case, it would not have been appropriate to disregard the United States objection that the Mexican nationals failed to exhaust local remedies. However, in view of the practice of United States courts which, in the past, have failed for various reasons to provide effective relief for violations of individual rights under Article 36, paragraph 1*(b),* of the Vienna Convention, Judge Tomka concludes that the exhaustion of local remedies does not apply in the present case.

Judge Tomka expresses some doubt as to the idea that the obligation to inform an arrested foreign national of his rights under Article 36 of the Vienna Convention only applies once the arresting authorities realize that the individual is a foreign national or have grounds for so believing. He takes the view that the obligation to give consular information arises upon the detention of the foreign national.

Judge Tomka agrees with the Court's finding that it cannot uphold Mexico's request seeking the cessation by the United States of any violations of its obligations under Article 36 of the Vienna Convention, because Mexico has not established that those violations are of a continuing nature. He does not find it pertinent to take account of the fact that criminal proceedings against the 52 individuals remain pending before domestic courts or to consider the nature of the appropriate remedy, in relation to the obligation of cessation.

Separate opinion of Judge Sepúlveda

Judge *ad hoc* Sepúlveda has stated that, even if he is basically in agreement with most of the findings of the Court, he

has some misgivings and reservations about the reasoning employed by the Court to reach certain conclusions. The following are the main ones:

(1) The Court has opted in favour of a restricted interpretation of the law of State responsibility, providing a limited reach to the claims for reparation sought by Mexico.

(2) The decision of the Court is not sufficiently clear in answering the request of Mexico asking it to adjudge that the United States violated its international legal obligations to Mexico, in its own right and in the exercise of its right to diplomatic protection of its nationals.

(3) The present Judgment departs substantially from the findings in the *LaGrand* Judgment on matters related to the circumstances in which local remedies must be exhausted, to the application of the procedural default rule, and to the question of denial of justice.

(4) It is factually and legally incorrect to assume that information drawn to the attention of the sending State by means different from those established in Article 36 of the Vienna Convention may still enable consular affairs to assist in arranging legal representation. A review of the cases quoted in the Judgment shows that in most if not all cases legal representation was badly needed from the very beginning.

(5) There is an intimate link between the Miranda warning and Article 36 of the Vienna Convention, in the sense that both aim at creating a scheme of protection of rights that directly impinge on the fairness of a trial. Consular protection may be an important element for due process of law, especially in capital cases.

(6) Full reparation seems unlikely to be achieved if the ambiguity of the notion of "by means of its own choosing" remains, and is not strengthened with the addition of some specific measures.

(7) The Court should have found the need for the cessation of the violations of Article 36 of the Vienna Convention by the United States.

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148. LEGAL CONSEQUENCES OF THE CONSTRUCTION OF A WALL IN THE OCCUPIED PALESTINIAN TERRITORY

Advisory Opinion of 9 July 2004

The Court handed down its advisory opinion on the request by the General Assembly of the United Nations on the question concerning the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory.

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The Court was composed as follows: President Shi, Vice-President Ranjeva; Judges Guillaume, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal, Elaraby, Owada, Simma and Tomka; Registrar Couvreur.

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The final paragraph (para. 163) of the Advisory Opinion reads as follows:

" . . .

The Court,

(1) Unanimously,

Finds that it has jurisdiction to give the advisory opinion requested;

(2) By fourteen votes to one,

Decides to comply with the request for an advisory opinion;

IN FAVOUR: President Shi; Vice-President Ranjeva; Judges Guillaume, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Elaraby, Owada, Simma, Tomka;

AGAINST: Judge Buergenthal;

(3) *Replies* in the following manner to the question put by the General Assembly:

A. By fourteen votes to one,

The construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, and its associated régime, are contrary to international law;

IN FAVOUR: President Shi; Vice-President Ranjeva; Judges Guillaume, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Elaraby, Owada, Simma, Tomka;

AGAINST: Judge Buergenthal;

B. By fourteen votes to one,

Israel is under an obligation to terminate its breaches of international law; it is under an obligation to cease forthwith the works of construction of the wall being built in the Occupied Palestinian Territory, including in and around East Jerusalem, to dismantle forthwith the structure therein situated, and to repeal or render ineffective forthwith all legislative and regulatory acts relating thereto, in accordance with paragraph 151 of this Opinion;

IN FAVOUR: President Shi; Vice-President Ranjeva; Judges Guillaume, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Elaraby, Owada, Simma, Tomka;

AGAINST: Judge Buergenthal;

C. By fourteen votes to one,

Israel is under an obligation to make reparation for all damage caused by the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem;

IN FAVOUR: President Shi; Vice-President Ranjeva; Judges Guillaume, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Elaraby, Owada, Simma, Tomka;

AGAINST: Judge Buergenthal;

D. By thirteen votes to two,

All States are under an obligation not to recognize the illegal situation resulting from the construction of the wall and not to render aid or assistance in maintaining the situation created by such construction; all States parties to the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 have in addition the obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention;

IN FAVOUR: President Shi; Vice-President Ranjeva; Judges Guillaume, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Rezek, Al-Khasawneh, Elaraby, Owada, Simma, Tomka;

AGAINST: Judges Kooijmans, Buergenthal;

E. By fourteen votes to one,

The United Nations, and especially the General Assembly and the Security Council, should consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall and the associated régime, taking due account of the present Advisory Opinion.

IN FAVOUR: President Shi; Vice-President Ranjeva; Judges Guillaume, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Elaraby, Owada, Simma, Tomka;

AGAINST: Judge Buergenthal."

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Judges Koroma, Higgins, Kooijmans and Al-Khasawneh appended separate opinions to the Advisory Opinion. Judge Buergenthal appended a declaration. Judges Elaraby and Owada appended separate opinions.

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* *

History of the proceedings
(paras. 1–12)

The Court first recalls that on 10 December 2003 the Secretary-General of the United Nations officially communicated to the Court the decision taken by the General Assembly to submit the question set forth in its resolution ES-10/14, adopted on 8 December 2003 at its Tenth Emergency Special Session, for an advisory opinion. The question is the following:

> "What are the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, as described in the report of the Secretary-General, considering the rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions?"

The Court then gives a short overview of the history of the proceedings.

Questions of jurisdiction
(paras. 13–42)

At the outset of its reasoning the Court observes that, when seised of a request for an advisory opinion, it must first consider whether it has jurisdiction to give the opinion requested and whether, should the answer be in the affirmative, there is any reason why it should decline to exercise any such jurisdiction.

The Court first addresses the question whether it possesses jurisdiction to give the advisory opinion. It notes first that the competence of the Court in this regard is based on Article 65, paragraph 1, of its Statute, according to which 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", and secondly that the General Assembly, which seeks the advisory opinion, is authorized to do so by Article 96, paragraph 1, of the Charter, which provides: "The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question." As it has done sometimes in the past, the Court then turns to the relationship between the question which is the subject of a request for an advisory opinion and the activities of the Assembly. It observes in this respect that Article 10 of the Charter has conferred upon the General Assembly a competence relating to "any questions or any matters" within the scope of the Charter, and that Article 11, paragraph 2, has specifically provided it with competence on "questions relating to the maintenance of international peace and security brought before it by any Member of the United Nations . . ." and to make recommendations under certain conditions fixed by those Articles. It notes that the question of the construction of the wall in the Occupied Palestinian Territory was brought before the General Assembly by a number of Member States in the context of the Tenth Emergency Special Session of the Assembly, convened to deal with what the Assembly, in its resolution ES-10/2 of 25 April 1997, considered to constitute a threat to international peace and security.

After recalling the sequence of events that led to the adoption of resolution ES-10/14, the Court turns to the first question of jurisdiction raised in the present proceedings. Israel has alleged that, given the active engagement of the Security Council with the situation in the Middle East, including the Palestinian question, the General Assembly acted *ultra vires* under the Charter, because its request for an advisory opinion was not in accordance with Article 12, paragraph 1, of the Charter, which provides that: "While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests." The Court first observes that a request for an advisory opinion is not a "recommendation" by the General Assembly "with regard to [a] dispute or situation", within the meaning of Article 12, but considers it appropriate to examine the significance of that Article, having regard to the practice of the United Nations. It notes that, under Article 24 of the Charter, the Security Council has "primary responsibility for the maintenance of international peace and security" and that both the Security Council and the General Assembly initially interpreted and applied Article 12 to the effect that the Assembly could not make a recommendation on a question concerning the maintenance of international peace and security while the matter remained on the Council's agenda, but that this interpretation of Article 12 has evolved subsequently. The Court takes note of an interpretation of that text given by the United Nations Legal Counsel at the Twenty-third Session of the Assembly, and of 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. The Court considers that the accepted practice of the Assembly, as it has evolved, is consistent with Article 12, paragraph 1; it is accordingly of the view that the General Assembly, in adopting resolution ES-10/14, seeking an advisory opinion from the Court, did not contravene the provisions of Article 12, paragraph 1, of the Charter. The Court concludes that by submitting that request the General Assembly did not exceed its competence.

The Court recalls that it has however been contended before it that the request did not fulfil the essential conditions set by resolution 377 A (V), under which the Tenth Emergency Special Session was convened and has continued to act.

Resolution 377 A (V) provides that:

> "if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures . . .".

The Court proceeds to ascertain whether the conditions laid down by this resolution were fulfilled as regards the convening of the Tenth Emergency Special Session of the General Assembly, in particular at the time when the Assembly decided to request an advisory opinion from the Court.

In light of the sequence of events as described by it, the Court observes that, at the time when the Tenth Emergency Special Session was convened in 1997, the Council had been unable to take a decision on the case of certain Israeli settlements in the Occupied Palestinian Territory, due to a negative vote of a permanent member; and that, as indicated in resolution ES-10/2, there existed a threat to international peace and security. The Court further notes that, on 20 October 2003, the Tenth Emergency Special Session of the General Assembly was reconvened on the same basis as in 1997, after the rejection by the Security Council, on 14 October 2003, again as a result of the negative vote of a permanent member, of a draft resolution concerning the construction by Israel of the wall in the Occupied Palestinian Territory. The Court considers that the Security Council again failed to act as contemplated in resolution 377 A (V). It does not appear to the Court that the situation in this regard changed between 20 October 2003 and 8 December 2003, since the Council neither discussed the construction of the wall nor adopted any resolution in that connection. Thus, the Court is of the view that, up to 8 December 2003, the Council had not reconsidered the negative vote of 14 October 2003. The Court concludes that, during that period, the Tenth Emergency Special Session was duly reconvened and could properly be seised of the matter now before the Court, under resolution 377 A (V).

The Court also emphasizes that, in the course of this Emergency Special Session, the General Assembly could adopt any resolution falling within the subject-matter for which the Session had been convened, and otherwise within its powers, including a resolution seeking the Court's opinion. It is irrelevant in that regard that no proposal had been made to the Security Council to request such an opinion.

Turning to alleged further procedural irregularities of the Tenth Emergency Special Session, the Court does not consider that the "rolling" character of that Session, namely the fact of it having been convened in April 1997 and reconvened 11 times since then, has any relevance with regard to the validity of the request by the General Assembly. In response to the contention by Israel that it was improper to reconvene the Tenth Emergency Special Session at a time when the regular Session of the General Assembly was in progress, the Court observes that, while it may not have been originally contemplated that it would be appropriate for the General Assembly to hold simultaneous emergency and regular sessions, no rule of the Organization has been identified which would be thereby violated, so as to render invalid the resolution adopting the present request for an advisory opinion. Finally, the Tenth Emergency Special Session appears to have been convened in accordance with Rule 9 *(b)* of the Rules of Procedure of the General Assembly, and the relevant meetings have been convened in pursuance of the applicable rules.

The Court turns to a further issue related to jurisdiction namely the contention that the request for an advisory opinion by the General Assembly does not raise a "legal question" within the meaning of Article 96, paragraph 1, of the Charter and Article 65, paragraph 1, of the Statute of the Court.

As regards the alleged lack of clarity of the terms of the General Assembly's request and its effect on the "legal nature"

of the question referred to the Court, the Court observes that this question is directed to the legal consequences arising from a given factual situation considering the rules and principles of international law, including the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 (hereinafter the "Fourth Geneva Convention") and relevant Security Council and General Assembly resolutions. In the view of the Court, it is indeed a question of a legal character. The Court further points out that lack of clarity in the drafting of a question does not deprive the Court of jurisdiction. Rather, such uncertainty will require clarification in interpretation, and such necessary clarifications of interpretation have frequently been given by the Court. Therefore, the Court will, as it has done often in the past, "identify the existing principles and rules, interpret them and apply them . . . , thus offering a reply to the question posed based on law" (*Legality of the Threat or Use of Nuclear Weapons, I.C.J. Reports 1996 (I),* p. 234, para. 13). The Court points out that, in the present instance, if the General Assembly requests the Court to state the "legal consequences" arising from the construction of the wall, the use of these terms necessarily encompasses an assessment of whether that construction is or is not in breach of certain rules and principles of international law.

The Court does not consider that what is contended to be the abstract nature of the question posed to it raises an issue of jurisdiction. Even when the matter was raised as an issue of propriety rather than one of jurisdiction, in the case concerning the *Legality of the Threat or Use of Nuclear Weapons,* the Court took the clear position that to contend that it should not deal with a question couched in abstract terms is "a mere affirmation devoid of any justification" and that "the Court may give an advisory opinion on any legal question, abstract or otherwise" *(I.C.J. Reports 1996 (I),* p. 236, para. 15).

The Court finds that it furthermore cannot accept the view, which has also been advanced, that it has no jurisdiction because of the "political" character of the question posed. As is clear from its long-standing jurisprudence on this point, the Court considers that the fact that a legal question also has political aspects, "does not suffice to deprive it of its character as a 'legal question' and to 'deprive the Court of a competence expressly conferred on it by its Statute', and the Court cannot refuse to admit the legal character of a question which invites it to discharge an essentially judicial task" *(Legality of the Threat or Use of Nuclear Weapons, I.C.J. Reports 1996 (I),* p. 234, para. 13).

The Court accordingly concludes that it has jurisdiction to give the advisory opinion requested by resolution ES-10/14 of the General Assembly.

Discretionary power of the Court to exercise its jurisdiction (paras. 43–65)

The Court notes that it has been contended, however, that the Court should decline to exercise its jurisdiction because of the presence of specific aspects of the General Assembly's request that would render the exercise of the Court's jurisdiction improper and inconsistent with the Court's judicial function.

The Court first recalls 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 retains a discretionary power to decline to give an advisory opinion even if the conditions of jurisdiction are met. It is mindful however of the fact that its answer to a request for an advisory opinion "represents its participation in the activities of the Organization, and, in principle, should not be refused". From this it follows that, given its responsibilities as the "principal judicial organ of the United Nations" (Article 92 of the Charter), the Court should in principle not decline to give an advisory opinion, and only "compelling reasons" should lead the Court to do so.

The first argument presented to the Court in this regard is to the effect that it should not exercise its jurisdiction in the present case because the request concerns a contentious matter between Israel and Palestine, in respect of which Israel has not consented to the exercise of that jurisdiction. According to this view, the subject-matter of the question posed by the General Assembly "is an integral part of the wider Israeli-Palestinian dispute concerning questions of terrorism, security, borders, settlements, Jerusalem and other related matters". The Court observes in this respect that the lack of consent to the Court's contentious jurisdiction by interested States has no bearing on the Court's jurisdiction to give an advisory opinion, but recalls its jurisprudence to the effect that the lack of consent of an interested State might render the giving of an advisory opinion incompatible with the Court's judicial character, e.g. if to give a reply would have the effect of circumventing the principle that a State is not obliged to submit its disputes to judicial settlement without its consent.

As regards the request for an advisory opinion now before it, the Court acknowledges that Israel and Palestine have expressed radically divergent views on the legal consequences of Israel's construction of the wall, on which the Court has been asked to pronounce in the context of the opinion it would give. However, as the Court has itself noted before, "Differences of views . . . on legal issues have existed in practically every advisory proceeding." Furthermore, the Court does not consider that the subject-matter of the General Assembly's request can be regarded as only a bilateral matter between Israel and Palestine. Given the powers and responsibilities of the United Nations in questions relating to international peace and security, it is the Court's view that the construction of the wall must be deemed to be directly of concern to the United Nations in general and the General Assembly in particular. The responsibility of the United Nations in this matter also has its origin in the Mandate and the Partition Resolution concerning Palestine. This responsibility has been described by the General Assembly as "a permanent responsibility towards the question of Palestine until the question is resolved in all its aspects in a satisfactory manner in accordance with international legitimacy" (General Assembly resolution 57/107 of 3 December 2002). The object of the request before the Court is to obtain from the Court an opinion which the General Assembly deems of assistance to it for the proper exercise of its functions. The opinion is requested on a question which is of particularly acute concern to the United Nations, and one which is located in a much broader frame of reference than

a bilateral dispute. In the circumstances, the Court does not consider that to give an opinion would have the effect of circumventing the principle of consent to judicial settlement, and the Court accordingly cannot, in the exercise of its discretion, decline to give an opinion on that ground.

The Court then turns to another argument raised in support of the view that it should decline to exercise its jurisdiction: that an advisory opinion from the Court on the legality of the wall and the legal consequences of its construction could impede a political, negotiated solution to the Israeli-Palestinian conflict. More particularly, it has been contended that such an opinion could undermine the scheme of the "Roadmap", which requires Israel and Palestine to comply with certain obligations in various phases referred to therein. The Court observes that it is conscious that the "Roadmap", which was endorsed by Security Council resolution 1515 (2003), constitutes a negotiating framework for the resolution of the Israeli-Palestinian conflict, but that it is not clear what influence its opinion might have on those negotiations: participants in the present proceedings have expressed differing views in this regard. The Court finds that it cannot regard this factor as a compelling reason to decline to exercise its jurisdiction.

It was also put to the Court by certain participants that the question of the construction of the wall was only one aspect of the wider Israeli-Palestinian conflict which could not be properly addressed in the present proceedings. The Court does not however consider this a reason for it to decline to reply to the question asked: it is aware, and would take into account, that the question of the wall is part of a greater whole. At the same time, the question which the General Assembly has chosen to ask of the Court is confined to the legal consequences of the construction of the wall, and that the Court would only examine other issues to the extent that they might be necessary to its consideration of the question put to it.

The further argument has been raised that the Court should decline to exercise its jurisdiction because it does not have at its disposal the requisite facts and evidence to enable it to reach its conclusions. According to Israel, if the Court decided to give the requested opinion, it would be forced to speculate about essential facts and make assumptions about arguments of law. The Court points out that in the present instance, it has at its disposal the report of the Secretary-General, as well as a voluminous dossier submitted by him to the Court, comprising not only detailed information on the route of the wall but also on its humanitarian and socio-economic impact on the Palestinian population. The dossier includes several reports based on on-site visits by special *rapporteurs* and competent organs of the United Nations. Moreover, numerous other participants have submitted to the Court written statements which contain information relevant to a response to the question put by the General Assembly. The Court notes in particular that Israel's Written Statement, although limited to issues of jurisdiction and propriety, contained observations on other matters, including Israel's concerns in terms of security, and was accompanied by corresponding annexes; and that many other documents issued by the Israeli Government on those matters are in the public domain.

The Court therefore finds that it has before it sufficient information and evidence to enable it to give the advisory opinion requested by the General Assembly. Moreover, the circumstance that others may evaluate and interpret these facts in a subjective or political manner can be no argument for a court of law to abdicate its judicial task. There is therefore in the present case no lack of information such as to constitute a compelling reason for the Court to decline to give the requested opinion.

Another argument that has been advanced is that the Court should decline to give the requested opinion on the legal consequences of the construction of the wall because such opinion would lack any useful purpose: the General Assembly would not need an opinion of the Court because it has already declared the construction of the wall to be illegal and has already determined the legal consequences by demanding that Israel stop and reverse its construction and further, because the General Assembly has never made it clear how it intended to use the opinion. The Court observes that, as is clear from its jurisprudence, advisory opinions have the purpose of furnishing to the requesting organs the elements of law necessary for them in their action. It recalls what it stated in its Opinion on the *Legality of the Threat or Use of Nuclear Weapons:* "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." It thus follows that the Court cannot decline to answer the question posed based on the ground that its opinion would lack any useful purpose. The 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. Furthermore, and in any event, the Court considers that the General Assembly has not yet determined all the possible consequences of its own resolution. The Court's task would be to determine in a comprehensive manner the legal consequences of the construction of the wall, while the General Assembly—and the Security Council—may then draw conclusions from the Court's findings.

Lastly, another argument advanced by Israel with regard to the propriety of its giving an advisory opinion in the present proceedings is that Palestine, given its responsibility for acts of violence against Israel and its population which the wall is aimed at addressing, cannot seek from the Court a remedy for a situation resulting from its own wrongdoing. Therefore, Israel concludes, good faith and the principle of "clean hands" provide a compelling reason that should lead the Court to refuse the General Assembly's request. The Court does not consider this argument to be pertinent. It emphasizes, as earlier, that it was the General Assembly which requested the advisory opinion, and that the opinion is to be given to the General Assembly, and not to an individual State or entity.

In the light of the foregoing, the Court concludes that it has jurisdiction to give an opinion on the question put to it by the General Assembly and that there is no compelling reason for it to use its discretionary power not to give that opinion.

Scope of the question before the Court
(paras. 66–69)

The Court then proceeds to address the question put to it by General Assembly resolution ES-10/14 (see above). The Court explains that it has chosen to use the term "wall" employed by the General Assembly, because the other terms used—"fence" or "barrier"—are no more accurate if understood in the physical sense. It further notes that the request of the General Assembly concerns the legal consequences of the wall being built "in the Occupied Palestinian Territory, including in and around East Jerusalem", and considers that it is not called upon to examine the legal consequences arising from the construction of those parts of the wall which are on the territory of Israel itself.

Historical background
(paras. 70–78)

In order to indicate the legal consequences of the construction of the wall in the Occupied Palestinian Territory, the Court has first to determine whether or not the construction of that wall breaches international law. To this end, it first makes a brief historical analysis of the status of the territory concerned since the time that Palestine, having been part of the Ottoman Empire, was, at the end of the First World War, the subject of a class "A" mandate entrusted by the League of Nations to Great Britain. In the course of this analysis, the Court mentions the hostilities of 1948–1949, and the armistice demarcation line between Israeli and Arab forces fixed by a general armistice agreement of 3 April 1949 between Israel and Jordan, referred to as the "Green Line". At the close of its analysis, the Court notes that the territories situated between the Green Line and the former eastern boundary of Palestine under the Mandate were occupied by Israel in 1967 during the armed conflict between Israel and Jordan. Under customary international law, the Court observes, these were therefore occupied territories in which Israel had the status of occupying Power. Subsequent events in these territories have done nothing to alter this situation. The Court concludes that all these territories (including East Jerusalem) remain occupied territories and that Israel has continued to have the status of occupying Power.

Description of the wall
(paras. 79–85)

The Court goes on to describe, on the basis of the information available to it in a report by the United Nations Secretary-General and the Written Statement presented to the Court by the Secretary-General, the works already constructed or in course of construction in that territory.

Relevant rules and principles of international law
(paras. 86–113)

It then turns to the determination of the rules and principles of international law which are relevant in assessing the legality of the measures taken by Israel. It observes that such rules and principles can be found in the United Nations Charter and certain other treaties, in customary international law and in the relevant resolutions adopted pursuant to the Charter by the General Assembly and the Security Council. It is aware, however, that doubts have been expressed by Israel as to the applicability in the Occupied Palestinian Territory of certain rules of international humanitarian law and human rights instruments.

United Nations Charter and General Assembly resolution 2625 (XXV)
(paras. 87–88)

The Court first recalls Article 2, paragraph 4, of the United Nations Charter, 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,"

and General Assembly resolution 2625 (XXV), entitled "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States" (hereinafter "resolution 2625 (XXV)"), in which the Assembly emphasized that "No territorial acquisition resulting from the threat or use of force shall be recognized as legal." As stated in the Court's Judgment in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America),* the principles as to the use of force incorporated in the Charter reflect customary international law (see *I.C.J. Reports 1986,* pp. 98–101, paras. 187–190); the same is true, it observes, of its corollary entailing the illegality of territorial acquisition resulting from the threat or use of force.

As to the principle of self-determination of peoples, the Court points out that it has been enshrined in the United Nations Charter and reaffirmed by the General Assembly in resolution 2625 (XXV) cited above, pursuant to which "Every State has the duty to refrain from any forcible action which deprives peoples referred to [in that resolution] . . . of their right to self-determination." Article 1 common to the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights reaffirms the right of all peoples to self-determination, and lays upon the States parties the obligation to promote the realization of that right and to respect it, in conformity with the provisions of the United Nations Charter. The Court recalls its previous case law, which emphasized that current developments in "international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all [such territories]", and that the right of peoples to self-determination is today a right *erga omnes*.

International humanitarian law
(paras. 89–101)

As regards international humanitarian law, the Court first recalls that Israel is not a party to the Fourth Hague Convention of 1907, to which the Hague Regulations are annexed. It considers, however, that the provisions of the Hague Regulations have become part of customary law, as is in fact recognized by all the participants in the proceedings before the Court. The Court also observes that, pursuant to Article 154

of the Fourth Geneva Convention, that Convention is supplementary to Sections II and III of the Hague Regulations. Section III of those Regulations, which concerns "Military authority over the territory of the hostile State", is particularly pertinent in the present case.

Secondly, with regard to the Fourth Geneva Convention, the Court takes note that differing views have been expressed by the participants in these proceedings. Israel, contrary to the great majority of the participants, disputes the applicability *de jure* of the Convention to the Occupied Palestinian Territory. The Court recalls that the Fourth Geneva Convention was ratified by Israel on 6 July 1951 and that Israel is a party to that Convention; that Jordan has also been a party thereto since 29 May 1951; and that neither of the two States has made any reservation that would be pertinent to the present proceedings. The Court observes that the Israeli authorities have indicated on a number of occasions that in fact they generally apply the humanitarian provisions of the Fourth Geneva Convention within the occupied territories. However, according to Israel's position, that Convention is not applicable *de jure* within those territories because, under Article 2, paragraph 2, it applies only in the case of occupation of territories falling under the sovereignty of a High Contracting Party involved in an armed conflict. Israel explains that the territories occupied by Israel subsequent to the 1967 conflict had not previously fallen under Jordanian sovereignty.

The Court notes that, according to the first paragraph of Article 2 of the Fourth Geneva Convention, when two conditions are fulfilled, namely that there exists an armed conflict (whether or not a state of war has been recognized), and that the conflict has arisen between two contracting parties, then the Convention applies, in particular, in any territory occupied in the course of the conflict by one of the contracting parties. The object of the second paragraph of Article 2, which refers to "occupation of the territory of a High Contracting Party", is not to restrict the scope of application of the Convention, as defined by the first paragraph, by excluding therefrom territories not falling under the sovereignty of one of the contracting parties, but simply to making it clear that, even if occupation effected during the conflict met no armed resistance, the Convention is still applicable.

This interpretation reflects the intention of the drafters of the Fourth Geneva Convention to protect civilians who find themselves, in whatever way, in the hands of the occupying Power, regardless of the status of the occupied territories, and is confirmed by the Convention's *travaux préparatoires*. The States parties to the Fourth Geneva Convention, at their Conference on 15 July 1999, approved that interpretation, which has also been adopted by the International Committee of the Red Cross (ICRC), the General Assembly and the Security Council. The Court finally makes mention of a judgment of the Supreme Court of Israel dated 30 May 2004, to a similar effect.

In view of the foregoing, the Court considers that the Fourth Geneva Convention is applicable in the Palestinian territories which before the 1967 conflict lay to the east of the Green Line and which, during that conflict, were occupied by Israel, there being no need for any enquiry into the precise prior status of those territories.

Human rights law
(paras. 102–113)

The participants in the proceedings before the Court also disagree whether the international human rights conventions to which Israel is party apply within the Occupied Palestinian Territory. Annex I to the report of the Secretary-General states:

> "4. Israel denies that the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, both of which it has signed, are applicable to the occupied Palestinian territory. It asserts that humanitarian law is the protection granted in a conflict situation such as the one in the West Bank and Gaza Strip, whereas human rights treaties were intended for the protection of citizens from their own Government in times of peace."

On 3 October 1991 Israel ratified both the International Covenant on Economic, Social and Cultural Rights of 19 December 1966 and the International Covenant on Civil and Political Rights of the same date, as well as the United Nations Convention on the Rights of the Child of 20 November 1989.

On the question of the relationship between international humanitarian law and human rights law, the Court first recalls its finding, in a previous case, that the protection of the International Covenant on Civil and Political Rights does not cease in time of war (*I.C.J. Reports 1996 (I),* p. 240, para. 25). More generally, it considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. It notes that there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis,* international humanitarian law.

It remains to be determined whether the two international Covenants and the Convention on the Rights of the Child are applicable only on the territories of the States parties thereto or whether they are also applicable outside those territories and, if so, in what circumstances. After examination of the provision of the two international Covenants, in the light of the relevant *travaux préparatoires* and of the position of Israel in communications to the Human Rights Committee and the Committee on Economic, Social and Cultural Rights, the Court concludes that those instruments are applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory. In the case of the International Covenant on Economic, Social and Cultural Rights, Israel is also under an obligation not to raise any obstacle to the exercise of such rights in those fields where competence has been transferred to Palestinian authorities. The Court further concludes

that the Convention on the Rights of the Child is also applicable within the Occupied Palestinian Territory.

Violation of relevant rules
(paras. 114–142)

The Court next proceeds to ascertain whether the construction of the wall has violated the rules and principles of international law found relevant to reply to the question posed by the General Assembly.

Impact on right of Palestinian people to self-determination
(paras. 115–122)

It notes in this regard the contentions of Palestine and other participants that the construction of the wall is "an attempt to annex the territory contrary to international law" and "a violation of the legal principle prohibiting the acquisition of territory by the use of force" and that "the *de facto* annexation of land interferes with the territorial sovereignty and consequently with the right of the Palestinians to self-determination". It notes also that Israel, for its part, has argued that the wall's sole purpose is to enable it effectively to combat terrorist attacks launched from the West Bank, and that Israel has repeatedly stated that the Barrier is a temporary measure.

The Court recalls that both the General Assembly and the Security Council have referred, with regard to Palestine, to the customary rule of "the inadmissibility of the acquisition of territory by war". As regards the principle of the right of peoples to self-determination, the Court observes that the existence of a "Palestinian people" is no longer in issue, and has been recognized by Israel, along with that people's "legitimate rights". The Court considers that those rights include the right to self-determination, as the General Assembly has moreover recognized on a number of occasions.

The Court notes that the route of the wall as fixed by the Israeli Government includes within the "Closed Area" (i.e. the part of the West Bank lying between the Green Line and the wall) some 80 per cent of the settlers living in the Occupied Palestinian Territory, and has been traced in such a way as to include within that area the great majority of the Israeli settlements in the Occupied Palestinian Territory (including East Jerusalem). The information provided to the Court shows that, since 1977, Israel has conducted a policy and developed practices involving the establishment of settlements in the Occupied Palestinian Territory, contrary to the terms of Article 49, paragraph 6, of the Fourth Geneva Convention which provides: "The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies." The Security Council has taken the view that such policy and practices "have no legal validity" and constitute a "flagrant violation" of the Convention. The Court concludes that the Israeli settlements in the Occupied Palestinian Territory (including East Jerusalem) have been established in breach of international law.

Whilst taking note of the assurance given by Israel that the construction of the wall does not amount to annexation and that the wall is of a temporary nature, the Court nevertheless considers that the construction of the wall and its associated régime create a "fait accompli" on the ground that could well become permanent, in which case, and notwithstanding the formal characterization of the wall by Israel, it would be tantamount to *de facto* annexation.

The Court considers moreover that the route chosen for the wall gives expression *in loco* to the illegal measures taken by Israel with regard to Jerusalem and the settlements, as deplored by the Security Council. There is also a risk of further alterations to the demographic composition of the Occupied Palestinian Territory resulting from the construction of the wall inasmuch as it is contributing to the departure of Palestinian populations from certain areas. That construction, along with measures taken previously, thus severely impedes the exercise by the Palestinian people of its right to self-determination, and is therefore a breach of Israel's obligation to respect that right.

Relevant international humanitarian law and human rights instruments
(paras. 123–137)

The construction of the wall also raises a number of issues in relation to the relevant provisions of international humanitarian law and of human rights instruments.

The Court first enumerates and quotes a number of such provisions applicable in the Occupied Palestinian Territory, including articles of the 1907 Hague Regulations, the Fourth Geneva Convention, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the United Nations Convention on the Rights of the Child. In this connection it also refers to obligations relating to guarantees of access to the Christian, Jewish and Islamic Holy Places.

From the information submitted to the Court, particularly the report of the Secretary-General, it appears that the construction of the wall has led to the destruction or requisition of properties under conditions which contravene the requirements of Articles 46 and 52 of the Hague Regulations of 1907 and of Article 53 of the Fourth Geneva Convention.

That construction, the establishment of a closed area between the Green Line and the wall itself, and the creation of enclaves, have moreover imposed substantial restrictions on the freedom of movement of the inhabitants of the Occupied Palestinian Territory (with the exception of Israeli citizens and those assimilated thereto). There have also been serious repercussions for agricultural production, and increasing difficulties for the population concerned regarding access to health services, educational establishments and primary sources of water.

In the view of the Court, the construction of the wall would also deprive a significant number of Palestinians of the "freedom to choose [their] residence". In addition, since a significant number of Palestinians have already been compelled by the construction of the wall and its associated régime to depart from certain areas, a process that will continue as more of the wall is built, that construction, coupled with the establishment of the Israeli settlements mentioned above, is tending to alter the demographic composition of the Occupied Palestinian Territory.

In sum, the Court is of the opinion that the construction of the wall and its associated régime impede the liberty of movement of the inhabitants of the Occupied Palestinian Territory (with the exception of Israeli citizens and those assimilated thereto) as guaranteed under Article 12, paragraph 1, of the International Covenant on Civil and Political Rights. They also impede the exercise by the persons concerned of the right to work, to health, to education and to an adequate standard of living as proclaimed in the International Covenant on Economic, Social and Cultural Rights and in the United Nations Convention on the Rights of the Child. Lastly, the construction of the wall and its associated régime, by contributing to the demographic changes mentioned, contravene Article 49, paragraph 6, of the Fourth Geneva Convention and the pertinent Security Council resolutions cited earlier.

The Court then examines certain provisions of the applicable international humanitarian law enabling account to be taken in certain circumstances of military exigencies, which may in its view be invoked in occupied territories even after the general close of the military operations that led to their occupation; it points out, however, that only Article 53 of the Fourth Geneva Convention contains a relevant provision of this kind, and finds that, on the material before it, the Court is not convinced that the destructions carried out contrary to the prohibition in that Article were "rendered absolutely necessary by military operations" so as to fall within the exception.

Similarly, the Court examines provisions in some human rights conventions permitting derogation from, or qualifying, the rights guaranteed by those conventions, but finds, on the basis of the information available to it, that the conditions laid down by such provisions are not met in the present instance.

In sum, the Court finds that, from the material available to it, it is not convinced that the specific course Israel has chosen for the wall was necessary to attain its security objectives. The wall, along the route chosen, and its associated régime gravely infringe a number of rights of Palestinians residing in the territory occupied by Israel, and the infringements resulting from that route cannot be justified by military exigencies or by the requirements of national security or public order. The construction of such a wall accordingly constitutes breaches by Israel of various of its obligations under the applicable international humanitarian law and human rights instruments.

Self-defence and state of necessity
(paras. 138–141)

The Court recalls that Annex I to the report of the Secretary-General states, however, that, according to Israel: "the construction of the Barrier is consistent with Article 51 of the Charter of the United Nations, its inherent right to self-defence and Security Council resolutions 1368 (2001) and 1373 (2001)".

Article 51 of the Charter, the Court notes, recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State. However, Israel does not claim that the attacks against it are imputable to a foreign State. The Court also notes that Israel exercises control in the Occupied Palestinian Territory and that, as Israel itself states, the threat which it regards as justifying the construction of the wall originates within, and not outside, that territory. The situation is thus different from that contemplated by Security Council resolutions 1368 (2001) and 1373 (2001), and therefore Israel could not in any event invoke those resolutions in support of its claim to be exercising a right of self-defence. Consequently, the Court concludes that Article 51 of the Charter has no relevance in this case.

The Court considers further whether Israel could rely on a state of necessity which would preclude the wrongfulness of the construction of the wall. In this regard, citing its decision in the case concerning the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia),* it observes that the state of necessity is a ground recognized by customary international law that "can only be invoked under certain strictly defined conditions which must be cumulatively satisfied" (*I.C.J. Reports 1997,* p. 40, para. 51), one of those conditions being that the act at issue be the only way for the State to guard an essential interest against a grave and imminent peril. In the light of the material before it, the Court is not convinced that the construction of the wall along the route chosen was the only means to safeguard the interests of Israel against the peril which it has invoked as justification for that construction. While Israel has the right, and indeed the duty to respond to the numerous and deadly acts of violence directed against its civilian population, in order to protect the life of its citizens, the measures taken are bound to remain in conformity with applicable international law. Israel cannot rely on a right of self-defence or on a state of necessity in order to preclude the wrongfulness of the construction of the wall. The Court accordingly finds that the construction of the wall, and its associated régime, are contrary to international law.

Legal consequences of the violations
(paras. 143–160)

The Court then examines the consequences of the violations by Israel of its international obligations. After recalling the contentions in that respect of various participants in the proceedings, the Court observes that the responsibility of Israel is engaged under international law. It then proceeds to examine the legal consequences by distinguishing between, on the one hand, those arising for Israel and, on the other, those arising for other States and, where appropriate, for the United Nations.

Legal consequences of those violations for Israel
(paras. 149–154)

The Court notes that Israel is first obliged to comply with the international obligations it has breached by the construction of the wall in the Occupied Palestinian Territory. Consequently, Israel is bound to comply with its obligation to respect the right of the Palestinian people to self-determination and its obligations under international humanitarian law and international human rights law. Furthermore, it must ensure freedom of access to the Holy Places that came under its control following the 1967 War.

The Court observes that Israel also has an obligation to put an end to the violation of its international obligations flowing from the construction of the wall in the Occupied Palestinian

Territory. Israel accordingly has the obligation to cease forthwith the works of construction of the wall being built by it in the Occupied Palestinian Territory, including in and around East Jerusalem. In the view of the Court, cessation of Israel's violations of its international obligations entails in practice the dismantling forthwith of those parts of that structure situated within the Occupied Palestinian Territory, including in and around East Jerusalem. All legislative and regulatory acts adopted with a view to its construction, and to the establishment of its associated régime, must forthwith be repealed or rendered ineffective, except where of continuing relevance to Israel's obligation of reparation.

The Court finds further that Israel has the obligation to make reparation for the damage caused to all the natural or legal persons concerned. The Court recalls the established jurisprudence that "The essential principle contained in the actual notion of an illegal act . . . is 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." Israel is accordingly under an obligation to return the land, orchards, olive groves and other immovable property seized from any natural or legal person for purposes of construction of the wall in the Occupied Palestinian Territory. In the event that such restitution should prove to be materially impossible, Israel has an obligation to compensate the persons in question for the damage suffered. The Court considers that Israel also has an obligation to compensate, in accordance with the applicable rules of international law, all natural or legal persons having suffered any form of material damage as a result of the wall's construction.

Legal consequences for other States
(paras. 154–159)

The Court points out that the obligations violated by Israel include certain obligations *erga omnes.* As the Court indicated in the *Barcelona Traction* case, such obligations are by their very nature "the concern of all States" and, "In view of the importance of the rights involved, all States can be held to have a legal interest in their protection." (*Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment, I.C.J. Reports 1970,* p. 32, para. 33.) The obligations *erga omnes* violated by Israel are the obligation to respect the right of the Palestinian people to self-determination, and certain of its obligations under international humanitarian law. As regards self-determination, the Court recalls its findings in the *East Timor* case, and General Assembly resolution 2625 (XXV). It recalls that a great many rules of humanitarian law "constitute intransgressible principles of international customary law" (*I.C.J. Reports 1996 (I),* p. 257, para. 79), and observes that they incorporate obligations which are essentially of an *erga omnes* character. It also notes the obligation of States parties to the Fourth Geneva Convention to "ensure respect" for its provisions.

Given the character and the importance of the rights and obligations involved, the Court is of the view that all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction. It is also for all States, while respecting the United Nations Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end. In addition, all the States parties to the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 are under an obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention.

The United Nations
(para. 160)

Finally, the Court is of the view that the United Nations, and especially the General Assembly and the Security Council, should consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall and the associated régime, taking due account of the present Advisory Opinion.

The Court considers that its conclusion that the construction of the wall by Israel in the Occupied Palestinian Territory is contrary to international law must be placed in a more general context. Since 1947, the year when General Assembly resolution 181 (II) was adopted and the Mandate for Palestine was terminated, there has been a succession of armed conflicts, acts of indiscriminate violence and repressive measures on the former mandated territory. The Court would emphasize that both Israel and Palestine are under an obligation scrupulously to observe the rules of international humanitarian law, one of the paramount purposes of which is to protect civilian life. Illegal actions and unilateral decisions have been taken on all sides, whereas, in the Court's view, this tragic situation can be brought to an end only through implementation in good faith of all relevant Security Council resolutions, in particular resolutions 242 (1967) and 338 (1973). The "Roadmap" approved by Security Council resolution 1515 (2003) represents the most recent of efforts to initiate negotiations to this end. The Court considers that it has a duty to draw the attention of the General Assembly, to which the present Opinion is addressed, to the need for these efforts to be encouraged with a view to achieving as soon as possible, on the basis of international law, a negotiated solution to the outstanding problems and the establishment of a Palestinian State, existing side by side with Israel and its other neighbours, with peace and security for all in the region.

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Separate opinion of Judge Koroma

In his separate opinion Judge Koroma stated that although he concurred with the Court's ruling that the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East

Jerusalem, and its associated régime are contrary to international law, he thought the following points worth stressing.

In his view, the construction of the wall has involved the annexation of parts of the occupied territory and the dispossession of some of the Palestinians of their land, contrary to international law (in particular, the principle of the non-acquisition of territory by force), human rights law and international humanitarian law, according to which the rights of an occupying Power in an occupied territory and over the inhabitants are of a limited nature; such rights do not amount to sovereign rights which would entitle the occupier to bring about changes in the status of that territory such as the construction of the wall. In other words, it is a violation of the existing law for an occupying Power unilaterally by its action to bring about changes in the status of a territory under its military occupation.

On the issue of jurisdiction, Judge Koroma stated that while it is understandable for a diversity of legal views to exist on the question submitted to the Court, he is of the opinion that the objection that the Court lacks jurisdiction to consider the issues raised in the question is not sustainable when seen in the light of the United Nations Charter, the Statute of the Court and its jurisprudence; also not sustainable, in his view, is the objection based on judicial propriety—a matter which the Court considered extensively in terms of the fair administration of justice. In the judge's view, not only is the question presented to the Court an eminently legal one susceptible of a legal response but no compelling evidence was adduced to persuade the Court to deny itself its advisory competence.

Equally worth stressing were the Court's finding regarding the right to self-determination of the Palestinian people including the establishment of a State of their own as envisaged in resolution 181 (II) and the finding that the construction of the wall would be an impediment to the realization of that right.

He also emphasized the authoritative character of the findings of the Court, some of which are based on the principles of *jus cogens* and are of an *erga omnes* character.

Also of importance is the call upon the parties to the conflict to respect the principles of humanitarian law, in particular the Fourth Geneva Convention, in the ongoing hostilities.

Finally, the judge stated that, the Court having made its findings, it was now up to the General Assembly to utilize those findings in such a way as to bring about a just and peaceful solution to the Israeli-Palestinian conflict, a conflict which has not only lasted for too long but has been the cause of enormous suffering to those directly involved and has poisoned international relations in general.

Separate opinion of Judge Higgins

Judge Higgins, who voted with the Court on each of the paragraphs in the *dispositif,* expounds in her separate opinion on some of the problems faced by the Court in deciding whether it should exercise its discretion to decline to respond to the question put to it. In her view, a condition elaborated by the Court in the *Western Sahara Advisory Opinion* is not met—namely, that where two States are in dispute, an opinion should not be requested by the General Assembly "in order that it may later, on the basis of the Court's opinion, exercise its powers and functions for the peaceful settlement of that dispute or controversy" (*I.C.J. Reports 1975,* p. 26, para. 39). Participants in this case made clear that the intention was precisely to use any opinion to bring pressure to bear.

Judge Higgins further opines that it is in principle undesirable for a question to be put to the Court, while precluding it from looking at the context in which the problem has arisen. She specifies what the Court should have done, both to ensure that the Opinion was balanced and evenhanded, and to make use of the possibilities afforded by an advisory opinion to remind both Palestine and Israel of their responsibilities under international law.

Judge Higgins further explains that, while she agrees that Articles 46 and 52 of the Hague Regulations and Article 53 of the Fourth Geneva Convention have been violated by the building of the wall within the Occupied Territory, she does not fully share all the reasoning of the Court in arriving at this conclusion. In particular, she doubts the wall constitutes a "serious impediment" to the exercise of Palestinian right to self-determination, seeing the real impediment as lying elsewhere. While she agrees that Israel may not exclude wrongfulness by invoking the right of self-defence, her reasons are different from those of the Court, whose views on self-defence as expressed in paragraph 139 of this Opinion she does not share.

As to the legal consequences of the Court's findings, Judge Higgins notes that while she has voted in favour, *inter alia,* of subparagraph (3) (D), she does not believe that the obligations incumbent on United Nations Members stem from or rely on the legal concept of obligations *erga omnes.*

Separate opinion of Judge Kooijmans

Judge Kooijmans starts by summarily explaining why he voted against operative subparagraph (3) (D).

He then sketches the background and context of the General Assembly's request. He feels that the Court should have described more in detail this context; the Opinion would then have reflected in a more satisfactory way the legitimate interests and responsibilities of all groups and persons involved.

Judge Kooijmans then makes some comments on jurisdictional issues and the question of judicial propriety. He is of the view that the request, which is premised on the illegality of the construction of the wall, is drafted in a rather infelicitous way; it is, however, the Court's judicial responsibility to analyse the request and, if necessary, to restate its object.

With regard to the merits Judge Kooijmans dissociates himself from the Court's finding that the construction of the wall constitutes a breach of Israel's obligation to respect the Palestinian people's right to self-determination. The realization of that right is part of the much wider political process, although he agrees with the Court that the wall impedes its realization.

Judge Kooijmans further regrets that the measures taken by Israel have not been put to the proportionality test but merely to that of military exigencies and requirements of national

security; in international humanitarian law the criteria of military necessity and proportionality are closely linked.

With regard to Israel's claim to have acted in self-defence Judge Kooijmans observes that the Court has failed to note that Security Council resolutions 1368 (2001) and 1373 (2001) on which Israel relies do not refer to an armed attack by another State but that it correctly points out that these resolutions refer to acts of *international* terrorism. In the present case the terrorist acts have their origin in territory which is under Israeli control.

Finally Judge Kooijmans explains why he supports the Court's findings on the legal consequences for the United Nations and for Israel but why he dissociates himself from the findings vis-à-vis other States with the exception of the duty not to render aid or assistance in maintaining the situation created by the construction of the wall.

With regard to the duty of non-recognition and the duty to ensure respect for compliance by Israel with international humanitarian law Judge Kooijmans is of the view that the Court's findings are not well founded in positive international law and that, moreover, these duties are without real substance.

Separate opinion of Judge Al-Khasawneh

Judge Al-Khasawneh, appending a separate opinion, expressed his agreement with the Court's findings and its reasoning but wished to elucidate three points:

Firstly, that the characterization of Israel's presence in the West Bank including East Jerusalem and Gaza as one of military occupation, rests on solid *opinio juris* and is supported by many resolutions, some of a binding nature, as well as the position of governments individually or in groups. The Court, while taking cognizance of that constant *opinio juris,* arrived at similar conclusions independently of those resolutions and other findings. The Court was wise, Judge Al-Khasawneh said, in not enquiring into the precise prior status of the occupied territories before 1967, because a finding that these territories are occupied and that the international legal régime of occupation applies in them can be arrived at without reference to their prior status. Moreover, except on the impossible thesis that the territories were *terra nullius* would their previous status matter. No one can seriously argue that those territories were *terra nullius* for that is a discredited concept that does not have relevance in the contemporary world. Moreover, the territories were part of mandatory territory and the right to self-determination of their inhabitants was not extinguished and would not be until the Palestinians achieved that right.

Secondly, Judge Al-Khasawneh advanced the question of the Green Line recalling that before 1967 prominent Israeli jurists sought to prove it was more than a mere armistice line, at the present it is the point from which Israeli occupation is measured. Denigrating the importance of that Line works both ways and opens the door for questioning Israel's title and its territory expanse beyond what was envisioned in the partition plan of Palestine in 1947.

Thirdly, Judge Al-Khasawneh recalled that referring to negotiations is possible but they are a means to an end and not an end to themselves. If they are not going to produce non-principled solutions they should be grounded in law. They should be conducted in good faith that should be concretized by not creating faits accomplis.

Declaration of Judge Buergenthal

In Judge Buergenthal's view the Court should have exercised its discretion and declined to render the requested advisory opinion because it lacked sufficient information and evidence to render the opinion. The absence in this case of the requisite factual basis vitiates the Court's sweeping findings on the merits, which is the reason for his dissenting votes.

Judge Buergenthal is prepared to assume that on a thorough analysis of all relevant facts, a finding could well be made that some or even all segments of the wall being constructed by Israel in the Occupied Palestinian Territory violate international law. But he believes that for the Court to reach such conclusion with regard to the wall as a whole without having before it or seeking to ascertain all relevant facts bearing directly on issues of Israel's legitimate right of self-defence, military necessity and security needs, given the repeated deadly terrorist attacks in and upon Israel proper coming from the Occupied Palestinian Territory to which Israel has been and continues to be subjected, cannot be justified as a matter of law. In this connection, Judge Buergenthal shows that the right of self-defence does not apply only to attacks by State actors and that armed attacks on Israel proper originating from the Occupied Palestinian Territory must be deemed, in the context of this case, to meet the requirements of Article 51 of the United Nations Charter.

Judge Buergenthal also concludes that the Court's overall findings that the wall violates international humanitarian law and human rights instruments are not convincing because they fail to address any facts or evidence specifically rebutting Israel's claim of military exigencies or requirements of national security. Judge Buergenthal recognises, however, that some international humanitarian law provisions the Court cites admit of no exceptions based on military exigencies, namely, Article 46 of the Hague Rules and paragraph 6 of Article 49 of the Fourth Geneva Convention. While Judge Buergenthal believes that the Court's analysis of the relevance to this case of Article 46 is not well founded, he concludes that Article 49, paragraph 6, which provides that "the Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies", applies to the Israeli settlements in the West Bank, and that they violate Article 49, paragraph 6. Hence, the segments of the wall being built by Israel to protect the settlements are *ipso facto* in violation of that provision.

Finally, Judge Buergenthal notes that it could be argued that the Court lacked many relevant facts bearing on the legality of Israel's construction of the wall because Israel failed to present them, and that the Court was therefore justified in relying almost exclusively on the United Nations reports submitted to it. This would be true if, instead of dealing with an advisory opinion request, the Court had before it a contentious case where each party has the burden of proving its claims. That is not the rule applicable to advisory opinion proceedings. Israel had no legal obligation to participate in these proceedings or

to adduce evidence supporting its claim regarding the legality of the wall. Consequently, the Court may not draw any adverse evidentiary conclusions from Israel's failure to supply it or assume, without itself fully inquiring into the matter, that the information before it is sufficient to support its sweeping legal conclusions.

Separate opinion of Judge Elaraby

Judge Elaraby expressed his complete and unqualified support for the findings and conclusions of the Court. He, however, considered it necessary to append a separate opinion in order to elaborate on some of the historical and legal aspects in the Advisory Opinion.

He first addressed the nature and scope of the United Nations responsibility towards Palestine, which has its genesis in General Assembly resolution 181 (II) of 29 November 1947. Known as the Partition Resolution, it called for the establishment of two independent States, one Arab and one Jewish, and affirmed that the period prior to the realization of the objective "shall be a transitional period".

Judge Elaraby then addressed the international legal status of the Occupied Palestinian Territory, and the legal implications of the Mandate over Palestine and its termination by the General Assembly. Judge Elaraby also recalled that the Court has, in the *South West Africa* and *Namibia* cases, held that former mandatory territories were "a sacred trust of civilization" and were "not to be annexed". He also referred to Israel's various undertakings to withdraw and to respect the territorial integrity of the Occupied Palestinian Territory.

In a third section of his separate opinion, he provided a brief analysis of the effects of the prolonged Israeli occupation, and the limitations in the rules of *jus in bello* that ensure protection for non-combatants. He considers that the breaches by Israel of international humanitarian law should have been characterized as grave breaches.

Judge Elaraby also commented on the Court's finding that "the construction of the wall severely impedes the exercise of the Palestinian people of their right to self-determination". He is of the view that this important finding should have been reflected in the *dispositif*.

Separate opinion of Judge Owada

In his separate opinion Judge Owada concurs with the conclusions of the Advisory Opinion of the Court, both on the preliminary issues of jurisdiction and of judicial propriety in exercising jurisdiction, and on most of the points belonging to the merits. He however has some reservations about the way the Court has proceeded in exercising its judicial propriety in the present case.

More specifically, Judge Owada is of the view that the Court should have approached the issue of judicial propriety, not simply in terms of whether it should comply with the request for an advisory opinion, but also in terms of how it should exercise jurisdiction once it has decided to exercise it, with a view to ensuring fairness in the administration of justice in the case which involves an underlying bilateral dispute. In this situation, consideration of fairness in the administration of justice would also require fair treatment of the positions of the parties involved in the subject-matter with regard to the assessment of facts and of law. Finally, Judge Owada would have wished to see in the Opinion of the Court a categorical rejection by the Court of the tragic circle of indiscriminate violence perpetrated by both sides against innocent civilian populations, which forms an important background to the present case.

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149. CASE CONCERNING LEGALITY OF USE OF FORCE (SERBIA AND MONTENEGRO *v.* BELGIUM) (PRELIMINARY OBJECTIONS)

Judgment of 15 December 2004

In its Judgment in the case concerning *Legality of the Use of Force* (*Serbia and Montenegro* v. *Belgium*), the Court unanimously concluded that it had no jurisdiction to entertain the claims made in the Application filed by Serbia and Montenegro against Belgium on 29 April 1999.

The Court was composed as follows: President Shi; Vice-President Ranjeva; Judges Guillaume, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal, Elaraby, Owada, Tomka; Judge *ad hoc* Kreća; Registrar Couvreur.

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The text of the operative paragraph (para. 129) of the Judgment reads as follows:

" . . .

The Court,

Unanimously,

Finds that it has no jurisdiction to entertain the claims made in the Application filed by Serbia and Montenegro on 29 April 1999."

*

* *

Vice-President Ranjeva and Judges Guillaume, Higgins, Kooijmans, Al-Khasawneh, Buergenthal and Elaraby

appended a joint declaration to the Judgment of the Court; Judge Koroma appended a declaration to the Judgment of the Court; Judges Higgins, Kooijmans and Elaraby and Judge *ad hoc* Kreća appended separate opinions to the Judgment of the Court.

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History of the proceedings and submissions of the Parties (paras. 1–24)

On 29 April 1999 the Government of the Federal Republic of Yugoslavia (with effect from 4 February 2003, "Serbia and Montenegro") filed in the Registry of the Court an Application instituting proceedings against the Kingdom of Belgium (hereinafter "Belgium") in respect of a dispute concerning acts allegedly committed by Belgium.

> "by which it has violated its international obligation banning the use of force against another State, the obligation not to intervene in the internal affairs of another State, the obligation not to violate the sovereignty of another State, the obligation to protect the civilian population and civilian objects in wartime, the obligation to protect the environment, the obligation relating to free navigation on international rivers, the obligation regarding fundamental human rights and freedoms, the obligation not to use prohibited weapons, the obligation not to deliberately inflict conditions of life calculated to cause the physical destruction of a national group".

The Application invoked as a basis of the Court's jurisdiction Article 36, paragraph 2, of the Statute of the Court, as well as Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the United Nations General Assembly on 9 December 1948 (hereinafter "the Genocide Convention").

On 29 April 1999, immediately after filing its Application, the Federal Republic of Yugoslavia also submitted a request for the indication of provisional measures pursuant to Article 73 of the Rules of Court.

On the same day, the Federal Republic of Yugoslavia filed Applications instituting proceedings and submitted requests for the indication of provisional measures, in respect of other disputes arising out of the same facts, against Canada, the French Republic, the Federal Republic of Germany, the Italian Republic, the Kingdom of the Netherlands, the Portuguese Republic, the Kingdom of Spain, the United Kingdom of Great Britain and Northern Ireland and the United States of America.

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: the Yugoslav Government chose Mr. Milenko Kreća and the Belgian Government chose Mr. Patrick Duinslaeger. Referring to Article 31, paragraph 5, of the Statute, the Yugoslav Government objected to the latter choice. The Court, after deliberating, found that the nomination of a judge *ad hoc* by Belgium was justified in the provisional measures phase of the case.

By letter of 12 May 1999 the Agent of the Federal Republic of Yugoslavia submitted a "Supplement to the Application", invoking as a further basis for the Court's jurisdiction "Article 4 of the Convention of Conciliation, Judicial Settlement and Arbitration between the Kingdom of Yugoslavia and Belgium, signed at Belgrade on 25 March 1930 and in force since 3 September 1930".

By ten Orders dated 2 June 1999 the Court, after hearing the Parties, rejected the request for the indication of provisional measures in all of the cases, and further decided to remove from the List the cases against Spain and the United States of America.

On 5 July 2000, within the time–limit fixed for the filing of its Counter-Memorial, Belgium, referring to Article 79, paragraph 1, of the Rules, submitted preliminary objections relating to the Court's jurisdiction to entertain the case and to the admissibility of the Application. Accordingly, the proceedings on the merits were suspended.

On 20 December 2002, within the prescribed time-limit as twice extended by the Court at the request of the Federal Republic of Yugoslavia, the latter filed a written statement of its observations and submissions on those preliminary objections (hereinafter referred to as its "Observations"), together with identical written statements in the seven other pending cases.

Pursuant to Article 24, paragraph 1, of the Statute, on 25 November 2003 Judge Simma informed the President that he considered that he should not take part in any of the cases.

At a meeting held by the President of the Court on 12 December 2003 with the representatives of the Parties in the eight cases concerning *Legality of Use of Force,* the questions of the presence on the Bench of judges *ad hoc* during the preliminary objections phase and of a possible joinder of the proceedings were discussed, among other issues. By letter of 23 December 2003 the Registrar informed the Agents of all the Parties that the Court had decided, pursuant to Article 31, paragraph 5, of the Statute, that, taking into account the presence upon the Bench of judges of British, Dutch and French nationality, the judges *ad hoc* chosen by the respondent States should not sit during the current phase of the procedure in these cases. The Agents were also informed that the Court had decided that a joinder of the proceedings would not be appropriate at that stage.

Public sittings in all the cases were held between 19 and 23 April 2004.

After setting out the Parties' claims in their written pleadings (which are not reproduced here), the Judgment recalls that, at the oral proceedings, the following final submissions were presented by the Parties:

On behalf of the Belgian Government,

at the hearing of 22 April 2004:

> "In the case concerning the *Legality of the Use of Force (Serbia and Montenegro* v. *Belgium),* for the reasons set out in the Preliminary Objections of Belgium dated 5 July 2000, and also for the reasons set out during the oral submissions on 19 and 22 April 2004, Belgium requests the Court to:

(a) remove the case brought by Serbia and Montenegro against Belgium from the List;

(b) in the alternative, to rule that the Court lacks jurisdiction in the case brought by Serbia and Montenegro against Belgium and/or that the case brought by Serbia and Montenegro against Belgium is inadmissible."

On behalf of the Government of Serbia and Montenegro

at the hearing of 23 April 2004:

"For the reasons given in its pleadings, and in particular in its Written Observations, subsequent correspondence with the Court, and at the oral hearing, Serbia and Montenegro requests the Court:

— to adjudge and declare on its jurisdiction *ratione personae* in the present cases; and

— to dismiss the remaining preliminary objections of the respondent States, and to order proceedings on the merits if it finds it has jurisdiction *ratione personae*."

Before proceeding to its reasoning, the Court includes a paragraph (para. 25) dealing with the Applicant's change of name on 4 February 2003 from "Federal Republic of Yugoslavia" to "Serbia and Montenegro". It explains that, as far as possible, except where the term in a historical context might cause confusion, it will use the name "Serbia and Montenegro", even where reference is made to a procedural step taken before the change.

Dismissal of the case in limine litis
(paras. 26–44)

The Court begins by observing that it must first deal with a preliminary question that has been raised in each of the cases, namely the contention, presented in various forms by the eight respondent States, that, as a result of the changed attitude of the Applicant to the question of the Court's jurisdiction as expressed in its Observations, the Court is no longer required to rule on those objections to jurisdiction, but can simply dismiss the cases *in limine litis* and remove them from its List, without enquiring further into matters of jurisdiction.

The Court then examines a number of arguments advanced by different Respondents as possible legal grounds that would lead the Court to take this course, including, *inter alia:* (i) that the position of Serbia and Montenegro is to be treated as one that in effect results in a discontinuance of the proceedings or that the Court should *ex officio* put an end to the case in the interests of the proper administration of justice; (ii) that there is agreement between the Parties on a "question of jurisdiction that is determinative of the case", and that as a result there is now no "dispute as to whether the Court has jurisdiction"; (iii) that the substantive dispute under the Genocide Convention has disappeared and thus the whole dispute has disappeared in those cases in which the only ground of jurisdiction relied on is Article IX of that Convention; (iv) that Serbia and Montenegro, by its conduct, has forfeited or renounced its right of action in the present case and is now estopped from pursuing the proceedings.

The Court finds itself unable to uphold the various contentions of the Respondents. The Court considers that it is unable to treat the Observations of Serbia and Montenegro as having the legal effect of a discontinuance of the proceedings under Article 88 or 89 of the Rules of Court and finds that the case does not fall into the category of cases in which it may of its own motion put an end to proceedings in a case. As regards the argument advanced by certain Respondents that the dispute on jurisdiction has disappeared since the Parties now agree that the Applicant was not a party to the Statute at the relevant time, the Court points out that Serbia and Montenegro has not invited the Court to find that it has no jurisdiction; while it is apparently in agreement with the arguments advanced by the Respondents in that regard in their preliminary objections, it has specifically asked in its submissions for a decision of the Court on the jurisdictional question. This question, in the view of the Court, is a legal question independent of the views of the parties upon it. As to the argument concerning the disappearance of the substantive dispute, it is clear that Serbia and Montenegro has by no means withdrawn its claims as to the merits. Indeed, these claims were extensively argued and developed in substance during the hearings on jurisdiction, in the context of the question of the jurisdiction of the Court under Article IX of the Genocide Convention. It is equally clear that these claims are being vigorously denied by the Respondents. It could not even be said under these circumstances that, while the essential dispute still subsists, Serbia and Montenegro is no longer seeking to have its claim determined by the Court. Serbia and Montenegro has not sought a discontinuance and has stated that it "wants the Court to continue the case and to decide upon its jurisdiction—and to decide on the merits as well, if it has jurisdiction". The Court therefore finds itself unable to conclude that Serbia and Montenegro has renounced any of its substantive or procedural rights, or has taken the position that the dispute between the Parties has ceased to exist. As for the argument based on the doctrine of estoppel, the Court does not consider that Serbia and Montenegro, by asking the Court "to decide on its jurisdiction" on the basis of certain alleged "new facts" about its own legal status vis-à-vis the United Nations, should be held to have forfeited or renounced its right of action and to be estopped from continuing the present action before the Court.

For all these reasons, the Court concludes that it cannot remove the cases concerning *Legality of Use of Force* from the List, or take any decision putting an end to those cases *in limine litis*. In the present phase of the proceedings, it must proceed to examine the question of its jurisdiction to entertain the case.

Serbia and Montenegro's access to the Court under Article 35, paragraph 1, of the Statute
(paras. 45–91)

The Court recalls that the Application filed on 29 April 1999 stated that "[t]he Government of the Federal Republic of Yugoslavia invokes Article 36, paragraph 2, of the Statute of the International Court of Justice as well as Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide". The Court further recalls that Serbia and Montenegro claims as an additional basis of jurisdiction "Article 4 of the Convention of Conciliation, Judicial Settlement and Arbitration between the Kingdom of Yugoslavia and Bel-

gium, signed at Belgrade on 25 March 1930 and in force since 3 September 1930".

The Court notes that in its jurisprudence it has referred to "its freedom to select the ground upon which it will base its judgment", and that, when its jurisdiction is challenged on diverse grounds, it is free to base its decision on one or more grounds of its own choosing, in particular "the ground which in its judgment is more direct and conclusive". However, in those instances, the Parties to the cases before the Court were, *without doubt,* parties to the Statute of the Court and the Court was thus open to them under Article 35, paragraph 1, of the Statute. The Court points out that this is not the case in the present proceedings, in which an objection has been made regarding the right of the Applicant to have access to the Court. And it is this issue of access to the Court which distinguishes the present case from those cited in the jurisprudence concerned.

The Court observes that the question whether Serbia and Montenegro was or was not a party to the Statute of the Court at the time of the institution of the present proceedings is fundamental; for if it were not such a party, the Court would not be open to it under Article 35, paragraph 1, of the Statute. In that situation, subject to any application of paragraph 2 of that Article, Serbia and Montenegro could not have properly seised the Court, whatever title of jurisdiction it might have invoked, for the simple reason that it did not have the right to appear before the Court. Hence, the Court must first examine the question whether the Applicant meets the conditions laid down in Articles 34 and 35 of the Statute for access to the Court. Only if the answer to that question is in the affirmative, will the Court have to deal with the issues relating to the conditions laid down in Articles 36 and 37 of the Statute.

The Court notes in this respect that there is no doubt that Serbia and Montenegro is a State for the purpose of Article 34, paragraph 1, of the Statute. However, certain Respondents objected that, at the time of the filing of its Application on 29 April 1999, that State did not meet the conditions set down in Article 35 of the Statute.

Thus Belgium argued, *inter alia,* that:

> "The FRY [the Federal Republic of Yugoslavia] is not now and has never been a member of the United Nations. This being the case, there is no basis for the FRY's claim to be a party to the *Statute* of the Court pursuant to Article 93 (1) of the *Charter.* The Court is not therefore, on this basis open to the FRY in accordance with Article 35 (1) of the *Statute*." (Preliminary Objections of Belgium, p. 69, para. 206; emphasis original.)

The Court then recapitulates the sequence of events relating to the legal position of the Applicant vis-à-vis the United Nations over the period 1992–2000. It refers, *inter alia,* to the following: the break-up of the Socialist Federal Republic of Yugoslavia in 1991–1992; a declaration of 27 April 1992 by the SFRY Assembly, the National Assembly of the Republic of Serbia and the Assembly of the Republic of Montenegro asserting the continuation of the international legal and political personality of the SFRY by the Federal Republic of Yugoslavia; a note of the same day from Yugoslavia to the United Nations Secretary-General asserting the continuation by the FRY of the membership of the SFRY in the Organization; Security Council resolution 777 of 1992 considering that the FRY could not continue automatically the SFRY's membership; General Assembly resolution 47/1 of 1992 stating that the FRY shall not participate in the work of the General Assembly; and a letter dated 29 September 1992 from the United Nations Legal Counsel regarding the "practical consequences" of General Assembly resolution 47/1.

The Court concludes that the legal situation that obtained within the United Nations during the period 1992–2000 concerning the status of the Federal Republic of Yugoslavia remained ambiguous and open to different assessments. This was due, *inter alia,* to the absence of an authoritative determination by the competent organs of the United Nations defining clearly the legal status of the Federal Republic of Yugoslavia vis-à-vis the United Nations.

The Court notes that three different positions were taken within the United Nations. In the first place, there was the position taken by the two political organs concerned. The Court refers in this respect to Security Council resolution 777 (1992) of 19 September 1992 and to General Assembly resolution 47/1 of 22 September 1992, according to which "the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations", and "should apply for membership in the United Nations". The Court points out that, while it is clear from the voting figures that these resolutions reflected a position endorsed by the vast majority of the Members of the United Nations, they cannot be construed as conveying an authoritative determination of the legal status of the Federal Republic of Yugoslavia within, or vis-à-vis, the United Nations. The uncertainty surrounding the question is evidenced, *inter alia,* by the practice of the General Assembly in budgetary matters during the years following the break-up of the Socialist Federal Republic of Yugoslavia.

The Court recalls that, secondly, the Federal Republic of Yugoslavia, for its part, maintained its claim that it continued the legal personality of the Socialist Federal Republic of Yugoslavia, "including its membership in all international organizations and participation in international treaties ratified or acceded to by Yugoslavia". This claim had been clearly stated in the official Note of 27 April 1992 from the Permanent Mission of Yugoslavia to the United Nations addressed to the Secretary-General of the United Nations. It was sustained by the Applicant throughout the period from 1992 to 2000.

Thirdly, another organ that came to be involved in this problem was the Secretariat of the United Nations. In the absence of any authoritative determination, the Secretariat, as the administrative organ of the Organization, simply continued to keep to the practice of the *status quo ante* that had prevailed prior to the break-up of the Socialist Federal Republic of Yugoslavia in 1992.

The Court points out that it was against this background that the Court itself, in its Judgment of 3 February 2003 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)* (hereinafter the "*Application for Revision* case"), referred to the "*sui generis* position which the FRY found itself in" during the relevant period; however, in that case, no final and definitive conclusion was drawn by the Court from this descriptive term on the amorphous status of the Federal Republic of Yugoslavia vis-à-vis or within the United Nations during this period.

The Court considers that this situation came to an end with a new development in 2000. On 27 October of that year, the Federal Republic of Yugoslavia requested admission to membership in the United Nations, and on 1 November, by General Assembly resolution 55/12, it was so admitted. Serbia and Montenegro thus has the status of membership in the Organization as from 1 November 2000. However, its admission to the United Nations did not have, and could not have had, the effect of dating back to the time when the SFRY broke up and disappeared. It became clear that the *sui generis* position of the Applicant could not have amounted to its membership in the Organization.

In the view of the Court, the significance of this new development in 2000 is that it has clarified the thus far amorphous legal situation concerning the status of the Federal Republic of Yugoslavia vis-à-vis the United Nations.

The Court finds that from the vantage point from which it now looks at the legal situation, and in light of the legal consequences of the new development since 1 November 2000, it is led to the conclusion that Serbia and Montenegro was not a Member of the United Nations, and in that capacity a State party to the Statute of the International Court of Justice, at the time of filing its Application.

A further point the Court considers is the relevance to the present case of the Judgment in the *Application for Revision* case, of 3 February 2003. The Court points out that, given the specific characteristics of the procedure under Article 61 of the Statute, in which the conditions for granting an application for revision of a judgment are strictly circumscribed, there is no reason to treat the Judgment in the *Application for Revision* case as having pronounced upon the issue of the legal status of Serbia and Montenegro vis-à-vis the United Nations. Nor does the Judgment pronounce upon the status of Serbia and Montenegro in relation to the Statute of the Court.

For all these reasons, the Court concludes that, at the time when the present proceedings were instituted, the Applicant in the present case, Serbia and Montenegro, was not a Member of the United Nations, and consequently, was not, on that basis, a State party to the Statute of the International Court of Justice. The Applicant not having become a party to the Statute on any other basis, it follows that the Court was not then open to it under Article 35, paragraph 1, of the Statute.

Serbia and Montenegro's possible access to the Court on the basis of Article 35, paragraph 2, of the Statute
(paras. 92–114)

The Court then considers whether it might be open to Serbia and Montenegro under paragraph 2 of Article 35, which provides:

> "The conditions under which the Court shall be open to other States [i.e. States not parties to the Statute] shall, subject to the special provisions contained in treaties in force, be laid down by the Security Council, but in no case shall such conditions place the parties in a position of inequality before the Court."

In this regard, it quotes from its Order of 8 April 1993 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)* (hereinafter the "*Genocide Convention* case"), where it stated, *inter alia,* that a "compromissory clause in a multilateral convention, such as Article IX of the Genocide Convention relied on by Bosnia and Herzegovina in the present case, *could,* in the view of the Court, be regarded *prima facie* as a special provision contained in a treaty in force" (emphasis added).

The Court recalls that a number of Respondents contended in their pleadings that the reference to "treaties in force" in Article 35, paragraph 2, of the Statute relates only to treaties in force when the Statute of the Court entered into force, i.e. on 24 October 1945. In respect of the Order of 8 April 1993 in the *Genocide Convention* case, the Respondents pointed out that that was a provisional assessment, not conclusive of the matter, and considered that "there [were] persuasive reasons why the Court should revisit the provisional approach it adopted to the interpretation of this clause in the *Genocide Convention* case".

The Court notes that the passage from the 1993 Order in the *Genocide Convention* case was addressed to the situation in which the proceedings were instituted against a State whose membership in the United Nations and status as a party to the Statute was unclear. It observes that the Order of 8 April 1993 was made on the basis of an examination of the relevant law and facts in the context of incidental proceedings on a request for the indication of provisional measures, and concludes that it would therefore now be appropriate for the Court to make a definitive finding on the question whether Article 35, paragraph 2, affords access to the Court in the present case, and for that purpose, to examine further the question of its applicability and interpretation.

The Court thus proceeds to the interpretation of Article 35, paragraph 2, of the Statute, and does so in accordance with customary international law, as reflected in Article 31 of the 1969 Vienna Convention on the Law of Treaties. According to paragraph 1 of Article 31, a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of the treaty's object and purpose. Interpretation must be based above all upon the text of the treaty. As a supplementary measure recourse may be had to means of interpretation such as the preparatory work of the treaty and the circumstances of its conclusion.

The Court points out that the words "treaties in force" in Article 35, paragraph 2, do not, in their natural and ordinary meaning, indicate at what date the treaties contemplated are to be in force, and may thus lend themselves to different interpretations. They may be interpreted as referring either to treaties which were in force at the time that the Statute itself came into force, or to those which were in force on the date of

the institution of proceedings in a case in which such treaties are invoked.

The Court observes that the object and purpose of Article 35 of the Statute is to define the conditions of access to the Court. While paragraph 1 of that Article opens it to the States parties to the Statute, paragraph 2 is intended to regulate access to the Court by States which are not parties to the Statute. It would have been inconsistent with the main thrust of the text to make it possible in the future for States not parties to the Statute to obtain access to the Court simply by the conclusion between themselves of a special treaty, multilateral or bilateral, containing a provision to that effect.

The Court moreover notes that the interpretation of Article 35, paragraph 2, whereby that paragraph is to be construed as referring to treaties in force at the time that the Statute came into force, is in fact reinforced by an examination of the *travaux préparatoires* of the text; the Court considers that the legislative history of Article 35, paragraph 2, of the Statute of the Permanent Court of International Justice (hereinafter the "Permanent Court") demonstrates that it was intended as an exception to the principle stated in paragraph 1, in order to cover cases contemplated in agreements concluded in the aftermath of the First World War before the Statute entered into force. However, the *travaux préparatoires* of the Statute of the present Court are less illuminating. The discussion of Article 35 was provisional and somewhat cursory; it took place at a stage in the planning of the future international organization when it was not yet settled whether the Permanent Court would be preserved or replaced by a new court. Indeed, the records do not include any discussion which would suggest that Article 35, paragraph 2, of the Statute should be given a different meaning from the corresponding provision in the Statute of the Permanent Court. It would rather seem that the text was reproduced from the Statute of the Permanent Court; there is no indication that any extension of access to the Court was intended.

Accordingly Article 35, paragraph 2, must be interpreted, *mutatis mutandis,* in the same way as the equivalent text in the Statute of the Permanent Court, namely as intended to refer to treaties in force at the date of the entry into force of the new Statute, and providing for the jurisdiction of the new Court. In fact, no such prior treaties, referring to the jurisdiction of the present Court, have been brought to the attention of the Court, and it may be that none exist. In the view of the Court, however, neither this circumstance, nor any consideration of the object and purpose of the text, nor the *travaux préparatoires,* offer support to the alternative interpretation that the provision was intended as granting access to the Court to States not parties to the Statute without any condition other than the existence of a treaty, containing a clause conferring jurisdiction on the Court, which might be concluded at any time subsequently to the entry into force of the Statute. As previously observed, this interpretation would lead to a result quite incompatible with the object and purpose of Article 35, paragraph 2, namely the regulation of access to the Court by States non-parties to the Statute. In the view of the Court therefore, the reference in Article 35, paragraph 2, of the Statute to "the special provisions contained in treaties in force" applies only to treaties in force at the date of the entry into force of the Statute, and not to any treaties concluded since that date.

The Court thus concludes that, even assuming that Serbia and Montenegro was a party to the Genocide Convention at the relevant date, Article 35, paragraph 2, of the Statute does not provide it with a basis to have access to the Court, under Article IX of that Convention, since the Convention only entered into force on 12 January 1951, after the entry into force of the Statute. The Court does not therefore consider it necessary to decide whether Serbia and Montenegro was or was not a party to the Genocide Convention on 29 April 1999 when the current proceedings were instituted.

Jurisdiction on the basis of Article 4 of the 1930 Convention of Conciliation, Judicial Settlement and Arbitration between the Kingdom of Yugoslavia and Belgium
(paras. 115–126)

As noted above, by a letter of 12 May 1999, the Agent of Serbia and Montenegro submitted to the Court a "Supplement to the Application" against the Kingdom of Belgium. In that Supplement, it invoked as an additional ground of jurisdiction of the Court "Article 4 of the Convention of Conciliation, Judicial Settlement and Arbitration between the Kingdom of Yugoslavia and Belgium, signed at Belgrade on 25 March 1930 and in force since 3 September 1930" (hereinafter "the 1930 Convention").

The Court recalls its finding that Serbia and Montenegro was not a party to the Statute at the date of the filing of its Application instituting proceedings in this case, and consequently that the Court was not open to it at that time under Article 35, paragraph 1, of the Statute. Therefore, to the extent that Serbia and Montenegro's case rests on reliance on Article 35, paragraph 1, it is irrelevant whether or not the 1930 Convention could provide a basis of jurisdiction.

The question nonetheless remains whether the 1930 Convention, which was concluded prior to the entry into force of the Statute, might rank as a "treaty in force" for purposes of Article 35, paragraph 2, of the Statute, and hence provide a basis of access.

The Court observes that Article 35 of the Statute of the Court concerns access to the present Court and not to its predecessor, the Permanent Court. The conditions for transfer of jurisdiction from the Permanent Court to the present Court are governed by Article 37 of the Statute. However, this does not signify that a similar substitution is to be read into Article 35, paragraph 2, of the Statute, which relates, not to consensual jurisdiction, but to the conditions of access to the Court. The Court notes that Article 37 of the Statute can be invoked only in cases which are brought before it as between parties to the Statute, i.e. under paragraph 1 of Article 35, and not on the basis of paragraph 2 of that Article. It then adds, as regards jurisdiction, that when a treaty providing for the jurisdiction of the Permanent Court is invoked in conjunction with Article 37, the Court has to satisfy itself, *inter alia,* that both the Applicant and the Respondent were, at the moment when the dispute was submitted to it, parties to the Statute. As the Court observed in the *Barcelona Traction* case,

"three conditions are actually stated in the Article. They are that there should be a treaty or convention in force; that it should provide (i.e., make provision) for the reference of a 'matter' (i.e., the matter in litigation) to the Permanent Court; and that the dispute should be between States both or all of which are parties to the Statute."

Having already determined that Serbia and Montenegro was not a party to the Statute of the Court when the proceedings were instituted against Belgium, the Court accordingly concludes that Article 37 cannot give Serbia and Montenegro access to the present Court under Article 35, paragraph 2, on the basis of the 1930 Convention, irrespective of whether or not that instrument was in force on 29 April 1999 at the date of the filing of the Application.

Unnecessary to consider other preliminary objections (para. 127)

Having found that Serbia and Montenegro did not, at the time of the institution of the present proceedings, have access to the Court under either paragraph 1 or paragraph 2 of Article 35 of the Statute, the Court states that it is unnecessary for it to consider the other preliminary objections filed by the Respondents to its jurisdiction.

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The Court finally recalls (para. 128) that, irrespective of whether it has jurisdiction over a dispute, the parties "remain in all cases responsible for acts attributable to them that violate the rights of other States".

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Joint declaration of Vice-President Ranjeva and Judges Guillaume, Higgins, Kooijmans, Al-Khasawneh, Buergenthal and Elaraby

1. Vice-President Ranjeva and Judges Guillaume, Higgins, Kooijmans, Al-Khasawneh, Buergenthal and Elaraby voted in favour of the *dispositif* of the Judgments because they agree that these cases cannot, as a matter of law, proceed to the merits. They have added in their joint declaration that they nevertheless profoundly disagree with the reasoning adopted by the Court.

2. They note that when the Court finds in a case that, on two or more grounds, its jurisdiction is not well founded *ratione personae, ratione materiae* or *ratione temporis,* it may choose the most appropriate ground on which to base its decision of lack of competence. They point out that this choice must be guided by three criteria: consistency with the past case law; degree of certitude of the ground chosen; possible implications for the other pending cases.

3. In the present instances, according to the Judgments of the Court, Serbia and Montenegro was not a Member of the United Nations in 1999 and, as a result, was not then a party to the Statute of the Court. In the Judgments, the Court concludes therefrom that it was not at that time open to the Applicant under Article 35, paragraph 1, of the Statute. The Judgments go on to state that paragraph 2 of that Article enables States not parties to the Statute to appear before the Court only by virtue of Security Council decisions or treaties concluded prior to the entry into force of the Statute. It is observed in the Judgments that the United Nations Genocide Convention only entered into force in 1951. It is thus concluded that Article 35, paragraph 2, of the Statute does not grant Serbia and Montenegro access to the Court either.

4. In the view of the seven judges making the joint declaration, this solution is at odds with a number of previous decisions of the Court, in particular the Judgment rendered on 3 February 2003 in a case between Bosnia and Herzegovina and Yugoslavia, in which it was found that Yugoslavia could appear before the Court between 1992 and 2000 and that this position had not been changed by its admission to the United Nations in 2002. Further, the authors of the declaration note that in reality it is far from self-evident that Yugoslavia was not a Member of the United Nations at that time. Lastly, they regret that the Judgment leaves some doubt as to whether Yugoslavia was a party, between 1992 and 2000, to the United Nations Genocide Convention and thus could call into question the solutions adopted by the Court in the case brought by Bosnia and Herzegovina against Serbia and Montenegro. Thus, the Court's Judgment does not meet any of the three criteria set out in paragraph 2 above.

5. The seven judges finally observe that the Court could easily have founded its Judgment that it lacked jurisdiction on the grounds on which it relied in 1999 when the requests for the indication of provisional measures were considered. The Court then found that it lacked jurisdiction *ratione temporis* in respect of the declaration accepting the compulsory jurisdiction of the Court which Serbia and Montenegro had filed several weeks after the start of military operations in Kosovo. It also found itself to be without jurisdiction *ratione materiae* in respect of the United Nations Genocide Convention, as no genocidal intention had been established. These solutions could easily have been confirmed.

Declaration of Judge Koroma

In his declaration Judge Koroma stated that, while concurring in the Judgment, he considered it necessary to stress the following. The question which the Court was requested to rule on and which it in fact did decide in this phase of the case was the issue of jurisdiction, namely, whether the Court could entertain the merits of the case. The jurisdictional function is intended to establish whether the Court is entitled to enter into and adjudicate on the substantive issues in a case. This function, in his view, cannot be dispensed with as it is both required by law and stipulated in the Statute of the Court. It is this function that the Court has carried out in this Judgment and it is within this paradigm that the Judgment must be understood. The Judgment cannot be interpreted as the Court taking a position on any of the matters of substance before the Court.

Separate opinion of Judge Higgins

Judge Higgins agrees that Serbia and Montenegro have not discontinued the case. However, she disagrees with the apparent finding of the Court that a case may only be removed from

the List where there is a discontinuance by the applicant or the parties, or where an applicant disclosed no subsisting title of jurisdiction, or where the Court manifestly lacked jurisdiction (see paragraph 33 of the Judgment). In her view, the right of the Court exceptionally to remove a case from the List rests on its inherent powers, which are not limited to *a priori* categories.

Judge Higgins is of the opinion that the present case should have been removed from the List, as the Applicant has by its own conduct put itself in a position incompatible with Article 38, paragraph 2, of the Rules of Court. The manner in which it has dealt with preliminary objections would further warrant the case not being proceeded with.

Finally, Judge Higgins greatly regrets the attention the Court has afforded to Article 35, paragraph 2, of the Statute, believing its relevance lies only in another pending case.

Separate opinion of Judge Kooijmans

Judge Kooijmans has added a separate opinion to the Judgment and the joint declaration of seven Members of the Court, which he co-signed, for two reasons.

First he wishes to explain why in his view the Court should not have decided the issue of jurisdiction on the ground of Serbia and Montenegro's lack of access to the Court, although in 1999, when the Court rejected Yugoslavia's request for interim measures of protection, he was in favour of this approach. In his view, the Court has not in a convincing and transparent way elucidated the status of the Federal Republic of Yugoslavia vis-à-vis the United Nations before its admission to the Organization in 2000. Further, the Court's Judgment has undeniable implications for other pending cases, in particular the *Genocide Convention* case (*Bosnia Herzegovina* v. *Serbia and Montenegro*), which could easily have been avoided by choosing another approach. Finally, the Judgment is at odds with previous decisions of the Court, thus endangering the principle of consistency of reasoning. This consistency with earlier case law should prevail over present or earlier misgivings of individual judges if an approach in conformity with that consistency does not lead to legally untenable results.

In the second place Judge Kooijmans sets out why in his view the Court would have done better to dismiss the cases *in limine litis.* In 1999 the Applicant invoked two grounds of jurisdiction which it explicitly abandoned in its Written Observations of 20 December 2002 without replacing them by other grounds. Nevertheless it did not discontinue the case but asked the Court to decide *whether* it had jurisdiction. Thus the Applications did no longer meet the requirement of Article 38, paragraph 2, of the Rules of Court, which states that the application shall specify as far as possible the legal grounds upon which the jurisdiction of the Court is said to be based. Since the Court has the inherent power to strike a case from the General List in order to safeguard the integrity of the procedure, it should have done so in view of the fact that the Applicant has failed to demonstrate and even did not make an effort to demonstrate that a valid ground of jurisdiction existed.

Separate opinion of Judge Elaraby

Judge Elaraby voted in favour of the *dispositif,* but disagreed both with the grounds on which the Court decided to base its Judgment—Article 35, paragraph 1 and Article 35, paragraph 2 of the Court's Statute—and with the conclusions which the Court reached on each of these grounds. The joint declaration, to which Judge Elaraby is a signatory, explains why he believes that the Court should have chosen alternative grounds to reach its decision. His separate opinion explains why he disagrees with its substantive findings.

Beginning with the issue of access to the Court under Article 35, paragraph 1, Judge Elaraby explained why, in his view, the Federal Republic of Yugoslavia *was* a Member of the United Nations at the time it filed its Application in the case. He emphasized that, although the FRY was excluded from participation in the work of the General Assembly and its subsidiary organs, it remained, as the Court had previously found, a *sui generis* Member between 1992 and 2000. Thus Judge Elaraby pointed out that during this period it continued to exhibit many attributes of United Nations membership and was neither suspended nor expelled from the Organization under the relevant provisions of the United Nations Charter. On this basis, Judge Elaraby concluded that the FRY was a Member of the United Nations when it filed its Application in 1999 and, as a result, he disagreed with the Court's finding that it was not "open" to the FRY under Article 35, paragraph 1, of the Court's Statute.

He also disagreed with the Court's finding that, assuming the FRY was a non-Member of the United Nations, it would not have had access to the Court under Article 35, paragraph 2. For Judge Elaraby, the Court's interpretation of the term "treaties in force" in Article 35, paragraph 2, as meaning "treaties in force at the time the Statute of the Court entered into force" was unduly restrictive. Like the Court, Judge Elaraby analysed the relevant *travaux préparatoires,* but, unlike the Court, he found that the expression "treaties in force" should be read to include any treaties connected with the peace settlement following the Second World War, whether they entered into force before or after the Statute of the Court. This would include, according to Judge Elaraby, the Genocide Convention, a treaty drafted under the auspices of the United Nations in direct response to the tragic events of the Second World War. In the alternative, Judge Elaraby stated that, even if the Court's reading of "treaties in force" were adopted as a general rule, there should be an exception for treaties intended to remedy violations of *jus cogens.* These, he wrote, should be subject to a broader interpretation so that any State seeking access to the Court on the basis of a treaty that addresses a *jus cogens* violation could do so as long as the treaty was in force when the Application was filed.

Because Judge Elaraby concluded that the Court was open to the FRY under Article 35 when it filed its Application in 1999, he went on to assess whether the Court has jurisdiction *ratione personae* under Article IX of the Genocide Convention. He concluded that it does, because the FRY succeeded to the treaty obligations of the former Socialist Federal Republic of Yugoslavia, including the Genocide Convention. In reaching this conclusion he explained that, in cases involving the sepa-

ration of parts of the territory of a State to form one or more new States, Article 34 of the Vienna Convention on Succession of States in respect of Treaties embodied a customary rule of automatic succession by the new State to the treaties in force on the territory of its predecessor. He pointed out that it was all the more important for the Court to recognize and apply this rule in the case of a fundamental human rights treaty such as the Genocide Convention. Judge Elaraby thus concluded that the FRY was a party to the Genocide Convention on the basis of succession—not its subsequent purported accession and reservation—and therefore that the Court had jurisdiction *ratione personae*. He found, however, that the Court did not have jurisdiction *ratione materiae* under the Convention, so in the final analysis agreed with the Court that there was no jurisdiction to examine the merits of the FRY's case.

Separate opinion of Judge Kreća

Judge *ad hoc* Kreća noted that the Respondent, as well as the Applicant, attached crucial importance to the issue of *locus standi* of Serbia and Montenegro before the Court.

In the case at hand, it is closely, and even organically, linked with the membership of Serbia and Montenegro in the United Nations, due to the fact that it could not be considered as being party to the Statute of the Court apart from being a Member State of the United Nations as well as the fact that its *locus standi* cannot be based on conditions set forth in Article 35, paragraph 2, of the Statute.

In that regard he finds that at the end of the year 2000 the Applicant did two things:

(i) renounced the continuity claim and accepted the status of the successor State of the former SFRY; and

(ii) proceeding from a qualitatively new legal basis—as the successor State—submitted the application for admission to membership in the United Nations.

The admission of the FRY to the United Nations as a Member as from 1 November 2000 has two principal consequences in the circumstances of the case at hand:

(i) with respect to the admission of Yugoslavia as a Member as from 1 November 2000, it can be said that what is involved is the admission as a new Member; and

(ii) the admission of Yugoslavia as a Member as from 1 November 2000 qualified *per se* its status vis-à-vis the United Nations before that date. It seems clear that, in the light of the decisions taken by the competent organs of the United Nations, this status could not be a membership status. *A contrario,* Yugoslavia could not have been admitted as a Member as from 1 November 2000.

He is also of the opinion that the formulation of the *dispositif* explicitly linked to the absence of *locus standi* of Serbia and Montenegro would be more appropriate considering the circumstances of the case as well as the reasoning of the Court.

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150. CASE CONCERNING LEGALITY OF USE OF FORCE (SERBIA AND MONTENEGRO *v.* CANADA) (PRELIMINARY OBJECTIONS)

Judgment of 15 December 2004

In its Judgment in the case concerning *Legality of the Use of Force* (*Serbia and Montenegro* v. *Canada*), the Court unanimously concluded that it had no jurisdiction to entertain the claims made in the Application filed by Serbia and Montenegro against Canada on 29 April 1999.

The Court was composed as follows: President Shi; Vice-President Ranjeva; Judges Guillaume, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal, Elaraby, Owada, Tomka; Judge *ad hoc* Kreća; Registrar Couvreur.

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The operative paragraph (para. 116) of the Judgment reads as follows:

" . . .

The Court,

Unanimously,

Finds that it has no jurisdiction to entertain the claims made in the Application filed by Serbia and Montenegro on 29 April 1999."

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Vice-President Ranjeva and Judges Guillaume, Higgins, Kooijmans, Al-Khasawneh, Buergenthal and Elaraby appended a joint declaration to the Judgment of the Court; Judge Koroma appended a declaration to the Judgment of the Court; Judges Higgins, Kooijmans and Elaraby and Judge *ad hoc* Kreća appended separate opinions to the Judgment of the Court.

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History of the proceedings and submissions of the Parties
(paras. 1–23)

On 29 April 1999 the Government of the Federal Republic of Yugoslavia (with effect from 4 February 2003, "Serbia and

Montenegro") filed in the Registry of the Court an Application instituting proceedings against the Government of Canada in respect of a dispute concerning acts allegedly committed by Canada

> "by which it has violated its international obligation banning the use of force against another State, the obligation not to intervene in the internal affairs of another State, the obligation not to violate the sovereignty of another State, the obligation to protect the civilian population and civilian objects in wartime, the obligation to protect the environment, the obligation relating to free navigation on international rivers, the obligation regarding fundamental human rights and freedoms, the obligation not to use prohibited weapons, the obligation not to deliberately inflict conditions of life calculated to cause the physical destruction of a national group".

The Application invoked as a basis of the Court's jurisdiction Article 36, paragraph 2, of the Statute of the Court, as well as Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the United Nations General Assembly on 9 December 1948 (hereinafter "the Genocide Convention").

On 29 April 1999, immediately after filing its Application, the Federal Republic of Yugoslavia also submitted a request for the indication of provisional measures pursuant to Article 73 of the Rules of Court.

On the same day, the Federal Republic of Yugoslavia filed Applications instituting proceedings and submitted requests for the indication of provisional measures, in respect of other disputes arising out of the same facts, against the Kingdom of Belgium, the French Republic, the Federal Republic of Germany, the Italian Republic, the Kingdom of the Netherlands, the Portuguese Republic, the Kingdom of Spain, the United Kingdom of Great Britain and Northern Ireland and the United States of America.

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: the Yugoslav Government chose Mr. Milenko Kreca and the Canadian Government chose Mr. Marc Lalonde. Referring to Article 31, paragraph 5, of the Statute, the Yugoslav Government objected to the latter choice. The Court, after deliberating, found that the nomination of a judge *ad hoc* by Canada was justified in the provisional measures phase of the case.

By ten Orders dated 2 June 1999 the Court, after hearing the Parties, rejected the request for the indication of provisional measures in all of the cases, and further decided to remove from the List the cases against Spain and the United States of America.

On 5 July 2000, within the time–limit fixed for the filing of its Counter-Memorial, Canada, referring to Article 79, paragraph 1, of the Rules, submitted preliminary objections relating to the Court's jurisdiction to entertain the case and to the admissibility of the Application. Accordingly, the proceedings on the merits were suspended.

On 20 December 2002, within the prescribed time-limit as twice extended by the Court at the request of the Federal Republic of Yugoslavia, the latter filed a written statement of its observations and submissions on those preliminary objections (hereinafter referred to as its "Observations"), together with identical written statements in the seven other pending cases.

Pursuant to Article 24, paragraph 1, of the Statute, on 25 November 2003 Judge Simma informed the President that he considered that he should not take part in any of the cases.

At a meeting held by the President of the Court on 12 December 2003 with the representatives of the Parties in the eight cases concerning *Legality of Use of Force,* the questions of the presence on the Bench of judges *ad hoc* during the preliminary objections phase and of a possible joinder of the proceedings were discussed, among other issues. By letter of 23 December 2003 the Registrar informed the Agents of all the Parties that the Court had decided, pursuant to Article 31, paragraph 5, of the Statute, that, taking into account the presence upon the Bench of judges of British, Dutch and French nationality, the judges *ad hoc* chosen by the respondent States should not sit during the current phase of the procedure in these cases. The Agents were also informed that the Court had decided that a joinder of the proceedings would not be appropriate at that stage.

Public sittings in all the cases were held between 19 and 23 April 2004.

After setting out the Parties' claims in their written pleadings (which are not reproduced here), the Judgment recalls that, at the oral proceedings, the following final submissions were presented by the Parties:

On behalf of the Canadian Government,

at the hearing of 22 April 2004:

"1. The Government of Canada requests the Court to adjudge and declare that the Court lacks jurisdiction because the Applicant has abandoned all the grounds of jurisdiction originally specified in its Application pursuant to Article 38, paragraph 2, of the Rules and has identified no alternative grounds of jurisdiction.

2. In the alternative, the Government of Canada requests the Court to adjudge and declare that:

(a) the Court lacks jurisdiction over the proceedings brought by the Applicant against Canada on 29 April 1999, on the basis of the purported declaration of 25 April 1999;

(b) the Court also lacks jurisdiction on the basis of Article IX of the Genocide Convention;

(c) the new claims respecting the period beginning 10 June 1999 are inadmissible because they would transform the subject of the dispute originally brought before the Court; and,

(d) the claims in their entirety are inadmissible because the subject-matter of the case requires the presence of essential third parties that are not before the Court."

On behalf of the Government of Serbia and Montenegro

at the hearing of 23 April 2004:

"For the reasons given in its pleadings, and in particular in its Written Observations, subsequent correspondence with the Court, and at the oral hearing, Serbia and Montenegro requests the Court:

- to adjudge and declare on its jurisdiction *ratione personae* in the present cases; and

- to dismiss the remaining preliminary objections of the respondent States, and to order proceedings on the merits if it finds it has jurisdiction *ratione personae*."

Before proceeding to its reasoning, the Court includes a paragraph (para. 24) dealing with the Applicant's change of name on 4 February 2003 from "Federal Republic of Yugoslavia" to "Serbia and Montenegro". It explains that, as far as possible, except where the term in a historical context might cause confusion, it will use the name "Serbia and Montenegro", even where reference is made to a procedural step taken before the change.

Dismissal of the case in limine litis
(paras. 25–43)

The Court begins by observing that it must first deal with a preliminary question that has been raised in each of the cases, namely the contention, presented in various forms by the eight respondent States, that, as a result of the changed attitude of the Applicant to the question of the Court's jurisdiction as expressed in its Observations, the Court is no longer required to rule on those objections to jurisdiction, but can simply dismiss the cases *in limine litis* and remove them from its List, without enquiring further into matters of jurisdiction.

The Court then examines a number of arguments advanced by different Respondents as possible legal grounds that would lead the Court to take this course, including, *inter alia:* (i) that the position of Serbia and Montenegro is to be treated as one that in effect results in a discontinuance of the proceedings or that the Court should *ex officio* put an end to the case in the interests of the proper administration of justice; (ii) that there is agreement between the Parties on a "question of jurisdiction that is determinative of the case", and that as a result there is now no "dispute as to whether the Court has jurisdiction"; (iii) that the substantive dispute under the Genocide Convention has disappeared and thus the whole dispute has disappeared in those cases in which the only ground of jurisdiction relied on is Article IX of that Convention; (iv) that Serbia and Montenegro, by its conduct, has forfeited or renounced its right of action in the present case and is now estopped from pursuing the proceedings.

The Court finds itself unable to uphold the various contentions of the Respondents. The Court considers that it is unable to treat the Observations of Serbia and Montenegro as having the legal effect of a discontinuance of the proceedings under Article 88 or 89 of the Rules of Court and finds that the case does not fall into the category of cases in which it may of its own motion put an end to proceedings in a case. As regards the argument advanced by certain Respondents that the dispute on jurisdiction has disappeared since the Parties now agree that the Applicant was not a party to the Statute at the relevant time, the Court points out that Serbia and Montenegro has not invited the Court to find that it has no jurisdiction; while it is apparently in agreement with the arguments advanced by the Respondents in that regard in their preliminary objections, it has specifically asked in its submissions for a decision of the Court on the jurisdictional question. This question, in the view of the Court, is a legal question independent of the views of the parties upon it. As to the argument concerning the disappearance of the substantive dispute, it is clear that Serbia and Montenegro has by no means withdrawn its claims as to the merits. Indeed, these claims were extensively argued and developed in substance during the hearings on jurisdiction, in the context of the question of the jurisdiction of the Court under Article IX of the Genocide Convention. It is equally clear that these claims are being vigorously denied by the Respondents. It could not even be said under these circumstances that, while the essential dispute still subsists, Serbia and Montenegro is no longer seeking to have its claim determined by the Court. Serbia and Montenegro has not sought a discontinuance and has stated that it "wants the Court to continue the case and to decide upon its jurisdiction—and to decide on the merits as well, if it has jurisdiction". The Court therefore finds itself unable to conclude that Serbia and Montenegro has renounced any of its substantive or procedural rights, or has taken the position that the dispute between the Parties has ceased to exist. As for the argument based on the doctrine of estoppel, the Court does not consider that Serbia and Montenegro, by asking the Court "to decide on its jurisdiction" on the basis of certain alleged "new facts" about its own legal status vis-à-vis the United Nations, should be held to have forfeited or renounced its right of action and to be estopped from continuing the present action before the Court.

For all these reasons, the Court concludes that it cannot remove the cases concerning *Legality of Use of Force* from the List, or take any decision putting an end to those cases *in limine litis*. In the present phase of the proceedings, it must proceed to examine the question of its jurisdiction to entertain the case.

Serbia and Montenegro's access to the Court under Article 35, paragraph 1, of the Statute
(paras. 44–90)

The Court recalls that the Application filed on 29 April 1999 stated that "[t]he Government of the Federal Republic of Yugoslavia invokes Article 36, paragraph 2, of the Statute of the International Court of Justice as well as Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide".

The Court notes that in its jurisprudence it has referred to "its freedom to select the ground upon which it will base its judgment", and that, when its jurisdiction is challenged on diverse grounds, it is free to base its decision on one or more grounds of its own choosing, in particular "the ground which in its judgment is more direct and conclusive". However, in those instances, the Parties to the cases before the Court were, *without doubt,* parties to the Statute of the Court and the Court was thus open to them under Article 35, paragraph 1, of the Statute. The Court points out that this is not the case in the present proceedings, in which an objection has been made regarding the right of the Applicant to have access to the

Court. And it is this issue of access to the Court which distinguishes the present case from those cited in the jurisprudence concerned.

The Court observes that the question whether Serbia and Montenegro was or was not a party to the Statute of the Court at the time of the institution of the present proceedings is fundamental; for if it were not such a party, the Court would not be open to it under Article 35, paragraph 1, of the Statute. In that situation, subject to any application of paragraph 2 of that Article, Serbia and Montenegro could not have properly seised the Court, whatever title of jurisdiction it might have invoked, for the simple reason that it did not have the right to appear before the Court. Hence, the Court must first examine the question whether the Applicant meets the conditions laid down in Articles 34 and 35 of the Statute for access to the Court. Only if the answer to that question is in the affirmative, will the Court have to deal with the issues relating to the conditions laid down in Article 36 of the Statute.

The Court notes in this respect that there is no doubt that Serbia and Montenegro is a State for the purpose of Article 34, paragraph 1, of the Statute. However, certain Respondents objected that, at the time of the filing of its Application on 29 April 1999, that State did not meet the conditions set down in Article 35 of the Statute.

Thus Canada argued, *inter alia,* that:

"The Applicant is not a Member of the United Nations and accordingly is not party to the Statute of the Court . . ." (Preliminary Objections of Canada, p. 9, para. 32.)

"In order to have access to the Court, the Applicant must be either be a party to the Statute of the Court, or claim to apply the exceptional mechanisms provided for in Article 93, paragraph 2, of the *Charter of the United Nations* or in Article 35, paragraph 2, of the Statute. The Applicant meets neither of these requirements." (*Ibid.,* para. 35; emphasis original.)

The Court then recapitulates the sequence of events relating to the legal position of the Applicant vis-à-vis the United Nations over the period 1992–2000. It refers, *inter alia,* to the following: the break-up of the Socialist Federal Republic of Yugoslavia in 1991–1992; a declaration of 27 April 1992 by the SFRY Assembly, the National Assembly of the Republic of Serbia and the Assembly of the Republic of Montenegro asserting the continuation of the international legal and political personality of the SFRY by the Federal Republic of Yugoslavia; a note of the same day from Yugoslavia to the United Nations Secretary-General asserting the continuation by the FRY of the membership of the SFRY in the Organization; Security Council resolution 777 of 1992 considering that the FRY could not continue automatically the SFRY's membership; General Assembly resolution 47/1 of 1992 stating that the FRY shall not participate in the work of the General Assembly; and a letter dated 29 September 1992 from the United Nations Legal Counsel regarding the "practical consequences" of General Assembly resolution 47/1.

The Court concludes that the legal situation that obtained within the United Nations during the period 1992–2000 concerning the status of the Federal Republic of Yugoslavia remained ambiguous and open to different assessments. This was due, *inter alia,* to the absence of an authoritative determination by the competent organs of the United Nations defining clearly the legal status of the Federal Republic of Yugoslavia vis-à-vis the United Nations.

The Court notes that three different positions were taken with the United Nations. In the first place, there was the position taken by the two political organs concerned. The Court refers in this respect to Security Council resolution 777 (1992) of 19 September 1992 and to General Assembly resolution 47/1 of 22 September 1992, according to which "the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations", and "should apply for membership in the United Nations". The Court points out that, while it is clear from the voting figures that these resolutions reflected a position endorsed by the vast majority of the Members of the United Nations, they cannot be construed as conveying an authoritative determination of the legal status of the Federal Republic of Yugoslavia within, or vis-à-vis, the United Nations. The uncertainty surrounding the question is evidenced, *inter alia,* by the practice of the General Assembly in budgetary matters during the years following the break-up of the Socialist Federal Republic of Yugoslavia.

The Court recalls that, secondly, the Federal Republic of Yugoslavia, for its part, maintained its claim that it continued the legal personality of the Socialist Federal Republic of Yugoslavia, "including its membership in all international organizations and participation in international treaties ratified or acceded to by Yugoslavia". This claim had been clearly stated in the official Note of 27 April 1992 from the Permanent Mission of Yugoslavia to the United Nations addressed to the Secretary-General of the United Nations. It was sustained by the Applicant throughout the period from 1992 to 2000.

Thirdly, another organ that came to be involved in this problem was the Secretariat of the United Nations. In the absence of any authoritative determination, the Secretariat, as the administrative organ of the Organization, simply continued to keep to the practice of the *status quo ante* that had prevailed prior to the break-up of the Socialist Federal Republic of Yugoslavia in 1992.

The Court points out that it was against this background that the Court itself, in its Judgment of 3 February 2003 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)* (hereinafter the "*Application for Revision* case"), referred to the "*sui generis* position which the FRY found itself in" during the relevant period; however, in that case, no final and definitive conclusion was drawn by the Court from this descriptive term on the amorphous status of the Federal Republic of Yugoslavia vis-à-vis or within the United Nations during this period.

The Court considers that this situation came to an end with a new development in 2000. On 27 October of that year, the Federal Republic of Yugoslavia requested admission to membership in the United Nations, and on 1 November, by Gen-

eral Assembly resolution 55/12, it was so admitted. Serbia and Montenegro thus has the status of membership in the Organization as from 1 November 2000. However, its admission to the United Nations did not have, and could not have had, the effect of dating back to the time when the SFRY broke up and disappeared. It became clear that the *sui generis* position of the Applicant could not have amounted to its membership in the Organization.

In the view of the Court, the significance of this new development in 2000 is that it has clarified the thus far amorphous legal situation concerning the status of the Federal Republic of Yugoslavia vis-à-vis the United Nations.

The Court finds that from the vantage point from which it now looks at the legal situation, and in light of the legal consequences of the new development since 1 November 2000, it is led to the conclusion that Serbia and Montenegro was not a Member of the United Nations, and in that capacity a State party to the Statute of the International Court of Justice, at the time of filing its Application.

A further point the Court considers is the relevance to the present case of the Judgment in the *Application for Revision* case, of 3 February 2003. The Court points out that, given the specific characteristics of the procedure under Article 61 of the Statute, in which the conditions for granting an application for revision of a judgment are strictly circumscribed, there is no reason to treat the Judgment in the *Application for Revision* case as having pronounced upon the issue of the legal status of Serbia and Montenegro vis-à-vis the United Nations. Nor does the Judgment pronounce upon the status of Serbia and Montenegro in relation to the Statute of the Court.

For all these reasons, the Court concludes that, at the time when the present proceedings were instituted, the Applicant in the present case, Serbia and Montenegro, was not a Member of the United Nations, and consequently, was not, on that basis, a State party to the Statute of the International Court of Justice. The Applicant not having become a party to the Statute on any other basis, it follows that the Court was not then open to it under Article 35, paragraph 1, of the Statute.

Serbia and Montenegro's possible access to the Court on the basis of Article 35, paragraph 2, of the Statute
(paras. 91–113)

The Court then considers whether it might be open to Serbia and Montenegro under paragraph 2 of Article 35, which provides:

> "The conditions under which the Court shall be open to other States [i.e. States not parties to the Statute] shall, subject to the special provisions contained in treaties in force, be laid down by the Security Council, but in no case shall such conditions place the parties in a position of inequality before the Court."

In this regard, it quotes from its Order of 8 April 1993 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)* (hereinafter the "*Genocide Convention* case"), where it stated, *inter alia,* that a "compromissory clause in a multilateral convention, such as Article IX of the Genocide Convention relied on by Bosnia and Herzegovina in the present case, *could,* in the view of the Court, be regarded *prima facie* as a special provision contained in a treaty in force" (emphasis added).

The Court recalls that a number of Respondents contended in their pleadings that the reference to "treaties in force" in Article 35, paragraph 2, of the Statute relates only to treaties in force when the Statute of the Court entered into force, i.e. on 24 October 1945. In respect of the Order of 8 April 1993 in the *Genocide Convention* case, the Respondents pointed out that that was a provisional assessment, not conclusive of the matter, and considered that "there [were] persuasive reasons why the Court should revisit the provisional approach it adopted to the interpretation of this clause in the *Genocide Convention* case".

The Court notes that the passage from the 1993 Order in the *Genocide Convention* case was addressed to the situation in which the proceedings were instituted against a State whose membership in the United Nations and status as a party to the Statute was unclear. It observes that the Order of 8 April 1993 was made on the basis of an examination of the relevant law and facts in the context of incidental proceedings on a request for the indication of provisional measures, and concludes that it would therefore now be appropriate for the Court to make a definitive finding on the question whether Article 35, paragraph 2, affords access to the Court in the present case, and for that purpose, to examine further the question of its applicability and interpretation.

The Court thus proceeds to the interpretation of Article 35, paragraph 2, of the Statute, and does so in accordance with customary international law, as reflected in Article 31 of the 1969 Vienna Convention on the Law of Treaties. According to paragraph 1 of Article 31, a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of the treaty's object and purpose. Interpretation must be based above all upon the text of the treaty. As a supplementary measure recourse may be had to means of interpretation such as the preparatory work of the treaty and the circumstances of its conclusion.

The Court points out that the words "treaties in force" in Article 35, paragraph 2, do not, in their natural and ordinary meaning, indicate at what date the treaties contemplated are to be in force, and may thus lend themselves to different interpretations. They may be interpreted as referring either to treaties which were in force at the time that the Statute itself came into force, or to those which were in force on the date of the institution of proceedings in a case in which such treaties are invoked.

The Court observes that the object and purpose of Article 35 of the Statute is to define the conditions of access to the Court. While paragraph 1 of that Article opens it to the States parties to the Statute, paragraph 2 is intended to regulate access to the Court by States which are not parties to the Statute. It would have been inconsistent with the main thrust of the text to make it possible in the future for States not parties to the Statute to obtain access to the Court simply by the conclusion between themselves of a special treaty, multilateral or bilateral, containing a provision to that effect.

The Court moreover notes that the interpretation of Article 35, paragraph 2, whereby that paragraph is to be construed as referring to treaties in force at the time that the Statute came into force is in fact reinforced by an examination of the *travaux préparatoires* of the text; the Court considers that the legislative history of Article 35, paragraph 2, of the Statute of the Permanent Court of International Justice (hereinafter the "Permanent Court") demonstrates that it was intended as an exception to the principle stated in paragraph 1, in order to cover cases contemplated in agreements concluded in the aftermath of the First World War before the Statute entered into force. However, the *travaux préparatoires* of the Statute of the present Court are less illuminating. The discussion of Article 35 was provisional and somewhat cursory; it took place at a stage in the planning of the future international organization when it was not yet settled whether the Permanent Court would be preserved or replaced by a new court. Indeed, the records do not include any discussion which would suggest that Article 35, paragraph 2, of the Statute should be given a different meaning from the corresponding provision in the Statute of the Permanent Court. It would rather seem that the text was reproduced from the Statute of the Permanent Court; there is no indication that any extension of access to the Court was intended.

Accordingly Article 35, paragraph 2, must be interpreted, *mutatis mutandis,* in the same way as the equivalent text in the Statute of the Permanent Court, namely as intended to refer to treaties in force at the date of the entry into force of the new Statute, and providing for the jurisdiction of the new Court. In fact, no such prior treaties, referring to the jurisdiction of the present Court, have been brought to the attention of the Court, and it may be that none exist. In the view of the Court, however, neither this circumstance, nor any consideration of the object and purpose of the text, nor the *travaux préparatoires,* offer support to the alternative interpretation that the provision was intended as granting access to the Court to States not parties to the Statute without any condition other than the existence of a treaty, containing a clause conferring jurisdiction on the Court, which might be concluded at any time subsequently to the entry into force of the Statute. As previously observed, this interpretation would lead to a result quite incompatible with the object and purpose of Article 35, paragraph 2, namely the regulation of access to the Court by States non-parties to the Statute. In the view of the Court therefore, the reference in Article 35, paragraph 2, of the Statute to "the special provisions contained in treaties in force" applies only to treaties in force at the date of the entry into force of the Statute, and not to any treaties concluded since that date.

The Court thus concludes that, even assuming that Serbia and Montenegro was a party to the Genocide Convention at the relevant date, Article 35, paragraph 2, of the Statute does not provide it with a basis to have access to the Court, under Article IX of that Convention, since the Convention only entered into force on 12 January 1951, after the entry into force of the Statute. The Court does not therefore consider it necessary to decide whether Serbia and Montenegro was or was not a party to the Genocide Convention on 29 April 1999 when the current proceedings were instituted.

Unnecessary to consider other preliminary objections (para. 114)

Having found that Serbia and Montenegro did not, at the time of the institution of the present proceedings, have access to the Court under either paragraph 1 or paragraph 2 of Article 35 of the Statute, the Court states that it is unnecessary for it to consider the other preliminary objections filed by the Respondents to its jurisdiction.

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The Court finally recalls (para. 115) that, irrespective of whether it has jurisdiction over a dispute, the parties "remain in all cases responsible for acts attributable to them that violate the rights of other States".

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Joint declaration of Vice-President Ranjeva and Judges Guillaume, Higgins, Kooijmans, Al-Khasawneh, Buergenthal and Elaraby

1. Vice-President Ranjeva and Judges Guillaume, Higgins, Kooijmans, Al-Khasawneh, Buergenthal and Elaraby voted in favour of the *dispositif* of the Judgments because they agree that these cases cannot, as a matter of law, proceed to the merits. They have added in their joint declaration that they nevertheless profoundly disagree with the reasoning adopted by the Court.

2. They note that when the Court finds in a case that, on two or more grounds, its jurisdiction is not well founded *ratione personae, ratione materiae* or *ratione temporis,* it may choose the most appropriate ground on which to base its decision of lack of competence. They point out that this choice must be guided by three criteria: consistency with the past case law; degree of certitude of the ground chosen; possible implications for the other pending cases.

3. In the present instances, according to the Judgments of the Court, Serbia and Montenegro was not a Member of the United Nations in 1999 and, as a result, was not then a party to the Statute of the Court. In the Judgments, the Court concludes therefrom that it was not at that time open to the Applicant under Article 35, paragraph 1, of the Statute. The Judgments go on to state that paragraph 2 of that Article enables States not parties to the Statute to appear before the Court only by virtue of Security Council decisions or treaties concluded prior to the entry into force of the Statute. It is observed in the Judgments that the United Nations Genocide Convention only entered into force in 1951. It is thus concluded that Article 35, paragraph 2, of the Statute does not grant Serbia and Montenegro access to the Court either.

4. In the view of the seven judges making the joint declaration, this solution is at odds with a number of previous decisions of the Court, in particular the Judgment rendered on 3 February 2003 in a case between Bosnia and Herzegovina and Yugoslavia, in which it was found that Yugoslavia could appear before the Court between 1992 and 2000 and that this position had not been changed by its admission to the United Nations in 2002. Further, the authors of the declaration note

that in reality it is far from self-evident that Yugoslavia was not a Member of the United Nations at that time. Lastly, they regret that the Judgment leaves some doubt as to whether Yugoslavia was a party, between 1992 and 2000, to the United Nations Genocide Convention and thus could call into question the solutions adopted by the Court in the case brought by Bosnia and Herzegovina against Serbia and Montenegro. Thus, the Court's Judgment does not meet any of the three criteria set out in paragraph 2 above.

5. The seven judges finally observe that the Court could easily have founded its Judgment that it lacked jurisdiction on the grounds on which it relied in 1999 when the requests for the indication of provisional measures were considered. The Court then found that it lacked jurisdiction *ratione temporis* in respect of the declaration accepting the compulsory jurisdiction of the Court which Serbia and Montenegro had filed several weeks after the start of military operations in Kosovo. It also found itself to be without jurisdiction *ratione materiae* in respect of the United Nations Genocide Convention, as no genocidal intention had been established. These solutions could easily have been confirmed.

Declaration of Judge Koroma

In his declaration Judge Koroma stated that, while concurring in the Judgment, he considered it necessary to stress the following. The question which the Court was requested to rule on and which it in fact did decide in this phase of the case was the issue of jurisdiction, namely, whether the Court could entertain the merits of the case. The jurisdictional function is intended to establish whether the Court is entitled to enter into and adjudicate on the substantive issues in a case. This function, in his view, cannot be dispensed with as it is both required by law and stipulated in the Statute of the Court. It is this function that the Court has carried out in this Judgment and it is within this paradigm that the Judgment must be understood. The Judgment cannot be interpreted as the Court taking a position on any of the matters of substance before the Court.

Separate opinion of Judge Higgins

Judge Higgins agrees that Serbia and Montenegro have not discontinued the case. However, she disagrees with the apparent finding of the Court that a case may only be removed from the List where there is a discontinuance by the applicant or the parties, or where an applicant disclosed no subsisting title of jurisdiction, or where the Court manifestly lacked jurisdiction (see paragraph 32 of the Judgment). In her view, the right of the Court exceptionally to remove a case from the List rests on its inherent powers, which are not limited to *a priori* categories.

Judge Higgins is of the opinion that the present case should have been removed from the List, as the Applicant has by its own conduct put itself in a position incompatible with Article 38, paragraph 2, of the Rules of Court. The manner in which it has dealt with preliminary objections would further warrant the case not being proceeded with.

Finally, Judge Higgins greatly regrets the attention the Court has afforded to Article 35, paragraph 2, of the Statute, believing its relevance lies only in another pending case.

Separate opinion of Judge Kooijmans

Judge Kooijmans has added a separate opinion to the Judgment and the joint declaration of seven Members of the Court, which he co-signed, for two reasons.

First he wishes to explain why in his view the Court should not have decided the issue of jurisdiction on the ground of Serbia and Montenegro's lack of access to the Court, although in 1999, when the Court rejected Yugoslavia's request for interim measures of protection, he was in favour of this approach. In his view, the Court has not in a convincing and transparent way elucidated the status of the Federal Republic of Yugoslavia vis-à-vis the United Nations before its admission to the Organization in 2000. Further, the Court's Judgment has undeniable implications for other pending cases, in particular the *Genocide Convention* case (*Bosnia Herzegovina* v. *Serbia and Montenegro*), which could easily have been avoided by choosing another approach. Finally, the Judgment is at odds with previous decisions of the Court, thus endangering the principle of consistency of reasoning. This consistency with earlier case law should prevail over present or earlier misgivings of individual judges if an approach in conformity with that consistency does not lead to legally untenable results.

In the second place Judge Kooijmans sets out why in his view the Court would have done better to dismiss the cases *in limine litis*. In 1999 the Applicant invoked two grounds of jurisdiction which it explicitly abandoned in its Written Observations of 20 December 2002 without replacing them by other grounds. Nevertheless it did not discontinue the case but asked the Court to decide *whether* it had jurisdiction. Thus the Applications did no longer meet the requirement of Article 38, paragraph 2, of the Rules of Court, which states that the application shall specify as far as possible the legal grounds upon which the jurisdiction of the Court is said to be based. Since the Court has the inherent power to strike a case from the General List in order to safeguard the integrity of the procedure, it should have done so in view of the fact that the Applicant has failed to demonstrate and even did not make an effort to demonstrate that a valid ground of jurisdiction existed.

Separate opinion of Judge Elaraby

Judge Elaraby voted in favour of the *dispositif,* but disagreed both with the grounds on which the Court decided to base its Judgment—Article 35, paragraph 1 and Article 35, paragraph 2 of the Court's Statute—and with the conclusions which the Court reached on each of these grounds. The joint declaration, to which Judge Elaraby is a signatory, explains why he believes that the Court should have chosen alternative grounds to reach its decision. His separate opinion explains why he disagrees with its substantive findings.

Beginning with the issue of access to the Court under Article 35, paragraph 1, Judge Elaraby explained why, in his view, the Federal Republic of Yugoslavia *was* a Member of the United Nations at the time it filed its Application in the case.

He emphasized that, although the FRY was excluded from participation in the work of the General Assembly and its subsidiary organs, it remained, as the Court had previously found, a *sui generis* Member between 1992 and 2000. Thus Judge Elaraby pointed out that during this period it continued to exhibit many attributes of United Nations membership and was neither suspended nor expelled from the Organization under the relevant provisions of the United Nations Charter. On this basis, Judge Elaraby concluded that the FRY was a Member of the United Nations when it filed its Application in 1999 and, as a result, he disagreed with the Court's finding that it was not "open" to the FRY under Article 35, paragraph 1, of the Court's Statute.

He also disagreed with the Court's finding that, assuming the FRY was a non-Member of the United Nations, it would not have had access to the Court under Article 35, paragraph 2. For Judge Elaraby, the Court's interpretation of the term "treaties in force" in Article 35, paragraph 2, as meaning "treaties in force at the time the Statute of the Court entered into force" was unduly restrictive. Like the Court, Judge Elaraby analysed the relevant *travaux préparatoires,* but, unlike the Court, he found that the expression "treaties in force" should be read to include any treaties connected with the peace settlement following the Second World War, whether they entered into force before or after the Statute of the Court. This would include, according to Judge Elaraby, the Genocide Convention, a treaty drafted under the auspices of the United Nations in direct response to the tragic events of the Second World War. In the alternative, Judge Elaraby stated that, even if the Court's reading of "treaties in force" were adopted as a general rule, there should be an exception for treaties intended to remedy violations of *jus cogens.* These, he wrote, should be subject to a broader interpretation so that any State seeking access to the Court on the basis of a treaty that addresses a *jus cogens* violation could do so as long as the treaty was in force when the Application was filed.

Because Judge Elaraby concluded that the Court was open to the FRY under Article 35 when it filed its Application in 1999, he went on to assess whether the Court has jurisdiction *ratione personae* under Article IX of the Genocide Convention. He concluded that it does, because the FRY succeeded to the treaty obligations of the former Socialist Federal Republic of Yugoslavia, including the Genocide Convention. In reaching this conclusion he explained that, in cases involving the separation of parts of the territory of a State to form one or more new States, Article 34 of the Vienna Convention on Succession of States in respect of Treaties embodied a customary rule of automatic succession by the new State to the treaties in force on the territory of its predecessor. He pointed out that it was all the more important for the Court to recognize and apply this rule in the case of a fundamental human rights treaty such as the Genocide Convention. Judge Elaraby thus concluded that the FRY was a party to the Genocide Convention on the basis of succession—not its subsequent purported accession and reservation—and therefore that the Court had jurisdiction *ratione personae.* He found, however, that the Court did not have jurisdiction *ratione materiae* under the Convention, so in the final analysis agreed with the Court that there was no jurisdiction to examine the merits of the FRY's case.

Separate opinion of Judge Kreća

Judge *ad hoc* Kreća noted that the Respondent, as well as the Applicant, attached crucial importance to the issue of *locus standi* of Serbia and Montenegro before the Court.

In the case at hand, it is closely, and even organically, linked with the membership of Serbia and Montenegro in the United Nations, due to the fact that it could not be considered as being party to the Statute of the Court apart from being a Member State of the United Nations as well as the fact that its *locus standi* cannot be based on conditions set forth in Article 35, paragraph 2, of the Statute.

In that regard he finds that at the end of the year 2000 the Applicant did two things:

(i) renounced the continuity claim and accepted the status of the successor State of the former SFRY; and

(ii) proceeding from a qualitatively new legal basis—as the successor State—submitted the application for admission to membership in the United Nations.

The admission of the FRY to the United Nations as a Member as from 1 November 2000 has two principal consequences in the circumstances of the case at hand:

(i) with respect to the admission of Yugoslavia as a Member as from 1 November 2000, it can be said that what is involved is the admission as a new Member; and

(ii) the admission of Yugoslavia as a Member as from 1 November 2000 qualified *per se* its status vis-à-vis the United Nations before that date. It seems clear that, in the light of the decisions taken by the competent organs of the United Nations, this status could not be a membership status. *A contrario,* Yugoslavia could not have been admitted as a Member as from 1 November 2000.

He is also of the opinion that the formulation of the *dispositif* explicitly linked to the absence of *locus standi* of Serbia and Montenegro would be more appropriate considering the circumstances of the case as well as the reasoning of the Court.

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151. CASE CONCERNING LEGALITY OF USE OF FORCE (SERBIA AND MONTENEGRO *v.* FRANCE) (PRELIMINARY OBJECTIONS)

Judgment of 15 December 2004

In its Judgment in the case concerning *Legality of the Use of Force* (*Serbia and Montenegro* v. *France*), the Court unanimously concluded that it had no jurisdiction to entertain the claims made in the Application filed by Serbia and Montenegro against France on 29 April 1999.

The Court was composed as follows: President Shi; Vice-President Ranjeva; Judges Guillaume, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal, Elaraby, Owada, Tomka; Judge *ad hoc* Kreća; Registrar Couvreur.

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The operative paragraph (para. 116) of the Judgment reads as follows:

" . . .

The Court,

Unanimously,

Finds that it has no jurisdiction to entertain the claims made in the Application filed by Serbia and Montenegro on 29 April 1999."

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* *

Vice-President Ranjeva and Judges Guillaume, Higgins, Kooijmans, Al-Khasawneh, Buergenthal and Elaraby appended a joint declaration to the Judgment of the Court; Judge Koroma appended a declaration to the Judgment of the Court; Judges Higgins, Kooijmans and Elaraby and Judge *ad hoc* Kreća appended separate opinions to the Judgment of the Court.

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History of the proceedings and submissions of the Parties (paras. 1–23)

On 29 April 1999 the Government of the Federal Republic of Yugoslavia (with effect from 4 February 2003, "Serbia and Montenegro") filed in the Registry of the Court an Application instituting proceedings against the French Republic (hereinafter "France") in respect of a dispute concerning acts allegedly committed by France

> "by which it has violated its international obligation banning the use of force against another State, the obligation not to intervene in the internal affairs of another State, the obligation not to violate the sovereignty of another State, the obligation to protect the civilian population and civilian objects in wartime, the obligation to protect the environment, the obligation relating to free navigation on international rivers, the obligation regarding fundamental human rights and freedoms, the obligation not to use prohibited weapons, the obligation not to deliberately inflict conditions of life calculated to cause the physical destruction of a national group".

The Application invoked as a basis of the Court's jurisdiction Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the United Nations General Assembly on 9 December 1948 (hereinafter "the Genocide Convention"), as well as Article 38, paragraph 5, of the Rules of Court.

On 29 April 1999, immediately after filing its Application, the Federal Republic of Yugoslavia also submitted a request for the indication of provisional measures pursuant to Article 73 of the Rules of Court.

On the same day, the Federal Republic of Yugoslavia filed Applications instituting proceedings and submitted requests for the indication of provisional measures, in respect of other disputes arising out of the same facts, against the Kingdom of Belgium, Canada, the Federal Republic of Germany, the Italian Republic, the Kingdom of the Netherlands, the Portuguese Republic, the Kingdom of Spain, the United Kingdom of Great Britain and Northern Ireland and the United States of America.

Since the Court included upon the Bench no judge of Yugoslav nationality, the Yugoslav Government exercised its right under Article 31 of the Statute and chose Mr. Milenko Kreća to sit as judge *ad hoc* in the case.

By ten Orders dated 2 June 1999 the Court, after hearing the Parties, rejected the request for the indication of provisional measures in all of the cases, and further decided to remove from the List the cases against Spain and the United States of America.

On 5 July 2000, within the time–limit fixed for the filing of its Counter-Memorial, France, referring to Article 79, paragraph 1, of the Rules, submitted preliminary objections relating to the Court's jurisdiction to entertain the case and to the admissibility of the Application. Accordingly, the proceedings on the merits were suspended.

On 20 December 2002, within the prescribed time-limit as twice extended by the Court at the request of the Federal Republic of Yugoslavia, the latter filed a written statement of its observations and submissions on those preliminary objections (hereinafter referred to as its "Observations"), together with identical written statements in the seven other pending cases.

Pursuant to Article 24, paragraph 1, of the Statute, on 25 November 2003 Judge Simma informed the President that he considered that he should not take part in any of the cases.

At a meeting held by the President of the Court on 12 December 2003 with the representatives of the Parties in the eight cases concerning *Legality of Use of Force,* the ques-

tions of the presence on the Bench of judges *ad hoc* during the preliminary objections phase and of a possible joinder of the proceedings were discussed, among other issues. By letter of 23 December 2003 the Registrar informed the Agents of all the Parties that the Court had decided, pursuant to Article 31, paragraph 5, of the Statute, that, taking into account the presence upon the Bench of judges of British, Dutch and French nationality, the judges *ad hoc* chosen by the respondent States should not sit during the current phase of the procedure in these cases. The Agents were also informed that the Court had decided that a joinder of the proceedings would not be appropriate at that stage.

Public sittings in all the cases were held between 19 and 23 April 2004.

After setting out the Parties' claims in their written pleadings (which are not reproduced here), the Judgment recalls that, at the oral proceedings, the following final submissions were presented by the Parties:

On behalf of the French Government,

at the hearing of 22 April 2004:

"For the reasons it has set out orally and in its written pleadings, the French Republic requests the International Court of Justice to:

— principally, remove the case from the List;

— in the alternative, decide that it lacks jurisdiction to rule on the Application filed by the Federal Republic of Yugoslavia against France; and,

— in the further alternative, decide that the Application is inadmissible."

On behalf of the Government of Serbia and Montenegro

at the hearing of 23 April 2004:

"For the reasons given in its pleadings, and in particular in its Written Observations, subsequent correspondence with the Court, and at the oral hearing, Serbia and Montenegro requests the Court:

— to adjudge and declare on its jurisdiction *ratione personae* in the present cases; and

— to dismiss the remaining preliminary objections of the respondent States, and to order proceedings on the merits if it finds it has jurisdiction *ratione personae*."

Before proceeding to its reasoning, the Court includes a paragraph (para. 24) dealing with the Applicant's change of name on 4 February 2003 from "Federal Republic of Yugoslavia" to "Serbia and Montenegro". It explains that, as far as possible, except where the term in a historical context might cause confusion, it will use the name "Serbia and Montenegro", even where reference is made to a procedural step taken before the change.

Dismissal of the case in limine litis
(paras. 25–43)

The Court begins by observing that it must first deal with a preliminary question that has been raised in each of the cases, namely the contention, presented in various forms by the eight respondent States, that, as a result of the changed attitude of the Applicant to the question of the Court's jurisdiction as expressed in its Observations, the Court is no longer required to rule on those objections to jurisdiction, but can simply dismiss the cases *in limine litis* and remove them from its List, without enquiring further into matters of jurisdiction.

The Court then examines a number of arguments advanced by different Respondents as possible legal grounds that would lead the Court to take this course, including, *inter alia:* (i) that the position of Serbia and Montenegro is to be treated as one that in effect results in a discontinuance of the proceedings or that the Court should *ex officio* put an end to the case in the interests of the proper administration of justice; (ii) that there is agreement between the Parties on a "question of jurisdiction that is determinative of the case", and that as a result there is now no "dispute as to whether the Court has jurisdiction"; (iii) that the substantive dispute under the Genocide Convention has disappeared and thus the whole dispute has disappeared in those cases in which the only ground of jurisdiction relied on is Article IX of that Convention; (iv) that Serbia and Montenegro, by its conduct, has forfeited or renounced its right of action in the present case and is now estopped from pursuing the proceedings.

The Court finds itself unable to uphold the various contentions of the Respondents. The Court considers that it is unable to treat the Observations of Serbia and Montenegro as having the legal effect of a discontinuance of the proceedings under Article 88 or 89 of the Rules of Court and finds that the case does not fall into the category of cases in which it may of its own motion put an end to proceedings in a case. As regards the argument advanced by certain Respondents that the dispute on jurisdiction has disappeared since the Parties now agree that the Applicant was not a party to the Statute at the relevant time, the Court points out that Serbia and Montenegro has not invited the Court to find that it has no jurisdiction; while it is apparently in agreement with the arguments advanced by the Respondents in that regard in their preliminary objections, it has specifically asked in its submissions for a decision of the Court on the jurisdictional question. This question, in the view of the Court, is a legal question independent of the views of the parties upon it. As to the argument concerning the disappearance of the substantive dispute, it is clear that Serbia and Montenegro has by no means withdrawn its claims as to the merits. Indeed, these claims were extensively argued and developed in substance during the hearings on jurisdiction, in the context of the question of the jurisdiction of the Court under Article IX of the Genocide Convention. It is equally clear that these claims are being vigorously denied by the Respondents. It could not even be said under these circumstances that, while the essential dispute still subsists, Serbia and Montenegro is no longer seeking to have its claim determined by the Court. Serbia and Montenegro has not sought a discontinuance and has stated that it "wants the Court to continue the case and to decide upon its jurisdiction—and to decide on the merits as well, if it has jurisdiction". The Court therefore finds itself unable to conclude that Serbia and Montenegro has renounced any of its substantive or procedural rights, or has taken the position that the dispute between the Parties has ceased to exist. As for the argument based on the doctrine of estoppel, the Court does not consider

that Serbia and Montenegro, by asking the Court "to decide on its jurisdiction" on the basis of certain alleged "new facts" about its own legal status vis-à-vis the United Nations, should be held to have forfeited or renounced its right of action and to be estopped from continuing the present action before the Court.

For all these reasons, the Court concludes that it cannot remove the cases concerning *Legality of Use of Force* from the List, or take any decision putting an end to those cases *in limine litis*. In the present phase of the proceedings, it must proceed to examine the question of its jurisdiction to entertain the case.

Serbia and Montenegro's access to the Court under Article 35, paragraph 1, of the Statute
(paras. 44–90)

The Court recalls that the Application filed on 29 April 1999 stated that "[t]he Government of the Federal Republic of Yugoslavia invokes Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide as well as Article 38, paragraph 5, of the Rules of Court". With regard to the second ground of jurisdiction thus invoked by the Applicant, the Court recalls that at the provisional measures stage, it found that "it is quite clear that, in the absence of consent by France, given pursuant to Article 38, paragraph 5, of the Rules, the Court cannot exercise jurisdiction . . . even *prima facie*" (*I.C.J. Reports 1999 (I),* p. 373, para. 31). The Court notes that the Parties have not returned to this matter.

The Court notes that in its jurisprudence it has referred to "its freedom to select the ground upon which it will base its judgment", and that, when its jurisdiction is challenged on diverse grounds, it is free to base its decision on one or more grounds of its own choosing, in particular "the ground which in its judgment is more direct and conclusive". However, in those instances, the Parties to the cases before the Court were, *without doubt,* parties to the Statute of the Court and the Court was thus open to them under Article 35, paragraph 1, of the Statute. The Court points out that this is not the case in the present proceedings, in which an objection has been made regarding the right of the Applicant to have access to the Court. And it is this issue of access to the Court which distinguishes the present case from those cited in the jurisprudence concerned.

The Court observes that the question whether Serbia and Montenegro was or was not a party to the Statute of the Court at the time of the institution of the present proceedings is fundamental; for if it were not such a party, the Court would not be open to it under Article 35, paragraph 1, of the Statute. In that situation, subject to any application of paragraph 2 of that Article, Serbia and Montenegro could not have properly seised the Court, whatever title of jurisdiction it might have invoked, for the simple reason that it did not have the right to appear before the Court. Hence, the Court must first examine the question whether the Applicant meets the conditions laid down in Articles 34 and 35 of the Statute for access to the Court. Only if the answer to that question is in the affirmative, will the Court have to deal with the issues relating to the conditions laid down in Article 36 of the Statute.

The Court notes in this respect that there is no doubt that Serbia and Montenegro is a State for the purpose of Article 34, paragraph 1, of the Statute. However, certain Respondents objected that, at the time of the filing of its Application on 29 April 1999, that State did not meet the conditions set down in Article 35, paragraph 1, of the Statute since it was not a member of the United Nations and was not on that basis a party to the Statute. The Court recalls that France did not raise this issue but reiterates that the question is fundamental and must be examined irrespective of the attitude of the Parties.

The Court then recapitulates the sequence of events relating to the legal position of the Applicant vis-à-vis the United Nations over the period 1992–2000. It refers, *inter alia,* to the following: the break-up of the Socialist Federal Republic of Yugoslavia in 1991–1992; a declaration of 27 April 1992 by the SFRY Assembly, the National Assembly of the Republic of Serbia and the Assembly of the Republic of Montenegro asserting the continuation of the international legal and political personality of the SFRY by the Federal Republic of Yugoslavia; a note of the same day from Yugoslavia to the United Nations Secretary-General asserting the continuation by the FRY of the membership of the SFRY in the Organization; Security Council resolution 777 of 1992 considering that the FRY could not continue automatically the SFRY's membership; General Assembly resolution 47/1 of 1992 stating that the FRY shall not participate in the work of the General Assembly; and a letter dated 29 September 1992 from the United Nations Legal Counsel regarding the "practical consequences" of General Assembly resolution 47/1.

The Court concludes that the legal situation that obtained within the United Nations during the period 1992–2000 concerning the status of the Federal Republic of Yugoslavia, remained ambiguous and open to different assessments. This was due, *inter alia,* to the absence of an authoritative determination by the competent organs of the United Nations defining clearly the legal status of the Federal Republic of Yugoslavia vis-à-vis the United Nations.

The Court notes that three different positions were taken within the United Nations. In the first place, there was the position taken by the two political organs concerned. The Court refers in this respect to Security Council resolution 777 (1992) of 19 September 1992 and to General Assembly resolution 47/1 of 22 September 1992, according to which "the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations", and "should apply for membership in the United Nations". The Court points out that, while it is clear from the voting figures that these resolutions reflected a position endorsed by the vast majority of the Members of the United Nations, they cannot be construed as conveying an authoritative determination of the legal status of the Federal Republic of Yugoslavia within, or vis-à-vis, the United Nations. The uncertainty surrounding the question is evidenced, *inter alia,* by the practice of the General Assembly in budgetary matters during the years following the break-up of the Socialist Federal Republic of Yugoslavia.

The Court recalls that, secondly, the Federal Republic of Yugoslavia, for its part, maintained its claim that it continued the legal personality of the Socialist Federal Republic of Yugoslavia, "including its membership in all international organizations and participation in international treaties ratified or acceded to by Yugoslavia". This claim had been clearly stated in the official Note of 27 April 1992 from the Permanent Mission of Yugoslavia to the United Nations addressed to the Secretary-General of the United Nations. It was sustained by the Applicant throughout the period from 1992 to 2000.

Thirdly, another organ that came to be involved in this problem was the Secretariat of the United Nations. In the absence of any authoritative determination, the Secretariat, as the administrative organ of the Organization, simply continued to keep to the practice of the *status quo ante* that had prevailed prior to the break-up of the Socialist Federal Republic of Yugoslavia in 1992.

The Court points out that it was against this background that the Court itself, in its Judgment of 3 February 2003 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)* (hereinafter the "*Application for Revision* case"), referred to the "*sui generis* position which the FRY found itself in" during the relevant period; however, in that case, no final and definitive conclusion was drawn by the Court from this descriptive term on the amorphous status of the Federal Republic of Yugoslavia vis-à-vis or within the United Nations during this period.

The Court considers that this situation came to an end with a new development in 2000. On 27 October of that year, the Federal Republic of Yugoslavia requested admission to membership in the United Nations, and on 1 November, by General Assembly resolution 55/12, it was so admitted. Serbia and Montenegro thus has the status of membership in the Organization as from 1 November 2000. However, its admission to the United Nations did not have, and could not have had, the effect of dating back to the time when the SFRY broke up and disappeared. It became clear that the *sui generis* position of the Applicant could not have amounted to its membership in the Organization.

In the view of the Court, the significance of this new development in 2000 is that it has clarified the thus far amorphous legal situation concerning the status of the Federal Republic of Yugoslavia vis-à-vis the United Nations.

The Court finds that from the vantage point from which it now looks at the legal situation, and in light of the legal consequences of the new development since 1 November 2000, it is led to the conclusion that Serbia and Montenegro was not a Member of the United Nations, and in that capacity a State party to the Statute of the International Court of Justice, at the time of filing its Application.

A further point the Court considers is the relevance to the present case of the Judgment in the *Application for Revision* case, of 3 February 2003. The Court points out that, given the specific characteristics of the procedure under Article 61 of the Statute, in which the conditions for granting an application for revision of a judgment are strictly circumscribed, there is no reason to treat the Judgment in the *Application for Revision* case as having pronounced upon the issue of the legal status of Serbia and Montenegro vis-à-vis the United Nations. Nor does the Judgment pronounce upon the status of Serbia and Montenegro in relation to the Statute of the Court.

For all these reasons, the Court concludes that, at the time when the present proceedings were instituted, the Applicant in the present case, Serbia and Montenegro, was not a Member of the United Nations, and consequently, was not, on that basis, a State party to the Statute of the International Court of Justice. The Applicant not having become a party to the Statute on any other basis, it follows that the Court was not then open to it under Article 35, paragraph 1, of the Statute.

Serbia and Montenegro's possible access to the Court on the basis of Article 35, paragraph 2, of the Statute
(paras. 91–113)

The Court then considers whether it might be open to Serbia and Montenegro under paragraph 2 of Article 35, which provides:

> "The conditions under which the Court shall be open to other States [i.e. States not parties to the Statute] shall, subject to the special provisions contained in treaties in force, be laid down by the Security Council, but in no case shall such conditions place the parties in a position of inequality before the Court."

In this regard, it quotes from its Order of 8 April 1993 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)* (hereinafter the "*Genocide Convention* case"), where it stated, *inter alia,* that a "compromissory clause in a multilateral convention, such as Article IX of the Genocide Convention relied on by Bosnia and Herzegovina in the present case, *could,* in the view of the Court, be regarded *prima facie* as a special provision contained in a treaty in force" (emphasis added).

The Court recalls that a number of Respondents contended in their pleadings that the reference to "treaties in force" in Article 35, paragraph 2, of the Statute relates only to treaties in force when the Statute of the Court entered into force, i.e. on 24 October 1945. In respect of the Order of 8 April 1993 in the *Genocide Convention* case, the Respondents pointed out that that was a provisional assessment, not conclusive of the matter, and considered that "there [were] persuasive reasons why the Court should revisit the provisional approach it adopted to the interpretation of this clause in the *Genocide Convention* case".

The Court notes that the passage from the 1993 Order in the *Genocide Convention* case was addressed to the situation in which the proceedings were instituted against a State whose membership in the United Nations and status as a party to the Statute was unclear. It observes that the Order of 8 April 1993 was made on the basis of an examination of the relevant law and facts in the context of incidental proceedings on a request for the indication of provisional measures, and concludes that it would therefore now be appropriate for the Court to make a definitive finding on the question whether Article 35,

paragraph 2, affords access to the Court in the present case, and for that purpose, to examine further the question of its applicability and interpretation.

The Court thus proceeds to the interpretation of Article 35, paragraph 2, of the Statute, and does so in accordance with customary international law, as reflected in Article 31 of the 1969 Vienna Convention on the Law of Treaties. According to paragraph 1 of Article 31, a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of the treaty's object and purpose. Interpretation must be based above all upon the text of the treaty. As a supplementary measure recourse may be had to means of interpretation such as the preparatory work of the treaty and the circumstances of its conclusion.

The Court points out that the words "treaties in force" in Article 35, paragraph 2, do not, in their natural and ordinary meaning, indicate at what date the treaties contemplated are to be in force, and may thus lend themselves to different interpretations. They may be interpreted as referring either to treaties which were in force at the time that the Statute itself came into force, or to those which were in force on the date of the institution of proceedings in a case in which such treaties are invoked.

The Court observes that the object and purpose of Article 35 of the Statute is to define the conditions of access to the Court. While paragraph 1 of that Article opens it to the States parties to the Statute, paragraph 2 is intended to regulate access to the Court by States which are not parties to the Statute. It would have been inconsistent with the main thrust of the text to make it possible in the future for States not parties to the Statute to obtain access to the Court simply by the conclusion between themselves of a special treaty, multilateral or bilateral, containing a provision to that effect.

The Court moreover notes that the interpretation of Article 35, paragraph 2, whereby that paragraph is to be construed as referring to treaties in force at the time that the Statute came into force, is in fact reinforced by an examination of the *travaux préparatoires* of the text; the Court considers that the legislative history of Article 35, paragraph 2, of the Statute of the Permanent Court of International Justice (hereinafter the "Permanent Court") demonstrates that it was intended as an exception to the principle stated in paragraph 1, in order to cover cases contemplated in agreements concluded in the aftermath of the First World War before the Statute entered into force. However, the *travaux préparatoires* of the Statute of the present Court are less illuminating. The discussion of Article 35 was provisional and somewhat cursory; it took place at a stage in the planning of the future international organization when it was not yet settled whether the Permanent Court would be preserved or replaced by a new court. Indeed, the records do not include any discussion which would suggest that Article 35, paragraph 2, of the Statute should be given a different meaning from the corresponding provision in the Statute of the Permanent Court. It would rather seem that the text was reproduced from the Statute of the Permanent Court; there is no indication that any extension of access to the Court was intended.

Accordingly Article 35, paragraph 2, must be interpreted, *mutatis mutandis,* in the same way as the equivalent text in the Statute of the Permanent Court, namely as intended to refer to treaties in force at the date of the entry into force of the new Statute, and providing for the jurisdiction of the new Court. In fact, no such prior treaties, referring to the jurisdiction of the present Court, have been brought to the attention of the Court, and it may be that none exist. In the view of the Court, however, neither this circumstance, nor any consideration of the object and purpose of the text, nor the *travaux préparatoires,* offer support to the alternative interpretation that the provision was intended as granting access to the Court to States not parties to the Statute without any condition other than the existence of a treaty, containing a clause conferring jurisdiction on the Court, which might be concluded at any time subsequently to the entry into force of the Statute. As previously observed, this interpretation would lead to a result quite incompatible with the object and purpose of Article 35, paragraph 2, namely the regulation of access to the Court by States non-parties to the Statute. In the view of the Court therefore, the reference in Article 35, paragraph 2, of the Statute to "the special provisions contained in treaties in force" applies only to treaties in force at the date of the entry into force of the Statute, and not to any treaties concluded since that date.

The Court thus concludes that, even assuming that Serbia and Montenegro was a party to the Genocide Convention at the relevant date, Article 35, paragraph 2, of the Statute does not provide it with a basis to have access to the Court, under Article IX of that Convention, since the Convention only entered into force on 12 January 1951, after the entry into force of the Statute. The Court does not therefore consider it necessary to decide whether Serbia and Montenegro was or was not a party to the Genocide Convention on 29 April 1999 when the current proceedings were instituted.

Unnecessary to consider other preliminary objections (para. 114)

Having found that Serbia and Montenegro did not, at the time of the institution of the present proceedings, have access to the Court under either paragraph 1 or paragraph 2 of Article 35 of the Statute, the Court states that it is unnecessary for it to consider the other preliminary objections filed by the Respondents to its jurisdiction.

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The Court finally recalls (para. 115) that, irrespective of whether it has jurisdiction over a dispute, the parties "remain in all cases responsible for acts attributable to them that violate the rights of other States".

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Joint declaration of Vice-President Ranjeva and Judges Guillaume, Higgins, Kooijmans, Al-Khasawneh, Buergenthal and Elaraby

1. Vice-President Ranjeva and Judges Guillaume, Higgins, Kooijmans, Al-Khasawneh, Buergenthal and Elaraby voted in

favour of the *dispositif* of the Judgments because they agree that these cases cannot, as a matter of law, proceed to the merits. They have added in their joint declaration that they nevertheless profoundly disagree with the reasoning adopted by the Court.

2. They note that when the Court finds in a case that, on two or more grounds, its jurisdiction is not well founded *ratione personae, ratione materiae* or *ratione temporis,* it may choose the most appropriate ground on which to base its decision of lack of competence. They point out that this choice must be guided by three criteria: consistency with the past case law; degree of certitude of the ground chosen; possible implications for the other pending cases.

3. In the present instances, according to the Judgments of the Court, Serbia and Montenegro was not a Member of the United Nations in 1999 and, as a result, was not then a party to the Statute of the Court. In the Judgments, the Court concludes therefrom that it was not at that time open to the Applicant under Article 35, paragraph 1, of the Statute. The Judgments go on to state that paragraph 2 of that Article enables States not parties to the Statute to appear before the Court only by virtue of Security Council decisions or treaties concluded prior to the entry into force of the Statute. It is observed in the Judgments that the United Nations Genocide Convention only entered into force in 1951. It is thus concluded that Article 35, paragraph 2, of the Statute does not grant Serbia and Montenegro access to the Court either.

4. In the view of the seven judges making the joint declaration, this solution is at odds with a number of previous decisions of the Court, in particular the Judgment rendered on 3 February 2003 in a case between Bosnia and Herzegovina and Yugoslavia, in which it was found that Yugoslavia could appear before the Court between 1992 and 2000 and that this position had not been changed by its admission to the United Nations in 2002. Further, the authors of the declaration note that in reality it is far from self-evident that Yugoslavia was not a Member of the United Nations at that time. Lastly, they regret that the Judgment leaves some doubt as to whether Yugoslavia was a party, between 1992 and 2000, to the United Nations Genocide Convention and thus could call into question the solutions adopted by the Court in the case brought by Bosnia and Herzegovina against Serbia and Montenegro. Thus, the Court's Judgment does not meet any of the three criteria set out in paragraph 2 above.

5. The seven judges finally observe that the Court could easily have founded its Judgment that it lacked jurisdiction on the grounds on which it relied in 1999 when the requests for the indication of provisional measures were considered. The Court then found that it lacked jurisdiction *ratione temporis* in respect of the declaration accepting the compulsory jurisdiction of the Court which Serbia and Montenegro had filed several weeks after the start of military operations in Kosovo. It also found itself to be without jurisdiction *ratione materiae* in respect of the United Nations Genocide Convention, as no genocidal intention had been established. These solutions could easily have been confirmed.

Declaration of Judge Koroma

In his declaration Judge Koroma stated that, while concurring in the Judgment, he considered it necessary to stress the following. The question which the Court was requested to rule on and which it in fact did decide in this phase of the case was the issue of jurisdiction, namely, whether the Court could entertain the merits of the case. The jurisdictional function is intended to establish whether the Court is entitled to enter into and adjudicate on the substantive issues in a case. This function, in his view, cannot be dispensed with as it is both required by law and stipulated in the Statute of the Court. It is this function that the Court has carried out in this Judgment and it is within this paradigm that the Judgment must be understood. The Judgment cannot be interpreted as the Court taking a position on any of the matters of substance before the Court.

Separate opinion of Judge Higgins

Judge Higgins agrees that Serbia and Montenegro have not discontinued the case. However, she disagrees with the apparent finding of the Court that a case may only be removed from the List where there is a discontinuance by the applicant or the parties, or where an applicant disclosed no subsisting title of jurisdiction, or where the Court manifestly lacked jurisdiction (see paragraph 32 of the Judgment). In her view, the right of the Court exceptionally to remove a case from the List rests on its inherent powers, which are not limited to *a priori* categories.

Judge Higgins is of the opinion that the present case should have been removed from the List, as the Applicant has by its own conduct put itself in a position incompatible with Article 38, paragraph 2, of the Rules of Court. The manner in which it has dealt with preliminary objections would further warrant the case not being proceeded with.

Finally, Judge Higgins greatly regrets the attention the Court has afforded to Article 35, paragraph 2, of the Statute, believing its relevance lies only in another pending case.

Separate opinion of Judge Kooijmans

Judge Kooijmans has added a separate opinion to the Judgment and the joint declaration of seven Members of the Court, which he co-signed, for two reasons.

First he wishes to explain why in his view the Court should not have decided the issue of jurisdiction on the ground of Serbia and Montenegro's lack of access to the Court, although in 1999, when the Court rejected Yugoslavia's request for interim measures of protection, he was in favour of this approach. In his view, the Court has not in a convincing and transparent way elucidated the status of the Federal Republic of Yugoslavia vis-à-vis the United Nations before its admission to the Organization in 2000. Further, the Court's Judgment has undeniable implications for other pending cases, in particular the *Genocide Convention* case (*Bosnia Herzegovina* v. *Serbia and Montenegro*), which could easily have been avoided by choosing another approach. Finally, the Judgment is at odds with previous decisions of the Court, thus endangering the principle of consistency of reasoning. This consistency with

earlier case law should prevail over present or earlier misgivings of individual judges if an approach in conformity with that consistency does not lead to legally untenable results.

In the second place Judge Kooijmans sets out why in his view the Court would have done better to dismiss the cases *in limine litis.* In 1999 the Applicant invoked two grounds of jurisdiction which it explicitly abandoned in its Written Observations of 20 December 2002 without replacing them by other grounds. Nevertheless it did not discontinue the case but asked the Court to decide *whether* it had jurisdiction. Thus the Applications did no longer meet the requirement of Article 38, paragraph 2, of the Rules of Court, which states that the application shall specify as far as possible the legal grounds upon which the jurisdiction of the Court is said to be based. Since the Court has the inherent power to strike a case from the General List in order to safeguard the integrity of the procedure, it should have done so in view of the fact that the Applicant has failed to demonstrate and even did not make an effort to demonstrate that a valid ground of jurisdiction existed.

Separate opinion of Judge Elaraby

Judge Elaraby voted in favour of the *dispositif,* but disagreed both with the grounds on which the Court decided to base its Judgment—Article 35, paragraph 1 and Article 35, paragraph 2 of the Court's Statute—and with the conclusions which the Court reached on each of these grounds. The joint declaration, to which Judge Elaraby is a signatory, explains why he believes that the Court should have chosen alternative grounds to reach its decision. His separate opinion explains why he disagrees with its substantive findings.

Beginning with the issue of access to the Court under Article 35, paragraph 1, Judge Elaraby explained why, in his view, the Federal Republic of Yugoslavia *was* a Member of the United Nations at the time it filed its Application in the case. He emphasized that, although the FRY was excluded from participation in the work of the General Assembly and its subsidiary organs, it remained, as the Court had previously found, a *sui generis* Member between 1992 and 2000. Thus Judge Elaraby pointed out that during this period it continued to exhibit many attributes of United Nations membership and was neither suspended nor expelled from the Organization under the relevant provisions of the United Nations Charter. On this basis, Judge Elaraby concluded that the FRY was a Member of the United Nations when it filed its Application in 1999 and, as a result, he disagreed with the Court's finding that it was not "open" to the FRY under Article 35, paragraph 1, of the Court's Statute.

He also disagreed with the Court's finding that, assuming the FRY was a non-Member of the United Nations, it would not have had access to the Court under Article 35, paragraph 2. For Judge Elaraby, the Court's interpretation of the term "treaties in force" in Article 35, paragraph 2, as meaning "treaties in force at the time the Statute of the Court entered into force" was unduly restrictive. Like the Court, Judge Elaraby analysed the relevant *travaux préparatoires,* but, unlike the Court, he found that the expression "treaties in force" should be read to include any treaties connected with the peace settlement following the Second World War, whether they entered into force before or after the Statute of the Court. This would include, according to Judge Elaraby, the Genocide Convention, a treaty drafted under the auspices of the United Nations in direct response to the tragic events of the Second World War. In the alternative, Judge Elaraby stated that, even if the Court's reading of "treaties in force" were adopted as a general rule, there should be an exception for treaties intended to remedy violations of *jus cogens.* These, he wrote, should be subject to a broader interpretation so that any State seeking access to the Court on the basis of a treaty that addresses a *jus cogens* violation could do so as long as the treaty was in force when the Application was filed.

Because Judge Elaraby concluded that the Court was open to the FRY under Article 35 when it filed its Application in 1999, he went on to assess whether the Court has jurisdiction *ratione personae* under Article IX of the Genocide Convention. He concluded that it does, because the FRY succeeded to the treaty obligations of the former Socialist Federal Republic of Yugoslavia, including the Genocide Convention. In reaching this conclusion he explained that, in cases involving the separation of parts of the territory of a State to form one or more new States, Article 34 of the Vienna Convention on Succession of States in respect of Treaties embodied a customary rule of automatic succession by the new State to the treaties in force on the territory of its predecessor. He pointed out that it was all the more important for the Court to recognize and apply this rule in the case of a fundamental human rights treaty such as the Genocide Convention. Judge Elaraby thus concluded that the FRY was a party to the Genocide Convention on the basis of succession—not its subsequent purported accession and reservation—and therefore that the Court had jurisdiction *ratione personae.* He found, however, that the Court did not have jurisdiction *ratione materiae* under the Convention, so in the final analysis agreed with the Court that there was no jurisdiction to examine the merits of the FRY's case.

Separate opinion of Judge Kreća

Judge *ad hoc* Kreća noted that the Respondent, as well as the Applicant, attached crucial importance to the issue of *locus standi* of Serbia and Montenegro before the Court.

In the case at hand, it is closely, and even organically, linked with the membership of Serbia and Montenegro in the United Nations, due to the fact that it could not be considered as being party to the Statute of the Court apart from being a Member State of the United Nations as well as the fact that its *locus standi* cannot be based on conditions set forth in Article 35, paragraph 2, of the Statute.

In that regard he finds that at the end of the year 2000 the Applicant did two things:

(i) renounced the continuity claim and accepted the status of the successor State of the former SFRY; and

(ii) proceeding from a qualitatively new legal basis—as the successor State—submitted the application for admission to membership in the United Nations.

The admission of the FRY to the United Nations as a Member as from 1 November 2000 has two principal consequences in the circumstances of the case at hand:

(i) with respect to the admission of Yugoslavia as a Member as from 1 November 2000, it can be said that what is involved is the admission as a new Member; and

(ii) the admission of Yugoslavia as a Member as from 1 November 2000 qualified *per se* its status vis-à-vis the United Nations before that date. It seems clear that, in the light of the decisions taken by the competent organs of the United Nations, this status could not be a membership status. *A contrario,* Yugoslavia could not have been admitted as a Member as from 1 November 2000.

He is also of the opinion that the formulation of the *dispositif* explicitly linked to the absence of *locus standi* of Serbia and Montenegro would be more appropriate considering the circumstances of the case as well as the reasoning of the Court.

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152. CASE CONCERNING LEGALITY OF USE OF FORCE (SERBIA AND MONTENEGRO *v.* GERMANY) (PRELIMINARY OBJECTIONS)

Judgment of 15 December 2004

In its Judgment in the case concerning *Legality of the Use of Force* (*Serbia and Montenegro* v. *Germany*), the Court unanimously concluded that it had no jurisdiction to entertain the claims made in the Application filed by Serbia and Montenegro against Germany on 29 April 1999.

The Court was composed as follows: President Shi; Vice-President Ranjeva; Judges Guillaume, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal, Elaraby, Owada, Tomka; Judge *ad hoc* Kreća; Registrar Couvreur.

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The operative paragraph (para. 115) of the Judgment reads as follows:

" . . .

The Court,

Unanimously,

Finds that it has no jurisdiction to entertain the claims made in the Application filed by Serbia and Montenegro on 29 April 1999."

*

* *

Vice-President Ranjeva and Judges Guillaume, Higgins, Kooijmans, Al-Khasawneh, Buergenthal and Elaraby appended a joint declaration to the Judgment of the Court; Judge Koroma appended a declaration to the Judgment of the Court; Judges Higgins, Kooijmans and Elaraby and Judge *ad hoc* Kreća appended separate opinions to the Judgment of the Court.

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

On 29 April 1999 the Government of the Federal Republic of Yugoslavia (with effect from 4 February 2003, "Serbia and Montenegro") filed in the Registry of the Court an Application instituting proceedings against the Federal Republic of Germany (hereinafter "Germany") in respect of a dispute concerning acts allegedly committed by Germany

> "by which it has violated its international obligation banning the use of force against another State, the obligation not to intervene in the internal affairs of another State, the obligation not to violate the sovereignty of another State, the obligation to protect the civilian population and civilian objects in wartime, the obligation to protect the environment, the obligation relating to free navigation on international rivers, the obligation regarding fundamental human rights and freedoms, the obligation not to use prohibited weapons, the obligation not to deliberately inflict conditions of life calculated to cause the physical destruction of a national group".

The Application invoked as a basis of the Court's jurisdiction Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the United Nations General Assembly on 9 December 1948 (hereinafter "the Genocide Convention"), as well as Article 38, paragraph 5, of the Rules of Court.

On 29 April 1999, immediately after filing its Application, the Federal Republic of Yugoslavia also submitted a request for the indication of provisional measures pursuant to Article 73 of the Rules of Court.

On the same day, the Federal Republic of Yugoslavia filed Applications instituting proceedings and submitted requests for the indication of provisional measures, in respect of other disputes arising out of the same facts, against the Kingdom of Belgium, Canada, the French Republic, the Italian Republic, the Kingdom of the Netherlands, the Portuguese Republic, the Kingdom of Spain, the United Kingdom of Great Britain and Northern Ireland and the United States of America.

Since the Court included upon the Bench no judge of Yugoslav nationality, the Yugoslav Government exercised its right under Article 31 of the Statute and chose Mr. Milenko Kreća to sit as judge *ad hoc* in the case.

By ten Orders dated 2 June 1999 the Court, after hearing the Parties, rejected the request for the indication of provisional measures in all of the cases, and further decided to remove from the List the cases against Spain and the United States of America.

On 5 July 2000, within the time-limit fixed for the filing of its Counter-Memorial, Germany, referring to Article 79, paragraph 1, of the Rules, submitted preliminary objections relating to the Court's jurisdiction to entertain the case and to the admissibility of the Application. Accordingly, the proceedings on the merits were suspended.

On 20 December 2002, within the prescribed time-limit as twice extended by the Court at the request of the Federal Republic of Yugoslavia, the latter filed a written statement of its observations and submissions on those preliminary objections (hereinafter referred to as its "Observations"), together with identical written statements in the seven other pending cases.

Pursuant to Article 24, paragraph 1, of the Statute, on 25 November 2003 Judge Simma informed the President that he considered that he should not take part in any of the cases.

At a meeting held by the President of the Court on 12 December 2003 with the representatives of the Parties in the eight cases concerning *Legality of Use of Force,* the questions of the presence on the Bench of judges *ad hoc* during the preliminary objections phase and of a possible joinder of the proceedings were discussed, among other issues. By letter of 23 December 2003 the Registrar informed the Agents of all the Parties that the Court had decided, pursuant to Article 31, paragraph 5, of the Statute, that, taking into account the presence upon the Bench of judges of British, Dutch and French nationality, the judges *ad hoc* chosen by the respondent States should not sit during the current phase of the procedure in these cases. The Agents were also informed that the Court had decided that a joinder of the proceedings would not be appropriate at that stage.

Public sittings in all the cases were held between 19 and 23 April 2004.

After setting out the Parties' claims in their written pleadings (which are not reproduced here), the Judgment recalls that, at the oral proceedings, the following final submissions were presented by the Parties:

On behalf of the German Government,

at the hearing of 22 April 2004:

"Germany requests the Court to dismiss the Application for lack of jurisdiction and, additionally, as being inadmissible on the grounds it has stated in its Preliminary Objections and during its oral pleadings."

On behalf of the Government of Serbia and Montenegro

at the hearing of 23 April 2004:

"For the reasons given in its pleadings, and in particular in its Written Observations, subsequent correspondence with the Court, and at the oral hearing, Serbia and Montenegro requests the Court:

— to adjudge and declare on its jurisdiction *ratione personae* in the present cases; and

— to dismiss the remaining preliminary objections of the respondent States, and to order proceedings on the merits if it finds it has jurisdiction *ratione personae*."

Before proceeding to its reasoning, the Court includes a paragraph (para. 23) dealing with the Applicant's change of name on 4 February 2003 from "Federal Republic of Yugoslavia" to "Serbia and Montenegro". It explains that, as far as possible, except where the term in a historical context might cause confusion, it will use the name "Serbia and Montenegro", even where reference is made to a procedural step taken before the change.

Dismissal of the case in limine litis
(paras. 24-42)

The Court begins by observing that it must first deal with a preliminary question that has been raised in each of the cases, namely the contention, presented in various forms by the eight respondent States, that, as a result of the changed attitude of the Applicant to the question of the Court's jurisdiction as expressed in its Observations, the Court is no longer required to rule on those objections to jurisdiction, but can simply dismiss the cases *in limine litis* and remove them from its List, without enquiring further into matters of jurisdiction.

The Court then examines a number of arguments advanced by different Respondents as possible legal grounds that would lead the Court to take this course, including, *inter alia:* (i) that the position of Serbia and Montenegro is to be treated as one that in effect results in a discontinuance of the proceedings or that the Court should *ex officio* put an end to the case in the interests of the proper administration of justice; (ii) that there is agreement between the Parties on a "question of jurisdiction that is determinative of the case", and that as a result there is now no "dispute as to whether the Court has jurisdiction"; (iii) that the substantive dispute under the Genocide Convention has disappeared and thus the whole dispute has disappeared in those cases in which the only ground of jurisdiction relied on is Article IX of that Convention; (iv) that Serbia and Montenegro, by its conduct, has forfeited or renounced its right of action in the present case and is now estopped from pursuing the proceedings.

The Court finds itself unable to uphold the various contentions of the Respondents. The Court considers that it is unable to treat the Observations of Serbia and Montenegro as having the legal effect of a discontinuance of the proceedings under Article 88 or 89 of the Rules of Court and finds that the case does not fall into the category of cases in which it may of its own motion put an end to proceedings in a case. As regards the argument advanced by certain Respondents that the dispute on jurisdiction has disappeared since the Parties now agree that the Applicant was not a party to the Statute at the relevant time, the Court points out that Serbia and Montenegro has not invited the Court to find that it has no jurisdiction; while it is apparently in agreement with the arguments advanced by the Respondents in that regard in their prelimi-

nary objections, it has specifically asked in its submissions for a decision of the Court on the jurisdictional question. This question, in the view of the Court, is a legal question independent of the views of the parties upon it. As to the argument concerning the disappearance of the substantive dispute, it is clear that Serbia and Montenegro has by no means withdrawn its claims as to the merits. Indeed, these claims were extensively argued and developed in substance during the hearings on jurisdiction, in the context of the question of the jurisdiction of the Court under Article IX of the Genocide Convention. It is equally clear that these claims are being vigorously denied by the Respondents. It could not even be said under these circumstances that, while the essential dispute still subsists, Serbia and Montenegro is no longer seeking to have its claim determined by the Court. Serbia and Montenegro has not sought a discontinuance and has stated that it "wants the Court to continue the case and to decide upon its jurisdiction—and to decide on the merits as well, if it has jurisdiction". The Court therefore finds itself unable to conclude that Serbia and Montenegro has renounced any of its substantive or procedural rights, or has taken the position that the dispute between the Parties has ceased to exist. As for the argument based on the doctrine of estoppel, the Court does not consider that Serbia and Montenegro, by asking the Court "to decide on its jurisdiction" on the basis of certain alleged "new facts" about its own legal status vis-à-vis the United Nations, should be held to have forfeited or renounced its right of action and to be estopped from continuing the present action before the Court.

For all these reasons, the Court concludes that it cannot remove the cases concerning *Legality of Use of Force* from the List, or take any decision putting an end to those cases *in limine litis*. In the present phase of the proceedings, it must proceed to examine the question of its jurisdiction to entertain the case.

Serbia and Montenegro's access to the Court under Article 35, paragraph 1, of the Statute
(paras. 43-89)

The Court recalls that the Application filed on 29 April 1999 stated that "[t]he Government of the Federal Republic of Yugoslavia invokes Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide as well as Article 38, paragraph 5, of the Rules of Court". With regard to the second ground of jurisdiction thus invoked by the Applicant, the Court recalls that at the provisional measures stage, it found that "it is quite clear that, in the absence of consent by Germany, given pursuant to Article 38, paragraph 5, of the Rules, the Court cannot exercise jurisdiction . . . even *prima facie*" (*I.C.J. Reports 1999 (I),* p. 432, para. 31). The Court notes that the Parties have not returned to this matter.

The Court notes that in its jurisprudence it has referred to "its freedom to select the ground upon which it will base its judgment", and that, when its jurisdiction is challenged on diverse grounds, it is free to base its decision on one or more grounds of its own choosing, in particular "the ground which in its judgment is more direct and conclusive". However, in those instances, the Parties to the cases before the Court were, *without doubt,* parties to the Statute of the Court and the Court was thus open to them under Article 35, paragraph 1, of the Statute. The Court points out that this is not the case in the present proceedings, in which an objection has been made regarding the right of the Applicant to have access to the Court. And it is this issue of access to the Court which distinguishes the present case from those cited in the jurisprudence concerned.

The Court observes that the question whether Serbia and Montenegro was or was not a party to the Statute of the Court at the time of the institution of the present proceedings is fundamental; for if it were not such a party, the Court would not be open to it under Article 35, paragraph 1, of the Statute. In that situation, subject to any application of paragraph 2 of that Article, Serbia and Montenegro could not have properly seised the Court, whatever title of jurisdiction it might have invoked, for the simple reason that it did not have the right to appear before the Court. Hence, the Court must first examine the question whether the Applicant meets the conditions laid down in Articles 34 and 35 of the Statute for access to the Court. Only if the answer to that question is in the affirmative, will the Court have to deal with the issues relating to the conditions laid down in Article 36 of the Statute.

The Court notes in this respect that there is no doubt that Serbia and Montenegro is a State for the purpose of Article 34, paragraph 1, of the Statute. However, certain Respondents objected that, at the time of the filing of its Application on 29 April 1999, that State did not meet the conditions set down in Article 35 of the Statute.

Thus Germany considered, *inter alia,* that "the FRY does not fulfil the requirements set forth in Article 93 of the Charter and Article 35 of the Statute. Not being a member of the United Nations, it is not a party to the Statute" (Preliminary Objections of Germany, p. 26, para. 3.1) and concluded that "[i]n order to enjoy a full right of standing *ratione personae* before the Court, as claimed by the FRY, a State must be a member of the United Nations" (*ibid.,* p. 38, para. 3.25).

The Court then recapitulates the sequence of events relating to the legal position of the Applicant vis-à-vis the United Nations over the period 1992-2000. It refers, *inter alia,* to the following: the break-up of the Socialist Federal Republic of Yugoslavia in 1991-1992; a declaration of 27 April 1992 by the SFRY Assembly, the National Assembly of the Republic of Serbia and the Assembly of the Republic of Montenegro asserting the continuation of the international legal and political personality of the SFRY by the Federal Republic of Yugoslavia; a note of the same day from Yugoslavia to the United Nations Secretary-General asserting the continuation by the FRY of the membership of the SFRY in the Organization; Security Council resolution 777 of 1992 considering that the FRY could not continue automatically the SFRY's membership; General Assembly resolution 47/1 of 1992 stating that the FRY shall not participate in the work of the General Assembly; and a letter dated 29 September 1992 from the United Nations Legal Counsel regarding the "practical consequences" of General Assembly resolution 47/1.

The Court concludes that the legal situation that obtained within the United Nations during the period 1992-2000 concerning the status of the Federal Republic of Yugoslavia

remained ambiguous and open to different assessments. This was due, *inter alia,* to the absence of an authoritative determination by the competent organs of the United Nations defining clearly the legal status of the Federal Republic of Yugoslavia vis-à-vis the United Nations.

The Court notes that three different positions were taken within the United Nations. In the first place, there was the position taken by the two political organs concerned. The Court refers in this respect to Security Council resolution 777 (1992) of 19 September 1992 and to General Assembly resolution 47/1 of 22 September 1992, according to which "the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations", and "should apply for membership in the United Nations". The Court points out that, while it is clear from the voting figures that these resolutions reflected a position endorsed by the vast majority of the Members of the United Nations, they cannot be construed as conveying an authoritative determination of the legal status of the Federal Republic of Yugoslavia within, or vis-à-vis, the United Nations. The uncertainty surrounding the question is evidenced, *inter alia,* by the practice of the General Assembly in budgetary matters during the years following the break-up of the Socialist Federal Republic of Yugoslavia.

The Court recalls that, secondly, the Federal Republic of Yugoslavia, for its part, maintained its claim that it continued the legal personality of the Socialist Federal Republic of Yugoslavia, "including its membership in all international organizations and participation in international treaties ratified or acceded to by Yugoslavia". This claim had been clearly stated in the official Note of 27 April 1992 from the Permanent Mission of Yugoslavia to the United Nations addressed to the Secretary-General of the United Nations. It was sustained by the Applicant throughout the period from 1992 to 2000.

Thirdly, another organ that came to be involved in this problem was the Secretariat of the United Nations. In the absence of any authoritative determination, the Secretariat, as the administrative organ of the Organization, simply continued to keep to the practice of the *status quo ante* that had prevailed prior to the break-up of the Socialist Federal Republic of Yugoslavia in 1992.

The Court points out that it was against this background that the Court itself, in its Judgment of 3 February 2003 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)* (hereinafter the "*Application for Revision* case"), referred to the "*sui generis* position which the FRY found itself in" during the relevant period; however, in that case, no final and definitive conclusion was drawn by the Court from this descriptive term on the amorphous status of the Federal Republic of Yugoslavia vis-à-vis or within the United Nations during this period.

The Court considers that this situation came to an end with a new development in 2000. On 27 October of that year, the Federal Republic of Yugoslavia requested admission to membership in the United Nations, and on 1 November, by General Assembly resolution 55/12, it was so admitted. Serbia and Montenegro thus has the status of membership in the Organization as from 1 November 2000. However, its admission to the United Nations did not have, and could not have had, the effect of dating back to the time when the SFRY broke up and disappeared. It became clear that the *sui generis* position of the Applicant could not have amounted to its membership in the Organization.

In the view of the Court, the significance of this new development in 2000 is that it has clarified the thus far amorphous legal situation concerning the status of the Federal Republic of Yugoslavia vis-à-vis the United Nations.

The Court finds that from the vantage point from which it now looks at the legal situation, and in light of the legal consequences of the new development since 1 November 2000, it is led to the conclusion that Serbia and Montenegro was not a Member of the United Nations, and in that capacity a State party to the Statute of the International Court of Justice, at the time of filing its Application.

A further point the Court considers is the relevance to the present case of the Judgment in the *Application for Revision* case, of 3 February 2003. The Court points out that, given the specific characteristics of the procedure under Article 61 of the Statute, in which the conditions for granting an application for revision of a judgment are strictly circumscribed, there is no reason to treat the Judgment in the *Application for Revision* case as having pronounced upon the issue of the legal status of Serbia and Montenegro vis-à-vis the United Nations. Nor does the Judgment pronounce upon the status of Serbia and Montenegro in relation to the Statute of the Court.

For all these reasons, the Court concludes that, at the time when the present proceedings were instituted, the Applicant in the present case, Serbia and Montenegro, was not a Member of the United Nations, and consequently, was not, on that basis, a State party to the Statute of the International Court of Justice. The Applicant not having become a party to the Statute on any other basis, it follows that the Court was not then open to it under Article 35, paragraph 1, of the Statute.

Serbia and Montenegro's possible access to the Court on the basis of Article 35, paragraph 2, of the Statute
(paras. 90-112)

The Court then considers whether it might be open to Serbia and Montenegro under paragraph 2 of Article 35, which provides:

> "The conditions under which the Court shall be open to other States [i.e. States not parties to the Statute] shall, subject to the special provisions contained in treaties in force, be laid down by the Security Council, but in no case shall such conditions place the parties in a position of inequality before the Court."

In this regard, it quotes from its Order of 8 April 1993 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)* (hereinafter the "*Genocide Convention* case"), where it stated, *inter alia,* that a "compromissory clause in a multilateral convention, such

as Article IX of the Genocide Convention relied on by Bosnia and Herzegovina in the present case, *could,* in the view of the Court, be regarded *prima facie* as a special provision contained in a treaty in force" (emphasis added).

The Court recalls that a number of Respondents contended in their pleadings that the reference to "treaties in force" in Article 35, paragraph 2, of the Statute relates only to treaties in force when the Statute of the Court entered into force, i.e. on 24 October 1945. In respect of the Order of 8 April 1993 in the *Genocide Convention* case, the Respondents pointed out that that was a provisional assessment, not conclusive of the matter, and considered that "there [were] persuasive reasons why the Court should revisit the provisional approach it adopted to the interpretation of this clause in the *Genocide Convention* case".

The Court notes that the passage from the 1993 Order in the *Genocide Convention* case was addressed to the situation in which the proceedings were instituted against a State whose membership in the United Nations and status as a party to the Statute was unclear. It observes that the Order of 8 April 1993 was made on the basis of an examination of the relevant law and facts in the context of incidental proceedings on a request for the indication of provisional measures, and concludes that it would therefore now be appropriate for the Court to make a definitive finding on the question whether Article 35, paragraph 2, affords access to the Court in the present case, and for that purpose, to examine further the question of its applicability and interpretation.

The Court thus proceeds to the interpretation of Article 35, paragraph 2, of the Statute, and does so in accordance with customary international law, as reflected in Article 31 of the 1969 Vienna Convention on the Law of Treaties. According to paragraph 1 of Article 31, a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of the treaty's object and purpose. Interpretation must be based above all upon the text of the treaty. As a supplementary measure recourse may be had to means of interpretation such as the preparatory work of the treaty and the circumstances of its conclusion.

The Court points out that the words "treaties in force" in Article 35, paragraph 2, do not, in their natural and ordinary meaning, indicate at what date the treaties contemplated are to be in force, and may thus lend themselves to different interpretations. They may be interpreted as referring either to treaties which were in force at the time that the Statute itself came into force, or to those which were in force on the date of the institution of proceedings in a case in which such treaties are invoked.

The Court observes that the object and purpose of Article 35 of the Statute is to define the conditions of access to the Court. While paragraph 1 of that Article opens it to the States parties to the Statute, paragraph 2 is intended to regulate access to the Court by States which are not parties to the Statute. It would have been inconsistent with the main thrust of the text to make it possible in the future for States not parties to the Statute to obtain access to the Court simply by the conclusion between themselves of a special treaty, multilateral or bilateral, containing a provision to that effect.

The Court moreover notes that the interpretation of Article 35, paragraph 2, whereby that paragraph is to be construed as referring to treaties in force at the time that the Statute came into force, is in fact reinforced by an examination of the *travaux préparatoires* of the text; the Court considers that the legislative history of Article 35, paragraph 2, of the Statute of the Permanent Court of International Justice (hereinafter the "Permanent Court") demonstrates that it was intended as an exception to the principle stated in paragraph 1, in order to cover cases contemplated in agreements concluded in the aftermath of the First World War before the Statute entered into force. However, the *travaux préparatoires* of the Statute of the present Court are less illuminating. The discussion of Article 35 was provisional and somewhat cursory; it took place at a stage in the planning of the future international organization when it was not yet settled whether the Permanent Court would be preserved or replaced by a new court. Indeed, the records do not include any discussion which would suggest that Article 35, paragraph 2, of the Statute should be given a different meaning from the corresponding provision in the Statute of the Permanent Court. It would rather seem that the text was reproduced from the Statute of the Permanent Court; there is no indication that any extension of access to the Court was intended.

Accordingly Article 35, paragraph 2, must be interpreted, *mutatis mutandis,* in the same way as the equivalent text in the Statute of the Permanent Court, namely as intended to refer to treaties in force at the date of the entry into force of the new Statute, and providing for the jurisdiction of the new Court. In fact, no such prior treaties, referring to the jurisdiction of the present Court, have been brought to the attention of the Court, and it may be that none exist. In the view of the Court, however, neither this circumstance, nor any consideration of the object and purpose of the text, nor the *travaux préparatoires,* offer support to the alternative interpretation that the provision was intended as granting access to the Court to States not parties to the Statute without any condition other than the existence of a treaty, containing a clause conferring jurisdiction on the Court, which might be concluded at any time subsequently to the entry into force of the Statute. As previously observed, this interpretation would lead to a result quite incompatible with the object and purpose of Article 35, paragraph 2, namely the regulation of access to the Court by States non-parties to the Statute. In the view of the Court therefore, the reference in Article 35, paragraph 2, of the Statute to "the special provisions contained in treaties in force" applies only to treaties in force at the date of the entry into force of the Statute, and not to any treaties concluded since that date.

The Court thus concludes that, even assuming that Serbia and Montenegro was a party to the Genocide Convention at the relevant date, Article 35, paragraph 2, of the Statute does not provide it with a basis to have access to the Court, under Article IX of that Convention, since the Convention only entered into force on 12 January 1951, after the entry into force of the Statute. The Court does not therefore consider it necessary to decide whether Serbia and Montenegro was or was not a party to the Genocide Convention on 29 April 1999 when the current proceedings were instituted.

Unnecessary to consider other preliminary objections (para. 113)

Having found that Serbia and Montenegro did not, at the time of the institution of the present proceedings, have access to the Court under either paragraph 1 or paragraph 2 of Article 35 of the Statute, the Court states that it is unnecessary for it to consider the other preliminary objections filed by the Respondents to its jurisdiction.

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The Court finally recalls (para. 114) that, irrespective of whether it has jurisdiction over a dispute, the parties "remain in all cases responsible for acts attributable to them that violate the rights of other States".

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Joint declaration of Vice-President Ranjeva and Judges Guillaume, Higgins, Kooijmans, Al-Khasawneh, Buergenthal and Elaraby

1. Vice-President Ranjeva and Judges Guillaume, Higgins, Kooijmans, Al-Khasawneh, Buergenthal and Elaraby voted in favour of the *dispositif* of the Judgments because they agree that these cases cannot, as a matter of law, proceed to the merits. They have added in their joint declaration that they nevertheless profoundly disagree with the reasoning adopted by the Court.

2. They note that when the Court finds in a case that, on two or more grounds, its jurisdiction is not well founded *ratione personae, ratione materiae* or *ratione temporis,* it may choose the most appropriate ground on which to base its decision of lack of competence. They point out that this choice must be guided by three criteria: consistency with the past case law; degree of certitude of the ground chosen; possible implications for the other pending cases.

3. In the present instances, according to the Judgments of the Court, Serbia and Montenegro was not a Member of the United Nations in 1999 and, as a result, was not then a party to the Statute of the Court. In the Judgments, the Court concludes therefrom that it was not at that time open to the Applicant under Article 35, paragraph 1, of the Statute. The Judgments go on to state that paragraph 2 of that Article enables States not parties to the Statute to appear before the Court only by virtue of Security Council decisions or treaties concluded prior to the entry into force of the Statute. It is observed in the Judgments that the United Nations Genocide Convention only entered into force in 1951. It is thus concluded that Article 35, paragraph 2, of the Statute does not grant Serbia and Montenegro access to the Court either.

4. In the view of the seven judges making the joint declaration, this solution is at odds with a number of previous decisions of the Court, in particular the Judgment rendered on 3 February 2003 in a case between Bosnia and Herzegovina and Yugoslavia, in which it was found that Yugoslavia could appear before the Court between 1992 and 2000 and that this position had not been changed by its admission to the United Nations in 2002. Further, the authors of the declaration note that in reality it is far from self-evident that Yugoslavia was not a Member of the United Nations at that time. Lastly, they regret that the Judgment leaves some doubt as to whether Yugoslavia was a party, between 1992 and 2000, to the United Nations Genocide Convention and thus could call into question the solutions adopted by the Court in the case brought by Bosnia and Herzegovina against Serbia and Montenegro. Thus, the Court's Judgment does not meet any of the three criteria set out in paragraph 2 above.

5. The seven judges finally observe that the Court could easily have founded its Judgment that it lacked jurisdiction on the grounds on which it relied in 1999 when the requests for the indication of provisional measures were considered. The Court then found that it lacked jurisdiction *ratione temporis* in respect of the declaration accepting the compulsory jurisdiction of the Court which Serbia and Montenegro had filed several weeks after the start of military operations in Kosovo. It also found itself to be without jurisdiction *ratione materiae* in respect of the United Nations Genocide Convention, as no genocidal intention had been established. These solutions could easily have been confirmed.

Declaration of Judge Koroma

In his declaration Judge Koroma stated that, while concurring in the Judgment, he considered it necessary to stress the following. The question which the Court was requested to rule on and which it in fact did decide in this phase of the case was the issue of jurisdiction, namely, whether the Court could entertain the merits of the case. The jurisdictional function is intended to establish whether the Court is entitled to enter into and adjudicate on the substantive issues in a case. This function, in his view, cannot be dispensed with as it is both required by law and stipulated in the Statute of the Court. It is this function that the Court has carried out in this Judgment and it is within this paradigm that the Judgment must be understood. The Judgment cannot be interpreted as the Court taking a position on any of the matters of substance before the Court.

Separate opinion of Judge Higgins

Judge Higgins agrees that Serbia and Montenegro have not discontinued the case. However, she disagrees with the apparent finding of the Court that a case may only be removed from the List where there is a discontinuance by the applicant or the parties, or where an applicant disclosed no subsisting title of jurisdiction, or where the Court manifestly lacked jurisdiction (see paragraph 31 of the Judgment). In her view, the right of the Court exceptionally to remove a case from the List rests on its inherent powers, which are not limited to *a priori* categories.

Judge Higgins is of the opinion that the present case should have been removed from the List, as the Applicant has by its own conduct put itself in a position incompatible with Article 38, paragraph 2, of the Rules of Court. The manner in which it has dealt with preliminary objections would further warrant the case not being proceeded with.

Finally, Judge Higgins greatly regrets the attention the Court has afforded to Article 35, paragraph 2, of the Statute, believing its relevance lies only in another pending case.

Separate opinion of Judge Kooijmans

Judge Kooijmans has added a separate opinion to the Judgment and the joint declaration of seven Members of the Court, which he co-signed, for two reasons.

First he wishes to explain why in his view the Court should not have decided the issue of jurisdiction on the ground of Serbia and Montenegro's lack of access to the Court, although in 1999, when the Court rejected Yugoslavia's request for interim measures of protection, he was in favour of this approach. In his view, the Court has not in a convincing and transparent way elucidated the status of the Federal Republic of Yugoslavia vis-à-vis the United Nations before its admission to the Organization in 2000. Further, the Court's Judgment has undeniable implications for other pending cases, in particular the *Genocide Convention* case (*Bosnia Herzegovina* v. *Serbia and Montenegro*), which could easily have been avoided by choosing another approach. Finally, the Judgment is at odds with previous decisions of the Court, thus endangering the principle of consistency of reasoning. This consistency with earlier case law should prevail over present or earlier misgivings of individual judges if an approach in conformity with that consistency does not lead to legally untenable results.

In the second place Judge Kooijmans sets out why in his view the Court would have done better to dismiss the cases *in limine litis*. In 1999 the Applicant invoked two grounds of jurisdiction which it explicitly abandoned in its Written Observations of 20 December 2002 without replacing them by other grounds. Nevertheless it did not discontinue the case but asked the Court to decide *whether* it had jurisdiction. Thus the Applications did no longer meet the requirement of Article 38, paragraph 2, of the Rules of Court, which states that the application shall specify as far as possible the legal grounds upon which the jurisdiction of the Court is said to be based. Since the Court has the inherent power to strike a case from the General List in order to safeguard the integrity of the procedure, it should have done so in view of the fact that the Applicant has failed to demonstrate and even did not make an effort to demonstrate that a valid ground of jurisdiction existed.

Separate opinion of Judge Elaraby

Judge Elaraby voted in favour of the *dispositif,* but disagreed both with the grounds on which the Court decided to base its Judgment—Article 35, paragraph 1 and Article 35, paragraph 2 of the Court's Statute—and with the conclusions which the Court reached on each of these grounds. The joint declaration, to which Judge Elaraby is a signatory, explains why he believes that the Court should have chosen alternative grounds to reach its decision. His separate opinion explains why he disagrees with its substantive findings.

Beginning with the issue of access to the Court under Article 35, paragraph 1, Judge Elaraby explained why, in his view, the Federal Republic of Yugoslavia *was* a Member of the United Nations at the time it filed its Application in the case. He emphasized that, although the FRY was excluded from participation in the work of the General Assembly and its subsidiary organs, it remained, as the Court had previously found, a *sui generis* Member between 1992 and 2000. Thus Judge Elaraby pointed out that during this period it continued to exhibit many attributes of United Nations membership and was neither suspended nor expelled from the Organization under the relevant provisions of the United Nations Charter. On this basis, Judge Elaraby concluded that the FRY was a Member of the United Nations when it filed its Application in 1999 and, as a result, he disagreed with the Court's finding that it was not "open" to the FRY under Article 35, paragraph 1, of the Court's Statute.

He also disagreed with the Court's finding that, assuming the FRY was a non-Member of the United Nations, it would not have had access to the Court under Article 35, paragraph 2. For Judge Elaraby, the Court's interpretation of the term "treaties in force" in Article 35, paragraph 2, as meaning "treaties in force at the time the Statute of the Court entered into force" was unduly restrictive. Like the Court, Judge Elaraby analysed the relevant *travaux préparatoires,* but, unlike the Court, he found that the expression "treaties in force" should be read to include any treaties connected with the peace settlement following the Second World War, whether they entered into force before or after the Statute of the Court. This would include, according to Judge Elaraby, the Genocide Convention, a treaty drafted under the auspices of the United Nations in direct response to the tragic events of the Second World War. In the alternative, Judge Elaraby stated that, even if the Court's reading of "treaties in force" were adopted as a general rule, there should be an exception for treaties intended to remedy violations of *jus cogens*. These, he wrote, should be subject to a broader interpretation so that any State seeking access to the Court on the basis of a treaty that addresses a *jus cogens* violation could do so as long as the treaty was in force when the Application was filed.

Because Judge Elaraby concluded that the Court was open to the FRY under Article 35 when it filed its Application in 1999, he went on to assess whether the Court has jurisdiction *ratione personae* under Article IX of the Genocide Convention. He concluded that it does, because the FRY succeeded to the treaty obligations of the former Socialist Federal Republic of Yugoslavia, including the Genocide Convention. In reaching this conclusion he explained that, in cases involving the separation of parts of the territory of a State to form one or more new States, Article 34 of the Vienna Convention on Succession of States in respect of Treaties embodied a customary rule of automatic succession by the new State to the treaties in force on the territory of its predecessor. He pointed out that it was all the more important for the Court to recognize and apply this rule in the case of a fundamental human rights treaty such as the Genocide Convention. Judge Elaraby thus concluded that the FRY was a party to the Genocide Convention on the basis of succession—not its subsequent purported accession and reservation—and therefore that the Court had jurisdiction *ratione personae*. He found, however, that the Court did not have jurisdiction *ratione materiae* under the Convention, so in the final analysis agreed with the Court that there was no jurisdiction to examine the merits of the FRY's case.

Separate opinion of Judge Kreća

Judge *ad hoc* Kreća noted that the Respondent, as well as the Applicant, attached crucial importance to the issue of *locus standi* of Serbia and Montenegro before the Court.

In the case at hand, it is closely, and even organically, linked with the membership of Serbia and Montenegro in the United Nations, due to the fact that it could not be considered as being party to the Statute of the Court apart from being a Member State of the United Nations as well as the fact that its *locus standi* cannot be based on conditions set forth in Article 35, paragraph 2, of the Statute.

In that regard he finds that at the end of the year 2000 the Applicant did two things:

(i) renounced the continuity claim and accepted the status of the successor State of the former SFRY; and

(ii) proceeding from a qualitatively new legal basis—as the successor State—submitted the application for admission to membership in the United Nations.

The admission of the FRY to the United Nations as a Member as from 1 November 2000 has two principal consequences in the circumstances of the case at hand:

(i) with respect to the admission of Yugoslavia as a Member as from 1 November 2000, it can be said that what is involved is the admission as a new Member; and

(ii) the admission of Yugoslavia as a Member as from 1 November 2000 qualified *per se* its status vis-à-vis the United Nations before that date. It seems clear that, in the light of the decisions taken by the competent organs of the United Nations, this status could not be a membership status. *A contrario,* Yugoslavia could not have been admitted as a Member as from 1 November 2000.

He is also of the opinion that the formulation of the *dispositif* explicitly linked to the absence of *locus standi* of Serbia and Montenegro would be more appropriate considering the circumstances of the case as well as the reasoning of the Court.

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153. CASE CONCERNING LEGALITY OF USE OF FORCE (SERBIA AND MONTENEGRO *v.* ITALY) (PRELIMINARY OBJECTIONS)

Judgment of 15 December 2004

In its Judgment in the case concerning *Legality of the Use of Force* (*Serbia and Montenegro* v. *Italy*), the Court unanimously concluded that it had no jurisdiction to entertain the claims made in the Application filed by Serbia and Montenegro against Italy on 29 April 1999.

The Court was composed as follows: President Shi; Vice-President Ranjeva; Judges Guillaume, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal, Elaraby, Owada, Tomka; Judge *ad hoc* Kreća; Registrar Couvreur.

*

* *

The operative paragraph (para. 116) of the Judgment reads as follows:

" . . .

The Court,

Unanimously,

Finds that it has no jurisdiction to entertain the claims made in the Application filed by Serbia and Montenegro on 29 April 1999."

*

* *

Vice-President Ranjeva and Judges Guillaume, Higgins, Kooijmans, Al-Khasawneh, Buergenthal and Elaraby appended a joint declaration to the Judgment of the Court; Judge Koroma appended a declaration to the Judgment of the Court; Judges Higgins, Kooijmans and Elaraby and Judge *ad hoc* Kreća appended separate opinions to the Judgment of the Court.

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History of the proceedings and submissions of the Parties (paras. 1–23)

On 29 April 1999 the Government of the Federal Republic of Yugoslavia (with effect from 4 February 2003, "Serbia and Montenegro") filed in the Registry of the Court an Application instituting proceedings against the Italian Republic (hereinafter "Italy") in respect of a dispute concerning acts allegedly committed by Italy

> "by which it has violated its international obligation banning the use of force against another State, the obligation not to intervene in the internal affairs of another State, the obligation not to violate the sovereignty of another State, the obligation to protect the civilian population and civilian objects in wartime, the obligation to protect the environment, the obligation relating to free navigation on international rivers, the obligation regarding fundamental human rights and freedoms, the obligation not to use prohibited weapons, the obligation not to deliberately inflict conditions of life calculated to cause the physical destruction of a national group".

The Application invoked as a basis of the Court's jurisdiction Article IX of the Convention on the Prevention and

Punishment of the Crime of Genocide, adopted by the United Nations General Assembly on 9 December 1948 (hereinafter "the Genocide Convention"), as well as Article 38, paragraph 5, of the Rules of Court.

On 29 April 1999, immediately after filing its Application, the Federal Republic of Yugoslavia also submitted a request for the indication of provisional measures pursuant to Article 73 of the Rules of Court.

On the same day, the Federal Republic of Yugoslavia filed Applications instituting proceedings and submitted requests for the indication of provisional measures, in respect of other disputes arising out of the same facts, against the Kingdom of Belgium, Canada, the French Republic, the Federal Republic of Germany, the Kingdom of the Netherlands, the Portuguese Republic, the Kingdom of Spain, the United Kingdom of Great Britain and Northern Ireland and the United States of America.

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: the Yugoslav Government chose Mr. Milenko Kreća and the Italian Government chose Mr. Giorgio Gaja. Referring to Article 31, paragraph 5, of the Statute, the Yugoslav Government objected to the latter choice. The Court, after deliberating, found that the nomination of a judge *ad hoc* by Italy was justified in the provisional measures phase of the case.

By ten Orders dated 2 June 1999 the Court, after hearing the Parties, rejected the request for the indication of provisional measures in all of the cases, and further decided to remove from the List the cases against Spain and the United States of America.

On 4 July 2000, within the time–limit fixed for the filing of its Counter-Memorial, Italy, referring to Article 79, paragraph 1, of the Rules, submitted preliminary objections relating to the Court's jurisdiction to entertain the case and to the admissibility of the Application. Accordingly, the proceedings on the merits were suspended.

On 20 December 2002, within the prescribed time-limit as twice extended by the Court at the request of the Federal Republic of Yugoslavia, the latter filed a written statement of its observations and submissions on those preliminary objections (hereinafter referred to as its "Observations"), together with identical written statements in the seven other pending cases.

Pursuant to Article 24, paragraph 1, of the Statute, on 25 November 2003 Judge Simma informed the President that he considered that he should not take part in any of the cases.

At a meeting held by the President of the Court on 12 December 2003 with the representatives of the Parties in the eight cases concerning *Legality of Use of Force,* the questions of the presence on the Bench of judges *ad hoc* during the preliminary objections phase and of a possible joinder of the proceedings were discussed, among other issues. By letter of 23 December 2003 the Registrar informed the Agents of all the Parties that the Court had decided, pursuant to Article 31, paragraph 5, of the Statute, that, taking into account the presence upon the Bench of judges of British, Dutch and French nationality, the judges *ad hoc* chosen by the respondent States should not sit during the current phase of the procedure in these cases. The Agents were also informed that the Court had decided that a joinder of the proceedings would not be appropriate at that stage.

Public sittings in all the cases were held between 19 and 23 April 2004.

After setting out the Parties' claims in their written pleadings (which are not reproduced here), the Judgment recalls that, at the oral proceedings, the following final submissions were presented by the Parties:

On behalf of the Italian Government,

at the hearing of 22 April 2004:

"For the reasons set out in its Preliminary Objections and oral statements, the Italian Government submits as follows:

May it please the Court to adjudge and declare,

Principally, that:

I. No decision is called for on the Application filed in the Registry of the Court on 29 April 1999 by Serbia and Montenegro against the Italian Republic for 'violation of the obligation not to use force', as supplemented by the Memorial filed on 5 January 2000, inasmuch as there is no longer any dispute between Serbia and Montenegro and the Italian Republic or as the subject-matter of the dispute has disappeared.

In the alternative, that:

II. The Court lacks jurisdiction *ratione personarum* to decide the present case, since Serbia and Montenegro was not a party to the Statute when the Application was filed and also does not consider itself a party to a 'treaty in force' such as would confer jurisdiction on the Court, in accordance with Article 35, paragraph 2, of the Statute;

III. The Court lacks jurisdiction *ratione materiae* to decide the present case, since Serbia and Montenegro does not regard itself as bound by Article IX of the Genocide Convention, to which it made a reservation upon giving notice of accession in March 2001 and since, in any event, the dispute arising from the terms of the Application instituting proceedings, as supplemented by the Memorial, is not a dispute relating to 'the interpretation, application or fulfilment' of the Genocide Convention, as provided in Article IX;

IV. Serbia and Montenegro's Application, as supplemented by the Memorial, is inadmissible in its entirety, inasmuch as Serbia and Montenegro seeks thereby to obtain from the Court a decision regarding the legality of action undertaken by subjects of international law not present in the proceedings or not *all* so present;

V. Serbia and Montenegro's Application is inadmissible with respect to the eleventh submission, mentioned for the first time in the Memorial, inasmuch as Serbia and Montenegro seeks thereby to introduce a dispute altogether different from the original dispute deriving from the Application."

On behalf of the Government of Serbia and Montenegro

at the hearing of 23 April 2004:

"For the reasons given in its pleadings, and in particular in its Written Observations, subsequent correspondence with the Court, and at the oral hearing, Serbia and Montenegro requests the Court:

— to adjudge and declare on its jurisdiction *ratione personae* in the present cases; and

— to dismiss the remaining preliminary objections of the respondent States, and to order proceedings on the merits if it finds it has jurisdiction *ratione personae*."

Before proceeding to its reasoning, the Court includes a paragraph (para. 24) dealing with the Applicant's change of name on 4 February 2003 from "Federal Republic of Yugoslavia" to "Serbia and Montenegro". It explains that, as far as possible, except where the term in a historical context might cause confusion, it will use the name "Serbia and Montenegro", even where reference is made to a procedural step taken before the change.

Dismissal of the case in limine litis
(paras. 25–43)

The Court begins by observing that it must first deal with a preliminary question that has been raised in each of the cases, namely the contention, presented in various forms by the eight respondent States, that, as a result of the changed attitude of the Applicant to the question of the Court's jurisdiction as expressed in its Observations, the Court is no longer required to rule on those objections to jurisdiction, but can simply dismiss the cases *in limine litis* and remove them from its List, without enquiring further into matters of jurisdiction.

The Court then examines a number of arguments advanced by different Respondents as possible legal grounds that would lead the Court to take this course, including, *inter alia:* (i) that the position of Serbia and Montenegro is to be treated as one that in effect results in a discontinuance of the proceedings or that the Court should *ex officio* put an end to the case in the interests of the proper administration of justice; (ii) that there is agreement between the Parties on a "question of jurisdiction that is determinative of the case", and that as a result there is now no "dispute as to whether the Court has jurisdiction"; (iii) that the substantive dispute under the Genocide Convention has disappeared and thus the whole dispute has disappeared in those cases in which the only ground of jurisdiction relied on is Article IX of that Convention; (iv) that Serbia and Montenegro, by its conduct, has forfeited or renounced its right of action in the present case and is now estopped from pursuing the proceedings.

The Court finds itself unable to uphold the various contentions of the Respondents. The Court considers that it is unable to treat the Observations of Serbia and Montenegro as having the legal effect of a discontinuance of the proceedings under Article 88 or 89 of the Rules of Court and finds that the case does not fall into the category of cases in which it may of its own motion put an end to proceedings in a case. As regards the argument advanced by certain Respondents that the dispute on jurisdiction has disappeared since the Parties now agree that the Applicant was not a party to the Statute at the relevant time, the Court points out that Serbia and Montenegro has not invited the Court to find that it has no jurisdiction; while it is apparently in agreement with the arguments advanced by the Respondents in that regard in their preliminary objections, it has specifically asked in its submissions for a decision of the Court on the jurisdictional question. This question, in the view of the Court, is a legal question independent of the views of the parties upon it. As to the argument concerning the disappearance of the substantive dispute, it is clear that Serbia and Montenegro has by no means withdrawn its claims as to the merits. Indeed, these claims were extensively argued and developed in substance during the hearings on jurisdiction, in the context of the question of the jurisdiction of the Court under Article IX of the Genocide Convention. It is equally clear that these claims are being vigorously denied by the Respondents. It could not even be said under these circumstances that, while the essential dispute still subsists, Serbia and Montenegro is no longer seeking to have its claim determined by the Court. Serbia and Montenegro has not sought a discontinuance and has stated that it "wants the Court to continue the case and to decide upon its jurisdiction—and to decide on the merits as well, if it has jurisdiction". The Court therefore finds itself unable to conclude that Serbia and Montenegro has renounced any of its substantive or procedural rights, or has taken the position that the dispute between the Parties has ceased to exist. As for the argument based on the doctrine of estoppel, the Court does not consider that Serbia and Montenegro, by asking the Court "to decide on its jurisdiction" on the basis of certain alleged "new facts" about its own legal status vis-à-vis the United Nations, should be held to have forfeited or renounced its right of action and to be estopped from continuing the present action before the Court.

For all these reasons, the Court concludes that it cannot remove the cases concerning *Legality of Use of Force* from the List, or take any decision putting an end to those cases *in limine litis.* In the present phase of the proceedings, it must proceed to examine the question of its jurisdiction to entertain the case.

Serbia and Montenegro's access to the Court under Article 35, paragraph 1, of the Statute
(paras. 44–90)

The Court recalls that the Application filed on 29 April 1999 stated that "[t]he Government of the Federal Republic of Yugoslavia invokes Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide as well as Article 38, paragraph 5, of the Rules of Court". With regard to the second ground of jurisdiction thus invoked by the Applicant, the Court recalls that at the provisional measures stage, it found that "it is quite clear that, in the absence of consent by Italy, given pursuant to Article 38, paragraph 5, of the Rules, the Court cannot exercise jurisdiction . . . even *prima facie*" (*I.C.J. Reports 1999 (I),* p. 492, para. 31). The Court notes that the Parties have not returned to this matter.

The Court notes that in its jurisprudence it has referred to "its freedom to select the ground upon which it will base its judgment", and that, when its jurisdiction is challenged on

diverse grounds, it is free to base its decision on one or more grounds of its own choosing, in particular "the ground which in its judgment is more direct and conclusive". However, in those instances, the Parties to the cases before the Court were, *without doubt,* parties to the Statute of the Court and the Court was thus open to them under Article 35, paragraph 1, of the Statute. The Court points out that this is not the case in the present proceedings, in which an objection has been made regarding the right of the Applicant to have access to the Court. And it is this issue of access to the Court which distinguishes the present case from those cited in the jurisprudence concerned.

The Court observes that the question whether Serbia and Montenegro was or was not a party to the Statute of the Court at the time of the institution of the present proceedings is fundamental; for if it were not such a party, the Court would not be open to it under Article 35, paragraph 1, of the Statute. In that situation, subject to any application of paragraph 2 of that Article, Serbia and Montenegro could not have properly seised the Court, whatever title of jurisdiction it might have invoked, for the simple reason that it did not have the right to appear before the Court. Hence, the Court must first examine the question whether the Applicant meets the conditions laid down in Articles 34 and 35 of the Statute for access to the Court. Only if the answer to that question is in the affirmative, will the Court have to deal with the issues relating to the conditions laid down in Article 36 of the Statute.

The Court notes in this respect that there is no doubt that Serbia and Montenegro is a State for the purpose of Article 34, paragraph 1, of the Statute. However, certain Respondents objected that, at the time of the filing of its Application on 29 April 1999, that State did not meet the conditions set down in Article 35 of the Statute.

Thus Italy argued that the Applicant does not have access to the Court. It considered that the Applicant was not a Member of the United Nations and concluded, *inter alia,* that

> "[s]ince it is not a Member of the United Nations, by the same token Yugoslavia is not a party to the Statute under Article 93, paragraph 1, of the Charter [of the United Nations]" (Preliminary Objections of Italy, p. 27).

The Court then recapitulates the sequence of events relating to the legal position of the Applicant vis-à-vis the United Nations over the period 1992–2000. It refers, *inter alia,* to the following: the break-up of the Socialist Federal Republic of Yugoslavia in 1991–1992; a declaration of 27 April 1992 by the SFRY Assembly, the National Assembly of the Republic of Serbia and the Assembly of the Republic of Montenegro asserting the continuation of the international legal and political personality of the SFRY by the Federal Republic of Yugoslavia; a note of the same day from Yugoslavia to the United Nations Secretary-General asserting the continuation by the FRY of the membership of the SFRY in the Organization; Security Council resolution 777 of 1992 considering that the FRY could not continue automatically the SFRY's membership; General Assembly resolution 47/1 of 1992 stating that the FRY shall not participate in the work of the General Assembly; and a letter dated 29 September 1992 from the United Nations Legal Counsel regarding the "practical consequences" of General Assembly resolution 47/1.

The Court concludes that the legal situation that obtained within the United Nations during the period 1992–2000 concerning the status of the Federal Republic of Yugoslavia remained ambiguous and open to different assessments. This was due, *inter alia,* to the absence of an authoritative determination by the competent organs of the United Nations defining clearly the legal status of the Federal Republic of Yugoslavia vis-à-vis the United Nations.

The Court notes that three different positions were taken within the United Nations. In the first place, there was the position taken by the two political organs concerned. The Court refers in this respect to Security Council resolution 777 (1992) of 19 September 1992 and to General Assembly resolution 47/1 of 22 September 1992, according to which "the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations", and "should apply for membership in the United Nations". The Court points out that, while it is clear from the voting figures that these resolutions reflected a position endorsed by the vast majority of the Members of the United Nations, they cannot be construed as conveying an authoritative determination of the legal status of the Federal Republic of Yugoslavia within, or vis-à-vis, the United Nations. The uncertainty surrounding the question is evidenced, *inter alia,* by the practice of the General Assembly in budgetary matters during the years following the break-up of the Socialist Federal Republic of Yugoslavia.

The Court recalls that, secondly, the Federal Republic of Yugoslavia, for its part, maintained its claim that it continued the legal personality of the Socialist Federal Republic of Yugoslavia, "including its membership in all international organizations and participation in international treaties ratified or acceded to by Yugoslavia". This claim had been clearly stated in the official Note of 27 April 1992 from the Permanent Mission of Yugoslavia to the United Nations addressed to the Secretary-General of the United Nations. It was sustained by the Applicant throughout the period from 1992 to 2000.

Thirdly, another organ that came to be involved in this problem was the Secretariat of the United Nations. In the absence of any authoritative determination, the Secretariat, as the administrative organ of the Organization, simply continued to keep to the practice of the *status quo ante* that had prevailed prior to the break-up of the Socialist Federal Republic of Yugoslavia in 1992.

The Court points out that it was against this background that the Court itself, in its Judgment of 3 February 2003 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)* (hereinafter the "*Application for Revision* case"), referred to the "*sui generis* position which the FRY found itself in" during the relevant period; however, in that case, no final and definitive conclusion was drawn by the Court from this descriptive term

on the amorphous status of the Federal Republic of Yugoslavia vis-à-vis or within the United Nations during this period.

The Court considers that this situation came to an end with a new development in 2000. On 27 October of that year, the Federal Republic of Yugoslavia requested admission to membership in the United Nations, and on 1 November, by General Assembly resolution 55/12, it was so admitted. Serbia and Montenegro thus has the status of membership in the Organization as from 1 November 2000. However, its admission to the United Nations did not have, and could not have had, the effect of dating back to the time when the SFRY broke up and disappeared. It became clear that the *sui generis* position of the Applicant could not have amounted to its membership in the Organization.

In the view of the Court, the significance of this new development in 2000 is that it has clarified the thus far amorphous legal situation concerning the status of the Federal Republic of Yugoslavia vis-à-vis the United Nations.

The Court finds that from the vantage point from which it now looks at the legal situation, and in light of the legal consequences of the new development since 1 November 2000, it is led to the conclusion that Serbia and Montenegro was not a Member of the United Nations, and in that capacity a State party to the Statute of the International Court of Justice, at the time of filing its Application.

A further point the Court considers is the relevance to the present case of the Judgment in the *Application for Revision* case, of 3 February 2003. The Court points out that, given the specific characteristics of the procedure under Article 61 of the Statute, in which the conditions for granting an application for revision of a judgment are strictly circumscribed, there is no reason to treat the Judgment in the *Application for Revision* case as having pronounced upon the issue of the legal status of Serbia and Montenegro vis-à-vis the United Nations. Nor does the Judgment pronounce upon the status of Serbia and Montenegro in relation to the Statute of the Court.

For all these reasons, the Court concludes that, at the time when the present proceedings were instituted, the Applicant in the present case, Serbia and Montenegro, was not a Member of the United Nations, and consequently, was not, on that basis, a State party to the Statute of the International Court of Justice. The Applicant not having become a party to the Statute on any other basis, it follows that the Court was not then open to it under Article 35, paragraph 1, of the Statute.

Serbia and Montenegro's possible access to the Court on the basis of Article 35, paragraph 2, of the Statute
(paras. 91–113)

The Court then considers whether it might be open to Serbia and Montenegro under paragraph 2 of Article 35, which provides:

> "The conditions under which the Court shall be open to other States [i.e. States not parties to the Statute] shall, subject to the special provisions contained in treaties in force, be laid down by the Security Council, but in no case shall such conditions place the parties in a position of inequality before the Court."

In this regard, it quotes from its Order of 8 April 1993 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)* (hereinafter the "*Genocide Convention* case"), where it stated, *inter alia,* that a "compromissory clause in a multilateral convention, such as Article IX of the Genocide Convention relied on by Bosnia and Herzegovina in the present case, *could,* in the view of the Court, be regarded *prima facie* as a special provision contained in a treaty in force" (emphasis added).

The Court recalls that a number of Respondents contended in their pleadings that the reference to "treaties in force" in Article 35, paragraph 2, of the Statute relates only to treaties in force when the Statute of the Court entered into force, i.e. on 24 October 1945. In respect of the Order of 8 April 1993 in the *Genocide Convention* case, the Respondents pointed out that that was a provisional assessment, not conclusive of the matter, and considered that "there [were] persuasive reasons why the Court should revisit the provisional approach it adopted to the interpretation of this clause in the *Genocide Convention* case".

The Court notes that the passage from the 1993 Order in the *Genocide Convention* case was addressed to the situation in which the proceedings were instituted against a State whose membership in the United Nations and status as a party to the Statute was unclear. It observes that the Order of 8 April 1993 was made on the basis of an examination of the relevant law and facts in the context of incidental proceedings on a request for the indication of provisional measures, and concludes that it would therefore now be appropriate for the Court to make a definitive finding on the question whether Article 35, paragraph 2, affords access to the Court in the present case, and for that purpose, to examine further the question of its applicability and interpretation.

The Court thus proceeds to the interpretation of Article 35, paragraph 2, of the Statute, and does so in accordance with customary international law, as reflected in Article 31 of the 1969 Vienna Convention on the Law of Treaties. According to paragraph 1 of Article 31, a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of the treaty's object and purpose. Interpretation must be based above all upon the text of the treaty. As a supplementary measure recourse may be had to means of interpretation such as the preparatory work of the treaty and the circumstances of its conclusion.

The Court points out that the words "treaties in force" in Article 35, paragraph 2, do not, in their natural and ordinary meaning, indicate at what date the treaties contemplated are to be in force, and may thus lend themselves to different interpretations. They may be interpreted as referring either to treaties which were in force at the time that the Statute itself came into force, or to those which were in force on the date of the institution of proceedings in a case in which such treaties are invoked.

The Court observes that the object and purpose of Article 35 of the Statute is to define the conditions of access to the Court. While paragraph 1 of that Article opens it to the States parties to the Statute, paragraph 2 is intended to regu-

late access to the Court by States which are not parties to the Statute. It would have been inconsistent with the main thrust of the text to make it possible in the future for States not parties to the Statute to obtain access to the Court simply by the conclusion between themselves of a special treaty, multilateral or bilateral, containing a provision to that effect.

The Court moreover notes that the interpretation of Article 35, paragraph 2, whereby that paragraph is to be construed as referring to treaties in force at the time that the Statute came into force is in fact reinforced by an examination of the *travaux préparatoires* of the text; the Court considers that the legislative history of Article 35, paragraph 2, of the Statute of the Permanent Court of International Justice (hereinafter the "Permanent Court") demonstrates that it was intended as an exception to the principle stated in paragraph 1, in order to cover cases contemplated in agreements concluded in the aftermath of the First World War before the Statute entered into force. However, the *travaux préparatoires* of the Statute of the present Court are less illuminating. The discussion of Article 35 was provisional and somewhat cursory; it took place at a stage in the planning of the future international organization when it was not yet settled whether the Permanent Court would be preserved or replaced by a new court. Indeed, the records do not include any discussion which would suggest that Article 35, paragraph 2, of the Statute should be given a different meaning from the corresponding provision in the Statute of the Permanent Court. It would rather seem that the text was reproduced from the Statute of the Permanent Court; there is no indication that any extension of access to the Court was intended.

Accordingly Article 35, paragraph 2, must be interpreted, *mutatis mutandis,* in the same way as the equivalent text in the Statute of the Permanent Court, namely as intended to refer to treaties in force at the date of the entry into force of the new Statute, and providing for the jurisdiction of the new Court. In fact, no such prior treaties, referring to the jurisdiction of the present Court, have been brought to the attention of the Court, and it may be that none exist. In the view of the Court, however, neither this circumstance, nor any consideration of the object and purpose of the text, nor the *travaux préparatoires,* offer support to the alternative interpretation that the provision was intended as granting access to the Court to States not parties to the Statute without any condition other than the existence of a treaty, containing a clause conferring jurisdiction on the Court, which might be concluded at any time subsequently to the entry into force of the Statute. As previously observed, this interpretation would lead to a result quite incompatible with the object and purpose of Article 35, paragraph 2, namely the regulation of access to the Court by States non-parties to the Statute. In the view of the Court therefore, the reference in Article 35, paragraph 2, of the Statute to "the special provisions contained in treaties in force" applies only to treaties in force at the date of the entry into force of the Statute, and not to any treaties concluded since that date.

The Court thus concludes that, even assuming that Serbia and Montenegro was a party to the Genocide Convention at the relevant date, Article 35, paragraph 2, of the Statute does not provide it with a basis to have access to the Court, under Article IX of that Convention, since the Convention only entered into force on 12 January 1951, after the entry into force of the Statute. The Court does not therefore consider it necessary to decide whether Serbia and Montenegro was or was not a party to the Genocide Convention on 29 April 1999 when the current proceedings were instituted.

Unnecessary to consider other preliminary objections (para. 114)

Having found that Serbia and Montenegro did not, at the time of the institution of the present proceedings, have access to the Court under either paragraph 1 or paragraph 2 of Article 35 of the Statute, the Court states that it is unnecessary for it to consider the other preliminary objections filed by the Respondents to its jurisdiction.

*

The Court finally recalls (para. 115) that, irrespective of whether it has jurisdiction over a dispute, the parties "remain in all cases responsible for acts attributable to them that violate the rights of other States".

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Joint declaration of Vice-President Ranjeva and Judges Guillaume, Higgins, Kooijmans, Al-Khasawneh, Buergenthal and Elaraby

1. Vice-President Ranjeva and Judges Guillaume, Higgins, Kooijmans, Al-Khasawneh, Buergenthal and Elaraby voted in favour of the *dispositif* of the Judgments because they agree that these cases cannot, as a matter of law, proceed to the merits. They have added in their joint declaration that they nevertheless profoundly disagree with the reasoning adopted by the Court.

2. They note that when the Court finds in a case that, on two or more grounds, its jurisdiction is not well founded *ratione personae, ratione materiae* or *ratione temporis,* it may choose the most appropriate ground on which to base its decision of lack of competence. They point out that this choice must be guided by three criteria: consistency with the past case law; degree of certitude of the ground chosen; possible implications for the other pending cases.

3. In the present instances, according to the Judgments of the Court, Serbia and Montenegro was not a Member of the United Nations in 1999 and, as a result, was not then a party to the Statute of the Court. In the Judgments, the Court concludes therefrom that it was not at that time open to the Applicant under Article 35, paragraph 1, of the Statute. The Judgments go on to state that paragraph 2 of that Article enables States not parties to the Statute to appear before the Court only by virtue of Security Council decisions or treaties concluded prior to the entry into force of the Statute. It is observed in the Judgments that the United Nations Genocide Convention only entered into force in 1951. It is thus concluded that Article 35, paragraph 2, of the Statute does not grant Serbia and Montenegro access to the Court either.

4. In the view of the seven judges making the joint declaration, this solution is at odds with a number of previous decisions of the Court, in particular the Judgment rendered on 3 February 2003 in a case between Bosnia and Herzegovina and Yugoslavia, in which it was found that Yugoslavia could appear before the Court between 1992 and 2000 and that this position had not been changed by its admission to the United Nations in 2002. Further, the authors of the declaration note that in reality it is far from self-evident that Yugoslavia was not a Member of the United Nations at that time. Lastly, they regret that the Judgment leaves some doubt as to whether Yugoslavia was a party, between 1992 and 2000, to the United Nations Genocide Convention and thus could call into question the solutions adopted by the Court in the case brought by Bosnia and Herzegovina against Serbia and Montenegro. Thus, the Court's Judgment does not meet any of the three criteria set out in paragraph 2 above.

5. The seven judges finally observe that the Court could easily have founded its Judgment that it lacked jurisdiction on the grounds on which it relied in 1999 when the requests for the indication of provisional measures were considered. The Court then found that it lacked jurisdiction *ratione temporis* in respect of the declaration accepting the compulsory jurisdiction of the Court which Serbia and Montenegro had filed several weeks after the start of military operations in Kosovo. It also found itself to be without jurisdiction *ratione materiae* in respect of the United Nations Genocide Convention, as no genocidal intention had been established. These solutions could easily have been confirmed.

Declaration of Judge Koroma

In his declaration Judge Koroma stated that, while concurring in the Judgment, he considered it necessary to stress the following. The question which the Court was requested to rule on and which it in fact did decide in this phase of the case was the issue of jurisdiction, namely, whether the Court could entertain the merits of the case. The jurisdictional function is intended to establish whether the Court is entitled to enter into and adjudicate on the substantive issues in a case. This function, in his view, cannot be dispensed with as it is both required by law and stipulated in the Statute of the Court. It is this function that the Court has carried out in this Judgment and it is within this paradigm that the Judgment must be understood. The Judgment cannot be interpreted as the Court taking a position on any of the matters of substance before the Court.

Separate opinion of Judge Higgins

Judge Higgins agrees that Serbia and Montenegro have not discontinued the case. However, she disagrees with the apparent finding of the Court that a case may only be removed from the List where there is a discontinuance by the applicant or the parties, or where an applicant disclosed no subsisting title of jurisdiction, or where the Court manifestly lacked jurisdiction (see paragraph 32 of the Judgment). In her view, the right of the Court exceptionally to remove a case from the List rests on its inherent powers, which are not limited to *a priori* categories.

Judge Higgins is of the opinion that the present case should have been removed from the List, as the Applicant has by its own conduct put itself in a position incompatible with Article 38, paragraph 2, of the Rules of Court. The manner in which it has dealt with preliminary objections would further warrant the case not being proceeded with.

Finally, Judge Higgins greatly regrets the attention the Court has afforded to Article 35, paragraph 2, of the Statute, believing its relevance lies only in another pending case.

Separate opinion of Judge Kooijmans

Judge Kooijmans has added a separate opinion to the Judgment and the joint declaration of seven Members of the Court, which he co-signed, for two reasons.

First he wishes to explain why in his view the Court should not have decided the issue of jurisdiction on the ground of Serbia and Montenegro's lack of access to the Court, although in 1999, when the Court rejected Yugoslavia's request for interim measures of protection, he was in favour of this approach. In his view, the Court has not in a convincing and transparent way elucidated the status of the Federal Republic of Yugoslavia vis-à-vis the United Nations before its admission to the Organization in 2000. Further, the Court's Judgment has undeniable implications for other pending cases, in particular the *Genocide Convention* case (*Bosnia Herzegovina* v. *Serbia and Montenegro*), which could easily have been avoided by choosing another approach. Finally, the Judgment is at odds with previous decisions of the Court, thus endangering the principle of consistency of reasoning. This consistency with earlier case law should prevail over present or earlier misgivings of individual judges if an approach in conformity with that consistency does not lead to legally untenable results.

In the second place Judge Kooijmans sets out why in his view the Court would have done better to dismiss the cases *in limine litis*. In 1999 the Applicant invoked two grounds of jurisdiction which it explicitly abandoned in its Written Observations of 20 December 2002 without replacing them by other grounds. Nevertheless it did not discontinue the case but asked the Court to decide *whether* it had jurisdiction. Thus the Applications did no longer meet the requirement of Article 38, paragraph 2, of the Rules of Court, which states that the application shall specify as far as possible the legal grounds upon which the jurisdiction of the Court is said to be based. Since the Court has the inherent power to strike a case from the General List in order to safeguard the integrity of the procedure, it should have done so in view of the fact that the Applicant has failed to demonstrate and even did not make an effort to demonstrate that a valid ground of jurisdiction existed.

Separate opinion of Judge Elaraby

Judge Elaraby voted in favour of the *dispositif,* but disagreed both with the grounds on which the Court decided to base its Judgment—Article 35, paragraph 1 and Article 35, paragraph 2 of the Court's Statute—and with the conclusions which the Court reached on each of these grounds. The joint declaration, to which Judge Elaraby is a signatory, explains why he believes that the Court should have chosen alternative

grounds to reach its decision. His separate opinion explains why he disagrees with its substantive findings.

Beginning with the issue of access to the Court under Article 35, paragraph 1, Judge Elaraby explained why, in his view, the Federal Republic of Yugoslavia *was* a Member of the United Nations at the time it filed its Application in the case. He emphasized that, although the FRY was excluded from participation in the work of the General Assembly and its subsidiary organs, it remained, as the Court had previously found, a *sui generis* Member between 1992 and 2000. Thus Judge Elaraby pointed out that during this period it continued to exhibit many attributes of United Nations membership and was neither suspended nor expelled from the Organization under the relevant provisions of the United Nations Charter. On this basis, Judge Elaraby concluded that the FRY was a Member of the United Nations when it filed its Application in 1999 and, as a result, he disagreed with the Court's finding that it was not "open" to the FRY under Article 35, paragraph 1, of the Court's Statute.

He also disagreed with the Court's finding that, assuming the FRY was a non-Member of the United Nations, it would not have had access to the Court under Article 35, paragraph 2. For Judge Elaraby, the Court's interpretation of the term "treaties in force" in Article 35, paragraph 2, as meaning "treaties in force at the time the Statute of the Court entered into force" was unduly restrictive. Like the Court, Judge Elaraby analysed the relevant *travaux préparatoires,* but, unlike the Court, he found that the expression "treaties in force" should be read to include any treaties connected with the peace settlement following the Second World War, whether they entered into force before or after the Statute of the Court. This would include, according to Judge Elaraby, the Genocide Convention, a treaty drafted under the auspices of the United Nations in direct response to the tragic events of the Second World War. In the alternative, Judge Elaraby stated that, even if the Court's reading of "treaties in force" were adopted as a general rule, there should be an exception for treaties intended to remedy violations of *jus cogens.* These, he wrote, should be subject to a broader interpretation so that any State seeking access to the Court on the basis of a treaty that addresses a *jus cogens* violation could do so as long as the treaty was in force when the Application was filed.

Because Judge Elaraby concluded that the Court was open to the FRY under Article 35 when it filed its Application in 1999, he went on to assess whether the Court has jurisdiction *ratione personae* under Article IX of the Genocide Convention. He concluded that it does, because the FRY succeeded to the treaty obligations of the former Socialist Federal Republic of Yugoslavia, including the Genocide Convention. In reaching this conclusion he explained that, in cases involving the separation of parts of the territory of a State to form one or more new States, Article 34 of the Vienna Convention on Succession of States in respect of Treaties embodied a customary rule of automatic succession by the new State to the treaties in force on the territory of its predecessor. He pointed out that it was all the more important for the Court to recognize and apply this rule in the case of a fundamental human rights treaty such as the Genocide Convention. Judge Elaraby thus concluded that the FRY was a party to the Genocide Convention on the basis of succession—not its subsequent purported accession and reservation—and therefore that the Court had jurisdiction *ratione personae.* He found, however, that the Court did not have jurisdiction *ratione materiae* under the Convention, so in the final analysis agreed with the Court that there was no jurisdiction to examine the merits of the FRY's case.

Separate opinion of Judge Kreća

Judge *ad hoc* Kreća noted that the Respondent, as well as the Applicant, attached crucial importance to the issue of *locus standi* of Serbia and Montenegro before the Court.

In the case at hand, it is closely, and even organically, linked with the membership of Serbia and Montenegro in the United Nations, due to the fact that it could not be considered as being party to the Statute of the Court apart from being a Member State of the United Nations as well as the fact that its *locus standi* cannot be based on conditions set forth in Article 35, paragraph 2, of the Statute.

In that regard he finds that at the end of the year 2000 the Applicant did two things:

(i) renounced the continuity claim and accepted the status of the successor State of the former SFRY; and

(ii) proceeding from a qualitatively new legal basis—as the successor State—submitted the application for admission to membership in the United Nations.

The admission of the FRY to the United Nations as a Member as from 1 November 2000 has two principal consequences in the circumstances of the case at hand:

(i) with respect to the admission of Yugoslavia as a Member as from 1 November 2000, it can be said that what is involved is the admission as a new Member; and

(ii) the admission of Yugoslavia as a Member as from 1 November 2000 qualified *per se* its status vis-à-vis the United Nations before that date. It seems clear that, in the light of the decisions taken by the competent organs of the United Nations, this status could not be a membership status. *A contrario,* Yugoslavia could not have been admitted as a Member as from 1 November 2000.

He is also of the opinion that the formulation of the *dispositif* explicitly linked to the absence of *locus standi* of Serbia and Montenegro would be more appropriate considering the circumstances of the case as well as the reasoning of the Court.

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154. CASE CONCERNING LEGALITY OF USE OF FORCE (SERBIA AND MONTENEGRO *v.* NETHERLANDS) (PRELIMINARY OBJECTIONS)

Judgment of 15 December 2004

In its Judgment in the case concerning *Legality of the Use of Force* (*Serbia and Montenegro* v. *Netherlands*), the Court unanimously concluded that it had no jurisdiction to entertain the claims made in the Application filed by Serbia and Montenegro against Netherlands on 29 April 1999.

The Court was composed as follows: President Shi; Vice-President Ranjeva; Judges Guillaume, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal, Elaraby, Owada, Tomka; Judge *ad hoc* Kreća; Registrar Couvreur.

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The operative paragraph (para. 128) of the Judgment reads as follows:

" . . .

The Court,

Unanimously,

Finds that it has no jurisdiction to entertain the claims made in the Application filed by Serbia and Montenegro on 29 April 1999."

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Vice-President Ranjeva and Judges Guillaume, Higgins, Kooijmans, Al-Khasawneh, Buergenthal and Elaraby appended a joint declaration to the Judgment of the Court; Judge Koroma appended a declaration to the Judgment of the Court; Judges Higgins, Kooijmans and Elaraby and Judge *ad hoc* Kreća appended separate opinions to the Judgment of the Court.

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History of the proceedings and submissions of the Parties
(paras. 1–23)

On 29 April 1999 the Government of the Federal Republic of Yugoslavia (with effect from 4 February 2003, "Serbia and Montenegro") filed in the Registry of the Court an Application instituting proceedings against the Kingdom of the Netherlands (hereinafter "the Netherlands") in respect of a dispute concerning acts allegedly committed by the Netherlands

> "by which it has violated its international obligation banning the use of force against another State, the obligation not to intervene in the internal affairs of another State, the obligation not to violate the sovereignty of another State, the obligation to protect the civilian population and civilian objects in wartime, the obligation to protect the environment, the obligation relating to free navigation on international rivers, the obligation regarding fundamental human rights and freedoms, the obligation not to use prohibited weapons, the obligation not to deliberately inflict conditions of life calculated to cause the physical destruction of a national group".

The Application invoked as a basis of the Court's jurisdiction Article 36, paragraph 2, of the Statute of the Court, as well as Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the United Nations General Assembly on 9 December 1948 (hereinafter "the Genocide Convention").

On 29 April 1999, immediately after filing its Application, the Federal Republic of Yugoslavia also submitted a request for the indication of provisional measures pursuant to Article 73 of the Rules of Court.

On the same day, the Federal Republic of Yugoslavia filed Applications instituting proceedings and submitted requests for the indication of provisional measures, in respect of other disputes arising out of the same facts, against the Kingdom of Belgium, Canada, the French Republic, the Federal Republic of Germany, the Italian Republic, the Portuguese Republic, the Kingdom of Spain, the United Kingdom of Great Britain and Northern Ireland and the United States of America.

Since the Court included upon the Bench no judge of Yugoslav nationality the Yugoslav Government exercised its right under Article 31 of the Statute and chose Mr. Milenko Kreća to sit as judge *ad hoc* in the case.

By letter of 12 May 1999 the Agent of the Federal Republic of Yugoslavia submitted a "Supplement to the Application", invoking as a further basis for the Court's jurisdiction "Article 4 of the Treaty of Judicial Settlement, Arbitration and Conciliation between the Kingdom of Yugoslavia and the Netherlands, signed in The Hague on 11 March 1931 and in force since 2 April 1932".

By ten Orders dated 2 June 1999 the Court, after hearing the Parties, rejected the request for the indication of provisional measures in all of the cases, and further decided to remove from the List the cases against Spain and the United States of America.

On 5 July 2000, within the time–limit fixed for the filing of its Counter-Memorial, the Netherlands, referring to Article 79, paragraph 1, of the Rules, submitted preliminary objections relating to the Court's jurisdiction to entertain the case and to the admissibility of the Application. Accordingly, the proceedings on the merits were suspended.

On 20 December 2002, within the prescribed time-limit as twice extended by the Court at the request of the Federal Republic of Yugoslavia, the latter filed a written statement of its observations and submissions on those preliminary objections (hereinafter referred to as its "Observations"), together

with identical written statements in the seven other pending cases.

Pursuant to Article 24, paragraph 1, of the Statute, on 25 November 2003 Judge Simma informed the President that he considered that he should not take part in any of the cases.

At a meeting held by the President of the Court on 12 December 2003 with the representatives of the Parties in the eight cases concerning *Legality of Use of Force,* the questions of the presence on the Bench of judges *ad hoc* during the preliminary objections phase and of a possible joinder of the proceedings were discussed, among other issues. By letter of 23 December 2003 the Registrar informed the Agents of all the Parties that the Court had decided, pursuant to Article 31, paragraph 5, of the Statute, that, taking into account the presence upon the Bench of judges of British, Dutch and French nationality, the judges *ad hoc* chosen by the respondent States should not sit during the current phase of the procedure in these cases. The Agents were also informed that the Court had decided that a joinder of the proceedings would not be appropriate at that stage.

Public sittings in all the cases were held between 19 and 23 April 2004.

After setting out the Parties' claims in their written pleadings (which are not reproduced here), the Judgment recalls that, at the oral proceedings, the following final submissions were presented by the Parties:

On behalf of the Dutch Government,

at the hearing of 22 April 2004:

"May it please the Court to adjudge and declare that:

— the Court has no jurisdiction or should decline to exercise jurisdiction as the parties in fact agree that the Court has no jurisdiction or as there is no longer a dispute between the parties on the jurisdiction of the Court.

Alternatively,

— Serbia and Montenegro is not entitled to appear before the Court;

— the Court has no jurisdiction over the claims brought against the Netherlands by Serbia and Montenegro; and/or

— the claims brought against the Netherlands by Serbia and Montenegro are inadmissible."

On behalf of the Government of Serbia and Montenegro

at the hearing of 23 April 2004:

"For the reasons given in its pleadings, and in particular in its Written Observations, subsequent correspondence with the Court, and at the oral hearing, Serbia and Montenegro requests the Court:

— to adjudge and declare on its jurisdiction *ratione personae* in the present cases; and

— to dismiss the remaining preliminary objections of the respondent States, and to order proceedings on the merits if it finds it has jurisdiction *ratione personae*."

Before proceeding to its reasoning, the Court includes a paragraph (para. 24) dealing with the Applicant's change of name on 4 February 2003 from "Federal Republic of Yugoslavia" to "Serbia and Montenegro". It explains that, as far as possible, except where the term in a historical context might cause confusion, it will use the name "Serbia and Montenegro", even where reference is made to a procedural step taken before the change.

Dismissal of the case in limine litis
(paras. 25–43)

The Court begins by observing that it must first deal with a preliminary question that has been raised in each of the cases, namely the contention, presented in various forms by the eight respondent States, that, as a result of the changed attitude of the Applicant to the question of the Court's jurisdiction as expressed in its Observations, the Court is no longer required to rule on those objections to jurisdiction, but can simply dismiss the cases *in limine litis* and remove them from its List, without enquiring further into matters of jurisdiction.

The Court then examines a number of arguments advanced by different Respondents as possible legal grounds that would lead the Court to take this course, including, *inter alia:* (i) that the position of Serbia and Montenegro is to be treated as one that in effect results in a discontinuance of the proceedings or that the Court should *ex officio* put an end to the case in the interests of the proper administration of justice; (ii) that there is agreement between the Parties on a "question of jurisdiction that is determinative of the case", and that as a result there is now no "dispute as to whether the Court has jurisdiction"; (iii) that the substantive dispute under the Genocide Convention has disappeared and thus the whole dispute has disappeared in those cases in which the only ground of jurisdiction relied on is Article IX of that Convention; (iv) that Serbia and Montenegro, by its conduct, has forfeited or renounced its right of action in the present case and is now estopped from pursuing the proceedings.

The Court finds itself unable to uphold the various contentions of the Respondents. The Court considers that it is unable to treat the Observations of Serbia and Montenegro as having the legal effect of a discontinuance of the proceedings under Article 88 or 89 of the Rules of Court and finds that the case does not fall into the category of cases in which it may of its own motion put an end to proceedings in a case. As regards the argument advanced by certain Respondents that the dispute on jurisdiction has disappeared since the Parties now agree that the Applicant was not a party to the Statute at the relevant time, the Court points out that Serbia and Montenegro has not invited the Court to find that it has no jurisdiction; while it is apparently in agreement with the arguments advanced by the Respondents in that regard in their preliminary objections, it has specifically asked in its submissions for a decision of the Court on the jurisdictional question. This question, in the view of the Court, is a legal question independent of the views of the parties upon it. As to the argument concerning the disappearance of the substantive dispute, it is clear that Serbia and Montenegro has by no means withdrawn its claims as to the merits. Indeed, these claims were extensively argued and developed in substance during the hearings on jurisdiction, in the context of the question of the jurisdiction of the Court under Article IX of the Genocide Conven-

tion. It is equally clear that these claims are being vigorously denied by the Respondents. It could not even be said under these circumstances that, while the essential dispute still subsists, Serbia and Montenegro is no longer seeking to have its claim determined by the Court. Serbia and Montenegro has not sought a discontinuance and has stated that it "wants the Court to continue the case and to decide upon its jurisdiction—and to decide on the merits as well, if it has jurisdiction". The Court therefore finds itself unable to conclude that Serbia and Montenegro has renounced any of its substantive or procedural rights, or has taken the position that the dispute between the Parties has ceased to exist. As for the argument based on the doctrine of estoppel, the Court does not consider that Serbia and Montenegro, by asking the Court "to decide on its jurisdiction" on the basis of certain alleged "new facts" about its own legal status vis-à-vis the United Nations, should be held to have forfeited or renounced its right of action and to be estopped from continuing the present action before the Court.

For all these reasons, the Court concludes that it cannot remove the cases concerning *Legality of Use of Force* from the List, or take any decision putting an end to those cases *in limine litis*. In the present phase of the proceedings, it must proceed to examine the question of its jurisdiction to entertain the case.

Serbia and Montenegro's access to the Court under Article 35, paragraph 1, of the Statute
(paras. 44–90)

The Court recalls that the Application filed on 29 April 1999 stated that "[t]he Government of the Federal Republic of Yugoslavia invokes Article 36, paragraph 2, of the Statute of the International Court of Justice as well as Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide". The Court further recalls that Serbia and Montenegro claims as an additional basis of jurisdiction "Article 4 of the Treaty of Judicial Settlement, Arbitration and Conciliation between the Kingdom of Yugoslavia and the Netherlands, signed in The Hague on 11 March 1931 and in force since 2 April 1932".

The Court notes that in its jurisprudence it has referred to "its freedom to select the ground upon which it will base its judgment", and that, when its jurisdiction is challenged on diverse grounds, it is free to base its decision on one or more grounds of its own choosing, in particular "the ground which in its judgment is more direct and conclusive". However, in those instances, the Parties to the cases before the Court were, *without doubt,* parties to the Statute of the Court and the Court was thus open to them under Article 35, paragraph 1, of the Statute. The Court points out that this is not the case in the present proceedings, in which an objection has been made regarding the right of the Applicant to have access to the Court. And it is this issue of access to the Court which distinguishes the present case from those cited in the jurisprudence concerned.

The Court observes that the question whether Serbia and Montenegro was or was not a party to the Statute of the Court at the time of the institution of the present proceedings is fundamental; for if it were not such a party, the Court would not be open to it under Article 35, paragraph 1, of the Statute. In that situation, subject to any application of paragraph 2 of that Article, Serbia and Montenegro could not have properly seised the Court, whatever title of jurisdiction it might have invoked, for the simple reason that it did not have the right to appear before the Court. Hence, the Court must first examine the question whether the Applicant meets the conditions laid down in Articles 34 and 35 of the Statute for access to the Court. Only if the answer to that question is in the affirmative, will the Court have to deal with the issues relating to the conditions laid down in Articles 36 and 37 of the Statute.

The Court notes in this respect that there is no doubt that Serbia and Montenegro is a State for the purpose of Article 34, paragraph 1, of the Statute. However, certain Respondents objected that, at the time of the filing of its Application on 29 April 1999, that State did not meet the conditions set down in Article 35 of the Statute.

Thus the Netherlands argued that "the FRY is not entitled to appear before the Court" and asserted, *inter alia,* that

> "the FRY as one of the successor States of the former SFRY is at present not a member of the United Nations and is therefore not a party to the Statute of the International Court of Justice by virtue of Article 93, paragraph 1, of the UN Charter" (Preliminary Objections of the Netherlands, p. 11, paras. 3.1 and 3.2 respectively).

The Court then recapitulates the sequence of events relating to the legal position of the Applicant vis-à-vis the United Nations over the period 1992–2000. It refers, *inter alia,* to the following: the break-up of the Socialist Federal Republic of Yugoslavia in 1991–1992; a declaration of 27 April 1992 by the SFRY Assembly, the National Assembly of the Republic of Serbia and the Assembly of the Republic of Montenegro asserting the continuation of the international legal and political personality of the SFRY by the Federal Republic of Yugoslavia; a note of the same day from Yugoslavia to the United Nations Secretary-General asserting the continuation by the FRY of the membership of the SFRY in the Organization; Security Council resolution 777 of 1992 considering that the FRY could not continue automatically the SFRY's membership; General Assembly resolution 47/1 of 1992 stating that the FRY shall not participate in the work of the General Assembly; and a letter dated 29 September 1992 from the United Nations Legal Counsel regarding the "practical consequences" of General Assembly resolution 47/1.

The Court concludes that the legal situation that obtained within the United Nations during the period 1992–2000 concerning the status of the Federal Republic of Yugoslavia remained ambiguous and open to different assessments. This was due, *inter alia,* to the absence of an authoritative determination by the competent organs of the United Nations defining clearly the legal status of the Federal Republic of Yugoslavia vis-à-vis the United Nations.

The Court notes that three different positions were taken within the United Nations. In the first place, there was the position taken by the two political organs concerned. The Court refers in this respect to Security Council resolution 777 (1992) of 19 September 1992 and to General Assem-

bly resolution 47/1 of 22 September 1992, according to which "the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations", and "should apply for membership in the United Nations". The Court points out that, while it is clear from the voting figures that these resolutions reflected a position endorsed by the vast majority of the Members of the United Nations, they cannot be construed as conveying an authoritative determination of the legal status of the Federal Republic of Yugoslavia within, or vis-à-vis, the United Nations. The uncertainty surrounding the question is evidenced, *inter alia,* by the practice of the General Assembly in budgetary matters during the years following the break-up of the Socialist Federal Republic of Yugoslavia.

The Court recalls that, secondly, the Federal Republic of Yugoslavia, for its part, maintained its claim that it continued the legal personality of the Socialist Federal Republic of Yugoslavia, "including its membership in all international organizations and participation in international treaties ratified or acceded to by Yugoslavia". This claim had been clearly stated in the official Note of 27 April 1992 from the Permanent Mission of Yugoslavia to the United Nations addressed to the Secretary-General of the United Nations. It was sustained by the Applicant throughout the period from 1992 to 2000.

Thirdly, another organ that came to be involved in this problem was the Secretariat of the United Nations. In the absence of any authoritative determination, the Secretariat, as the administrative organ of the Organization, simply continued to keep to the practice of the *status quo ante* that had prevailed prior to the break-up of the Socialist Federal Republic of Yugoslavia in 1992.

The Court points out that it was against this background that the Court itself, in its Judgment of 3 February 2003 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)* (hereinafter the "*Application for Revision* case"), referred to the "*sui generis* position which the FRY found itself in" during the relevant period; however, in that case, no final and definitive conclusion was drawn by the Court from this descriptive term on the amorphous status of the Federal Republic of Yugoslavia vis-à-vis or within the United Nations during this period.

The Court considers that this situation came to an end with a new development in 2000. On 27 October of that year, the Federal Republic of Yugoslavia requested admission to membership in the United Nations, and on 1 November, by General Assembly resolution 55/12, it was so admitted. Serbia and Montenegro thus has the status of membership in the Organization as from 1 November 2000. However, its admission to the United Nations did not have, and could not have had, the effect of dating back to the time when the SFRY broke up and disappeared. It became clear that the *sui generis* position of the Applicant could not have amounted to its membership in the Organization.

In the view of the Court, the significance of this new development in 2000 is that it has clarified the thus far amorphous legal situation concerning the status of the Federal Republic of Yugoslavia vis-à-vis the United Nations.

The Court finds that from the vantage point from which it now looks at the legal situation, and in light of the legal consequences of the new development since 1 November 2000, it is led to the conclusion that Serbia and Montenegro was not a Member of the United Nations, and in that capacity a State party to the Statute of the International Court of Justice, at the time of filing its Application.

A further point the Court considers is the relevance to the present case of the Judgment in the *Application for Revision* case, of 3 February 2003. The Court points out that, given the specific characteristics of the procedure under Article 61 of the Statute, in which the conditions for granting an application for revision of a judgment are strictly circumscribed, there is no reason to treat the Judgment in the *Application for Revision* case as having pronounced upon the issue of the legal status of Serbia and Montenegro vis-à-vis the United Nations. Nor does the Judgment pronounce upon the status of Serbia and Montenegro in relation to the Statute of the Court.

For all these reasons, the Court concludes that, at the time when the present proceedings were instituted, the Applicant in the present case, Serbia and Montenegro, was not a Member of the United Nations, and consequently, was not, on that basis, a State party to the Statute of the International Court of Justice. The Applicant not having become a party to the Statute on any other basis, it follows that the Court was not then open to it under Article 35, paragraph 1, of the Statute.

Serbia and Montenegro's possible access to the Court on the basis of Article 35, paragraph 2, of the Statute
(paras. 91–113)

The Court then considers whether it might be open to Serbia and Montenegro under paragraph 2 of Article 35, which provides:

> "The conditions under which the Court shall be open to other States [i.e. States not parties to the Statute] shall, subject to the special provisions contained in treaties in force, be laid down by the Security Council, but in no case shall such conditions place the parties in a position of inequality before the Court."

In this regard, it quotes from its Order of 8 April 1993 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)* (hereinafter the "*Genocide Convention* case"), where it stated, *inter alia,* that a "compromissory clause in a multilateral convention, such as Article IX of the Genocide Convention relied on by Bosnia and Herzegovina in the present case, *could,* in the view of the Court, be regarded *prima facie* as a special provision contained in a treaty in force" (emphasis added).

The Court recalls that a number of Respondents contended in their pleadings that the reference to "treaties in force" in Article 35, paragraph 2, of the Statute relates only to treaties in force when the Statute of the Court entered into force, i.e. on 24 October 1945. In respect of the Order of 8 April 1993 in the

Genocide Convention case, the Respondents pointed out that that was a provisional assessment, not conclusive of the matter, and considered that "there [were] persuasive reasons why the Court should revisit the provisional approach it adopted to the interpretation of this clause in the *Genocide Convention* case".

The Court notes that the passage from the 1993 Order in the *Genocide Convention* case was addressed to the situation in which the proceedings were instituted against a State whose membership in the United Nations and status as a party to the Statute was unclear. It observes that the Order of 8 April 1993 was made on the basis of an examination of the relevant law and facts in the context of incidental proceedings on a request for the indication of provisional measures, and concludes that it would therefore now be appropriate for the Court to make a definitive finding on the question whether Article 35, paragraph 2, affords access to the Court in the present case, and for that purpose, to examine further the question of its applicability and interpretation.

The Court thus proceeds to the interpretation of Article 35, paragraph 2, of the Statute, and does so in accordance with customary international law, as reflected in Article 31 of the 1969 Vienna Convention on the Law of Treaties. According to paragraph 1 of Article 31, a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of the treaty's object and purpose. Interpretation must be based above all upon the text of the treaty. As a supplementary measure recourse may be had to means of interpretation such as the preparatory work of the treaty and the circumstances of its conclusion.

The Court points out that the words "treaties in force" in Article 35, paragraph 2, do not, in their natural and ordinary meaning, indicate at what date the treaties contemplated are to be in force, and may thus lend themselves to different interpretations. They may be interpreted as referring either to treaties which were in force at the time that the Statute itself came into force, or to those which were in force on the date of the institution of proceedings in a case in which such treaties are invoked.

The Court observes that the object and purpose of Article 35 of the Statute is to define the conditions of access to the Court. While paragraph 1 of that Article opens it to the States parties to the Statute, paragraph 2 is intended to regulate access to the Court by States which are not parties to the Statute. It would have been inconsistent with the main thrust of the text to make it possible in the future for States not parties to the Statute to obtain access to the Court simply by the conclusion between themselves of a special treaty, multilateral or bilateral, containing a provision to that effect.

The Court moreover notes that the interpretation of Article 35, paragraph 2, whereby that paragraph is to be construed as referring to treaties in force at the time that the Statute came into force, is in fact reinforced by an examination of the *travaux préparatoires* of the text; the Court considers that the legislative history of Article 35, paragraph 2, of the Statute of the Permanent Court of International Justice (hereinafter the "Permanent Court") demonstrates that it was intended as an exception to the principle stated in paragraph 1, in order to cover cases contemplated in agreements concluded in the aftermath of the First World War before the Statute entered into force. However, the *travaux préparatoires* of the Statute of the present Court are less illuminating. The discussion of Article 35 was provisional and somewhat cursory; it took place at a stage in the planning of the future international organization when it was not yet settled whether the Permanent Court would be preserved or replaced by a new court. Indeed, the records do not include any discussion which would suggest that Article 35, paragraph 2, of the Statute should be given a different meaning from the corresponding provision in the Statute of the Permanent Court. It would rather seem that the text was reproduced from the Statute of the Permanent Court; there is no indication that any extension of access to the Court was intended.

Accordingly Article 35, paragraph 2, must be interpreted, *mutatis mutandis,* in the same way as the equivalent text in the Statute of the Permanent Court, namely as intended to refer to treaties in force at the date of the entry into force of the new Statute, and providing for the jurisdiction of the new Court. In fact, no such prior treaties, referring to the jurisdiction of the present Court, have been brought to the attention of the Court, and it may be that none exist. In the view of the Court, however, neither this circumstance, nor any consideration of the object and purpose of the text, nor the *travaux préparatoires,* offer support to the alternative interpretation that the provision was intended as granting access to the Court to States not parties to the Statute without any condition other than the existence of a treaty, containing a clause conferring jurisdiction on the Court, which might be concluded at any time subsequently to the entry into force of the Statute. As previously observed, this interpretation would lead to a result quite incompatible with the object and purpose of Article 35, paragraph 2, namely the regulation of access to the Court by States non-parties to the Statute. In the view of the Court therefore, the reference in Article 35, paragraph 2, of the Statute to "the special provisions contained in treaties in force" applies only to treaties in force at the date of the entry into force of the Statute, and not to any treaties concluded since that date.

The Court thus concludes that, even assuming that Serbia and Montenegro was a party to the Genocide Convention at the relevant date, Article 35, paragraph 2, of the Statute does not provide it with a basis to have access to the Court, under Article IX of that Convention, since the Convention only entered into force on 12 January 1951, after the entry into force of the Statute. The Court does not therefore consider it necessary to decide whether Serbia and Montenegro was or was not a party to the Genocide Convention on 29 April 1999 when the current proceedings were instituted.

Jurisdiction on the basis of Article 4 of the 1931 Treaty of Judicial Settlement, Arbitration and Conciliation between the Kingdom of Yugoslavia and the Netherlands
(paras. 114–125)

As noted above, by a letter of 12 May 1999, the Agent of Serbia and Montenegro submitted to the Court a "Supplement to the Application" against the Netherlands. In that Supplement, it invoked as an additional ground of jurisdiction of the Court "Article 4 of the Treaty of Judicial Settlement, Arbitra-

tion and Conciliation between the Kingdom of Yugoslavia and the Netherlands, signed in The Hague on 11 March 1931 and in force since 2 April 1932" (hereinafter "the 1931 Treaty").

The Court recalls its finding that Serbia and Montenegro was not a party to the Statute at the date of the filing of its Application instituting proceedings in this case, and consequently that the Court was not open to it at that time under Article 35, paragraph 1, of the Statute. Therefore, to the extent that Serbia and Montenegro's case rests on reliance on Article 35, paragraph 1, it is irrelevant whether or not the 1931 Treaty could provide a basis of jurisdiction.

The question nonetheless remains whether the 1931 Treaty, which was concluded prior to the entry into force of the Statute, might rank as a "treaty in force" for purposes of Article 35, paragraph 2, of the Statute, and hence provide a basis of access.

The Court observes that Article 35 of the Statute of the Court concerns access to the present Court and not to its predecessor, the Permanent Court. The conditions for transfer of jurisdiction from the Permanent Court to the present Court are governed by Article 37 of the Statute. However, this does not signify that a similar substitution is to be read into Article 35, paragraph 2, of the Statute, which relates, not to consensual jurisdiction, but to the conditions of access to the Court. The Court notes that Article 37 of the Statute can be invoked only in cases which are brought before it as between parties to the Statute, i.e. under paragraph 1 of Article 35, and not on the basis of paragraph 2 of that Article. It then adds, as regards jurisdiction, that when a treaty providing for the jurisdiction of the Permanent Court is invoked in conjunction with Article 37, the Court has to satisfy itself, *inter alia,* that both the Applicant and the Respondent were, at the moment when the dispute was submitted to it, parties to the Statute. As the Court observed in the *Barcelona Traction* case,

> "three conditions are actually stated in the Article. They are that there should be a treaty or convention in force; that it should provide (i.e., make provision) for the reference of a 'matter' (i.e., the matter in litigation) to the Permanent Court; and that the dispute should be between States both or all of which are parties to the Statute."

Having already determined that Serbia and Montenegro was not a party to the Statute of the Court when the proceedings were instituted against the Netherlands, the Court accordingly concludes that Article 37 cannot give Serbia and Montenegro access to the present Court under Article 35, paragraph 2, on the basis of the 1931 Treaty, irrespective of whether or not that instrument was in force on 29 April 1999 at the date of the filing of the Application.

Unnecessary to consider other preliminary objections (para. 126)

Having found that Serbia and Montenegro did not, at the time of the institution of the present proceedings, have access to the Court under either paragraph 1 or paragraph 2 of Article 35 of the Statute, the Court states that it is unnecessary for it to consider the other preliminary objections filed by the Respondents to its jurisdiction.

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The Court finally recalls (para. 127) that, irrespective of whether it has jurisdiction over a dispute, the parties "remain in all cases responsible for acts attributable to them that violate the rights of other States".

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Joint declaration of Vice-President Ranjeva and Judges Guillaume, Higgins, Kooijmans, Al-Khasawneh, Buergenthal and Elaraby

1. Vice-President Ranjeva and Judges Guillaume, Higgins, Kooijmans, Al-Khasawneh, Buergenthal and Elaraby voted in favour of the *dispositif* of the Judgments because they agree that these cases cannot, as a matter of law, proceed to the merits. They have added in their joint declaration that they nevertheless profoundly disagree with the reasoning adopted by the Court.

2. They note that when the Court finds in a case that, on two or more grounds, its jurisdiction is not well founded *ratione personae, ratione materiae* or *ratione temporis,* it may choose the most appropriate ground on which to base its decision of lack of competence. They point out that this choice must be guided by three criteria: consistency with the past case law; degree of certitude of the ground chosen; possible implications for the other pending cases.

3. In the present instances, according to the Judgments of the Court, Serbia and Montenegro was not a Member of the United Nations in 1999 and, as a result, was not then a party to the Statute of the Court. In the Judgments, the Court concludes therefrom that it was not at that time open to the Applicant under Article 35, paragraph 1, of the Statute. The Judgments go on to state that paragraph 2 of that Article enables States not parties to the Statute to appear before the Court only by virtue of Security Council decisions or treaties concluded prior to the entry into force of the Statute. It is observed in the Judgments that the United Nations Genocide Convention only entered into force in 1951. It is thus concluded that Article 35, paragraph 2, of the Statute does not grant Serbia and Montenegro access to the Court either.

4. In the view of the seven judges making the joint declaration, this solution is at odds with a number of previous decisions of the Court, in particular the Judgment rendered on 3 February 2003 in a case between Bosnia and Herzegovina and Yugoslavia, in which it was found that Yugoslavia could appear before the Court between 1992 and 2000 and that this position had not been changed by its admission to the United Nations in 2002. Further, the authors of the declaration note that in reality it is far from self-evident that Yugoslavia was not a Member of the United Nations at that time. Lastly, they regret that the Judgment leaves some doubt as to whether Yugoslavia was a party, between 1992 and 2000, to the United Nations Genocide Convention and thus could call into question the solutions adopted by the Court in the case brought by Bosnia and Herzegovina against Serbia and Montenegro. Thus, the Court's Judgment does not meet any of the three criteria set out in paragraph 2 above.

5. The seven judges finally observe that the Court could easily have founded its Judgment that it lacked jurisdiction on the grounds on which it relied in 1999 when the requests for the indication of provisional measures were considered. The Court then found that it lacked jurisdiction *ratione temporis* in respect of the declaration accepting the compulsory jurisdiction of the Court which Serbia and Montenegro had filed several weeks after the start of military operations in Kosovo. It also found itself to be without jurisdiction *ratione materiae* in respect of the United Nations Genocide Convention, as no genocidal intention had been established. These solutions could easily have been confirmed.

Declaration of Judge Koroma

In his declaration Judge Koroma stated that, while concurring in the Judgment, he considered it necessary to stress the following. The question which the Court was requested to rule on and which it in fact did decide in this phase of the case was the issue of jurisdiction, namely, whether the Court could entertain the merits of the case. The jurisdictional function is intended to establish whether the Court is entitled to enter into and adjudicate on the substantive issues in a case. This function, in his view, cannot be dispensed with as it is both required by law and stipulated in the Statute of the Court. It is this function that the Court has carried out in this Judgment and it is within this paradigm that the Judgment must be understood. The Judgment cannot be interpreted as the Court taking a position on any of the matters of substance before the Court.

Separate opinion of Judge Higgins

Judge Higgins agrees that Serbia and Montenegro have not discontinued the case. However, she disagrees with the apparent finding of the Court that a case may only be removed from the List where there is a discontinuance by the applicant or the parties, or where an applicant disclosed no subsisting title of jurisdiction, or where the Court manifestly lacked jurisdiction (see paragraph 32 of the Judgment). In her view, the right of the Court exceptionally to remove a case from the List rests on its inherent powers, which are not limited to *a priori* categories.

Judge Higgins is of the opinion that the present case should have been removed from the List, as the Applicant has by its own conduct put itself in a position incompatible with Article 38, paragraph 2, of the Rules of Court. The manner in which it has dealt with preliminary objections would further warrant the case not being proceeded with.

Finally, Judge Higgins greatly regrets the attention the Court has afforded to Article 35, paragraph 2, of the Statute, believing its relevance lies only in another pending case.

Separate opinion of Judge Kooijmans

Judge Kooijmans has added a separate opinion to the Judgment and the joint declaration of seven Members of the Court, which he co-signed, for two reasons.

First he wishes to explain why in his view the Court should not have decided the issue of jurisdiction on the ground of Serbia and Montenegro's lack of access to the Court, although in 1999, when the Court rejected Yugoslavia's request for interim measures of protection, he was in favour of this approach. In his view, the Court has not in a convincing and transparent way elucidated the status of the Federal Republic of Yugoslavia vis-à-vis the United Nations before its admission to the Organization in 2000. Further, the Court's Judgment has undeniable implications for other pending cases, in particular the *Genocide Convention* case (*Bosnia Herzegovina* v. *Serbia and Montenegro*), which could easily have been avoided by choosing another approach. Finally, the Judgment is at odds with previous decisions of the Court, thus endangering the principle of consistency of reasoning. This consistency with earlier case law should prevail over present or earlier misgivings of individual judges if an approach in conformity with that consistency does not lead to legally untenable results.

In the second place Judge Kooijmans sets out why in his view the Court would have done better to dismiss the cases *in limine litis*. In 1999 the Applicant invoked two grounds of jurisdiction which it explicitly abandoned in its Written Observations of 20 December 2002 without replacing them by other grounds. Nevertheless it did not discontinue the case but asked the Court to decide *whether* it had jurisdiction. Thus the Applications did no longer meet the requirement of Article 38, paragraph 2, of the Rules of Court, which states that the application shall specify as far as possible the legal grounds upon which the jurisdiction of the Court is said to be based. Since the Court has the inherent power to strike a case from the General List in order to safeguard the integrity of the procedure, it should have done so in view of the fact that the Applicant has failed to demonstrate and even did not make an effort to demonstrate that a valid ground of jurisdiction existed.

Separate opinion of Judge Elaraby

Judge Elaraby voted in favour of the *dispositif,* but disagreed both with the grounds on which the Court decided to base its Judgment—Article 35, paragraph 1 and Article 35, paragraph 2 of the Court's Statute—and with the conclusions which the Court reached on each of these grounds. The joint declaration, to which Judge Elaraby is a signatory, explains why he believes that the Court should have chosen alternative grounds to reach its decision. His separate opinion explains why he disagrees with its substantive findings.

Beginning with the issue of access to the Court under Article 35, paragraph 1, Judge Elaraby explained why, in his view, the Federal Republic of Yugoslavia *was* a Member of the United Nations at the time it filed its Application in the case. He emphasized that, although the FRY was excluded from participation in the work of the General Assembly and its subsidiary organs, it remained, as the Court had previously found, a *sui generis* Member between 1992 and 2000. Thus Judge Elaraby pointed out that during this period it continued to exhibit many attributes of United Nations membership and was neither suspended nor expelled from the Organization under the relevant provisions of the United Nations Charter. On this basis, Judge Elaraby concluded that the FRY was a Member of the United Nations when it filed its Application

in 1999 and, as a result, he disagreed with the Court's finding that it was not "open" to the FRY under Article 35, paragraph 1, of the Court's Statute.

He also disagreed with the Court's finding that, assuming the FRY was a non-Member of the United Nations, it would not have had access to the Court under Article 35, paragraph 2. For Judge Elaraby, the Court's interpretation of the term "treaties in force" in Article 35, paragraph 2, as meaning "treaties in force at the time the Statute of the Court entered into force" was unduly restrictive. Like the Court, Judge Elaraby analysed the relevant *travaux préparatoires,* but, unlike the Court, he found that the expression "treaties in force" should be read to include any treaties connected with the peace settlement following the Second World War, whether they entered into force before or after the Statute of the Court. This would include, according to Judge Elaraby, the Genocide Convention, a treaty drafted under the auspices of the United Nations in direct response to the tragic events of the Second World War. In the alternative, Judge Elaraby stated that, even if the Court's reading of "treaties in force" were adopted as a general rule, there should be an exception for treaties intended to remedy violations of *jus cogens*. These, he wrote, should be subject to a broader interpretation so that any State seeking access to the Court on the basis of a treaty that addresses a *jus cogens* violation could do so as long as the treaty was in force when the Application was filed.

Because Judge Elaraby concluded that the Court was open to the FRY under Article 35 when it filed its Application in 1999, he went on to assess whether the Court has jurisdiction *ratione personae* under Article IX of the Genocide Convention. He concluded that it does, because the FRY succeeded to the treaty obligations of the former Socialist Federal Republic of Yugoslavia, including the Genocide Convention. In reaching this conclusion he explained that, in cases involving the separation of parts of the territory of a State to form one or more new States, Article 34 of the Vienna Convention on Succession of States in respect of Treaties embodied a customary rule of automatic succession by the new State to the treaties in force on the territory of its predecessor. He pointed out that it was all the more important for the Court to recognize and apply this rule in the case of a fundamental human rights treaty such as the Genocide Convention. Judge Elaraby thus concluded that the FRY was a party to the Genocide Convention on the basis of succession—not its subsequent purported accession and reservation—and therefore that the Court had jurisdiction *ratione personae.* He found, however, that the Court did not have jurisdiction *ratione materiae* under the Convention, so in the final analysis agreed with the Court that there was no jurisdiction to examine the merits of the FRY's case.

Separate opinion of Judge Kreća

Judge *ad hoc* Kreća noted that the Respondent, as well as the Applicant, attached crucial importance to the issue of *locus standi* of Serbia and Montenegro before the Court.

In the case at hand, it is closely, and even organically, linked with the membership of Serbia and Montenegro in the United Nations, due to the fact that it could not be considered as being party to the Statute of the Court apart from being a Member State of the United Nations as well as the fact that its *locus standi* cannot be based on conditions set forth in Article 35, paragraph 2, of the Statute.

In that regard he finds that at the end of the year 2000 the Applicant did two things:

(i) renounced the continuity claim and accepted the status of the successor State of the former SFRY; and

(ii) proceeding from a qualitatively new legal basis—as the successor State—submitted the application for admission to membership in the United Nations.

The admission of the FRY to the United Nations as a Member as from 1 November 2000 has two principal consequences in the circumstances of the case at hand:

(i) with respect to the admission of Yugoslavia as a Member as from 1 November 2000, it can be said that what is involved is the admission as a new Member; and

(ii) the admission of Yugoslavia as a Member as from 1 November 2000 qualified *per se* its status vis-à-vis the United Nations before that date. It seems clear that, in the light of the decisions taken by the competent organs of the United Nations, this status could not be a membership status. *A contrario,* Yugoslavia could not have been admitted as a Member as from 1 November 2000.

He is also of the opinion that the formulation of the *dispositif* explicitly linked to the absence of *locus standi* of Serbia and Montenegro would be more appropriate considering the circumstances of the case as well as the reasoning of the Court.

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155. CASE CONCERNING LEGALITY OF USE OF FORCE (SERBIA AND MONTENEGRO *v.* PORTUGAL) (PRELIMINARY OBJECTIONS)

Judgment of 15 December 2004

In its Judgment in the case concerning *Legality of the Use of Force* (*Serbia and Montenegro* v. *Portuga*l), the Court unanimously concluded that it had no jurisdiction to entertain the claims made in the Application filed by Serbia and Montenegro against Portugal on 29 April 1999.

The Court was composed as follows: President Shi; Vice-President Ranjeva; Judges Guillaume, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal, Elaraby, Owada, Tomka; Judge *ad hoc* Kreća; Registrar Couvreur.

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The operative paragraph (para. 119) of the Judgment reads as follows:

" . . .

The Court,

Unanimously,

Finds that it has no jurisdiction to entertain the claims made in the Application filed by Serbia and Montenegro on 29 April 1999."

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Vice-President Ranjeva and Judges Guillaume, Higgins, Kooijmans, Al-Khasawneh, Buergenthal and Elaraby appended a joint declaration to the Judgment of the Court; Judge Koroma appended a declaration to the Judgment of the Court; Judges Higgins, Kooijmans and Elaraby and Judge *ad hoc* Kreća appended separate opinions to the Judgment of the Court.

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History of the proceedings and submissions of the Parties
(paras. 1–23)

On 29 April 1999 the Government of the Federal Republic of Yugoslavia (with effect from 4 February 2003, "Serbia and Montenegro") filed in the Registry of the Court an Application instituting proceedings against the Portuguese Republic (hereinafter "Portugal") in respect of a dispute concerning acts allegedly committed by Portugal

> "by which it has violated its international obligation banning the use of force against another State, the obligation not to intervene in the internal affairs of another State, the obligation not to violate the sovereignty of another State, the obligation to protect the civilian population and civilian objects in wartime, the obligation to protect the environment, the obligation relating to free navigation on international rivers, the obligation regarding fundamental human rights and freedoms, the obligation not to use prohibited weapons, the obligation not to deliberately inflict conditions of life calculated to cause the physical destruction of a national group".

The Application invoked as a basis of the Court's jurisdiction Article 36, paragraph 2, of the Statute of the Court, as well as Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the United Nations General Assembly on 9 December 1948 (hereinafter "the Genocide Convention").

On 29 April 1999, immediately after filing its Application, the Federal Republic of Yugoslavia also submitted a request for the indication of provisional measures pursuant to Article 73 of the Rules of Court.

On the same day, the Federal Republic of Yugoslavia filed Applications instituting proceedings and submitted requests for the indication of provisional measures, in respect of other disputes arising out of the same facts, against the Kingdom of Belgium, Canada, the French Republic, the Federal Republic of Germany, the Italian Republic, the Kingdom of the Netherlands, the Kingdom of Spain, the United Kingdom of Great Britain and Northern Ireland and the United States of America.

Since the Court included upon the Bench no judge of Yugoslav nationality, the Yugoslav Government exercised its right under Article 31 of the Statute and chose Mr. Milenko Kreća to sit as judge *ad hoc* in the case. By letter of 10 May 1999, Portugal informed the Court that it reserved the right to choose a judge *ad hoc* in the case, in accordance with Article 31 of the Statute of the Court.

By ten Orders dated 2 June 1999 the Court, after hearing the Parties, rejected the request for the indication of provisional measures in all of the cases, and further decided to remove from the List the cases against Spain and the United States of America.

On 5 July 2000, within the time–limit fixed for the filing of its Counter-Memorial, Portugal, referring to Article 79, paragraph 1, of the Rules, submitted preliminary objections relating to the Court's jurisdiction to entertain the case and to the admissibility of the Application. Accordingly, the proceedings on the merits were suspended.

On 20 December 2002, within the prescribed time-limit as twice extended by the Court at the request of the Federal Republic of Yugoslavia, the latter filed a written statement of its observations and submissions on those preliminary objections (hereinafter referred to as its "Observations"), together with identical written statements in the seven other pending cases.

Pursuant to Article 24, paragraph 1, of the Statute, on 25 November 2003 Judge Simma informed the President that he considered that he should not take part in any of the cases.

At a meeting held by the President of the Court on 12 December 2003 with the representatives of the Parties in the eight cases concerning *Legality of Use of Force,* the questions of the presence on the Bench of judges *ad hoc* during the preliminary objections phase and of a possible joinder of the proceedings were discussed, among other issues. By letter of 23 December 2003 the Registrar informed the Agents of all the Parties that the Court had decided, pursuant to Article 31, paragraph 5, of the Statute, that, taking into account the presence upon the Bench of judges of British, Dutch and French nationality, the judges *ad hoc* chosen by the respondent States should not sit during the current phase of the procedure in these cases. The Agents were also informed that the Court had decided that a joinder of the proceedings would not be appropriate at that stage.

Public sittings in all the cases were held between 19 and 23 April 2004.

After setting out the Parties' claims in their written pleadings (which are not reproduced here), the Judgment recalls that, at the oral proceedings, the following final submissions were presented by the Parties:

On behalf of the Portuguese Government,

at the hearing of 22 April 2004:

"May it please the Court to adjudge and declare that:

(i) the Court is not called upon to give a decision on the claims of Serbia and Montenegro.

Alternatively,

(ii) the Court lacks jurisdiction, either

(a) under Article 36, paragraph 2, of the Statute;

(b) under Article IX of the Genocide Convention;

and

The claims are inadmissible."

On behalf of the Government of Serbia and Montenegro

at the hearing of 23 April 2004:

"For the reasons given in its pleadings, and in particular in its Written Observations, subsequent correspondence with the Court, and at the oral hearing, Serbia and Montenegro requests the Court:

— to adjudge and declare on its jurisdiction *ratione personae* in the present cases; and

— to dismiss the remaining preliminary objections of the respondent States, and to order proceedings on the merits if it finds it has jurisdiction *ratione personae*."

Before proceeding to its reasoning, the Court includes a paragraph (para. 24) dealing with the Applicant's change of name on 4 February 2003 from "Federal Republic of Yugoslavia" to "Serbia and Montenegro". It explains that, as far as possible, except where the term in a historical context might cause confusion, it will use the name "Serbia and Montenegro", even where reference is made to a procedural step taken before the change.

Dismissal of the case in limine litis
(paras. 25–43)

The Court begins by observing that it must first deal with a preliminary question that has been raised in each of the cases, namely the contention, presented in various forms by the eight respondent States, that, as a result of the changed attitude of the Applicant to the question of the Court's jurisdiction as expressed in its Observations, the Court is no longer required to rule on those objections to jurisdiction, but can simply dismiss the cases *in limine litis* and remove them from its List, without enquiring further into matters of jurisdiction.

The Court then examines a number of arguments advanced by different Respondents as possible legal grounds that would lead the Court to take this course, including, *inter alia:* (i) that the position of Serbia and Montenegro is to be treated as one that in effect results in a discontinuance of the proceedings or that the Court should *ex officio* put an end to the case in the interests of the proper administration of justice; (ii) that there is agreement between the Parties on a "question of jurisdiction that is determinative of the case", and that as a result there is now no "dispute as to whether the Court has jurisdiction"; (iii) that the substantive dispute under the Genocide Convention has disappeared and thus the whole dispute has disappeared in those cases in which the only ground of jurisdiction relied on is Article IX of that Convention; (iv) that Serbia and Montenegro, by its conduct, has forfeited or renounced its right of action in the present case and is now estopped from pursuing the proceedings.

The Court finds itself unable to uphold the various contentions of the Respondents. The Court considers that it is unable to treat the Observations of Serbia and Montenegro as having the legal effect of a discontinuance of the proceedings under Article 88 or 89 of the Rules of Court and finds that the case does not fall into the category of cases in which it may of its own motion put an end to proceedings in a case. As regards the argument advanced by certain Respondents that the dispute on jurisdiction has disappeared since the Parties now agree that the Applicant was not a party to the Statute at the relevant time, the Court points out that Serbia and Montenegro has not invited the Court to find that it has no jurisdiction; while it is apparently in agreement with the arguments advanced by the Respondents in that regard in their preliminary objections, it has specifically asked in its submissions for a decision of the Court on the jurisdictional question. This question, in the view of the Court, is a legal question independent of the views of the parties upon it. As to the argument concerning the disappearance of the substantive dispute, it is clear that Serbia and Montenegro has by no means withdrawn its claims as to the merits. Indeed, these claims were extensively argued and developed in substance during the hearings on jurisdiction, in the context of the question of the jurisdiction of the Court under Article IX of the Genocide Convention. It is equally clear that these claims are being vigorously denied by the Respondents. It could not even be said under these circumstances that, while the essential dispute still subsists, Serbia and Montenegro is no longer seeking to have its claim determined by the Court. Serbia and Montenegro has not sought a discontinuance and has stated that it "wants the

Court to continue the case and to decide upon its jurisdiction—and to decide on the merits as well, if it has jurisdiction". The Court therefore finds itself unable to conclude that Serbia and Montenegro has renounced any of its substantive or procedural rights, or has taken the position that the dispute between the Parties has ceased to exist. As for the argument based on the doctrine of estoppel, the Court does not consider that Serbia and Montenegro, by asking the Court "to decide on its jurisdiction" on the basis of certain alleged "new facts" about its own legal status vis-à-vis the United Nations, should be held to have forfeited or renounced its right of action and to be estopped from continuing the present action before the Court.

For all these reasons, the Court concludes that it cannot remove the cases concerning *Legality of Use of Force* from the List, or take any decision putting an end to those cases *in limine litis*. In the present phase of the proceedings, it must proceed to examine the question of its jurisdiction to entertain the case.

Serbia and Montenegro's access to the Court under Article 35, paragraph 1, of the Statute
(paras. 44–90)

The Court recalls that the Application filed on 29 April 1999 stated that "[t]he Government of the Federal Republic of Yugoslavia invokes Article 36, paragraph 2, of the Statute of the International Court of Justice as well as Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide".

The Court notes that in its jurisprudence it has referred to "its freedom to select the ground upon which it will base its judgment", and that, when its jurisdiction is challenged on diverse grounds, it is free to base its decision on one or more grounds of its own choosing, in particular "the ground which in its judgment is more direct and conclusive". However, in those instances, the Parties to the cases before the Court were, *without doubt,* parties to the Statute of the Court and the Court was thus open to them under Article 35, paragraph 1, of the Statute. The Court points out that this is not the case in the present proceedings, in which an objection has been made regarding the right of the Applicant to have access to the Court. And it is this issue of access to the Court which distinguishes the present case from those cited in the jurisprudence concerned.

The Court observes that the question whether Serbia and Montenegro was or was not a party to the Statute of the Court at the time of the institution of the present proceedings is fundamental; for if it were not such a party, the Court would not be open to it under Article 35, paragraph 1, of the Statute. In that situation, subject to any application of paragraph 2 of that Article, Serbia and Montenegro could not have properly seised the Court, whatever title of jurisdiction it might have invoked, for the simple reason that it did not have the right to appear before the Court. Hence, the Court must first examine the question whether the Applicant meets the conditions laid down in Articles 34 and 35 of the Statute for access to the Court. Only if the answer to that question is in the affirmative, will the Court have to deal with the issues relating to the conditions laid down in Article 36 of the Statute.

The Court notes in this respect that there is no doubt that Serbia and Montenegro is a State for the purpose of Article 34, paragraph 1, of the Statute. However, certain Respondents objected that, at the time of the filing of its Application on 29 April 1999, that State did not meet the conditions set down in Article 35 of the Statute. Thus Portugal argued, *inter alia,* that the Applicant did not have access to the Court under Article 35, paragraph 1, of the Statute (Preliminary Objections of Portugal, pp. 5–17). It considered that the Applicant was not a Member of the United Nations and that therefore it was not a party to the Statute since "only member States [of the United Nations] are *ipso facto* parties in the Statute of the Court (Article 93 (1) of the Charter)" and the Applicant had not "sought to be bound by the Statute pursuant to Article 93 (2) [of the Charter of the United Nations]" (Preliminary Objections of Portugal, pp. 9 and 16, paras. 29 and 56 respectively).

The Court then recapitulates the sequence of events relating to the legal position of the Applicant vis-à-vis the United Nations over the period 1992–2000. It refers, *inter alia,* to the following: the break-up of the Socialist Federal Republic of Yugoslavia in 1991–1992; a declaration of 27 April 1992 by the SFRY Assembly, the National Assembly of the Republic of Serbia and the Assembly of the Republic of Montenegro asserting the continuation of the international legal and political personality of the SFRY by the Federal Republic of Yugoslavia; a note of the same day from Yugoslavia to the United Nations Secretary-General asserting the continuation by the FRY of the membership of the SFRY in the Organization; Security Council resolution 777 of 1992 considering that the FRY could not continue automatically the SFRY's membership; General Assembly resolution 47/1 of 1992 stating that the FRY shall not participate in the work of the General Assembly; and a letter dated 29 September 1992 from the United Nations Legal Counsel regarding the "practical consequences" of General Assembly resolution 47/1.

The Court concludes that the legal situation that obtained within the United Nations during the period 1992–2000 concerning the status of the Federal Republic of Yugoslavia, remained ambiguous and open to different assessments. This was due, *inter alia,* to the absence of an authoritative determination by the competent organs of the United Nations defining clearly the legal status of the Federal Republic of Yugoslavia vis-à-vis the United Nations.

The Court notes that three different positions were taken within the United Nations. In the first place, there was the position taken by the two political organs concerned. The Court refers in this respect to Security Council resolution 777 (1992) of 19 September 1992 and to General Assembly resolution 47/1 of 22 September 1992, according to which "the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations", and "should apply for membership in the United Nations". The Court points out that, while it is clear from the voting figures that these resolutions reflected a position endorsed by the vast majority of the Members of the United

Nations, they cannot be construed as conveying an authoritative determination of the legal status of the Federal Republic of Yugoslavia within, or vis-à-vis, the United Nations. The uncertainty surrounding the question is evidenced, *inter alia,* by the practice of the General Assembly in budgetary matters during the years following the break-up of the Socialist Federal Republic of Yugoslavia.

The Court recalls that, secondly, the Federal Republic of Yugoslavia, for its part, maintained its claim that it continued the legal personality of the Socialist Federal Republic of Yugoslavia, "including its membership in all international organizations and participation in international treaties ratified or acceded to by Yugoslavia". This claim had been clearly stated in the official Note of 27 April 1992 from the Permanent Mission of Yugoslavia to the United Nations addressed to the Secretary-General of the United Nations. It was sustained by the Applicant throughout the period from 1992 to 2000.

Thirdly, another organ that came to be involved in this problem was the Secretariat of the United Nations. In the absence of any authoritative determination, the Secretariat, as the administrative organ of the Organization, simply continued to keep to the practice of the *status quo ante* that had prevailed prior to the break-up of the Socialist Federal Republic of Yugoslavia in 1992.

The Court points out that it was against this background that the Court itself, in its Judgment of 3 February 2003 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)* (hereinafter the "*Application for Revision* case"), referred to the "*sui generis* position which the FRY found itself in" during the relevant period; however, in that case, no final and definitive conclusion was drawn by the Court from this descriptive term on the amorphous status of the Federal Republic of Yugoslavia vis-à-vis or within the United Nations during this period.

The Court considers that this situation came to an end with a new development in 2000. On 27 October of that year, the Federal Republic of Yugoslavia requested admission to membership in the United Nations, and on 1 November, by General Assembly resolution 55/12, it was so admitted. Serbia and Montenegro thus has the status of membership in the Organization as from 1 November 2000. However, its admission to the United Nations did not have, and could not have had, the effect of dating back to the time when the SFRY broke up and disappeared. It became clear that the *sui generis* position of the Applicant could not have amounted to its membership in the Organization.

In the view of the Court, the significance of this new development in 2000 is that it has clarified the thus far amorphous legal situation concerning the status of the Federal Republic of Yugoslavia vis-à-vis the United Nations.

The Court finds that from the vantage point from which it now looks at the legal situation, and in light of the legal consequences of the new development since 1 November 2000, it is led to the conclusion that Serbia and Montenegro was not a Member of the United Nations, and in that capacity a State party to the Statute of the International Court of Justice, at the time of filing its Application.

A further point the Court considers is the relevance to the present case of the Judgment in the *Application for Revision* case, of 3 February 2003. The Court points out that, given the specific characteristics of the procedure under Article 61 of the Statute, in which the conditions for granting an application for revision of a judgment are strictly circumscribed, there is no reason to treat the Judgment in the *Application for Revision* case as having pronounced upon the issue of the legal status of Serbia and Montenegro vis-à-vis the United Nations. Nor does the Judgment pronounce upon the status of Serbia and Montenegro in relation to the Statute of the Court.

For all these reasons, the Court concludes that, at the time when the present proceedings were instituted, the Applicant in the present case, Serbia and Montenegro, was not a Member of the United Nations, and consequently, was not, on that basis, a State party to the Statute of the International Court of Justice. The Applicant not having become a party to the Statute on any other basis, it follows that the Court was not then open to it under Article 35, paragraph 1, of the Statute.

Serbia and Montenegro's possible access to the Court on the basis of Article 35, paragraph 2, of the Statute
(paras. 91–116)

The Court then considers whether it might be open to Serbia and Montenegro under paragraph 2 of Article 35, which provides:

> "The conditions under which the Court shall be open to other States [i.e. States not parties to the Statute] shall, subject to the special provisions contained in treaties in force, be laid down by the Security Council, but in no case shall such conditions place the parties in a position of inequality before the Court."

In this regard, it quotes from its Order of 8 April 1993 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)* (hereinafter the "*Genocide Convention* case"), where it stated, *inter alia,* that a "compromissory clause in a multilateral convention, such as Article IX of the Genocide Convention relied on by Bosnia and Herzegovina in the present case, *could,* in the view of the Court, be regarded *prima facie* as a special provision contained in a treaty in force" (emphasis added).

The Court initially notes that Portugal has contended that, at the date of the filing of the Application, 29 April 1999, it was not a party to the Genocide Convention. However, the Court considers that logical priority must be given to the question whether Serbia and Montenegro can invoke Article 35, paragraph 2, of the Statute, that is to say, whether or not Article IX of the Genocide Convention can be regarded as one of the "special provisions in treaties in force" contemplated by that text.

The Court recalls that a number of Respondents contended in their pleadings that the reference to "treaties in force" in Article 35, paragraph 2, of the Statute relates only to treaties in force when the Statute of the Court entered into force, i.e. on 24 October 1945. In respect of the Order of 8 April 1993 in the

Genocide Convention case, the Respondents pointed out that that was a provisional assessment, not conclusive of the matter, and considered that "there [were] persuasive reasons why the Court should revisit the provisional approach it adopted to the interpretation of this clause in the *Genocide Convention* case".

The Court notes that the passage from the 1993 Order in the *Genocide Convention* case was addressed to the situation in which the proceedings were instituted against a State whose membership in the United Nations and status as a party to the Statute was unclear. It observes that the Order of 8 April 1993 was made on the basis of an examination of the relevant law and facts in the context of incidental proceedings on a request for the indication of provisional measures, and concludes that it would therefore now be appropriate for the Court to make a definitive finding on the question whether Article 35, paragraph 2, affords access to the Court in the present case, and for that purpose, to examine further the question of its applicability and interpretation.

The Court thus proceeds to the interpretation of Article 35, paragraph 2, of the Statute, and does so in accordance with customary international law, as reflected in Article 31 of the 1969 Vienna Convention on the Law of Treaties. According to paragraph 1 of Article 31, a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of the treaty's object and purpose. Interpretation must be based above all upon the text of the treaty. As a supplementary measure recourse may be had to means of interpretation such as the preparatory work of the treaty and the circumstances of its conclusion.

The Court points out that the words "treaties in force" in Article 35, paragraph 2, do not, in their natural and ordinary meaning, indicate at what date the treaties contemplated are to be in force, and may thus lend themselves to different interpretations. They may be interpreted as referring either to treaties which were in force at the time that the Statute itself came into force, or to those which were in force on the date of the institution of proceedings in a case in which such treaties are invoked.

The Court observes that the object and purpose of Article 35 of the Statute is to define the conditions of access to the Court. While paragraph 1 of that Article opens it to the States parties to the Statute, paragraph 2 is intended to regulate access to the Court by States which are not parties to the Statute. It would have been inconsistent with the main thrust of the text to make it possible in the future for States not parties to the Statute to obtain access to the Court simply by the conclusion between themselves of a special treaty, multilateral or bilateral, containing a provision to that effect.

The Court moreover notes that the interpretation of Article 35, paragraph 2, whereby that paragraph is to be construed as referring to treaties in force at the time that the Statute came into force, is in fact reinforced by an examination of the *travaux préparatoires* of the text; the Court considers that the legislative history of Article 35, paragraph 2, of the Statute of the Permanent Court of International Justice (hereinafter the "Permanent Court") demonstrates that it was intended as an exception to the principle stated in paragraph 1, in order to cover cases contemplated in agreements concluded in the aftermath of the First World War before the Statute entered into force. However, the *travaux préparatoires* of the Statute of the present Court are less illuminating. The discussion of Article 35 was provisional and somewhat cursory; it took place at a stage in the planning of the future international organization when it was not yet settled whether the Permanent Court would be preserved or replaced by a new court. Indeed, the records do not include any discussion which would suggest that Article 35, paragraph 2, of the Statute should be given a different meaning from the corresponding provision in the Statute of the Permanent Court. It would rather seem that the text was reproduced from the Statute of the Permanent Court; there is no indication that any extension of access to the Court was intended.

Accordingly Article 35, paragraph 2, must be interpreted, *mutatis mutandis,* in the same way as the equivalent text in the Statute of the Permanent Court, namely as intended to refer to treaties in force at the date of the entry into force of the new Statute, and providing for the jurisdiction of the new Court. In fact, no such prior treaties, referring to the jurisdiction of the present Court, have been brought to the attention of the Court, and it may be that none exist. In the view of the Court, however, neither this circumstance, nor any consideration of the object and purpose of the text, nor the *travaux préparatoires,* offer support to the alternative interpretation that the provision was intended as granting access to the Court to States not parties to the Statute without any condition other than the existence of a treaty, containing a clause conferring jurisdiction on the Court, which might be concluded at any time subsequently to the entry into force of the Statute. As previously observed, this interpretation would lead to a result quite incompatible with the object and purpose of Article 35, paragraph 2, namely the regulation of access to the Court by States non-parties to the Statute. In the view of the Court therefore, the reference in Article 35, paragraph 2, of the Statute to "the special provisions contained in treaties in force" applies only to treaties in force at the date of the entry into force of the Statute, and not to any treaties concluded since that date.

The Court thus concludes that, even assuming that Serbia and Montenegro was a party to the Genocide Convention at the relevant date, Article 35, paragraph 2, of the Statute does not provide it with a basis to have access to the Court, under Article IX of that Convention, since the Convention only entered into force on 12 January 1951, after the entry into force of the Statute. The Court does not therefore consider it necessary to decide whether Serbia and Montenegro was or was not a party to the Genocide Convention on 29 April 1999 when the current proceedings were instituted.

Unnecessary to consider other preliminary objections
(para. 117)

Having found that Serbia and Montenegro did not, at the time of the institution of the present proceedings, have access to the Court under either paragraph 1 or paragraph 2 of Article 35 of the Statute, the Court states that it is unnecessary for it to consider the other preliminary objections filed by the Respondents to its jurisdiction.

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The Court finally recalls (para. 118) that, irrespective of whether it has jurisdiction over a dispute, the parties "remain in all cases responsible for acts attributable to them that violate the rights of other States".

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Joint declaration of Vice-President Ranjeva and Judges Guillaume, Higgins, Kooijmans, Al-Khasawneh, Buergenthal and Elaraby

1. Vice-President Ranjeva and Judges Guillaume, Higgins, Kooijmans, Al-Khasawneh, Buergenthal and Elaraby voted in favour of the *dispositif* of the Judgments because they agree that these cases cannot, as a matter of law, proceed to the merits. They have added in their joint declaration that they nevertheless profoundly disagree with the reasoning adopted by the Court.

2. They note that when the Court finds in a case that, on two or more grounds, its jurisdiction is not well founded *ratione personae, ratione materiae* or *ratione temporis,* it may choose the most appropriate ground on which to base its decision of lack of competence. They point out that this choice must be guided by three criteria: consistency with the past case law; degree of certitude of the ground chosen; possible implications for the other pending cases.

3. In the present instances, according to the Judgments of the Court, Serbia and Montenegro was not a Member of the United Nations in 1999 and, as a result, was not then a party to the Statute of the Court. In the Judgments, the Court concludes therefrom that it was not at that time open to the Applicant under Article 35, paragraph 1, of the Statute. The Judgments go on to state that paragraph 2 of that Article enables States not parties to the Statute to appear before the Court only by virtue of Security Council decisions or treaties concluded prior to the entry into force of the Statute. It is observed in the Judgments that the United Nations Genocide Convention only entered into force in 1951. It is thus concluded that Article 35, paragraph 2, of the Statute does not grant Serbia and Montenegro access to the Court either.

4. In the view of the seven judges making the joint declaration, this solution is at odds with a number of previous decisions of the Court, in particular the Judgment rendered on 3 February 2003 in a case between Bosnia and Herzegovina and Yugoslavia, in which it was found that Yugoslavia could appear before the Court between 1992 and 2000 and that this position had not been changed by its admission to the United Nations in 2002. Further, the authors of the declaration note that in reality it is far from self-evident that Yugoslavia was not a Member of the United Nations at that time. Lastly, they regret that the Judgment leaves some doubt as to whether Yugoslavia was a party, between 1992 and 2000, to the United Nations Genocide Convention and thus could call into question the solutions adopted by the Court in the case brought by Bosnia and Herzegovina against Serbia and Montenegro. Thus, the Court's Judgment does not meet any of the three criteria set out in paragraph 2 above.

5. The seven judges finally observe that the Court could easily have founded its Judgment that it lacked jurisdiction on the grounds on which it relied in 1999 when the requests for the indication of provisional measures were considered. The Court then found that it lacked jurisdiction *ratione temporis* in respect of the declaration accepting the compulsory jurisdiction of the Court which Serbia and Montenegro had filed several weeks after the start of military operations in Kosovo. It also found itself to be without jurisdiction *ratione materiae* in respect of the United Nations Genocide Convention, as no genocidal intention had been established. These solutions could easily have been confirmed.

Declaration of Judge Koroma

In his declaration Judge Koroma stated that, while concurring in the Judgment, he considered it necessary to stress the following. The question which the Court was requested to rule on and which it in fact did decide in this phase of the case was the issue of jurisdiction, namely, whether the Court could entertain the merits of the case. The jurisdictional function is intended to establish whether the Court is entitled to enter into and adjudicate on the substantive issues in a case. This function, in his view, cannot be dispensed with as it is both required by law and stipulated in the Statute of the Court. It is this function that the Court has carried out in this Judgment and it is within this paradigm that the Judgment must be understood. The Judgment cannot be interpreted as the Court taking a position on any of the matters of substance before the Court.

Separate opinion of Judge Higgins

Judge Higgins agrees that Serbia and Montenegro have not discontinued the case. However, she disagrees with the apparent finding of the Court that a case may only be removed from the List where there is a discontinuance by the applicant or the parties, or where an applicant disclosed no subsisting title of jurisdiction, or where the Court manifestly lacked jurisdiction (see paragraph 32 of the Judgment). In her view, the right of the Court exceptionally to remove a case from the List rests on its inherent powers, which are not limited to *a priori* categories.

Judge Higgins is of the opinion that the present case should have been removed from the List, as the Applicant has by its own conduct put itself in a position incompatible with Article 38, paragraph 2, of the Rules of Court. The manner in which it has dealt with preliminary objections would further warrant the case not being proceeded with.

Finally, Judge Higgins greatly regrets the attention the Court has afforded to Article 35, paragraph 2, of the Statute, believing its relevance lies only in another pending case.

Separate opinion of Judge Kooijmans

Judge Kooijmans has added a separate opinion to the Judgment and the joint declaration of seven Members of the Court, which he co-signed, for two reasons.

First he wishes to explain why in his view the Court should not have decided the issue of jurisdiction on the ground of Serbia and Montenegro's lack of access to the Court, although in

1999, when the Court rejected Yugoslavia's request for interim measures of protection, he was in favour of this approach. In his view, the Court has not in a convincing and transparent way elucidated the status of the Federal Republic of Yugoslavia vis-à-vis the United Nations before its admission to the Organization in 2000. Further, the Court's Judgment has undeniable implications for other pending cases, in particular the *Genocide Convention* case (*Bosnia Herzegovina* v. *Serbia and Montenegro*), which could easily have been avoided by choosing another approach. Finally, the Judgment is at odds with previous decisions of the Court, thus endangering the principle of consistency of reasoning. This consistency with earlier case law should prevail over present or earlier misgivings of individual judges if an approach in conformity with that consistency does not lead to legally untenable results.

In the second place Judge Kooijmans sets out why in his view the Court would have done better to dismiss the cases *in limine litis*. In 1999 the Applicant invoked two grounds of jurisdiction which it explicitly abandoned in its Written Observations of 20 December 2002 without replacing them by other grounds. Nevertheless it did not discontinue the case but asked the Court to decide *whether* it had jurisdiction. Thus the Applications did no longer meet the requirement of Article 38, paragraph 2, of the Rules of Court, which states that the application shall specify as far as possible the legal grounds upon which the jurisdiction of the Court is said to be based. Since the Court has the inherent power to strike a case from the General List in order to safeguard the integrity of the procedure, it should have done so in view of the fact that the Applicant has failed to demonstrate and even did not make an effort to demonstrate that a valid ground of jurisdiction existed.

Separate opinion of Judge Elaraby

Judge Elaraby voted in favour of the *dispositif,* but disagreed both with the grounds on which the Court decided to base its Judgment—Article 35, paragraph 1 and Article 35, paragraph 2 of the Court's Statute—and with the conclusions which the Court reached on each of these grounds. The joint declaration, to which Judge Elaraby is a signatory, explains why he believes that the Court should have chosen alternative grounds to reach its decision. His separate opinion explains why he disagrees with its substantive findings.

Beginning with the issue of access to the Court under Article 35, paragraph 1, Judge Elaraby explained why, in his view, the Federal Republic of Yugoslavia *was* a Member of the United Nations at the time it filed its Application in the case. He emphasized that, although the FRY was excluded from participation in the work of the General Assembly and its subsidiary organs, it remained, as the Court had previously found, a *sui generis* Member between 1992 and 2000. Thus Judge Elaraby pointed out that during this period it continued to exhibit many attributes of United Nations membership and was neither suspended nor expelled from the Organization under the relevant provisions of the United Nations Charter. On this basis, Judge Elaraby concluded that the FRY was a Member of the United Nations when it filed its Application in 1999 and, as a result, he disagreed with the Court's finding that it was not "open" to the FRY under Article 35, paragraph 1, of the Court's Statute.

He also disagreed with the Court's finding that, assuming the FRY was a non-Member of the United Nations, it would not have had access to the Court under Article 35, paragraph 2. For Judge Elaraby, the Court's interpretation of the term "treaties in force" in Article 35, paragraph 2, as meaning "treaties in force at the time the Statute of the Court entered into force" was unduly restrictive. Like the Court, Judge Elaraby analysed the relevant *travaux préparatoires,* but, unlike the Court, he found that the expression "treaties in force" should be read to include any treaties connected with the peace settlement following the Second World War, whether they entered into force before or after the Statute of the Court. This would include, according to Judge Elaraby, the Genocide Convention, a treaty drafted under the auspices of the United Nations in direct response to the tragic events of the Second World War. In the alternative, Judge Elaraby stated that, even if the Court's reading of "treaties in force" were adopted as a general rule, there should be an exception for treaties intended to remedy violations of *jus cogens*. These, he wrote, should be subject to a broader interpretation so that any State seeking access to the Court on the basis of a treaty that addresses a *jus cogens* violation could do so as long as the treaty was in force when the Application was filed.

Because Judge Elaraby concluded that the Court was open to the FRY under Article 35 when it filed its Application in 1999, he went on to assess whether the Court has jurisdiction *ratione personae* under Article IX of the Genocide Convention. He concluded that it does, because the FRY succeeded to the treaty obligations of the former Socialist Federal Republic of Yugoslavia, including the Genocide Convention. In reaching this conclusion he explained that, in cases involving the separation of parts of the territory of a State to form one or more new States, Article 34 of the Vienna Convention on Succession of States in respect of Treaties embodied a customary rule of automatic succession by the new State to the treaties in force on the territory of its predecessor. He pointed out that it was all the more important for the Court to recognize and apply this rule in the case of a fundamental human rights treaty such as the Genocide Convention. Judge Elaraby thus concluded that the FRY was a party to the Genocide Convention on the basis of succession—not its subsequent purported accession and reservation—and therefore that the Court had jurisdiction *ratione personae*. He found, however, that the Court did not have jurisdiction *ratione materiae* under the Convention, so in the final analysis agreed with the Court that there was no jurisdiction to examine the merits of the FRY's case.

Separate opinion of Judge Kreća

Judge *ad hoc* Kreća noted that the Respondent, as well as the Applicant, attached crucial importance to the issue of *locus standi* of Serbia and Montenegro before the Court.

In the case at hand, it is closely, and even organically, linked with the membership of Serbia and Montenegro in the United Nations, due to the fact that it could not be considered as being party to the Statute of the Court apart from being a Member State of the United Nations as well as the fact that its

locus standi cannot be based on conditions set forth in Article 35, paragraph 2, of the Statute.

In that regard he finds that at the end of the year 2000 the Applicant did two things:

(i) renounced the continuity claim and accepted the status of the successor State of the former SFRY; and

(ii) proceeding from a qualitatively new legal basis—as the successor State—submitted the application for admission to membership in the United Nations.

The admission of the FRY to the United Nations as a Member as from 1 November 2000 has two principal consequences in the circumstances of the case at hand:

(i) with respect to the admission of Yugoslavia as a Member as from 1 November 2000, it can be said that what is involved is the admission as a new Member; and

(ii) the admission of Yugoslavia as a Member as from 1 November 2000 qualified *per se* its status vis-à-vis the United Nations before that date. It seems clear that, in the light of the decisions taken by the competent organs of the United Nations, this status could not be a membership status. *A contrario,* Yugoslavia could not have been admitted as a Member as from 1 November 2000.

He is also of the opinion that the formulation of the *dispositif* explicitly linked to the absence of *locus standi* of Serbia and Montenegro would be more appropriate considering the circumstances of the case as well as the reasoning of the Court.

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156. CASE CONCERNING LEGALITY OF USE OF FORCE (SERBIA AND MONTENEGRO *v.* UNITED KINGDOM) (PRELIMINARY OBJECTIONS)

Judgment of 15 December 2004

In its Judgment in the case concerning *Legality of the Use of Force* (*Serbia and Montenegro* v. *United Kingdom*), the Court unanimously concluded that it had no jurisdiction to entertain the claims made in the Application filed by Serbia and Montenegro against United Kingdom on 29 April 1999.

The Court was composed as follows: President Shi; Vice-President Ranjeva; Judges Guillaume, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal, Elaraby, Owada, Tomka; Judge *ad hoc* Kreća; Registrar Couvreur.

*

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The operative paragraph (para. 115) of the Judgment reads as follows:

" . . .

The Court,

Unanimously,

Finds that it has no jurisdiction to entertain the claims made in the Application filed by Serbia and Montenegro on 29 April 1999."

*

* *

Vice-President Ranjeva and Judges Guillaume, Higgins, Kooijmans, Al-Khasawneh, Buergenthal and Elaraby appended a joint declaration to the Judgment of the Court; Judge Koroma appended a declaration to the Judgment of the Court; Judges Higgins, Kooijmans and Elaraby and Judge *ad hoc* Kreća appended separate opinions to the Judgment of the Court.

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History of the proceedings and submissions of the Parties (paras. 1–22)

On 29 April 1999 the Government of the Federal Republic of Yugoslavia (with effect from 4 February 2003, "Serbia and Montenegro") filed in the Registry of the Court an Application instituting proceedings against the United Kingdom of Great Britain and Northern Ireland (hereinafter "the United Kingdom") in respect of a dispute concerning acts allegedly committed by the United Kingdom

> "by which it has violated its international obligation banning the use of force against another State, the obligation not to intervene in the internal affairs of another State, the obligation not to violate the sovereignty of another State, the obligation to protect the civilian population and civilian objects in wartime, the obligation to protect the environment, the obligation relating to free navigation on international rivers, the obligation regarding fundamental human rights and freedoms, the obligation not to use prohibited weapons, the obligation not to deliberately inflict conditions of life calculated to cause the physical destruction of a national group".

The Application invoked as a basis of the Court's jurisdiction Article 36, paragraph 2, of the Statute of the Court, as well as Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the United Nations General Assembly on 9 December 1948 (hereinafter "the Genocide Convention").

On 29 April 1999, immediately after filing its Application, the Federal Republic of Yugoslavia also submitted a request for the indication of provisional measures pursuant to Article 73 of the Rules of Court.

On the same day, the Federal Republic of Yugoslavia filed Applications instituting proceedings and submitted requests for the indication of provisional measures, in respect of other

disputes arising out of the same facts, against the Kingdom of Belgium, Canada, the French Republic, the Federal Republic of Germany, the Italian Republic, the Kingdom of the Netherlands, the Portuguese Republic, the Kingdom of Spain and the United States of America.

Since the Court included upon the Bench no judge of Yugoslav nationality, the Yugoslav Government exercised its right under Article 31 of the Statute and chose Mr. Milenko Kreća to sit as judge *ad hoc* in the case.

By ten Orders dated 2 June 1999 the Court, after hearing the Parties, rejected the request for the indication of provisional measures in all of the cases, and further decided to remove from the List the cases against Spain and the United States of America.

On 4 July 2000, within the time–limit fixed for the filing of its Counter-Memorial, the United Kingdom, referring to Article 79, paragraph 1, of the Rules, submitted preliminary objections relating to the Court's jurisdiction to entertain the case and to the admissibility of the Application. Accordingly, the proceedings on the merits were suspended.

On 20 December 2002, within the prescribed time-limit as twice extended by the Court at the request of the Federal Republic of Yugoslavia, the latter filed a written statement of its observations and submissions on those preliminary objections (hereinafter referred to as its "Observations"), together with identical written statements in the seven other pending cases.

Pursuant to Article 24, paragraph 1, of the Statute, on 25 November 2003 Judge Simma informed the President that he considered that he should not take part in any of the cases.

At a meeting held by the President of the Court on 12 December 2003 with the representatives of the Parties in the eight cases concerning *Legality of Use of Force,* the questions of the presence on the Bench of judges *ad hoc* during the preliminary objections phase and of a possible joinder of the proceedings were discussed, among other issues. By letter of 23 December 2003 the Registrar informed the Agents of all the Parties that the Court had decided, pursuant to Article 31, paragraph 5, of the Statute, that, taking into account the presence upon the Bench of judges of British, Dutch and French nationality, the judges *ad hoc* chosen by the respondent States should not sit during the current phase of the procedure in these cases. The Agents were also informed that the Court had decided that a joinder of the proceedings would not be appropriate at that stage.

Public sittings in all the cases were held between 19 and 23 April 2004.

After setting out the Parties' claims in their written pleadings (which are not reproduced here), the Judgment recalls that, at the oral proceedings, the following final submissions were presented by the Parties:

On behalf of the Government of the United Kingdom,

at the hearing of 22 April 2004:

"For the reasons given in our written Preliminary Objections and at the oral hearing, the United Kingdom requests the Court:

— to remove the case from its List, or in the alternative,

— to adjudge and declare that:

— it lacks jurisdiction over the claims brought against the United Kingdom by Serbia and Montenegro,

and/or

— the claims brought against the United Kingdom by Serbia and Montenegro are inadmissible."

On behalf of the Government of Serbia and Montenegro

at the hearing of 23 April 2004:

"For the reasons given in its pleadings, and in particular in its Written Observations, subsequent correspondence with the Court, and at the oral hearing, Serbia and Montenegro requests the Court:

— to adjudge and declare on its jurisdiction *ratione personae* in the present cases; and

— to dismiss the remaining preliminary objections of the respondent States, and to order proceedings on the merits if it finds it has jurisdiction *ratione personae*."

Before proceeding to its reasoning, the Court includes a paragraph (para. 23) dealing with the Applicant's change of name on 4 February 2003 from "Federal Republic of Yugoslavia" to "Serbia and Montenegro". It explains that, as far as possible, except where the term in a historical context might cause confusion, it will use the name "Serbia and Montenegro", even where reference is made to a procedural step taken before the change.

Dismissal of the case in limine litis
(paras. 24–42)

The Court begins by observing that it must first deal with a preliminary question that has been raised in each of the cases, namely the contention, presented in various forms by the eight respondent States, that, as a result of the changed attitude of the Applicant to the question of the Court's jurisdiction as expressed in its Observations, the Court is no longer required to rule on those objections to jurisdiction, but can simply dismiss the cases *in limine litis* and remove them from its List, without enquiring further into matters of jurisdiction.

The Court then examines a number of arguments advanced by different Respondents as possible legal grounds that would lead the Court to take this course, including, *inter alia:* (i) that the position of Serbia and Montenegro is to be treated as one that in effect results in a discontinuance of the proceedings or that the Court should *ex officio* put an end to the case in the interests of the proper administration of justice; (ii) that there is agreement between the Parties on a "question of jurisdiction that is determinative of the case", and that as a result there is now no "dispute as to whether the Court has jurisdiction"; (iii) that the substantive dispute under the Genocide Convention has disappeared and thus the whole dispute has disappeared in those cases in which the only ground of jurisdiction relied on is Article IX of that Convention; (iv) that Serbia and Montenegro, by its conduct, has forfeited or renounced its right of action in the present case and is now estopped from pursuing the proceedings.

The Court finds itself unable to uphold the various contentions of the Respondents. The Court considers that it is unable to treat the Observations of Serbia and Montenegro as having the legal effect of a discontinuance of the proceedings under Article 88 or 89 of the Rules of Court and finds that the case does not fall into the category of cases in which it may of its own motion put an end to proceedings in a case. As regards the argument advanced by certain Respondents that the dispute on jurisdiction has disappeared since the Parties now agree that the Applicant was not a party to the Statute at the relevant time, the Court points out that Serbia and Montenegro has not invited the Court to find that it has no jurisdiction; while it is apparently in agreement with the arguments advanced by the Respondents in that regard in their preliminary objections, it has specifically asked in its submissions for a decision of the Court on the jurisdictional question. This question, in the view of the Court, is a legal question independent of the views of the parties upon it. As to the argument concerning the disappearance of the substantive dispute, it is clear that Serbia and Montenegro has by no means withdrawn its claims as to the merits. Indeed, these claims were extensively argued and developed in substance during the hearings on jurisdiction, in the context of the question of the jurisdiction of the Court under Article IX of the Genocide Convention. It is equally clear that these claims are being vigorously denied by the Respondents. It could not even be said under these circumstances that, while the essential dispute still subsists, Serbia and Montenegro is no longer seeking to have its claim determined by the Court. Serbia and Montenegro has not sought a discontinuance and has stated that it "wants the Court to continue the case and to decide upon its jurisdiction—and to decide on the merits as well, if it has jurisdiction". The Court therefore finds itself unable to conclude that Serbia and Montenegro has renounced any of its substantive or procedural rights, or has taken the position that the dispute between the Parties has ceased to exist. As for the argument based on the doctrine of estoppel, the Court does not consider that Serbia and Montenegro, by asking the Court "to decide on its jurisdiction" on the basis of certain alleged "new facts" about its own legal status vis-à-vis the United Nations, should be held to have forfeited or renounced its right of action and to be estopped from continuing the present action before the Court.

For all these reasons, the Court concludes that it cannot remove the cases concerning *Legality of Use of Force* from the List, or take any decision putting an end to those cases *in limine litis*. In the present phase of the proceedings, it must proceed to examine the question of its jurisdiction to entertain the case.

Serbia and Montenegro's access to the Court under Article 35, paragraph 1, of the Statute
(paras. 43–89)

The Court recalls that the Application filed on 29 April 1999 stated that "[t]he Government of the Federal Republic of Yugoslavia invokes Article 36, paragraph 2, of the Statute of the International Court of Justice as well as Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide".

The Court notes that in its jurisprudence it has referred to "its freedom to select the ground upon which it will base its judgment", and that, when its jurisdiction is challenged on diverse grounds, it is free to base its decision on one or more grounds of its own choosing, in particular "the ground which in its judgment is more direct and conclusive". However, in those instances, the Parties to the cases before the Court were, *without doubt,* parties to the Statute of the Court and the Court was thus open to them under Article 35, paragraph 1, of the Statute. The Court points out that this is not the case in the present proceedings, in which an objection has been made regarding the right of the Applicant to have access to the Court. And it is this issue of access to the Court which distinguishes the present case from those cited in the jurisprudence concerned.

The Court observes that the question whether Serbia and Montenegro was or was not a party to the Statute of the Court at the time of the institution of the present proceedings is fundamental; for if it were not such a party, the Court would not be open to it under Article 35, paragraph 1, of the Statute. In that situation, subject to any application of paragraph 2 of that Article, Serbia and Montenegro could not have properly seised the Court, whatever title of jurisdiction it might have invoked, for the simple reason that it did not have the right to appear before the Court. Hence, the Court must first examine the question whether the Applicant meets the conditions laid down in Articles 34 and 35 of the Statute for access to the Court. Only if the answer to that question is in the affirmative, will the Court have to deal with the issues relating to the conditions laid down in Article 36 of the Statute.

The Court notes in this respect that there is no doubt that Serbia and Montenegro is a State for the purpose of Article 34, paragraph 1, of the Statute. However, certain Respondents objected that, at the time of the filing of its Application on 29 April 1999, that State did not meet the conditions set down in Article 35 of the Statute.

Thus the United Kingdom argued that "the FRY is not qualified to bring these proceedings" on the grounds, *inter alia,* that

> "[t]he FRY is not a party to the Statute of the Court, since it is neither a Member of the united Nations nor a non-Member State that has become a party to the Statute under Article 93 (2) of the Charter [of the United Nations]" (Preliminary Objections of the United Kingdom, p. 25, para. 3.1).

The Court then recapitulates the sequence of events relating to the legal position of the Applicant vis-à-vis the United Nations over the period 1992–2000. It refers, *inter alia,* to the following: the break-up of the Socialist Federal Republic of Yugoslavia in 1991–1992; a declaration of 27 April 1992 by the SFRY Assembly, the National Assembly of the Republic of Serbia and the Assembly of the Republic of Montenegro asserting the continuation of the international legal and political personality of the SFRY by the Federal Republic of Yugoslavia; a note of the same day from Yugoslavia to the United Nations Secretary-General asserting the continuation by the FRY of the membership of the SFRY in the Organization; Security Council resolution 777 of 1992 considering that the FRY could not continue automatically the SFRY's membership; General

Assembly resolution 47/1 of 1992 stating that the FRY shall not participate in the work of the General Assembly; and a letter dated 29 September 1992 from the United Nations Legal Counsel regarding the "practical consequences" of General Assembly resolution 47/1.

The Court concludes that the legal situation that obtained within the United Nations during the period 1992–2000 concerning the status of the Federal Republic of Yugoslavia remained ambiguous and open to different assessments. This was due, *inter alia,* to the absence of an authoritative determination by the competent organs of the United Nations defining clearly the legal status of the Federal Republic of Yugoslavia vis-à-vis the United Nations.

The Court notes that three different positions were taken within the United Nations. In the first place, there was the position taken by the two political organs concerned. The Court refers in this respect to Security Council resolution 777 (1992) of 19 September 1992 and to General Assembly resolution 47/1 of 22 September 1992, according to which "the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations", and "should apply for membership in the United Nations". The Court points out that, while it is clear from the voting figures that these resolutions reflected a position endorsed by the vast majority of the Members of the United Nations, they cannot be construed as conveying an authoritative determination of the legal status of the Federal Republic of Yugoslavia within, or vis-à-vis, the United Nations. The uncertainty surrounding the question is evidenced, *inter alia,* by the practice of the General Assembly in budgetary matters during the years following the break-up of the Socialist Federal Republic of Yugoslavia.

The Court recalls that, secondly, the Federal Republic of Yugoslavia, for its part, maintained its claim that it continued the legal personality of the Socialist Federal Republic of Yugoslavia, "including its membership in all international organizations and participation in international treaties ratified or acceded to by Yugoslavia". This claim had been clearly stated in the official Note of 27 April 1992 from the Permanent Mission of Yugoslavia to the United Nations addressed to the Secretary-General of the United Nations. It was sustained by the Applicant throughout the period from 1992 to 2000.

Thirdly, another organ that came to be involved in this problem was the Secretariat of the United Nations. In the absence of any authoritative determination, the Secretariat, as the administrative organ of the Organization, simply continued to keep to the practice of the *status quo ante* that had prevailed prior to the break-up of the Socialist Federal Republic of Yugoslavia in 1992.

The Court points out that it was against this background that the Court itself, in its Judgment of 3 February 2003 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)* (hereinafter the "*Application for Revision* case"), referred to the "*sui generis* position which the FRY found itself in" during the relevant period; however, in that case, no final and definitive conclusion was drawn by the Court from this descriptive term on the amorphous status of the Federal Republic of Yugoslavia vis-à-vis or within the United Nations during this period.

The Court considers that this situation came to an end with a new development in 2000. On 27 October of that year, the Federal Republic of Yugoslavia requested admission to membership in the United Nations, and on 1 November, by General Assembly resolution 55/12, it was so admitted. Serbia and Montenegro thus has the status of membership in the Organization as from 1 November 2000. However, its admission to the United Nations did not have, and could not have had, the effect of dating back to the time when the SFRY broke up and disappeared. It became clear that the *sui generis* position of the Applicant could not have amounted to its membership in the Organization.

In the view of the Court, the significance of this new development in 2000 is that it has clarified the thus far amorphous legal situation concerning the status of the Federal Republic of Yugoslavia vis-à-vis the United Nations.

The Court finds that from the vantage point from which it now looks at the legal situation, and in light of the legal consequences of the new development since 1 November 2000, it is led to the conclusion that Serbia and Montenegro was not a Member of the United Nations, and in that capacity a State party to the Statute of the International Court of Justice, at the time of filing its Application.

A further point the Court considers is the relevance to the present case of the Judgment in the *Application for Revision* case, of 3 February 2003. The Court points out that, given the specific characteristics of the procedure under Article 61 of the Statute, in which the conditions for granting an application for revision of a judgment are strictly circumscribed, there is no reason to treat the Judgment in the *Application for Revision* case as having pronounced upon the issue of the legal status of Serbia and Montenegro vis-à-vis the United Nations. Nor does the Judgment pronounce upon the status of Serbia and Montenegro in relation to the Statute of the Court.

For all these reasons, the Court concludes that, at the time when the present proceedings were instituted, the Applicant in the present case, Serbia and Montenegro, was not a Member of the United Nations, and consequently, was not, on that basis, a State party to the Statute of the International Court of Justice. The Applicant not having become a party to the Statute on any other basis, it follows that the Court was not then open to it under Article 35, paragraph 1, of the Statute.

Serbia and Montenegro's possible access to the Court on the basis of Article 35, paragraph 2, of the Statute
(paras. 90–112)

The Court then considers whether it might be open to Serbia and Montenegro under paragraph 2 of Article 35, which provides:

> "The conditions under which the Court shall be open to other States [i.e. States not parties to the Statute] shall, subject to the special provisions contained in treaties in force, be laid down by the Security Council, but in no case shall

such conditions place the parties in a position of inequality before the Court."

In this regard, it quotes from its Order of 8 April 1993 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)* (hereinafter the "*Genocide Convention* case"), where it stated, *inter alia,* that a "compromissory clause in a multilateral convention, such as Article IX of the Genocide Convention relied on by Bosnia and Herzegovina in the present case, *could,* in the view of the Court, be regarded *prima facie* as a special provision contained in a treaty in force" (emphasis added).

The Court recalls that a number of Respondents contended in their pleadings that the reference to "treaties in force" in Article 35, paragraph 2, of the Statute relates only to treaties in force when the Statute of the Court entered into force, i.e. on 24 October 1945. In respect of the Order of 8 April 1993 in the *Genocide Convention* case, the Respondents pointed out that that was a provisional assessment, not conclusive of the matter, and considered that "there [were] persuasive reasons why the Court should revisit the provisional approach it adopted to the interpretation of this clause in the *Genocide Convention* case".

The Court notes that the passage from the 1993 Order in the *Genocide Convention* case was addressed to the situation in which the proceedings were instituted against a State whose membership in the United Nations and status as a party to the Statute was unclear. It observes that the Order of 8 April 1993 was made on the basis of an examination of the relevant law and facts in the context of incidental proceedings on a request for the indication of provisional measures, and concludes that it would therefore now be appropriate for the Court to make a definitive finding on the question whether Article 35, paragraph 2, affords access to the Court in the present case, and for that purpose, to examine further the question of its applicability and interpretation.

The Court thus proceeds to the interpretation of Article 35, paragraph 2, of the Statute, and does so in accordance with customary international law, as reflected in Article 31 of the 1969 Vienna Convention on the Law of Treaties. According to paragraph 1 of Article 31, a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of the treaty's object and purpose. Interpretation must be based above all upon the text of the treaty. As a supplementary measure recourse may be had to means of interpretation such as the preparatory work of the treaty and the circumstances of its conclusion.

The Court points out that the words "treaties in force" in Article 35, paragraph 2, do not, in their natural and ordinary meaning, indicate at what date the treaties contemplated are to be in force, and may thus lend themselves to different interpretations. They may be interpreted as referring either to treaties which were in force at the time that the Statute itself came into force, or to those which were in force on the date of the institution of proceedings in a case in which such treaties are invoked.

The Court observes that the object and purpose of Article 35 of the Statute is to define the conditions of access to the Court. While paragraph 1 of that Article opens it to the States parties to the Statute, paragraph 2 is intended to regulate access to the Court by States which are not parties to the Statute. It would have been inconsistent with the main thrust of the text to make it possible in the future for States not parties to the Statute to obtain access to the Court simply by the conclusion between themselves of a special treaty, multilateral or bilateral, containing a provision to that effect.

The Court moreover notes that the interpretation of Article 35, paragraph 2, whereby that paragraph is to be construed as referring to treaties in force at the time that the Statute came into force is in fact reinforced by an examination of the *travaux préparatoires* of the text; the Court considers that the legislative history of Article 35, paragraph 2, of the Statute of the Permanent Court of International Justice (hereinafter the "Permanent Court") demonstrates that it was intended as an exception to the principle stated in paragraph 1, in order to cover cases contemplated in agreements concluded in the aftermath of the First World War before the Statute entered into force. However, the *travaux préparatoires* of the Statute of the present Court are less illuminating. The discussion of Article 35 was provisional and somewhat cursory; it took place at a stage in the planning of the future international organization when it was not yet settled whether the Permanent Court would be preserved or replaced by a new court. Indeed, the records do not include any discussion which would suggest that Article 35, paragraph 2, of the Statute should be given a different meaning from the corresponding provision in the Statute of the Permanent Court. It would rather seem that the text was reproduced from the Statute of the Permanent Court; there is no indication that any extension of access to the Court was intended.

Accordingly Article 35, paragraph 2, must be interpreted, *mutatis mutandis,* in the same way as the equivalent text in the Statute of the Permanent Court, namely as intended to refer to treaties in force at the date of the entry into force of the new Statute, and providing for the jurisdiction of the new Court. In fact, no such prior treaties, referring to the jurisdiction of the present Court, have been brought to the attention of the Court, and it may be that none exist. In the view of the Court, however, neither this circumstance, nor any consideration of the object and purpose of the text, nor the *travaux préparatoires,* offer support to the alternative interpretation that the provision was intended as granting access to the Court to States not parties to the Statute without any condition other than the existence of a treaty, containing a clause conferring jurisdiction on the Court, which might be concluded at any time subsequently to the entry into force of the Statute. As previously observed, this interpretation would lead to a result quite incompatible with the object and purpose of Article 35, paragraph 2, namely the regulation of access to the Court by States non-parties to the Statute. In the view of the Court therefore, the reference in Article 35, paragraph 2, of the Statute to "the special provisions contained in treaties in force" applies only to treaties in force at the date of the entry into force of the Statute, and not to any treaties concluded since that date.

The Court thus concludes that, even assuming that Serbia and Montenegro was a party to the Genocide Convention at

the relevant date, Article 35, paragraph 2, of the Statute does not provide it with a basis to have access to the Court, under Article IX of that Convention, since the Convention only entered into force on 12 January 1951, after the entry into force of the Statute. The Court does not therefore consider it necessary to decide whether Serbia and Montenegro was or was not a party to the Genocide Convention on 29 April 1999 when the current proceedings were instituted.

Unnecessary to consider other preliminary objections (para. 113)

Having found that Serbia and Montenegro did not, at the time of the institution of the present proceedings, have access to the Court under either paragraph 1 or paragraph 2 of Article 35 of the Statute, the Court states that it is unnecessary for it to consider the other preliminary objections filed by the Respondents to its jurisdiction.

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The Court finally recalls (para. 114) that, irrespective of whether it has jurisdiction over a dispute, the parties "remain in all cases responsible for acts attributable to them that violate the rights of other States".

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Joint declaration of Vice-President Ranjeva and Judges Guillaume, Higgins, Kooijmans, Al-Khasawneh, Buergenthal and Elaraby

1. Vice-President Ranjeva and Judges Guillaume, Higgins, Kooijmans, Al-Khasawneh, Buergenthal and Elaraby voted in favour of the *dispositif* of the Judgments because they agree that these cases cannot, as a matter of law, proceed to the merits. They have added in their joint declaration that they nevertheless profoundly disagree with the reasoning adopted by the Court.

2. They note that when the Court finds in a case that, on two or more grounds, its jurisdiction is not well founded *ratione personae, ratione materiae* or *ratione temporis,* it may choose the most appropriate ground on which to base its decision of lack of competence. They point out that this choice must be guided by three criteria: consistency with the past case law; degree of certitude of the ground chosen; possible implications for the other pending cases.

3. In the present instances, according to the Judgments of the Court, Serbia and Montenegro was not a Member of the United Nations in 1999 and, as a result, was not then a party to the Statute of the Court. In the Judgments, the Court concludes therefrom that it was not at that time open to the Applicant under Article 35, paragraph 1, of the Statute. The Judgments go on to state that paragraph 2 of that Article enables States not parties to the Statute to appear before the Court only by virtue of Security Council decisions or treaties concluded prior to the entry into force of the Statute. It is observed in the Judgments that the United Nations Genocide Convention only entered into force in 1951. It is thus concluded that Article 35, paragraph 2, of the Statute does not grant Serbia and Montenegro access to the Court either.

4. In the view of the seven judges making the joint declaration, this solution is at odds with a number of previous decisions of the Court, in particular the Judgment rendered on 3 February 2003 in a case between Bosnia and Herzegovina and Yugoslavia, in which it was found that Yugoslavia could appear before the Court between 1992 and 2000 and that this position had not been changed by its admission to the United Nations in 2002. Further, the authors of the declaration note that in reality it is far from self-evident that Yugoslavia was not a Member of the United Nations at that time. Lastly, they regret that the Judgment leaves some doubt as to whether Yugoslavia was a party, between 1992 and 2000, to the United Nations Genocide Convention and thus could call into question the solutions adopted by the Court in the case brought by Bosnia and Herzegovina against Serbia and Montenegro. Thus, the Court's Judgment does not meet any of the three criteria set out in paragraph 2 above.

5. The seven judges finally observe that the Court could easily have founded its Judgment that it lacked jurisdiction on the grounds on which it relied in 1999 when the requests for the indication of provisional measures were considered. The Court then found that it lacked jurisdiction *ratione temporis* in respect of the declaration accepting the compulsory jurisdiction of the Court which Serbia and Montenegro had filed several weeks after the start of military operations in Kosovo. It also found itself to be without jurisdiction *ratione materiae* in respect of the United Nations Genocide Convention, as no genocidal intention had been established. These solutions could easily have been confirmed.

Declaration of Judge Koroma

In his declaration Judge Koroma stated that, while concurring in the Judgment, he considered it necessary to stress the following. The question which the Court was requested to rule on and which it in fact did decide in this phase of the case was the issue of jurisdiction, namely, whether the Court could entertain the merits of the case. The jurisdictional function is intended to establish whether the Court is entitled to enter into and adjudicate on the substantive issues in a case. This function, in his view, cannot be dispensed with as it is both required by law and stipulated in the Statute of the Court. It is this function that the Court has carried out in this Judgment and it is within this paradigm that the Judgment must be understood. The Judgment cannot be interpreted as the Court taking a position on any of the matters of substance before the Court.

Separate opinion of Judge Higgins

Judge Higgins agrees that Serbia and Montenegro have not discontinued the case. However, she disagrees with the apparent finding of the Court that a case may only be removed from the List where there is a discontinuance by the applicant or the parties, or where an applicant disclosed no subsisting title of jurisdiction, or where the Court manifestly lacked jurisdiction (see paragraph 31 of the Judgment). In her view, the right of the Court exceptionally to remove a case from the List rests on its inherent powers, which are not limited to *a priori* categories.

Judge Higgins is of the opinion that the present case should have been removed from the List, as the Applicant has by its

own conduct put itself in a position incompatible with Article 38, paragraph 2, of the Rules of Court. The manner in which it has dealt with preliminary objections would further warrant the case not being proceeded with.

Finally, Judge Higgins greatly regrets the attention the Court has afforded to Article 35, paragraph 2, of the Statute, believing its relevance lies only in another pending case.

Separate opinion of Judge Kooijmans

Judge Kooijmans has added a separate opinion to the Judgment and the joint declaration of seven Members of the Court, which he co-signed, for two reasons.

First he wishes to explain why in his view the Court should not have decided the issue of jurisdiction on the ground of Serbia and Montenegro's lack of access to the Court, although in 1999, when the Court rejected Yugoslavia's request for interim measures of protection, he was in favour of this approach. In his view, the Court has not in a convincing and transparent way elucidated the status of the Federal Republic of Yugoslavia vis-à-vis the United Nations before its admission to the Organization in 2000. Further, the Court's Judgment has undeniable implications for other pending cases, in particular the *Genocide Convention* case (*Bosnia Herzegovina* v. *Serbia and Montenegro*), which could easily have been avoided by choosing another approach. Finally, the Judgment is at odds with previous decisions of the Court, thus endangering the principle of consistency of reasoning. This consistency with earlier case law should prevail over present or earlier misgivings of individual judges if an approach in conformity with that consistency does not lead to legally untenable results.

In the second place Judge Kooijmans sets out why in his view the Court would have done better to dismiss the cases *in limine litis*. In 1999 the Applicant invoked two grounds of jurisdiction which it explicitly abandoned in its Written Observations of 20 December 2002 without replacing them by other grounds. Nevertheless it did not discontinue the case but asked the Court to decide *whether* it had jurisdiction. Thus the Applications did no longer meet the requirement of Article 38, paragraph 2, of the Rules of Court, which states that the application shall specify as far as possible the legal grounds upon which the jurisdiction of the Court is said to be based. Since the Court has the inherent power to strike a case from the General List in order to safeguard the integrity of the procedure, it should have done so in view of the fact that the Applicant has failed to demonstrate and even did not make an effort to demonstrate that a valid ground of jurisdiction existed.

Separate opinion of Judge Elaraby

Judge Elaraby voted in favour of the *dispositif,* but disagreed both with the grounds on which the Court decided to base its Judgment—Article 35, paragraph 1 and Article 35, paragraph 2 of the Court's Statute—and with the conclusions which the Court reached on each of these grounds. The joint declaration, to which Judge Elaraby is a signatory, explains why he believes that the Court should have chosen alternative grounds to reach its decision. His separate opinion explains why he disagrees with its substantive findings.

Beginning with the issue of access to the Court under Article 35, paragraph 1, Judge Elaraby explained why, in his view, the Federal Republic of Yugoslavia *was* a Member of the United Nations at the time it filed its Application in the case. He emphasized that, although the FRY was excluded from participation in the work of the General Assembly and its subsidiary organs, it remained, as the Court had previously found, a *sui generis* Member between 1992 and 2000. Thus Judge Elaraby pointed out that during this period it continued to exhibit many attributes of United Nations membership and was neither suspended nor expelled from the Organization under the relevant provisions of the United Nations Charter. On this basis, Judge Elaraby concluded that the FRY was a Member of the United Nations when it filed its Application in 1999 and, as a result, he disagreed with the Court's finding that it was not "open" to the FRY under Article 35, paragraph 1, of the Court's Statute.

He also disagreed with the Court's finding that, assuming the FRY was a non-Member of the United Nations, it would not have had access to the Court under Article 35, paragraph 2. For Judge Elaraby, the Court's interpretation of the term "treaties in force" in Article 35, paragraph 2, as meaning "treaties in force at the time the Statute of the Court entered into force" was unduly restrictive. Like the Court, Judge Elaraby analysed the relevant *travaux préparatoires,* but, unlike the Court, he found that the expression "treaties in force" should be read to include any treaties connected with the peace settlement following the Second World War, whether they entered into force before or after the Statute of the Court. This would include, according to Judge Elaraby, the Genocide Convention, a treaty drafted under the auspices of the United Nations in direct response to the tragic events of the Second World War. In the alternative, Judge Elaraby stated that, even if the Court's reading of "treaties in force" were adopted as a general rule, there should be an exception for treaties intended to remedy violations of *jus cogens*. These, he wrote, should be subject to a broader interpretation so that any State seeking access to the Court on the basis of a treaty that addresses a *jus cogens* violation could do so as long as the treaty was in force when the Application was filed.

Because Judge Elaraby concluded that the Court was open to the FRY under Article 35 when it filed its Application in 1999, he went on to assess whether the Court has jurisdiction *ratione personae* under Article IX of the Genocide Convention. He concluded that it does, because the FRY succeeded to the treaty obligations of the former Socialist Federal Republic of Yugoslavia, including the Genocide Convention. In reaching this conclusion he explained that, in cases involving the separation of parts of the territory of a State to form one or more new States, Article 34 of the Vienna Convention on Succession of States in respect of Treaties embodied a customary rule of automatic succession by the new State to the treaties in force on the territory of its predecessor. He pointed out that it was all the more important for the Court to recognize and apply this rule in the case of a fundamental human rights treaty such as the Genocide Convention. Judge Elaraby thus concluded that the FRY was a party to the Genocide Convention on the basis of succession—not its subsequent purported accession and reservation—and therefore that the Court had jurisdic-

tion *ratione personae.* He found, however, that the Court did not have jurisdiction *ratione materiae* under the Convention, so in the final analysis agreed with the Court that there was no jurisdiction to examine the merits of the FRY's case.

Separate opinion of Judge Kreća

Judge *ad hoc* Kreća noted that the Respondent, as well as the Applicant, attached crucial importance to the issue of *locus standi* of Serbia and Montenegro before the Court.

In the case at hand, it is closely, and even organically, linked with the membership of Serbia and Montenegro in the United Nations, due to the fact that it could not be considered as being party to the Statute of the Court apart from being a Member State of the United Nations as well as the fact that its *locus standi* cannot be based on conditions set forth in Article 35, paragraph 2, of the Statute.

In that regard he finds that at the end of the year 2000 the Applicant did two things:

(i) renounced the continuity claim and accepted the status of the successor State of the former SFRY; and

(ii) proceeding from a qualitatively new legal basis—as the successor State—submitted the application for admission to membership in the United Nations.

The admission of the FRY to the United Nations as a Member as from 1 November 2000 has two principal consequences in the circumstances of the case at hand:

(i) with respect to the admission of Yugoslavia as a Member as from 1 November 2000, it can be said that what is involved is the admission as a new Member; and

(ii) the admission of Yugoslavia as a Member as from 1 November 2000 qualified *per se* its status vis-à-vis the United Nations before that date. It seems clear that, in the light of the decisions taken by the competent organs of the United Nations, this status could not be a membership status. *A contrario,* Yugoslavia could not have been admitted as a Member as from 1 November 2000.

He is also of the opinion that the formulation of the *dispositif* explicitly linked to the absence of *locus standi* of Serbia and Montenegro would be more appropriate considering the circumstances of the case as well as the reasoning of the Court.

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157. CASE CONCERNING CERTAIN PROPERTY (LIECHTENSTEIN *v.* GERMANY) (PRELIMINARY OBJECTIONS)

Judgment of 10 February 2005

In the case concerning *Certain Property* (*Liechtenstein* v. *Germany*), on 10 February 2005, the Court found that it had no jurisdiction to entertain the application filed by Liechtenstein.

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The Court was composed as follows: President Shi; Vice-President Ranjeva; Judges Guillaume, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal, Elaraby, Owada and Tomka; Judges *ad hoc* Fleischhauer and Sir Franklin Berman; Registrar Couvreur.

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The operative paragraph 54 of the Judgment reads as follows:

" . . .

The Court,

(1) (a) by fifteen votes to one,

Rejects the preliminary objection that there is no dispute between Liechtenstein and Germany;

IN FAVOUR: President Shi; Vice-President Ranjeva; Judges Guillaume, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal, Elaraby, Owada, Tomka; Judge *ad hoc* Sir Franklin Berman;

AGAINST: Judge *ad hoc* Fleischhauer;

(b) by twelve votes to four,

Upholds the preliminary objection that Liechtenstein's Application should be rejected on the grounds that the Court lacks jurisdiction *ratione temporis* to decide the dispute;

IN FAVOUR: President Shi; Vice-President Ranjeva; Judges Guillaume, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Rezek, Al-Khasawneh, Buergenthal, Tomka; Judge *ad hoc* Fleischhauer;

AGAINST: Judges Kooijmans, Elaraby, Owada; Judge *ad hoc* Sir Franklin Berman;

(2) by twelve votes to four,

Finds that it has no jurisdiction to entertain the Application filed by Liechtenstein on 1 June 2001.

IN FAVOUR: President Shi; Vice-President Ranjeva; Judges Guillaume, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Rezek, Al-Khasawneh, Buergenthal, Tomka; Judge *ad hoc* Fleischhauer;

AGAINST: Judges Kooijmans, Elaraby, Owada; Judge *ad hoc* Sir Franklin Berman."

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Judges Kooijmans, Elaraby and Owada appended dissenting opinions to the Judgment of the Court. Judge *ad hoc* Fleischhauer appended a declaration to the Judgment of the

Court. Judge *ad hoc* Sir Franklin Berman appended a dissenting opinion to the Judgment of the Court.

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* *

History of the proceedings and submissions of the Parties
(paras. 1–12)

The Court begins by recalling the history of the proceedings.

On 1 June 2001, the Principality of Liechtenstein (hereinafter "Liechtenstein") filed an Application instituting proceedings against the Federal Republic of Germany (hereinafter "Germany") relating to a dispute concerning

> "decisions of Germany, in and after 1998, to treat certain property of Liechtenstein nationals as German assets having been 'seized for the purposes of reparation or restitution, or as a result of the state of war'—i.e., as a consequence of World War II -, without ensuring any compensation for the loss of that property to its owners, and to the detriment of Liechtenstein itself".

In order to found the jurisdiction of the Court, the Application relied on Article 1 of the European Convention for the Peaceful Settlement of Disputes of 29 April 1957, which entered into force between Liechtenstein and Germany on 18 February 1980.

On 27 June 2002, Germany raised preliminary objections relating to the jurisdiction of the Court to entertain the case and to the admissibility of the Application submitted by Liechtenstein. In accordance with Article 79, paragraph 5, of the Rules of the Court, the proceedings on the merits were suspended.

Liechtenstein filed a written statement of its observations and submissions on these preliminary objections within the time-limit fixed.

Public hearings were held on 14, 16, 17 and 18 June 2004. At those hearings, the following submissions were presented by the Parties:

On behalf of the Government of Germany,

at the hearing of 17 June 2004:

"Germany requests the Court to adjudge and declare that:

— it lacks jurisdiction over the claims brought against Germany by the Principality of Liechtenstein, referred to it by the Application of Liechtenstein of 30 May 2001,

and that

— the claims brought against Germany by the Principality of Liechtenstein are inadmissible to the extent specified in its Preliminary Objections."

On behalf of the Government of Liechtenstein,

at the hearing of 18 June 2004:

"For the reasons set out in its Written Observations and during the oral proceedings, the Principality of Liechtenstein respectfully requests the Court:

(a) to adjudge and declare that the Court has jurisdiction over the claims presented in its Application and that they are admissible;

and accordingly,

(b) to reject the Preliminary Objections of Germany in their entirety."

Historical background of the case
(paras. 13–17)

The Court first sets out the historical background of the case.

During the Second World War Czechoslovakia was an allied country and a belligerent in the war against Germany. In 1945, it adopted a series of decrees (the "Beneš Decrees"), among them Decree No. 12 of 21 June 1945, under which certain property owned by Liechtenstein nationals, including Prince Franz Josef II of Liechtenstein, was confiscated.

Following earlier allied enactments concerning a reparations régime in general and German external assets and other property seized in connection with the Second World War in particular, a special régime dealing with the latter subject was created by Chapter Six of the Convention on the Settlement of Matters Arising out of the War and the Occupation, signed by the United States of America, the United Kingdom, France and the Federal Republic of Germany, at Bonn on 26 May 1952 (as amended by Schedule IV to the Protocol on the Termination of the Occupation Regime in the Federal Republic of Germany, signed at Paris on 23 October 1954) (hereinafter the "Settlement Convention"). This Convention entered into force on 5 May 1955.

Article 3 of Chapter Six of the Settlement Convention reads as follows:

> "1. The Federal Republic shall in the future raise no objections against the measures which have been, or will be, carried out with regard to German external assets or other property, seized for the purpose of reparation or restitution, or as a result of the state of war, or on the basis of agreements concluded, or to be concluded, by the Three Powers with other Allied countries, neutral countries or former allies of Germany.
>
> . . .
>
> 3. No claim or action shall be admissible against persons who shall have acquired or transferred title to property on the basis of the measures referred to in paragraph 1 and 2 of this Article, or against international organizations, foreign governments or persons who have acted upon instructions of such organizations or governments."

The régime of the Settlement Convention was intended to be temporary until the problem of reparation was finally settled "by the peace treaty between Germany and its former enemies or by earlier agreements concerning this matter" (Article 1 of Chapter Six). A final settlement was brought about through the conclusion in 1990 of the Treaty on the Final Settlement with respect to Germany (signed at Moscow on 12 September 1990 and entered into force on 15 March 1991). On 27 and 28 September 1990, an Exchange of Notes was executed between the three Western Powers and

the Government of the Federal Republic of Germany (the parties to the Settlement Convention) under which the Settlement Convention would terminate simultaneously with the entry into force of the Treaty. Whereas that Exchange of Notes terminated the Settlement Convention itself, including Article 5 of Chapter Six (relating to compensation by Germany), it provided that paragraphs 1 and 3 of Article 3, Chapter Six, "shall, however, remain in force".

In 1991, a painting by the seventeenth century Dutch artist Pieter van Laer was lent by a museum in Brno (Czechoslovakia) to a museum in Cologne (Germany) for inclusion in an exhibition. This painting had been the property of the family of the Reigning Prince of Liechtenstein since the eighteenth century; it was confiscated in 1945 by Czechoslovakia under the Beneš Decrees.

A lawsuit filed in his personal capacity by Prince Hans-Adam II of Liechtenstein in the German courts in the 1990s to have the painting returned to him as his property was dismissed on the basis that, under Article 3, Chapter Six, of the Settlement Convention, no claim or action in connection with measures taken against German external assets in the aftermath of the Second World War was admissible in German courts (hereinafter the "*Pieter van Laer Painting*" case).

A claim relating to the decisions of the German courts brought by Prince Hans-Adam II of Liechtenstein before the European Court of Human Rights was dismissed in July 2001.

The Court begins its reasoning by recalling that in the present proceedings, Liechtenstein based the Court's jurisdiction on Article 1 of the European Convention for the Peaceful Settlement of Disputes which provides that:

> "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."
>
> Article 27 *(a)* of that Convention reads as follows:
>
> "The provisions of this Convention shall not apply to:
>
> *(a)* disputes relating to facts or situations prior to the entry into force of this Convention as between the parties to the dispute".

Germany raised six preliminary objections to the jurisdiction of the Court and the admissibility of the Application.

Germany's first preliminary objection
(paras. 20–27)

The Court recalls that Germany, in its first preliminary objection, argues that there is no dispute between the Parties. Germany in particular observes that even though the facts that are at the core of the dispute lie in Czechoslovakia's seizure of certain Liechtenstein property under the Beneš Decrees of 1945, Liechtenstein bases its claims before the Court on an alleged "change of position" by Germany in the 1990s as to the need to apply the Settlement Convention to that property, whilst Germany contends that such a change has never occurred. Germany maintains that a distinction is to be made between the issue of the lawfulness of the Czechoslovak expropriations and that of the jurisdiction of the German courts regarding this matter. Germany contends that on neither issue has it changed its position either before or after 1995: as to the first, it has never accepted the validity of the relevant Czechoslovak measures against Liechtenstein property; as to the second, the German courts have always held that they are barred by the Settlement Convention from adjudicating on the lawfulness of confiscation measures, and for the purposes of the application of Article 3 of Chapter Six of the Settlement Convention, they have always relied on the assessment of the expropriating State. Germany further claims that it is not German acts related to Czechoslovak confiscations but the lawfulness of the Czechoslovak measures as such and the resulting obligations of compensation on the part of the successor States to the former Czechoslovakia that are in question. Germany therefore concludes that the only dispute which exists is one between Liechtenstein and the successor States of the former Czechoslovakia.

Liechtenstein maintains that its dispute with Germany concerns Germany's position, whereby for the first time in 1995 it began to treat Liechtenstein assets as German external assets for purposes of the Settlement Convention, thus infringing Liechtenstein's neutrality and sovereignty. Liechtenstein recognizes the existence of another dispute, one between itself and the Czech Republic, but observes that this does not negate the existence of a separate dispute between itself and Germany, based on Germany's unlawful conduct in relation to Liechtenstein. Liechtenstein contends further that Germany itself acknowledged the existence of the dispute between them both in the course of bilateral consultations held in July 1998 and June 1999, and in a letter from the German Minister for Foreign Affairs to his Liechtenstein counterpart dated 20 January 2000.

Germany for its part denies that it acknowledged the existence of a dispute by participating in diplomatic consultations at the request of Liechtenstein. It argues that a discussion of divergent legal opinions should not be considered as evidence of the existence of a dispute in the sense of the Court's Statute "before it reaches a certain threshold".

In examining Germany's first preliminary objection the Court refers to its own consistent jurisprudence and that of the Permanent Court of International Justice, according to which a dispute is a disagreement on a point of law or fact, a conflict of legal views or interests between parties. It goes on to observe that, moreover, for the purposes of verifying the existence of a legal dispute, it falls to the Court to determine whether "the claim of one party is positively opposed by the other".

The Court finds that in the present proceedings complaints of fact and law formulated by Liechtenstein against Germany are denied by the latter, and concludes that "[b]y virtue of this denial, there is a legal dispute" between Liechtenstein and

Germany. The Court further notes that Germany's position taken in the course of bilateral consultations and in the letter by the Minister for Foreign Affairs of 20 January 2000 has evidentiary value in support of the proposition that Liechtenstein's claims were positively opposed by Germany and that this was recognized by the latter.

Turning to the determination of the subject-matter of the dispute, the Court, upon examination of the case file, finds that the subject-matter of the dispute is whether, by applying Article 3, Chapter Six, of the Settlement Convention to Liechtenstein property that had been confiscated in Czechoslovakia under the Beneš Decrees in 1945, Germany was in breach of the international obligations it owed to Liechtenstein and, if so, what is Germany's international responsibility.

Having thus established the existence of a dispute between Liechtenstein and Germany and identified its subject-matter, the Court concludes that the first preliminary objection of Germany must be dismissed.

Germany's second preliminary objection
(paras. 28–52)

The Court then examines Germany's second preliminary objection that Liechtenstein's Application should be rejected on the grounds that the Court lacks jurisdiction *ratione temporis* to decide the present dispute.

Germany asserts that were the Court to find that there exists a dispute, it would nevertheless fall outside the jurisdiction of the Court by virtue of Article 27 *(a)* of the European Convention for the Peaceful Settlement of Disputes (see above, p. 3). In its view, such a dispute would relate to facts or situations prior to 18 February 1980, the date when the European Convention for the Peaceful Settlement of Disputes entered into force as between Germany and Liechtenstein. In Germany's view, the Application should therefore be rejected.

Germany claims that the property of Prince Franz Joseph II of Liechtenstein, including the painting by Pieter van Laer, as well as property belonging to other Liechtenstein nationals, was seized in Czechoslovakia pursuant to the Beneš Decrees; and that the Settlement Convention required Germany to bar any action in its courts that sought to challenge the legality of such confiscations. In Germany's view, the lawsuit brought by Prince Hans-Adam II of Liechtenstein before the German courts to recover the Pieter van Laer painting was governed by the provisions of the Settlement Convention. The dismissal of the lawsuit by various German courts, beginning with the decision of the Cologne Regional Court in 1995, acting in compliance with the provisions of that Convention, was in conformity with earlier decisions of German courts. According to Germany, its courts have consistently held that they lacked jurisdiction to evaluate the lawfulness of such confiscations. In Germany's view the dispute which arose in the 1990s with regard to the Pieter van Laer painting was directly related to the Settlement Convention and the Beneš Decrees; it had its real source in facts and situations existing prior to the 1980 critical date.

The Court observes that Liechtenstein contends that until the decisions of the German courts in the *Pieter van Laer Painting* case, it was understood between Germany and Liechtenstein that Liechtenstein property confiscated pursuant to the Beneš Decrees could not be deemed to have been covered by the Settlement Convention because of Liechtenstein's neutrality. German courts would therefore not be barred by that Convention from passing on the lawfulness of these confiscations. In Liechtenstein's view, the decisions of the German courts in the 1990s with regard to the painting made clear that Germany no longer adhered to that shared view, and thus amounted to a change of position. Liechtenstein maintains, *inter alia,* that, in so far as there was a change of position by Germany, the decisions of the German courts in the *Pieter van Laer Painting* case and the "positions taken by the German Government, in the period after 1995" gave rise to the present dispute. The facts that triggered the present dispute were therefore not the Settlement Convention or the Beneš Decrees, but Germany's decision in 1995 to apply the Settlement Convention to Liechtenstein property.

The Court notes that in support of their arguments on the subject of the legal test for temporal jurisdiction, both Liechtenstein and Germany refer to the jurisprudence of the Permanent Court of International Justice (the *Phosphates in Morocco* case and the *Electricity Company* case) and of this Court (*Right of Passage* case).

The Court observes that Germany's second preliminary objection requires it to decide whether, applying the provisions of Article 27 *(a* of the European Convention for the Peaceful Settlement of Disputes, the present dispute relates to facts or situations that arose before or after the 1980 critical date.

The Court finds that the text of Article 27 *(a)* of the European Convention for the Peaceful Settlement of Disputes does not differ in substance from the temporal jurisdiction limitations dealt with in the *Phosphates in Morocco* case, the *Electricity Company in Sofia and Bulgaria* case and the *Right of Passage* case. In particular, no consequence can be drawn from the use of the expressions "with regard to" or "relating to" which have been employed indifferently in the various texts in question. The Court notes further that in those cases the Permanent Court of International Justice and this Court were called upon to interpret unilateral declarations accepting the Court's jurisdiction under its Statute, whereas, in the present case, the Court has to interpret a multilateral Convention. Without pronouncing in any more general sense upon the extent to which such instruments are to be treated comparably, the Court finds no reason on this ground to interpret differently the phrase in issue. Nor, it observes, have the Parties suggested otherwise. The Court accordingly finds its previous jurisprudence on temporal limitations of relevance in the present case.

The Court considers that, in so far as it has to determine the facts or situations to which this dispute relates, the test in the above-mentioned jurisprudence for establishing the jurisdiction of the Court *ratione temporis,* which consists of finding the source or real cause of the dispute, is equally applicable to this case.

The Court points out that it is not contested that the present dispute was triggered by the decisions of the German courts in the *Pieter van Laer Painting* case. This conclusion does not, however, dispose of the question the Court is called upon to

decide, for under Article 27 *(a)* of the European Convention for the Peaceful Settlement of Disputes, the critical issue is not the date when the dispute arose, but the date of the facts or situations in relation to which the dispute arose.

In the Court's view, the present dispute could only relate to the events that transpired in the 1990s if, as argued by Liechtenstein, in this period, Germany either departed from a previous common position that the Settlement Convention did not apply to Liechtenstein property, or if German courts, by applying their earlier case law under the Settlement Convention for the first time to Liechtenstein property, applied that Convention "to a new situation" after the critical date.

With regard to the first alternative, the Court finds that it has no basis for concluding that prior to the decisions of the German courts in the *Pieter van Laer Painting* case, there existed a common understanding or agreement between Liechtenstein and Germany that the Settlement Convention did not apply to the Liechtenstein property seized abroad as "German external assets" for the purpose of reparation or as a result of the war. The issue whether or not the Settlement Convention applied to Liechtenstein property had not previously arisen before German courts, nor had it been dealt with prior thereto in intergovernmental talks between Germany and Liechtenstein. The Court observes, moreover, that German courts have consistently held that the Settlement Convention deprived them of jurisdiction to address the legality of any confiscation of property treated as German property by the confiscating State. In the *Pieter van Laer Painting* case, the German courts confined themselves to stating that the Settlement Convention was applicable in cases of confiscation under Decree No. 12, as with the other Beneš Decrees, and that, consequently, the Convention was also applicable to the confiscation of the painting. In the view of the Court, Liechtenstein's contention regarding the existence of a prior agreement or common understanding and an alleged "change of position" by Germany cannot therefore be upheld.

As to Liechtenstein's contention that the dispute relates to the application, for the first time, of pre-1990 German jurisprudence to Liechtenstein property in the 1990s, the Court points out that German courts did not face any "new situation" when dealing for the first time with a case concerning the confiscation of Liechtenstein property as a result of the Second World War. The Court finds that this case, like previous ones on the confiscation of German external assets, was inextricably linked to the Settlement Convention. It further finds that the decisions of the German courts in the *Pieter van Laer Painting* case cannot be separated from the Settlement Convention and the Beneš Decrees, and that these decisions cannot consequently be considered as the source or real cause of the dispute between Liechtenstein and Germany.

The Court concludes therefore that, while the decisions of the German courts triggered the dispute between Liechtenstein and Germany, the source or real cause of the dispute is to be found in the Settlement Convention and the Beneš Decrees. In light of the provisions of Article 27 *(a)* of the European Convention for the Peaceful Settlement of Disputes, Germany's second preliminary objection must therefore be upheld.

Having dismissed the first preliminary objection of Germany, but upheld its second, the Court finds that it is not required to consider Germany's other objections and that it cannot rule on Liechtenstein's claims on the merits.

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Dissenting opinion of Judge Kooijmans

Judge Kooijmans agrees with the Court's finding on the existence of a dispute between Liechtenstein and Germany and with its identification of the subject-matter of that dispute.

He cannot, however, subscribe to the Court's conclusion that the dispute relates to facts or situations prior to the entry into force of the European Convention on Dispute Settlement as between the Parties on 18 February 1980 and that the Court is consequently without jurisdiction. After having analysed the case law of German courts on the application of Article 3, Chapter Six, of the 1952 Settlement Convention, he concludes that German courts did not rule before the critical date on the applicability of that Article to assets of the nationals of a State which had remained neutral during the Second World War. They did so for the very first time in the *Pieter van Laer Painting* case, submitted by the then Reigning Prince of Liechtenstein, thus establishing a "new situation" subsequent to the critical date. The preliminary objection *ratione temporis* should, therefore, not have been upheld.

Since Judge Kooijmans is of the view that the remaining preliminary objections which have not been considered by the Court are without merit, he concludes that the Court has jurisdiction and that Liechtenstein's Application is admissible.

Dissenting opinion of Judge Elaraby

Judge Elaraby agreed with the Court's conclusion that Germany's first preliminary objection—alleging that there was no dispute—should be rejected. He disagreed, however, with the Court's finding that the second preliminary objection should be upheld, and with the Court's consequent dismissal of the case on the ground that it lacked jurisdiction *ratione temporis*.

Judge Elaraby began by noting that the temporal limitation clause before the Court was different from those which the Court, and its predecessor the Permanent Court of International Justice, had interpreted in prior cases *(a)* because its terms were broader and *(b)* because it was contained in a multilateral treaty, as opposed to a unilateral acceptance of jurisdiction. In his view, these differences may have justified a departure from the approach adopted in prior cases—according to which the facts or situations relevant to a *ratione temporis* analysis are those that constitute the "real cause" of the dispute—but he confined his opinion to an explanation of why, in his view, the Court reached the wrong conclusion in applying the "real cause" test to the specific facts of the case.

In Judge Elaraby's view, the real cause of the dispute between Liechtenstein and Germany was the German court decisions of the 1990s—well after the critical date—in the *Pieter van Laer Painting* case. Because these court decisions

purported *for the first time* to include neutral Liechtenstein property as "German external assets" under the Settlement Convention, Judge Elaraby found that any facts or situations *before* these court decisions (such as the Settlement Convention, the Beneš Decrees, and prior cases dealing with the Convention) were mere historical background and could not be the real cause of the dispute between the Parties.

In reaching this conclusion, Judge Elaraby found it pertinent that, unlike in the three cases relied on by the Court (*Right of Passage over Indian Territory, Electricity Company of Sofia and Bulgaria and Phosphates in Morocco*), there were no pre-critical-date acts imputable to the Respondent that were relevant to the Applicant's claims; the only actions attributable to Germany that might potentially have engaged its international responsibility vis-à-vis Liechtenstein occurred after the critical date.

Judge Elaraby's conclusion was that the Court should not have found that it was precluded by the temporal limitation clause from exercising its jurisdiction and he pointed out that the European Court of Human Rights reached the same conclusion as him when it analysed the question of its jurisdiction *ratione temporis* in the case filed by the Prince of Liechtenstein under the European Convention on Human Rights. He added that, in the alternative, the Court should have joined the objection *ratione temporis* to the merits instead of disposing of the case *in limine*. Finally, Judge Elaraby expressed regret that the Court, having recognized and defined the dispute between the Parties, then opted to dispose of it without a hearing, as this was not, in his view, a positive contribution to the settlement of international disputes.

Dissenting opinion of Judge Owada

Judge Owada appends his opinion dissenting from the main conclusion of the Judgment that the Court has no jurisdiction to entertain the Application filed by the Principality of Liechtenstein.

Judge Owada concurs in the first finding of the Court (paragraph 1 (a) of the *dispositif*) in rejecting the preliminary objection of the Federal Republic of Germany that there is no dispute between Liechtenstein and Germany. However, he dissents from the second finding of the Court (paragraph 1 (b) of the *dispositif*) upholding the preliminary objection of the Respondent that Liechtenstein's Application should be rejected on the grounds that the Court lacks jurisdiction *ratione temporis* to decide the dispute.

In Judge Owada's view, the Court has correctly identified the subject-matter of the dispute that exists between the Parties as consisting in the treatment by Germany of Liechtenstein property confiscated in Czechoslovakia under the Beneš Decrees, in that Germany has applied Article 3, Chapter Six, of the Settlement Convention to the property in question. On this basis the critical date for determining the scope of limitation *ratione temporis* upon jurisdiction of the Court under Article 27 *(a)* of the European Convention for the Peaceful Settlement of Disputes should be determined *with reference to this subject-matter of the dispute thus defined*. It cannot be denied in this respect that the alleged "change in position of Germany" in the treatment of the Liechtenstein property in question in applying the Settlement Convention, which came through a series of decisions of German courts and confirmed by German authorities, created a situation that gave rise to a dispute which had not existed between the Parties prior to those events. Thus Judge Owada argues that these events did in fact amount to creating a "new situation", for the purpose of application of the jurisdiction *ratione temporis* rule as established by jurisprudence of the Court, through the treatment of Liechtenstein property by the German courts in applying Article 3, Chapter Six, of the Settlement Convention for the first time to neutral property. It goes without saying that the question of whether this "new situation" has had the effect of bringing into existence international responsibility attributable to Germany is a matter to be examined at the merits stage of the proceedings. Since this new development took place only in the late 1990s, *to that extent and strictly for the purposes of determining its jurisdiction,* the Court should have concluded that this development could constitute "facts or situations giving rise to the dispute" between the Parties for the purpose of application of the compromissory clause contained in Article 27 *(a)* of the European Convention for the Peaceful Settlement of Disputes. This question, which may require further examination at the merits stage of the proceedings, is therefore to be joined to the merits of the case.

As for the other preliminary objections of Germany relating to the jurisdiction of the Court (the third preliminary objection) or to the admissibility of the Liechtenstein claims before the Court (the fourth, fifth and sixth objections), it is the view of Judge Owada that they are either to be rejected as unfounded (the third, fourth and sixth objections) or to be joined to the merits of the case (the fifth objection) as not possessing an exclusively preliminary character.

Declaration of Judge Fleischhauer

Judge *ad hoc* Fleischhauer expresses his agreement with the upholding by the Court of Germany's second preliminary objection. Regarding the first preliminary objection, he cannot follow the Court with respect to Germany's position in bilateral consultations and in the letter of the Minister for Foreign Affairs of 20 January 2000.

Dissenting opinion of Judge Berman

Judge *ad hoc* Berman explains in his dissenting opinion why, although he agrees with much of what the Court has said, he agrees neither with the finding that Germany's second preliminary objection should be upheld nor with the Court's handling of the preliminary phase of the case more generally.

Having pointed out that Liechtenstein's claim, although possibly without precedent, is nevertheless essentially straightforward, Judge Berman draws attention to the fact that it has been opposed by no less than six preliminary objections raised by Germany, three of which ask the Court to decline to hear the case even if it finds that it has the jurisdiction to do so. He is in full agreement with the Court in rejecting Germany's first preliminary objection (that there is no dispute between the Parties) and would have been prepared to go further, and hold that Germany is precluded from raising such an objection now, having earlier recognized in its diplomatic contacts

with Liechtenstein that there existed differences between the two States which might have to be settled by judicial means.

While he has no fundamental disagreement with the way in which the Court assesses its previous jurisprudence on temporal clauses limiting the acceptance of the Court's jurisdiction (Germany's second preliminary objection), Judge Berman states that, in his view, the earlier case law establishes that the Court possesses a degree of latitude or discretion in deciding what situations or facts are indeed the "source or real cause" of a particular dispute, not least because no two international disputes arise in exactly the same way. He adds that, in his opinion, this discretion might, in appropriate circumstances, be influenced by whether the parties' acceptance of the jurisdiction is in an agreed general treaty on the peaceful settlement of disputes, as opposed to unilateral declarations under the optional clause.

His main disagreement with the Court is however over its uncritical acceptance of an argument that lies at the heart of the German case and also of the Court's own reasoning, namely the claim that the German courts had no option but to apply the Settlement Convention of 1952/1955 to neutral property when the question arose for the first time many years later. He demonstrates that, on his reading of the German case law (not all of which had been presented to the Court, or explained to it in detail), the German superior courts had clearly not regarded themselves in the early days as prevented from considering whether the Settlement Convention (or its predecessor Allied legislation) did apply, or even should be applied, in particular cases, and that the practice of considering whether the preconditions were met for applying the Convention continued throughout the handling of the case of the *Pieter van Laer Painting* itself in the 1990s, including before the European Court of Human Rights.

Moreover, to interpret the Settlement Convention (to which Liechtenstein was not in any case a party) as covering neutral property is contrary to the wording of the Convention, and had never been justified before the German courts with evidence that this was in fact the intention of the Contracting Parties. To attribute such an intention to the Three Allied Powers was, furthermore, against all logic, and would have entailed a breach of their own obligations towards the States which had been neutral in the Second World War. It was not therefore to be foreseen that Germany would in due course adopt such a position in its bilateral relations, and use it as an argument for excluding any possibility of compensation. It is, however, precisely the adoption of this position which, according to Judge Berman, was the real source of the dispute; it gave rise to a new situation, and it took place well after the critical date. While it cannot be denied that the Settlement Convention and Beneš Decrees are connected with the dispute, that does not in itself make them the dispute's "source or real cause".

Judge Berman goes on to discuss the circumstances under which certain parts of what had been an avowedly temporary régime under the Settlement Convention were made permanent, whereas other parts (the obligation to pay compensation) were abrogated, on the unification of Germany in 1990. Although the Parties had either not possessed, or at least not produced, evidence to the Court showing why this had been done, the inference must be that it had been at Germany's request, and that too reinforced the view that the source of the dispute lay after the critical date.

Judge Berman concludes by stating that, if there was however any remaining doubt on any of these points, the correct procedure would have been to join the second preliminary objection to the merits, so as to allow the opportunity for full evidence and argument.

As to the remaining preliminary objections, Judge Berman states that he would reject them all. He discusses briefly the fifth objection (absence of an indispensable third party), but finds it clear that the dispute, as now defined in the Judgment of the Court, would not have required the Court to have pronounced in any way on the lawfulness of the Beneš Decrees as such, or particular confiscations undertaken pursuant to them. Once again, he concludes, any doubt on this score would most appropriately have been managed by joining the objection to the merits.

Finally, Judge Berman points out that the Judgment of the Court declining jurisdiction does not dispose of the dispute itself, which the Court has now formally determined to exist between the two States, and regrets their failure to agree, if necessary *ad hoc*, that the dispute be settled by the International Court in accordance with the traditions of both Parties. He comments on the propriety of claiming protection under the Settlement Convention while disclaiming its corresponding obligation to pay compensation, and indicates that the claims advanced by Liechtenstein, even if unusual, deserved a hearing.

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158. FRONTIER DISPUTE (BENIN/NIGER)

Judgment of 12 July 2005

On 12 July 2005, the Chamber of the Court constituted in the case concerning *Frontier Dispute* (*Benin/Niger*) delivered its Judgment.

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The Chamber was composed as follows: Judge Ranjeva, Vice-President of the Court, President of the Chamber; Judges Kooijmans, Abraham; Judges *ad hoc* Bedjaoui, Bennouna; Registrar Couvreur.

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The operative paragraph of the judgment reads as follows:

" . . .

The Chamber,

(1) By four votes to one,

Finds that the boundary between the Republic of Benin and the Republic of Niger in the River Niger sector takes the following course:

— the line of deepest soundings of the main navigable channel of that river, from the intersection of the said line with the median line of the River Mekrou until the point situated at co-ordinates 11° 52' 29" latitude North and 3° 25' 34" longitude East;

— from that point, the line of deepest soundings of the left navigable channel until the point located at co-ordinates 11° 51' 55" latitude North and 3° 27' 41" longitude East, where the boundary deviates from this channel and passes to the left of the island of Kata Goungou, subsequently rejoining the main navigable channel at the point located at co-ordinates 11° 51' 41" latitude North and 3° 28' 53" longitude East;

— from this latter point, the line of deepest soundings of the main navigable channel of the river as far as the boundary of the Parties with Nigeria;

and that the boundary line, proceeding downstream, passes through the points numbered from 1 to 154, the co-ordinates of which are indicated in paragraph 115 of the present Judgment;

IN FAVOUR: Judge Ranjeva, Vice-President of the Court, President of the Chamber; Judges Kooijmans, Abraham; Judge *ad hoc* Bedjaoui;

AGAINST: Judge *ad hoc* Bennouna;

(2) By four votes to one,

Finds that the islands situated in the River Niger therefore belong to the Republic of Benin or to the Republic of Niger as indicated in paragraph 117 of the present Judgment;

IN FAVOUR: Judge Ranjeva, Vice-President of the Court, President of the Chamber; Judges Kooijmans, Abraham; Judge *ad hoc* Bedjaoui;

AGAINST: Judge *ad hoc* Bennouna;

(3) By four votes to one,

Finds that the boundary between the Republic of Benin and the Republic of Niger on the bridges between Gaya and Malanville follows the course of the boundary in the river;

IN FAVOUR: Judge Ranjeva, Vice-President of the Court, President of the Chamber; Judges Kooijmans, Abraham; Judge *ad hoc* Bedjaoui;

AGAINST: Judge *ad hoc* Bennouna;

(4) Unanimously,

Finds that the boundary between the Republic of Benin and the Republic of Niger in the River Mekrou sector follows the median line of that river, from the intersection of the said line with the line of deepest soundings of the main navigable channel of the River Niger as far as the boundary of the Parties with Burkina Faso."

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Judge *ad hoc* Bennouna appended a dissenting opinion to the Judgment.

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History of the proceedings and submissions of the Parties
(paras. 1–16)

The Chamber recalls at the outset that, on 3 May 2002, by a joint letter of notification dated 11 April 2002, the Republic of Benin (hereinafter "Benin") and the Republic of Niger (hereinafter "Niger") transmitted to the Registrar a Special Agreement whereby the Governments of the two States agreed to submit to a Chamber of the Court a dispute concerning "the definitive delimitation of the whole boundary between them". In Article 2 of the Special Agreement, the Court is requested to:

"(a) determine the course of the boundary between the Republic of Benin and the Republic of Niger in the River Niger sector;

(b) specify which State owns each of the islands in the said river, and in particular Lété Island;

(c) determine the course of the boundary between the two States in the River Mekrou sector."

The Chamber then recalls the history of the proceedings including with respect to the formation and composition of the Chamber. By an Order of 27 November 2002 the Court constituted a Chamber to deal with the case, composed of President Guillaume and Judges Ranjeva and Kooijmans

together with the judges *ad hoc*. In accordance with Article 18, paragraph 2, of the Rules of Court, Judge Guillaume, who held the office of President of the Court when the Chamber was formed, was to preside over the Chamber. However, by a letter of 11 October 2004, Judge Guillaume informed the President of the Court, pursuant to Article 13, paragraph 4, of the Statute, that he had decided to resign from the Court with effect from 11 February 2005. On 16 February 2005 the Court elected Judge Abraham as a member of the Chamber to fill the seat left vacant by Judge Guillaume's resignation. By an Order of 16 February 2005, the Court declared that, as a result of this election, the Chamber was composed as follows: Judge Ranjeva, who, in his capacity as Vice-President of the Court, had become President of the Chamber, pursuant to Article 18, paragraph 2, of the Rules of Court; Judges Kooijmans and Abraham; and Judges *ad hoc* Bedjaoui and Bennouna.

The Chamber finally reproduces, *inter alia,* the final submissions presented by the Parties at the conclusion of the oral proceedings:

On behalf of the Government of Benin,

"For the reasons set out in its written and oral pleadings, the Republic of Benin requests the Chamber of the International Court of Justice to decide:

(1) that the boundary between the Republic of Benin and the Republic of Niger takes the following course:

— from the point having co-ordinates 11° 54' 15" latitude North and 2° 25' 10" longitude East, it follows the median line of the River Mekrou as far as the point having co-ordinates 12° 24' 29" latitude North and 2° 49' 38" longitude East,

— from that point, the boundary follows the left bank of the River [Niger] as far as the point having co-ordinates 11° 41' 44" North and 3° 36' 44" East;

(2) that sovereignty over all of the islands in the River [Niger], and in particular the island of Lété, lies with the Republic of Benin."

On behalf of the Government of Niger,

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

(1) The boundary between the Republic of Benin and the Republic of Niger follows the line of deepest soundings in the River Niger, in so far as that line could be established at the date of independence, from the point having co-ordinates latitude 12° 24' 27" North, longitude 2° 49' 36" East, as far as the point having co-ordinates latitude 11° 41' 40.7" North, longitude 3° 36' 44" East.

(2) That line determines which islands belong to each Party.

— The islands between the line of deepest soundings and the right bank of the river, namely Pekinga, Tondi Kwaria Barou, Koki Barou, Sandi Tounga Barou, Gandégabi Barou Kaïna, Dan Koré Guirawa, Barou Elhadji Dan Djoda, Koundou Barou and Elhadji Chaïbou Barou Kaïna, belong to the Republic of Benin;

— The islands located between the line of deepest soundings and the left bank of the river, namely Boumba Barou Béri, Boumba Barou Kaïna, Kouassi Barou, Sansan Goungou, Lété Goungou, Monboye Tounga Barou, Sini Goungou, Lama Barou, Kotcha Barou, Gagno Goungou, Kata Goungou, Gandégabi Barou Béri, Guirawa Barou, Elhadji Chaïbou Barou Béri, Goussou Barou, Beyo Barou and Dolé Barou, belong to the Republic of Niger.

(3) The attribution of islands to the Republic of Benin and the Republic of Niger according to the line of deepest soundings as determined at the date of independence shall be regarded as final.

(4) With regard to the Gaya-Malanville bridges, the boundary passes through the middle of each of those structures.

(5) The boundary between the Republic of Benin and the Republic of Niger in the River Mekrou sector follows a line comprising two parts:

— the first part is a straight line joining the point of confluence of the River Mekrou with the River Niger to the point where the Paris meridian meets the Atacora mountain range, indicative co-ordinates of which are as follows: latitude: 11° 41' 50" North; longitude: 2° 20' 14" East;

— the second part of the line joins this latter point to the point where the former boundary between the *cercles* of Say and Fada meets the former boundary between the *cercles* of Fada and Atacora, indicative co-ordinates of which are as follows: latitude: 11° 44' 37" North; longitude: 2° 18' 55" East."

Geographical context and historical background of the dispute (paras. 17–22)

The Chamber notes that Article 2 of the Special Agreement divides the disputed boundary into two sectors, the River Mekrou sector in the west and the River Niger sector in the east. The Chamber then briefly describes each of these sectors.

The western part of the boundary follows a course running approximately south-west to north-east from a point marking the boundary between the two States and Burkina Faso as far as the confluence of the River Mekrou and the River Niger.

The eastern part of the boundary follows the River Niger in a south-easterly direction over a distance of some 150 km from that confluence and ends at a point marking the boundary of the two States with Nigeria. There are several islands within the stretch concerned; their exact number and their attribution to either Party are matters of dispute in the present case. The island of Lété, referred to expressly in Article 2 *(b)* of the Special Agreement, is the largest, covering approximately 40 sq. km. The island is fertile, with rich pastures, and is permanently inhabited; according to information supplied by Niger, its population numbered some 2,000 in the year 2000.

The frontier dispute between the Parties is set within a historical context marked by the accession to independence of the territories that were formerly part of French West Africa ("*Afrique occidentale française*", hereinafter "AOF"). Benin, which has been independent since 1 August 1960, corresponds to the former colony of Dahomey, and Niger, which has been independent since 3 August 1960, corresponds to a territory

which underwent various administrative transformations during the colonial period.

Both Parties referred to incidents that occurred on the island of Lété on the eve of their independence, in 1959 and 1960. The two States subsequently set up a process for the friendly settlement of their frontier dispute: in 1961 and 1963 two Dahomey-Niger joint commissions met to discuss the matter. In October 1963 the crisis between Dahomey and Niger regarding the island of Lété deepened and each State subsequently published a White Paper setting out, *inter alia,* their positions regarding the frontier dispute. There were fresh attempts to reach a peaceful settlement in the years that followed. However, the issue of sovereignty over the island of Lété was not resolved and there were further incidents in subsequent years, notably in 1993 and 1998. On 8 April 1994 Benin and Niger entered into an agreement creating a joint commission for the delimitation of their common border. Since efforts to arrive at a negotiated solution to the dispute were unsuccessful, the commission proposed that the governments of the two States bring the dispute before the International Court of Justice by Special Agreement.

Applicable law and principle of uti possidetis juris (paras. 23–31)

The Chamber notes that, under Article 6 of the Special Agreement ("Applicable Law"), the rules and principles of international law applicable to the present dispute include "the principle of State succession to the boundaries inherited from colonization, that is to say, the intangibility of those boundaries". The Chamber observes that it follows from the wording of this provision and from the arguments of the Parties that they are in agreement on the relevance of the principle of *uti possidetis juris* for the purposes of determining their common border. It recalls that the Chamber formed in the case concerning the *Frontier Dispute (Burkina Faso/Republic of Mali)* had occasion to state, that, according to the principle in question, "pre-eminence [is] accorded to legal title over effective possession as a basis of sovereignty" and that its essence lies "in its primary aim of securing respect for the territorial boundaries at the moment when independence is achieved", including former administrative delimitations established during the colonial period that became international frontiers *(Frontier Dispute (Burkina Faso/Mali), Judgment, I.C.J. Reports 1986,* pp. 586–587, para. 63, and p. 566, para. 23).

The Chamber concludes that on the basis of the principle of *uti possidetis juris,* it must seek to determine, in the case before it, the boundary that was inherited from the French administration. The Parties agree that the dates to be taken into account for this purpose are those of their respective independence, namely 1 and 3 August 1960. The Chamber observes that there was no change in the frontier between these two very close dates.

In response to differing opinions expressed by the Parties regarding certain aspects of the application of the *uti possidetis juris* principle in the present case, the Chamber firstly observes that the Parties agree that the course of their common boundary should be determined, in accordance with the *uti possidetis juris* principle, by reference to the physical situation to which French colonial law was applied, as that situation existed at the dates of independence. It emphasizes, however, that the consequences of such a course on the ground, particularly with regard to the question of to which Party the islands in the River Niger belong, must be assessed in relation to present-day physical realities and that, in carrying out the task assigned to it under Article 2 of the Special Agreement, the Chamber cannot disregard the possible appearance or disappearance of certain islands in the stretch concerned.

The Chamber secondly points out that it cannot exclude *a priori* the possibility that maps, research or other documents subsequent to the dates of independence may be relevant in order to establish, in application of the *uti possidetis juris* principle, the situation that existed at the time. In any event, since the effect of the *uti possidetis* principle is to freeze the territorial title, the examination of documents posterior to independence cannot lead to any modification of the "photograph of the territory" at the critical date unless, of course, such documents clearly express the Parties' agreement to such a change.

The Chamber thirdly notes that the approach employed by both Parties, which have on occasion sought to confirm their claims to legal title by relying on acts whereby their authorities allegedly exercised sovereignty over the disputed territories after 1960, should not necessarily be excluded.

The Chamber recalls that both Parties acknowledge that, in accordance with the principle of *uti possidetis juris,* the course of the frontier and the attribution of islands in the River Niger to either one of them must be determined in the light of French colonial law, known as "*droit d'outre-mer*". The Parties also agree on the identification of the relevant rules of that law, but do not share the same interpretation thereof. Before turning to those rules, the Chamber recalls that, when reference is made to domestic law in such a context, that law is applicable "not in itself (as if there were a sort of *continuum juris,* a legal relay between such law and international law), but only as one factual element among others, or as evidence indicative of . . . the 'colonial heritage'" (*ibid.,* p. 568, para. 30).

The Chamber then observes that the territorial administration of the French possessions in West Africa was centralized by a decree of the President of the French Republic of 16 June 1895 and placed under the authority of a Governor-General. The entity of the AOF thus created was divided into colonies, headed by Lieutenant-Governors and themselves made up of basic units called "*cercles*" which were administered by *commandants de cercle;* each *cercle* was in turn composed of *subdivisions,* each administered by a *chef de subdivision.* The *subdivisions* consisted of *cantons,* which grouped together a number of villages.

The Chamber notes that the Parties acknowledge that the creation and abolition of colonies fell within the jurisdiction of the authorities of metropolitan France: the President of the French Republic, acting by decree, under the Constitution of the Third Republic, and subsequently the French Parliament, following the adoption of the Constitution of 27 October 1946. The power to create territorial subdivisions within a single

colony, on the other hand, was vested in the AOF until being transferred to the local representative institutions in 1957.

Article 5 of the decree of the President of the French Republic dated 18 October 1904, providing for the reorganization of the AOF, vested the Governor-General with authority to "determine in government council *(conseil de gouvernement),* and on the proposal of the Lieutenant-Governors concerned, the administrative districts in each of the colonies". In his circular No. 114 *c* of 3 November 1912, concerning the form of instruments for the organization of administrative districts and subdivisions, the Governor-General interpreted this text as conferring upon him "the right to establish . . . the number and extent of the *cercles* which, within the colonies, constitute[d] the actual administrative unit", but pointed out that it was "acknowledged that the Lieutenant-Governors would retain the power to determine the territorial subdivisions created within these *cercles* by measures adopted under their own authority". According to that circular, "any measure concerning the administrative district, the territorial unit proper, i.e. affecting the *cercle,* in terms of its existence (creation or abolition), its extent, its name, or the location of its administrative centre", was to be confirmed by an *arrêté général* adopted in government council; it lay with the Lieutenant-Governors "to define, by means of *arrêtés,* the approval of which [was] reserved to [the Governor-General], the exact and detailed topographical boundaries of each of these districts", as well as "within the *cercles,* [to] fix . . . the number and extent of the territorial subdivisions . . . and the location of their centre" by means of local decisions.

Evolution of legal status of territories concerned
(paras. 32–36)

For a better understanding of the historical context in which the Parties' claims stand in relation to the determination of the frontier and to the question of to whom the islands in the River Niger belong, the Chamber briefly recapitulates the evolution of the legal status of the territories concerned during the colonial period.

Documents and cartographic material relevant to the settlement of the dispute
(paras. 37–44)

The Chamber goes on to describe the main documents relevant to the settlement of the frontier dispute, listing on the one hand the documents that concern the determination of the course of the boundary in the River Niger sector and the question of to whom the islands in that river belong, and on the other hand the documents that relate to the delimitation in the River Mekrou sector. The Chamber also describes the large quantity of cartographic and photographic material produced by the Parties in support of their respective arguments.

The course of the boundary in the sector of the River Niger and the question of to which Party each of the islands belongs
(paras. 45–124)

Evidence of title
(paras. 45–74)

Benin's claims to title

The Chamber recalls that it is firstly asked, in accordance with Article 2, paragraphs *(a)* and *(b),* of the Special Agreement, to determine the course of the boundary in the sector of the River Niger and then to specify to which Party each of the islands in the river belongs.

The Chamber points out that in the present case these territorial boundaries were no more than delimitations between different administrative divisions or colonies subject to the same colonial authority. Only at the moment of independence, also called the "critical date", did these boundaries become international frontiers. Since the Parties achieved independence virtually simultaneously the period between 1 and 3 August 1960 can be considered as the critical date. The Chamber indicates that, in accordance with the approach of the Chamber in the *Frontier Dispute (Burkina Faso/Republic of Mali)* case, it will first consider the various regulative or administrative acts invoked by the Parties.

In this respect, the Chamber recalls that the Parties agree that, during the period under consideration, the power to create colonies or territories was vested in the President of the French Republic until 1946 and thereafter in the French Parliament, while colonial subdivisions could be created by the Governor-General of the AOF under the terms of the decree of 18 October 1904. In his circular No. 114 *c* of 3 November 1912, the Governor-General of the AOF determined that the main subdivisions *("cercles")* would be established by the Governor-General, but that the Lieutenant-Governors would be entitled to create further territorial subdivisions within the *cercles.* The Chamber observes that it appears that it is not disputed between the Parties that the competence to create or establish territorial entities included the power to determine their extent and to delimit them, although during the colonial period this was never made explicit in any regulative or administrative act.

The Chamber further recalls that it is not contested that in the initial period after its creation in 1894 the colony of Dahomey comprised territories situated on both banks of the River Niger. By *arrêté* of 23 July 1900, the Governor-General of the AOF established a third military territory, which "will encompass the areas on the left bank of the Niger between Say and Lake Chad that were placed within the French sphere of influence by the [Anglo-French] Convention of 14 June 1898". On 20 December 1900 a decree of the President of the French Republic was issued which established a third military territory "between the Niger and Lake Chad". The decree, which was superior to an *arrêté* in the hierarchy of legal acts, made no reference to the *arrêté* of 23 July 1900. In the Chamber's view, the decree must nevertheless be seen as a confirmation of the *arrêté* of the Governor-General since it covers the same area between the (River) Niger and (Lake) Chad.

The Chamber notes that Benin contends that the *arrêté* of 23 July 1900 established the boundary between the Third Military Territory and the colony of Dahomey at the left bank of the River Niger, leaving the river itself and the islands located therein as part of that colony. Benin further contends that the boundary thus established was confirmed by the Governor *ad interim* of Niger in a letter of 27 August 1954 which stated "that the boundary of the Territory of Niger [was] constituted by the line of highest water on the left bank of the river, from the village of Bandofay to the frontier of Nigeria" and that "[c]onsequently, all the islands situated in this part of the river [formed] part of the Territory of Dahomey". Niger, for its part, denies that the *arrêté* of 23 July 1900 established a boundary; in its view the relevant wording was merely intended to indicate the territorial extent of the newly created Territory. It further observes that an understanding soon developed that the boundary was constituted by "the course of the river" and that this could only mean that the boundary was situated within the watercourse of the river.

The Chamber is of the view that the *arrêté* of 23 July 1900 in conjunction with the decree of the President of the French Republic of 20 December 1900, which created the Third Military Territory, cannot be read as determining the boundaries thereof. The geographical references used can only be seen as indicating in general terms the extent of the newly created territory; the words "the areas on the left bank of the Niger" in the *arrêté* and "the Niger" in the decree make it clear that these areas are detached from the colony of Dahomey to which they previously belonged. The conclusion that the legal instruments of 23 July and 20 December 1900 did not determine any boundary, and were not considered at the time as doing so, is confirmed by the letter of 7 September 1901 of the French Minister for the Colonies addressed to the Governor-General of the AOF, referring to the "course of the Niger as the best demarcation line". Although this letter did not determine the boundary, the Chamber considers that it provides sufficient evidence that a delimitation had not taken place the year before. Nor has the Chamber found any document which shows that a delimitation was carried out in subsequent years.

The Chamber therefore concludes that Benin's argument that the *arrêté* of 23 July 1900 located the boundary at the left bank of the River Niger, and that this delimitation remained in force until the date of independence, cannot be upheld.

Turning to the letter of 27 August 1954 of the Governor *ad interim* of Niger, the Chamber initially analyses the context in which this letter was written. It concludes that, in view of its finding that the *arrêté* of 23 July 1900 did not establish a boundary, this letter cannot be seen as an authoritative confirmation of such a boundary, as claimed by Benin. The Chamber further notes that, under French colonial law, the Lieutenant-Governor of a colony had no competence to delimit unilaterally the external boundaries of the colony. Therefore, the letter in itself cannot be relied on by Benin as a legal title placing the boundary on the left bank of the river. The Chamber thus finds that it cannot uphold Benin's claim according to which the letter of 27 August 1954 in conjunction with the *arrêté* of 23 July 1900 provides it with legal title to a boundary on the left bank.

Niger's claims to title

The Chamber then turns to the acts invoked by Niger as evidence of its legal title, namely the *arrêtés* issued by the Governor-General of the AOF on 8 December 1934 and 27 October 1938 reorganizing the internal administrative structure of the colony of Dahomey and containing a description of the boundaries of the various *cercles*. In both *arrêtés* the north-west boundary of the *cercle* of Kandi is described as "the course of the Niger as far as its confluence with the Mekrou".

The Chamber first notes that both *arrêtés* were issued by the Governor-General, who was the authority competent to establish, delimit and reorganize the *cercles* of colonies. In so far as they describe the boundaries of these *cercles* with the neighbouring colonies which also came under his authority, the *arrêtés* do not have an exclusive internal character but may also be relied upon in intercolonial relations. Consequently it can be concluded on the basis of these *arrêtés* that the course of the River Niger constituted the intercolonial boundary. The Chamber finds itself unable, however, to deduce therefrom that that boundary was situated *in* the river, whether at the thalweg or the median line. It notes in this regard that the terminology used in the *arrêtés* is identical to that of the 1901 letter and is just as imprecise. The notion of the "course of the river" covers a range of possibilities: a boundary on either river bank or a boundary somewhere within the river. The Chamber thus finds that the 1934 and 1938 *arrêtés* did not establish a boundary *in* the river; and that it cannot therefore sustain Niger's claims as to title.

Effectivités *as basis for determination of the frontier* (paras. 75–102)

Since the Chamber has concluded that neither of the Parties has succeeded in providing evidence of title on the basis of regulative or administrative acts during the colonial period, it turns to consider whether the evidence furnished by the Parties with respect to *effectivités* can provide the basis for it to determine the course of the frontier in the sector of the River Niger and to which of the two States each of the islands in the river belongs.

It recalls in this regard that the Court has previously ruled in a number of cases on the legal relationship between *effectivités* and title. The passage most pertinent to the present case can be found in the Judgment in the *Frontier Dispute (Burkina Faso/Republic of Mali)* case, in which the Chamber of the Court, having noted that "a distinction must be drawn among several eventualities" when evaluating the legal relationship between *effectivités* and title, stated, *inter alia,* that: "[i]n the event that the *effectivité* does not co-exist with any legal title, it must invariably be taken into consideration" (*I.C.J. Reports 1986,* p. 587, para. 63).

The Chamber first analyses the various activities prior to 1954, presented as *effectivités* by the Parties. It refers to the letter of 3 July 1914 of the *commandant of the secteur* of Gaya (Niger), *administrateur adjoint* Sadoux, to the *commandant* of the *cercle* of Moyen-Niger (Dahomey), written for the purpose of determining when grazing permits should be issued and delimiting the jurisdiction of the two colonies' indigenous tribunals. *Administrateur adjoint* Sadoux attached to his letter a

list of islands in the border area, drawn up on the basis of an exploration of the whole stretch of the river, with an indication of the colony to which each island belonged according to its position with respect to the main navigable channel. He defined this channel as "the river's main channel, not the widest channel, but the *only channel navigable at low water*". The Chamber notes that it appears that a meeting took place and led to an agreement. Although difficulties arose in 1919 with regard to the administration of the island of Lété by Gaya, which was contested by Dahomey, the 1914 arrangement, which became known as the 1914 *modus vivendi,* seems to have been complied with in subsequent years.

The Chamber then turns to the *effectivités* in the period from 1954 until the critical date in 1960. It recalls that, on 27 August 1954, the Governor *ad interim* of Niger wrote a letter in which he stated that the boundary was situated "at the line of highest water, on the left bank of the river, from the village of Bandofay to the frontier of Nigeria" and that "all the islands situated in this part of the river [formed] part of the territory of Dahomey". The Chamber takes note of the fact that, during this period, the claims of Dahomey to be entitled to administer the island of Lété became more frequent.

On the basis of the evidence before it, the Chamber finds that, from 1914 to 1954, the terms of the *modus vivendi* established by the 1914 Sadoux letter were in general respected and that, during this period, the main navigable channel of the River Niger was considered by both sides to be the boundary. As a result, administrative authority was exercised by Niger on the islands to the left and by Dahomey on the islands to the right of that line. The entitlement of Niger to administer the island of Lété was sporadically called into question for practical reasons but was neither legally nor factually contested.

With respect to the islands opposite Gaya, the Chamber notes that, on the basis of the *modus vivendi* established by the 1914 Sadoux letter, these islands were considered to fall under the jurisdiction of Dahomey and that it has not received any information to indicate that these islands were administered from anywhere else other than the *cercle* of Kandi (Dahomey). The Chamber therefore concludes that, in this sector of the river, the boundary was regarded as passing to the left of these three islands.

The Chamber finds that the situation is less clear in the period between 1954 and 1960. It is apparent that both Parties periodically claimed rights over the islands, in particular Lété, and also occasionally performed administrative acts as a display of authority. However, on the basis of the evidence before it, the Chamber cannot conclude that the administration of the island of Lété, which before 1954 was undoubtedly carried out by Niger, was effectively transferred to or taken over by Dahomey. In this respect, the Chamber notes that a report of the gendarmerie of Malanville of 1 July 1960 stated that Lété was "currently administered by the *subdivision* of Gaya".

For all these reasons and in the circumstances of the case, particularly in light of the evidence furnished by the Parties, the Chamber concludes that the boundary between Benin and Niger follows the main navigable channel of the River Niger as it existed at the dates of independence, it being understood that, in the vicinity of the three islands opposite Gaya, the boundary passes to the left of these islands. Consequently, Benin has title to the islands situated between the boundary thus defined and the right bank of the river and Niger has title to the islands between that boundary and the left bank of the river.

Precise location of the boundary line in the main navigable channel
(paras. 103–115)

The Chamber then proceeds to determine the location of the boundary line in the main navigable channel, namely the line of deepest soundings, as it existed at the dates of independence.

The Chamber initially notes that, over the course of time, a number of hydrographic and topographic surveys have taken place on the River Niger and that the position of the main navigable channel of the river as determined by each of the missions is very similar. The Chamber considers that this indicates that the riverbed is relatively stable and that any siltation which has taken place has rarely led to a noticeable change in the location of the main navigable channel. This appears to have been the case in both the colonial and post-independence period.

Given that it has to determine the course of the boundary at the time of independence, the Chamber is of the view that the report of a study on the navigability of the Middle Niger, carried out by the NEDECO firm between 1967 and 1970, provides the most useful information on the situation at the critical date. In view of the proven stability of the riverbed, it may be assumed that the situation between 1967 and 1970 was virtually identical with that in 1960. In this respect, the Chamber considers it of great importance that the 1967–1970 survey was carried out by an independent firm renowned for its expertise and experience and that the results were contained in a report presented to the governments of four riparian States, including the Parties to the present case. Furthermore, the findings of the NEDECO study were not contested at the time of their publication and they are corroborated by both earlier and later studies.

The Chamber notes that map No. 36 of the NEDECO report indicates that in the sector opposite the village of Gaya, the river has two navigable channels. On the basis of the available data, it is not possible to say which one is consistently deeper. This is however without consequence in the present case given the conclusions drawn above by the Chamber, from the colonial *effectivités* in that sector. The Chamber considers that, in the sector of the three islands opposite Gaya, the boundary is constituted by the line of deepest soundings of the left navigable channel. However, in the vicinity of the last of these islands, Kata Goungou, the boundary deviates from that line and passes to the left of that island.

With the exception indicated in the previous paragraph, the boundary between the Parties therefore follows the line of deepest soundings of the main navigable channel of the River Niger as it appears in the 1970 NEDECO report, from the intersection of this line with the median line of the River Mekrou until its intersection with the boundary of the Parties with Nigeria.

Opposite Gaya, the boundary is constituted by the line of deepest soundings of the left navigable channel from the point situated at co-ordinates 11° 52' 29" latitude North and 3° 25' 34" longitude East until the point located at co-ordinates 11° 51' 55" latitude North and 3° 27' 41" longitude East, where the boundary deviates from this channel and passes to the left of the island of Kata Goungou, subsequently rejoining the main navigable channel at the point located at co-ordinates 11° 51' 41" latitude North and 3° 28' 53" longitude East.

The Chamber then provides a table, indicating the co-ordinates of the points numbered from 1 to 154, through which the boundary line between Benin and Niger passes in the sector of the River Niger, proceeding downstream. These points that constitute the boundary line are further represented, purely for illustrative purposes, on a sketch-map (No. 4) attached to the judgment.

Determination of to which of the Parties each of the islands belongs
(paras. 116–118)

The Chamber proceeds to determine to which of the Parties each of the islands in the River Niger belongs, following the course of the river downstream from its confluence with the Mekrou to the frontier with Nigeria.

The Chamber notes that it has not received reliable information that new islands formed nor that islands disappeared between 1960 and 1967–1970. As regards subsequent years, it observes that one of the islands identified by Niger, namely Sandi Tounga Barou, which is not represented on any map prepared before 1973, does appear on various aerial photographs and SPOT images taken from 1973 onwards. The Chamber finds it must consequently determine to which of the Parties this island belongs. With respect to the "island" of Pekinga, which Niger in its final submissions attributed to Benin, the Chamber notes that it is not identifiable as a separate island on the maps annexed to the NEDECO report, but instead appears to be part of the river bank on the Benin side. The judgment then lists all the islands in the relevant sector of the River Niger, indicating to which Party they belong in accordance with the Chamber's findings. Finally, the Chamber observes that the determination in regard to the attribution of islands is without prejudice to any private law rights which may be held in respect of those islands.

The frontier on the two bridges between Gaya (Niger) and Malanville (Benin)
(paras. 119–124)

The Chamber finally notes that Niger has also asked it to determine the frontier on the two bridges between Gaya (Niger) and Malanville (Benin). Benin contends that this issue is not covered by the Special Agreement and that the Chamber therefore has no jurisdiction to comply with Niger's request. The Chamber observes in this regard that, in the Special Agreement, "[t]he Court is requested to . . . determine the course of the boundary . . . in the River Niger sector". Since the bridges between Gaya and Malanville are located in that sector, the Chamber considers that it has jurisdiction to determine where the boundary is located on these bridges.

The Chamber notes that Niger claims that the boundary is situated at the middle point of each of the bridges given that the construction and maintenance of these structures has been financed by the Parties on an equal basis and that the bridges are their joint property. Benin, for its part, submits that a difference between the location of the boundary on the bridges and the course of the boundary in the river beneath would be incoherent.

The Chamber observes that, in the absence of an agreement between the Parties, the solution is to extend vertically the line of the boundary on the watercourse. This solution accords with the general theory that a boundary represents the line of separation between areas of State sovereignty, not only on the earth's surface but also in the subsoil and in the superjacent column of air. Moreover, the solution consisting of the vertical extension of the boundary line on the watercourse avoids the difficulties which could be engendered by having two different boundaries on geometrical planes situated in close proximity to one another.

In light of the foregoing, the Chamber concludes that the boundary on the bridges between Gaya and Malanville follows the course of the boundary in the river. This finding is without prejudice to the arrangements in force between Benin and Niger regarding the use and maintenance of these bridges, which are financed by the two States on an equal basis. The Chamber observes in particular that the question of the course of the boundary on the bridges is totally independent of that of the ownership of those structures, which belong to the Parties jointly.

The course of the boundary in the River Mekrou sector
(paras. 125–145)

The Chamber then determines "the course of the boundary between the two States in the River Mekrou sector", a task with which it is charged under Article 2 *(c)* of the Special Agreement.

It notes that, according to Benin, the boundary follows the median line of the River Mekrou as far as the boundary of the Parties with Burkina Faso. That is said to result, on the one hand, from the application of the *uti possidetis juris* principle, since, at their dates of independence, the territories of Dahomey and Niger were separated by the course of that river pursuant both to the legal titles in force and to the *effectivités;* on the other hand and in any event, such a boundary is said to have been confirmed by Niger's formal recognition, at the time of the negotiations between the two Parties in 1973 and 1974 with a view to the construction of the Dyodyonga dam, that the Mekrou did indeed constitute the boundary between their respective territories.

The Chamber notes that, according to Niger, the boundary in the sector in question follows a line comprising two parts: the first is a straight line in a south-westerly direction joining the point of confluence of the River Mekrou with the River Niger to the point where the Paris meridian meets the Atakora mountain range: the second part joins this latter point to the point where the former boundary between the *cercles* of Say and Fada meets the former boundary between the *cercles* of Fada and Atakora. That is claimed to result from the combined

effect of the regulatory instruments which, during the colonial period, defined the boundary between Dahomey and Niger in the sector in question, namely the decree of 2 March 1907 incorporating the *cercles* of Fada-N'Gourma and Say into the colony of Haut-Sénégal et Niger (to which Niger succeeded) and the decrees of 12 August 1909 and 23 April 1913 modifying the boundary of the latter colony with Dahomey.

The Chamber states that it will first ascertain, by application of the principle of *uti possidetis juris,* what the course of the intercolonial boundary was at the critical dates of independence in August 1960. It observes that, for that purpose, it is necessary to examine first the legal titles relied on by the Parties, with any *effectivités* being considered only on a confirmatory or subsidiary basis, in accordance with the rules recalled earlier in its judgment.

The first text for consideration is the decree of 2 March 1907, the object of which was to change the course of the boundary between the colony of Haut-Sénégal et Niger and that of Dahomey by incorporating the *cercles* of Fada N'Gourma and Say, until then part of Dahomey, into the neighbouring colony. Article 1 of that decree provides that the new intercolonial boundary:

> "is constituted, from the boundary of Togo, by the present boundary of the *cercle* of Gourma until it reaches the Atakora mountain range, whose summit it follows until it meets the Paris meridian, from which point it runs in a straight line in a north-easterly direction, terminating at the confluence of the River Mekrou with the Niger".

The Chamber considers that that delimitation, which clearly does not coincide with the course of the River Mekrou, tends to support the position of Niger.

The Chamber finds that it cannot accept the proposition put forward by Benin that the decree of 1 March 1919 implicitly abrogated or amended that of 2 March 1907 in relation to the intercolonial boundary in the sector in question. The 1919 decree created the colony of Haute-Volta, which was constituted by detaching a certain number of *cercles,* including Fada N'Gourma and Say, from Haut-Sénégal et Niger. However, there is nothing in the terms of the 1919 decree to suggest that its authors intended to call into question the line defined as the intercolonial boundary in 1907.

That does not suffice nevertheless to refute Benin's argument with respect to the course of the boundary in the sector concerned.

The Chamber is bound to note, first of all, that the 1919 decree refers neither in its citations nor in its operative articles to the 1907 decree, and that it does not include any precise definition of the intercolonial boundary, as the earlier decree had done. In reality, the 1919 decree defines the territory of Haute-Volta solely by reference to the *cercles* which compose it, and it is thus also by this means that it indirectly defines the boundaries between Haute-Volta and the neighbouring colonies, and in particular Dahomey. It is by the precise delimitation of the *cercles* mentioned in Article 1 of the decree of 1 March 1919—a delimitation not effected by the decree itself—that, from this date, the intercolonial boundary could be defined. However, the delimitation of the *cercles,* the principal administrative subdivisions of the colonies, was at that time a matter falling within the competence of the Governor-General. It must therefore be concluded from the foregoing that, while the 1919 decree did not call into question the intercolonial boundary determined in 1907, it left unaffected the power of the Governor-General to modify the boundary in the future by fixing the boundaries of the *cercles* in question in accordance with his normal competence in that regard.

The Chamber notes that an *arrêté* of the Governor-General of 31 August 1927 defines the River Mekrou as the boundary of the *cercle* of Say in the area contiguous with the colony of Dahomey. That *arrêté* was adopted by the Governor-General following, and as a consequence of, the decree of 28 December 1926 incorporating the *cercle* of Say into the colony of Niger (created some years earlier). It was thus for the Governor-General to define the boundaries between the colonies of Haute-Volta and Niger, in the exercise of his power to define the boundaries of the *cercles:* that was the purpose of the *arrêté* of 31 August 1927. That instrument, in the second paragraph of Article 1, defined the boundary between the *cercle* of Say and Haute-Volta in the following terms:

> "In the South-West [by] a line starting approximately from the [River] Sirba at the level of the Say parallel and terminating at the Mekrou;
>
> In the South-East, by the Mekrou from that point as far as its confluence with the Niger."

Thus, by this *arrêté* the Governor-General clearly fixed the boundary of the *cercle* of Say, and hence the intercolonial boundary, on the Mekrou.

The Chamber observes that the *arrêté* of 31 August 1927 was followed on 15 October by an *erratum* amending its text retroactively by removing the reference to the course of the Mekrou as the south-eastern boundary between the *cercle* of Say and Haute-Volta. However, the *erratum* would seem in effect to have been motivated not by the fact that the Governor-General did not mean to fix the south-eastern boundary of the *cercle* of Say along the Mekrou, but rather by a wish not to define the boundary between Dahomey and Niger in an arrêté whose purpose, as was clear from its title, was to fix the boundary between Niger and Haute-Volta.

The Chamber furthermore takes account of the instruments concerning the creation of game reserves and national parks in the area known as "The Niger W"; it notes that all those instruments use the River Mekrou for purposes of delimitation of the areas in question. If, in the eyes of the administrative authorities competent to promulgate the *arrêtés* in question, the Mekrou did not represent the intercolonial boundary, it is difficult to see why it should have been chosen as the boundary of these national parks and nature reserves. Finally, the Chamber notes that the cartographic material in the file clearly confirms that, certainly from 1926–1927, the Mekrou was generally regarded as the intercolonial boundary by all the administrative authorities and institutions of the colonial Power.

All of the foregoing considerations confirm the position that the 1907 line no longer corresponded, at the critical date, to the intercolonial boundary and that, on the contrary, at that date, it was the course of the Mekrou which, in the view of all the competent authorities of the colonial administration,

constituted the boundary between the adjacent colonies—at that date the colonies of Dahomey and Niger.

The Chamber observes that, as argued by Niger, the decree of 2 March 1907, which clearly defined a different boundary, was never expressly abrogated or amended, or indeed superseded by some other instrument of at least equal authority—either a decree or a statute—containing provisions clearly incompatible with its own. However, the Chamber emphasizes that the *uti possidetis juris* principle requires not only that reliance be placed on existing legal titles, but also that account be taken of the manner in which those titles were interpreted and applied by the competent public authorities of the colonial Power, in particular in the exercise of their law-making power. The Chamber is bound to note that the administrative instruments promulgated after 1927 were never the subject of any challenge before the competent courts, and that there is no evidence that the colonial administration was ever criticized at the time for having improperly departed from the line resulting from the 1907 decree.

The Chamber concludes from all of the foregoing that, at least from 1927 onwards, the competent administrative authorities regarded the course of the Mekrou as the inter-colonial boundary separating Dahomey from Niger; that those authorities reflected that boundary in the successive instruments promulgated by them after 1927, some of which expressly indicated that boundary, whilst others necessarily implied it; and that this was the state of the law at the dates of independence in August 1960. In these circumstances, the Chamber finds, it is unnecessary to look for any *effectivités* in order to apply the *uti possidetis* principle, since *effectivités* can only be of interest in a case in order to complete or make good doubtful or absent legal titles, but can never prevail over titles with which they are at variance. The Chamber notes moreover, *ex abundanti,* that the *effectivités* relied on by the Parties in the sector in question are relatively weak.

In the light of this conclusion, the Chamber notes that the dispute between the Parties regarding the Dyodyonga dam negotiations of 1973 and 1974 becomes moot. It is thus unnecessary for the Chamber to decide whether the resulting documents could have constituted a legally binding obligation for Niger and, if so, whether that obligation could have been vitiated by an error fulfilling the conditions laid down by customary international law.

Location of the boundary line in the River Mekrou (paras. 143–145)

Lastly, the Chamber determines the exact location in the River Mekrou of the boundary between Benin and Niger.

The Chamber recalls that, in the case concerning *Kasikili/Sedudu Island (Botswana/Namibia),* the Court observed that:

> "Treaties or conventions which define boundaries in water courses nowadays usually refer to the thalweg as the boundary when the watercourse is navigable and to the median line between the two banks when it is not, although it cannot be said that practice has been fully consistent." (*I.C.J. Reports 1999 (II),* p. 1062, para. 24.)

In the present case, the Chamber observes that the Parties did not provide the Chamber with any documents that would enable the exact course of the thalweg of the Mekrou to be identified. The Chamber notes that in all likelihood there is a negligible difference between the course of the thalweg and the course of the median line of the River Mekrou, but considers that, in view of the circumstances, including the fact that the river is not navigable, a boundary following the median line of the Mekrou would more satisfactorily meet the requirement of legal security inherent in the determination of an international boundary.

The Chamber concludes therefore, that, in the sector of the River Mekrou, the boundary between Benin and Niger is constituted by the median line of that river.

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Dissenting opinion of Judge Bennouna

Judge Bennouna cannot agree with the first three findings of the Chamber on the course of the boundary between Benin and Niger in the River Niger sector and on the question of which State the islands in the river belong to. However, he does agree with the Chamber's fourth finding, concerning the course of the boundary between Benin and Niger in the River Mekrou sector.

Judge Bennouna considers that the boundary in the River Niger sector is located on the left bank of the river, by virtue both of the legal title and of the *effectivités*. He accordingly concludes that all of the islands in the river belong to Benin. Finally, in Judge Bennouna's view, the Chamber has no jurisdiction to determine the course of the boundary on the two bridges across the River Niger.

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159. ARMED ACTIVITIES ON THE TERRITORY OF THE CONGO (DEMOCRATIC REPUBLIC OF THE CONGO *v.* UGANDA)

Judgment of 19 December 2005

On 19 December 2005, the Court delivered its Judgment in the case concerning *Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo* v. *Uganda)*.

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The Court was composed as follows: President Shi; Vice-President Ranjeva; Judges Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal, Elaraby, Owada, Simma, Tomka, Abraham; Judges *ad hoc* Verhoeven, Kateka; Registrar Couvreur.

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The operative paragraph (para. 345) of the Judgment reads as follows:

" . . .

The Court,

(1) By sixteen votes to one,

Finds that the Republic of Uganda, by engaging in military activities against the Democratic Republic of the Congo on the latter's territory, by occupying Ituri and by actively extending military, logistic, economic and financial support to irregular forces having operated on the territory of the DRC, violated the principle of non-use of force in international relations and the principle of non-intervention;

IN FAVOUR: President Shi; Vice-President Ranjeva; Judges Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal, Elaraby, Owada, Simma, Tomka, Abraham; Judge *ad hoc* Verhoeven;

AGAINST: Judge *ad hoc* Kateka;

(2) Unanimously,

Finds admissible the claim submitted by the Democratic Republic of the Congo relating to alleged violations by the Republic of Uganda of its obligations under international human rights law and international humanitarian law in the course of hostilities between Ugandan and Rwandan military forces in Kisangani;

(3) By sixteen votes to one,

Finds that the Republic of Uganda, by the conduct of its armed forces, which committed acts of killing, torture and other forms of inhumane treatment of the Congolese civilian population, destroyed villages and civilian buildings, failed to distinguish between civilian and military targets and to protect the civilian population in fighting with other combatants, trained child soldiers, incited ethnic conflict and failed to take measures to put an end to such conflict; as well as by its failure, as an occupying Power, to take measures to respect and ensure respect for human rights and international humanitarian law in Ituri district, violated its obligations under international human rights law and international humanitarian law;

IN FAVOUR: President Shi; Vice-President Ranjeva; Judges Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal, Elaraby, Owada, Simma, Tomka, Abraham; Judge *ad hoc* Verhoeven;

AGAINST: Judge *ad hoc* Kateka;

(4) By sixteen votes to one,

Finds that the Republic of Uganda, by acts of looting, plundering and exploitation of Congolese natural resources committed by members of the Ugandan armed forces in the territory of the Democratic Republic of the Congo and by its failure to comply with its obligations as an occupying Power in Ituri district to prevent acts of looting, plundering and exploitation of Congolese natural resources, violated obligations owed to the Democratic Republic of the Congo under international law;

IN FAVOUR: President Shi; *Vice-President* Ranjeva; *Judges* Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal, Elaraby, Owada, Simma, Tomka, Abraham; Judge *ad hoc* Verhoeven;

AGAINST: Judge *ad hoc* Kateka;

(5) Unanimously,

Finds that the Republic of Uganda is under obligation to make reparation to the Democratic Republic of the Congo for the injury caused;

(6) Unanimously,

Decides that, failing agreement between the Parties, the question of reparation due to the Democratic Republic of the Congo shall be settled by the Court, and reserves for this purpose the subsequent procedure in the case;

(7) By fifteen votes to two,

Finds that the Republic of Uganda did not comply with the Order of the Court on provisional measures of 1 July 2000;

IN FAVOUR: President Shi; Vice-President Ranjeva; Judges Koroma, Vereshchetin, Higgins, Parra-Aranguren, Rezek, Al-Khasawneh, Buergenthal, Elaraby, Owada, Simma, Tomka, Abraham; Judge *ad hoc* Verhoeven;

AGAINST: Judge Kooijmans; Judge *ad hoc* Kateka;

(8) Unanimously,

Rejects the objections of the Democratic Republic of the Congo to the admissibility of the first counter-claim submitted by the Republic of Uganda;

(9) By fourteen votes to three,

Finds that the first counter-claim submitted by the Republic of Uganda cannot be upheld;

IN FAVOUR: President Shi; Vice-President Ranjeva; Judges Koroma, Vereshchetin, Higgins, Parra-Aranguren, Rezek,

Al-Khasawneh, Buergenthal, Elaraby, Owada, Simma, Abraham; Judge *ad hoc* Verhoeven;

AGAINST: Judges Kooijmans, Tomka; Judge *ad hoc* Kateka;

(10) Unanimously,

Rejects the objection of the Democratic Republic of the Congo to the admissibility of the part of the second counter-claim submitted by the Republic of Uganda relating to the breach of the Vienna Convention on Diplomatic Relations of 1961;

(11) By sixteen votes to one,

Upholds the objection of the Democratic Republic of the Congo to the admissibility of the part of the second counter-claim submitted by the Republic of Uganda relating to the maltreatment of individuals other than Ugandan diplomats at Ndjili International Airport on 20 August 1998;

IN FAVOUR: President Shi; Vice-President Ranjeva; Judges Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal, Elaraby, Owada, Simma, Tomka, Abraham; Judge *ad hoc* Verhoeven;

AGAINST: Judge *ad hoc* Kateka;

(12) Unanimously,

Finds that the Democratic Republic of the Congo, by the conduct of its armed forces, which attacked the Ugandan Embassy in Kinshasa, maltreated Ugandan diplomats and other individuals on the Embassy premises, maltreated Ugandan diplomats at Ndjili International Airport, as well as by its failure to provide the Ugandan Embassy and Ugandan diplomats with effective protection and by its failure to prevent archives and Ugandan property from being seized from the premises of the Ugandan Embassy, violated obligations owed to the Republic of Uganda under the Vienna Convention on Diplomatic Relations of 1961;

(13) Unanimously,

Finds that the Democratic Republic of the Congo is under obligation to make reparation to the Republic of Uganda for the injury caused;

(14) Unanimously,

Decides that, failing agreement between the Parties, the question of reparation due to the Republic of Uganda shall be settled by the Court and reserves for this purpose the subsequent procedure in the case."

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* *

Judge Koroma has appended a declaration to the Judgment of the Court; Judges Parra-Aranguren, Kooijmans, Elaraby and Simma have appended separate opinions; Judge Tomka and Judge *ad hoc* Verhoeven have appended declarations; Judge *ad hoc* Kateka has appended a dissenting opinion.

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History of the proceedings and submissions of the Parties (paras. 1–25)

The Court begins by recapitulating the various stages of the proceedings.

On 23 June 1999, the Democratic Republic of the Congo (hereinafter "the DRC") filed an Application instituting proceedings against the Republic of Uganda (hereinafter "Uganda") in respect of a dispute concerning "acts of *armed aggression* perpetrated by Uganda on the territory of the Democratic Republic of the Congo, in flagrant violation of the United Nations Charter and of the Charter of the Organization of African Unity" (emphasis in the original).

In order to found the jurisdiction of the Court, the Application relied on the declarations made by the two Parties accepting the Court's compulsory jurisdiction under Article 36, paragraph 2, of the Statute of the Court.

By an Order of 21 October 1999, the Court fixed time-limits for the filing of the Memorial of the DRC and the Counter-Memorial of Uganda. The DRC filed its Memorial within the time-limit prescribed. On 19 June 2000, the DRC submitted a request for the indication of provisional measures pursuant to Article 41 of the Statute of the Court. By an Order dated 1 July 2000, the Court, after hearing the Parties, indicated certain provisional measures. Uganda subsequently filed its Counter-Memorial within the time-limit fixed. That pleading included counter-claims.

Since the Court included upon the Bench no judge of the nationality of the Parties, each Party availed itself of its right under Article 31 of the Statute of the Court to choose a judge *ad hoc* to sit in the case. The DRC chose Mr. Joe Verhoeven and Uganda Mr. James L. Kateka.

At a meeting held by the President of the Court with the Agents of the Parties on 11 June 2001, the DRC, invoking Article 80 of the Rules of Court, raised certain objections to the admissibility of Uganda's counter-claims. The two Agents agreed that their respective Governments would file written observations on that question; they also agreed on the time-limits for that purpose. Those observations were filed within the prescribed time-limits.

By an Order of 29 November 2001, the Court held that two of the three counter-claims submitted by Uganda were admissible as such and formed part of the current proceedings, but that the third was not. It also directed the DRC to file a Reply and Uganda to file a Rejoinder, addressing the claims of both Parties, and fixed time-limits for the filing of those pleadings. Lastly, the Court held that it was necessary, "in order to ensure strict equality between the Parties, to reserve the right of the Congo to present its views in writing a second time on the Ugandan counter-claims, in an additional pleading which [might] be the subject of a subsequent Order". The DRC duly filed its Reply within the time-limit prescribed while Uganda filed its Rejoinder within the time-limit extended by a further Order. By an Order of 29 January 2003 the Court, taking account of the agreement of the Parties, authorized the submission by the DRC of an additional pleading relating solely to the counter-claims submitted by Uganda and fixed a time-limit for the filing of that pleading. The DRC duly filed the additional pleading within the time-limit fixed.

At a meeting held by the President of the Court with the Agents of the Parties on 24 April 2003, the Agents presented their views on the organization of the oral proceedings on the merits. Pursuant to Article 54, paragraph 1, of the Rules, the Court fixed 10 November 2003 as the date for the opening of the oral proceedings. On 5 November 2003, the Agent of the DRC enquired whether it might be possible to postpone to a later date, in April 2004, the opening of the hearings in the case, "so as to permit the diplomatic negotiations engaged by the Parties to be conducted in an atmosphere of calm". By a letter of 6 November 2003, the Agent of Uganda informed the Court that his Government "supporte[d] the proposal and adopt[ed] the request". On the same day, the Registrar informed both Parties by letter that the Court, "taking account of the representations made to it by the Parties, [had] decided to postpone the opening of the oral proceedings in the case". By a letter of 9 September 2004, the Agent of the DRC formally requested that the Court fix a new date for the opening of the oral proceedings. By letters of 20 October 2004, the Registrar informed the Parties that the Court had decided to fix Monday 11 April 2005 for the opening of the oral proceedings in the case.

Public hearings were held from 11 April to 29 April 2005, during which the following submissions were presented by the Parties:

On behalf of the DRC,

at the hearing of 25 April 2005, on the claims of the DRC:

"The Congo requests the Court to adjudge and declare:

1. That the Republic of Uganda, by engaging in military and paramilitary activities against the Democratic Republic of the Congo, by occupying its territory and by actively extending military, logistic, economic and financial support to irregular forces having operated there, has violated the following principles of conventional and customary law:

— the principle of non-use of force in international relations, including the prohibition of aggression;

— the obligation to settle international disputes exclusively by peaceful means so as to ensure that international peace and security, as well as justice, are not placed in jeopardy;

— respect for the sovereignty of States and the rights of peoples to self-determination, and hence to choose their own political and economic system freely and without outside interference;

— the principle of non-intervention in matters within the domestic jurisdiction of States, including refraining from extending any assistance to the parties to a civil war operating on the territory of another State.

2. That the Republic of Uganda, by committing acts of violence against nationals of the Democratic Republic of the Congo, by killing and injuring them or despoiling them of their property, by failing to take adequate measures to prevent violations of human rights in the DRC by persons under its jurisdiction or control, and/or failing to punish persons under its jurisdiction or control having engaged in the above-mentioned acts, has violated the following principles of conventional and customary law:

— the principle of conventional and customary law imposing an obligation to respect, and ensure respect for, fundamental human rights, including in times of armed conflict, in accordance with international humanitarian law;

— the principle of conventional and customary law imposing an obligation, at all times, to make a distinction in an armed conflict between civilian and military objectives;

— the right of Congolese nationals to enjoy the most basic rights, both civil and political, as well as economic, social and cultural.

3. That the Republic of Uganda, by engaging in the illegal exploitation of Congolese natural resources, by pillaging its assets and wealth, by failing to take adequate measures to prevent the illegal exploitation of the resources of the DRC by persons under its jurisdiction or control, and/or failing to punish persons under its jurisdiction or control having engaged in the above-mentioned acts, has violated the following principles of conventional and customary law:

— the applicable rules of international humanitarian law;

— respect for the sovereignty of States, including over their natural resources;

— the duty to promote the realization of the principle of equality of peoples and of their right of self-determination, and consequently to refrain from exposing peoples to foreign subjugation, domination or exploitation;

— the principle of non-interference in matters within the domestic jurisdiction of States, including economic matters.

4. *(a)* That the violations of international law set out in submissions 1, 2 and 3 constitute wrongful acts attributable to Uganda which engage its international responsibility;

(b) that the Republic of Uganda shall cease forthwith all continuing internationally wrongful acts, and in particular its support for irregular forces operating in the DRC and its exploitation of Congolese wealth and natural resources;

(c) that the Republic of Uganda shall provide specific guarantees and assurances that it will not repeat the wrongful acts complained of;

(d) that the Republic of Uganda is under an obligation to the Democratic Republic of the Congo to make reparation for all injury caused to the latter by the violation of the obligations imposed by international law and set out in submissions 1, 2 and 3 above;

(e) that the nature, form and amount of the reparation shall be determined by the Court, failing agreement thereon between the Parties, and that the Court shall reserve the subsequent procedure for that purpose.

5. That the Republic of Uganda has violated the Order of the Court on provisional measures of 1 July 2000, in that it has failed to comply with the following provisional measures:

'(1) both Parties must, forthwith, prevent and refrain from any action, and in particular any armed action,

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

(2) both Parties must, forthwith, take all measures necessary to comply with all of their obligations under international law, in particular those under the United Nations Charter and the Charter of the Organization of African Unity, and with United Nations Security Council resolution 1304 (2000) of 16 June 2000;

(3) both Parties must, forthwith, take all measures necessary to ensure full respect within the zone of conflict for fundamental human rights and for the applicable provisions of humanitarian law'";

at the hearing of 29 April 2005, on the counter-claims of Uganda:

"The Congo requests the International Court of Justice to adjudge and declare:

As regards the first counter-claim submitted by Uganda:

(1) to the extent that it relates to the period before Laurent-Désiré Kabila came to power, Uganda's claim is inadmissible because Uganda had previously renounced its right to lodge such a claim: in the alternative, the claim is unfounded because Uganda has failed to establish the facts on which it is based;

(2) to the extent that it relates to the period from the time when Laurent-Désiré Kabila came to power to the time when Uganda launched its armed attack, Uganda's claim is unfounded in fact because Uganda has failed to establish the facts on which it is based;

(3) to the extent that it relates to the period subsequent to the launching of Uganda's armed attack, Uganda's claim is unfounded both in fact and in law because Uganda has failed to establish the facts on which it is based and, in any event, from 2 August 1998 the DRC was in a situation of self-defence.

As regards the second counter-claim submitted by Uganda:

(1) to the extent that it now relates to the interpretation and application of the Vienna Convention of 1961 on Diplomatic Relations, the claim submitted by Uganda radically changes the subject-matter of the dispute, contrary to the Statute and to the Rules of Court; that part of the claim must therefore be dismissed from the present proceedings;

(2) that part of the claim relating to the alleged mistreatment of certain Ugandan nationals remains inadmissible because Uganda has still failed to show that the requirements laid down by international law for the exercise of its diplomatic protection were satisfied; in the alternative, that part of the claim is unfounded because Uganda is still unable to establish the factual and legal bases of its claims.

(3) that part of the claim relating to the alleged expropriation of Uganda's public property is unfounded because Uganda is still unable to establish the factual and legal bases of its claims."

On behalf of Uganda,

at the hearing of 27 April 2005, on the claims of the DRC and the counter-claims of Uganda:

"The Republic of Uganda requests the Court:

(1) To adjudge and declare in accordance with international law:

(A) that the requests of the Democratic Republic of the Congo relating to the activities or situations involving the Republic of Rwanda or her agents are inadmissible for the reasons set forth in Chapter XV of the Counter-Memorial and reaffirmed in the oral pleadings;

(B) that the requests of the Democratic Republic of the Congo that the Court adjudge and declare that the Republic of Uganda is responsible for various breaches of international law, as alleged in the Memorial, the Reply and/or the oral pleadings are rejected; and

(C) that Uganda's counter-claims presented in Chapter XVIII of the Counter-Memorial, and reaffirmed in Chapter VI of the Rejoinder as well as the oral pleadings be upheld.

(2) To reserve the issue of reparation in relation to Uganda's counter-claims for a subsequent stage of the proceedings."

Situation in the Great Lake region and task of the Court
(para. 26)

The Court notes that it is aware of the complex and tragic situation which has long prevailed in the Great Lakes region and of the suffering by the local population. It observes that the instability in the DRC in particular has had negative security implications for Uganda and some other neighbouring States. It however states that its task is to respond, on the basis of international law, to the particular legal dispute brought before it.

The DRC's first submission
(paras. 28–165)

Contentions of the Parties
(paras. 29–41)

The Court sets out the contentions of the Parties. The DRC asserts that, following President Laurent-Désiré Kabila's accession to power in May 1997, Uganda and Rwanda were granted substantial benefits in the DRC in the military and economic fields. According to the DRC, President Kabila subsequently sought to reduce the two countries' influence and this "new policy of independence and emancipation" from Rwanda and Uganda constituted the reason for the invasion of Congolese territory by Ugandan forces in August 1998. The DRC claims that on 4 August 1998 Uganda and Rwanda organized an airborne operation, flying their troops from Goma on the eastern frontier of the DRC to Kitona, some 1,800 km away on the other side of the DRC, on the Atlantic coast. It further states that, in the north-eastern part of the country, within a matter of months, troops from the Uganda Peoples' Defence Forces (UPDF) had advanced and progressively occupied a substantial part of Congolese territory in several provinces. The DRC also submits that Uganda supported Congolese armed groups opposed to President Kabila's Government. For its part Uganda affirms that on 4 August 1998 there were no Ugan-

dan troops present in either Goma or Kitona, or on board the planes referred to by the DRC. It claims that upon assuming power, President Kabila invited Uganda to deploy its troops in eastern Congo since the Congolese army did not have the resources to control the remote eastern provinces, and in order to "eliminate" the anti-Ugandan insurgents operating in that zone and to secure the border region. Uganda maintains that between May and July 1998 President Kabila broke off his alliances with Rwanda and Uganda and established new alliances with Chad, the Sudan and various anti-Ugandan insurgent groups. Uganda affirms that it did not send additional troops into the DRC during August 1998 but states, however, that by August-September 1998, as the DRC and the Sudan prepared to attack Ugandan forces in eastern Congo, its security situation had become untenable. Uganda submits that in response to this "grave threat, and in the lawful exercise of its sovereign right of self-defence", it made a decision on 11 September 1998 to augment its forces in eastern Congo and to gain control of the strategic airfields and river ports in northern and eastern Congo. Uganda notes that the on-going regional peace process led to the signing on 10 July 1999 of the Lusaka Ceasefire Agreement, followed by the Kampala and Harare Disengagement Plans. Finally, under the terms of the bilateral Luanda Agreement, signed on 6 September 2002, Uganda agreed to withdraw all its troops from the DRC, except for those expressly authorized by the DRC to remain on the slopes of Mt. Ruwenzori. Uganda claims that it completed this withdrawal in June 2003 and that since that time, "not a single Ugandan soldier has been deployed inside the Congo".

Issue of consent
(paras. 42–54)

After having examined the materials put before it by the Parties, the Court finds that it is clear that in the period preceding August 1998 the DRC did not object to Uganda's military presence and activities in its eastern border area. The Court takes note of the Protocol on Security along the Common Border signed on 27 April 1998 between the two countries, in which they agreed that their respective armies would "co-operate in order to ensure security and peace along the common border". The Court finds however, that, while the co-operation envisaged in the Protocol may be reasonably understood as having its effect in a continued authorization of Ugandan troops in the border area, it was not the legal basis for such authorization or consent. The source of an authorization or consent to the crossing of the border by these troops antedated the Protocol; this prior authorization or consent could thus be withdrawn at any time by the Government of the DRC, without further formalities being necessary.

The Court observes that when President Kabila came to power, the influence in the DRC of Uganda, and in particular of Rwanda, became substantial. It states that from late Spring 1998 President Kabila sought, for various reasons, to reduce this foreign influence. On 28 July 1998, an official statement by President Kabila was published, in which he announced that he "had just terminated, with effect from . . . Monday 27 July 1998, the Rwandan military presence which has assisted us during the period of the country's liberation" and concluded that "this marks the end of the presence of all foreign military forces in the Congo". The DRC contends that, although there was no specific reference to Ugandan troops in the statement, the final phrase indicated that consent was withdrawn for Ugandan as well as Rwandan troops. Uganda, for its part, maintains that the President's statement was directed at the Rwandan forces alone. The Court observes that the content of President Kabila's statement, as a purely textual matter, was ambiguous.

The Court draws attention to the fact that the consent that had been given to Uganda to place its forces in the DRC, and to engage in military operations, was not an open-ended consent. Even had consent to the Ugandan military presence extended much beyond the end of July 1998, the parameters of that consent, in terms of geographic location and objectives, would have remained thus restricted.

In the event, the issue of withdrawal of consent by the DRC, and that of expansion by Uganda of the scope and nature of its activities, went hand in hand. The Court observes that at the Summit of Heads of State held in Victoria Falls on 7 and 8 August 1998 the DRC accused Rwanda and Uganda of invading its territory. It thus appears evident to the Court that any earlier consent by the DRC to the presence of Ugandan troops on its territory had at the latest been withdrawn by 8 August 1998, i.e. the closing date of the Summit.

Findings of fact concerning Uganda's use of force in respect of Kitona
(paras. 55–71)

The Court notes that the dispute about the commencement date of the military action by Uganda that was not covered by consent is, in the most part, directed at the legal characterization of events rather than at whether these events occurred. In some instances, however, Uganda denies that its troops were ever present at particular locations, the military action at Kitona being an important example.

The Court then sets out its method of assessing the vast amount of evidentiary materials proffered by the Parties. It recalls that its task is to decide not only which of those materials must be considered relevant, but also which of them have probative value with regard to the alleged facts. The Court explains that it will treat with caution evidentiary materials specially prepared for this case and also materials emanating from a single source. It will prefer contemporaneous evidence from persons with direct knowledge; it will give particular attention to reliable evidence acknowledging facts or conduct unfavourable to the State represented by the person making them; and it will give weight to evidence that has not been challenged by impartial persons for the correctness of what it contains. It further points out that evidence obtained by examination of persons directly involved, and who were subsequently cross-examined by judges skilled in examination and experienced in assessing large amounts of factual information, merits special attention. It will thus give appropriate consideration to the Report of the Judicial Commission of Inquiry into Allegations of Illegal Exploitation of Natural Resources and Other Forms of Wealth in the Democratic Republic of the Congo set up by the Ugandan Government in May 2001 and headed by Justice David Porter ("the Porter Commission"), which has been accepted by both Parties.

Having examined the evidence in relation to the DRC's contention concerning the events at Kitona, the Court concludes that it has not been established to its satisfaction that Uganda participated in the attack on Kitona on 4 August 1998.

Findings of fact: military action in the east of the DRC and in other areas of that country
(paras. 72–91)

The Court states that the facts regarding the military action by Uganda in the east of the DRC between August 1998 and July 1999 are relatively little contested between the Parties. Based on the evidence in the case file, it determines which locations were taken by Uganda in this period and the corresponding "dates of capture".

The Court states that there is, however, considerable controversy between the Parties over the DRC's claim regarding towns taken after 10 July 1999. The Court recalls that on this date the Parties had agreed to a ceasefire and to all further provisions of the Lusaka Agreement. It makes no findings as to the responsibility of each of the Parties for any violations of the Lusaka Agreement, confining itself to stating that it has not received convincing evidence that Ugandan forces were present at locations claimed by the DRC to have been taken after 10 July 1999.

Did the Lusaka, Kampala and Harare Agreements constitute any consent of the DRC to the presence of Ugandan troops?
(paras. 92–105)

The Court turns to the question whether the Lusaka Agreement, the Kampala and Harare Disengagement Plans and the Luanda Agreement constituted consent to the presence of Ugandan troops on the territory of the DRC.

It observes that nothing in the provisions of the Lusaka Agreement can be interpreted as an affirmation that the security interests of Uganda had already required the presence of Ugandan forces on the territory of the DRC as from September 1998. It finds that the Lusaka Agreement only represented an agreed *modus operandi* for the parties, providing a framework for the orderly withdrawal of all foreign forces from the DRC. In accepting this *modus operandi* the DRC did not "consent" to the presence of Ugandan troops. This conclusion did not change with the revisions to the schedule for withdrawal that subsequently became necessary.

After careful examination of the Kampala and Harare Disengagement Plans, as well as of the Luanda Agreement, the Court concludes that the various treaties directed to achieving and maintaining a ceasefire, the withdrawal of foreign forces and the stabilization of relations between the DRC and Uganda, did not (save for the limited exception regarding the border region of the Ruwenzori Mountains contained in the Luanda Agreement) constitute consent by the DRC to the presence of Ugandan troops on its territory for the period after July 1999, in the sense of validating that presence in law.

Self-defence in the light of proven facts
(paras. 106–147)

The Court states that Ugandan actions at Aru, Beni, Bunia and Watsa in August 1998 were of a different nature from previous operations along the common border. The Court finds these actions to be quite outside any mutual understanding between the Parties as to Uganda's presence on Congolese territory near the border. Such actions could therefore only be justified, if at all, as actions in self-defence. However, the Court notes that at no time has Uganda sought to justify them on this basis. By contrast, the operation known as operation "Safe Haven", i.e. military actions of Uganda on the DRC's territory after 7 August 1998, was firmly rooted in a claimed entitlement "to secure Uganda's legitimate security interests" and, according to the Court, those who were intimately involved in its execution regarded the military actions throughout August 1998 as already part and parcel of that operation.

The Court observes that the objectives of operation "Safe Haven", as stated in a Ugandan High Command document issued on 11 September 1998, were not consonant with the concept of self-defence as understood in international law. Uganda maintains that the operation had been launched because of "stepped-up cross-border attacks against Uganda by the Allied Democratic Forces (ADF), which was being re-supplied and re-equipped by the Sudan and the DRC Government". Uganda claims that there existed a tripartite anti-Ugandan conspiracy between the DRC, the ADF and the Sudan for this purpose. After careful consideration of the evidence produced by Uganda, the Court observes that it cannot safely be relied on to prove that there was an agreement between the DRC and the Sudan to participate in or to support military action against Uganda; or that any action by the Sudan was of such character as to justify Uganda's claim that it was acting in self-defence.

The Court further notes that Uganda did not report to the Security Council events that it had regarded as requiring it to act in self-defence. It further states that Uganda never claimed that it had been subjected to an armed attack by the armed forces of the DRC. The "armed attacks" to which reference was made came rather from the ADF. Furthermore, there was no satisfactory proof of the involvement in these attacks, direct or indirect, of the Government of the DRC.

The Court concludes that the legal and factual circumstances for the exercise of a right of self-defence by Uganda against the DRC were not present.

Findings of law on the prohibition against the use of force
(paras. 148–165)

As to the DRC's claim that, from September 1998 onwards, Uganda both created and controlled the Congo Liberation Movement (MLC), a rebel movement led by Mr. Bemba, the Court states that there is no credible evidence to support this allegation. The Court however notes that the training and military support given by Uganda to the ALC, the military wing of the MLC, violated certain obligations of international law.

In relation to the first of the DRC's final submissions, the Court finds that Uganda has violated the sovereignty and also the territorial integrity of the DRC. Uganda's actions equally constituted an interference in the internal affairs of the DRC and in the civil war raging there. The unlawful military intervention by Uganda was of such magnitude and duration that the Court considers it to be a grave violation of the prohibition

on the use of force expressed in Article 2, paragraph 4, of the Charter.

The issue of belligerent occupation
(paras. 166–180)

Before turning to the DRC's second and third submissions, the Court considers the question as to whether or not Uganda was an occupying Power in the parts of the Congolese territory where its troops were present at the relevant time.

It observes that, under customary international law, as reflected in Article 42 of the Hague Regulations of 1907, territory is considered to be occupied when it is actually placed under the authority of the hostile army, and the occupation extends only to the territory where such authority has been established and can be exercised.

The Court states that it is not disputed between the Parties that General Kazini, commander of the Ugandan forces in the DRC, created the new "province of Kibali-Ituri" in June 1999. It considers that, regardless of whether or not General Kazini acted in violation of orders and was punished as a result, his conduct is clear evidence of the fact that Uganda established and exercised authority in Ituri as an occupying Power. The Court however observes that the DRC does not provide any specific evidence to show that authority was exercised by the Ugandan armed forces in any areas other than in Ituri district.

Having concluded that Uganda was the occupying Power in Ituri at the relevant time, the Court states that, as such, it was under an obligation, according to Article 43 of the Hague Regulations, to take all measures in its power to restore, and ensure, as far as possible, public order and safety in the occupied area, while respecting, unless absolutely prevented, the laws in force in the DRC. This obligation comprised the duty to secure respect for the applicable rules of international human rights law and international humanitarian law, to protect the inhabitants of the occupied territory against acts of violence, and not to tolerate such violence by any third party.

The Court finds that Uganda's responsibility is engaged both for any acts of its military that violated its international obligations and for any lack of vigilance in preventing violations of human rights and international humanitarian law by other actors present in the occupied territory, including rebel groups acting on their own account. It notes that Uganda at all times has responsibility for all actions and omissions of its own military forces in the territory of the DRC in breach of its obligations under the rules of international human rights law and international humanitarian law which are relevant and applicable in the specific situation.

The DRC's second submission
(paras. 181–221)

Violations of international human rights law and international humanitarian law: contentions of the Parties
(paras. 181–195)

The Court sets out the contention of the DRC that Ugandan armed forces committed wide-scale human rights violations on Congolese territory, particularly in Ituri, and Uganda's contention that the DRC has failed to provide any credible evidentiary basis to support its allegations.

Admissibility of claims in relation to events in Kisangani
(paras. 196–204)

The DRC's claim relates in part to events in Kisangani, where in June 2000 fighting broke out between Ugandan and Rwandan troops. It is Uganda's contention that, in the absence of Rwanda from the proceedings, the DRC's claim relating to Uganda's responsibility for these events is inadmissible.

The Court points out that it has had to examine questions of this kind on previous occasions. In the case concerning *Certain Phosphate Lands (Nauru* v. *Australia),* the Court observed that it is not precluded from adjudicating upon the claims submitted to it in a case in which a third State "has an interest of a legal nature which may be affected by the decision in the case", provided that "the legal interests of the third State which may possibly be affected do not form the very subject-matter of the decision that is applied for". The Court considers that this jurisprudence is applicable in the current proceedings since the interests of Rwanda do not constitute the "very subject-matter" of the decision to be rendered by it. Thus it is not necessary for Rwanda to be a party to this case for the Court to be able to rule on Uganda's responsibility for violations of its obligations under international human rights law and international humanitarian law in the course of fighting in Kisangani.

Violations of international human rights law and international humanitarian law: findings of the Court
(paras. 205–221)

Having examined the case file, the Court considers that it has credible evidence sufficient to conclude that the UPDF troops committed acts of killing, torture and other forms of inhumane treatment of the civilian population, destroyed villages and civilian buildings, failed to distinguish between civilian and military targets and to protect the civilian population in fighting with other combatants, incited ethnic conflict and took no steps to put an end to such conflicts, was involved in the training of child soldiers, and failed to take measures to ensure respect for human rights and international humanitarian law in Ituri.

The Court however does not consider that the allegation of the DRC that the Ugandan Government carried out a deliberate policy of terror has been proven.

Turning to the question as to whether acts and omissions of the UPDF and its officers and soldiers are attributable to Uganda, the Court states that the conduct of the UPDF as a whole is clearly attributable to Uganda, being the conduct of a State organ. The conduct of individual soldiers and officers of the UPDF is to be considered as the conduct of a State organ. In the Court's view, by virtue of the military status and function of Ugandan soldiers in the DRC, their conduct is attributable to Uganda. It is furthermore irrelevant for the attribution of their conduct to Uganda whether UPDF personnel acted contrary to the instructions given or exceeded their authority. According to a well-established rule of a customary nature, as reflected in Article 3 of the Fourth Hague Convention respecting the Laws and Customs of War on Land of 1907 as well as in Article 91 of Protocol I additional to the Geneva Conventions of 1949, a party to an armed conflict shall be responsible for all acts by persons forming part of its armed forces.

The Court finds that the acts committed by the UPDF and officers and soldiers of the UPDF are in clear violation of the obligations under the Hague Regulations of 1907, Articles 25, 27 and 28, as well as Articles 43, 46 and 47 with regard to obligations of an occupying Power. These obligations are binding on the Parties as customary international law. Uganda also violated the following provisions of the international humanitarian law and international human rights law instruments, to which both Uganda and the DRC are parties:

– Fourth Geneva Convention, Articles 27 and 32 as well as Article 53 with regard to obligations of an occupying Power;

– International Covenant on Civil and Political Rights, Articles 6, paragraph 1, and 7;

– First Protocol Additional to the Geneva Conventions of 12 August 1949, Articles 48, 51, 52, 57, 58 and 75, paragraphs 1 and 2;

– African Charter on Human and Peoples' Rights, Articles 4 and 5;

– Convention on the Rights of the Child, Article 38, paragraphs 2 and 3;

– Optional Protocol to the Convention on the Rights of the Child, Articles 1, 2, 3, paragraph 3, Articles 4, 5 and 6.

The Court thus concludes that Uganda is internationally responsible for violations of international human rights law and international humanitarian law committed by the UPDF and by its members in the territory of the DRC and for failing to comply with its obligations as an occupying Power in Ituri.

The Court points out that, while it has pronounced on the violations of international human rights law and international humanitarian law committed by Ugandan military forces on the territory of the DRC, the actions of the various parties in the complex conflict in the DRC have contributed to the immense suffering faced by the Congolese population. The Court is painfully aware that many atrocities have been committed in the course of the conflict. It is incumbent on all those involved in the conflict to support the peace process in the DRC and other peace processes in the Great Lakes area, in order to ensure respect for human rights in the region.

The DRC's third submission
(paras. 222–250)

Illegal exploitation of natural resources
(paras. 222–236)

The Court sets out the contention of the DRC that Ugandan troops systematically looted and exploited the assets and natural resources of the DRC and Uganda's contention that the DRC has failed to provide reliable evidence to corroborate its allegations.

Findings of the Court concerning acts of illegal exploitation of natural resources
(paras. 237–250)

Having examined the case file, the Court finds that it does not have at its disposal credible evidence to prove that there was a governmental policy on the part of Uganda directed at the exploitation of natural resources of the DRC or that Uganda's military intervention was carried out in order to obtain access to Congolese resources. At the same time, the Court considers that it has ample credible and persuasive evidence to conclude that officers and soldiers of the UPDF, including the most high-ranking officers, were involved in the looting, plundering and exploitation of the DRC's natural resources and that the military authorities did not take any measures to put an end to these acts.

As the Court has already noted, Uganda is responsible both for the conduct of the UPDF as a whole and for the conduct of individual soldiers and officers of the UPDF in the DRC. The Court further recalls that it is also irrelevant for the purposes of attributing their conduct to Uganda whether UPDF officers and soldiers acted contrary to instructions given or exceeded their authority.

The Court finds that it cannot uphold the contention of the DRC that Uganda violated the principle of the DRC's sovereignty over its natural resources. While recognizing the importance of this principle, the Court does not believe that it is applicable to the specific situation of looting, pillage and exploitation of certain natural resources by members of the army of a State militarily intervening in another State.

As the Court has already stated, the acts and omissions of members of Uganda's military forces in the DRC engage Uganda's international responsibility in all circumstances, whether it was an occupying Power in particular regions or not. Thus, whenever members of the UPDF were involved in the looting, plundering and exploitation of natural resources in the territory of the DRC, they acted in violation of the *jus in bello,* which prohibits the commission of such acts by a foreign army in the territory where it is present. The Court notes in this regard that both Article 47 of the Hague Regulations of 1907 and Article 33 of the Fourth Geneva Convention of 1949 prohibit pillage.

The Court further observes that both the DRC and Uganda are parties to the African Charter on Human and Peoples' Rights of 27 June 1981, paragraph 2 of Article 21 of which states that "[i]n case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation".

The Court finds that there is sufficient evidence to support the DRC's claim that Uganda violated its duty of vigilance by not taking adequate measures to ensure that its military forces did not engage in the looting, plundering and exploitation of the DRC's natural resources. It follows that by this failure to act Uganda violated its international obligations, thereby incurring its international responsibility. In any event, whatever measures had been taken by its authorities, Uganda's responsibility was nonetheless engaged by the fact that the unlawful acts had been committed by members of its armed forces.

As for the claim that Uganda also failed to prevent the looting, plundering and illegal exploitation of the DRC's natural resources by rebel groups, the Court has already found that the latter were not under the control of Uganda. Thus, with regard to the illegal activities of such groups outside of Ituri, it cannot conclude that Uganda was in breach of its duty of vigilance.

The Court further observes that the fact that Uganda was the occupying Power in Ituri district extends Uganda's obligation to take appropriate measures to prevent the looting, plundering and exploitation of natural resources in the occupied territory to cover private persons in this district and not only members of Ugandan military forces.

The Court finally concludes that it is in possession of sufficient credible evidence to find that Uganda is internationally responsible for acts of looting, plundering and exploitation of the DRC's natural resources committed by members of the UPDF in the territory of the DRC, for violating its obligation of vigilance in regard to these acts and for failing to comply with its obligations under Article 43 of the Hague Regulations of 1907 as an occupying Power in Ituri in respect of all acts of looting, plundering and exploitation of natural resources in the occupied territory.

The DRC's fourth submission
(paras. 251–261)

Legal consequences of violations of international obligations by Uganda

The DRC requests the Court to adjudge and declare that Uganda shall cease forthwith all continuing internationally wrongful acts.

The Court observes that there is no evidence in the case file which can corroborate the DRC's allegation that at present Uganda supports irregular forces operating in the DRC and continues to be involved in the exploitation of Congolese natural resources. The Court thus does not find it established that Uganda, following the withdrawal of its troops from the territory of the DRC in June 2003, continues to commit the internationally wrongful acts specified by the DRC. The Court accordingly concludes that the DRC's request cannot be upheld.

The DRC further requests the Court to rule that Uganda provide specific guarantees and assurances of non-repetition of the wrongful acts complained of. In this respect the Court has taken judicial notice of the Tripartite Agreement on Regional Security in the Great Lakes, signed on 26 October 2004 by the DRC, Rwanda and Uganda. In the Preamble of this Agreement the Parties emphasize "the need to ensure that the principles of good neighbourliness, respect for the sovereignty, territorial integrity, and non-interference in the internal affairs of sovereign states are respected, particularly in the region". In the Court's view, the commitments assumed by Uganda under the Tripartite Agreement must be regarded as meeting the DRC's request for specific guarantees and assurances of non-repetition. The Court expects and demands that the Parties will respect and adhere to their obligations under that Agreement and under general international law.

Finally, the DRC asks the Court to adjudge and declare that Uganda is under an obligation to make reparation to the DRC for all injury caused by the violation by Uganda of its obligations under international law. The Court observes that it is well established in general international law that a State which bears responsibility for an internationally wrongful act is under an obligation to make full reparation for the injury caused by that act. Upon examination of the case file, given the character of the internationally wrongful acts for which Uganda has been found responsible, the Court considers that those acts resulted in injury to the DRC and to persons on its territory. Having satisfied itself that this injury was caused to the DRC by Uganda, the Court finds that Uganda has an obligation to make reparation accordingly.

The Court further considers appropriate the request of the DRC for the nature, form and amount of the reparation due to it to be determined by the Court, failing agreement between the Parties, in a subsequent phase of the proceedings.

The DRC's fifth submission
(paras. 262–265)

Compliance with the Court's Order on provisional measures

The Court then examines the question whether Uganda has complied with the Order of the Court on provisional measures of 1 July 2000. Having observed that its "orders on provisional measures under Article 41 [of the Statute] have binding effect", the Court states that the DRC did not put forward any specific evidence demonstrating that after July 2000 Uganda committed acts in violation of each of the three provisional measures indicated by the Court. The Court however observes that in its Judgment it has found that Uganda is responsible for acts in violation of international humanitarian law and international human right law. The evidence shows that such violations were committed throughout the period when Ugandan troops were present in the DRC, including the period from 1 July 2000 until practically their final withdrawal on 2 June 2003. The Court thus concludes that Uganda did not comply with the Order.

The Court further notes that the provisional measures indicated in the Order of 1 July 2000 were addressed to both Parties. The Court's finding is without prejudice to the question as to whether the DRC also failed to comply with the provisional measures indicated by the Court.

Counter-Claims
(paras. 266–344)

Admissibility of objections
(paras. 266–275)

The DRC maintains that the joinder of Uganda's first and second counter-claims to the proceedings following the Order of 29 November 2001, by which the Court found that those two counter-claims were admissible as such, does not imply that preliminary objections cannot be raised against them. Uganda asserts for its part that the DRC is no longer entitled at this stage of the proceedings to plead the inadmissibility of the counter-claims, since the Court's Order is a definitive determination on counter-claims under Article 80 of the Rules of Court.

The Court notes that in the *Oil Platforms* case it was called upon to resolve the same issue and that it concluded that Iran was entitled to challenge the admissibility of the United States counter-claim in general, even though the counter-claim had previously been found admissible under Article 80 of the Rules. The Court also points out that Article 79 of the Rules of Court

invoked by Uganda is inapplicable to the case of an objection to counter-claims which have been joined to the original proceedings. It accordingly finds that the DRC is entitled to challenge the admissibility of Uganda's counter-claims.

First counter-claim
(paras. 276–305)

In its first counter-claim, Uganda contends that, since 1994, it has been the victim of military operations and other destabilizing activities carried out by hostile armed groups based in the DRC and either supported or tolerated by successive Congolese governments.

In rebutting Uganda's first counter-claim, the DRC divides it into three periods of time: *(a)* the period prior to President Laurent-Désiré Kabila coming to power in May 1997; *(b)* the period starting from the accession to power of President Kabila until 2 August 1998, the date on which Uganda's military attack was launched; and *(c)* the period subsequent to 2 August 1998. It submits that, in so far as the alleged claim that the DRC was involved in armed attacks against Uganda covers the first period, it is inadmissible on the basis that Uganda renounced its right to invoke the international responsibility of the DRC (Zaire at the time) in respect of acts dating back to that period; and, in the alternative, groundless. It further asserts that the claim has no basis in fact for the second period and that it is not founded in fact or in law regarding the third period.

The Court does not see any obstacle to examining Uganda's first counter-claim following these three periods of time, and for practical purposes deems it useful to do so.

With respect to the question of admissibility of the first part of the counter-claim, the Court observes that nothing in the conduct of Uganda in the period after May 1997 can be considered as implying an unequivocal waiver of its right to bring a counter-claim relating to events which occurred during the Mobutu régime. It adds that the long period of time between the events during the Mobutu régime and the filing of Uganda's counter-claims has not rendered inadmissible Uganda's first counter-claim for the period prior to May 1997. The DRC's objection to admissibility cannot therefore be upheld.

With respect to the merits of the counter-claim for the first period, the Court finds that Uganda has not produced sufficient evidence to show that Zaire provided political and military support to anti-Ugandan rebel groups operating in its territory during the Mobutu régime.

With regard to the second period, the Court finds that Uganda has failed to provide conclusive evidence of actual support for anti-Ugandan rebel groups by the DRC. The Court notes that during this period, the DRC was in fact acting together with Uganda against the rebels, not in support of them.

In relation to the third period, and in view of the Court's finding that Uganda engaged in an illegal military operation against the DRC, the Court considers that any military action taken by the DRC against Uganda during this period could not be deemed wrongful since it would be justified as action taken in self-defence under Article 51 of the United Nations Charter. Moreover, the Court has already found that the alleged participation of DRC regular troops in attacks by anti-Ugandan rebels against the UPDF and the alleged support to anti-Ugandan insurgents in this period cannot be considered proven.

The first counter-claim thus fails in its entirety.

Second counter-claim
(paras. 306–344)

In its second counter-claim, Uganda contends that Congolese armed forces attacked the premises of the Ugandan Embassy, confiscated property belonging to the Government of Uganda, Ugandan diplomats and Ugandan nationals; and maltreated diplomats and other Ugandan nationals present on the premises of the mission and at Ndjili International Airport.

In rebutting Uganda's second counter-claim, the DRC argues that it is partially inadmissible on the ground that Uganda has ascribed new legal bases in its Rejoinder to the DRC's responsibility by including claims based on the violation of the Vienna Convention on Diplomatic Relations. According to the DRC, Uganda thus breaks the connection with the principal claim. The DRC also asserts that the alleged modification of the subject-matter of this part of the dispute is manifestly incompatible with the Court's Order of 29 November 2001.

The DRC further argues that the claim based on the inhumane treatment of Ugandan nationals cannot be admitted, because the requirements for admissibility of a diplomatic protection claim are not satisfied.

As to the merits of the second counter-claim, the DRC argues that in any event Uganda has been unable to establish the factual and legal bases of its claims.

With respect to the question of admissibility, the Court finds that its Order of 29 November 2001 did not preclude Uganda from invoking the Vienna Convention on Diplomatic Relations, since the formulation of the Order was sufficiently broad to encompass claims based on the Convention. It further observes that the substance of the part of the counter-claim relating to acts of maltreatment against other persons on the premises of the Embassy falls within the ambit of Article 22 of the Convention and is admissible. It however states that the other part relating to the maltreatment of persons not enjoying diplomatic status at Ndjili International Airport as they attempted to leave the country is based on diplomatic protection and that, in the absence of evidence with respect to the Ugandan nationality of the persons in question, that part of the counter-claim is inadmissible.

Regarding the merits of Uganda's second counter-claim, the Court finds that there is sufficient evidence to prove the attacks against the Embassy and acts of maltreatment against Ugandan diplomats on Embassy premises and at Ndjili International Airport. It finds that, by committing those acts, the DRC breached its obligations under Articles 22 and 29 of the Vienna Convention on Diplomatic Relations. The Court further finds that the removal of property and archives from the Ugandan Embassy was in violation of the rules of international law on diplomatic relations.

The Court points out that it would only be at a subsequent phase, failing an agreement between the Parties, that the specific circumstances of these violations as well as the precise damage suffered by Uganda and the extent of the reparation to which it is entitled would have to be demonstrated.

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Declaration of Judge Koroma

In his declaration appended to the Judgment, Judge Koroma emphasizes that the circumstances and consequences of the case involving loss of millions of lives and other suffering have made it one of the most tragic and compelling to come before the Court.

Judge Koroma outlines the Court's findings confirming that Uganda has been in violation of a wide range of legal instruments to which it is a party and, according to the evidence before the Court, the violations gave rise to the most egregious of consequences. He stresses the importance of these obligations with specific reference to Articles 1 and 2 of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949; Article 51 of Protocol I Additional to the Geneva Conventions of 12 August 1949; and Articles 3, 19, and 38 of the Convention on the Rights of the Child of 28 November 1989.

Judge Koroma emphasizes that, crucially and for very cogent reasons, the Court has rejected Uganda's contention that it acted in self-defence in using military force in the Congo. Specifically, he observes the Court rightly rejected Uganda's claim that actions of the ADF were attributable to the Congo in the sense of Article 3, paragraph *(g),* of the Definition of Aggression of 1974 (XXIX). Judge Koroma notes that such a finding of the Court is consistent with its past jurisprudence and is a correct interpretation of Article 51 of the United Nations Charter.

Judge Koroma notes that the Court acknowledged the customary law character of General Assembly resolution 1803 (XVII) of 14 December 1962, on permanent sovereignty over natural resources, noting also that both Congo and Uganda are parties to the African Charter on Human and Peoples' Rights of 1981, which contains a provision on permanent sovereignty over natural resources in Article 21, paragraph 1.

Judge Koroma comments that the findings of the Court, a judicial organ, are in the main in accordance with determinations made by the Security Council in its resolutions on this dispute.

Judge Koroma concludes that, above all, Uganda should have respected the fundamental and customary principle of international law, the principle of *pacta sunt servanda*—requiring a State to comply with its obligations under a treaty. Observance of treaty obligations serves an important role in maintaining peace and security between neighbouring States, and observance of the principle of *pacta sunt servanda* would have prevented the tragedy so vividly put before the Court.

Separate opinion of Judge Parra-Aranguren

His vote in favour of the Judgment does not mean that Judge Parra-Aranguren agrees with all the findings of its operative part nor that he concurs with each and every part of the reasoning followed by the majority of the Court in reaching its conclusions.

I

In paragraph 345 (1) of the operative part of the Judgment the Court

> "*Finds* that the Republic of Uganda, by engaging in military activities against the Democratic Republic of the Congo . . . violated the principle of non-use of force in international relations and the principle of non-intervention."

Judge Parra-Aranguren agrees that the Republic of Uganda (hereinafter referred to as "Uganda") violated the principle of non-use of force in international relations by engaging in military activities against the Democratic Republic of the Congo (hereinafter referred to as the "DRC") between 7 and 8 August 1998 and 10 July 1999, for the reasons explained in the Judgment; but he does not agree with the finding that the violation continued from 10 July 1999 until 2 June 2003, when Ugandan troops withdrew from the DRC territory, because in his opinion the DRC consented during this period to their presence in its territory under the terms and conditions prescribed in the Lusaka Ceasefire Agreement of 10 July 1999, the Kampala Disengagement Plan of 8 April 2000, the Harare Disengagement Plan of 6 December 2000 and the Luanda Agreement of 6 September 2002, as amended in the Dar es Salaam Agreement of 10 February 2003.

The majority of the Court understands that the Lusaka Ceasefire Agreement did not change the legal status of the presence of Uganda, i.e., in violation of international law, but at the same time it considers that Uganda was under an obligation to respect the timetable agreed upon, as revised in the Kampala Disengagement Plan of 8 April 2000, the Harare Disengagement Plan of 6 December 2000 and the Luanda Agreement of 6 September 2002 (paragraphs 95, 97, 99, 101, and 104 of the Judgment).

In the opinion of Judge Parra-Aranguren this interpretation of the Lusaka Ceasefire Agreement, the Kampala Disengagement Plan, the Harare Disengagement Plan and the Luanda Agreement creates an impossible legal situation for Uganda. On the one hand, if Uganda complied with its treaty obligations and remained in the territory of the DRC until the expiration of the timetables agreed upon, Uganda would be in violation of international law because the legal status of its presence had not been changed, the status of its military forces in the DRC remaining a violation of international law. On the other hand, if Uganda chose not to violate international law as a consequence of its military presence in the DRC, and therefore withdrew its troops from the territory of the DRC otherwise than in accordance with the timetables agreed upon, Uganda would have violated its treaty obligations, thereby also being in violation of international law.

This reasoning is persuasive enough, in the opinion of Judge Parra-Aranguren not to accept the very peculiar interpretation advanced in the Judgment of the Lusaka Ceasefire

Agreement, the Kampala Disengagement Plan, the Harare Disengagement Plan and the Luanda Agreement. Moreover, an examination of the terms of these instruments leads to the conclusion that the DRC consented, not retroactively but for the time they were in force, to the presence of Uganda's military forces in the territory of the DRC, as it is explained in detail in paragraphs 10 to 20 of his separate opinion.

II

In paragraph 345 (1) of the operative part of the Judgment the Court

> "*Finds* that the Republic of Uganda . . . by actively extending military, logistic, economic and financial support to irregular forces having operated on the territory of the DRC, violated the principle of non-use of force in international relations and the principle of non-intervention."

In this respect Judge Parra-Aranguren observes that the Lusaka Ceasefire Agreement stipulated the importance of the solution of the internal conflict in the Congo by inter-Congolese dialogue. The Government of the DRC, the Rally for the Congolese Democracy (RCD), the Movement for the Liberation of the Congo (MLC), the political opposition, the civil society, the Congolese Rally for Democracy/Movement of Liberation (RCD-NL), the Congolese Rally for Democratic/National (RDC/N) and the Mai Mai decided, on 16 December 2002 in Pretoria, to put in place a government of national unity, aiming at national reconciliation. A calendar was set forth but it was not complied with, political reconciliation only being implemented through the installation of a new national government, including leaders of the three armed rebel organizations and Congolese society; the military forces of these three rebel groups were fully integrated into the national army and democratic elections were to be held within two years.

Judge Parra-Aranguren accepts the principles of international law enunciated in General Assembly resolution 2625 (XXV) (24 October 1970) mentioned in paragraph 162 of the Judgment, but in his view they do not apply to the present case. As a consequence of the dialogue among the parties, a new national government was installed on 1 July 2003 in the DRC with participation of the leaders of the rebel forces, which were integrated into the Congolese army; this reconciliation, in the opinion of Judge Parra-Aranguren, exonerates Uganda from any possible international responsibility arising out of the assistance it gave in the past to the RCD and to the MLC.

A similar situation took place in the Congo not very long ago, when in May 1997 the Alliance of Democratic Forces for the Liberation of the Congo (AFGL), with the support of Uganda and Rwanda, overthrew the legal Head of State of the former Zaire, Marshal Mobutu Ssese Seko, taking control of the country under the direction of Laurent-Désiré Kabila. Judge Parra-Aranguren wonders whether Uganda would have been condemned for this assistance had the Court been requested by the DRC to make such a declaration after Laurent-Désiré Kabila legally assumed the Presidency of the country.

III

In paragraph 345 (1) of the operative part of the Judgment the Court

> "*Finds* that the Republic of Uganda . . . by occupying Ituri . . . violated the principle of non-use of force in international relations and the principle of non-intervention."

The majority of the Court maintains that customary international law is reflected in the Regulations Respecting the Laws and Customs of War on Land annexed to the Fourth Hague Convention of 18 October 1907 (hereinafter "the Hague Regulations of 1907") (Judgment, paragraph 172). In the opinion of Judge Parra-Aranguren this statement is noteworthy because occupying Powers have not always complied with the Hague Regulations of 1907.

The Court examines whether the requirements of Article 42 of "the Hague Regulations of 1907" are met in the present case, stressing that it must satisfy itself that Ugandan armed forces in the DRC were not only stationed in particular locations but that they had substituted their own authority for that of the Congolese Government (Judgment, paragraph 173).

Paragraph 175 of the Judgment states:

> "It is not disputed between the Parties that General Kazini, commander of the Ugandan forces in the DRC, created the new 'province of Kibali-Ituri' in June 1999 and appointed Ms. Adèle Lotsove as its Governor. Various sources of evidence attest to this fact, in particular a letter from General Kazini dated 18 June 1999, in which he appoints Ms. Adèle Lotsove as 'provisional Governor' and gives suggestions with regard to questions of administration of the new province. This is also supported by material from the Porter Commission. The Court further notes that the Sixth report of the Secretary-General on MONUC (S/2001/128 of 12 February 2001) states that, according to MONUC military observers, the UPDF was in effective control in Bunia (capital of Ituri district)."

These facts are not disputed by Uganda and the majority of the Court concludes from them that the conduct of General Kazini "is clear evidence of the fact that Uganda established and exercised authority in Ituri as an occupying Power" (Judgment, paragraph 176).

In the opinion of Judge Parra-Aranguren this conclusion is not acceptable. It is true that General Kazini, Commander of the Ugandan forces in the DRC, appointed Ms. Adèle Lotsove as "provisional Governor" in charge of the newly created province of Kibali-Ituri in June 1999, giving her suggestions with regard to the administration of the province. However, this fact does not prove that either General Kazini or the appointed Governor were in a position to exercise, and in fact did exercise, actual authority in the whole province of Kibali-Ituri. It is also true that the UPDF was in control in Bunia (capital of Kibali-Ituri district), but control over Bunia does not imply effective control over the whole province of Kibali-Ituri, just as control over the capital of the DRC (Kinshasa) by the Government does not inevitably mean that it actually controls the whole territory of the country. Therefore, Judge Parra-Aranguren considers that the elements advanced in the Judgment do not prove that Uganda established and exercised actual authority in the whole province of Kibali-Ituri.

In addition, Judge Parra-Aranguren observes that the DRC's Application instituting proceedings against Rwanda, filed in the Registry on 28 May 2002, which is a document in

the public domain, states in paragraph 5 of the section entitled Statement of Facts, under the heading "Armed Aggression":

> "5. Since 2 August 1995, Rwandan troops have occupied a significant part of the eastern Democratic Republic of the Congo, notably in the provinces of Nord-Kivu, Sud-Kivu, Katanga, Kasai Oriental, Kasai Occidental, and Maniema and in Orientale Province, committing atrocities of all kinds there with total impunity." (*Armed Activities on the Territory of the Congo (New Application: 2002), I. Statement of Facts; A. Armed Aggression,* p. 7.)

Consequently, in this statement "against interest" the DRC maintains that Rwanda occupied Orientale province from 1995 until the end of May 2002, the date of its New Application to the Court, and Orientale province included the territories of what was to become Kibali-Ituri province in 1999. Therefore, the DRC considered Rwanda as the occupying Power of those territories, including the territories of Kibali-Ituri, and gave no indication in its Application that the occupation by Rwanda came to an end after the creation of Kibali-Ituri province.

Moreover, Judge Parra-Aranguren considers that the Special Report on the events in Ituri, January 2002 to December 2003, prepared by the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC), and distributed on 16 July 2004 does not support the conclusion that Uganda's authority was actually exercised in the whole territory of Kibali-Ituri province, as would be required by the 1907 Hague Regulations in order for Uganda to be considered its occupying Power. On the contrary, it acknowledges that Rwanda as well as many rebel groups played an important role in the tragedy experienced in Kibali-Ituri province, as it is explained in paragraphs 36 to 41 of his separate opinion.

The above considerations demonstrate in the opinion of Judge Parra-Aranguren that Uganda was not an occupying Power of the whole of Kibali-Ituri province but of some parts of it and at different times, as Uganda itself acknowledges. Therefore, he considers that it is for the DRC in the second phase of the present proceedings to demonstrate in respect of each one of the illegal acts violating human rights and humanitarian law, and each one of the illegal acts of looting, plundering and exploitation of Congolese natural resources it complains of, that it was committed by Uganda or in an area under Uganda's occupation at the time.

IV

As indicated above, the majority of the Court concluded that Uganda was an occupying Power of Kibali-Ituri province and that for this reason it

> "was under an obligation, according to Article 43 of the Hague Regulations of 1907, to take all the measures in its power to restore, and ensure, as far as possible, public order and safety in the occupied area, while respecting, unless absolutely prevented, the laws in force in the DRC. This obligation comprised the duty to secure respect for the applicable rules of international human rights law and international humanitarian law, to protect the inhabitants of the occupied territory against acts of violence, and not to tolerate such violence by any third party." (Judgment, paragraph 178.)

Article 43 of the Hague Regulations of 1907 states:

> "When the legally constituted authority has actually passed into the hands of the occupant, the latter shall take all measures within his power to restore and, as far as possible, to insure public order and life, respecting the laws in force in the country unless absolutely prevented."

Consequently, application of Article 43 is conditional on the fact that "legally constituted authority actually passed into the hands of the occupant". It is not clear to Judge Parra-Aranguren how the majority of the Court came to the conclusion that this requirement was met, because no explanation in this respect is given in the Judgment.

Moreover, the obligation imposed upon the occupying Power by Article 43 is not an obligation of result. An occupying Power is not in violation of Article 43 for failing to restore public order and life in the occupied territory, since it is only under the obligation to "take all measures within his power to restore and, as far as possible, to insure public order and life". Judge Parra-Aranguren considers it an open question whether the nature of this obligation has been duly taken into account in the Judgment.

Furthermore, when dealing with the occupation of the province of Kibali-Ituri by Uganda, the majority of the Court rarely takes into account the province's geographical characteristics in order to determine whether Uganda complied with its obligation of due diligence under Article 43 of the Hague Regulations of 1907; but they were considered to exonerate the DRC for its failure to prevent cross-border actions of anti-Ugandan rebel forces, as may be observed in the examination of Uganda's first counter-claim.

V

In the opinion of Judge Parra-Aranguren it is finally to be observed that rebel groups existed in the province of Kibali-Ituri before May 1997, when Marshal Mobutu Ssese Seko governed the former Zaire; they continued to exist after President Laurent-Désiré Kabila came to power and for this reason the DRC expressly consented to the presence of Ugandan troops in its territory. The Court itself acknowledges the inability of the DRC to control events along its border (Judgment, paragraph 135). Rebel groups were also present during Uganda's military actions in the region and continue to be present even after the withdrawal of Ugandan troops from the territory of the DRC on 2 June 2003, notwithstanding the intensive efforts of the Government of the DRC, with strong help from the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC), employing more that 15,000 soldiers, as is a matter of public knowledge.

Separate opinion of Judge Kooijmans

Judge Kooijmans first expresses his regret about the fact that in his view the Court has insufficiently taken into consideration the general context of the dispute between the Parties and the deeply rooted instability of the region which has prompted Uganda and other countries to military actions. As a result, the Judgment can be said to lack the balance which is needed for a genuine settlement of the dispute.

Judge Kooijmans is further of the view that the Court should have taken account of the fact that the armed actions, carried out by the Ugandan rebel movements from Congolese territory during June and July 1998 were, because of their scale and effects, equivalent to an armed attack had they been carried out by regular armed forces. The fact that these armed actions cannot be attributed to the DRC, since no involvement on its part has been proved, does not mean that Uganda was not entitled to act in self-defence; Article 51 of the Charter does not make the right of self-defence conditional on an armed attack by a State. In the present case, however, Uganda did not meet the standard of necessity and proportionality from 1 September 1998 onwards and thus violated the principle of the non-use of force.

Judge Kooijmans is also of the view that the Court unnecessarily narrowed the criteria for applicability of the law of belligerent occupation by ascertaining whether the Ugandan armed forces were not only stationed in particular locations but also had actually *substituted* their own authority for that of the Congolese Government. On this, basis the Court concluded that this was the case only in Ituri district and not in the other invaded areas.

According to Judge Kooijmans it would have been preferable to determine that, as a result of the seizure by Ugandan armed forces of the airports and military bases in a large area, the DRC Government was rendered incapable of exercising its authority. As long as Uganda effectively controlled these locations, which the DRC Government would have needed to reestablish its authority over the Congolese rebel movements, it must be considered as the occupying Power in all areas where its troops were present.

This situation changed when, as a result of the Lusaka Ceasefire Agreement, these rebel movements were upgraded to the status of formal participants in the rebuilding of the Congolese State. In view of their position in the invaded areas, Uganda can no longer be said to have replaced the territorial government since they had become participants in that government. Uganda retained the status of occupying Power only in Ituri district where it was in full and effective control.

Judge Kooijmans also disagrees with the Court's finding in the operative part that by occupying Ituri district, Uganda has violated the principle of the non-use of force. In his view it is Uganda's armed action which constitutes an unlawful use of force, whereas the occupation as the outcome of that unlawful act should merely be considered in the light of the *jus in bello*. By including occupation in the concept of the unlawful use of force, the Court may have contributed to the reluctance of States to apply the law of belligerent occupation when that is called for.

Judge Kooijmans has voted against the Court's ruling that Uganda did not comply with its Order on provisional measures of 1 July 2000. In his view, this ruling is not appropriate since the DRC has not provided specific evidence in this respect. Moreover, the Order was addressed to both Parties and the Court itself has expressed its awareness that massive violations of human rights have been committed by all parties in the conflict.

Judge Kooijmans has also voted against the paragraph in the *dispositif* in which the Court finds that Uganda's first counter-claim cannot be upheld. He is of the opinion that it was not only for Uganda to prove that, during the period 1994 to 1997, the Government of Zaire was supporting the Ugandan rebel movements, but also for the DRC to provide evidence that it respected its duty of vigilance. Since the DRC failed to do so, the part of the counter-claim dealing with this period should not have been dismissed.

Separate opinion of Judge Elaraby

Judge Elaraby expresses his full support for the Judgment's findings. His separate opinion elaborates upon the Court's finding relating to the use of force in order to explicitly address the Democratic Republic of the Congo's claim that certain activities of Uganda in the instant case amount to a violation of the prohibition of aggression under international law.

Judge Elaraby underlines the central place of this argument in the Democratic Republic of the Congo's pleadings before the Court. While he concurs with the Court's finding of a violation of the prohibition of the use of force, he argues that, in view of its gravity, the Court should have examined whether there had furthermore been a violation of the prohibition of aggression in the present case.

Judge Elaraby provides a brief historical background to General Assembly resolution 3314 (XXIX) and points out that the Court has authority to find that aggression has been committed. He cites the Court's dicta in the *Nicaragua* case acknowledging the status of this resolution as customary international law and, stressing the importance of consistency within the Court's jurisprudence, concludes that the Court should have found that the unlawful use of force by Uganda amounts to aggression.

Separate opinion of Judge Simma

In his separate opinion, Judge Simma emphasizes that he is in general agreement with what the Court has said in its Judgment, but expresses concerns about three issues on which the Court decided to say nothing.

First, Judge Simma associates himself with the criticism expressed in the separate opinion of Judge Elaraby that the Court should have acknowledged that Uganda has committed an act of aggression. He notes that if there ever was a military activity before the Court that deserves to be qualified as an act of aggression, it is the Ugandan invasion of the DRC. Compared to its scale and impact, the military adventures the Court had to deal with in earlier cases, as in *Corfu Channel, Nicaragua,* or *Oil Platforms,* border on the insignificant.

In this regard, Judge Simma emphasizes that although the United Nations Security Council has stopped short of expressly qualifying the Ugandan invasion as an act of aggression, it had its own—political—reasons to refrain from such a determination. The Court, as the principal *judicial* organ of the United Nations, has as its very raison d'être to arrive at decisions based on law, keeping the political context of the cases before it in mind, of course, but not desisting from stat-

ing what is manifest out of regard for such non-legal considerations.

Second, Judge Simma notes that the Court has left unanswered the question whether, even if not attributable to the DRC, cross-boundary military activities of anti-Ugandan rebel groups could have been repelled by Uganda, provided that the rebel attacks were of a scale sufficient to reach the threshold of an "armed attack" within the meaning of Article 51 of the United Nations Charter.

In this regard, Judge Simma agrees with the argument presented in the separate opinion of Judge Kooijmans to the effect that the Court should have taken the opportunity offered by this case to clarify the state of the law on this highly controversial matter, an issue left open by its *Nicaragua* Judgment of two decades ago. He believes that if armed attacks are carried out by irregular bands against a neighbouring State, these activities are still armed attacks even if they cannot be attributed to the territorial State, and they give rise to the right of self-defence within the same limits as in a State-to-State case.

Third, Judge Simma stresses that although he believes the Court correctly concluded that Uganda could not raise a claim of diplomatic protection regarding acts of maltreatment inflicted on private persons by Congolese soldiers at Ndjili International Airport in Kinshasa in August 1998, international human rights and international humanitarian law are applicable to the situation. Judge Simma considers that an unequivocal confirmation by the Court that these persons remained protected under those branches of international law would have been important in the face of current attempts to create legal voids in which human beings may disappear for indefinite periods of time.

Judge Simma argues that the key issue in finding whether international humanitarian law should apply also in areas of the territory of a belligerent State generally unaffected by actual armed conflict is whether those areas are somehow connected to the conflict. In the present case, such a connection exists. It exists as a matter of fact because the individuals maltreated at Ndjili International Airport found themselves in a situation of evacuation from armed conflict. It exists as a matter of law because the Court had already determined, in its Order under Article 80 of 29 November 2001, that the events at the airport formed part of the "same factual complex" as the armed conflict which constitutes the basis of the main claim. Judge Simma also makes reference to decisions of the ICTY holding that international humanitarian law applies in the entire territory of the belligerent States, whether or not actual combat takes place there.

Discussing the substantive rules of international humanitarian law applicable to the persons in question, Judge Simma concludes that although they may not qualify as "protected persons" under Article 4 of the Fourth Geneva Convention, they are, at a minimum, protected by Article 75 of the Protocol I Additional to the Geneva Conventions. He emphasizes that there is therefore no legal void in international humanitarian law.

Applying international human rights law to the individuals maltreated by the DRC at Ndjili International Airport, Judge Simma notes that the conduct of the DRC violated provisions of the International Covenant on Civil and Political Rights of 19 December 1966, the African Charter on Human and Peoples' Rights of 27 June 1981, and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984, to all of which both the DRC and Uganda are parties.

Judge Simma then discusses the issue of standing to raise violations of international humanitarian and human rights law in the case of persons who may not have the nationality of the claimant State. As to international humanitarian law, he concludes, based on the *Wall* Opinion of the Court and the ICRC Commentary to common Article 1 of the Geneva Conventions, that regardless of whether the maltreated individuals were Ugandans, Uganda had the right—indeed the duty—to raise the violations of international humanitarian law committed against the persons as part of its duty to "ensure respect" for international humanitarian law. As to human rights law, he concludes based on Article 48 of the International Law Commission's 2001 draft Articles on Responsibility of States for Internationally Wrongful Acts that Uganda would have had standing to raise violations of relevant human rights treaties.

Judge Simma concludes with a general observation on the community interest underlying international humanitarian and human rights law, emphasizing that at least the core of the obligations deriving from those bodies of law are valid *erga omnes*.

Declaration by Judge Tomka

Judge Tomka, who voted in favour of all paragraphs of the operative part of the Judgment, with the exception of one, explains why, in his view, the Court could have upheld the counter-claim of Uganda on the alleged toleration of the DRC's (then Zaire's) authorities of rebel group attacks from its territory against Uganda in the 1994-May 1997 period.

He expresses the opinion that the duty of vigilance required that Zaire exert good efforts to prevent its territory from being used against Uganda. Zaire knew of the existence of such rebel anti-Ugandan groups operating in its territory and causing harm to Uganda and its population. In his view, the DRC had to demonstrate to the Court that Zaire's Government exerted all good efforts to prevent its territory from being misused for launching attacks against Uganda. No such credible information on any bona fide efforts had been submitted to the Court. He cannot concur with the view of the majority that the absence of actions by Zaire's Government against rebel groups in the border area is not tantamount to tolerating or acquiescing in their activities.

Further in his declaration, Judge Tomka expresses his view that Uganda remains under obligation to prosecute those who have committed grave breaches under the Fourth Geneva Convention of 1949 and the Additional Protocol I of 1977.

Finally, he briefly touches upon the order in which the Court considered in this case the issues of self-defence and of the prohibition of the use of force.

Declaration of Judge Verhoeven

In his declaration, Judge *ad hoc* Verhoeven reflects upon the conditions under which, and the limits within which, the Court can find a State's conduct wrongful without ruling on the ensuing consequences under international law. In the present case, it is easily understandable that, in light of the circumstances, the decision on reparation should be deferred to a subsequent stage of the proceedings if the Parties are unable to agree on this point. That is true at least for the main claim; doubt however arises as to this outcome in respect of the second counter-claim given the absence of elements which could objectively justify postponing the decision. The other points of the *dispositif* concerning the consequences of what the Court has found to be violations by the Respondent may moreover raise some question from this point of view, even though the Court did not expressly rule in this regard.

Judge Verhoeven then points out that the obligation to respect and ensure respect for human rights and international humanitarian law, referred to in point 4 of the *dispositif,* cannot be confined solely to the case of occupation in the sense of the *jus in bello;* it applies generally to all armed forces in foreign territory, particularly when their presence there follows from a violation of the *jus ad bellum*. The obligation to make reparation deriving from this violation extends moreover to all the prejudicial consequences of the violation, even those resulting from conduct or acts which are in themselves in accordance with the *jus in bello.*

Dissenting opinion of Judge Kateka

In his dissenting opinion, Judge *ad hoc* Kateka cannot agree with the Court's findings that Uganda violated the principles of non-use of force in international relations and of non-intervention; that the Respondent violated its obligations under international human rights law and international humanitarian law; and that the Respondent violated obligations owed to the Democratic Republic of the Congo under international law by acts of unlawful exploitation of the latter's natural resources.

Judge Kateka expresses the view that the Court should have reviewed its dictum in the 1986 *Nicaragua* case concerning insurgent activities and what amounts to an "armed attack". As insurgent activities are at the centre of the present case, it would have helped to clarify the law in this regard.

In his opinion, Judge Kateka argues that Uganda's armed forces were in the Democratic Republic of the Congo, at different times, with the consent of the Applicant as well as in the exercise of the right of self-defence. Alleged violations of human rights and international humanitarian law, in the view of Judge Kateka, were not proven by the Applicant which is not innocent in this connection. Judge Kateka is of the view that a finding on violation of provisional measures is unnecessary.

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160. ARMED ACTIVITIES ON THE TERRITORY OF THE CONGO (NEW APPLICATION: 2002) (DEMOCRATIC REPUBLIC OF THE CONGO *v.* RWANDA) (JURISDICTION OF THE COURT AND ADMISSIBILITY OF THE APPLICATION)

Judgment of 3 February 2006

In its judgment on jurisdiction of the Court and admissibility of the application in the case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Rwanda)*, the Court, by fifteen votes to two, found that it had no jurisdiction to entertain the Application filed by the Democratic Republic of the Congo on 28 May 2002.

*

* *

The Court was composed as follows: President Shi; Vice-President Ranjeva; Judges Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal, Elaraby, Owada, Simma, Tomka, Abraham; Judges *ad hoc* Dugard, Mavungu; Registrar Couvreur.

*

* *

The operative paragraph (para. 128) of the judgment reads as follows:

" . . .

The Court,

By fifteen votes to two,

Finds that it has no jurisdiction to entertain the Application filed by the Democratic Republic of the Congo on 28 May 2002.

IN FAVOUR: President Shi; Vice-President Ranjeva; Judges Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal, Elaraby, Owada, Simma, Tomka, Abraham; Judge *ad hoc* Dugard;

AGAINST: Judge Koroma; Judge *ad hoc* Mavungu."

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Judge Koroma appended a dissenting opinion to the Judgment of the Court; Judges Higgins, Kooijmans, Elaraby, Owada and Simma appended a joint separate opinion to the Judgment of the Court; Judge Kooijmans appended a declaration to the Judgment of the Court; Judge Al-Khasawneh appended a separate opinion to the Judgment of the Court;

Judge Elaraby appended a declaration to the Judgment of the Court; Judge *ad hoc* Dugard appended a separate opinion to the Judgment of the Court; Judge *ad hoc* Mavungu appended a dissenting opinion to the Judgment of the Court.

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* *

History of the proceedings and submissions of the Parties (paras. 1–13)

The Court begins by recapitulating the various stages of the proceedings.

On 28 May 2002 the Government of the Democratic Republic of the Congo (hereinafter "the DRC") filed in the Registry of the Court an Application instituting proceedings against the Republic of Rwanda (hereinafter "Rwanda") in respect of a dispute concerning "massive, serious and flagrant violations of human rights and of international humanitarian law" alleged to have been committed "in breach of the 'International Bill of Human Rights', other relevant international instruments and mandatory resolutions of the United Nations Security Council". In the Application the DRC stated that "[the] flagrant and serious violations [of human rights and of international humanitarian law]" of which it complained "result from acts of armed aggression perpetrated by Rwanda on the territory of the Democratic Republic of the Congo in flagrant breach of the sovereignty and territorial integrity of [the latter], as guaranteed by the Charters of the United Nations and the Organization of African Unity".

In order to found the jurisdiction of the Court, the DRC, referring to Article 36, paragraph 1, of the Statute, invoked in its Application: Article 22 of the International Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965 (hereinafter the "Convention on Racial Discrimination"); Article 29, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination Against Women of 18 December 1979 (hereinafter the "Convention on Discrimination Against Women"); Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948 (hereinafter the "Genocide Convention"); Article 75 of the Constitution of the World Health Organization of 22 July 1946 (hereinafter the "WHO Constitution"); Article XIV, paragraph 2, of the Constitution of the United Nations Educational, Scientific and Cultural Organization of 16 November 1945 (hereinafter the "Unesco Constitution") and Article 9 of the Convention on the Privileges and Immunities of the Specialized Agencies of 21 November 1947 (hereinafter the "Convention on Privileges and Immunities"); Article 30, paragraph 1, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984 (hereinafter the "Convention against Torture"); and Article 14, paragraph 1, of the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation of 23 September 1971 (hereinafter the "Montreal Convention").

The DRC further contended in its Application that Article 66 of the Vienna Convention on the Law of Treaties of 23 May 1969 established the jurisdiction of the Court to settle disputes arising from the violation of peremptory norms *(jus cogens)* in the area of human rights, as those norms were reflected in a number of international instruments.

On 28 May 2002 the DRC also submitted a request for the indication of provisional measures pursuant to Article 41 of the Statute of the Court and Articles 73 and 74 of its Rules. Since the Court included upon the Bench no judge of the nationality of the Parties, each of them availed itself of the right conferred upon it by Article 31 of the Statute to choose a judge *ad hoc* to sit in the case. The DRC chose Mr. Jean-Pierre Mavungu, and Rwanda Mr. Christopher John Robert Dugard. At the hearings on the request for the indication of provisional measures held on 13 and 14 June 2002, Rwanda asked the Court to remove the case from the List for manifest lack of jurisdiction. By Order of 10 July 2002 the Court found that it lacked *prima facie* jurisdiction to indicate the provisional measures requested by the DRC. The Court also rejected Rwanda's request that the case be removed from the List.

At a meeting held on 4 September 2002 by the President of the Court with the Agents of the Parties, Rwanda proposed that the procedure provided for in Article 79, paragraphs 2 and 3, of the Rules of Court be followed, and that the questions of jurisdiction and admissibility in the case therefore be determined separately before any proceedings on the merits. The DRC stated that it would leave the decision in this regard to the Court. By Order of 18 September 2002 the Court decided that the written pleadings would first be addressed to the questions of the jurisdiction of the Court and of the admissibility of the Application and fixed time-limits for the filing of a Memorial by Rwanda and a Counter-Memorial by the DRC. Those pleadings were filed within the time-limits so prescribed. In its Counter-Memorial (and later in the hearings) the DRC asserted two additional bases of jurisdiction: the doctrine of *forum prorogatum* and the Court's Order of 10 July 2002 on the DRC's request for the indication of provisional measures.

Public hearings were held between 4 and 8 July 2005, at which the following submissions were presented by the Parties:

On behalf of the Rwandan Government,

at the hearing of 6 July 2005:

"For the reasons given in our written preliminary objection and at the oral hearings, the Republic of Rwanda requests the Court to adjudge and declare that:

1. it lacks jurisdiction over the claims brought against the Republic of Rwanda by the Democratic Republic of the Congo; and

2. in the alternative, that the claims brought against the Republic of Rwanda by the Democratic Republic of the Congo are inadmissible."

On behalf of the Congolese Government,

at the hearing of 8 July 2005:

"May it please the Court,

1. to find that the objections to jurisdiction and admissibility raised by Rwanda are unfounded;

2. consequently, to find that the Court has jurisdiction to entertain the case on the merits and that the Application

of the Democratic Republic of the Congo is admissible as submitted;

3. to decide to proceed with the case on the merits."

Object of the present proceedings limited to the questions of the Court's jurisdiction and the admissibility of the DRC's Application
(para. 14)

The Court notes first of all that at the present stage of the proceedings it cannot consider any matter relating to the merits of the dispute between the DRC and Rwanda. In accordance with the decision taken in its Order of 18 September 2002, the Court is required to address only the questions of whether it is competent to hear the dispute and whether the DRC's Application is admissible.

Examination of the bases of jurisdiction put forward by the DRC
(paras. 15–125)

The Court begins its examination of the 11 bases of jurisdiction put forward by the DRC. It recalls the Parties' arguments in respect of them and reaches the following conclusions:

(1) 1984 Convention against Torture (para. 16)

The Court points out that it had noted Rwanda's statement that it "is not, and never has been, party" to this Convention. Observing that the DRC did not raise any argument in response to this contention, the Court accordingly concludes that the DRC cannot rely upon this Convention as a basis of jurisdiction.

(2) Convention on Privileges and Immunities (para. 17)

The Court recalls that, in its Order of 10 July 2002, it stated that the DRC did not appear to found the jurisdiction of the Court on this Convention, and that the Court was accordingly not required to take the instrument into consideration in the context of the request for the indication of provisional measures. Since the DRC has also not sought to invoke this Convention in the present phase of the proceedings, the Court does not take it into consideration in its Judgment.

(3) Forum prorogatum (paras. 19–22)

The DRC argues on this point that the willingness of a State to submit a dispute to the Court may be apparent not only from an express declaration but also from any conclusive act, in particular from the conduct of the respondent State subsequent to seisin of the Court. In particular it contends that "the Respondent's agreement to plead implies that it accepts the Court's jurisdiction". For its part Rwanda contends that the DRC's argument is without foundation, since in this case there has been no "voluntary and indisputable acceptance of the Court's jurisdiction". Rwanda points out that it has, on the contrary, consistently asserted that the Court has no jurisdiction and that it has appeared solely for the purpose of challenging that jurisdiction.

In the present case the Court notes that Rwanda has expressly and repeatedly objected to its jurisdiction at every stage of the proceedings. Rwanda's attitude therefore cannot be regarded as "an unequivocal indication" of its desire to accept the jurisdiction of the Court in a "voluntary and indisputable" manner. The fact, as the DRC has pointed out, that Rwanda has "fully and properly participated in the different procedures in this case, without having itself represented or failing to appear", and that "it has not refused to appear before the Court or make submissions", cannot be interpreted as consent to the Court's jurisdiction over the merits, inasmuch as the very purpose of this participation was to challenge that jurisdiction.

(4) Court's Order of 10 July 2002 (paras. 23–25)

To found the jurisdiction of the Court, the DRC also relies on one of the Court's findings in its Order of 10 July 2002, whereby it stated that, "in the absence of a manifest lack of jurisdiction, the Court cannot grant Rwanda's request that the case be removed from the List". In the DRC's view, this finding of an "absence of a manifest lack of jurisdiction" could be interpreted as an acknowledgement by the Court that it has jurisdiction. On this point, for its part Rwanda recalls that in this same Order the Court clearly stated that the findings reached by it at that stage in the proceedings in no way prejudged the question of its jurisdiction to deal with the merits of the case.

The Court observes on this subject that, given the urgency which, *ex hypothesi,* characterizes the consideration of requests for the indication of provisional measures, it does not normally at that stage take a definitive decision on its jurisdiction. It does so only if it is apparent from the outset that there is no basis on which jurisdiction could lie, and that it therefore cannot entertain the case. According to the Court, the fact that it did not conclude in its Order of 10 July 2002 that it manifestly lacked jurisdiction cannot therefore amount to an acknowledgment that it has jurisdiction. On the contrary, the Court points out that from the outset it had serious doubts regarding its jurisdiction to entertain the DRC's Application, for in that same Order it justified its refusal to indicate provisional measures by the lack of *prima facie* jurisdiction. In declining Rwanda's request to remove the case from the List, the Court simply reserved the right fully to examine further the issue of its jurisdiction at a later stage.

(5) Article IX of the Genocide Convention (paras. 28–70)

The Court notes that both the DRC and Rwanda are parties to the Genocide Convention, the DRC having acceded on 31 May 1962 and Rwanda on 16 April 1975. The Court observes, however, that Rwanda's instrument of accession to the Convention, as deposited with the Secretary-General of the United Nations, contains a reservation worded as follows: "The Rwandese Republic does not consider itself as bound by Article IX of the Convention." Article IX provides: "Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute."

The Court also notes that the Parties take opposing views on two questions: first, on whether, in adopting "*Décret-loi* No. 014/01 of 15 February 1995 withdrawing all reservations entered by the Rwandese Republic at the accession, approval and ratification of international instruments", Rwanda effectively withdrew its reservation to Article IX of the Genocide

Convention and, secondly, on the question of the legal effect of the statement by Rwanda's Minister of Justice at the Sixty-first Session of the United Nations Commission on Human Rights, according to which, "[t]he few [human rights] instruments not yet ratified" by Rwanda at that date "will shortly be ratified" and reservations "not yet withdrawn will shortly be withdrawn".

In regard to the first question, the Court notes that *Décret-loi* No. 014/01 was adopted on 15 February 1995 by the President of the Rwandese Republic following an Opinion of the Council of Ministers and was countersigned by the Prime Minister and Minister of Justice of the Rwandese Republic. Article 1 of this *décret-loi,* which contains three articles, provides that "[a]11 reservations entered by the Rwandese Republic in respect of the accession, approval and ratification of international instruments are withdrawn"; Article 2 states that "[a]11 prior provisions contrary to the present *décret-loi* are abrogated"; while Article 3 provides that "[t]his *décret-loi* shall enter into force on the day of its publication in the Official Journal of the Rwandese Republic". The *décret-loi* was published in the Official Journal of the Rwandese Republic and entered into force.

The validity of this *décret-loi* under Rwandan domestic law has been denied by Rwanda. However, in the Court's view the question of the validity and effect of the *décret-loi* within the domestic legal order of Rwanda is different from that of its effect within the international legal order. Thus a clear distinction has to be drawn between a decision to withdraw a reservation to a treaty taken within a State's domestic legal order and the implementation of that decision by the competent national authorities within the international legal order, which can be effected only by notification of withdrawal of the reservation to the other States parties to the treaty in question. It is a rule of international law, deriving from the principle of legal security and well established in practice, that, subject to agreement to the contrary, the withdrawal by a Contracting State of a reservation to a multilateral treaty takes effect in relation to the other Contracting States only when they have received notification thereof. This rule is expressed in Article 22, paragraph 3 *(a),* of the Vienna Convention on the Law of Treaties.

The Court observes that in this case it has not been shown that Rwanda notified the withdrawal of its reservations to the other States parties to the "international instruments" referred to in Article 1 of *décret-loi* No. 014/01, and in particular to the States parties to the Genocide Convention. Nor has it been shown that there was any agreement whereby such withdrawal could have become operative without notification. In the Court's view, the adoption of that *décret-loi* and its publication in the Official Journal of the Rwandese Republic cannot in themselves amount to such notification. In order to have effect in international law, the withdrawal would have had to be the subject of a notice received at the international level.

The Court notes that, as regards the Genocide Convention, the Government of Rwanda has taken no action at international level on the basis of the *décret-loi.* It observes that this Convention is a multilateral treaty whose depositary is the Secretary-General of the United Nations, and it considers that it was normally through the latter that Rwanda should have notified withdrawal of its reservation. The Court notes that it has no evidence that Rwanda sent any such notice to the Secretary-General.

The Court finds that the adoption and publication of *décret-loi* No. 014/01 of 15 February 1995 by Rwanda did not, as a matter of international law, effect a withdrawal by that State of its reservation to Article IX of the Genocide Convention.

In respect of the second question, that of the legal effect of the statement made on 17 March 2005 by Ms. Mukabagwiza, Minister of Justice of Rwanda, the Court begins by examining Rwanda's argument that it cannot be legally bound by the statement in question inasmuch as a statement made not by a Foreign Minister or a Head of Government "with automatic authority to bind the State in matters of international relations, but by a Minister of Justice, cannot bind the State to lift a particular reservation". In this connection, the Court observes that, in accordance with its consistent jurisprudence, it is a well-established rule of international law that the Head of State, the Head of Government and the Minister for Foreign Affairs are deemed to represent the State merely by virtue of exercising their functions, including for the performance, on behalf of the said State, of unilateral acts having the force of international commitments. The Court notes, however, that with increasing frequency in modern international relations other persons representing a State in specific fields may be authorized by that State to bind it by their statements in respect of matters falling within their purview. This may be true, for example, of holders of technical ministerial portfolios exercising powers in their field of competence in the area of foreign relations, and even of certain officials.

In this case, the Court notes first that Ms. Mukabagwiza spoke before the United Nations Commission on Human Rights in her capacity as Minister of Justice of Rwanda and that she indicated *inter alia* that she was making her statement "on behalf of the Rwandan people". The Court further notes that the questions relating to the protection of human rights which were the subject of that statement fall within the purview of a Minister of Justice. It is the Court's view that the possibility cannot be ruled out in principle that a Minister of Justice may, under certain circumstances, bind the State he or she represents by his or her statements.

In order to determine the legal effect of that statement, the Court examines its actual content as well as the circumstances in which it was made. The Court recalls that a statement of this kind can create legal obligations only if it is made in clear and specific terms. The Court observes that in her statement the Minister of Justice of Rwanda did not refer explicitly to the reservation made by Rwanda to Article IX of the Genocide Convention. The statement merely raises in general terms the question of Rwandan reservations and simply indicates that "past reservations not yet withdrawn will shortly be withdrawn", without setting out any precise time-frame for such withdrawals. It follows that the statement was not made in sufficiently specific terms in relation to the particular question of the withdrawal of reservations. Given the general nature of its wording, the statement cannot therefore be considered as confirmation by Rwanda of a previous decision to withdraw

its reservation to Article IX of the Genocide Convention, or as any sort of unilateral commitment on its part having legal effects in regard to such withdrawal; at most, it can be interpreted as a declaration of intent, very general in scope.

The Court lastly addresses Rwanda's argument that the statement by its Minister of Justice could not in any event have any implications for the question of the Court's jurisdiction in this case, since it was made nearly three years after the institution of the proceedings. In this connection, the Court recalls that it has consistently held that, while its jurisdiction must surely be assessed on the date of the filing of the act instituting proceedings, the Court should not, however, penalize a defect in procedure which the Applicant could easily remedy. In the present case, if the Rwandan Minister's statement had somehow entailed the withdrawal of Rwanda's reservation to Article IX of the Genocide Convention in the course of the proceedings, the DRC could on its own initiative have remedied the procedural defect in its original Application by filing a new Application. This argument by Rwanda must accordingly be rejected.

The Court then turns to the DRC's argument that Rwanda's reservation is invalid. In order to show that Rwanda's reservation is invalid, the DRC maintains that the Genocide Convention has "the force of general law with respect to all States" including Rwanda, inasmuch as it contains norms of *jus cogens*. Rwanda observes *inter alia* that, although, as the DRC contends, the norms codified in the substantive provisions of the Genocide Convention have the status of *jus cogens* and create rights and obligations *erga omnes,* that does not in itself suffice to "confer jurisdiction on the Court with respect to a dispute concerning the application of those rights and obligations".

The Court reaffirms in this regard that "the principles underlying the [Genocide] Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation" and that a consequence of that conception is "the universal character both of the condemnation of genocide and of the co-operation required 'in order to liberate mankind from such an odious scourge' (Preamble to the Convention)". It follows that "the rights and obligations enshrined by the Convention are rights and obligations *erga omnes*". The Court observes, however, as it has already had occasion to emphasize, that "the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things", and that the mere fact that rights and obligations *erga omnes* may be at issue in a dispute would not give the Court jurisdiction to entertain that dispute. The same applies to the relationship between peremptory norms of general international law *(jus cogens)* and the establishment of the Court's jurisdiction: the fact that a dispute relates to compliance with a norm having such a character, which is assuredly the case with regard to the prohibition of genocide, cannot of itself provide a basis for the jurisdiction of the Court to entertain that dispute. Under the Court's Statute that jurisdiction is always based on the consent of the parties. The Court adds that Rwanda's reservation to Article IX of the Genocide Convention bears on the jurisdiction of the Court, and does not affect substantive obligations relating to acts of genocide themselves under that Convention. In the circumstances of the present case, the Court cannot conclude that Rwanda's reservation, which is meant to exclude a particular method of settling a dispute relating to the interpretation, application or fulfilment of the Convention, is to be regarded as being incompatible with the object and purpose of the Convention. The Court further notes that, as a matter of the law of treaties, when Rwanda acceded to the Genocide Convention and made the reservation in question, the DRC made no objection to it.

The Court concludes from the foregoing that, having regard to Rwanda's reservation to Article IX of the Genocide Convention, this Article cannot constitute a basis for jurisdiction in the present case.

(6) Article 22 of the Convention on Racial Discrimination (paras. 71–79)

The Court notes that both the DRC and Rwanda are parties to the Convention on Racial Discrimination, the DRC having acceded thereto on 21 April 1976 and Rwanda on 16 April 1975. Rwanda's instrument of accession to the Convention, as deposited with the United Nations Secretary-General, does however include a reservation reading as follows: "The Rwandese Republic does not consider itself as bound by article 22 of the Convention". Under that article: "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 first addresses the DRC's argument that the reservation has "lapsed or fallen into desuetude as a result of the undertaking, enshrined in the Rwandan Fundamental Law, to 'withdraw all reservations entered by Rwanda when it adhered to . . . international instruments'" relating to human rights. Without prejudice to the applicability *mutatis mutandis* to the Convention on Racial Discrimination of the Court's reasoning and conclusions in respect of the DRC's claim that Rwanda withdrew its reservation to the Genocide Convention, the Court observes that the procedures for withdrawing a reservation to the Convention on Racial Discrimination are expressly provided for in Article 20, paragraph 3, of that Convention, which states: "Reservations may be withdrawn at any time by notification to this effect addressed to the Secretary-General. Such notification shall take effect on the date on which it is received." However, there is no evidence before the Court of any notification by Rwanda to the United Nations Secretary-General of its intention to withdraw its reservation. The Court accordingly concludes that the respondent State has maintained that reservation.

Regarding the DRC's argument that the reservation is invalid, the Court notes that the Convention on Racial Discrimination prohibits reservations incompatible with its object and purpose. The Court observes in this connection that, under Article 20, paragraph 2, of the Convention, "[a] reservation shall be considered incompatible . . . if at least two-thirds of the States Parties to [the] Convention object to it". The Court notes, however, that such has not been the case as regards Rwanda's reservation in respect of the Court's

jurisdiction. Without prejudice to the applicability *mutatis mutandis* to Rwanda's reservation to Article 22 of the Convention on Racial Discrimination of the Court's reasoning and conclusions in respect of Rwanda's reservation to Article IX of the Genocide Convention, the Court is of the view that Rwanda's reservation to Article 22 cannot therefore be regarded as incompatible with that Convention's object and purpose. The Court observes, moreover, that the DRC itself raised no objection to the reservation when it acceded to the Convention.

In relation to the DRC's argument that the reservation is without legal effect because, on the one hand, the prohibition on racial discrimination is a peremptory norm of general international law and, on the other, such a reservation is in conflict with a peremptory norm, the Court refers to its reasoning when dismissing the DRC's similar argument in regard to Rwanda's reservation to Article IX of the Genocide Convention.

The Court concludes from the foregoing that, having regard to Rwanda's reservation to Article 22 of the Convention on Racial Discrimination, this instrument cannot constitute a basis for jurisdiction in the present case.

(7) Article 29, paragraph 1, of the Convention on Discrimination Against Women (paras. 80–93)

The Court notes that both the DRC and Rwanda are parties to the Convention on Discrimination Against Women, the DRC having ratified it on 17 October 1986 and Rwanda on 2 March 1981. It also notes that Article 29 of this Convention gives the Court jurisdiction in respect of any dispute between States parties concerning its interpretation or application, on condition that: it has not been possible to settle the dispute by negotiation; that, following the failure of negotiations, the dispute has, at the request of one such State, been submitted to arbitration; and that, if the parties have been unable to agree on the organization of the arbitration, a period of six months has elapsed from the date of the request for arbitration.

In the view of the Court, it is apparent from the language of Article 29 of the Convention that these conditions are cumulative. It must therefore consider whether the preconditions on its seisin set out in the said Article 29 have been satisfied in this case.

The Court however first addresses the DRC's argument that the objection based on non-fulfilment of the preconditions set out in the compromissory clauses, and in particular in Article 29 of the Convention, is an objection to the admissibility of its Application rather than to the jurisdiction of the Court. The Court recalls in this regard that its jurisdiction is based on the consent of the parties and is confined to the extent accepted by them. When that consent is expressed in a compromissory clause in an international agreement, any conditions to which such consent is subject must be regarded as constituting the limits thereon. The Court accordingly considers that the examination of such conditions relates to its jurisdiction and not to the admissibility of the application. It follows that in the present case the conditions for seisin of the Court set out in Article 29 of the Convention on Discrimination Against Women must be examined in the context of the issue of the Court's jurisdiction. This conclusion applies *mutatis mutandis* to all of the other compromissory clauses invoked by the DRC.

The Court then considers whether in this case there exists a dispute between the Parties "concerning the interpretation or application of [that] Convention" which could not have been settled by negotiation. It notes that the DRC made numerous protests against Rwanda's actions in alleged violation of international human rights law, both at the bilateral level through direct contact with Rwanda and at the multilateral level within the framework of international institutions such as the United Nations Security Council and the Commission on Human and Peoples' Rights of the Organization of African Unity. The Court recalls that, in its Counter-Memorial and at the hearings, the DRC presented these protests as proof that "the DRC has satisfied the preconditions to the seisin of the Court in the compromissory clauses invoked". Whatever may be the legal characterization of such protests as regards the requirement of the existence of a dispute between the DRC and Rwanda for purposes of Article 29 of the Convention, that Article requires also that any such dispute be the subject of negotiations. The Court states that the evidence has not satisfied it that the DRC in fact sought to commence negotiations in respect of the interpretation or application of the Convention.

It adds that the DRC has also failed to prove any attempts on its part to initiate arbitration proceedings with Rwanda and that the Court cannot accept the DRC's argument that the impossibility of opening or advancing in negotiations with Rwanda prevented it from contemplating having recourse to arbitration; since this is a condition formally set out in Article 29 of the Convention on Discrimination Against Women, 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. The Court has found nothing in the file which would enable it to conclude that the DRC made a proposal to Rwanda that arbitration proceedings should be organized, and that the latter failed to respond to that proposal.

It follows from the foregoing that Article 29, paragraph 1, of the Convention on Discrimination Against Women cannot serve to found the jurisdiction of the Court in the present case.

(8) Article 75 of the WHO Constitution (paras. 94–101)

The Court observes that the DRC has been a party to the WHO Constitution since 24 February 1961 and Rwanda since 7 November 1962 and that both are thus members of that Organization. The Court further notes that Article 75 of the WHO Constitution provides for the Court's jurisdiction, under the conditions laid down therein, over "any question or dispute concerning the interpretation or application" of that instrument. The Article requires that a question or dispute must specifically concern the interpretation or application of the Constitution. In the opinion of the Court, the DRC has not shown that there was a question concerning the interpretation or application of the WHO Constitution on which itself and Rwanda had opposing views, or that it had a dispute with that State in regard to this matter.

The Court further notes that, even if the DRC had demonstrated the existence of a question or dispute falling within the scope of Article 75 of the WHO Constitution, it has not proved that the other preconditions for seisin of the Court established by that provision have been satisfied, namely that it attempted to settle the question or dispute by negotiation with Rwanda or that the World Health Assembly had been unable to settle it.

The Court accordingly concludes that Article 75 of the WHO Constitution cannot serve to found its jurisdiction in the present case.

(9) Article XIV, paragraph 2, of the Unesco Constitution (paras. 102–109)

The Court notes that both the DRC and Rwanda are parties to the Unesco Constitution and have been since 25 November 1960 in the case of the DRC and 7 November 1962 in the case of Rwanda, and that both are thus members of that Organization. The Court further observes that Article XIV, paragraph 2, of the Unesco Constitution provides for the referral, under the conditions established therein, of questions or disputes concerning the Constitution, but only in respect of its interpretation. The Court considers that such is not the object of the DRC's Application. It finds that the DRC has in this case invoked the Unesco Constitution and Article I thereof for the sole purpose of maintaining that "[o]wing to the war", it "today is unable to fulfil its missions within Unesco". The Court is of the opinion that this is not a question or dispute concerning the interpretation of the Unesco Constitution. Thus the DRC's Application does not fall within the scope of Article XIV of the Constitution.

The Court further considers that, even if the existence of a question or dispute falling within the terms of the above provision were established, the DRC has failed to show that the prior procedure for seisin of the Court pursuant to that provision and to Article 38 of the Rules of Procedure of the Unesco General Conference was followed.

The Court accordingly concludes that Article XIV, paragraph 2, of the Unesco Constitution cannot found its jurisdiction in the present case.

(10) Article 14, paragraph 1, of the Montreal Convention (paras. 110–119)

The Court notes that both the DRC and Rwanda are parties to the Montreal Convention and have been since 6 July 1977 in the case of the DRC and 3 November 1987 in the case of Rwanda, that both are members of the ICAO, and that the Montreal Convention was already in force between them at the time when the Congo Airlines aircraft is stated to have been destroyed above Kindu, on 10 October 1998, and when the Application was filed, on 28 May 2002. The Court also notes that Article 14, paragraph 1, of the Montreal Convention gives the Court jurisdiction in respect of any dispute between Contracting States concerning the interpretation or application of the Convention, on condition that: it has not been possible to settle the dispute by negotiation; that, following the failure of negotiations, the dispute has, at the request of one such State, been submitted to arbitration; and that, if the parties have been unable to agree on the organization of the arbitration, a period of six months has elapsed from the date of the request for arbitration. In order to determine whether it has jurisdiction under this provision, the Court must therefore first ascertain whether there is a dispute between the Parties relating to the interpretation or application of the Montreal Convention which could not have been settled by negotiation.

The Court observes in this regard that the DRC has not indicated to it which are the specific provisions of the Montreal Convention which could apply to its claims on the merits. In its Application the DRC confined itself to invoking that Convention in connection with the destruction shortly after take-off from Kindu Airport of a civil aircraft belonging to Congo Airlines. Even if it could be established that the facts cited by the DRC might, if proved, fall within the terms of the Convention and gave rise to a dispute between the Parties concerning its interpretation or application, and even if it could be considered that the discussions within the Council of the ICAO amounted to negotiations, the Court finds that, in any event, the DRC has failed to show that it satisfied the conditions required by Article 14, paragraph 1, of the Montreal Convention concerning recourse to arbitration: in particular, it has not shown that it made a proposal to Rwanda that arbitration proceedings should be organized, and that the latter failed to respond to that proposal.

The Court considers that Article 14, paragraph 1, of the Montreal Convention cannot therefore serve to found its jurisdiction in the present case.

(11) Article 66 of the Vienna Convention on the Law of Treaties (paras. 120–125)

To found the jurisdiction of the Court in the present case, the DRC relies finally on Article 66 of the Vienna Convention on the Law of Treaties, which provides *inter alia* that "[a]ny one of the parties to a dispute concerning the application or the interpretation of article 53 or 64", relating to conflicts between treaties and peremptory norms of general international law, "may, by a written application, submit it to the International Court of Justice for a decision unless the parties by common consent agree to submit the dispute to arbitration".

The Court recalls that the DRC explained at the hearings that Article 66 of the Vienna Convention on the Law of Treaties, to which Rwanda is a party, allows the Court to rule on any dispute concerning "the validity of a treaty which is contrary to a norm of *jus cogens*". In this regard the DRC argued that reservations to a treaty form an integral part thereof, and that they must accordingly "avoid either being in direct contradiction with a norm of *jus cogens,* or preventing the implementation of that norm". According to the DRC, Rwanda's reservation to Article IX of the Genocide Convention, as well as to "other similar provisions and compromissory clauses, seeks to prevent the . . . Court from fulfilling its noble mission of safeguarding peremptory norms, including the prohibition of genocide", and must therefore be regarded as "null and void".

In reply to Rwanda's reliance at the hearings on Article 4 of the Vienna Convention, which provides that the Convention applies only to treaties which are concluded by States after its entry into force with regard to such States, the DRC contended that "the supremacy and mandatory force of the norms referred to in this Convention (Articles 53 and 64) bind States irrespective of any temporal consideration or any treaty-based

link"; according to the DRC, the rule can therefore "have retroactive effect in the overriding interest of humanity".

The Court recalls that Article 4 of the Vienna Convention on the Law of Treaties provides for the non-retroactivity of that Convention in the following terms: "Without prejudice to the application of any rules set forth in the present Convention to which treaties would be subject under international law independently of the Convention, the Convention applies only to treaties which are concluded by States after the entry into force of the present Convention with regard to such States."

In this connection, the Court notes first that the Genocide Convention was adopted on 9 December 1948, the DRC and Rwanda having acceded to it on 31 May 1962 and 16 April 1975 respectively; and that the Convention on Racial Discrimination was adopted on 21 December 1965, the DRC and Rwanda having acceded on 21 April 1976 and 16 April 1975 respectively. The Court notes secondly that the Vienna Convention on the Law of Treaties entered into force between the DRC and Rwanda only on 3 February 1980, pursuant to Article 84, paragraph 2, thereof. The Conventions on Genocide and Racial Discrimination were concluded before the latter date. Thus in the present case the rules contained in the Vienna Convention are not applicable, save in so far as they are declaratory of customary international law. The Court considers that the rules contained in Article 66 of the Vienna Convention are not of this character. Nor have the two Parties otherwise agreed to apply Article 66 between themselves.

Finally, the Court deems it necessary to recall that the mere fact that rights and obligations *erga omnes* or peremptory norms of general international law *(jus cogens)* are at issue in a dispute cannot in itself constitute an exception to the principle that its jurisdiction always depends on the consent of the parties.

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Lack of jurisdiction to entertain the Application; no need for the Court to rule on its admissibility
(para. 126)

The Court concludes from all of the foregoing considerations that it cannot accept any of the bases of jurisdiction put forward by the DRC in the present case. Since it has no jurisdiction to entertain the Application, the Court is not required to rule on its admissibility.

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Fundamental distinction between the acceptance by States of the Court's jurisdiction and the conformity of their acts with international law
(para. 127)

While the Court has come to the conclusion that it cannot accept any of the grounds put forward by the DRC to establish its jurisdiction in the present case, and cannot therefore entertain the latter's Application, it stresses that it has reached this conclusion solely in the context of the preliminary question of whether it has jurisdiction in this case—the issue to be determined at this stage of the proceedings. The Court is precluded by its Statute from taking any position on the merits of the claims made by the DRC. However, as the Court has stated on numerous previous occasions, there is a fundamental distinction between the question of the acceptance by States of the Court's jurisdiction and the conformity of their acts with international law. Whether or not States have accepted the jurisdiction of the Court, they are required to fulfil their obligations under the United Nations Charter and the other rules of international law, including international humanitarian and human rights law, and they remain responsible for acts attributable to them which are contrary to international law.

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Dissenting opinion of Judge Koroma

In his dissenting opinion, Judge Koroma analyses Rwanda's reservation to Article IX of the Genocide Convention, arguing that if the Court had undertaken such an analysis, it would have found the reservation contrary to the object and purpose of the Convention and jurisdiction is therefore proper under Article IX of the Genocide Convention.

Judge Koroma points out that the dispute settlement clause in Article IX relates not only to the interpretation or application of the Convention but also to the *fulfilment* of the Convention. Recalling the language of Article IX *"including those relating to the responsibility of a State for genocide"*, Judge Koroma emphasizes that the monitoring function given to the Court by that Article extends to disputes relating to State responsibility for genocide.

Judge Koroma recalls the gravity of the DRC's allegations to the effect that Rwandan forces, directly or through their Rassemblement congolais pour la démocratie (RCD/Goma) agents, committed acts of genocide against 3,500,000 Congolese, by carrying out large-scale massacres, assassinations and other murders targeting well-identified groups.

He notes that, while a reservation to a treaty clause concerning dispute settlement or the monitoring of the implementation of the treaty is not, in itself, incompatible with the object and purpose of the treaty, it is incompatible if the provision to which the reservation relates constitutes the raison d'être of the treaty. In this regard, the object and purpose of the Genocide Convention is the prevention and punishment of the crime of genocide, and this encompasses holding a State responsible whenever it is found to be in breach of its obligations under the Convention.

Analysing the structure of the Genocide Convention, Judge Koroma notes that unlike Articles IV, V, VI, and VII, Article IX is the only provision of the Genocide Convention with specific language concerning the responsibility of a State for genocide. Because the power of the Court to enquire into disputes between Contracting Parties relating to the responsibility of a State for genocide derives from Article IX, that provision is crucial to fulfilling the object and purpose of the Convention.

Judge Koroma then explains that the DRC's failure to object to Rwanda's reservation at the time it was made is not sufficient to prevent the Court from examining the reservation, as human rights treaties like the Genocide Convention are not based on reciprocity between States but instead serve to protect individuals and the international community at large. He draws a parallel to General Comment 24 of the Human

Rights Committee, which noted: "The absence of protest by States cannot imply that a reservation is either compatible or incompatible with the object and purpose of the Covenant."

Judge Koroma observes that, while the question of reservations to Article IX of the Genocide Convention came up in connection with the provisional measures orders against Spain and the United States in the case concerning *Legality of Use of Force,* the Court did not conduct a full examination of the compatibility of a reservation to Article IX with the object and purpose of the Convention because the issue had not been raised by Yugoslavia. Judge Koroma contrasts the present case—in which both Parties raised and argued the question—concluding that the Court was thus entitled to examine Rwanda's reservation in detail in the light of the object and purpose of the Convention.

Judge Koroma emphasizes that, in considering Rwanda's position on Article IX, the Court should have taken due account of the principle of good faith. In this regard, Rwanda's prior declarations on the importance of human rights treaties must be juxtaposed with its present attempt to avoid scrutiny of its own conduct. Similarly, it is neither morally right nor just for Rwanda to shield itself from judicial scrutiny under Article IX of the Convention for the very same conduct for which it successfully urged the establishment of an international tribunal for the prosecution of persons responsible for genocide and other serious violations of international humanitarian law.

This prior conduct and the principle of good faith lead Judge Koroma to take the view that, given the nature of the Convention, and the gravity of the allegation before the Court, Rwanda should have accepted the jurisdiction of the Court based on the principle of *forum prorogatum,* thereby allowing it to adjudicate the merits of the case. He notes that genocide has been declared "the crime of all crimes" and "the principles underlying the [Genocide] Convention" characterized as "principles which are recognized by civilized nations as binding on States, even without any conventional obligation". In his view, the letter as well as the spirit of the Convention must be respected at all times.

The Court's pronouncements fostered high hopes and expectations that the object and purpose of the Convention would be fulfilled. This case presented an opportunity to apply the Convention and its principles. In Judge Koroma's view, apart from Article IX of the Genocide Convention, sufficient material, including various other compromissory clauses, was put before the Court for it to have been able to entertain the dispute. He also notes that the Court could have exercised jurisdiction under the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation and the Convention on the Elimination of All Forms of Discrimination Against Women.

Joint separate opinion of Judges Higgins, Kooijmans, Elaraby, Owada and Simma

Judges Higgins, Kooijmans, Elaraby, Owada and Simma in their joint separate opinion emphasize that a proper reading of the Court's 1951 Advisory Opinion shows that there is no incompatibility between certain developments in the practice of human rights courts and bodies and the law as there stated by the International Court.

The concordance of practice is evidenced by the International Court's Order of 10 July 2002, at paragraph 72, and again at paragraph 67 of the present Judgment.

In their view the Court had in mind certain factors in deciding on several recent occasions that a reservation to Article IX of the Genocide Convention is not incompatible with the object and purpose of that treaty. While these factors are entirely understandable, there are other elements within Article IX which make it less than self-evident that a reservation thereto might not be incompatible with the object and purpose of the Genocide Convention.

The authors of the joint separate opinion suggest that the Court should revisit this matter for further consideration.

Declaration of Judge Kooijmans

In his declaration Judge Kooijmans sets out why he is of the view that the Court has been unduly restrictive in concluding that one of the conditions on its jurisdiction has not been met. Article 29, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination Against Women provides that a dispute can be brought before the Court only if negotiations have been unsuccessful and a subsequent effort to settle it through arbitration has also turned out to be fruitless.

The Court recognizes that, by bringing the conflict with its neighbours to the attention of the Security Council, the DRC can be said to have tried to initiate negotiations in a multilateral context. In its complaints the DRC did not, however, explicitly refer to the Convention on Discrimination Against Women.

Judge Kooijmans observes that the DRC in its protests referred to alleged violations of a great number of treaty-based human rights norms, including norms providing for the protection of women. In view of the facts that the complaints were made in a general context and that they were ignored by Rwanda, the Court should have concluded that the DRC's attempt to enter into negotiations had been to no avail.

In holding as it has in the present case, the Court has made it more difficult for States to satisfy the condition of prior negotiations required in many compromissory clauses.

Separate opinion of Judge Al-Khasawneh

While Judge Al-Khasawneh concurred that the Court lacked jurisdiction, he felt compelled to append a separate opinion in view of the continuing doubts he had with respect to the Court's reasoning regarding the requirement (contained in Article 29 of the Convention on Discrimination Against Women) that prior negotiations should be attempted before referral to the Court.

The Court acknowledged that such negotiations took place but found them irrelevant in view of the fact that they did not refer to the interpretation or application of the Convention on Discrimination Against Women.

Judge Al-Khasawneh believed that such a requirement was not realistic as a matter of diplomatic practice especially in multifaceted disputes and where context was important, i.e., it

is not usual before the Security Council, for example, to itemize complaints on a treaty-by-treaty basis.

What was important was the substantive relevance of the treaty. There was no doubt in his mind that the Convention on Discrimination Against Women was relevant in view of the comment of the monitoring committee which found violence against women to constitute discrimination. More importantly, the jurisprudence of the Court favoured a broad interpretation of compromissory clauses, e.g., in the *Ambatielos (Greece* v. *United Kingdom*) case the requirement was one of a defensible argument on relevance. In other cases the test of reasonable or tangible connection was devised. He felt there was no need to refer expressly to a particular treaty in prior negotiations and a general reference as was the case to complaints made by DRC to the African Commission on Human and Peoples' Rights and to the Security Council constituted prior negotiations. He was nevertheless able to concur with the majority view that the Court lacked jurisdiction because another condition under Article 29, namely arbitration was not met.

Declaration of Judge Elaraby

Judge Elaraby agrees with the finding of the Court. Although sound in law, he believes the finding that the Court lacks jurisdiction highlights certain important limitations of the contemporary international legal system. Unlike in situations where both States have recognized the compulsory jurisdiction of the Court, independent grounds of jurisdiction are necessary in the instant case for the Court to examine the merits of the Application. However, none of the grounds which the DRC has advanced to this end grant the Court jurisdiction.

Judge Elaraby acknowledges the gravity of the situation in this case as well as the complexity of the circumstances in the Great Lakes region. Although he agrees that the consensual nature of the Court's jurisdiction prevents it from considering the substantive issues, he emphasizes the duty of States to settle their disputes peacefully and in accordance with international law. In this respect, Judge Elaraby highlights the importance of States recognition of the compulsory jurisdiction of the Court and the efforts that have been made to this effect.

In conclusion, Judge Elaraby expresses a hope that States must prioritize international adjudication as a vital means of peaceful settlement of disputes in accordance with the principles and purposes of the Charter of the United Nations.

Separate opinion of Judge Dugard

In his separate opinion Judge *ad hoc* Dugard endorses the Court's finding that it has no jurisdiction to entertain the Application filed by the Democratic Republic of the Congo. He comments on two issues raised by the present Judgment.

The Court has for the first time acknowledged the existence of peremptory norms *(jus cogens)* in its Judgment. Judge Dugard welcomes this acknowledgment and states that norms of *jus cogens* have an important role to play in the judicial process. He argues that in most instances such norms will be used to guide the Court in the exercise of its judicial choice between competing precedents, conflicting State practices and different general principles of law. In order to illustrate this point he examines a number of earlier decisions of the Court in which norms of *jus cogens* might have been invoked. Norms of *jus cogens per se* cannot, however, confer jurisdiction on the Court as the principle of consent as the basis of the Court's jurisdiction is founded in the Court's Statute (Art. 36) and may itself be described as a norm of general international law accepted and recognized by the international community of States as a whole.

Judge Dugard then examines the argument of the Applicant that it has engaged in negotiations in international bodies in respect of the Convention on the Elimination of All Forms of Discrimination Against Women and that these negotiations show that the dispute is not capable of settlement, as required by the compromissory clause of the Convention for the establishment of jurisdiction. Judge Dugard concludes that the Applicant has failed to show that it has clearly identified the Convention on the Elimination of All Forms of Discrimination Against Women as the basis of its complaint in "conference or parliamentary diplomacy" in international bodies. It has therefore failed to satisfy the requirement contained in Article 29 of the Convention that the dispute cannot be settled by negotiation. Judge Dugard distinguishes the decision of the Court in the *South West Africa* cases *(South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*).

Dissenting opinion of Judge Mavungu

The Democratic Republic of the Congo (DRC) invoked a number of bases in order to establish the Court's jurisdiction. While it is true that not all of these bases are relevant in order to found such jurisdiction, three clauses at least could have been accepted for this purpose. These are Article 75 of the Constitution of the WHO, Article 14 of the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, read in conjunction with the Chicago Convention on Civil Aviation, and Article 29 of the Convention on Discrimination Against Women.

The Court's failure to take account of the above matters provides grounds for a dissenting opinion.

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161. CASE CONCERNING THE STATUS VIS-À-VIS THE HOST STATE OF A DIPLOMATIC ENVOY TO THE UNITED NATIONS (COMMONWEALTH OF DOMINICA *v.* SWITZERLAND) (DISCONTINUANCE)

Order of 9 June 2006

In the case concerning the *Status vis-à-vis the Host State of a Diplomatic Envoy to the United Nations* (*Commonwealth of Dominica* v. *Switzerland*), the Court issued an Order on 9 June 2006, recording the discontinuance of the proceedings and directing the removal of the case from the Court's list.

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

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The order of the Court reads as follows:

"Having regard to Article 48 of the Statute of the Court and to Article 89, paragraph 1, of the Rules of Court,

Having regard to the Application filed in the Registry of the Court on 26 April 2006, whereby the Commonwealth of Dominica instituted proceedings against the Swiss Confederation in respect of a dispute concerning 'violations of the Vienna Convention on Diplomatic Relations of 18 April 1961 . . . , the Headquarters Agreement between Switzerland and the United Nations of 11 June and 1 July 1946, the Agreement on Privileges and Immunities of the United Nations between Switzerland and the United Nations of 11 April 1946, the Convention on Privileges and Immunities of the United Nations of 13 February 1946 as well as general well-established rules and principles of international law on appointment and withdrawal of diplomats, on diplomatic immunity, on equality of States and on the rights of the United Nations of passive legation';

Whereas a certified copy of this Application was immediately transmitted to the Government of the Swiss Confederation, pursuant to Article 38, paragraph 4, of the Rules of Court;

Whereas, by a letter dated 15 May 2006, received in the Registry by facsimile on 24 May 2006 under cover of two letters from the Permanent Representative of the Commonwealth of Dominica to the United Nations, and the original of which has reached the Registry on 6 June 2006, the Prime Minister of the Commonwealth of Dominica, referring to Article 89 of the Rules of Court, informed the Court that the Government of the Commonwealth of Dominica '[did] not wish to go on with the proceedings instituted against Switzerland, and requested the Court to make an Order 'officially recording the unconditional discontinuance' of these proceedings and 'directing the removal of the case from the General List';

Whereas a copy of that letter was immediately transmitted to the Government of the Swiss Confederation;

Whereas, by a letter dated 24 May 2006 and received in the Registry on the same day by facsimile, the Ambassador of Switzerland in The Hague advised the Court that he had informed the competent Swiss authorities of the discontinuance notified by the Prime Minister of Dominica;

Whereas the Government of the Swiss Confederation has not taken any step in the proceedings,

Places on record the discontinuance by the Commonwealth of Dominica of the proceedings instituted by the Application filed on 26 April 2006; and

Orders that the case be removed from the List."

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162. PULP MILLS ON THE RIVER URUGUAY (ARGENTINA *v.* URUGUAY) (PROVISIONAL MEASURES)

Order of 13 July 2006

In the case concerning *Pulp Mills on the River Uruguay*, the International Court of Justice issued an Order on 13 July 2006, in which it found 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.

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

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The operative paragraph (para. 87) of the Order reads as follows:

" . . .

The Court,

By fourteen 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 Higgins; Vice-President Al-Khasawneh; Judges Ranjeva, Koroma, Parra-Aranguren, Buergenthal, Owada, Simma, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov; Judge *ad hoc* Torres Bernárdez;

AGAINST: Judge *ad hoc* Vinuesa."

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Judge Ranjeva appended a declaration to the Order of the Court; Judges Abraham and Bennouna appended separate opinions to the Order of the Court; Judge *ad hoc* Vinuesa appended a dissenting opinion to the Order of the Court.

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The Court recalls that, by an Application filed in the Registry of the Court on 4 May 2006, the Argentine Republic (hereinafter "Argentina") instituted proceedings against the Eastern Republic of Uruguay (hereinafter "Uruguay") for the alleged breach by Uruguay of obligations under the Statute of the River Uruguay, which was signed by Argentina and Uruguay on 26 February 1975 and entered into force on 18 September 1976 (hereinafter the "1975 Statute"). In its Application, Argentina claims that that breach arises from "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". Argentina explains that the 1975 Statute was adopted in accordance with Article 7 of the Treaty defining the boundary on the River Uruguay between Argentina and Uruguay, signed at Montevideo on 7 April 1961 and which entered into force on 19 February 1966, which provided for the establishment of a joint régime for the use of the river.

Argentina bases the jurisdiction of the Court on Article 36, paragraph 1, of the Statute of the Court and on the first paragraph of Article 60 of the 1975 Statute, which provides as follows: "Any dispute concerning the interpretation or application of the [1961] Treaty and the [1975] Statute which cannot be settled by direct negotiations may be submitted by either Party to the International Court of Justice". Argentina claims that direct negotiations between the Parties have failed.

According to Argentina, the purpose of the 1975 Statute is "to establish the joint machinery necessary for the optimum and rational utilization" of that part of the River Uruguay which is shared by the two States and constitutes their common boundary. In addition to governing "activities such as conservation, utilization and development of other natural resources", the 1975 Statute deals with "obligations of the Parties regarding the prevention of pollution and the liability resulting from damage inflicted as a result of pollution" and sets up an "Administrative Commission of the River Uruguay" (hereinafter "CARU", in its Spanish acronym) whose functions include regulation and co-ordination. Argentina submits, in particular, that Articles 7 to 13 of the Statute provide for an obligatory procedure for prior notification and consultation through CARU for any party planning to carry out works liable to affect navigation, the régime of the river or the quality of its waters.

Argentina states that the Government of Uruguay, in October 2003, "unilaterally authorized the Spanish company ENCE to construct a pulp mill near the city of Fray Bentos", a project known as "Celulosa de M'Bopicuá" (hereinafter "CMB"), and claims that this was done without complying with the abovementioned notification and consultation procedure. It maintains that, despite its repeated protests concerning "the environmental impact of the proposed mill", made both directly to the Government of Uruguay and to CARU, "the Uruguayan Government has persisted in its refusal to follow the procedures prescribed by the 1975 Statute", and that Uruguay has in fact "aggravated the dispute" by authorizing the Finnish company Oy Metsä-Botnia AB (hereinafter "Botnia") in February 2005 to construct a second pulp mill, the "Orion mill", in the vicinity of the CMB plant. According to Argentina the "Uruguayan Government has further aggravated the dispute" by issuing authorization to Botnia in July 2005 "for the construction of a port for the exclusive use of the Orion mill without following the procedures prescribed by the 1975 Statute".

Argentina concludes its Application by requesting the Court to

"adjudge and declare:

1. that Uruguay has breached the obligations incumbent upon it under the 1975 Statute and the other rules of international law to which that instrument refers, including but not limited to:

(a) the obligation to take all necessary measures for the optimum and rational utilization of the River Uruguay;

(b) the obligation of prior notification to CARU and to Argentina;

(c) the obligation to comply with the procedures prescribed in Chapter II of the 1975 Statute;

(d) the obligation to take all necessary measures to preserve the aquatic environment and prevent pollution and the obligation to protect biodiversity and fisheries, including the obligation to prepare a full and objective environmental impact study;

(e) the obligation to co-operate in the prevention of pollution and the protection of biodiversity and of fisheries; and

2. that, by its conduct, Uruguay has engaged its international responsibility to Argentina;

3. that Uruguay shall cease its wrongful conduct and comply scrupulously in future with the obligations incumbent upon it; and

4. that Uruguay shall make full reparation for the injury caused by its breach of the obligations incumbent upon it."

The Court recalls that, after filing its Application on 4 May 2006, Argentina also submitted a request for the indication of provisional measures, pursuant to Article 41 of the Statute of the Court and to Article 73 of the Rules of Court, in which it refers to the basis of jurisdiction of the Court invoked in its Application, and to the facts set out therein. At the conclusion of its request for the indication of provisional measures Argentina asks the Court to indicate that:

"(a) pending the Court's final judgment, Uruguay shall:

(i) suspend forthwith all authorizations for the construction of the CMB and Orion mills;

(ii) take all necessary measures to suspend building work on the Orion mill; and

(iii) take all necessary measures to ensure that the suspension of building work on the CMB mill is prolonged beyond 28 June 2006;

(b) Uruguay shall co-operate in good faith with Argentina with a view to ensuring the optimum and rational utilization of the River Uruguay in order to protect and preserve the aquatic environment and to prevent its pollution;

(c) pending the Court's final judgment, Uruguay shall refrain from taking any further unilateral action with respect to construction of the CMB and Orion mills which does not comply with the 1975 Statute and the rules of international law necessary for the latter's interpretation and application;

(d) Uruguay shall refrain from any other action which might aggravate or extend the dispute which is the subject-matter of the present proceedings or render its settlement more difficult."

Arguments of the Parties at the hearings

The Court observes that at the hearings, which took place on 8 and 9 June 2006, Argentina reiterated the arguments set out in its Application and its request for the indication of provisional measures, and claimed that the conditions for the indication of provisional measures had been fulfilled.

Argentina *inter alia* argued that its rights under the 1975 Statute arose in relation to two interwoven categories of obligations: "obligations of result that are of a substantive character, and obligations of conduct that have a procedural character". With respect to substantive obligations, Argentina observed that Article 41 *(a)* of the 1975 Statute created for it at least two distinct rights: first, "the right that Uruguay shall prevent pollution" and, second, "the right to ensure that Uruguay prescribes measures 'in accordance with applicable international standards'", and Argentina claimed that Uruguay had respected neither of these obligations. Argentina further asserted that the substantive obligations under the Statute included "Uruguay's obligation not to cause environmental pollution or consequential economic losses, for example to tourism". It added that Articles 7 to 13 of the 1975 Statute and Article 60 thereof give it a number of procedural rights: "first, the right to be notified by Uruguay before works begin; secondly, to express views that are to be taken into account in the design of a proposed project; and, thirdly, to have th[e] Court resolve any differences before construction takes place". Argentina emphasized that, according to Articles 9 and 12 of the 1975 Statute, Uruguay had the obligation "to ensure that no works are carried out until either Argentina has expressed no objections, or Argentina fails to respond to Uruguay's notification, or the Court had indicated the positive conditions under which Uruguay may proceed to carry out works". It submitted that none of these three conditions had yet been met, despite the fact that the above-mentioned procedures are mandatory and "admit of no exception". Argentina further emphasized that, in its view, Article 9 of the 1975 Statute "established a 'no construction' obligation . . . of central importance to this phase of the proceedings".

Argentina maintained that its rights, derived from both substantive and procedural obligations, were "under immediate threat of serious and irreparable prejudice", contending that the site chosen for the two plants was "the worst imaginable in terms of protection of the river and the transboundary environment" and that environmental damage was, at the least, "a very serious probability" and would be irreparable. It submitted that economic and social damage would also result and would be impossible to assess, and further contended that the construction of the mills "[was] already having serious negative effects on tourism and other economic activities of the region", including suspension of investment in tourism and a drastic decline in real estate transactions. Argentina asserted that there was no doubt that the condition of urgency necessary for the indication of provisional measures was satisfied, since "when there is a reasonable risk that the damage cited may occur before delivery of judgment on the merits, the requirement of urgency broadly merges with the condition [of the] existence of a serious risk of irreparable prejudice to the rights in issue". Moreover, it observed that the construction of the mills was "underway and advancing at a rapid rate" and that the construction itself of the mills was causing "real and present damage" and noted that the mills "would patently be commissioned before [the Court] [would be] able to render judgment" since commissioning was scheduled for August 2007 for Orion and June 2008 for CMB. Argentina claimed that the suspension of both the authorizations for the construction of the plants and of the construction work itself was the only measure capable of preventing the choice of sites for the plants becoming a fait accompli and would avoid aggravating the economic and social damage caused by the construction of the plants.

The Court then considers the arguments put forward by Uruguay. It notes that Uruguay stated that it "had fully complied with the 1975 Statute of the River Uruguay throughout the period in which this case has developed" and argued that Argentina's request was unfounded and that the requisite circumstances for a request for provisional measures were entirely lacking.

Uruguay stated that it did not dispute that Article 60 of the 1975 Statute constituted a *prima facie* basis for the jurisdiction of the Court to hear Argentina's request for the indication of provisional measures, but that this provision establishes the Court's jurisdiction only in relation to Argentina's claims concerning the 1975 Statute and not for disputes falling out-

side the Court's jurisdiction, such as those concerning "tourism, urban and rural property values, professional activities, unemployment levels, etc." in Argentina, and those regarding other aspects of environmental protection in transboundary relations between the two States. It contended that Argentina's request for the indication of provisional measures must be rejected because the breaches of the Statute of which Uruguay is accused "*prima facie* lack substance" and, in "applying both the highest and the most appropriate international standards of pollution control to these two mills", Uruguay had "met its obligations under Article 41 of the Statute". Uruguay further stated that it had "discharged the obligations imposed upon it by Articles 7 *et seq.* [of the 1975 Statute] in good faith". In particular, it contended that those Articles did not give either party a "right of veto" over the implementation by the other party of industrial development projects, but were confined to imposing on the parties an obligation to engage in a full and good-faith exchange of information under the procedures provided by the Statute or agreed between them. Uruguay noted that it had complied fully with that obligation by "inform[ing] Argentina—through CARU or through other channels—of the existence of th[e] [pulp mill] projects, describing them in detail with an impressive amount of information", and by "suppl[ying] all the necessary technical data to make Argentina aware of the absence of any risk in regard to their potential environmental impact on the River Uruguay". It further asserted that it was the first time "in the 31 years since the [1975] Statute came into being" that Argentina had claimed it had "a procedural right under the Statute, not only to receive notice and information and to engage in good faith negotiations, but to block Uruguay from initiating projects during [the] procedural stages and during any litigation that might ensue". Uruguay moreover stated that the dispute between Uruguay and Argentina over the pulp mills had in reality been settled by an agreement entered into on 2 March 2004 between the Uruguayan Minister for Foreign Affairs and his Argentine counterpart, by which the two Ministers had agreed, first, that the CMB mill could be built according to the Uruguayan plan, secondly, that Uruguay would provide Argentina with information regarding its specifications and operation and, thirdly, that CARU would monitor the quality of the river water once the mill became operational in order to ensure compliance with the Statute. According to Uruguay, the existence of this agreement had been confirmed a number of times, *inter alia,* by the Argentine Minister for Foreign Affairs and by the Argentine President, and its terms had been extended so as to apply also to the projected Orion mill.

Moreover, according to Uruguay there is no current or imminent threat to any right of Argentina, so that the conditions of risk of irreparable harm and urgency are not fulfilled. In support of its position, Uruguay *inter alia* explained that the environmental impact assessments so far undertaken, as well as those to come, and the regulatory controls and strict licensing conditions imposed by Uruguayan law for the construction and operation of the mills, guaranteed that the latter would not cause any harm to the River Uruguay or to Argentina, and that they would abide by the strict requirements imposed by "the latest European Union 1999 International Pollution Prevention and Control (IPPC) recommendations, with which compliance is required by all pulp plants in Europe by 2007". Uruguay pointed out that the mills would not be operational before August 2007 and June 2008 respectively, and that a number of further conditions would have to be met before that stage was reached. Uruguay concluded that, even if it were to be considered that the operation of the mills might lead to "the contamination of the river", the gravity of the "alleged peril to Argentina" was not "sufficiently certain or immediate as to satisfy the Court's requirement that it be 'imminent' or urgent".

Lastly, Uruguay argued that suspending constructions of the mills would cause such economic loss to the companies involved and their shareholders that it would be highly likely to jeopardize the entire two projects. Uruguay contended that the provisional measures sought by Argentina would therefore irreparably prejudice its sovereign right to implement sustainable economic development projects in its own territory. It pointed out in this connection that the pulp mill projects represented the largest foreign investment in Uruguay's history, that construction in itself would create many thousands of new jobs and that, once in service, the mills would have "an economic impact of more than $350 million per year", representing "an increase of fully 2 per cent in Uruguay's gross domestic product".

In its second round of oral observations Argentina *inter alia* maintained that, according to Article 42 of the 1975 Statute and established international principles, the 1975 Statute covered not only the pollution of the river, as claimed by Uruguay, but also pollution of all kinds resulting from the use of the river as well as the economic and social consequences of the mills. Argentina strongly disputed Uruguay's assertion that it had *prima facie* fulfilled its obligations under the 1975 Statute; it observed that the projects had never been formerly notified to CARU by Uruguay, and that Uruguay had not provided adequate information regarding the pulp mills. Argentina further asserted that there was no bilateral agreement of 2 March 2004 to the effect that construction of the CMB mill could proceed as planned. It contended that the arrangement reached at the meeting of that date between the Ministers for Foreign Affairs of the two States was simply that Uruguay would transmit all the information on CMB to CARU and that CARU would begin monitoring water quality in the area of the proposed site, but that Uruguay had failed to supply the information promised.

For its part, Uruguay noted that "Argentina [did] not deny obtaining from Uruguay a substantial amount of information through a variety of machinery and channels", and that the measures taken by Uruguay in this regard were "fully supported by the CARU minutes". It reiterated its contention that the 1975 Statute does not confer a "right of veto" upon the parties and argued that, in order to resolve any "difficulties of interpretation caused by an incomplete text", it was necessary to turn to Article 31, paragraph 3, of the Vienna Convention on the Law of Treaties and, in particular, to consider "any subsequent practice from which important inferences can be drawn, making it possible to identify the agreement between the parties on how to interpret the treaty in question". According to Uruguay, "the subsequent verbal agreement between the two countries of 2 March 2004 made by their Foreign Ministers"

constituted a specific example of such subsequent practice excluding any interpretation which would recognize a right of veto. Uruguay further reiterated that the bilateral agreement of 2 March 2004, whose existence had been acknowledged by the President of the Argentine Republic, clearly authorized construction of the mills. In concluding its second round of oral observations, Uruguay expressly reiterated "its intention to comply in full with the 1975 Statute of the River Uruguay and its application", and repeated "as a concrete expression of that intention . . . its offer of conducting continuous joint monitoring with the Argentine Republic" regarding the environmental consequences of the mills' future operations.

The Court's reasoning

The Court begins by observing that, in dealing with a request for provisional measures, it need not finally satisfy itself that it has jurisdiction on the merits of the case, but will not indicate such measures unless the provisions invoked by the applicant appear, *prima facie*, to afford a basis on which the jurisdiction of the Court might be established.

The Court notes that Uruguay does not deny that the Court has jurisdiction under Article 60 of the 1975 Statute. It explains that Uruguay, however, asserts that such jurisdiction exists *prima facie* only with regard to those aspects of Argentina's request that are directly related to the rights Argentina is entitled to claim under the 1975 Statute, and that Uruguay insists in this regard that rights claimed by Argentina relating to any alleged consequential economic and social impact of the mills, including any impact on tourism, are not covered by the 1975 Statute.

The Court, taking account of the fact that the Parties are in agreement that it has jurisdiction with regard to the rights to which Article 60 of the 1975 Statute applies, states that it does not need at this stage of the proceedings to address this further issue raised by Uruguay. It concludes, therefore, that it has *prima facie* jurisdiction under Article 60 of the 1975 Statute to deal with the merits, and thus may address the present request for provisional measures.

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The Court then recalls that the object of its power to indicate provisional measures is to permit it to preserve the respective rights of the parties to a case "[p]ending the final decision" in the judicial proceedings, provided such measures are necessary to prevent irreparable prejudice to the rights in dispute. The Court further states that this power is to be exercised only if there is an urgent need to prevent irreparable prejudice to the rights that are the subject of the dispute before the Court has had an opportunity to render its decision.

The Court begins by addressing Argentina's requests directed at the suspension of the authorization to construct the pulp mills and the suspension of the construction work itself. As regards the rights of a procedural nature invoked by Argentina, the Court leaves to the merits stage the question of whether Uruguay may have failed to adhere fully to the provisions of Chapter II of the 1975 Statute when it authorized the construction of the two mills. The Court adds that it is not at present convinced that, if it should later be shown that Uruguay had failed, prior to the present proceedings or at some later stage, fully to adhere to these provisions, any such violations would not be capable of being remedied at the merits stage of the proceedings.

The Court takes note of the interpretation of the 1975 Statute advanced by Argentina to the effect that it provides for a "no construction" obligation, that is to say that it stipulates that a project may only proceed if agreed to by both parties or that, lacking such agreement, it shall not proceed until the Court has ruled on the dispute. The Court, however, takes the view that it does not have to consider that issue for current purposes, since it is not at present convinced that, if it should later be shown that such is the correct interpretation of the 1975 Statute, any consequent violations of the Statute that Uruguay might be found to have committed would not be capable of being remedied at the merits stage of the proceedings.

As regard the rights of a substantive nature invoked by Argentina, the Court recognizes the concerns expressed by Argentina for the need to protect its natural environment and, in particular, the quality of the water of the River Uruguay. It recalls that it has had occasion in the past to stress the great significance it attaches to respect for the environment, in particular in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* and in its Judgment in the case concerning the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*.

In the Court's view, there is, however, nothing in the record to demonstrate that the actual decision by Uruguay to authorize the construction of the mills poses an imminent threat of irreparable damage to the aquatic environment of the River Uruguay or to the economic and social interests of the riparian inhabitants on the Argentine side of the river.

The Court observes that Argentina has not persuaded it that the construction of the mills presents a risk of irreparable damage to the environment; nor has it been demonstrated that the construction of the mills constitutes a present threat of irreparable economic and social damage. Furthermore, Argentina has not shown that the mere suspension of the construction of the mills, pending final judgment on the merits, would be capable of reversing or repairing the alleged economic and social consequences attributed by Argentina to the building works.

Moreover, Argentina has not at present provided evidence that suggests that any pollution resulting from the commissioning of the mills would be of a character to cause irreparable damage to the River Uruguay. The Court notes that it is a function of CARU to ensure the quality of water of the river by regulating and minimizing the level of pollution and that, in any event, the threat of any pollution is not imminent as the mills are not expected to be operational before August 2007 (Orion) and June 2008 (CMB).

The Court adds that it is not persuaded by the argument that the rights claimed by Argentina would no longer be capable of protection if the Court were to decide not to indicate at this stage of the proceeding the suspension of the authorization to construct the pulp mills and the suspension of the construction work itself.

The Court finds, in view of the foregoing, that the circumstances of the case are not such as to require the indication of a provisional measure ordering the suspension by Uruguay

of the authorization to construct the pulp mills or the suspension of the actual construction works. The Court makes it clear, however, that, in proceeding with the authorization and construction of the mills, Uruguay necessarily bears all risks relating to any finding on the merits that the Court might later make. It points out that their construction at the current site cannot be deemed to create a fait accompli because, as the Court has had occasion to emphasize, "if it is established that the construction of works involves an infringement of a legal right, the possibility cannot and should not be excluded *a priori* of a judicial finding that such works must not be continued or must be modified or dismantled".

The Court then turns to the remaining provisional measures sought by Argentina in its request. The Court points out that the present case highlights the importance of the need to ensure environmental protection of shared natural resources while allowing for sustainable economic development, and that it is in particular necessary to bear in mind the reliance of the Parties on the quality of the water of the River Uruguay for their livelihood and economic development; from this point of view, account must be taken of the need to safeguard the continued conservation of the river environment and of the rights of economic development of the riparian States.

The Court recalls in this connection that the 1975 Statute was established pursuant to the 1961 Montevideo Treaty defining the boundary on the River Uruguay between Argentina and Uruguay, and that it is not disputed between the Parties that the 1975 Statute establishes a joint machinery for the use and conservation of the river. The Court observes that the detailed provisions of the 1975 Statute, which require co-operation between the parties for activities affecting the river environment, created a comprehensive and progressive régime; of significance in this regard is the establishment of the CARU, a joint mechanism with regulatory, executive, administrative, technical and conciliatory functions, entrusted with the proper implementation of the rules contained in the 1975 Statute governing the management of the shared river resource, and that the procedural mechanism put in place under the 1975 Statute constitutes a very important part of that treaty régime.

The Court declares that the Parties are required to fulfil their obligations under international law and stresses the need for Argentina and Uruguay to implement in good faith the consultation and co-operation procedures provided for by the 1975 Statute, with CARU constituting the envisaged forum in this regard. The Court further encourages both Parties to refrain from any actions which might render more difficult the resolution of the present dispute.

Having regard to all the above considerations and to the commitment affirmed before the Court by Uruguay during the oral proceedings to comply in full with the 1975 Statute of the River Uruguay, the Court does not consider that there are grounds for it to indicate the remaining provisional measures requested by Argentina. The Court concludes by recalling that its decision 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 Argentina and of Uruguay to submit arguments in respect of those questions. The decision also leaves unaffected the right of Argentina to submit in the 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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Declaration of Judge Ranjeva

Judge Ranjeva agrees with the Court's decision to dismiss the request for provisional measures. However, he is not entirely satisfied with the approach of the Court, which focuses on urgency and the risk of irreparable prejudice in the event of the non-indication of such measures.

The parties' obligation to comply with provisional measures pursuant to Article 94 of the United Nations Charter requires the Court to ensure that its decision cannot be viewed as a provisional judgment capable of prejudging future scrutiny of and findings on the merits. An examination of the effects of the measures is thus not, in itself, sufficient to prevent such a possibility; that examination must also be supported by an analysis of the very purpose of the measures requested.

It is for the Court to compare *in limine* the purpose of those measures with that sought through the principal proceedings and thus to dismiss direct, or in some cases indirect, requests that would, in reality, result in a provisional judgment. Such an approach will, first, help to clarify the relationship between the incidental proceedings and the principal proceedings so as to ensure that the Court, when ruling on the merits, is not bound by the provisional measures and, secondly, to limit the incidental proceedings to an examination of only the urgent parts of the request.

Separate opinion of Judge Abraham

While expressing his agreement with the *dispositif* of the Order, Judge Abraham regrets that the Court did not seize the opportunity presented by this case to clarify the question of principle as to the relationship between the merit, or *prima facie* merit, of the Applicant's contentions in respect of the right it claims and the ordering of the urgent measures it seeks. According to many commentators, the Court, when ruling on a request for provisional measures, should refrain from any consideration at all of the merit of the parties' arguments as to the existence and scope of the rights in dispute and should confine itself to ascertaining whether, assuming that the right claimed by the applicant is ultimately upheld in the final judgment, that right is threatened with irreparable injury in the meantime. Judge Abraham considers this view to be misguided. He points out that a provisional measure enjoining the respondent to act or to refrain from acting in a particular way necessarily interferes with the fundamental right of all sovereign States to act as they think best provided that their acts comply with international law. He deems it unthinkable that such an injunction could be issued without the Court having first satisfied itself that there is at least an appearance of merit in the applicant's argument. In this regard, Judge Abraham draws a connection between the issue he addresses and the Court's affirmation in its Judgment in

LaGrand (Germany v. *United States of America) (I.C.J. Reports 2001, p. 466)* that measures indicated under Article 41 of the Statute are binding. Since an order by the Court obliges the State to which the indicated measure is directed to comply with it, the Court cannot prescribe such a measure without having conducted some minimum degree of review as to the existence of the rights claimed by the applicant, and without therefore taking a look at the merits of the dispute.

Judge Abraham is of the view that this review must necessarily be limited and closely resemble the standard of *fumus boni juris* so familiar to other international courts and many domestic legal systems. Regardless of the terminology employed, this amounts in substance to verifying that three conditions have been satisfied to enable the Court to order a measure to safeguard a right claimed by the applicant: there must be a plausible case for the existence of the right; there must be a reasonable argument that the respondent's conduct is causing, or liable to cause, imminent injury to the right; and, finally, urgency in the specific circumstances must justify a protective measure to safeguard the right from irreparable injury.

Separate opinion of Judge Bennouna

Judge Bennouna regrets that the Court did not take the opportunity in the present case to clarify the relationship between the principal proceedings and the request for the indication of provisional measures.

The two Parties engaged in a full-scale debate before the Court as to the very existence of the right claimed by Argentina, whereby authorization to build the pulp mills could not be given, nor work on the sites begun, without the prior agreement of both States. If such a right existed, the indication of provisional measures, namely the withdrawal of that authorization and the suspension of building work, would effectively follow naturally from it.

The Court should have considered whether, in certain circumstances, it is not obliged to examine the *prima facie* existence of the right at issue—although it must not come to a final decision at that point—when doubt remains due to the possible complexity, ambiguity or silence of the texts concerned.

Judge Bennouna regrets that the Court did not enter into this issue and is of the opinion that there is therefore a link missing in the reasoning of the Order.

Nevertheless, since Judge Bennouna considers that the evidence presented to the Court was insufficient for it to determine *prima facie* whether the right claimed by Argentina existed, and since he is in agreement with the rest of the Court's reasoning, he voted in favour of the Order.

Dissenting opinion of Judge Vinuesa

Judge *ad hoc* Vinuesa disagrees with the Court's finding that "the circumstances, as they present themselves to the Court, are not such as to require the exercise of its power" to indicate provisional measures.

He insists on the necessity to apply the joint mechanism provided for by the 1975 Statute for the optimum and rational utilization of the River Uruguay, and notes the present uncertainty of a risk of irreparable harm to the environment of the River Uruguay. In his opinion, the rights and duties under the 1975 Statute are an expression of the precautionary principle, which has been conventionally incorporated by Uruguay and Argentina. Taking note of the legal effects of Uruguay's commitments before the Court to fully comply with the 1975 Statute, Judge *ad hoc* Vinuesa considers that the Court, in order to guarantee those commitments, should have indicated the temporary suspension of the construction of the mills until Uruguay notifies the Court of the fulfilment of its obligations under the 1975 Statute.

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163. PULP MILLS ON THE RIVER URUGUAY (ARGENTINA *v.* URUGUAY) (PROVISIONAL MEASURES)

Order of 23 January 2007

In an Order issued in the case concerning *Pulp Mills on the River Uruguay*, the Court, by fourteen votes to one, found 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.

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

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The operative paragraph (para. 56) of the Order reads as follows:

" . . .

The Court

By fourteen 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 Higgins; Vice-President Al-Khasawneh; Judges Ranjeva, Shi, Koroma, Buergenthal, Owada, Simma, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov; Judge *ad hoc* Vinuesa;

AGAINST: Judge *ad hoc* Torres Bernárdez."

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Judges Koroma and Buergenthal appended declarations to the Order. Judge *ad hoc* Torres Bernárdez appended a dissenting opinion to the Order.

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Application and requests for the indication of provisional measures

The Court recalls that, by an Application filed in the Registry of the Court on 4 May 2006, the Argentine Republic (hereinafter "Argentina") instituted proceedings against the Eastern Republic of Uruguay (hereinafter "Uruguay") for the alleged breach by Uruguay of obligations under the Statute of the River Uruguay, which was signed by Argentina and Uruguay on 26 February 1975 and entered into force on 18 September 1976 (hereinafter the "1975 Statute"). In its Application, Argentina claims that that breach arises from "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".

Argentina bases the jurisdiction of the Court on Article 36, paragraph 1, of the Statute of the Court and on the first paragraph of Article 60 of the 1975 Statute, which provides *inter alia* that any dispute concerning the interpretation or application of the 1975 Statute "which cannot be settled by direct negotiations may be submitted by either Party to the International Court of Justice".

On the basis of the statement of facts and the legal grounds set out in the Application, Argentina requests the Court to adjudge and declare:

"1. that Uruguay has breached the obligations incumbent upon it under the 1975 Statute and the other rules of international law to which that instrument refers, including but not limited to:

(a) the obligation to take all necessary measures for the optimum and rational utilization of the River Uruguay;

(b) the obligation of prior notification to CARU [the Spanish acronym of the Administrative Commission of the River Uruguay] and to Argentina;

(c) the obligation to comply with the procedures prescribed in Chapter II of the 1975 Statute;

(d) the obligation to take all necessary measures to preserve the aquatic environment and prevent pollution and the obligation to protect biodiversity and fisheries, including the obligation to prepare a full and objective environmental impact study;

(e) the obligation to co-operate in the prevention of pollution and the protection of biodiversity and of fisheries; and

2. that, by its conduct, Uruguay has engaged its international responsibility to Argentina;

3. that Uruguay shall cease its wrongful conduct and comply scrupulously in future with the obligations incumbent upon it; and

4. that Uruguay shall make full reparation for the injury caused by its breach of the obligations incumbent upon it."

The Court recalls that, immediately after filing its Application on 4 May 2006, Argentina submitted a request for the indication of provisional measures requiring Uruguay: to suspend the authorizations for the construction of the mills and to suspend building work on them pending the Court's final decision; and to co-operate with Argentina in order to protect and preserve the aquatic environment of the River Uruguay, to refrain from taking any further unilateral action with respect to construction of the two mills which does not comply with the 1975 Statute and also to refrain from any other action which might aggravate the dispute or render its settlement more difficult. By Order dated 13 July 2006, the Court found "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". By Order of the same date, the Court fixed time-limits for the filing of the initial written pleadings.

On 29 November 2006, Uruguay, referring to the pending case and citing Article 41 of the Statute of the Court and Article 73 of the Rules of Court, in turn submitted a request for the indication of provisional measures, asserting that they were "urgently needed to protect the rights of Uruguay that are at issue in these proceedings from imminent and irreparable injury, and to prevent the aggravation of the present dispute". Uruguay stated *inter alia* that, since 20 November 2006, "[o]rganized groups of Argentine citizens have blockaded a vital international bridge over the Uruguay River, shutting off commercial and tourist travel from Argentina to Uruguay" and that those groups planned to extend the blockades to the river itself. Uruguay claimed to have suffered significant economic injury from these actions, against which Argentina has failed, according to Uruguay, to take any steps. It alleged that the stated purpose of the actions was to force it to accede to Argentina's demand that it permanently end construction of the Botnia pulp mill, the subject-matter of the dispute, and prevent the plant from ever coming into operation.

At the conclusion of its request Uruguay asked the Court to indicate the following measures:

"While awaiting the final judgment of the Court, Argentina

(i) shall take all reasonable and appropriate steps at its disposal to prevent or end the interruption of transit between Uruguay and Argentina, including the blockading of bridges and roads between the two States;

(ii) shall abstain from any measure that might aggravate, extend or make more difficult the settlement of this dispute; and

(iii) shall abstain from any other measure that might prejudice the rights of Uruguay in dispute before the Court."

Jurisdiction of the Court

The Court notes that at the hearings on 18 and 19 December 2006 Argentina challenged the jurisdiction of the Court to indicate the provisional measures sought by Uruguay on the ground, notably, that the request had no link with the Statute of the River Uruguay or with the Application instituting proceedings. In Argentina's view, the real purpose of Uruguay's request was to obtain the removal of the roadblocks and none of the rights potentially affected by the roadblocks, that is the right to freedom of transport and to freedom of commerce between the two States, were rights governed by the Statute of the River Uruguay. Argentina argued that those rights were governed by the Treaty of Asunción, which established the Southern Common Market (hereinafter "Mercosur"), pointing out that Uruguay had already seised a Mercosur *ad hoc* Tribunal in relation to the roadblocks and that that tribunal had handed down its decision on the case on 6 September last, which decision was final and binding and constituted *res judicata* with respect to the Parties. Argentina contended that Mercosur's dispute settlement system ruled out the possibility of applying to any other forum.

The Court next sets out Uruguay's arguments. Uruguay denied that its request for the indication of provisional measures sought to obtain from the Court condemnation of the unlawfulness of the blocking of international roads and bridges connecting Argentina to Uruguay under general international law or under the rules of the Treaty of Asunción. According to Uruguay, the roadblocks constituted unlawful acts violating and threatening irreparable harm to the very rights which it was defending before the Court. Uruguay maintained that the blocking of international roads and bridges was a matter directly, intimately and indissociably related to the subject-matter of the case before the Court and that the Court unquestionably had jurisdiction to entertain it. Uruguay further denied that the measures it had taken within the framework of the Mercosur institutions had any bearing whatsoever on the Court's jurisdiction, given that the decision of the *ad hoc* Tribunal of 6 September 2006 concerned different roadblocks—established at another time and with a different purpose—to those referred to in its request for provisional measures and that it had not instituted any further proceedings within Mercosur's dispute settlement mechanisms with respect to the existing roadblocks.

The Court first points out that, in dealing with a request for provisional measures, it need not finally satisfy itself that it has jurisdiction on the merits of the case but that it will not indicate such measures unless there is, *prima facie*, a basis on which its jurisdiction might be established. It observes that this is so whether the request is made by the applicant or by the respondent in the proceedings on the merits.

After noting that it already concluded, in its Order of 13 July 2006, that it had *prima facie* jurisdiction under Article 60 of the 1975 Statute to deal with the merits of the case, the Court examines the link between the rights sought to be protected through the provisional measures and the subject of the proceedings before the Court on the merits of the case. It observes that Article 41 of the Court's Statute authorizes it to indicate "any provisional measures which ought to be taken to preserve the respective rights of either party" and states that the rights of the respondent (Uruguay) are not dependent solely upon the way in which the applicant (Argentina) formulates its application.

The Court finds that any right Uruguay may have to continue the construction and to begin the commissioning of the Botnia plant in conformity with the provisions of the 1975 Statute, pending a final decision by the Court, effectively constitutes a claimed right in the present case, which may in principle be protected by the indication of provisional measures. It adds that Uruguay's claimed right to have the merits of the present case resolved by the Court under Article 60 of the 1975 Statute also has a connection with the subject of the proceedings on the merits initiated by Argentina and may in principle be protected by the indication of provisional measures.

The Court concludes that the rights which Uruguay invokes in, and seeks to protect by, its request have a sufficient connection with the merits of the case and that Article 60 of the 1975 Statute may thus be applicable to those rights. The Court points out that the rights invoked by Uruguay before the Mercosur *ad hoc* Tribunal are different from those that it seeks to have protected in the present case and that it follows that the Court has jurisdiction to address Uruguay's request for provisional measures.

Provisional measures: reasoning of the Court

The Court observes that its power to indicate provisional measures has as its object to preserve the respective rights of each party to the proceedings "[p]ending the final decision", providing that such measures are justified to prevent irreparable prejudice to the rights which are the subject of the dispute. It adds that this power can be exercised only if there is an urgent necessity to prevent irreparable prejudice to such rights, before the Court has given its final decision.

In respect of the first provisional measure sought by Uruguay, namely that Argentina "shall take all reasonable and appropriate steps at its disposal to prevent or end the interruption of transit between Uruguay and Argentina, including the blockading of bridges and roads between the two States", the Court notes that, according to Uruguay: roadblocks have been installed on all of the bridges linking Uruguay to Argentina; the Fray Bentos bridge, which normally carries 91 per cent of Uruguay's exports to Argentina, has been subject to a complete and uninterrupted blockade; and the two other bridges linking the two countries "have at times been closed" and that there was a real risk of them being blocked permanently. Again according to Uruguay, these roadblocks have an extremely serious impact on Uruguay's economy and on its tourist industry and are moreover aimed at compelling Uruguay to halt construction of the Botnia plant, which would be lost in its entirety, thereby leading to irreparable prejudice. Uruguay further claimed that, in encouraging the blockades, Argentina had initiated a trend intended to result in irreparable harm to the very substance of the rights in dispute and that, accordingly, "it is the blockades that present the urgent threat, not . . . [the] impact they may eventually have on the Botnia plant". The Court notes that Argentina disputed the

version of the facts presented by Uruguay and argued that the issue was the blockade of roads in Argentine territory and not of an international bridge. In its view, the roadblocks were "sporadic, partial and geographically localized" and moreover had no impact on either tourism or trade between the two countries, nor on the construction of the pulp mills, which has continued. Argentina stated in this respect that the Orion mill was "at 70 per cent of the planned construction". It added that it had never encouraged the roadblocks, nor provided the blockaders with any support, and submitted that the partial blocking of roads in Argentina was not capable of causing irreparable prejudice to the rights which will be the subject of the Court's decision on the merits, and that there was no urgency to the provisional measures sought by Uruguay.

Referring to the arguments of the Parties, the Court expresses its view that, notwithstanding the blockades, the construction of the Botnia plant has progressed significantly since the summer of 2006 with two further authorizations having been granted and that it is now well advanced and thus continuing. It states that it is not convinced that the blockades risk prejudicing irreparably the rights which Uruguay claims in the present case from the 1975 Statute as such and adds that it has not been shown that, were there such a risk, it would be imminent. The Court consequently finds that the circumstances of the case are not such as to require the indication of the first provisional measure requested by Uruguay, to "prevent or end the interruption of transit" between the two States and *inter alia* "the blockading of [the] bridges and roads" linking them.

The Court next turns to the other two provisional measures sought by Uruguay, namely that Argentina "shall abstain from any measure that might aggravate, extend or make more difficult the settlement of this dispute; and shall abstain from any other measure that might prejudice the rights of Uruguay in dispute before the Court". The Court refers to Uruguay's argument that an order can be made to prevent aggravation of the dispute even where the Court has found that there is no threat of irreparable damage to the rights in dispute and notes that, according to Uruguay, the blockade of the bridges over the River Uruguay amounts to an aggravation of the dispute which threatens the due administration of justice. Uruguay further argued that, given Argentina's conduct aimed at compelling Uruguay to submit, without waiting for the judgment on the merits, to the claims asserted by Argentina before the Court, the Court should order Argentina to abstain from any other measure that might prejudice Uruguay's rights in dispute. The Court observes that, in Argentina's view, there was no risk of aggravation or extension of the dispute and nothing in its conduct infringed Uruguay's procedural rights or endangered Uruguay's rights to continue the proceedings, to deploy all its grounds of defence and to obtain from the Court a decision with binding force. Argentina added that, in the absence of any link to the subject-matter of the proceedings, should the Court decide not to indicate the first provisional measure, the second and third provisional measures requested by Uruguay could not be indicated independently from the first.

The Court points out that it has on several occasions, in past cases of which it cites examples, indicated provisional measures directing the parties not to take any actions which could aggravate or extend the dispute or render more difficult its settlement. It notes that in those cases provisional measures other than those directing the parties not to take actions to aggravate or extend the dispute or to render more difficult its settlement were also indicated. In this case the Court does not find that there is at present an imminent risk of irreparable prejudice to the rights of Uruguay in dispute before it, caused by the blockades of the bridges and roads linking the two States. It therefore considers that the blockades themselves do not justify the indication of the second provisional measure requested by Uruguay, in the absence of the conditions for the Court to indicate the first provisional measure. For the aforementioned reasons, the Court cannot indicate the third provisional measure requested by Uruguay either.

Having rejected Uruguay's request for the indication of provisional measures in its entirety, the Court reiterates its call to the Parties made in its Order of 13 July 2006 "to fulfil their obligations under international law", "to implement in good faith the consultation and co-operation procedures provided for by the 1975 Statute, with CARU [Administrative Commission of the River Uruguay] constituting the envisaged forum in this regard", and "to refrain from any actions which might render more difficult the resolution of the present dispute". It points out that its decision 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 to the merits themselves and that the decision leaves unaffected the right of Argentina and of Uruguay to submit arguments in respect of those questions. The decision also leaves unaffected the right of Uruguay to submit in the 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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Declaration of Judge Koroma

In a declaration attached to the Order Judge Koroma has pointed out that the decision taken by the Court in this case was judicious. That while the Court found that it had *prima facie* jurisdiction, but, because no imminent threat of irreparable harm or prejudice to Uruguay's rights was demonstrated, it could not uphold the request in its entirety, Judge Koroma considered it appropriate to call on the Parties not to take any action that might render more difficult the resolution of the dispute. He believes that this exhortation not only falls within the purview of Article 41 of the Statute—the preservation of the respective rights of the Parties—but should encourage them to solve their dispute peacefully. In his view, the judicial function is not limited to settling disputes and fostering the development of the law but includes encouraging parties in dispute to find a peaceful solution to their dispute on the basis of law rather than otherwise.

Declaration of Judge Buergenthal

Although agreeing with the Court's decision rejecting Uruguay's request for provisional measures, Judge Buergenthal argues in his Declaration that the Court has the power to

grant two distinct types of provisional measures. One type is based on a finding that there is an urgent need for such measures because of the risk of irreparable prejudice or harm to the rights that are the subject of the dispute over which the Court has *prima facie* jurisdiction. The other type of provisional measures may be indicated, according to Judge Buergenthal, in order to prevent the aggravation or extension of the dispute by extrajudicial coercive means unrelated to the subject matter of the dispute. He submits that by focusing only on the first type, the Court missed an opportunity to thoroughly consider the full scope of its power under Article 41 of its Statute in circumstances involving allegations of extrajudicial coercive measures.

Judge Buergenthal concludes that, despite the regrettable economic harm caused Uruguay by the blockades of the bridges, these actions appear not to have seriously undermined the ability of Uruguay to effectively protect its rights generally in the pending judicial proceedings.

Dissenting opinion of Judge Torres Bernárdez

1. In his dissenting opinion Judge *ad hoc* Torres Bernárdez first examines the question of the Court's *prima facie* jurisdiction and the admissibility of Uruguay's request for the indication of provisional measures and then the question whether or not there is a risk of irreparable prejudice to the disputed rights claimed by Uruguay and an urgent need to remedy it.

2. In respect of the first question, Judge Torres Bernárdez concludes that Argentina's contentions as to lack of jurisdiction and inadmissibility are not supported by either the facts of the case or the applicable law. Thus, Judge Torres Bernárdez expresses his agreement with the Court's rejection of the objections submitted by Argentina (para. 30 of the Order). He also sees in this rejection confirmation that the rights invoked by Uruguay as a party to the 1975 Statute of the River Uruguay, for which Uruguay seeks protection through the indication of provisional measures, are not, *prima faci*e, non-existent or alien to the dispute. They are fully plausible rights in dispute and are sufficiently important and solid to merit possible protective measures in response to a party's conduct threatening to infringe them. Thus, Uruguay's claim satisfies the "*fumus boni juris*" or "*fumus non mali juris*" test.

3. In respect of the question whether or not there is a risk of irreparable prejudice to the disputed rights claimed by Uruguay and an urgent need to remedy it, Judge Torres Bernárdez begins by recalling that, under Article 41 of the Statute of the Court, the indication of provisional measures presupposes that "irreparable prejudice" shall not be caused in the course of the judicial proceedings to rights which are the subject of dispute and that the Court must therefore 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 (see, for example, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia (Serbia and Montenegro)), Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993,* p. 19, para. 34). But it is obviously unnecessary, where provisional measures are to be indicated, for the "prejudice" itself already to have occurred. It is enough for there to be a serious "risk" of irreparable prejudice to the rights at issue. This explains why it is well-established in the jurisprudence of the Court that provisional measures are aimed at responding not to "irreparable prejudice" *per se*, but to a "risk of irreparable prejudice" to the rights in dispute. And it is indeed the "risk" and the "urgency" which must be shown.

4. Judge Torres Bernárdez points out that, in addressing the issue of the existence of the risk and its imminence, he will rely essentially on factual elements. He notes that the term "prejudice" as used in the jurisprudence of the Court has a broader, more elastic meaning than economic injury or loss alone. As for the "irreparability" of the prejudice, he concurs that the main test employed in the jurisprudence refers to preserving the integrity and effectiveness of the judgment on the merits.

5. The fact that in the present case the rights claimed by Uruguay, targeted by the "asambleistas" of Gualeguaychu and its environs, are "rights in dispute" before the Court in no way changes Argentina's obligations as territorial sovereign. Further, as a Party to the case, Argentina must not forestall the Court's final decision on the "rights in dispute" in the case which it itself referred to the Court. Moreover, the situation has deteriorated since late November 2006. It should have prompted the exercise by the Court of its power to indicate such measures to preserve Uruguay's rights at issue and to check the marked proclivity towards aggravating and extending the dispute.

6. In the opinion of Judge Torres Bernárdez, the circumstances of the present case require the indication of very specific provisional measures. It is rare for a respondent State to find itself exposed, as a "litigant", to economic, social and political injury as a result of coercive actions taken by nationals of the applicant State in that State. The avowed purpose of those coercive actions is to halt the construction of the "Orion" pulp mill or to force its relocation, i.e. to cause prejudice to Uruguay's main right at issue in the case. Nor is it frequent for an applicant State to "tolerate" such a situation, relying on a domestic policy of persuasion, rather than repression, vis-à-vis social movements and, for that reason, failing to exercise the "due diligence" required of the territorial sovereign by general international law in the area, including first and foremost compliance with the obligation not knowingly to allow its territory to be used for acts contrary to the rights of other States (case concerning *Corfu Channel (United Kingdom* v. *Albania), Merits, Judgment, I.C.J. Reports 1949,* p. 22).

7. Notwithstanding the foregoing points, the Court found that the circumstances of the case were not such as to require the indication of the *first provisional measure* requested by Uruguay, to "prevent or end the interruption of transit" between the two States and *inter alia* "the blockading of [the] bridges and roads" linking them (paragraph 43 of the Order). In the Order this conclusion is supported by reasoning which casts no doubt on the facts as such, i.e. on the existence of the blockades of the Argentine access roads to the international bridges. However, the Court did not see in them any "imminent risk" of "irreparable prejudice" to Uruguay's right to build the "Orion" plant at Fray Bentos *pendente lite.*

8. Judge Torres Bernárdez takes issue with this finding in the Order because it is based on a "reductionist" approach to the concept of "imminent *risk* of irreparable prejudice" and to the scope of "Uruguay's rights in dispute" in the case. This "reductionism" is evidenced by the fact that the Court refrained from considering whether the blockades have caused and/or may continue to cause economic and social prejudice to Uruguay. That however was the raison d'être of Uruguay's request. Uruguay sought to protect itself from the significant damage caused to Uruguayan trade and tourism inherent in the situation created by the blockades. After all, the blockades were set up with the goal of making Uruguay pay a price, or a "toll", to be able to pursue the building of the "Orion" plant at Fray Bentos.

9. In this connection, the Judge points out in his opinion that the blockades tolerated by Argentina have created a dilemma for Uruguay: either it halts construction of the "Orion" plant or its pays an economic and social "toll" to be able to continue the building work. Thus, the fact that construction of the plant is continuing does not dispel the "*risk of prejudice*" to Uruguay's rights which are infringed by the blockades. On the contrary, the "toll" grows heavier by the day and there is a recognized relationship between the facts out of which the "toll" arises and Uruguay's claimed "right" to build the Fray Bentos mill pending the final decision by the Court. Moreover, the "toll" creates a security problem because the actions by the "asambleistas" cause alarm and social tension which could give rise to border and trans-border incidents.

10. For Judge Torres Bernárdez, that "toll" may essentially be viewed as *lost profit* for the Uruguayan economy and one which bears "a risk of prejudice" for the rights that the country is defending in the instant case based on the Statute of the River Uruguay, *inter alia* the right to continue construction of the Orion mill in Fray Bentos and the right to have the legal dispute between Argentina and Uruguay over the paper mills decided in accordance with Article 60 of the river's Statute, as "subsequent events may [effectively] render an application without object" (case concerning *Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988,* p. 95, para. 66). For example, the passage of time has stripped certain conclusions of Argentina's Application of 4 May 2006 of their relevance, as ENCE's planned CMB mill has been relocated to Punta Pereyra on the Uruguayan side of the River Plata. Therein lies the "risk of prejudice" to the rights in dispute for Uruguay in the present case. Social peace is much appreciated by industrial concerns. The Argentine demonstrators are well aware of this, as indicated by the fact that they began the current road and bridge blockades shortly after the Orion project was approved by the World Bank and its lending institutions.

11. The prejudice in question is, by its very nature, "irreparable", as the Court's Judgment could not restore the "Orion" project to Fray Bentos should Botnia decide to leave. Although this is not so for the moment, it is not the point. What matters, in Judge Torres Bernárdez's view, is the "risk of prejudice" and this risk is a real and present one as Argentina has not taken the measures necessary to put an end to the situation caused by the roadblocks nor to prevent a repetition of them. The "irreparable prejudice" also urgently needs to be eliminated because it is a *"present risk"*.

12. That present risk has steadily increased since the end of November 2006 with the regrettable consequences that can readily be imagined for the sustainable economic development of the country. It also impairs the right to have the dispute resolved by the Court under Article 60 of the Statute of the River Uruguay. The need to protect this right as of now cannot be open to doubt as the duration of the risk of prejudice created by the "toll" threatens the very integrity of the judicial settlement.

13. Furthermore, the harm caused to the Uruguayan economy by the roadblocks is in no way a prejudice which Uruguay is supposed to suffer under the material law applicable to the legal dispute before the Court—i.e. the 1975 Statute of the River Uruguay—nor under the Statute or the Rules of Court or the Order of 13 July 2006 either. Uruguay is entitled to call for an end to the roadblocks and the actions of the demonstrators which are damaging its economy, thus creating a "present risk" for the rights claimed by it in the case. Argentina, in turn, has particular duties of its own in this respect as the State with authority over the territory in which the acts in question are taking place, and also as a Party to the present case. It is surprising that, hitherto, neither of these two duties has prompted the Argentine authorities to put an end to the roadblocks.

14. Lastly, Judge Torres Bernárdez considers that, for the indication of provisional measures, there is an ample *prima facie* legal link between: (1) the facts related to the blockade of roads and bridges by Argentine demonstrators, tolerated by that country's authorities; (2) the present risk of irreparable prejudice to Uruguay's rights at issue; (3) the principle of optimum and rational utilization of the River Uruguay and its water, including for industrial purposes in conformity with the régime governing the river and the quality of its water (Article 27 of the 1975 Statute); and (4) the judicial resolution of disputes under the Statute. Argentina's Application instituting proceedings would appear to confirm these links.

15. In light of these considerations, and taking account of the arguments and documents presented by the Parties, Judge Torres Bernárdez considers that the circumstances of the case favour the indication of the *first provisional measure* requested by Uruguay, namely, that Argentina must take "all reasonable and appropriate steps at its disposal to prevent or end the interruption of transit between Uruguay and Argentina, including the blockading of bridges and roads between the two States".

16. Judge Torres Bernárdez also disagrees with the Order as regards the failure to indicate, in its operative part, a provisional measure to avoid the aggravation or extension of the dispute or to make its settlement more difficult, which is the matter raised by the *second provisional measure* requested by Uruguay. For Judge Torres Bernárdez, the particular circumstances of the case, including those subsequent to the hearings which are in the public domain, call for the urgent indication of provisional measures relating to the non-aggravation and non-extension of the dispute *addressed to both Parties*. Regarding the latter aspect, Judge Torres Bernárdez therefore

diverges from Uruguay's formulation of the second measure it requests (Article 75, paragraph 2, of the Rules of Court).

17. The opinion stresses the full importance of the Court's power to indicate the above-mentioned measures "independently" of the requests for the indication of provisional measures presented by the parties with a view to safeguarding specific rights. Such declarations have been incorporated into the reasoning of Orders for provisional measures both before and after the *LaGrand* case.

18. Judge Torres Bernárdez regrets the fact that the Court has not indicated provisional measures for both Parties to avoid aggravating or extending the dispute. The Court should have done so on the basis of international law, namely, on the

> "principle universally accepted by international tribunals and likewise laid down in many conventions . . . to the effect that the parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given and, in general, not allow any step of any kind to be taken which might aggravate or extend the dispute" (*Electricity Company of Sofia and Bulgaria, P.C.I.J., Series A/B No. 79,* p. 199; *LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001,* p. 503, para. 103).

19. Lastly, Judge Torres Bernárdez concurs with the Order as regards its rejection of the *third provisional measure* requested by Uruguay, but not for the reason indicated in the Order (para. 51). For him, that third provisional measure lacks precision, is insufficiently specific and the circumstance of the case at present do not require the indication of a measure so broad in scope.

20. In short, Judge Torres Bernárdez concurs with the Order's conclusion regarding the Court's *prima facie* jurisdiction to entertain Uruguay's request and with its rejection of the third measure requested. On the other hand, he disagrees with the Order's rejection of the first measure requested, as well as with its rejection of the second measure reformulated so that it is addressed to both parties. These two points of disagreement prevented him from voting in favour of the Order.

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164. 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

In its Judgment in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro*), the Court affirmed that it had jurisdiction, on the basis of article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, to adjudicate upon the dispute. It found that Serbia had not committed genocide, had not conspired to commit genocide nor incited the commission of genocide and had not been complicit in genocide, in violation of its obligations under the Convention.

The Court further found that Serbia had violated the obligation to prevent genocide in respect of the genocide that occurred in Srebrenica and its obligations under the Convention by having failed to transfer Ratko Mladić, indicted for genocide and complicity in genocide, for trial by the International Criminal Tribunal for the former Yugoslavia, and thus having failed fully to co-operate with that Tribunal.

The Court also found that Serbia had violated its obligation to comply with the provisional measures ordered by the Court on 8 April and 13 September 1993 in this case, inasmuch as it failed to take all measures within its power to prevent genocide in Srebrenica in July 1995.

The Court decided that Serbia shall immediately take effective steps to ensure full compliance with its obligation under the Convention to punish acts of genocide, or any of the other acts proscribed by Article III of the Convention, and to transfer individuals accused of genocide or any of those other acts for trial by the International Criminal Tribunal for the former Yugoslavia, and to co-operate fully with that Tribunal. Finally, the Court found that its findings in the judgment on Serbia's violations of its obligations under the Convention constituted appropriate satisfaction and that the case was not one in which an order for payment of compensation, or, in respect of the violation of the obligation to prevent genocide, a direction to provide assurances and guarantees of non-repetition, would be appropriate.

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

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The operative paragraph (para. 471) of the Judgment reads as follows:

"...

The Court,

(1) by ten votes to five,

Rejects the objections contained in the final submissions made by the Respondent to the effect that the Court has no jurisdiction; and *affirms* that it has jurisdiction, on the basis of Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, to adjudicate

upon the dispute brought before it on 20 March 1993 by the Republic of Bosnia and Herzegovina;

IN FAVOUR: President Higgins; Vice-President Al-Khasawneh; Judges Owada, Simma, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna; Judge *ad hoc* Mahiou;

AGAINST: Judges Ranjeva, Shi, Koroma, Skotnikov; Judge *ad hoc* Kreća;

(2) by thirteen votes to two,

Finds that Serbia has not committed genocide, through its organs or persons whose acts engage its responsibility under customary international law, in violation of its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide;

IN FAVOUR: President Higgins; Judges Ranjeva, Shi, Koroma, Owada, Simma, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov; Judge *ad hoc* Kreća;

AGAINST: Vice-President Al-Khasawneh; Judge *ad hoc* Mahiou;

(3) by thirteen votes to two,

Finds that Serbia has not conspired to commit genocide, nor incited the commission of genocide, in violation of its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide;

IN FAVOUR: President Higgins; Judges Ranjeva, Shi, Koroma, Owada, Simma, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov; Judge *ad hoc* Kreća;

AGAINST: Vice-President Al-Khasawneh; Judge *ad hoc* Mahiou;

(4) by eleven votes to four,

Finds that Serbia has not been complicit in genocide, in violation of its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide;

IN FAVOUR: President Higgins; Judges Ranjeva, Shi, Koroma, Owada, Simma, Tomka, Abraham, Sepúlveda-Amor, Skotnikov; Judge *ad hoc* Kreća;

AGAINST: Vice-President Al-Khasawneh; Judges Keith, Bennouna; Judge *ad hoc* Mahiou;

(5) by twelve votes to three,

Finds that Serbia has violated the obligation to prevent genocide, under the Convention on the Prevention and Punishment of the Crime of Genocide, in respect of the genocide that occurred in Srebrenica in July 1995;

IN FAVOUR: President Higgins; Vice-President Al-Khasawneh; Judges Ranjeva, Shi, Koroma, Owada, Simma, Abraham, Keith, Sepúlveda-Amor, Bennouna; Judge *ad hoc* Mahiou;

AGAINST: Judges Tomka, Skotnikov; Judge *ad hoc* Kreća;

(6) by fourteen votes to one,

Finds that Serbia has violated its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide by having failed to transfer Ratko Mladić, indicted for genocide and complicity in genocide, for trial by the International Criminal Tribunal for the former Yugoslavia, and thus having failed fully to co-operate with that Tribunal;

IN FAVOUR: President Higgins; Vice-President Al-Khasawneh; Judges Ranjeva, Shi, Koroma, Owada, Simma, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov; Judge *ad hoc* Mahiou;

AGAINST: Judge *ad hoc* Kreća;

(7) by thirteen votes to two,

Finds that Serbia has violated its obligation to comply with the provisional measures ordered by the Court on 8 April and 13 September 1993 in this case, inasmuch as it failed to take all measures within its power to prevent genocide in Srebrenica in July 1995;

IN FAVOUR: President Higgins; Vice-President Al-Khasawneh; Judges Ranjeva, Shi, Koroma, Owada, Simma, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna; Judge *ad hoc* Mahiou;

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

(8) by fourteen votes to one,

Decides that Serbia shall immediately take effective steps to ensure full compliance with its obligation under the Convention on the Prevention and Punishment of the Crime of Genocide to punish acts of genocide as defined by Article II of the Convention, or any of the other acts proscribed by Article III of the Convention, and to transfer individuals accused of genocide or any of those other acts for trial by the International Criminal Tribunal for the former Yugoslavia, and to co-operate fully with that Tribunal;

IN FAVOUR: President Higgins; Vice-President Al-Khasawneh; Judges Ranjeva, Shi, Koroma, Owada, Simma, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov; Judge *ad hoc* Mahiou;

AGAINST: Judge *ad hoc* Kreća;

(9) by thirteen votes to two,

Finds that, as regards the breaches by Serbia of the obligations referred to in subparagraphs (5) and (7) above, the Court's findings in those paragraphs constitute appropriate satisfaction, and that the case is not one in which an order for payment of compensation, or, in respect of the violation referred to in subparagraph (5), a direction to provide assurances and guarantees of non-repetition, would be appropriate.

IN FAVOUR: President Higgins; Judges Ranjeva, Shi, Koroma, Owada, Simma, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov; Judge *ad hoc* Kreća;

AGAINST: Vice-President Al-Khasawneh; Judge *ad hoc* Mahiou."

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Vice-President Al-Khasawneh appended a dissenting opinion to the Judgment of the Court; Judges Ranjeva, Shi and Koroma appended a joint dissenting opinion; Judge Ranjeva appended a separate opinion; Judges Shi and Koroma appended a joint declaration; Judges Owada and Tomka appended sepa-

rate opinions; Judges Keith, Bennouna and Skotnikov appended declarations; Judge *ad hoc* Mahiou appended a dissenting opinion; Judge *ad hoc* Kreća appended a separate opinion.

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History of the proceedings and submissions of the Parties
(paras. 1–66)

The Court begins by recapitulating the various stages of the proceedings (this history may be found in Press Release No. 2006/9 of 27 February 2006). It also recalls the final submissions presented by the Parties at the oral proceedings (see Press Release No. 2006/18 of 9 May 2006).

Identification of the respondent party
(paras. 67–79)

The Court first identifies the respondent party before it in the proceedings. It observes that after the close of the oral proceedings, by a letter dated 3 June 2006, the President of the Republic of Serbia informed the Secretary-General of the United Nations that, following the Declaration of Independence adopted by the National Assembly of Montenegro on 3 June 2006, "the membership of the state union Serbia and Montenegro in the United Nations, including all organs and organisations 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". On 28 June 2006, by its resolution 60/264, the General Assembly admitted the Republic of Montenegro as a new Member of the United Nations.

After having examined the views expressed on this issue by the Agent of Bosnia and Herzegovina, the Agent of Serbia and Montenegro and the Chief State Prosecutor of Montenegro, the Court observes that the facts and events on which the final submissions of Bosnia and Herzegovina are based occurred at a period of time when Serbia and Montenegro constituted a single State.

It notes that Serbia has accepted "continuity between Serbia and Montenegro and the Republic of Serbia", and has assumed responsibility for "its commitments deriving from international treaties concluded by Serbia and Montenegro", thus including commitments under the Genocide Convention. Montenegro, on the other hand, does not claim to be the continuator of Serbia and Montenegro.

The Court recalls a fundamental principle that no State may be subject to its jurisdiction without its consent. It states that the events related clearly show that the Republic of 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. It is also clear that Montenegro does not give its consent to the jurisdiction of the Court over it for the purposes of the dispute. Furthermore, the Applicant did not assert that Montenegro is still a party to the present case; it merely emphasized its views as to the joint and several liability of Serbia and of Montenegro.

The Court thus notes that the Republic of Serbia remains a respondent in the case, and at the date of the present Judgment is indeed the only Respondent. Accordingly, any findings that the Court may make in the operative paragraph of the Judgment are to be addressed to Serbia. That being said, the Court recalls that any responsibility for past events determined in the present Judgment involved at the relevant time the State of Serbia and Montenegro. It further observes that the Republic of Montenegro is a party to the Genocide Convention and that Parties to that Convention have undertaken the obligations flowing from it, in particular the obligation to co-operate in order to punish the perpetrators of genocide.

The Court's jurisdiction
(paras. 80–141)

The jurisdictional objection of the Respondent

The Court proceeds to examine an important issue of jurisdictional character raised by the "Initiative to Reconsider *ex officio* Jurisdiction over Yugoslavia" filed by the Respondent in 2001 (hereinafter "the Initiative"). It explains that the central question raised by the Respondent is whether at the time of the filing of the Application instituting proceedings the Respondent was or was not the continuator of the Socialist Federal Republic of Yugoslavia (SFRY). The Respondent now contends that it was not a continuator State, and that therefore not only was it not a party to the Genocide Convention when the proceedings were instituted, but it was not then a party to the Statute of the Court by virtue of membership in the United Nations; and that, not being such a party, it did not have access to the Court, with the consequence that the Court had no jurisdiction *ratione personae* over it.

The Court recalls the circumstances underlying that Initiative. Briefly stated, the situation was that the Respondent, after claiming that since the break-up of the SFRY in 1992 it was the continuator of that State, and as such maintained the membership of the SFRY in the United Nations, had on 27 October 2000 applied, "in light of the implementation of the Security Council resolution 777 (1992)" to be admitted to the Organization as a new Member, thereby in effect relinquishing its previous claim.

In order to clarify the background to these issues, the Court reviews the history of the status of the Respondent with regard to the United Nations from the break-up of the SFRY to the admission of Serbia and Montenegro on 1 November 2000 as a new Member.

The response of Bosnia and Herzegovina

The Court observes that the Applicant contends that the Court should not examine the question raised by the Respondent in its Initiative. Bosnia and Herzegovina firstly argues that the Respondent was under a duty to raise the issue of whether the FRY was a Member of the United Nations at the time of the proceedings on the preliminary objections, in 1996, and that since it did not do so, the principle of *res judicata,* attaching to the Court's 1996 Judgment on those objections, prevents it from reopening the issue. Bosnia and Herzegovina secondly maintains that the Court itself, having decided in 1996 that it had jurisdiction in the case, would be in breach of the principle of *res judicata* if it were now to decide otherwise, and that

the Court cannot call in question the authority of its decisions as *res judicata*.

With respect to the first contention of Bosnia and Herzegovina, the Court notes that if a party to proceedings before the Court chooses not to raise an issue of jurisdiction by way of the preliminary objection procedure under Article 79 of the Rules, that party is not necessarily thereby debarred from raising such issue during the proceedings on the merits of the case.

The Court does not find it necessary to consider whether the conduct of the Respondent could be held to constitute an acquiescence in the jurisdiction of the Court. Such acquiescence, if established, might be relevant to questions of consensual jurisdiction, but not to the question whether a State has the capacity under the Statute to be a party to proceedings before the Court. The Court observes that the latter question may be regarded as an issue prior to that of jurisdiction *ratione personae,* or as one constitutive element within the concept of jurisdiction *ratione personae*. Either way, unlike the majority of questions of jurisdiction, it is not a matter of the consent of the parties. It follows that, whether or not the Respondent should be held to have acquiesced in the jurisdiction of the Court in the case, such acquiescence would in no way debar the Court from examining and ruling upon the question it raised. The same reasoning applies to the argument that the Respondent is estopped from raising the matter at this stage, or debarred from doing so by considerations of good faith. The Court therefore turns to examine the second contention of Bosnia and Herzegovina that the question of the capacity of the Respondent to be a party to proceedings before the Court has already been resolved as a matter of *res judicata* by the 1996 Judgment on jurisdiction.

The principle of res judicata

After having reviewed its relevant past decisions, notably its 1996 Judgment on Preliminary Objections in the case and the 2003 Judgment in the *Application for Revision* case, the Court considers the principle of *res judicata,* and its application to the 1996 Judgment.

The Court recalls that the principle of *res judicata* appears from the terms of the Statute of the Court and the Charter of the United Nations. That principle signifies that the decisions of the Court are not only binding on the parties, but are final, in the sense that they cannot be reopened by the parties as regards the issues that have been determined, save by procedures, of an exceptional nature, specially laid down for that purpose (the procedure for revision set down in Article 61 of the Statute). In the view of the Court, two purposes underlie the principle of *res judicata:* first, the stability of legal relations requires that litigation come to an end; secondly, it is in the interest of each party that an issue which has already been adjudicated in favour of that party be not argued again.

The Court observes that it has been suggested *inter alia* by the Respondent that a distinction may be drawn between the application of the principle of *res judicata* to judgments given on the merits of a case and judgments determining the Court's jurisdiction, in response to preliminary objections. The Respondent contends that the latter "do not and cannot have the same consequences as decisions on the merits". The Court dismisses this contention, explaining that the decision on questions of jurisdiction is given by a judgment, and Article 60 of the Statute provides that "[t]he judgment is final and without appeal", without distinguishing between judgments on jurisdiction and admissibility, and judgments on the merits. The Court does not uphold the other arguments of the Respondent in respect of *res judicata*. It states that, should a party to a case believe that elements have come to light subsequent to the decision of the Court which tend to show that the Court's conclusions may have been based on incorrect or insufficient facts, the Statute provides for only one procedure: that under Article 61, which offers the possibility of the revision of judgments, subject to the restrictions stated in that Article. In this regard, it recalls that the Respondent's Application for revision of the 1996 Judgment in the case was dismissed, as not meeting the conditions of Article 61.

Application of the principle of res judicata *to the 1996 Judgment*

The Court recalls that the operative part of a judgment of the Court possesses the force of *res judicata.* The operative part of the 1996 Judgment stated that the Court found "that, on the basis of Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, it has jurisdiction to decide upon the dispute". According to the Court, that jurisdiction is thus established with the full weight of the Court's judicial authority. For a party to assert today that, at the date the 1996 Judgment was given, the Court had no power to give it, because one of the parties can now be seen to have been unable to come before the Court is to call in question the force as *res judicata* of the operative clause of the Judgment. Therefore, the Court need not examine the Respondent's objection to jurisdiction based on its contention as to its lack of status in 1993.

The Respondent has however advanced a number of arguments tending to show that the 1996 Judgment is not conclusive on the matter. It has been *inter alia* suggested that, for the purposes of applying the principle of *res judicata* to a judgment on preliminary objections, the operative clause to be taken into account and given the force of *res judicata* is the decision rejecting specified preliminary objections, rather than the broad ascertainment upholding jurisdiction. The Court does not uphold this contention, explaining that it does not consider that it was the purpose of Article 79 of the Rules of Court to limit the extent of the force of *res judicata* attaching to a judgment on preliminary objections, nor that, in the case of such judgment, such force is necessarily limited to the clauses of the *dispositif* specifically rejecting particular objections. If any question arises as to the scope of *res judicata* attaching to a judgment, it must be determined in each case having regard to the context in which the judgment was given. It may be necessary to distinguish between, first, the issues which have been decided with the force of *res judicata,* or which are necessarily entailed in the decision of those issues; secondly any peripheral or subsidiary matters, or *obiter dicta;* and finally matters which have not been ruled upon at all.

The Court notes that the fact that it has dealt, in a number of past cases, with jurisdictional issues after having delivered a judgment on jurisdiction does not support the contention that

such a judgment can be reopened at any time, so as to permit reconsideration of issues already settled with the force of *res judicata*. There is an essential difference between those cases mentioned in paragraph 127 of the Judgment and the present case: the jurisdictional issues examined at a late stage in those cases were such that the decision on them would not contradict the finding of jurisdiction made in the earlier judgment. By contrast, the contentions of the Respondent in the present case would, if upheld, effectively reverse the 1996 Judgment.

Addressing the argument of the Respondent that the issue whether the FRY had access to the Court had not been decided in the 1996 Judgment, the Court notes that the statements it made in the 2004 Judgments in the *Legality of Use of Force* cases do not signify that in 1996 the Court was unaware of the fact that the solution adopted in the United Nations as to the question of continuation of the membership of the SFRY "[was] not free from legal difficulties". As the Court recognized in the 2004 Judgments, in 1999—and even more so in 1996—it was by no means so clear as the Court found it to be in 2004 that the Respondent was not a Member of the United Nations. Although the legal complications of the position of the Respondent in relation to the United Nations were not specifically mentioned in the 1996 Judgment, the Court affirmed its jurisdiction to adjudicate upon the dispute and since the question of a State's capacity to be a party to proceedings is a matter which the Court must, if necessary, raise *ex officio*, this finding must as a matter of construction be understood, by necessary implication, to mean that the Court at that time perceived the Respondent as being in a position to participate in cases before the Court. On that basis, it proceeded to make a finding on jurisdiction which would have the force of *res judicata*. The Court does not need to go behind that finding and consider on what basis the Court was able to satisfy itself on the point. Whether the Parties classify the matter as one of "access to the Court" or of "jurisdiction *ratione personae*", the fact remains that the Court could not have proceeded to determine the merits unless the Respondent had had the capacity under the Statute to be a party to proceedings before the Court. That the FRY had the capacity to appear before the Court in accordance with the Statute was an element in the reasoning of the 1996 Judgment which can—and indeed must—be read into the Judgment as a matter of logical construction.

Conclusion: jurisdiction affirmed

The Court concludes that, in respect of the contention that the Respondent was not, on the date of filing of the Application instituting proceedings, a State having the capacity to come before the Court under the Statute, the principle of *res judicata* precludes any reopening of the decision embodied in the 1996 Judgment. The Respondent has however also argued that the 1996 Judgment is not *res judicata* as to the further question whether the FRY was, at the time of institution of proceedings, a party to the Genocide Convention, and has sought to show that at that time it was not, and could not have been, such a party. The Court however considers that the reasons given for holding that the 1996 Judgment settles the question of jurisdiction in this case with the force of *res judicata* are applicable *a fortiori* as regards this contention, since on this point the 1996 Judgment was quite specific, as it was not on the question of capacity to come before the Court. The Court thus concludes that, as stated in the 1996 Judgment, it has jurisdiction, under Article IX of the Genocide Convention, to adjudicate upon the dispute. It follows that the Court does not find it necessary to consider the questions, extensively addressed by the Parties, of the status of the Respondent under the Charter of the United Nations and the Statute of the Court, and its position in relation to the Genocide Convention at the time of the filing of the Application.

The applicable law
(paras. 142–201)

The Court first recalls that its jurisdiction in the case is based solely on Article IX of the Genocide Convention, since all the other grounds of jurisdiction invoked by the Applicant were rejected in the 1996 Judgment on jurisdiction. Article IX provides that

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

It follows that the Court may rule only on disputes between the States parties relating to the interpretation, application or fulfilment of the Convention and that it has no power to rule on alleged breaches of other obligations under international law, not amounting to genocide, particularly those protecting human rights in armed conflict. That is so even if the alleged breaches are of obligations under peremptory norms, or of obligations which protect essential humanitarian values, and which may be owed *erga omnes*.

Obligations imposed by the Convention on the Contracting Parties

The Court notes that there exists a dispute between the Parties as to the meaning and the legal scope of Article IX of the Convention, especially about whether the obligations the Convention imposes upon the Parties are limited to legislate, and to prosecute or extradite, or whether the obligations of the States parties extend to the obligation not to commit genocide and the other acts enumerated in Article III.

The Court observes that what obligations the Convention imposes upon the parties to it depends on the ordinary meaning of the terms of the Convention read in their context and in the light of its object and purpose. It reviews the wording of Article I, which provides *inter alia* that "[t]he Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish". The Court finds that Article I, in particular its undertaking to prevent, creates obligations distinct from those which appear in the subsequent Articles. This finding is confirmed by the preparatory work of the Convention and the circumstances of its conclusion.

The Court then considers whether the Parties are under an obligation not to commit genocide themselves since such an obligation is not expressly imposed by the actual terms of the Convention. In the view of the Court, taking into account the established purpose of the Convention, the effects of Article I is to prohibit States from themselves committing genocide. Such a prohibition follows, first, from the fact that Article I categorizes genocide as "a crime under international law": by agreeing to such a categorization, the States parties must logically be undertaking not to commit the act so described. Secondly, it follows from the expressly stated obligation to prevent the commission of acts of genocide. It would be paradoxical, if States were thus under an obligation to prevent, but were not forbidden to commit such acts through their own organs, or persons over whom they have such firm control that their conduct is attributable to the State concerned under international law. In short, the obligation to prevent genocide necessarily implies the prohibition of commission of genocide. The Court notes that its conclusion is confirmed by one unusual feature of the wording of Article IX, namely the phrase "including those [disputes] relating to the responsibility of a State for genocide or any of the other acts enumerated in Article III". According to the English text of the Convention, the responsibility contemplated is responsibility "for genocide", not merely responsibility "for failing to prevent or punish genocide". The particular terms of the phrase as a whole confirm that Contracting Parties may be held responsible for genocide and the other acts enumerated in Article III of the Convention.

The Court subsequently discusses three further arguments which may be seen as contradicting the proposition that the Convention imposes a duty on the Contracting Parties not to commit genocide and the other acts enumerated in Article III.

The first is that, as a matter of principle, international law does not recognize the criminal responsibility of the State, and the Genocide Convention does not provide a vehicle for the imposition of such criminal responsibility. The Court observes that the obligation for which the Respondent may be held responsible, in the event of breach, in proceedings under Article IX, is simply an obligation arising under international law, in this case the provisions of the Convention, and that the obligations in question and the responsibilities of States that would arise from breach of such obligations are obligations and responsibilities under international law. They are not of a criminal nature.

The second is that the nature of the Convention is such as to exclude from its scope State responsibility for genocide and the other enumerated acts. The Convention, it is said, is a standard international criminal law convention focussed essentially on the criminal prosecution and punishment of individuals and not on the responsibility of States. However, the Court sees nothing in the wording or the structure of the provisions of the Convention relating to individual criminal liability which would displace the meaning of Article I, read with paragraphs *(a)* to *(e)* of Article III, so far as these provisions impose obligations on States distinct from the obligations which the Convention requires them to place on individuals.

Concerning the third and final argument, the Court examines the drafting history of the Convention, in the Sixth Committee of the General Assembly, which is said to show that "there was no question of direct responsibility of the State for acts of genocide". However, having reviewed said history, the Court concludes that it may be seen as supporting the conclusion that Contracting Parties are bound not to commit genocide, through the actions of their organs or persons or groups whose acts are attributable to them.

Question whether the Court may make a finding of genocide by a State in the absence of a prior conviction of an individual for genocide by a competent court

The Court observes that if a State is to be responsible because it has breached its obligation not to commit genocide, it must be shown that genocide as defined in the Convention has been committed. That will also be the case with conspiracy under Article III, paragraph *(b),* and complicity under Article III, paragraph *(e);* and, for purposes of the obligation to prevent genocide.

According to the Respondent, the condition *sine qua non* for establishing State responsibility is the prior establishment, according to the rules of criminal law, of the individual responsibility of a perpetrator engaging the State's responsibility.

In the view of the Court, the different procedures followed by, and powers available to, the Court and to the courts and tribunals trying persons for criminal offences, do not themselves indicate that there is a legal bar to the Court itself finding that genocide or the other acts enumerated in Article III have been committed. Under its Statute the Court has the capacity to undertake that task, while applying the standard of proof appropriate to charges of exceptional gravity. Turning to the terms of the Convention itself, the Court has already held that it has jurisdiction under Article IX to find a State responsible if genocide or other acts enumerated in Article III are committed by its organs, or persons or groups whose acts are attributable to it.

The Court accordingly concludes that State responsibility can arise under the Convention for genocide and complicity, without an individual being convicted of the crime or an associated one.

Possible territorial limits of the obligations

The Court observes that the substantive obligations arising from Articles I and III are not on their face limited by territory. They apply to a State wherever it may be acting or may be able to act in ways appropriate to meeting the obligations in question.

The obligation to prosecute imposed by Article VI is by contrast subject to an express territorial limit. The trial of persons charged with genocide is to be in a competent tribunal of the State in the territory of which the act was committed, or by an international penal tribunal with jurisdiction.

The question of intent to commit genocide

The Court notes that genocide as defined in Article II of the Convention comprises "acts" and "intent". It is well established that the acts -

"*(a)* Killing members of the group;

(b) Causing serious bodily or mental harm to members of the group;

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) Imposing measures intended to prevent births within the group"; and

(*e*) "Forcibly transferring children of the group to another group" -

themselves include mental elements. The Court stresses that, in addition to those mental elements, Article II requires a further mental element: the establishment of the "intent to destroy, in whole or in part, . . . [the protected] group, as such". It is often referred to as a special or specific intent or *dolus specialis.* It is not enough that the members of the group are targeted because they belong to that group. Something more is required. The acts listed in Article II must be done with intent to destroy the group as such in whole or in part. The words "as such" emphasize that intent to destroy the protected group.

Intent and "ethnic cleansing"

The Court states that "ethnic cleansing" can only be a form of genocide within the meaning of the Convention, if it corresponds to or falls within one of the categories of acts prohibited by Article II of the Convention. Neither the intent, as a matter of policy, to render an area "ethnically homogeneous", nor the operations that may be carried out to implement such policy, can *as such* be designated as genocide. However, this does not mean that acts described as "ethnic cleansing" may never constitute genocide, if they are such as to be characterized as, for example, "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part", contrary to Article II, paragraph *(c),* of the Convention, provided such action is carried out with the necessary specific intent *(dolus specialis),* that is to say with a view to the destruction of the group, as distinct from its removal from the region.

Definition of the protected group

The Court needs to identify the group against which genocide may be considered to have been committed. It notes that the Parties disagree on aspects of the definition of the "group", the Applicant refers to "the non-Serb national, ethnical or religious group within, but not limited to, the territory of Bosnia and Herzegovina, including in particular the Muslim population". It thus follows what is termed the negative approach to the definition of the protected group under the Convention.

The Court recalls that the essence of the intent is to destroy the protected group, in whole or in part, as such. It is a group which must have particular positive characteristics—national, ethnical, racial or religious—and not the lack of them. This interpretation is confirmed by the drafting history of the Convention.

Accordingly, the Court concludes that it should deal with the matter on the basis that the targeted group must in law be defined positively, and thus not negatively as the "non-Serb" population. The Applicant has made only very limited reference to the non-Serb populations of Bosnia and Herzegovina other than the Bosnian Muslims, e.g. the Croats. The Court will therefore examine the facts of the case on the basis that genocide may be found to have been committed if an intent to destroy the Bosnian Muslims, as a group, in whole or in part, can be established.

The Court further specifies that for the purposes of Article II, first, the intent must be to destroy at least a substantial part of the particular group. That is demanded by the very nature of the crime of genocide: since the object and purpose of the Convention as a whole is to prevent the intentional destruction of groups, the part targeted must be significant enough to have an impact on the group as a whole. Second, the Court observes that it is widely accepted that genocide may be found to have been committed where the intent is to destroy the group within a geographically limited area.

Questions of proof
(paras. 202–230)

The Court first considers the burden or onus of proof, the standard of proof, and the methods of proof.

Burden of proof

The Court states that it is well established in general that the applicant must establish its case and that a party asserting a fact must establish it.

With regard to the refusal of the Respondent to produce the full text of certain documents, the Court observes that the Applicant has had extensive documentation and other evidence available to it, especially from the readily accessible records of the International Criminal Tribunal for the former Yugoslavia (ICTY), and that it has made very ample use of it. The Court finally observes that although it has not agreed to either of the Applicant's requests to be provided with unedited copies of certain documents, it has not failed to note the Applicant's suggestion that the Court may be free to draw its own conclusions.

Standard of proof

The Parties also differ on the standard of proof.

The Court has long recognized that claims against a State involving charges of exceptional gravity must be proved by evidence that is fully conclusive. It requires that it be fully convinced that allegations made in the proceedings, that the crime of genocide or the other acts enumerated in Article III have been committed, have been clearly established. The same standard applies to the proof of attribution for such acts.

In respect of the Applicant's claim that the Respondent has breached its undertakings to prevent genocide and to punish and extradite persons charged with genocide, the Court requires proof at a high level of certainty appropriate to the seriousness of the allegation.

Methods of proof

The Court recalls that the Parties submitted a vast array of material, from different sources. It included reports, resolutions and findings by various United Nations organs; documents from other intergovernmental organizations;

documents, evidence and decisions from the ICTY; publications from governments; documents from non-governmental organizations; media reports, articles and books. They also called witnesses, experts and witness-experts.

The Court must itself make its own determination of the facts which are relevant to the law which the Applicant claims the Respondent has breached. It however acknowledges that the present case does have an unusual feature since many of the allegations before it have already been the subject of the processes and decisions of the ICTY. The Court has thus to consider their significance.

It recalls that in the case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda),* it notably said that "evidence obtained by examination of persons directly involved, and who were subsequently cross-examined by judges skilled in examination and experienced in assessing large amounts of factual information, some of it of a technical nature, merits special attention".

The Court states that the fact-finding process of the ICTY falls within this formulation, as "evidence obtained by persons directly involved", tested by cross-examination, the credibility of which has not been challenged subsequently.

After having set out the arguments of the Parties on the weight to be given to the ICTY material and after having reviewed the various ICTY processes, the Court concludes that it should in principle accept as highly persuasive relevant findings of fact made by the Tribunal at trial, unless of course they have been upset on appeal. For the same reasons, any evaluation by the Tribunal based on the facts as so found for instance about the existence of the required intent, is also entitled to due weight.

The Court finally comments on some of the other evidence submitted to it. Evoking *inter alia* the report entitled "The Fall of Srebrenica", which the United Nations Secretary-General submitted in November 1999 to the General Assembly, it observes that the care taken in preparing said report, its comprehensive sources and the independence of those responsible for its preparation all lend considerable authority to it. It assures having gained substantial assistance from this report.

The facts
(paras. 231–376)

The Court reviews the background of the facts invoked by the Applicant, as well as the entities involved in the events complained of. It notes that on 9 January 1992, the Republic of the Serb People of Bosnia and Herzegovina, later to be called the Republika Srpska (RS), declared its independence. According to the Court, this entity never attained international recognition as a sovereign State, but it had *de facto* control of substantial territory, and the loyalty of large numbers of Bosnian Serbs.

The Court observes that the Applicant has asserted the existence of close ties between the Government of the Respondent and the authorities of the Republika Srpska, of a political and financial nature, and also as regards administration and control of the army of the Republika Srpska (VRS). The Court finds it established that the Respondent was making its considerable military and financial support available to the Republika Srpska, and had it withdrawn that support, this would have greatly constrained the options that were available to the Republika Srpska authorities.

The Court then embarks on the examination of the facts alleged by the Applicant, in order to satisfy itself, first, that the alleged atrocities occurred; secondly, whether such atrocities, if established, fall within the scope of Article II of the Genocide Convention, that is to say whether the facts establish the existence of an intent, on the part of the perpetrators of those atrocities, to destroy, in whole or in part, a defined group, namely that of the Bosnian Muslims.

Article II (a): Killing members of the protected group

The Court examines the evidence of killings of members of the protected group (Article II *(a)* of the Genocide Convention) in the principal areas of Bosnia: Sarajevo, Drina River Valley, Prijedor, Banja Luka and Brčko—and in the various detention camps.

It finds that it is established by overwhelming evidence that massive killings in specific areas and detention camps throughout the territory of Bosnia and Herzegovina were perpetrated during the conflict. Furthermore, the evidence presented shows that the victims were in large majority members of the protected group, which suggests that they may have been systematically targeted by the killings.

The Court is however not convinced, on the basis of the evidence before it, that it has been conclusively established that the massive killings of members of the protected group were committed with the specific intent *(dolus specialis)* on the part of the perpetrators to destroy, in whole or in part, the group as such. The killings outlined above may amount to war crimes and crimes against humanity, but the Court has no jurisdiction to determine whether this is so.

The massacre at Srebrenica

Having recapitulated the events surrounding the takeover of Srebrenica, the Court observes that the Trial Chambers in the *Krstić* and *Blagojević* cases both found that Bosnian Serb forces killed over 7,000 Bosnian Muslim men following the takeover of the "safe area" in July 1995. Accordingly they found that the *actus reus* of killings in Article II *(a)* of the Convention was satisfied. Both also found that actions of Bosnian Serb forces also satisfied the *actus reus* of causing serious bodily or mental harm, as defined in Article II *(b)* of the Convention—both to those who where about to be executed, and to the others who were separated from them in respect of their forced displacement and the loss suffered by survivors among them. The Court is thus fully persuaded that both killings within the terms of Article II *(a)* of the Convention, and acts causing serious bodily or mental harm within the terms of Article II *(b)* thereof occurred during the Srebrenica massacre.

The Court goes on to examine whether there was specific intent *(dolus specialis)* on the part of the perpetrators. Its conclusion, fortified by the Judgments of the ICTY Trial Chambers in the *Krstić* and *Blagojević* cases, is that the necessary intent was not established until after the change in the military objective (from "reducing the enclave to the urban area" to taking over Srebrenica town and the enclave as a whole)

and after the takeover of Srebrenica, on about 12 or 13 July. This may be significant for the application of the obligations of the Respondent under the Convention. The Court has no reason to depart from the Tribunal's determination that the necessary specific intent *(dolus specialis)* was established and that it was not established until that time.

The Court turns to the findings in the *Krstić* case, in which the Appeals Chamber endorsed the findings of the Trial Chamber in the following terms:

> "In this case, having identified the protected group as the national group of Bosnian Muslims, the Trial Chamber concluded that the part the VRS Main Staff and Radislav Krstić targeted was the Bosnian Muslims of Srebrenica, or the Bosnian Muslims of Eastern Bosnia. This conclusion comports with the guidelines outlined above. The size of the Bosnian Muslim population in Srebrenica prior to its capture by the VRS forces in 1995 amounted to approximately forty thousand people. This represented not only the Muslim inhabitants of the Srebrenica municipality but also many Muslim refugees from the surrounding region. Although this population constituted only a small percentage of the overall Muslim population of Bosnia and Herzegovina at the time, the importance of the Muslim community of Srebrenica is not captured solely by its size."

The Court sees no reason to disagree with the concordant findings of the Trial Chamber and the Appeals Chamber.

The Court concludes that the acts committed at Srebrenica falling within Article II *(a)* and *(b)* of the Convention were committed with the specific intent to destroy in part the group of the Muslims of Bosnia and Herzegovina as such; and accordingly that these were acts of genocide, committed by members of the VRS in and around Srebrenica from about 13 July 1995.

Article II (b): Causing serious bodily or mental harm to members of the protected group

Having examined the specific allegations of the Applicant under this heading, and having taken note of the evidence presented to the ICTY, the Court considers that it has been established by fully conclusive evidence that members of the protected group were systematically victims of massive mistreatment, beatings, rape and torture causing serious bodily and mental harm, during the conflict and, in particular, in the detention camps. The Court finds, however, that it has not been conclusively established that those atrocities, although they too may amount to war crimes and crimes against humanity, were committed with the specific intent *(dolus specialis)* to destroy the protected group, in whole or in part.

Article II (c): Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part

The Court goes on to examine in turn the evidence concerning the three sets of claims made by the Applicant: encirclement, shelling and starvation; deportation and expulsion; destruction of historical, religious and cultural property. It considers the evidence presented regarding the conditions of life in the detention camps already referred to above.

On the basis of a careful examination of the evidence submitted by the Parties with respect to encirclement, shelling and starvation on the one hand, and deportation and expulsion on the other hand, the Court cannot establish that the alleged acts were accompanied by the specific intent to destroy the protected group in whole or in part.

With respect to the destruction of historical, religious and cultural property, the Court finds that there is conclusive evidence of the deliberate destruction of the historical, cultural and religious heritage of the protected group. However, such destruction does not fall as such within the categories of acts of genocide set out in Article II of the Convention.

On the basis of the elements presented to it concerning the camps, the Court considers that there is convincing and persuasive evidence that terrible conditions were inflicted upon detainees of the camps. However, the evidence presented has not enabled the Court to find that those acts were accompanied by specific intent *(dolus specialis)* to destroy the protected group, in whole or in part. In this regard, the Court observes that, in none of the ICTY cases concerning camps cited above, has the Tribunal found that the accused acted with such specific intent *(dolus specialis)*.

Article II (d): Imposing measures to prevent births within the protected group

Article II (e): Forcibly transferring children of the protected group to another group

Having carefully examined the arguments of the Parties under these two headings, the Court finds that the evidence placed before it by the Applicant does not enable it to conclude that Bosnian Serb forces committed such acts.

Alleged genocide outside Bosnia and Herzegovina

The Court finds that the Applicant has not established to the satisfaction of the Court any facts in support of the allegation according to which acts of genocide, for which the Respondent was allegedly responsible, also took place on the territory of the FRY.

The question of pattern of acts said to evidence an intent to commit genocide

The Applicant relies on the alleged existence of an overall plan to commit genocide throughout the territory, against persons identified everywhere and in each case on the basis of their belonging to a specified group.

The Court notes that this argument of the Applicant moves from the intent of the individual perpetrators of the alleged acts of genocide complained of, to the intent of higher authority, whether within the VRS or the Republika Srpska, or at the level of the Government of the Respondent itself. Having examined, in context, the Decision on Strategic Goals issued in May 1992 by Momčilo Krajišnik as the President of the National Assembly of Republika Srpska, which in the Applicant's view approaches an official statement of an overall plan, the Court does not see the 1992 Strategic Goals as establishing the specific intent.

Turning to the Applicant's contention that the very pattern of the atrocities committed over many communities, over a lengthy period, focussed on Bosnian Muslims and also Croats, demonstrates the necessary intent, the Court cannot agree with such a broad proposition. The *dolus specialis,* the specific intent to destroy the group in whole or in part, has to be convincingly shown by reference to particular circumstances, unless a general plan to that end can be convincingly demonstrated to exist; and for a pattern of conduct to be accepted as evidence of its existence, it would have to be such that it could only point to the existence of such intent.

The Court finds that the Applicant has not established the existence of that intent on the part of the Respondent, either on the basis of a concerted plan, or on the basis that the events reviewed above reveal a consistent pattern of conduct which could only point to the existence of such intent. Having however concluded, in the specific case of the massacres at Srebrenica in July 1995, that acts of genocide were committed, the Court turns to the question whether those acts are attributable to the Respondent.

Responsibility for events at Srebrenica
(paras. 377–415)

The alleged admission

The Court first notes that the Applicant contends that the Respondent has in fact recognized that genocide was committed at Srebrenica, and has accepted legal responsibility for it. For purposes of determining whether the Respondent has recognized its responsibility, the Court may take into account any statements made by either party that appear to bear upon the matters in issue, and have been brought to its attention, and may accord to them such legal effect as may be appropriate. However, in the present case, it appears to the Court that the declaration made by the Council of Ministers of the Respondent on 15 June 2005 following the showing on a Belgrade television channel on 2 June 2005 of a video-recording of the murder by a paramilitary unit of six Bosnian Muslim prisoners near Srebrenica was of a political nature; it was clearly not intended as an admission.

The test of responsibility

In order to ascertain whether the international responsibility of the Respondent can have been incurred, on whatever basis, in connection with the massacres committed in the Srebrenica area during the period in question, the Court must consider three questions in turn. First, it needs to be determined whether the acts of genocide could be attributed to the Respondent on the basis that those acts where committed by its organs or persons whose acts are attributable to it under customary rules of State Responsibility. Second, the Court needs to ascertain whether acts of the kind referred to in Article III, paragraphs *(b)* to *(e),* of the Convention, other than genocide itself, were committed by persons or organs whose conduct is attributable to the Respondent. Finally, it will be for the Court to rule on the issue as to whether the Respondent complied with its twofold obligation deriving from Article I of the Convention to prevent and punish genocide.

The question of attribution of the Srebrenica genocide to the Respondent on the basis of the conduct of its organs

The first of these two questions relates to the well-established rule, one of the cornerstones of the law of State responsibility, that the conduct of any State organ is to be considered an act of the State under international law, and therefore gives rise to the responsibility of the State if it constitutes a breach of an international obligation of the State.

When applied to the present case, this rule first calls for a determination whether the acts of genocide committed in Srebrenica were perpetrated by "persons or entities" having the status of organs of the Federal Republic of Yugoslavia (as the Respondent was known at the time) under its internal law, as then in force. According to the Court, it must be said that there is nothing which could justify an affirmative response to this question. It has not been shown that the FRY army took part in the massacres, nor that the political leaders of the FRY had a hand in preparing, planning or in any way carrying out the massacres. It is true that there is much evidence of direct or indirect participation by the official army of the FRY, along with the Bosnian Serb armed forces, in military operations in Bosnia and Herzegovina in the years prior to the events at Srebrenica.

That participation was repeatedly condemned by the political organs of the United Nations, which demanded that the FRY put an end to it. It has however not been shown that there was any such participation in relation to the massacres committed at Srebrenica. Further, neither the Republika Srpska, nor the VRS were *de jure* organs of the FRY, since none of them had the status of organ of that State under its internal law.

With regard to the particular situation of General Mladić, the Court notes first that no evidence has been presented that either General Mladić or any of the other officers whose affairs were handled by the 30th Personnel Centre in Belgrade were, according to the internal law of the Respondent, officers of the army of the Respondent—a *de jure* organ of the Respondent. Nor has it been conclusively established that General Mladić was one of those officers; and even on the basis that he might have been, the Court does not consider that he would, for that reason alone, have to be treated as an organ of the FRY for the purposes of the application of the rules of State responsibility. There is no doubt that the FRY was providing substantial support, *inter alia,* financial support, to the Republika Srpska, and that one of the forms that support took was payment of salaries and other benefits to some officers of the VRS, but the Court considers that this did not automatically make them organs of the FRY. The particular situation of General Mladić, or of any other VRS officer present at Srebrenica who may have been being "administered" from Belgrade, is not such as to lead the Court to modify the conclusion reached in the previous paragraph.

The issue also arises as to whether the Respondent might bear responsibility for the acts of the paramilitary militia known as the "Scorpions" in the Srebrenica area. Judging on the basis of materials submitted to it, the Court is unable to find that the "Scorpions"—referred to as "a unit of Ministry of Interiors of Serbia" in those documents—were, in mid-1995, *de jure* organs of the Respondent. Furthermore, the Court notes

that in any event the act of an organ placed by a State at the disposal of another public authority shall not be considered an act of that State if the organ was acting on behalf of the public authority at whose disposal it had been placed.

The Court observes that, according to its jurisprudence (notably its 1986 Judgment in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*), persons, groups of persons or entities may, for purposes of international responsibility, be equated with State organs even if that status does not follow from internal law, provided that in fact the persons, groups or entities act in "complete dependence" on the State, of which they are ultimately merely the instrument. In the present case, the Court however cannot find that the persons or entities that committed the acts of genocide at Srebrenica had such ties with the FRY that they can be deemed to have been completely dependent on it.

At the relevant time, July 1995, according to the Court, neither the Republika Srpska nor the VRS could be regarded as mere instruments through which the FRY was acting, and as lacking any real autonomy. The Court further states that it has not been presented with materials indicating that the "Scorpions" were in fact acting in complete dependence on the Respondent.

The Court therefore finds that the acts of genocide at Srebrenica cannot be attributed to the Respondent as having been committed by its organs or by persons or entities wholly dependent upon it, and thus do not on this basis entail the Respondent's international responsibility.

The question of attribution of the Srebrenica genocide to the Respondent on the basis of direction or control

The Court then determines whether the massacres at Srebrenica were committed by persons who, though not having the status of organs of the Respondent, nevertheless acted on its instructions or under its direction or control.

The Court indicates that the applicable rule, which is one of customary law of international responsibility, is that the conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct. This provision must be understood in the light of the Court's jurisprudence on the subject, particularly that of the 1986 Judgment in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America).*

Under the test set out above, it must be shown that this "effective control" was exercised, or that the State's instructions were given, in respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions taken by the persons or groups of persons having committed the violations.

The Court finds that in the light of the information available to it, it has not been established that the massacres at Srebrenica were committed by persons or entities ranking as organs of the Respondent. It finds also that it has not been established that those massacres were committed on the instructions, or under the direction of organs of the Respondent State, nor that the Respondent exercised effective control over the operations in the course of which those massacres, which constituted the crime of genocide, were perpetrated.

In the view of the Court, the Applicant has not proved that instructions were issued by the federal authorities in Belgrade, or by any other organ of the FRY, to commit the massacres, still less that any such instructions were given with the specific intent *(dolus specialis)* characterizing the crime of genocide. All indications are to the contrary: that the decision to kill the adult male population of the Muslim community in Srebrenica was taken by some members of the VRS Main Staff, but without instructions from or effective control by the FRY.

The Court concludes from the foregoing that the acts of those who committed genocide at Srebrenica cannot be attributed to the Respondent under the rules of international law of State responsibility: thus, the international responsibility of the Respondent is not engaged on this basis.

Responsibility, in respect of Srebrenica, for acts enumerated in Article III, paragraphs (b) to (e), of the Genocide Convention (paras. 416–424)

The Court comes to the second of the questions set out above, namely, that relating to the Respondent's possible responsibility on the ground of one of the acts related to genocide enumerated in Article III of the Convention. It notes that it is clear from an examination of the facts that only alleged acts of complicity in genocide, within the meaning of Article III, paragraph *(e),* are relevant in the present case.

The question is whether such acts can be attributed to organs of the Respondent or to persons acting under its instructions or under its effective control.

The Court states that, in order to ascertain whether the Respondent is responsible for "complicity in genocide", it must examine whether those organs or persons furnished "aid or assistance" in the commission of the genocide in Srebrenica, in a sense not significantly different from that of those concepts in the general law of international responsibility. It also needs to consider whether the organ or person furnishing aid or assistance to a perpetrator of the crime of genocide acted knowingly, that is to say, in particular, was aware or should have been aware of the specific intent *(dolus specialis)* of the principal perpetrator.

The Court is not convinced by the evidence furnished by the Applicant that the above conditions were met. In particular, it has not been established beyond any doubt in the argument between the Parties whether the authorities of the FRY supplied—and continued to supply—the VRS leaders who decided upon and carried out those acts of genocide with their aid and assistance, at a time when those authorities were clearly aware that genocide was about to take place or was under way.

The Court notes that a point which is clearly decisive in this connection is that it was not conclusively shown that the decision to eliminate physically the adult male population of the Muslim community from Srebrenica was brought to the attention of the Belgrade authorities when it was taken.

The Court concludes from the above that the international responsibility of the Respondent is not engaged for acts of complicity in genocide mentioned in Article III, paragraph *(e),* of the Convention. In the light of this finding, and of the findings above relating to the other paragraphs of Article III, the international responsibility of the Respondent is not engaged under Article III as a whole.

Responsibility for breach of the obligations to prevent and punish genocide
(paras. 425–450)

The Court points out that in the Genocide Convention, the duty to prevent genocide and the duty to punish its perpetrators are two distinct yet connected obligations. Each of them must accordingly be considered in turn.

The obligation to prevent genocide (paras. 428–438)

The Court makes a few preliminary remarks. First, the Genocide Convention is not the only international instrument providing for an obligation on the States parties to it to take certain steps to prevent the acts it seeks to prohibit. Secondly, it is clear that the obligation in question is one of conduct and not one of result, in the sense that a State cannot be under an obligation to succeed, whatever the circumstances, in preventing the commission of genocide: the obligation of States parties is rather to employ all means reasonably available to them, so as to prevent genocide so far as possible. A State does not incur responsibility simply because the desired result is not achieved; responsibility is however incurred if the State manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide. Thirdly, a State can be held responsible for breaching the obligation to prevent genocide only if genocide was actually committed. Fourth and finally, the Court believes it especially important to lay stress on the differences between the requirements to be met before a State can be held to have violated the obligation to prevent genocide—within the meaning of Article I of the Convention—and those to be satisfied in order for a State to be held responsible for "complicity in genocide"—within the meaning of Article III, paragraph *(e)*—as previously discussed.

The Court then considers the facts of the case, confining itself to the FRY's conduct vis-à-vis the Srebrenica massacres. It first notes that, during the period under consideration, the FRY was in a position of influence, over the Bosnian Serbs who devised and implemented the genocide in Srebrenica, unlike that of any of the other States parties to the Genocide Convention owing to the strength of the political, military and financial links between the FRY on the one hand and the Republika Srpska and the VRS on the other, which, though somewhat weaker than in the preceding period, nonetheless remained very close.

Secondly, the Court cannot but note that, on the relevant date, the FRY was bound by very specific obligations by virtue of the two Orders of the Court indicating provisional measures delivered in 1993. In particular, in its Order of 8 April 1993, the Court stated, *inter alia,* that the FRY was required to ensure "that any military, paramilitary or irregular armed units which may be directed or supported by it, as well as any organizations and persons which may be subject to its control, direction or influence, do not commit any acts of genocide, of conspiracy to commit genocide, of direct and public incitement to commit genocide, or of complicity in genocide . . .". The Court's use, in the above passage, of the term "influence" is particularly revealing of the fact that the Order concerned not only the persons or entities whose conduct was attributable to the FRY, but also all those with whom the Respondent maintained close links and on which it could exert a certain influence.

Thirdly, the Court recalls that although it has not found that the information available to the Belgrade authorities indicated, as a matter of certainty, that genocide was imminent (which is why complicity in genocide was not upheld above), they could hardly have been unaware of the serious risk of it once the VRS forces had decided to occupy the Srebrenica enclave.

In view of their undeniable influence and of the information, voicing serious concern, in their possession, the Yugoslav federal authorities should, in the view of the Court, have made the best efforts within their power to try and prevent the tragic events then taking shape, whose scale, though it could not have been foreseen with certainty, might at least have been surmised. The FRY leadership, and President Milošević above all, were fully aware of the climate of deep-seated hatred which reigned between the Bosnian Serbs and the Muslims in the Srebrenica region. Yet the Respondent has not shown that it took any initiative to prevent what happened, or any action on its part to avert the atrocities which were committed. It must therefore be concluded that the organs of the Respondent did nothing to prevent the Srebrenica massacres, claiming that they were powerless to do so, which hardly tallies with their known influence over the VRS. As indicated above, for a State to be held responsible for breaching its obligation of prevention, it does not need to be proven that the State concerned definitely had the power to prevent the genocide; it is sufficient that it had the means to do so and that it manifestly refrained from using them.

Such is the case here. In view of the foregoing, the Court concludes that the Respondent violated its obligation to prevent the Srebrenica genocide in such a manner as to engage its international responsibility.

The obligation to punish genocide (paras. 439–450)

The Court first recalls that the genocide in Srebrenica, the commission of which it has established above, was not carried out in the Respondent's territory. It concludes from this that the Respondent cannot be charged with not having tried before its own courts those accused of having participated in the Srebrenica genocide, either as principal perpetrators or as accomplices, or of having committed one of the other acts mentioned in Article III of the Convention in connection with the Srebrenica genocide.

The Court needs then to consider whether the Respondent fulfilled its obligation to co-operate with the "international penal tribunal" referred to in Article VI of the Convention. For it is certain that once such a court has been established, Article VI obliges the Contracting Parties "which shall have

accepted its jurisdiction" to co-operate with it, which implies that they will arrest persons accused of genocide who are in their territory—even if the crime of which they are accused was committed outside it—and, failing prosecution of them in the parties' own courts, that they will hand them over for trial by the competent international tribunal.

The Court establishes that the ICTY constitutes an "international penal tribunal" within the meaning of Article VI and that the Respondent must be regarded has having "accepted the jurisdiction" of the tribunal within the meaning of the provision from 14 December 1995 at the latest, the date of the signing and entry into force of the Dayton Agreement between Bosnia and Herzegovina, Croatia and the FRY. Annex 1A of that treaty, made binding on the parties by virtue of its Article II, provides namely that they must fully co-operate, notably with the ICTY.

In this connection, the Court first observes that, during the oral proceedings, the Respondent asserted that the duty to co-operate had been complied with following the régime change in Belgrade in the year 2000, thus implicitly admitting that such had not been the case during the preceding period. The conduct of the organs of the FRY before the régime change however engages the Respondent's international responsibility just as much as it does that of its State authorities from that date. Further, the Court cannot but attach a certain weight to the plentiful, and mutually corroborative, information suggesting that General Mladić, indicted by the ICTY for genocide, as one of those principally responsible for the Srebrenica massacres, was on the territory of the Respondent at least on several occasions and for substantial periods during the last few years and is still there now, without the Serb authorities doing what they could and can reasonably do to ascertain exactly where he is living and arrest him.

It therefore appears to the Court sufficiently established that the Respondent failed in its duty to co-operate fully with the ICTY. This failure constitutes a violation by the Respondent of its duties as a party to the Dayton Agreement, and as a Member of the United Nations, and accordingly a violation of its obligations under Article VI of the Genocide Convention. On this point, the Applicant's submissions relating to the violation by the Respondent of Articles I and VI of the Convention must therefore be upheld.

Responsibility for breach of the Court's Orders indicating provisional measures
(paras. 451–458)

Having recalled that its "orders on provisional measures under Article 41 [of the Statute] have binding effect", the Court finds that it is clear that in respect of the massacres at Srebrenica in July 1995 the Respondent failed to fulfil its obligation indicated in paragraph 52 A (1) of the Order of 8 April 1993 and reaffirmed in the Order of 13 September 1993 to "take all measures within its power to prevent commission of the crime of genocide". Nor did it comply with the measure indicated in paragraph 52 A (2) of the Order of 8 April 1993, reaffirmed in the Order of 13 September 1993, insofar as that measure required it to "ensure that any . . . organizations and persons which may be subject to its . . . influence . . . do not commit any acts of genocide".

The question of reparation
(paras. 459–470)

In the circumstances of the present case, as the Applicant recognizes, it is inappropriate to ask the Court to find that the Respondent is under an obligation of *restitutio in integrum*. Insofar as restitution is not possible, as the Court stated in the case of the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia),* "[i]t is a well-established rule of international law that an injured State is entitled to obtain compensation from the State which has committed an internationally wrongful act for the damage caused by it".

The Court, in order to rule on the claim for reparation must ascertain whether, and to what extent, the injury asserted by the Applicant is the consequence of wrongful conduct by the Respondent with the consequence that the Respondent should be required to make reparation for it, in accordance with the principle of customary international law stated above. In this context, the question whether the genocide at Srebrenica would have taken place even if the Respondent had attempted to prevent it by employing all means in its possession, becomes directly relevant. However, the Court clearly cannot conclude from the case as a whole and with a sufficient degree of certainty that the genocide at Srebrenica would in fact have been averted if the Respondent had acted in compliance with its legal obligations. Since the Court cannot regard as proven a causal nexus between the Respondent's violation of its obligation of prevention and the genocide at Srebrenica, financial compensation is not the appropriate form of reparation for the breach of the obligation to prevent genocide.

It is however clear that the Applicant is entitled to reparation in the form of satisfaction, and this may take the most appropriate form, as the Applicant itself suggested, of a declaration in the present Judgment that the Respondent has failed to comply with the obligation imposed by the Convention to prevent the crime of genocide.

Turning to the question of the appropriate reparation for the breach by the Respondent of its obligation under the Convention to punish acts of genocide, the Court notes that it is satisfied that the Respondent has outstanding obligations as regards the transfer to the ICTY of persons accused of genocide, in order to comply with its obligations under Articles I and VI of the Genocide Convention, in particular in respect of General Ratko Mladić.

The Court does not find it appropriate to give effect to the Applicant's request for an order for symbolic compensation in respect of the non-compliance of the Respondent with the Court's Order of 8 April 1993 on provisional measures.

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Dissenting opinion of Vice-President Al-Khasawneh

Vice-President Al-Khasawneh felt that he should explain the nature of his dissent before explaining the reasons for it.

He believed his disagreement with the majority, relating as it did, not only to their conclusions but also to their reasoning, assumptions and methodology was deep enough to justify his dissent notwithstanding his agreement with certain other parts of the Judgment notably: Jurisdiction—Serbian failure to prevent genocide in Srebrenica—failure to co-operate with the ICTY—failure to comply with earlier provisional measures.

On jurisdiction, the Vice-President recalled that an unprecedented number of jurisdictional rounds has been partly responsible for the huge delay in dispensing justice in the present case. Jurisdiction centred on the Federal Republic of Yugoslavia's (FRY) international status and its United Nations membership and consequently the question of "access"—blown out of proportion, in an attempt to undermine the Court's clearly established jurisdiction in the 1996 Judgment—came to play a central role. He analysed the context in which the issue of FRY membership in the United Nations and its claim to be a continuator of the Socialist Federal Republic of Yugoslavia (SFRY) arose and came to the conclusions that the FRY was always a United Nations Member and could not have been otherwise and that the sole effect of relevant Security Council and General Assembly resolutions was FRY non-participation in the work of the General Assembly. This conclusion was based on the objectively verifiable criterion that the SFRY was an original Member of the United Nations and that it was never extinguished and that there is a general presumption against loss of United Nations membership.

The Vice-President also recalled that only the FRY could, of its own will, give up its membership as a continuator of SFRY and apply as a new Member, i.e. as a successor. Therefore, when it did so in 2000 this meant that it was a continuator from 1992–2000 and a successor from 2000 and not that it was a non-Member before 2000 as the 2004 Judgments on the *Legality of Use of Force* found. Because no conclusion, for the past, could be derived from the fact of FRY admission to the United Nations in 2000, and because an independent analysis of the FRY status in 1992–2000 (an analysis independent from the fact of admission) could lead only to one conclusion, i.e. 1992–2000 membership, he felt the logic of the 2004 Judgments was defective. He also felt it contradicted earlier jurisprudence, i.e. 1993 Order, 1996 Judgment and particularly the 2003 *Application for Revision* Judgment which correctly found that no retroactive consequences for FRY membership in the United Nations could be derived from FRY admission in 2000.

The Vice-President also felt that FRY initiative to the Court to reconsider *ex officio* its jurisdiction to be irregular and felt it regrettable that the Court in 2003 accepted that initiative because that contradicted its own jurisdiction. Thus, he thought, the initiative led to contradictions in the Court's jurisprudence and had no place under the Court's Statute. He felt that precedents cited in support of the propositions that the "Court must always be satisfied it has jurisdiction" to be inapplicable.

With all these contradictions—for which the Court itself had been mainly responsible—being quoted back at the Court and the contagion spreading, the Court had to rely unduly on the principle of *res judicata* which was correct but not very satisfying. Clearly the Court had retreated to the last line of defence partly because of its own doing.

On the merits, Vice-President Al-Khasawneh felt that through a combination of methods and assumptions, uncalled for in law and not suitable to the facts of the case, the Court achieved the extraordinary feat of absolving Serbia of its responsibility for genocide in Bosnia and Herzegovina save for failure to prevent the genocide at Srebrenica, where in any case he thought Serbian responsibility was more actively involved than the mere failure to prevent.

Firstly, since *intent* is usually elusive and, together with *attributability,* often carefully concealed, the Court should have sought access to the papers of the *"Serbian Defence Council"* which would probably have made the Court's task much easier. Refusal of Serbia to divulge documents should have led at least to more liberal recourse to evidence. By insisting on a very high evidentiary *"standard"* and no shifting of *"Burden of proof",* the Applicant was put at a huge disadvantage. Secondly, the Court also applied a strict test of *effective control:* the Nicaragua test to a different situation where *inter alia* shared ethnicity and shared purpose to commit international crimes, e.g. ethnic cleansing require only an *overall control test.* Thirdly, the Court also refused to infer genocide from a *"consistent pattern of conduct"* disregarding in this respect a rich and relevant jurisprudence of other courts. Fourthly, the Court failed to appreciate genocide as a complex crime and not a single murder. Therefore, events which when looked at comprehensively gave rise to responsibility of Serbia, were instead seen in a *disconnected manner,* e.g. the participation of General Mladić in Srebrenica and the role of the "Scorpions". Fifthly, even when there was a clear admission of guilt, e.g. the Serbian Council of Ministers' statement as a reaction to the video showing the execution of Muslim prisoners by the "Scorpions" was dismissed as a political statement though legal weight is attached to such statements in previous Court jurisprudence some of which the Court did not even invoke.

The Vice-President concluded that had the Court tried to see for itself it most probably would have found Serbia responsible either as principal or an accomplice in the genocide in Bosnia. This it could have done without losing the rigor of its reasoning or the high standards of evidence it required. With regard to Srebrenica he was sure that active Serbian involvement was proved to satisfactory to standards in facts and in law.

Joint dissenting opinion of Judges Ranjeva, Shi, and Koroma

In a joint dissenting opinion attached to the Judgment (Merits), Judges Ranjeva, Shi, and Koroma have expressed their serious misgivings about the Judgment's application of the doctrine of *res judicata* [that a matter has been finally adjudicated] to the Court's 1996 Judgment on Preliminary Objections to conclude by "necessary implication" that the issue of jurisdiction *ratione personae* had been decided. In taking this position the judges pointed out that theirs is purely a legal one, not involving any political or moral judgment in respect of the merits of the case. In their view, the Judgment's reliance on *res judicata* largely sidesteps two fundamental and related questions before the Court which have a bearing on the

existence of the Court's jurisdiction at the time the Application was filed: namely, whether Serbia and Montenegro was a United Nations Member and whether it was a party to and/or bound by the Genocide Convention.

According to the judges, the scope and effect of *res judicata* is properly derived from constitutional and statutory requirements and from the submissions by the parties to a particular dispute. Moreover, Article 56 of the Statute provides: "The judgment shall state the reasons on which it is based." In the present case, the Judgment implies that the issue of access had been considered and decided, but the issue of access had not been addressed by the Parties—who the Judgment acknowledges did not have "any interest" in raising the issue at the time—or decided by the Court in its 1996 Judgment. Moreover, the judges have pointed out, the 2004 Judgment in *Legality of Use of Force (Serbia and Montenegro* v. *Belgium)* concluded that Serbia and Montenegro was not a Member of the United Nations in 1999 and that the Genocide Convention did not contain any of the "special provisions contained in treaties in force" that would grant States parties access to the Court. Accordingly, in the view of the judges, from both factual and legal perspectives it would seem clear that, if Serbia and Montenegro was not a United Nations Member in 1999, then it also must not have been a Member when the Application in this case was filed on 28 March 1993 and the Respondent was thus ineligible to accede to the Genocide Convention pursuant to one of the two means specified in its Article XI. *Res judicata* serves a purpose which, in the view of the judges, cannot replace the requirements of the United Nations Charter or the Statute of the Court. They have pointed out that the Court should always face jurisdictional challenges when they are presented, as they are now, and that the Court first examined the issue of access in the *Legality of Use of Force* in an exception to the general rule that the Court is free to determine which jurisdictional ground to examine first. In any event, the Court's application of *res judicata,* they have pointed out, is inconsistent even within the present Judgment, as the jurisdictional findings made in the 1996 Judgment and relied on in the present Judgment were addressed to Serbia and Montenegro, whereas the *res judicata* effect of the 1996 Judgment is applied only to Serbia in the present Judgment.

Judges Ranjeva, Shi, and Koroma have thus concluded that the Judgment has neglected to deal with one of the substantive submissions squarely put before the Court at this juncture and that it would only have been by addressing all of those submissions that the Court could have arrived at a legally valid conclusion.

Separate opinion of Judge Ranjeva

The international responsibility of a State for omission is the sanction which attaches to the obligation to prevent the crime of genocide, which is an obligation *erga omnes.* To achieve the international solidarity which is its basis, constant vigilance is required in a context of multilateral co-operation. This obligation, which must be fulfilled with discernment, is one incumbent on all States parties. The obligation is assessed *in concreto* by the Court, a task not without difficulty, for it essentially entails sovereign States acting preventatively through concerted diplomatic action.

Joint declaration of Judges Shi and Koroma

In a joint declaration attached to the Judgment (Merits), Judges Shi and Koroma have expressed their serious doubts about the interpretation given to the Genocide Convention by the Judgment to the effect that a State itself could be held to have committed the crime of genocide and to be held responsible therefor. In their view, such an interpretation, derived "by implication" from Article I of the Convention, is inconsistent with the object and purpose of the Convention as a whole, with its plain meaning, and with the intention of the parties at the time the treaty was concluded. The judges have maintained that what the Convention envisages is the trial and punishment of individuals for the crime of genocide and that State responsibility is defined in terms of various specific obligations related to the undertaking to prevent the crime and to punish those who commit it and that it would be absurd for a State party to the Convention to undertake to punish itself as a State. In the judges' view, if the Convention had been intended to contain an obligation of such importance as to envision the criminal responsibility of States, then this would have been expressly stipulated in the Convention, but there is no such stipulation. They have pointed out that proposals made during the negotiation of the Convention that would have prescribed State responsibility for the commission of genocide itself were rejected. The judges have also pointed out that the purpose of interpreting a treaty is to discover its meaning and the intention of the parties at the time of the treaty's negotiation and not to achieve a desired objective.

* *

However, notwithstanding their disagreement with the interpretation given to the Convention, including its first Article, in the Judgment, Judges Shi and Koroma voted in favour of the findings regarding the prevention of genocide in Srebrenica in July 1995 as they believe in the intrinsic humanitarian value of the conclusion reached by the Court as well as in the overriding legal imperative established by Article I of the Convention, namely: the duty of a State to do what it properly can, within its means and the law, to try to prevent genocide when there is a serious danger of its occurrence of which the State is or should be aware. Judges Shi and Koroma believe, however, that the conclusion reached by the Judgment in this regard could have been more legally secure if anchored on the relevant Chapter VII Security Council resolutions that identified several clear missed moments of opportunity for the FRY leadership to have acted with respect to the imminent and serious humanitarian risk posed by any advance of Bosnian Serb paramilitary units on Srebrenica and its surroundings. Mr. Milošević could and should have exerted whatever pressure he had at his disposal over the Bosnian Serb leadership to try to prevent the genocide at Srebrenica.

Separate opinion of Judge Owada

Judge Owada has appended his separate opinion to the Judgment of the Court. He argues that while he concurs in

general with the conclusions that the Court has reached in its *dispositif,* he finds that some of the reasonings of the Judgment differ from his own or need some further elaboration in some important respects.

First, Judge Owada finds that the Court's pronouncement on the issue of *jus standi* of the Respondent in the present case should not be understood based on an oversimplified application of the principle of *res judicata.* The Applicant has argued in effect that the point raised in the submission of the Respondent in the form of the "Initiative" of 4 May 2001 is in the nature of an objection to jurisdiction, that the 1996 Judgment on Preliminary Objections in this case has settled all issues of jurisdiction and thus constitutes *res judicata* on the matter of jurisdiction in this case and that *ergo* that is the end of the story and the objection raised anew by the Respondent should be rejected. According to Judge Owada it is not such a simple case of application of the principle of *res judicata simpliciter,* and he wishes to expound a little the rationale of the Judgment on this point according to his own view. While fully endorsing the legal ground on which the 2004 Judgments in the *Legality of Use of Force* cases is based with regard to the same issue of *jus standi* of the FRY, Judge Owada emphasizes that the 1996 Judgment is to be distinguished from the 2004 Judgment in one important respect. His conclusion is that while it is true that the 1996 Judgment did not specifically address as a matter of fact the issue of *jus standi,* it nonetheless must be *construed as a matter of law* as having made *the final determination* on this point of *jus standi* of the Respondent, which had been left open in the 1993 Judgment on the Request for Provisional Measures in the present case.

Second, Judge Owada does not associate himself with the position of the Judgment that under Article I of the Genocide Convention the States parties to the Convention have undertaken the obligation, not just to prevent and punish the crime of genocide committed by individuals, but the obligation not to commit genocide themselves under pain of direct international responsibility under the Convention itself in the case of the breach of this obligation. In the view of Judge Owada, while the object and purpose of the Genocide Convention is to banish the heinous crime of genocide, the approach employed by the Convention is specific: in order to achieve this purpose, the Convention purports to go through the channel of prosecuting the individuals in national courts and international tribunals by holding them to account for the crime of genocide. According to Judge Owada, the underlying assumption of the Convention is no doubt that nobody, including States, should be allowed to commit this heinous crime of genocide, but this does not mean, in the absence of a proof to the contrary, that the States parties have undertaken the legal commitment to accept their legal responsibility under the Convention in such a way that in the case of default in this undertaking they can be held to account for this act *within the régime of the Convention.* While Judge Owada reaches the same conclusion as the Judgment to the extent that the Court is empowered under Article IX of the Convention to deal with the issue of State responsibility under general international law on the part of a State for an act of individuals whose act is attributable to the State—an issue not covered in his view by the substantive provisions of the Convention—he tries to show that the Court should arrive at the same conclusion on a much less controversial ground.

Separate opinion of Judge Tomka

In his separate opinion, Judge Tomka disagrees with the majority's view that *res judicata* bars the Court's reconsideration of the issue of its jurisdiction, as "embodied" in its Judgment of 11 July 1996. This finding contradicts the Court's earlier position, communicated to the Parties in 2003 by a letter from the Court's Registrar, that the FRY could present further arguments on jurisdiction at the merits stage. Neither the Court's Statute nor its Rules prohibit objections to jurisdiction during merits proceedings, and the Court must examine such issues *proprio motu* if necessary. In any event, the Court's decision of 11 July 1996 did not address the specific jurisdictional question now raised—whether the FRY was party to the Court's Statute by virtue of United Nations membership when the Application was filed in March 1993. Therefore, the Court's earlier decision is not preclusive, and the Court should have made this jurisdictional enquiry *de novo.*

Reviewing jurisdiction *de novo,* Judge Tomka concludes that the Court has jurisdiction. The exercise of the Court's jurisdiction requires both access to the Court under Article 35 of the Court's Statute and jurisdiction *ratione personae.* Judge Tomka explains that the access requirement is now met because the FRY became a Member of the United Nations on 1 November 2000, and has therefore had access to the Court since that date. Jurisdiction *ratione personae* is established because the FRY has been party to the Genocide Convention since April 1992 under the customary rule of *ipso jure* succession, as applied to cases of State dissolution. The FRY's attempt, in March 2001, to accede to the Genocide Convention, with a reservation to Article IX, was completely inconsistent with its contemporaneous succession to other conventions as the successor State to the SFRY, including the Vienna Convention on Succession of States in Respect of Treaties, which provides that in cases of State dissolution, the treaties of the predecessor State continue in force in respect of each successor State. Moreover, Bosnia and Herzegovina timely raised an objection to the FRY's notification of accession to the Genocide Convention. As such, the FRY's attempt to accede to the Genocide Convention with a reservation to Article IX should be deemed ineffective. The fact that the FRY did not have access to the Court when Bosnia and Herzegovina filed its Application is a remediable defect which, once remedied, does not preclude the exercise of jurisdiction. Therefore, Judge Tomka concludes, (1) it was improper for the Court to decline to consider the FRY's objections to its jurisdiction at the merits stage on the ground of *res judicata;* and (2) reviewing the FRY's non-precluded objections *de novo,* the Court has jurisdiction.

Judge Tomka next turns to his divergent views on the purpose of the Genocide Convention and the interpretation of some of its provisions in light of that purpose. The Convention is primarily an instrument of international criminal law which compels States to prevent genocide and to punish its individual perpetrators. The drafting history of the Convention does not support the view that the Convention conceives genocide as a criminal act of a State. Judge Tomka disagrees

with the majority's position that the compromissory clause in Article IX of the Convention encompasses the jurisdiction to determine whether a State has committed genocide. He believes that such clause undoubtedly confers jurisdiction on the Court to determine whether a State has fulfilled its duties to prevent genocide and to punish individuals for such crime, as well as the responsibility a State incurs for neglecting those duties. Further, in his view, the jurisdiction of the Court, as a consequence of the addition of the words "including those [disputes] relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III" into the compromissory clause in Article IX, also includes the power of the Court to determine international "responsibility of a State for genocide" on the basis of attribution to the State of the criminal act of genocide perpetrated by a person. The Court, however, is not the proper forum in which to make a legally binding pronouncement that a *crime* of genocide was committed. Such a finding is to be made within the framework of a criminal procedure which also provides for a right of appeal. The Court has no criminal jurisdiction and its procedure is *not* a criminal one.

Judge Tomka further reasons that the Court's findings on the Respondent's breach of its obligation to prevent genocide are not clearly supported by the evidence and fail to fully address the Parties' arguments. Regarding the territorial scope of States parties' obligation to prevent genocide, he takes the view that under Article I of the Genocide Convention the State does have an obligation to prevent genocide outside its territory to the extent that it exercises jurisdiction outside its territory, or exercises control over certain persons in their activities abroad. This obligation exists in addition to the unequivocal duty to prevent the commission of genocide within its territory. It has not been established that the Federal Republic of Yugoslavia exercised jurisdiction in the areas surrounding Srebrenica where atrocious mass killings took place. Nor has it been established before the Court that it exercised control over the perpetrators who conducted these atrocious killings outside the territory of the Federal Republic of Yugoslavia. The plan to execute as many as possible of the military aged Bosnian Muslim men present in the Srebrenica enclave was devised and implemented by the Bosnian Serbs following the take-over of Srebrenica in July 1995. That was the factual finding of the ICTY. It has not been established as a matter of fact before this Court that the Federal Republic of Yugoslavia authorities knew in advance of this plan. In such a situation they could not have prevented the terrible massacres in Srebrenica.

Finally, Judge Tomka explains that although the FRY did not become a party to the Court's Statute until 1 November 2000 when it was admitted as a Member of the United Nations, the FRY claimed to be a United Nations Member at the time the Court rendered its Orders on provisional measures in 1993, and therefore should have perceived itself as bound by those Orders. In any event, orders on provisional measures produce their effects from the time of their notification to the parties and remain in force until a court's final judgment on the case, even if the court eventually finds that it is without jurisdiction. Judge Tomka accordingly agrees that the FRY failed to comply with some of the provisional measures ordered by the Court in 1993 while they were in effect.

Declaration of Judge Keith

Judge Keith explained his reasons for finding that Serbia and Montenegro was complicit in the genocide committed at Srebrenica in July 1995, in terms of Article III *(e)* of the Genocide Convention.

In summary his position on the law was that Serbia and Montenegro, as an alleged accomplice, had to be proved to have had knowledge of the genocidal intent of the principal perpetrator (but need not share that intent) and, with that knowledge, to have provided aid and assistance to the perpetrator. His position on the facts was that those two elements were proved to the necessary standard.

Declaration of Judge Bennouna

Concurring in the Court's renewed affirmation of jurisdiction in the present case, Judge Bennouna nevertheless wished to point out that the admission of Serbia and Montenegro to the United Nations on 1 November 2000 was effective only prospectively and did not undo its previous status, or that of the FRY, within the Organization; it was on that basis that the State was able to appear before the Court in 1993 and to answer for its acts before the Security Council.

In addition, Judge Bennouna, who voted against point 4 of the operative part concerning Serbia's lack of complicity in genocide, considers that all the elements were present to justify a finding by the Court of complicity on the part of the authorities in Belgrade: not only the various forms of assistance they provided to Republika Srpska and its army but also the knowledge they had or should have had of the genocidal intention of the principal perpetrator of the massacre at Srebrenica.

Declaration of Judge Skotnikov

In Judge Skotnokiv's view, the Court did not have jurisdiction in this case. He points out that in the 2004 *Legality of Use of Force* cases, which the Respondent brought against the NATO States, the Court decided that Serbia and Montenegro had not been a Member of the United Nations prior to 1 November 2001. The Court determined that membership of the United Nations at the time of filing an application was a requirement of the Court's Statute for it to entertain Serbia and Montenegro's claims, and therefore it had no jurisdiction to hear these cases.

However, in this case the Court has avoided making the same finding, even though in Judge Skotnikov's view it was bound to do so (as this case was also filed before Serbia and Montenegro became a United Nations Member), by stating that its finding on jurisdiction in the 1996 incidental proceedings was final and without appeal.

Judge Skotnikov points out that the question of the Respondent's access to the Court by virtue of its membership of the United Nations was not addressed in the 1996 Judgment on Preliminary Objections. Accordingly, in his view the question of jurisdiction in this case was not then definitively

determined. By applying now the principle of *res judicata* to its finding on jurisdiction in the 1966 proceedings, the Court has created "parallel realities": the one being that the Court has jurisdiction over Serbia and Montenegro in cases filed before 1 November 2001 (in this case) and the other that it does not (in the 2004 *Legality of Use of Force* cases).

Judge Skotnikov disagrees with the Court's interpretation of the Genocide Convention as containing an implied obligation for States to not themselves commit genocide or the other acts enumerated in Article III of that Convention. He finds the very idea of an unstated obligation to be objectionable in general. In addition, in this particular case it is at odds with the terms of the Convention, an instrument which deals with the criminal culpability of individuals.

However, Judge Skotnikov does not think that such an unstated obligation is necessary at all for a State to be held responsible for genocide under the Genocide Convention. He states that, generally, as a matter of principle, wherever international law criminalizes an act, if that act is committed by someone capable of engaging the State's responsibility, the State can be held responsible. This is, in his view, definitely so in the case of the Genocide Convention.

In Judge Skotnikov's view the Genocide Convention does not empower the Court to go beyond settling disputes relating to a State's responsibility for genocide and to conduct an enquiry and make a determination whether or not the crime of genocide was committed. The Court cannot perform this task because it lacks criminal jurisdiction. In particular, by reason of its lack of criminal jurisdiction, the Court cannot establish the existence or absence of genocidal intent, which is a requisite element, a mental part, of the crime of genocide.

Accordingly, Judge Skotnikov disagrees that the Court has the capacity to determine whether or not the crime of genocide has been committed. In his view this approach is consistent neither with the Genocide Convention or the Court's Statute.

Judge Skotnikov believes that in this case it would have been sufficient for the Court to rely upon the findings of the International Criminal Tribunal for the former Yugoslavia (ICTY) to determine whether the crime of genocide had been committed. However, he places one important caveat on that statement: those findings can only be relied upon to the extent they are in conformity with the Genocide Convention.

In the view of Judge Skotnikov, the only findings by the ICTY of the commission of genocide-related crimes in the former Yugoslavia, in the *Krstić* and *Blagojević* cases, have not been made in conformity with the Genocide Convention. In both cases the defendants were convicted of a crime not recognized in the Genocide Convention, but rather one which is established in the ICTY's Statute, namely "aiding and abetting" genocide without having genocidal intent. In addition, these cases determined that genocide had occurred in Srebrenica by making findings about the genocidal intent of unidentified persons not before the ICTY. For these reasons, Judge Skotnikov considers that the Court should have disregarded these findings and concluded that it had not been sufficiently established that the massacre in Srebrenica can be qualified as genocide.

Consequently, Judge Skotnikov also disagrees with the finding of the Court that the Respondent breached the provisional measures ordered in 1993.

Judge Skotnikov finds that the Court has introduced a concept of the duty to prevent which may be politically appealing, but hardly measurable at all in legal terms. In his view, the obligation to prevent applies only in the territory where a State exercises its jurisdiction or which is under its control. He considers that the duty is one of result and not conduct: if genocide has occurred in that territory, the State is responsible.

Finally, Judge Skotnikov notes that the Respondent has not provided a clear-cut statement before this Court that it has done everything in its power to apprehend and transfer Ratko Mladić to the ICTY. He agrees with the Court that Serbia is under an obligation to co-operate with that Tribunal.

Dissenting opinion of Judge Mahiou

This is the first time the Court has been called upon to rule on an accusation of genocide and its consequences, genocide being seen as the most horrible of crimes that can be ascribed to an individual or a State, as in the present proceedings. This case gives the Court the opportunity to enforce the Convention on the Prevention and Punishment of the Crime of Genocide and to interpret the greater part of its provisions, some of which have given rise to much debate over their meaning and scope. The importance, complexity and difficulty of the case lie both in the procedural facet—the case having by now been pending before the Court for 14 years and the proceedings on the merits having suffered repeated delay owing to conduct on the part of the Respondent, conduct which should not go unmarked—and in the substantive facet, this terrible tragedy having taken form in some 100,000 deaths, suffered for the most part under gruesome conditions, and physical and psychological after-effects on an ineffably great scale.

Judge *ad hoc* Mahiou concurs in all the Court's findings on the jurisdictional issue, even though my approach is sometimes quite different in respect of the route taken to those conclusions. Significantly, the Court has not only confirmed its jurisdiction and its 1996 Judgment but has also now made clear how State responsibility, as recognized in the Convention on the Prevention and Punishment of the Crime of Genocide, is to be interpreted.

On the other hand, Judge Mahiou cannot subscribe to most of the substantive findings reached by the Court by way of what he believes to be: a timorous, questionable view of its role in the evidentiary process, a deficient examination of the evidence submitted by the Applicant, a rather odd interpretation of the facts in the case and of the rules governing them and, finally, a method of reasoning which remains unconvincing on a number of very important points. It is serious cause for concern that the Court could not have accomplished its task of establishing the facts and inferring from them the consequences as to responsibility without help from the International Criminal Tribunal for the former Yugoslavia. This raises the problem if not of the efficacy of the Court's rules of procedure then at least of their application by the Court, which did not truly seek to secure for itself the means to accomplish its mission. Further, in Judge Mahiou's opinion,

the Respondent incurred responsibility in this case as a direct perpetrator of some of the crimes, even though he concedes that certain instances might be arguable, open to interpretation or matters for the adjudicator's innermost conviction. In his view, the Respondent's responsibility appears clearly established in respect of Republika Srpska's actions, either because of the very close ties between that entity and the Respondent, resulting in the Respondent's implication in the ethnic cleansing plan carried out between 1992 and 1995, or because of the relationship of subordination or control between the Respondent and those who played a crucial role in that ethnic cleansing, which extended to the commission of genocide in Bosnia and Herzegovina. Even assuming the findings in respect of these charges to be problematic, the evidence before the Court appears sufficiently strong and convincing to have at the very least justified a finding of complicity in the crime of genocide; serious weaknesses and contradictions clearly emerge in the reasoning of the Court, which exonerates the Respondent from such responsibility.

Separate opinion of Judge Kreća

Although termed as a separate opinion, the opinion of Judge *ad hoc* Kreća is, form a substantive point of view, a dissenting opinion for the most part.

It is a separate opinion as regards the principal claim, rejected by the Court, that the Respondent has violated its obligation under the Genocide Convention by committing genocide, conspiracy to commit genocide, incitement to commit genocide and complicity in alleged genocide.

In relation to the remaining parts of the *dispositif* as well as the reasoning part of the Judgment, the opinion of Judge Kreća is strongly dissenting. Judge Kreća finds not only that the reasoning and findings of the majority are unfounded, but run counter in more than one element to cogent legal considerations and, even, common sense, thus assuming the aroma of *argumentum ad casum*.

The majority view on the *res iudicata* rule, *exempli causa,* is similar to an ode to infallibility of Judges rather than to a proper legal reasoning about the characteristics and effects of that rule in the milieu of the law which the Court is bound to apply. The interpretation of the *res iudicata* rule in the circumstances surrounding the case inevitably led to the nullification of the relevance of *jus standi* of the Respondent being an essential condition for the validity of any decision taken by the Court *in casu*.

It appears that the determination of the tragic massacre in Srebrenica as genocide is, both in the formal and the substantive sense, well beyond the real meaning of the provisions of the Genocide Convention as applicable law *in casu*. Hardly any of the components of the special intent as a *sine qua non* of the crime of genocide as established by the Convention is satisfied in the relevant judgments of the ICTY as regards the massacre in Srebrenica. Judge Kreća is of the opinion that the massacre in Srebrenica, according to its characteristics, rather fits in the frame of crimes against humanity and war crimes committed in the fratricidal war in Bosnia and Herzegovina.

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165. AHMADOU SADIO DIALLO (REPUBLIC OF GUINEA *v.* DEMOCRATIC REPUBLIC OF THE CONGO) (PRELIMINARY OBJECTIONS)

Judgment of 24 May 2007

The Court in a judgment handed down in the case concerning *Ahmadou Sadio Diallo* (*Republic of Guinea* v. *Democratic Republic of the Congo*), concluded that Guinea's Application is admissible in so far as it concerns protection of Mr. Diallo's rights as an individual and his direct rights as *associé* in Africom-Zaire and Africontainers-Zaire. The Court also indicated that, in accordance with Article 79, paragraph 7, of the Rules of Court as adopted on 14 April 1978, time-limits for the further proceedings shall subsequently be fixed by Order of the Court (para. 96–97)

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

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The operative paragraph (para. 98) of the Judgment reads as follows:

" . . .

The Court,

(1) As regards the preliminary objection to admissibility raised by the Democratic Republic of the Congo for lack of standing by the Republic of Guinea to exercise diplomatic protection in the present case:

(a) unanimously,

Rejects the objection in so far as it concerns protection of Mr. Diallo's direct rights as *associé* in Africom-Zaire and Africontainers-Zaire;

(b) by fourteen votes to one,

Upholds the objection in so far as it concerns protection of Mr. Diallo in respect of alleged violations of rights of Africom-Zaire and Africontainers-Zaire;

IN FAVOUR: President Higgins; Vice-President Al-Khasawneh; Judges Ranjeva, Shi, Koroma, Buergenthal, Owada, Simma, Tomka, Abraham, Keith, Bennouna, Skotnikov; Judge *ad hoc* Mampuya;

AGAINST: Judge *ad hoc* Mahiou;

(2) As regards the preliminary objection to admissibility raised by the Democratic Republic of the Congo on account of non-exhaustion by Mr. Diallo of local remedies:

(a) unanimously,

Rejects the objection in so far as it concerns protection of Mr. Diallo's rights as an individual;

(b) by fourteen votes to one,

Rejects the objection in so far as it concerns protection of Mr. Diallo's direct rights as *associé* in Africom-Zaire and Africontainers-Zaire;

IN FAVOUR: President Higgins; Vice-President Al-Khasawneh; Judges Ranjeva, Shi, Koroma, Buergenthal, Owada, Simma, Tomka, Abraham, Keith, Bennouna, Skotnikov; Judge *ad hoc* Mahiou;

AGAINST: Judge *ad hoc* Mampuya;

(3) In consequence,

(a) unanimously,

Declares the Application of the Republic of Guinea to be admissible in so far as it concerns protection of Mr. Diallo's rights as an individual;

(b) by fourteen votes to one,

Declares the Application of the Republic of Guinea to be admissible in so far as it concerns protection of Mr. Diallo's direct rights as *associé* in Africom-Zaire and Africontainers-Zaire;

IN FAVOUR: President Higgins; Vice-President Al-Khasawneh; Judges Ranjeva, Shi, Koroma, Buergenthal, Owada, Simma, Tomka, Abraham, Keith, Bennouna, Skotnikov; Judge *ad hoc* Mahiou;

AGAINST: Judge *ad hoc* Mampuya;

(c) by fourteen votes to one,

Declares the Application of the Republic 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 FAVOUR: President Higgins; Vice-President Al-Khasawneh; Judges Ranjeva, Shi, Koroma, Buergenthal, Owada, Simma, Tomka, Abraham, Keith, Bennouna, Skotnikov; Judge *ad hoc* Mampuya;

AGAINST: Judge *ad hoc* Mahiou."

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Judge *ad hoc* Mahiou has appended a declaration to the Judgment of the Court; Judge *ad hoc* Mampuya has appended a separate opinion.

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History of proceedings and submissions of the Parties
(paras. 1–12)

The Court begins by recapitulating the various stages of the proceedings (this history may be found in Press Release No. 2006/36 of 9 November 2006). It also recalls the final submissions presented by the Parties at the oral proceedings (see Press Release No. 2006/41 of 1 December 2006).

Background to the case
(paras. 13–25)

The Court indicates that, in their written pleadings, the Parties are in agreement as to the following facts. Mr. Ahmadou Sadio Diallo, a Guinean citizen, settled in the DRC (called "Congo" between 1960 and 1971 and "Zaire" between 1971 and 1997) in 1964. There, in 1974, he founded an import-export company, Africom-Zaire, a *société privée à responsabilité limitée* (private limited liability company, hereinafter "SPRL") incorporated under Zairean law and entered in the Trade Register of the city of Kinshasa, and he became its *gérant* (manager). In 1979 Mr. Diallo expanded his activities, taking part, as *gérant* of Africom-Zaire and with backing from two private partners, in the founding of another Zairean SPRL, specializing in the containerized transport of goods. The capital in the new company, Africontainers-Zaire, was held as follows: 40 per cent by Mr. Zala, a Zairean national; 30 per cent by Ms. Dewast, a French national; and 30 per cent by Africom-Zaire. It too was entered in the Trade Register of the city of Kinshasa. In 1980 Africom-Zaire's two partners in Africontainers-Zaire withdrew. The *parts sociales* in Africontainers-Zaire were then held as follows: 60 per cent by Africom-Zaire and 40 per cent by Mr. Diallo. At the same time Mr. Diallo became the *gérant* of Africontainers-Zaire. Towards the end of the 1980s, Africom-Zaire's and Africontainers-Zaire's relationships with their business partners started to deteriorate. The two companies, acting through their *gérant,* Mr. Diallo, then initiated various steps, including judicial ones, in an attempt to recover alleged debts. The various disputes between Africom-Zaire or Africontainers-Zaire, on the one hand, and their business partners, on the other, continued throughout the 1990s and for the most part remain unresolved today. Thus, Africom-Zaire claims payment from the DRC of a debt (acknowledged by the DRC) resulting from default in payment for deliveries of listing paper to the Zairean State between 1983 and 1986. Africom-Zaire is involved in another dispute, concerning arrears or overpayments of rent, with Plantation Lever au Zaire ("PLZ"). Africontainers-Zaire is in dispute with the companies Zaire Fina, Zaire Shell and Zaire Mobil Oil, as well as with the Office National des Transports ("ONATRA") and *Générale des Carrières et des Mines ("Gécamines").* For the most part these differences concern alleged violations of contractual exclusivity clauses and the lay-up, improper use or destruction or loss of containers.

The Court considers the following facts also to be established. On 31 October 1995, the Prime Minister of Zaire issued an expulsion Order against Mr. Diallo. The Order gave the following reason for the expulsion: Mr. Diallo's "presence and conduct have breached public order in Zaire, especially in the economic, financial and monetary areas, and continue to do so". On 31 January 1996, Mr. Diallo, already under arrest, was deported from Zaire and returned to Guinea by air. The removal from Zaire was formalized and served on Mr. Diallo in the shape of a notice of refusal of entry (*refoulement*) on account of "illegal residence" (*séjour irrégulier*) that had been drawn up at the Kinshasa airport on the same day.

However, throughout the proceedings Guinea and the DRC continued to differ on a number of other facts, *inter alia* the specific circumstances of Mr. Diallo's arrest, detention and expulsion and the reasons therefor. Guinea maintained that Mr. Diallo's arrest, detention and expulsion were the culmination of a DRC policy to prevent him from recovering the debts owed to his companies. The DRC rejected that allegation and argued that his expulsion was justified by the fact that his presence and conduct breached public order in Zaire.

Violations of rights invoked by Guinea for which it seeks to exercise diplomatic protection
(paras. 26–31)

The Court notes that Guinea, as well as claiming the payment of debts due to Mr. Diallo and his companies, seeks to exercise its diplomatic protection on behalf of Mr. Diallo for the violation, alleged to have occurred at the time of his arrest, detention and expulsion, or to have derived therefrom, of three categories of rights: his individual personal rights, his direct rights as *associé* in Africom-Zaire and Africontainers-Zaire and the rights of those companies, by "substitution".

Jurisdiction of the Court
(para. 32)

To establish the jurisdiction of the Court, Guinea relies on the declarations made by the Parties under Article 36, paragraph 2, of the Statute. The DRC acknowledges that the declarations are sufficient to found the jurisdiction of the Court in the present case. The DRC nevertheless challenges the admissibility of Guinea's Application and raises two preliminary objections in doing so. First of all, according to the DRC, Guinea lacks standing to act in the current proceedings since the rights which it seeks to protect belong to Africom-Zaire and Africontainers-Zaire, Congolese companies, not to Mr. Diallo. Guinea, it is argued, is further precluded from exercising its diplomatic protection on the ground that neither Mr. Diallo nor the companies have exhausted the remedies available in the Congolese legal system to obtain reparation for the injuries claimed by Guinea before the Court.

Admissibility of the Application in so far as it concerns the protection of Mr. Diallo's rights as an individual
(paras. 33–48)

The Court recalls that, according to the DRC, Guinea's claims in respect of Mr. Diallo's rights as an individual are inadmissible because he "[has not] exhausted the available and effective local remedies existing in Zaire, and subsequently in the Democratic Republic of the Congo". The Court notes, however, that in the course of the present proceedings the DRC elaborated on only a single aspect of that objection: that concerning his expulsion from Congolese territory. It indicates that on this subject the DRC maintained that its domestic legal system provided for available, effective remedies which Mr. Diallo should have exhausted, and that his expulsion from the territory was lawful. The DRC acknowledges that the notice signed by the immigration officer "inadvertently" refers to "refusal of entry" (*refoulement)* instead of "expulsion". It does not challenge Guinea's assertion that Congolese law provides that refusals of entry are not appealable. The DRC nevertheless maintains that "despite this error, it is indisputable . . . that this was indeed an expulsion and not a refusal of entry". According to the DRC, calling the action a refusal of entry was therefore not intended to deprive Mr. Diallo of a remedy.

Guinea responds, with respect to Mr. Diallo's expulsion from the Congolese territory, that there were no effective remedies first in Zaire, nor later in the DRC, against this measure. It recalls that the expulsion Order against Mr. Diallo was carried out by way of an action denominated "refusal of entry", which precluded any possibility of redress. Guinea adds, moreover, that "[a]dministrative or other remedies which are neither judicial nor quasi-judicial and are discretionary in nature are not . . . taken into account by the local remedies rule". Guinea further contends that, even though some remedies may in theory have been available to Mr. Diallo in the Congolese legal system, they would in any event have offered him no reasonable possibility of protection at the time as the objective in expelling Mr. Diallo was precisely to prevent him from pursuing legal proceedings.

The Court recalls that under customary international law, diplomatic protection "consists of the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility" (Article 1 of the draft Articles on Diplomatic Protection adopted by the International Law Commission (ILC) at its Fifty-eighth Session (2006)). In the present case, it falls to the Court to ascertain whether the Applicant has met the requirements for the exercise of diplomatic protection, that is to say whether Mr. Diallo is a national of Guinea and whether he has exhausted the local remedies available in the DRC.

On the first point, the Court observes that it is not disputed by the DRC that Mr. Diallo's sole nationality is that of Guinea and that he has continuously held that nationality from the date of the alleged injury to the date the proceedings were initiated.

On the second point, the Court notes, as it stated in the *Interhandel (Switzerland* v. *United States of America)* case, that "[t]he rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law" which "has been generally observed in cases in which a State has adopted the cause of its national whose rights are claimed to have been disregarded in another State in violation of international law."

The Court observes that the Parties do not question the local remedies rule; they do however differ as to whether the Congolese legal system actually offered local remedies which Mr. Diallo should have exhausted before his cause could be espoused by Guinea before the Court. More specifically, the Court indicates that, in matters of diplomatic protection, it is incumbent on the applicant to prove that local remedies were indeed exhausted or to establish that exceptional circumstances relieved the allegedly injured person whom the applicant seeks to protect of the obligation to exhaust available local remedies. It is for the respondent to convince the Court that there were effective remedies in its domestic legal system that were not exhausted.

In view of the arguments made by the Parties, the Court addresses the question of local remedies solely in respect of Mr. Diallo's expulsion. It notes that the expulsion was characterized as a "refusal of entry" when it was carried out, as both Parties have acknowledged and as is confirmed by the notice drawn up on 31 January 1996 by the national immigration service of Zaire. It is apparent that refusals of entry are not appealable under Congolese law. Article 13 of Legislative Order No. 83–033 of 12 September 1983, concerning immigration control, expressly states that the "measure [refusing entry] shall not be subject to appeal". The Court considers that the DRC cannot now rely on an error allegedly made by its administrative agencies at the time Mr. Diallo was "refused entry" to claim that he should have treated the measure as an expulsion. Mr. Diallo, as the subject of the refusal of entry, was justified in relying on the consequences of the legal characterization thus given by the Zairean authorities, including for purposes of the local remedies rule.

The Court further observes that, even if this was a case of expulsion and not refusal of entry, the DRC has also failed to show that means of redress against expulsion decisions are available under its domestic law. The DRC did, it is true, cite the possibility of requesting reconsideration by the competent administrative authority. The Court nevertheless recalls that, while the local remedies that must be exhausted include all remedies of a legal nature, judicial redress as well as redress before administrative bodies, administrative remedies can only be taken into consideration for purposes of the local remedies rule if they are aimed at vindicating a right and not at obtaining a favour, unless they constitute an essential prerequisite for the admissibility of subsequent contentious proceedings. Thus, the possibility open to Mr. Diallo of submitting a request for reconsideration of the expulsion decision to the administrative authority having taken it—that is to say the Prime Minister—in the hope that he would retract his decision as a matter of grace cannot be deemed a local remedy to be exhausted.

Having established that the DRC has not proved the existence in its domestic legal system of available and effective remedies allowing Mr. Diallo to challenge his expulsion, the Court concludes that the DRC's objection to admissibility based on the failure to exhaust local remedies cannot be upheld in respect of that expulsion.

Admissibility of the Application in so far as it concerns protection of Mr. Diallo' s direct rights as 'associé' *in Africom-Zaire and Africontainers-Zaire*
(paras. 49–75)

The Court indicates that the DRC raises two objections to admissibility regarding this aspect of the Application: the DRC contests Guinea's standing, and it suggests that Mr. Diallo has not exhausted the local remedies that were available to him in the DRC to assert his rights. The Court deals with these objections in turn.

Guinea's standing
(paras. 50–67)

The DRC accepts that under international law the State of nationality has the right to exercise its diplomatic protection in favour of *associés* or shareholders when there is an injury to their direct rights as such. It nonetheless contends that "international law allows for [this] protection . . . only under very limited conditions which are not fulfilled in the present case". The DRC maintains first of all that Guinea is not seeking, in this case, to protect the direct rights of Mr. Diallo as *associé*, but that it identifies a violation of the rights of Africom-Zaire and Africontainers-Zaire with a violation of the rights of Mr. Diallo. The DRC further asserts that action to protect the direct rights of shareholders as such applies to only very limited cases and, relying on the Judgment of the Court in the Barcelona Traction case, contends that the only acts capable of violating those rights would consequently be "acts of interference in relations between the company and its shareholders". For the DRC, therefore, the arrest, detention and expulsion of Mr. Diallo could not constitute acts of interference on its part in relations between the *associé* Mr. Diallo and the companies Africom-Zaire and Africontainers-Zaire. As a result, they could not injure Mr. Diallo's direct rights. The DRC thus indicates that Mr. Diallo could very well have exercised his rights from foreign territory and that he could have delegated his tasks to local administrators.

Guinea also refers to the Judgment in the Barcelona Traction case, in which the Court, having ruled that "an act directed against and infringing only the company's rights does not involve responsibility towards the shareholders, even if their interests are affected", added that "[t]he situation is different if the act complained of is aimed at the direct rights of the shareholder as such". Guinea further claims that this position of the Court was taken up in Article 12 of the ILC's draft Articles on Diplomatic Protection. Guinea points out that, in SPRLs, the parts sociales "are not freely transferable", which "considerably accentuates the *intuitu personae* character of these companies" and emphasizes that this character is seen as even more marked in the case of Africom-Zaire and Africontainers-Zaire, since Mr. Diallo was their "sole manager (*gérant*) and sole *associé (*directly or indirectly)". According to Guinea, "in fact and in law it was virtually impossible to distinguish Mr. Diallo from his companies" and the arrest, detention and expulsion of Mr. Diallo not only had the effect "of preventing him from continuing to administer, manage and control any of the operations" of his companies, but were specifically motivated by the intent to prevent him from exercising these rights, from pursuing the legal proceedings brought on behalf

of the companies, and thereby from recovering their debts. Finally, Guinea maintains that, contrary to what is claimed by the DRC, Mr. Diallo could not validly exercise his direct rights as shareholder from his country of origin.

Noting that the Parties have referred to the Barcelona Traction case, the Court recalls that this involved a public limited company whose capital was represented by shares, while the present case concerns SPRLs whose capital is composed of parts sociales. In order to establish the precise legal nature of Africom-Zaire and Africontainers-Zaire, the Court must refer to the domestic law of the DRC. It indicates that Congolese law accords an SPRL independent legal personality distinct from that of its *associés,* particularly in that the property of the *associés* is completely separate from that of the company, and in that the *associés* are responsible for the debts of the company only to the extent of the resources they have subscribed. Consequently, the company's debts receivable from and owing to third parties relate to its respective rights and obligations.

The Court recalls that the exercise by a State of diplomatic protection on behalf of a natural or legal person, who is *associé* or shareholder, having its nationality, seeks to engage the responsibility of another State for an injury caused to that person by an internationally wrongful act committed by that State. What amounts to the internationally wrongful act, in the case of *associés* or shareholders, is the violation by the respondent State of their direct rights in relation to a legal person, direct rights that are defined by the domestic law of that State. On this basis, diplomatic protection of the direct rights of *associés* of an SPRL or shareholders of a public limited company is not to be regarded as an exception to the general legal régime of diplomatic protection for natural or legal persons, as derived from customary international law.

Having considered the arguments advanced by the Parties, the Court finds that Guinea does indeed have standing in this case in so far as its action involves a person of its nationality, Mr. Diallo, and is directed against the allegedly unlawful acts of the DRC which are said to have infringed his rights, particularly his direct rights as *associé* of the two companies Africom-Zaire and Africontainers-Zaire. The Court notes that Mr. Diallo, who was *associé* in both companies, also held the position of *gérant* in each of them. An *associé* of an SPRL holds parts sociales in its capital, while the *gérant* is an organ of the company acting on its behalf.

In view of the foregoing, the Court concludes that the objection of inadmissibility raised by the DRC due to Guinea's lack of standing to protect Mr. Diallo cannot be upheld in so far as it concerns his direct rights as *associé* of Africom-Zaire and Africontainers-Zaire.

Non-exhaustion of local remedies
(paras. 68–75)

The DRC further claims that Guinea cannot exercise its diplomatic protection for the violation of Mr. Diallo's direct rights as *associé* of Africom-Zaire and Africontainers-Zaire in so far as he has not attempted to exhaust the local remedies available in Congolese law for the alleged breach of those specific rights. It submits in this respect that "Mr. Diallo's absence from Congolese territory was not an obstacle [in Congolese law] to the proceedings already initiated when Mr. Diallo was still in the Congo" or for him to bring other proceedings, and that Mr. Diallo could also have appointed representatives to that end. The DRC also asserts that the existing remedies available in the Congolese legal system are effective.

For its part, Guinea alleges that "the Congolese State deliberately chose to deny access to its territory to Mr. Diallo because of the legal proceedings that he had initiated on behalf of his companies". It maintains that "[i]n these circumstances, to accuse Mr. Diallo of not having exhausted the remedies would not only be manifestly 'unreasonable' and 'unfair', but also an abuse of the rule regarding the exhaustion of local remedies". According to Guinea, the circumstances of Mr. Diallo's expulsion moreover precluded him from pursuing local remedies on his own behalf or on that of his companies. Guinea further emphasizes that the existing remedies in the Congolese legal system are ineffective in view, *inter alia*, of excessive delays, "unlawful administrative practices" and the fact that "at the time of the events, the enforcement of legal decisions depended solely on the government's goodwill".

The Court notes that the alleged violation of Mr. Diallo's direct rights as *associé* was dealt with by Guinea as a direct consequence of his expulsion. The Court has already found that the DRC has not proved that there were effective remedies, under Congolese law, against the expulsion Order. The Court further observes that at no time has the DRC argued that remedies distinct from those in respect of Mr. Diallo's expulsion existed in the Congolese legal system against the alleged violations of his direct rights as *associé* and that he should have exhausted them. According to the Court, the Parties indeed devoted some discussion to the question of the effectiveness of local remedies in the DRC but have confined themselves in it to examining remedies open to Africom-Zaire and Africontainers-Zaire, without considering any which may have been open to Mr. Diallo as *associé* in the companies. Inasmuch as it has not been argued that there were remedies that Mr. Diallo should have exhausted in respect of his direct rights as *associé,* the question of the effectiveness of those remedies does not in any case arise.

The Court thus concludes that the objection as to inadmissibility raised by the DRC on the ground of the failure to exhaust the local remedies against the alleged violations of Mr. Diallo's direct rights as *associé* of the two companies Africom-Zaire and Africontainers-Zaire cannot be upheld.

Admissibility of the Application in so far as it concerns the exercise of diplomatic protection with respect to Mr. Diallo "by substitution for" Africom-Zaire and Africontainers-Zaire
(paras. 76–95)

The Court notes that here too the DRC raises two objections to the admissibility of Guinea's Application, derived respectively from Guinea's lack of standing and the failure to exhaust local remedies. The Court again addresses these issues in turn.

Guinea's standing
(paras. 77–94)

The DRC contends that Guinea cannot invoke "'considerations of equity' in order to justify 'the right to exercise its diplomatic protection [in favour of Mr. Diallo and by substitution for Africom-Zaire and Africontainers-Zaire] independently of the violation of the direct rights [of Mr. Diallo]'" on the ground that the State whose responsibility is at issue is also the State of nationality of the companies concerned. Diplomatic protection "by substitution" is said by the DRC to go "far beyond what positive international law provides" and neither the Court's jurisprudence nor State practice recognizes such a possibility. The DRC even goes as far as to assert that Guinea is in reality asking the Court to authorize it to exercise its diplomatic protection in a manner contrary to international law. In this connection, it indicates that the Court should dismiss any possibility of resorting to equity *contra legem*. The DRC also points out that Guinea has not demonstrated that protection of the shareholder "in substitution" for the company which possesses the nationality of the respondent State would be justified in the present case. According to the DRC, such protection by substitution would in fact lead to a discriminatory régime of protection, resulting as it would in the unequal treatment of the shareholders.

Lastly, the DRC maintains that application of protection "by substitution" to the case of Mr. Diallo would prove "fundamentally inequitable", in view of his personality and conduct, which are "far from irreproachable".

For its part, Guinea observes that it is not asking the Court to resort to equity *contra legem,* but it contends that, in the Barcelona Traction case, the Court referred, in a dictum, to the possibility of an exception, founded on reasons of equity, to the general rule of the protection of a company by its national State, "when the State whose responsibility is invoked is the national State of the company". Guinea contends that the existence of the rule of protection by substitution and its customary nature are confirmed by numerous arbitral awards. Further, according to Guinea, "[s]ubsequent practice [following Barcelona Traction], conventional or jurisprudential . . . has dispelled any uncertainty . . . on the positive nature of the 'exception'". Finally Guinea claims that the application of protection by substitution is particularly appropriate in this case, as Africom-Zaire and Africontainers-Zaire are SPRLs, which have a marked *intuitu personae* character and which, moreover, are statutorily controlled and managed by one and the same person. Further, it especially points out that Mr. Diallo was bound, under Zairean legislation, to incorporate the companies in Zaire.

The Court recalls that, as regards diplomatic protection, the principle as emphasized in the Barcelona Traction case, is that: "Not a mere interest affected, but solely a right infringed involves responsibility, so that an act directed against and infringing only the company's rights does not involve responsibility towards the shareholders, even if their interests are affected." (*I.C.J. Reports 1970,* p. 36, para. 46.) Since its dictum in the aforementioned case, the Court notes that it has not had occasion to rule on whether, in international law, there is indeed an exception to the general rule "that the right of diplomatic protection of a company belongs to its national State", which allows for protection of the shareholders by their own national State "by substitution", and on the reach of any such exception. It observes that in the case concerning *Elettronica Sicula S.p.A. (ELSI) (United States of America* v. *Italy*), the Chamber of the Court allowed a claim by the United States of America on behalf of two United States corporations (who held 100 per cent of the shares in an Italian company), in relation to alleged acts by the Italian authorities injuring the rights of the latter company. However, the Court recalls that in doing so, the Chamber based itself not on customary international law but on a Treaty of Friendship, Commerce and Navigation between the two countries directly granting to their nationals, corporations and associations certain rights in relation to their participation in corporations and associations having the nationality of the other State.

The Court examines whether the exception invoked by Guinea is part of customary international law. It notes in this respect that the role of diplomatic protection has somewhat faded, as in practice recourse is only made to it in rare cases where treaty régimes do not exist or have proved inoperative. According to the Court, the theory of protection by substitution seeks to offer protection to the foreign shareholders of a company who could not rely on the benefit of an international treaty and to whom no other remedy is available, the allegedly unlawful acts having been committed against the company by the State of its nationality. Protection by "substitution" would therefore appear to constitute the very last resort for the protection of foreign investments. Having examined State practice and decisions of international courts and tribunals, it is of the opinion that these do not reveal—at least at the present time—an exception in customary international law allowing for protection by substitution, such as is relied on by Guinea. The Court adds that the fact invoked by Guinea that various international agreements have established special legal régimes governing investment protection, or that provisions in this regard are commonly included in contracts entered into directly between States and foreign investors, is not sufficient to show that there has been a change in the customary rules of diplomatic protection; it could equally show the contrary.

The Court then turns to the question of whether customary international law contains a more limited rule of protection by substitution, such as that set out by the ILC in its draft Articles on Diplomatic Protection, which would apply only where a company's incorporation in the State having committed the alleged violation of international law "was required by it as a precondition for doing business there" (Article 11, paragraph (b)). However, this very special case does not seem to correspond to the one the Court is dealing with here. The Court observes that it appears natural that Africom-Zaire and Africontainers-Zaire were created in Zaire and entered in the Trade Register of the city of Kinshasa by Mr. Diallo, who had settled in the country in 1964. Furthermore, and above all it has not satisfactorily been established before the Court that their incorporation in that country, as legal entities of Congolese nationality, would have been required of their founders to enable the founders to operate in the economic sectors concerned. The Court thus concludes that the two companies were not incorporated in such a way that they would fall within the scope of protection by substitution in the sense of Article 11,

paragraph (b), of the ILC draft Articles on Diplomatic Protection. Therefore, the question of whether or not this paragraph of Article 11 reflects customary international law does not arise in this case. The Court cannot accept Guinea's claim to exercise diplomatic protection by substitution. It is therefore the normal rule of the nationality of the claims which governs the question of the diplomatic protection of Africom-Zaire and Africontainers-Zaire. The companies in question have Congolese nationality.

The objection as to inadmissibility raised by the DRC owing to Guinea's lack of standing to offer Mr. Diallo diplomatic protection as regards the alleged unlawful acts of the DRC against the rights of the two companies Africom-Zaire and Africontainers-Zaire is consequently well founded and must be upheld.

Non-exhaustion of local remedies
(para. 95)

Having concluded that Guinea is without standing to offer Mr. Diallo diplomatic protection as regards the alleged unlawful acts of the DRC against the rights of the companies Africom-Zaire and Africontainers-Zaire, the Court need not further consider the DRC's objection based on the non-exhaustion of local remedies.

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Declaration of Judge Mahiou

After declaring Guinea's Application admissible in so far as it concerns protection of, on the one hand, Mr. Diallo's rights as an individual and, on the other hand, his direct rights as *associé* in the companies Africom-Zaire and Africontainers-Zaire, the Court declares inadmissible the Application seeking to protect Mr. Diallo in respect of the alleged violations of rights of these companies. In rejecting this latter Application, the Court relies on the approach set out by the International Law Commission (ILC) in its draft Articles on Diplomatic Protection, which it takes up in paragraphs 88 and 91 of the Judgment. However, after explaining and apparently accepting this approach to diplomatic protection, the Court takes the view that it does not apply in the present case.

After noting that the first condition has been satisfied —since the two companies in question do indeed have the nationality of the Congolese State, which has committed the wrongful acts—it considers that the second condition has not been met, because this nationality results from a free choice of their owner and not from a requirement of local law that would enable diplomatic protection to be invoked. The choice of Congolese nationality was certainly made by Mr. Diallo, but it seems questionable to conclude that this was a free choice, as the Court does in paragraph 92 of the Judgment.

Freedom of choice is more appearance than reality when one examines Congolese law, which requires both the registered office and administrative headquarters to be in the DRC if the main operating centre is located in that country, failing which the two companies would automatically be struck off the Trade Register, thereby preventing them from existing or carrying on activities in the DRC. Consequently, because of this legal and factual situation, this case falls within the scope of Article 11, paragraph (b), of the ILC draft as one in which it would be legitimate for the right to diplomatic protection from the State of the shareholders' nationality to be exercised if prejudicial measures are taken by the State against a company having its nationality. Furthermore, it should be noted that one of the two companies, Africom-Zaire, is said to have disappeared as a result of action taken by the Congolese authorities. If that should prove to be the case, a new situation would result in which there would no longer be any possibility for that company to assert its rights directly, and that could deprive its sole shareholder, Mr. Diallo, of any means of redress if he were refused the benefit of diplomatic protection. Judge *ad hoc* Mahiou therefore believes that the Court should have taken further account of this situation in order to safeguard the rights and interests of the sole shareholder in this company.

Separate opinion of Judge Mampuya

In this case between Guinea and the Democratic Republic of the Congo, while generally subscribing to the Court's findings on the admissibility of Guinea's Application, Judge *ad hoc* Mampuya would express reservations about certain aspects of the approach taken in the Judgment and about some issues associated with the admissibility of the Application as regards the protection of the direct rights of a Guinean national as *associé* in the two Congolese companies. Judge Mampuya endorses the main operative part of the Judgment declaring Guinea's Application admissible in so far as it concerns the direct rights of its national as an individual and inadmissible in so far as it also concerned the rights of non-Guinean companies. However, it seemed to him in fact that whereas a study of the Court's case law points to the need for the nature of its claim to be stated "within the degree of precision and clearness requisite for the administration of justice", Guinea's Application was not worded clearly enough to define its object, the circumstances of its filing explaining why Guinea has, from start to finish in the procedure, wavered between, on the one hand, protection of the two companies controlled by its national Mr. Diallo but which are of Congolese nationality, whose financial claims emerge clearly as the real object of the Application, and, on the other hand, protection of Mr. Diallo's direct rights as an individual and *associé*. Judge Mampuya believes that, on grounds of *obscuri libelli,* if not lack of standing, the admissibility of Guinea's Application is at least problematic. Moreover, by upholding the direct rights of Mr. Diallo as an object of the Application, opting for this artificial dispute instead of the real one, the Court is admitting quite new private claims, not hitherto known to the Congolese authorities and not constituting in themselves a dispute arising directly from relations between Guinea and the Democratic Republic of the Congo, without verifying, contrary to all its previous case law, whether Mr. Diallo's private dispute had given rise to an international dispute between the two States which could be submitted to the Court, the latter only entertaining international disputes and not mere acts, even if they may be internationally wrongful.

Lastly, while Guinea's right to act in respect of the direct rights of its national as *associé* cannot be contested, Judge

Mampuya did not support the finding that, since the DRC had not shown remedies against the expulsion order to exist, there would also be none against the alleged infringement of these direct rights as *associé,* which is regarded as a direct consequence of that expulsion. That is why, having accepted Guinea's standing, in particular to act in respect of alleged violations of human rights, Judge Mampuya did not join the majority in favour of the operative provision which rejects, on the grounds set out here, the DRC's preliminary objection that domestic remedies concerning the direct rights as *associé* had not been exhausted.

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166. TERRITORIAL AND MARITIME DISPUTE BETWEEN NICARAGUA AND HONDURAS IN THE CARIBBEAN SEA (NICARAGUA *v.* HONDURAS)

Judgment of 8 October 2007

In the case concerning the *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea* (*Nicaragua* v. *Honduras*), the Court delivered its judgment on 8 October 2007.

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

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Paragraph 321 of the judgment reads as follows:

" . . .

The Court,

(1) Unanimously,

Finds that the Republic of Honduras has sovereignty over Bobel Cay, Savanna Cay, Port Royal Cay and South Cay;

(2) By fifteen votes to two,

Decides that the starting-point of the single maritime boundary that divides the territorial sea, continental shelf and exclusive economic zones of the Republic of Nicaragua and the Republic of Honduras shall be located at a point with the co-ordinates 15° 00' 52" N and 83° 05' 58" W;

IN FAVOUR: President Higgins; Vice-President Al-Khasawneh; Judges Ranjeva, Shi, Koroma, Buergenthal, Owada, Simma, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov; Judge *ad hoc* Gaja;

AGAINST: Judge Parra-Aranguren, Judge *ad hoc* Torres Bernárdez;

(3) By fourteen votes to three,

Decides that starting from the point with the co-ordinates 15° 00' 52" N and 83° 05' 58" W the line of the single maritime boundary shall follow the azimuth 70° 14' 41.25" until its intersection with the 12-nautical-mile arc of the territorial sea of Bobel Cay at point A (with co-ordinates 15° 05' 25" N and 82° 52' 54" W). From point A the boundary line shall follow the 12-nautical-mile arc of the territorial sea of Bobel Cay in a southerly direction until its intersection with the 12-nautical-mile arc of the territorial sea of Edinburgh Cay at point B (with co-ordinates 14° 57' 13" N and 82° 50' 03" W). From point B the boundary line shall continue along the median line which is formed by the points of equidistance between Bobel Cay, Port Royal Cay and South Cay (Honduras) and Edinburgh Cay (Nicaragua), through point C (with co-ordinates 14° 56' 45" N and 82° 33' 56" W) and D (with co-ordinates 14° 56' 35" N and 82° 33' 20" W), until it meets the point of intersection of the 12-nautical-mile arcs of the territorial seas of South Cay (Honduras) and Edinburgh Cay (Nicaragua) at point E (with co-ordinates 14° 53' 15" N and 82° 29' 24" W). From point E the boundary line shall follow the 12-nautical-mile arc of the territorial sea of South Cay in a northerly direction until it meets the line of the azimuth at point F (with co-ordinates 15° 16' 08" N and 82° 21' 56" W). From point F, it 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;

IN FAVOUR: President Higgins; Vice-President Al-Khasawneh; Judges Shi, Koroma, Buergenthal, Owada, Simma, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna,Skotnikov; Judge *ad hoc* Gaja;

AGAINST: Judges Ranjeva, Parra-Aranguren, Judge *ad hoc* Torres Bernárdez;

(4) By sixteen votes to one,

Finds that the Parties must negotiate in good faith with a view to agreeing on the course of the delimitation line of that portion of the territorial sea located between the endpoint of the land boundary as established by the 1906 Arbitral Award and the starting-point of the single maritime boundary determined by the Court to be located at the point with the co-ordinates 15° 00' 52" N and 83° 05' 58" W.

IN FAVOUR: President Higgins; Vice-President Al-Khasawneh; Judges Ranjeva, Shi, Koroma, Buergenthal, Owada, Simma, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov; Judges *ad hoc* Torres Bernárdez, Gaja;

AGAINST: Judge Parra-Aranguren."

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Judge Ranjeva appends a separate opinion to the Judgment of the Court; Judge Koroma appends a separate opinion to the Judgment of the Court; Judge Parra-Aranguren appends a declaration to the Judgment of the Court; Judge *ad hoc* Torres Bernárdez appends a dissenting opinion to the Judgment of the Court; Judge *ad hoc* Gaja appends a declaration to the Judgment of the Court.

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Chronology of the procedure and submissions of the Parties
(paras. 1–19)

On 8 December 1999 Nicaragua filed an Application instituting proceedings against Honduras in respect of a dispute relating to the delimitation of the maritime areas appertaining to each of those States in the Caribbean Sea.

In its Application, Nicaragua sought to found the jurisdiction of the Court on the provisions of Article XXXI of the American Treaty on Pacific Settlement (officially known as the "Pact of Bogotá"), as well as on the declarations accepting the jurisdiction of the Court made by the Parties, as provided for in Article 36, paragraph 2, of the Statute of the Court.

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 in the case. Nicaragua chose Mr. Giorgio Gaja and Honduras first chose Mr. Julio González Campos, who resigned on 17 August 2006, and subsequently Mr. Santiago Torres Bernárdez.

By an Order dated 21 March 2000 the President of the Court fixed 21 March 2001 and 21 March 2002, respectively, as the time-limits for the filing of the Memorial of Nicaragua and the Counter-Memorial of Honduras. Those pleadings were duly filed within the prescribed time-limits.

By an Order of 13 June 2002, the Court authorized the submission of a Reply by Nicaragua and a Rejoinder by Honduras, and fixed 13 January 2003 and 13 August 2003 as the respective time-limits for the filing of those pleadings. The Reply of Nicaragua and the Rejoinder of Honduras were filed within the time-limits so prescribed.

Public hearings were held between 5 and 23 March 2007. At the conclusion of the oral proceedings, the Parties presented the following final submissions to the Court:

On behalf of the Government of Nicaragua,

"Having regard to the considerations set forth in the Memorial, Reply and hearings and, in particular, the evidence relating to the relations of the Parties,

May it please the Court to adjudge and declare that:

The bisector of the lines representing the coastal fronts of the two Parties as described in the pleadings, drawn from a fixed point approximately 3 miles from the river mouth in the position 15° 02' 00" N and 83° 05' 26" W, constitutes the single maritime boundary for the purposes of the delimitation of the disputed areas of the territorial sea, exclusive economic zone and continental shelf in the region of the Nicaraguan Rise.

The starting-point of the delimitation is the thalweg of the main mouth of the River Coco such as it may be at any given moment as determined by the Award of the King of Spain of 1906.

Without prejudice to the foregoing, the Court is required to decide the question of sovereignty over the islands and cays within the area in dispute."

On behalf of the Government of Honduras:

"Having regard to the pleadings, written and oral, and to the evidence submitted by the Parties,

May it please the Court to adjudge and declare that:

1. The islands Bobel Cay, South Cay, Savanna Cay and Port Royal Cay, together with all other islands, cays, rocks, banks and reefs claimed by Nicaragua which lie north of the 15th parallel are under the sovereignty of the Republic of Honduras.

2. The starting-point of the maritime boundary to be delimited by the Court shall be a point located at 14° 59.8' N latitude, 83° 05.8' W longitude. The boundary from the point determined by the Mixed Commission in 1962 at 14° 59.8' N latitude, 83° 08.9' W longitude to the starting-point of the maritime boundary to be delimited by the Court shall be agreed between the Parties to this case on the basis of the Award of the King of Spain of 23 December 1906, which is binding upon the Parties, and taking into account the changing geographical characteristics of the mouth of the river Coco (also known as the river Segovia or Wanks).

3. East of the point at 14° 59.8' N latitude, 83° 05.8' W longitude, the single maritime boundary which divides the respective territorial seas, exclusive economic zones and continental shelves of Honduras and Nicaragua follows 14° 59.8' N latitude, as the existing maritime boundary, or an adjusted equidistance line, until the jurisdiction of a third State is reached."

Geography
(paras. 20–32)

The Court notes that the area within which the delimitation sought is to be carried out lies in the basin of the Atlantic Ocean between 9° to 22° N and 89° to 60° W, commonly known as the Caribbean Sea. The Nicaraguan coast runs slightly west of south after Cape Gracias a Dios all the way to the Nicaraguan border with Costa Rica except for the eastward protrusion at Punta Gorda. The Honduran coast, for its part, runs generally in an east-west direction between the parallels 15º to 16º of North latitude. The Honduran segment of the Central American coast along the Caribbean continues its northward extension beyond Cape Gracias a Dios to Cape Falso where it begins to swing towards the west. At Cape Camarón the coast turns more sharply so that it runs almost due west all the way to the Honduran border with Guatemala. The two coastlines roughly form a right angle that juts out to sea. The convexity of the coast is compounded by the cape formed at the mouth of the River Coco, which generally runs

east as it nears the coast and meets the sea at the eastern tip of Cape Gracias a Dios. Cape Gracias a Dios marks the point of convergence of both States' coastlines. It abuts a concave coastline on its sides and has two points, one on each side of the margin of the River Coco separated by a few hundred meters.

The continental margin off the east coast of Nicaragua and Honduras is generally termed the "Nicaraguan Rise". It takes the form of a relatively flat triangular shaped platform, with depths around 20 m. Approximately midway between the coast of those countries and the coast of Jamaica, the Nicaraguan Rise terminates by deepening abruptly to depths of over 1,500 m. Before descending to these greater depths the Rise is broken into several large banks, such as Thunder Knoll Bank and Rosalind Bank (also known as Rosalinda Bank) that are separated from the main platform by deeper channels of over 200 m. In the shallow area of the ridge close to the mainland of Nicaragua and Honduras there are numerous reefs, some of which reach above the water surface in the form of cays.

Cays are small, low islands composed largely of sand derived from the physical breakdown of coral reefs by wave action and subsequent reworking by wind. Larger cays can accumulate enough sediment to allow for colonization and fixation by vegetation. The insular features present on the continental shelf in front of Cape Gracias a Dios, to the north of the 15th parallel, include Bobel Cay, Savanna Cay, Port Royal Cay and South Cay, located between 30 and 40 nautical miles east of the mouth of the River Coco.

With regard to the geomorphology of the mouth of the River Coco, the longest river of the Central American isthmus, the Court notes that it is a typical delta which forms a protrusion of the coastline forming a cape: Cape Gracias a Dios. All deltas are by definition geographical accidents of an unstable nature. Both the delta of the River Coco and even the coastline north and south of it show a very active morphodynamism. The result is that the river mouth is constantly changing its shape and unstable islands and shoals form in the mouth where the river deposits much of its sediment.

Historical background
(paras. 33–71)

The Court gives a brief account of the history which forms the background of the dispute between the Parties (only parts of which are referred to below).

It notes that upon gaining independence from Spain in 1821, Nicaragua and Honduras obtained sovereignty over their respective territory including adjacent islands along their coasts, without these islands being identified by name. On 7 October 1894 Nicaragua and Honduras successfully concluded a general boundary treaty known as the Gámez-Bonilla Treaty which entered into force on 26 December 1896. Article II of the Treaty, according to the principle of *uti possidetis juris*, provided that "each Republic is owner of the territory which at the date of independence constituted respectively, the provinces of Honduras and Nicaragua". Article I of the Treaty further provided for the establishment of a Mixed Boundary Commission to demarcate the boundary between Nicaragua and Honduras. The Commission fixed the boundary from the Pacific Ocean at the Gulf of Fonseca to the Portillo de Teotecacinte, which is located approximately one third of the way across the land territory, but it was unable to determine the boundary from that point to the Atlantic coast.

Pursuant to the terms of Article III of the Gámez-Bonilla Treaty, Nicaragua and Honduras subsequently submitted their dispute over the remaining portion of the boundary to the King of Spain as sole arbitrator. King Alfonso XIII of Spain handed down an Arbitral Award on 23 December 1906, which drew a boundary from the mouth of the River Coco at Cape Gracias a Dios to Portillo de Teotecacinte. Nicaragua subsequently challenged the validity and binding character of the Arbitral Award in a Note dated 19 March 1912. After several failed attempts to settle this dispute and a number of boundary incidents in 1957, the Council of the Organization of American States (OAS) took up the issue that same year. Through the mediation of an *ad hoc* Committee established by the Council of the OAS, Nicaragua and Honduras agreed to submit their dispute to the International Court of Justice.

In its Judgment of 18 November 1960, the International Court of Justice found that the Award made by the King of Spain on 23 December 1906 was valid and binding and that Nicaragua was under an obligation to give effect to it.

As Nicaragua and Honduras could not thereafter agree on how to implement the 1906 Arbitral Award, Nicaragua requested the intervention of the Inter-American Peace Committee. The Committee subsequently established a Mixed Commission which completed the demarcation of the boundary line with the placement of boundary markers in 1962. The Mixed Commission determined that the land boundary would begin at the mouth of the River Coco, at 14° 59.8' N latitude and 83° 08.9' W longitude.

From 1963 to 1979, Honduras and Nicaragua enjoyed friendly relations. In 1977 Nicaragua initiated negotiations on matters relating to the maritime boundary in the Caribbean. However these negotiations made no progress. In the period that followed relations between the two countries deteriorated. Numerous incidents involving the capture and/or attack by each State of fishing vessels belonging to the other State in the vicinity of the 15th parallel were recorded in a series of diplomatic exchanges. Several mixed commissions were established with a view to finding a resolution to the situation but were unsuccessful in their attempts.

On 29 November 1999, Nicaragua filed an application instituting proceedings against Honduras as well as a request for the indication of provisional measures before the Central American Court of Justice. This followed Honduras's expressed intention to ratify a 1986 Treaty on maritime delimitation with Colombia in which the parallel 14° 59' 08" to the east of the 82nd meridian is given as the boundary line between Honduras and Colombia. In its Application, Nicaragua asked the Central American Court of Justice to declare that Honduras, by proceeding to the approval and ratification of the 1986 Treaty, was acting in violation of certain legal instruments of regional integration, including the Tegucigalpa Protocol to the Charter of the Organization of Central American States. In its request for the indication of provisional measures, Nicaragua asked the Central American Court of Justice to order

Honduras to abstain from approving and ratifying the 1986 Treaty, until the sovereign interests of Nicaragua in its maritime spaces, the patrimonial interests of Central America and the highest interests of the regional institutions had been "safeguarded". By Order of 30 November 1999 the Central American Court of Justice ruled that Honduras suspend the procedure of ratification of the 1986 Treaty pending the determination of the merits in the case.

Honduras and Colombia continued the ratification process and on 20 December 1999 exchanged instruments of ratification. On 7 January 2000, Nicaragua made a further request for the indication of provisional measures asking the Central American Court of Justice to declare the nullity of Honduras's process of ratification of the 1986 Treaty. By Order of 17 January 2000, the Central American Court of Justice ruled that Honduras had not complied with its Order on provisional measures dated 30 November 1999 but considered that it did not have jurisdiction to rule on the request made by Nicaragua to declare the nullity of Honduras's ratification process. In its judgment on the merits, on 27 November 2001, the Central American Court of Justice confirmed the existence of a "territorial patrimony of Central America". It further held that, by having ratified the 1986 Treaty, Honduras had infringed a number of provisions of the Tegucigalpa Protocol to the Charter of the Organization of Central American States, which set out, *inter alia*, the fundamental objectives and principles of the Central American Integration System, including the concept of the "territorial patrimony of Central America".

Throughout the 1990s several diplomatic notes were also exchanged with regard to the Parties' publication of maps concerning the area in dispute.

Positions of the Parties
(paras. 72–103)

Subject-matter of the dispute

In its Application and written pleadings Nicaragua asked the Court to determine 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 in the Caribbean Sea. Nicaragua states that it has consistently maintained the position that its maritime boundary with Honduras in the Caribbean Sea has not been delimited. During the oral proceedings, Nicaragua also made a specific request that the Court pronounce on sovereignty over islands located in the disputed area to the north of the boundary line claimed by Honduras running along the 15th parallel (14° 59.08' N latitude).

According to Honduras, there already exists in the Caribbean Sea a traditionally recognized boundary between the maritime spaces of Honduras and Nicaragua "which has its origins in the principle of *uti possidetis juris* and which is firmly rooted in the practice of both Honduras and Nicaragua and confirmed by the practice of third States". Honduras agrees that the Court should "determine the location of a single maritime boundary" and asks the Court to trace it following the "traditional maritime boundary" along the 15th parallel "until the jurisdiction of a third State is reached". During the oral proceedings Honduras also asked the Court to adjudge that "[t]he islands Bobel Cay, South Cay, Savanna Cay and Port Royal Cay, together with all other islands, cays, rocks, banks and reefs claimed by Nicaragua which lie north of the 15th parallel are under the sovereignty of the Republic of Honduras". For the claims of the Parties, see sketch-map No. 2 in the Judgment.

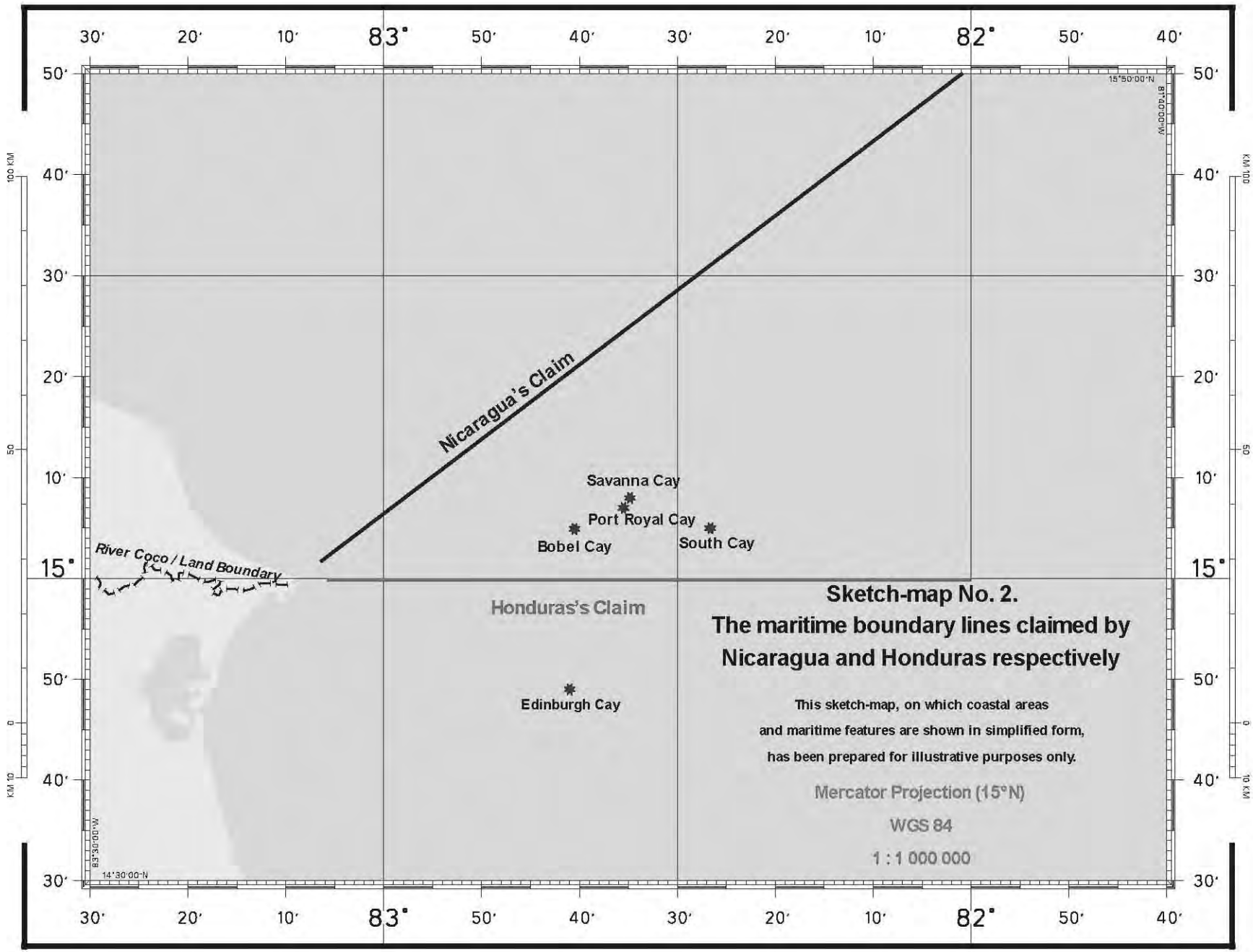
Sovereignty over the islands in the area in dispute

Nicaragua claims sovereignty over the islands and cays in the disputed area of the Caribbean Sea to the north of the 15th parallel, including Bobel Cay, Savanna Cay, Port Royal Cay and South Cay. Honduras claims sovereignty over Bobel Cay, Savanna Cay, Port Royal Cay and South Cay, in addition to claiming title over other smaller islands and cays lying in the same area.

Both States agree that none of the islands and cays in dispute were *terra nullius* upon independence in 1821. However the Parties disagree on the situation thereafter. Nicaragua asserts that these features were not assigned to either of the Republics and that it is impossible to establish the *uti possidetis juris* situation of 1821 with respect to the cays. It concludes that recourse must be had to "other titles" and in particular, contends that it holds original title over the cays under the principle of adjacency. Honduras, for its part, claims that it has an original title over the disputed islands from the doctrine of *uti possidetis juris* and that its title is confirmed by many *effectivités*.

Maritime delimitation beyond the territorial sea
Nicaragua's line: bisector method

The Court notes that Nicaragua proposes a method of delimitation consisting of "the bisector of the angle produced by constructing lines based upon the respective coastal frontages and producing extensions of these lines". Such a bisector is calculated from the general direction of the Nicaraguan coast and the general direction of the Honduran coast. These coastal fronts generate a bisector which runs from the mouth of the River Coco as a line of constant bearing (azimuth 52° 45' 21") until intersecting with the boundary of a third State in the vicinity of Rosalind Bank.


Nicaragua's Claim
Savanna Cay
Port Royal Cay
Bobel Cay
South Cay
River Coco / Land Boundary
Honduras's Claim
Edinburgh Cay
Sketch-map No. 2.
The maritime boundary lines claimed by
Nicaragua and Honduras respectively
This sketch-map, on which coastal areas
and maritime features are shown in simplified form,
has been prepared for illustrative purposes only.
Mercator Projection (15°N)
WGS 84
1 : 1 000 000
83°
82°
15°
15°50'00"N
14°30'00"N
83°30'00"W
81°40'00"W

Honduras's line: "traditional boundary" along the 15th parallel

Honduras, for its part, asks the Court to confirm what it claims is a traditional maritime boundary based on *uti possidetis juris* running along the 15th parallel between Honduras and Nicaragua in the Caribbean Sea and to continue that existing line until the jurisdiction of a third State is reached. Were its contentions as to the 15th parallel not to be accepted by the Court, Honduras asks alternatively that the Court trace an adjusted equidistance line, until the jurisdiction of a third State is reached.

Starting-point of the maritime boundary

Both Parties agree that the terminus of the land boundary between Nicaragua and Honduras was established by the 1906 Arbitral Award at the mouth of the principal arm of the River Coco. The Mixed Boundary Commission determined in 1962 that the starting-point of the land boundary at the mouth of the River Coco was situated at 14° 59.8' N latitude and 83° 08.9' W longitude. Both Parties also agree that due to the accretion of sediments, this point has moved since 1962.

Nicaragua proposes, in its written pleadings, that the starting-point of the maritime boundary be set "at a prudent distance", namely 3 nautical miles out at sea from the actual mouth of the River Coco on the bisector line. Nicaragua initially suggested that the Parties would have to negotiate "a line representing the boundary between the point of departure of the boundary at the mouth of the River Coco and the point of departure from which the Court will have determined the [maritime] boundary line". While leaving that proposal open, Nicaragua, in its final submissions, asked the Court to confirm that: "[t]he starting-point of the delimitation is the thalweg of the main mouth of the River Coco such as it may be at any given moment as determined by the Award of the King of Spain of 1906". Honduras accepts a starting-point of the boundary "at 3 miles from the terminal point adopted in 1962" but argues that the seaward fixed-point should be measured from the point established by the 1962 Mixed Commission and located on the 15th parallel.

Delimitation of the territorial sea

Nicaragua states that the delimitation of the territorial sea between States with adjacent coasts must be effected on the basis of the principles set out in Article 15 of the United Nations Convention on the Law of the Sea (UNCLOS). In the view of Nicaragua, in the present case however, it is technically impossible to draw an equidistance line because it would have to be entirely drawn on the basis of the two outermost points of the mouth of the river, which are extremely unstable and continuously change position. Thus, according to Nicaragua, the bisector line should also be used for the delimitation of the territorial sea.

Honduras agrees with Nicaragua that there are "special circumstances" which, under Article 15 of UNCLOS "require delimitation by a line other than a strict median line". However, according to Honduras, while the configuration of the continental landmass may be one such "special circumstance", of far greater significance "is the established practice of the Parties in treating the 15th parallel as their boundary from the mouth of the River Coco". Honduras also identifies as a factor of "the greatest significance . . . the gradual movement eastwards of the actual mouth of the River Coco". Honduras therefore suggests that from the fixed seaward starting-point the maritime boundary in the territorial sea should follow in an eastward direction the 15th parallel.

Admissibility of the new claim to sovereignty over the islands in the area in dispute
(paras. 104–116)

The Court observes that, from a formal point of view, the claim relating to sovereignty over the islands in the maritime area in dispute, as presented in the final submissions of Nicaragua, is a new claim in relation to the claims presented in the Application and in the written pleadings.

However, the mere fact that a claim is new is not in itself decisive for the issue of admissibility. In order to determine whether a new claim introduced during the course of the proceedings is admissible the Court needs to consider whether, "although formally a new claim, the claim in question can be considered as included in the original claim in substance" (*Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, pp. 265–266, para. 65). For this purpose, to find that the 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. Moreover,

> "[a]n additional claim must have been implicit in the application (*Temple of Preah Vihear, Merits, Judgment, I.C.J. Reports 1962*, p. 36) or must arise 'directly out of the question which is the subject-matter of that Application' (*Fisheries jurisdiction (Federal Republic of Germany* v. *Iceland*), *Merits, I.C.J. Reports 1974*, p. 203, para. 72)" (*Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 266, para. 67).

Recalling that on a number of occasions it has emphasized that "the land dominates the sea", the Court observes that in order to draw a single maritime boundary line in an area of the Caribbean Sea where a number of islands and rocks are located, it would have to consider what influence these maritime features might have on the course of that line. To plot that line the Court would first have to determine which State has sovereignty over the islands and rocks in the disputed area. The Court is bound to do so whether or not a formal claim has been made in this respect. Thus the claim relating to sovereignty is implicit in and arises directly out of the question which is the subject-matter of Nicaragua's Application, namely the delimitation of the disputed areas of the territorial sea, continental shelf and exclusive economic zone.

The Court thus concludes that the Nicaraguan claim relating to sovereignty over the islands in the maritime area in dispute is admissible as it is inherent in the original claim relating to the maritime delimitation between Nicaragua and Honduras in the Caribbean Sea.

The critical date
(paras. 117–131)

The Court recalls that, in the context of a maritime delimitation dispute or of a dispute related to sovereignty over land, the significance of a critical date lies in distinguishing between those acts performed *à titre de souverain* which are in principle relevant for the purpose of assessing and validating *effectivités*, and those acts occurring after such critical date, which are in general meaningless for that purpose, having been carried out by a State which, already having claims to assert in a legal dispute, could have taken those actions strictly with the aim of buttressing those claims. Thus a critical date will be the dividing line after which the Parties' acts become irrelevant for the purposes of assessing the value of *effectivités*.

Honduras contends that there are two disputes, albeit related: one as to whether Nicaragua or Honduras has title to the disputed islands; and the other as to whether the 15th parallel represents the current maritime frontier between the Parties. Nicaragua perceives it as a single dispute.

Honduras observes that in respect of the dispute concerning sovereignty over the maritime features in the disputed area there "may be more than one critical date". Thus, "[t]o the extent that the issue of title turns on the application of *uti possidetis*", the critical date would be 1821—the date of independence of Honduras and Nicaragua from Spain. For the purposes of post-colonial *effectivités*, Honduras argues that the critical date cannot be "earlier than the date of the filing of the Memorial—21 March 2001—since this was the first time that Nicaragua asserted that it had title to the islands". With regard to the dispute over the maritime boundary, Honduras maintains that 1979, when the Sandinista Government came to power, constitutes the critical date, as up to that date "Nicaragua never showed the slightest interest in the cays and islands north of the 15th parallel".

For Nicaragua, the critical date is 1977, when the Parties initiated negotiations on maritime delimitation, following an exchange of letters by the two Governments. Nicaragua asserts that the dispute over the maritime boundary, by implication, encompasses the dispute over the islands within the relevant area and therefore the critical date for both disputes coincides.

Having examined the arguments of the Parties, the Court considers that in cases where there exist two interrelated disputes, as in the present case, there is not necessarily a single critical date and that date may be different in the two disputes. For these reasons, the Court finds it necessary to distinguish two different critical dates which are to be applied to two different circumstances. One critical date concerns the attribution of sovereignty over the islands to one of the two contending States. The other critical date is related to the issue of delimitation of the disputed maritime area.

With regard to the dispute over the islands, the Court considers 2001 as the critical date, since it was only in its Memorial filed in 2001 that Nicaragua expressly reserved "the sovereign rights appurtenant to all the islets and rocks claimed by Nicaragua in the disputed area".

With regard to the dispute over the delimitation line, the Court finds that it is from the time of two incidents involving the capture of fishing vessels in March 1982 and eliciting a diplomatic exchange between the Parties that a dispute as to the maritime delimitation could be said to exist.

Sovereignty over the islands
(paras. 132–227)

The maritime features in the area in dispute

In assessing the legal nature of the land features in the disputed area the Court notes that the Parties do not dispute the fact that Bobel Cay, Savanna Cay, Port Royal Cay and South Cay remain above water at high tide. They thus fall within the definition and régime of islands under Article 121 of UNCLOS (to which Nicaragua and Honduras are both parties).

With the exception of these four islands, the Court states that there seems to be an insufficiency in the information it would require in order to identify a number of the other maritime features in the disputed area. In this regard little assistance was provided in the written and oral procedures to define with the necessary precision the other "features" in respect of which the Parties asked the Court to decide the question of territorial sovereignty.

The Court notes that during the proceedings, two other cays were mentioned: Logwood Cay (also called Palo de Campeche) and Media Luna Cay. In response to a question put by a judge *ad hoc*, the Parties have stated that Media Luna Cay is now submerged and thus that it is no longer an island. Uncertainty prevails in the case of Logwood Cay's current condition: according to Honduras it remains above water (though only slightly) at high tide; according to Nicaragua, it is completely submerged at high tide.

Given all these circumstances, the Court regards it as appropriate to pronounce only upon the question of sovereignty over Bobel Cay, Savanna Cay, Port Royal Cay and South Cay.

A claim was also made during the oral proceedings by each Party to an island in an entirely different location, namely, the island in the mouth of the River Coco. For the last century the unstable nature of the river mouth has meant that larger islands are liable to join their nearer bank and the future of smaller islands is uncertain. Because of the changing conditions of the area, the Court makes no finding as to sovereign title over islands in the mouth of the River Coco.

The uti possidetis juris *principle and sovereignty over the islands in dispute*

The Court observes that the principle of *uti possidetis juris* has been relied on by Honduras as the basis of sovereignty over the islands in dispute. This is contested by Nicaragua which asserts that sovereignty over the islands cannot be attributed to one or the other Party on the basis of this principle.

The Court notes that it has recognized that "the principle of *uti possidetis* has kept its place among the most important legal principles" regarding territorial title and boundary delimitation at the moment of decolonization (*Frontier Dis-*

pute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986, p. 567, para. 26). It states that it is beyond doubt that the principle is applicable to the question of territorial delimitation between Nicaragua and Honduras, both former Spanish colonial provinces. During the nineteenth century, negotiations aimed at determining the territorial boundary between Nicaragua and Honduras culminated in the conclusion of the Gámez-Bonilla Treaty of 7 October 1894, in which both States agreed in Article II, paragraph 3, that "each Republic [was] owner of the territory which at the date of independence constituted, respectively, the provinces of Honduras and Nicaragua". The terms of the Award of the King of Spain of 1906, based specifically on the principle of *uti possidetis juris* as established in Article II, paragraph 3, of the Gámez-Bonilla Treaty, defined the territorial boundary between the two countries with regard to the disputed portions of land, i.e. from Portillo de Teotecacinte to the Atlantic Coast. The validity and binding force of the 1906 Award have been confirmed by the International Court of Justice in its 1960 Judgment and both Parties to the dispute accept the Award as legally binding.

Turning to the question of sovereignty over the islands, the Court begins by observing that *uti possidetis juris* may, in principle, apply to offshore possessions and maritime spaces. It observes that the mere invocation of the principle does not of itself provide a clear answer as to sovereignty over the disputed islands. If the islands are not *terra nullius*, as both Parties acknowledge and as is generally recognized, it must be assumed that they had been under the rule of the Spanish Crown. However, it does not necessarily follow that the successor to the disputed islands could only be Honduras, being the only State formally to have claimed such status. The Court recalls that *uti possidetis juris* presupposes the existence of a delimitation of territory between the colonial provinces concerned having been effected by the central colonial authorities. Thus in order to apply the principle of *uti possidetis juris* to the islands in dispute it must be shown that the Spanish Crown had allocated them to one or the other of its colonial provinces.

The Court looks for convincing evidence which would allow it to determine whether and to which of the colonial provinces of the former Spanish America the islands had been attributed.

It states that the Parties have not produced documentary or other evidence from the pre-independence era which explicitly refers to the islands. The Court also observes that proximity as such is not necessarily determinative of legal title. The information provided by the Parties on the colonial administration of Central America by Spain does not allow for certainty as to whether one entity (the Captaincy-General of Guatemala), or two subordinate entities (the Government of Honduras and the General Command of Nicaragua), exercised administration over the insular territories of Honduras and Nicaragua at that time. Unlike the land territory where the administrative boundary between different provinces was more or less clearly demarcated, it is apparent that there was no clear-cut demarcation with regard to islands in general. This seems all the more so with regard to the islands in question, since they must have been scarcely inhabited, if at all, and possessed no natural resources to speak of for exploitation, except for fishing in the surrounding maritime area. The Court also observes that the Captaincy-General of Guatemala may well have had control over land and insular territories adjacent to coasts in order to provide security, prevent smuggling and undertake other measures to ensure the protection of the interests of the Spanish Crown. However there is no evidence to suggest that the islands in question played any role in the fulfillment of any of these strategic aims.

Notwithstanding the historical and continuing importance of the *uti possidetis juris* principle, so closely associated with Latin American decolonization, it cannot in this case be said that the application of this principle to these small islands, located considerably offshore and not obviously adjacent to the mainland coast of Nicaragua or Honduras, would settle the issue of sovereignty over them.

With regard to the adjacency argument put forward by Nicaragua, the Court notes that the independence treaties concluded by Nicaragua and Honduras with Spain in 1850 and 1866 respectively refer to adjacency with respect to mainland coasts rather than to offshore islands. Nicaragua's argument that the islands in dispute are closer to Edinburgh Cay, which belongs to Nicaragua, cannot therefore be accepted. While the Court does not rely on adjacency in reaching its findings, it observes that, in any event, the islands in dispute appear to be in fact closer to the coast of Honduras than to the coast of Nicaragua.

Having concluded that the question of sovereignty over the islands in dispute cannot be resolved on the above basis, the Court then ascertains whether there were relevant *effectivités* during the colonial period. This test of "colonial *effectivités*" has been defined as "the conduct of the administrative authorities as proof of the effective exercise of territorial jurisdiction in the region during the colonial period" (*Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986, p. 586, para. 63; Frontier Dispute (Benin/Niger), Judgment, I.C.J. Reports 2005*, p. 120, para. 47).

The Court notes that information about such conduct by the colonial administrative authorities is lacking in the case. It considers that, given the location of the disputed islands and the lack of any particular economic or strategic significance of these islands at the time, there were no colonial *effectivités* in relation to them. Thus the Court can neither found nor confirm on this basis a title to territory over the islands in question.

In light of the above considerations the Court concludes that the principle of *uti possidetis* affords inadequate assistance in determining sovereignty over the islands because nothing clearly indicates whether they were attributed to the colonial provinces of Nicaragua or of Honduras prior to or upon independence. Neither can such attribution be discerned in the King of Spain's Arbitral Award of 1906. Equally, the Court has been presented with no evidence as to colonial *effectivités* in respect of these islands. Thus it has not been established that either Honduras or Nicaragua had title to these islands by virtue of *uti possidetis*.

Post colonial effectivités *and sovereignty over the disputed islands*

The Court first notes that according to its jurisprudence (in particular the *Indonesia/Malaysia* case) and that of the Permanent Court of International Justice, sovereignty over minor maritime features, such as the islands in dispute between Honduras and Nicaragua, may be established on the basis of a relatively modest display of State powers in terms of quality and quantity.

It then examines the different categories of *effectivités* presented by the Parties.

Concerning the category of *legislative and administrative control*, the Court, noting that there is no reference to the four islands in dispute in the various Honduran Constitutions and in the Agrarian Law, further notes that there is no evidence that Honduras applied these legal instruments to the islands in any specific manner. The Court therefore finds that the Honduran claim that it had legislative and administrative control over the islands is not convincing.

Concerning the *application and enforcement of criminal and civil law*, the Court is of the opinion that the evidence provided by Honduras does have legal significance. The fact that a number of the acts mentioned (*inter alia* criminal complaints of theft and physical assault on Savanna and Bobel Cays, as well as a 1993 drug enforcement operation in the area by Honduras authorities and the United States Drug Enforcement Administration (DEA)) occurred in the 1990s is no obstacle to their relevance as the Court has found the critical date in relation to the islands to be 2001. The criminal complaints have relevance because the criminal acts occurred on the islands in dispute. The 1993 drug enforcement operation, while not necessarily an example of the application and enforcement of Honduran criminal law, can well be considered as an authorization by Honduras to the United States DEA granting it the right to fly over the islands mentioned in the document, which are within the disputed area. The permit extended by Honduras to the DEA to overfly the "national air space", together with the specific mention of the four islands and cays, may be understood as a sovereign act by a State, amounting to a relevant effectivité in the area.

Concerning the *regulation of immigration*, the Court notes that there appears to have been substantial activity with regard to immigration and work-permit related regulation by Honduras of persons on the islands in 1999 and 2000. In 1999 Honduran authorities visited the four islands and recorded the details of the foreigners living in South Cay, Port Royal Cay and Savanna Cay (Bobel Cay was uninhabited at the time, though it had previously been inhabited). Honduras provides a statement by a Honduran immigration officer who visited the islands three or four times from 1997 to 1999. The Court finds that legal significance is to be attached to the evidence provided by Honduras on the regulation of immigration as proof of *effectivités*, notwithstanding that it began only in the late 1990s. The issuance of work permits and visas to Jamaican and Nicaraguan nationals exhibit a regulatory power on the part of Honduras. The visits to the islands by a Honduran immigration officer entail the exercise of jurisdictional authority, even if its purpose was to monitor rather than to regulate immigration on the islands. The time span for these acts of sovereignty is rather short, but then it is only Honduras which has undertaken measures in the area that can be regarded as acts performed *à titre de souverain*. There is no contention by Nicaragua of regulation by itself of immigration on the islands either before or after the 1990s.

Concerning the *regulation of fisheries* activities, the Court is of the view that the Honduran authorities issued fishing permits with the belief that they had a legal entitlement to the maritime areas around the islands, derived from Honduran title over those islands. The evidence of Honduran-regulated fishing boats and construction on the islands is also legally relevant for the Court under the category of administrative and legislative control. The Court considers that the permits issued by the Honduran Government allowing the construction of houses in Savanna Cay and the permit for the storage of fishing equipment in the same cay provided by the municipality of Puerto Lempira may also be regarded as a display, albeit modest, of the exercise of authority, and as evidence of *effectivités* with respect to the disputed islands. The Court does not find persuasive Nicaragua's argument that the negotiations between Nicaragua and the United Kingdom in the 1950s over renewed turtle fishing rights off the Nicaraguan coast attests to Nicaraguan sovereignty over the islands in dispute.

Concerning *naval patrols*, the Court recalls that it has already indicated that the critical date for the purposes of the issue of title to the islands is not 1977 but 2001. The evidence put forward by both Parties on naval patrolling is sparse and does not clearly entail a direct relationship between either Nicaragua or Honduras and the islands in dispute. Thus the Court does not find the evidence provided by either Party on naval patrols persuasive as to the existence of *effectivités* with respect to the islands.

Concerning *oil concessions*, the Court finds that the evidence relating to the offshore oil exploration activities of the Parties has no bearing on the islands in dispute. It will therefore concentrate on the oil concession related acts on the islands under the category of public works.

Concerning *public works*, the Court observes that the placing on Bobel Cay in 1975 of a 10 m long antenna by Geophysical Services Inc. for the Union Oil Company was part of a local geodetic network to assist in drilling activities in the context of oil concessions granted. Honduras claims that the construction of the antenna was an integral part of the "oil exploration activity authorized by Honduras". Reports on these activities were periodically submitted by the oil company to the Honduran authorities, in which the amount of the corresponding taxes paid was also indicated. Nicaragua claims that the placement of the antenna on Bobel Cay was a private act for which no specific governmental authorization was granted. The Court is of the view that the antenna was erected in the context of authorized oil exploration activities. Furthermore the payment of taxes in respect of such activities in general can be considered additional evidence that the placement of the antenna was done with governmental authorization. The Court thus considers that the public works referred to by Honduras constitute *effectivités* which support Honduran sovereignty over the islands in dispute.

Having considered the arguments and evidence put forward by the Parties, the Court finds that the *effectivités* invoked by Honduras evidenced an "intention and will to act as sovereign" and constitute a modest but real display of authority over the four islands. Although it has not been established that the four islands are of economic or strategic importance and in spite of the scarcity of acts of State authority, Honduras has shown a sufficient overall pattern of conduct to demonstrate its intention to act as sovereign in respect of Bobel Cay, Savanna Cay, Port Royal Cay and South Cay. The Court further notes that those Honduran activities qualifying as *effectivités* which can be assumed to have come to the knowledge of Nicaragua did not elicit any protest on the part of the latter. With regard to Nicaragua, the Court has found no proof of intention or will to act as sovereign, and no proof of any actual exercise or display of authority over the islands.

Evidentiary value of maps in confirming sovereignty over the disputed islands

The Court notes that a large number of maps was presented by the Parties to illustrate their respective arguments, but that none of the maps which include some of the islands in dispute clearly specify which State is the one exercising sovereignty over those islands. Furthermore none of the maps being part of a legal instrument in force nor more specifically part of a boundary treaty concluded between Nicaragua and Honduras, the Court concludes that the cartographic material presented by the Parties cannot of itself support their respective claims to sovereignty over islands to the north of the 15th parallel.

Recognition by third States and bilateral treaties; the 1998 Free Trade Agreement

In the Court's view there is no evidence to support any of the contentions made by the Parties with respect to recognition by third States that sovereignty over the disputed islands is vested in Honduras or in Nicaragua. Some of the evidence offered by the Parties shows episodic incidents that are neither consistent nor consecutive. It is obvious that they do not signify an explicit acknowledgment of sovereignty, nor were they meant to imply any such acknowledgment.

The Court observes that bilateral treaties of Colombia, one with Honduras and one with Jamaica, have been invoked by Honduras as proof of recognition of sovereignty over the disputed islands. The Court notes that in relation to these treaties Nicaragua never acquiesced in any understanding that Honduras had sovereignty over the disputed islands. The Court does not find these bilateral treaties relevant as regards recognition by a third party of title over the disputed islands.

The Court recalls that during the oral proceedings it was apprised of the negotiating history of a Free Trade Agreement Central America-Dominican Republic which was signed on 16 April 1998 in Santo Domingo by Nicaragua, Honduras, Costa Rica, Guatemala, El Salvador and the Dominican Republic. According to Honduras the original text of the Agreement included an Annex to Article 2.01 giving a definition of the territory of Honduras, which referred *inter alia* to Palo de Campeche and Media Luna cays. Honduras claims that the term "Media Luna" was "frequently used to refer to the entire group of islands and cays" in the area in dispute. Nicaragua points out that during the ratification process, its National Assembly approved a revised text of the Free Trade Agreement which did not contain the Annex to Article 2.01. Having examined said Annex, the Court observes that the four islands in dispute are not mentioned by name in it. Moreover, the Court notes that it has not been presented with any convincing evidence that the term "Media Luna" has the meaning advanced by Honduras. In these circumstances the Court finds that it need not further examine arguments relating to this Treaty nor its status for the purposes of these proceedings.

Decision as to sovereignty over the islands

The Court, having examined all of the evidence related to the claims of the Parties as to sovereignty over the islands of Bobel Cay, Savanna Cay, Port Royal Cay and South Cay, including the issue of the evidentiary value of maps and the question of recognition by third States, concludes that Honduras has sovereignty over these islands on the basis of post-colonial *effectivités*.

Delimitation of maritime areas
(paras. 228–320)

Traditional maritime boundary line claimed by Honduras

The principle of uti possidetis juris

The Court observes that the *uti possidetis juris* principle might in certain circumstances, such as in connection with historic bays and territorial seas, play a role in a maritime delimitation. However, in the present case, were the Court to accept Honduras's claim that Cape Gracias a Dios marked the separation of the respective maritime jurisdiction of the colonial provinces of Honduras and Nicaragua, no persuasive case has been made by Honduras as to why the maritime boundary should then extend from the Cape along the 15th parallel. It merely asserts that the Spanish Crown tended to use parallels and meridians to draw jurisdictional divisions, without presenting any evidence that the colonial Power did so in this particular case.

The Court thus cannot uphold Honduras's assertion that the *uti possidetis juris* principle provided for a maritime division along the 15th parallel "to at least 6 nautical miles from Cape Gracias a Dios" nor that the territorial sovereignty over the islands to the north of the 15th parallel on the basis of the *uti possidetis juris* principle "provides the traditional line which separates these Honduran islands from the Nicaraguan islands to the south" with "a rich historical basis that contributes to its legal foundation".

The Court further observes that Nicaragua and Honduras as new independent States were entitled by virtue of the *uti possidetis juris* principle to such mainland and insular territories and territorial seas which constituted their provinces at independence. The Court, however, has already found that it is not possible to determine sovereignty over the islands in question on the basis of the *uti possidetis juris* principle. Nor has it been shown that the Spanish Crown divided its maritime jurisdiction between the colonial provinces of Nicaragua and Honduras even within the limits of the territorial

sea. Although it may be accepted that all States gained their independence with an entitlement to a territorial sea, that legal fact does not determine where the maritime boundary between adjacent seas of neighbouring States will run. In the circumstances of the present case, the *uti possidetis juris* principle cannot be said to have provided a basis for a maritime division along the 15th parallel.

The Court also notes that the 1906 Arbitral Award, which indeed was based on the *uti possidetis juris* principle, did not deal with the maritime delimitation between Nicaragua and Honduras and that it does not confirm a maritime boundary between them along the 15th parallel.

The Court thus finds that the contention of Honduras that the *uti possidetis juris* principle provides a basis for an alleged "traditional" maritime boundary along the 15th parallel cannot be sustained.

Tacit agreement

Having already indicated that there was no boundary established by reference to *uti possidetis juris*, the Court must determine whether, as claimed by Honduras, there was a tacit agreement sufficient to establish a boundary. Evidence of a tacit legal agreement must be compelling. The establishment of a permanent maritime boundary is a matter of grave importance and agreement is not easily to be presumed. A *de facto* line might in certain circumstances correspond to the existence of an agreed legal boundary or might be more in the nature of a provisional line or of a line for a specific, limited purpose, such as sharing a scarce resource. Even if there had been a provisional line found convenient for a period of time, this is to be distinguished from an international boundary.

As regards the evidence of oil concessions proffered by Honduras in support of its contention, the Court considers that Nicaragua, by leaving open the northern limit to its concessions or by abstaining from mentioning the boundary with Honduras in that connection, reserved its position concerning its maritime boundary with Honduras. Moreover, the Court observes that the Nicaraguan concessions provisionally extending up to the 15th parallel were all given after Honduras had granted its concessions extending southwards to the 15th parallel.

With regard to the 1986 Treaty between Colombia and Honduras and the 1993 Treaty between Colombia and Jamaica invoked by Honduras, the Court recalls that Nicaragua has maintained its persistent objections to these treaties. In the 1986 Treaty the parallel 14° 59' 08" to the east of the 82nd meridian serves as the boundary line between Honduras and Colombia. As already mentioned, according to Honduras the 1993 Treaty proceeds from a recognition of the validity of the 1986 Treaty between Colombia and Honduras, thereby recognizing Honduran jurisdiction over the waters and islands to the north of the 15th parallel.

The Court has noted that at periods in time, as the evidence shows, the 15th parallel appears to have had some relevance in the conduct of the Parties. This evidence relates to the period after 1961 when Nicaragua left areas to the north of Cape Gracias a Dios following the rendering of the Court's Judgment on the validity of the 1906 Arbitral Award and until 1977 when Nicaragua proposed negotiations with Honduras with the purpose of delimiting maritime areas in the Caribbean Sea. The Court observes that during this period several oil concessions were granted by the Parties which indicated that their northern and southern limits lay respectively at 14° 59.8'. Furthermore, regulation of fishing in the area at times seemed to suggest an understanding that the 15th parallel divided the respective fishing areas of the two States; and in addition the 15th parallel was also perceived by some fishermen as a line dividing maritime areas under the jurisdiction of Nicaragua and Honduras. However, these events, spanning a short period of time, are not sufficient for the Court to conclude that there was a legally established international maritime boundary between the two States.

The Court observes that the Note of the Honduran Minister for Foreign Affairs dated 3 May 1982 cited by the Parties (in which he concurred with the Nicaraguan Foreign Ministry that "the maritime border between Honduras and Nicaragua has not been legally delimited" and proposed that the Parties at least come to a "temporary" arrangement about the boundary so as to avoid further boundary incidents) is somewhat uncertain regarding the existence of an acknowledged boundary along the 15th parallel. The acknowledgment that there was then no legal delimitation "was not a proposal or a concession made during negotiations, but a statement of facts transmitted to the Foreign [Ministry, which] did not express any reservation in respect thereof" and should thus be taken "as evidence of the [Honduran] official view at that time".

Having reviewed all of this practice including diplomatic exchanges, the Court concludes that there was no tacit agreement in effect between the Parties in 1982—nor *a fortiori* at any subsequent date—of a nature to establish a legally binding maritime boundary.

Determination of the maritime boundary

The Court, having found that there is no traditional boundary line along the 15th parallel, proceeds to the maritime delimitation between Nicaragua and Honduras.

Applicable law

Both Parties in their final submissions asked the Court to draw a "single maritime boundary" delimiting their respective territorial seas, exclusive economic zones, and continental shelves in the disputed area. Although Nicaragua was not party to UNCLOS at the time it filed the Application in this case, the Parties are in agreement that UNCLOS is now in force between them and that its relevant articles are applicable between them in this dispute.

Areas to be delimited and methodology

The "single maritime boundary" in the present case will be the result of the delimitation of the various areas of jurisdiction spanning the maritime zone from the Nicaragua-Honduras mainland out to at least the 82nd meridian, where third-State interests may become relevant. In the western reaches of the area to be delimited the Parties' mainland coasts are adjacent; thus, for some distance the boundary will delimit exclusively their territorial seas (UNCLOS, Art. 2, para. 1).

Both Parties also accept that the four islands in dispute north of the 15th parallel (Bobel Cay, Savanna Cay, Port Royal Cay and South Cay), which have been attributed to Honduras, as well as Nicaragua's Edinburgh Cay south of the 15th parallel, are entitled to generate their own territorial seas for the coastal State. The Court recalls that as regards the islands in dispute no claim has been made by either Party for maritime areas other than the territorial sea.

The Court notes that, while the Parties disagree as to the appropriate breadth of these islands' territorial seas, according to Article 3 of UNCLOS, a State's territorial sea cannot extend beyond 12 nautical miles. These islands are all indisputably located within 24 miles of each other but more than 24 miles from the mainland that lies to the west. Thus the single maritime boundary might also include segments delimiting overlapping areas of the islands' opposite-facing territorial seas as well as segments delimiting the continental shelf and exclusive economic zones around them.

For the delimitation of the territorial seas, Article 15 of UNCLOS, which is binding as a treaty between the Parties, provides:

> "Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest point on the baselines from which the breadth of the territorial seas of each of the two States is measured. The above provision does not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance therewith."

As already indicated, the Court has determined that there is no existing "historic" or traditional line along the 15th parallel.

As the Court has observed with respect to implementing the provisions of Article 15 of UNCLOS: "The most logical and widely practised approach is first to draw provisionally an equidistance line and then to consider whether that line must be adjusted in the light of the existence of special circumstances." (*Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain), Merits, Judgment, I.C.J. Reports 2001*, p. 94, para. 176.)

The jurisprudence of the Court sets out the reasons why the equidistance method is widely used in the practice of maritime delimitation: it has a certain intrinsic value because of its scientific character and the relative ease with which it can be applied. However, the equidistance method does not automatically have priority over other methods of delimitation and, in particular circumstances, there may be factors which make the application of the equidistance method inappropriate.

The Court notes that neither Party has as its main argument a call for a provisional equidistance line as the most suitable method of delimitation.

It observes at the outset that both Parties have raised a number of geographical and legal considerations with regard to the method to be followed by the Court for the maritime delimitation. Cape Gracias a Dios, where the Nicaragua-Honduras land boundary ends, is a sharply convex territorial projection abutting a concave coastline on either side to the north and south-west. Taking into account Article 15 of UNCLOS and given the geographical configuration described above, the pair of base points to be identified on either bank of the River Coco at the tip of the Cape would assume a considerable dominance in constructing an equidistance line, especially as it travels out from the coast. Given the close proximity of these base points to each other, any variation or error in situating them would become disproportionately magnified in the resulting equidistance line. The Parties agree, moreover, that the sediment carried to and deposited at sea by the River Coco have caused its delta, as well as the coastline to the north and south of the Cape, to exhibit a very active morpho-dynamism. Thus continued accretion at the Cape might render any equidistance line so constructed today arbitrary and unreasonable in the near future. These geographical and geological difficulties are further exacerbated by the absence of viable base points claimed or accepted by the Parties themselves at Cape Gracias a Dios.

This difficulty in identifying reliable base points is compounded by the differences, addressed more fully, *infra*, that apparently still remain between the Parties as to the interpretation and application of the King of Spain's 1906 Arbitral Award in respect of sovereignty over the islets formed near the mouth of the River Coco and the establishment of "[t]he extreme common boundary point on the coast of the Atlantic" (*Arbitral Award Made by the King of Spain on 23 December 1906, Judgment, I.C.J. Reports 1960*, p. 202).

Given the set of circumstances in the case it is impossible for the Court to identify base points and construct a provisional equidistance line for the single maritime boundary delimiting maritime areas off the Parties' mainland coasts. Even if the particular features already indicated make it impossible to draw an equidistance line as the single maritime frontier, the Court must nonetheless see if it would be possible to start the frontier line across the territorial seas as an equidistance line, as envisaged in Article 15 of UNCLOS. It may be argued that the problems associated with distortion, if the protrusions either side of Cape Gracias a Dios were used as base points, are less severe close to the coast. However, the Court notes first that the Parties are in disagreement as to title over the unstable islands having formed in the mouth of the River Coco, islands which the Parties suggested during the oral proceedings could be used as base points. It is recalled that because of the changing conditions of the area the Court has made no finding as to sovereignty over these islands. Moreover, whatever base points would be used for the drawing of an equidistance line, the configuration and unstable nature of the relevant coasts, including the disputed islands formed in the mouth of the River Coco, would make these base points (whether at Cape Gracias a Dios or elsewhere) uncertain within a short period of time.

Article 15 of UNCLOS itself envisages an exception to the drawing of a median line, namely "where it is necessary by reason of historic title or special circumstances . . .". Nothing in the wording of Article 15 suggests that geomorphological problems are per se precluded from being "special circumstances" within the meaning of the exception, nor that such

"special circumstances" may only be used as a corrective element to a line already drawn. Indeed, the latter suggestion is plainly inconsistent with the wording of the exception described in Article 15. It is recalled that Article 15 of UNCLOS, which was adopted without any discussion as to the method of delimitation of the territorial sea, is virtually identical (save for minor editorial changes) to the text of Article 12, paragraph 1, of the 1958 Convention on the Territorial Sea and the Contiguous Zone.

The genesis of the text of Article 12 of the 1958 Convention on the Territorial Sea and the Contiguous Zone shows that it was indeed envisaged that a special configuration of the coast might require a different method of delimitation (see Yearbook of the International Law Commission (YILC), 1952, Vol. II, p. 38, commentary, para. 4). Furthermore, the consideration of this matter in 1956 does not indicate otherwise. The terms of the exception to the general rule remained the same (YILC, 1956, Vol. I, p. 284; Vol. II, pp. 271, 272, and p. 300 where the Commentary to the Draft Convention on the Continental Shelf noted that "as in the case of the boundaries of the territorial sea, provision must be made for departures necessitated by any exceptional configuration of the coast . . ."). Additionally, the jurisprudence of the Court does not reveal an interpretation that is at variance with the ordinary meaning of the terms of Article 15 of UNCLOS.

For all of the above reasons, the Court finds itself within the exception provided for in Article 15 of UNCLOS, namely facing special circumstances in which it cannot apply the equidistance principle. At the same time equidistance remains the general rule.

Construction of a bisector line

Having reached the conclusion that the construction of an equidistance line from the mainland is not feasible, the Court must consider the applicability of the alternative methods put forward by the Parties.

Nicaragua's primary argument is that a "bisector of two lines representing the entire coastal front of both States" should be used to effect the delimitation from the mainland, while sovereignty over the maritime features in the area in dispute "could be attributed to either Party depending on the position of the feature involved with respect to the bisector line".

Honduras "does not deny that geometrical methods of delimitation, such as perpendiculars and bisectors, are methods that may produce equitable delimitations in some circumstances", but it disagrees with Nicaragua's construction of the angle to be bisected. Honduras, as already explained, advocates a line along the 15th parallel, no adjustment of which would be necessary in relation to the islands. The Court notes that in Honduras's final submissions it requested the Court to declare that the single maritime boundary between Honduras and Nicaragua "follows 14° 59.8' N latitude, as the existing maritime boundary, or an adjusted equidistance line, until the jurisdiction of a third State is reached".

The Court recalls that both of Honduras's proposals (the main one based on tacit agreement as to the 15th parallel representing the maritime frontier and the other on the use of an adjusted equidistance line) have not been accepted by the Court.

It states that the use of a bisector—the line formed by bisecting the angle created by the linear approximations of coastlines—has proved to be a viable substitute method in certain circumstances where equidistance is not possible or appropriate. The justification for the application of the bisector method in maritime delimitation lies in the configuration of and relationship between the relevant coastal fronts and the maritime areas to be delimited. In instances where, as in the present case, any base points that could be determined by the Court are inherently unstable, the bisector method may be seen as an approximation of the equidistance method. Like equidistance, the bisector method is a geometrical approach that can be used to give legal effect to the

> "criterion long held to be as equitable as it is simple, namely that in principle, while having regard to the special circumstances of the case, one should aim at an equal division of areas where the maritime projections of the coasts of the States . . . converge and overlap" (*Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984*, p. 327, para. 195).

If it is to "be faithful to the actual geographical situation" (*Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 45, para. 57), the method of delimitation should seek a solution by reference first to the States' "relevant coasts" (*see Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain), Judgment, I.C.J. Reports 2001*, p. 94 para. 178; see also the *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), I.C.J. Reports 2002*, p. 442, para. 90)). Identifying the relevant coastal geography calls for the exercise of judgment in assessing the actual coastal geography. The equidistance method approximates the relationship between two parties' relevant coasts by taking account of the relationships between designated pairs of base points. The bisector method comparably seeks to approximate the relevant coastal relationships, but does so on the basis of the macro-geography of a coastline as represented by a line drawn between two points on the coast. Thus, where the bisector method is to be applied, care must be taken to avoid "completely refashioning nature" (*North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, P. 49, para. 91).

The Court notes that, in the present case, the application of the bisector method is justified by the geographical configuration of the coast, and the geomorphological features of the area where the endpoint of the land boundary is located.

The Court considers for present purposes that it will be most convenient to use the point fixed in 1962 by the Mixed Commission at Cape Gracias a Dios as the point where the Parties' coastal fronts meet. The Court adds that the co-ordinates of the endpoints of the chosen coastal fronts need not at this juncture be specified with exactitude for present purposes; one of the practical advantages of the bisector method is that a minor deviation in the exact position of endpoints, which are at a reasonable distance from the shared point, will have only a relatively minor influence on the course of the entire coastal front line. If necessary in the circumstances, the Court

could adjust the line so as to achieve an equitable result (see UNCLOS, Arts. 74, para. 1, and 83, para. 1).

The Court then considers the various possibilities for the coastal fronts that could be used to define these linear approximations of the relevant geography. Nicaragua's primary proposal for the coastal fronts, as running from Cape Gracias a Dios to the Guatemalan border for Honduras and to the Costa Rican border for Nicaragua, would cut off a significant portion of Honduran territory falling north of this line and thus would give significant weight to Honduran territory that is far removed from the area to be delimited. This would seem to present an exaggeratedly acute angle to bisect.

In selecting the relevant coastal fronts, the Court has considered the Cape Falso-Punta Gorda coast (generating a bisector with an azimuth of 70° 54'), which certainly faces the disputed area, but it is quite a short façade (some 100 km) from which to reflect a coastal front more than 100 nautical miles out to sea, especially taking into account how quickly to the north-west the Honduran coast turns away from the area to be delimited after Cape Falso, as it continues past Punta Patuca and up to Cape Camerón. Indeed, Cape Falso is identified by Honduras as the most relevant "turn" in the mainland coastline.

A coastal front extending from Cape Camerón to Rio Grande (generating a bisector with an azimuth of 64° 02') would, like the original Nicaraguan proposal, also overcompensate in this regard since the line would run entirely over the Honduran mainland and thus would deprive the significant Honduran land mass lying between the sea and the line of any effect on the delimitation.

The front that extends from Punta Patuca to Wouhnta, would avoid the problem of cutting off Honduran territory and at the same time provides a coastal façade of sufficient length to account properly for the coastal configuration in the disputed area. Thus, a Honduran coastal front running to Punta Patuca and a Nicaraguan coastal front running to Wouhnta are in the Court's view the relevant coasts for purposes of drawing the bisector. This resulting bisector line has an azimuth of 70° 14' 41.25".

Delimitation around the islands

The Court notes that, by virtue of Article 3 of UNCLOS Honduras has the right to establish the breadth of its territorial sea up to a limit of 12 nautical miles be that for its mainland or for islands under its sovereignty. In the current proceedings Honduras claims for the four islands in question a territorial sea of 12 nautical miles. The Court thus finds that, subject to any overlap between the territorial sea around Honduran islands and the territorial sea around Nicaraguan islands in the vicinity, Bobel Cay, Savanna Cay, Port Royal Cay and South Cay shall be accorded a territorial sea of 12 nautical miles.

As a 12-mile breadth of territorial sea has been accorded to these islands, it becomes apparent that the territorial seas attributed to the islands of Bobel Cay, Savanna Cay, Port Royal Cay and South Cay (Honduras) and Edinburgh Cay (Nicaragua) would lead to an overlap in the territorial sea of Nicaragua and Honduras in this area, both to the south and to the north of the 15th parallel.

Drawing a provisional equidistance line for this territorial sea delimitation between the opposite-facing islands does not present the problems that would an equidistance line from the mainland. The Parties have provided the Court with co-ordinates for the four islands in dispute north of the 15th parallel and for Edinburgh Cay to the south. Delimitation of this relatively small area can be satisfactorily accomplished by drawing a provisional equidistance line, using co-ordinates for the above islands as the base points for their territorial seas, in the overlapping areas between the territorial seas of Bobel Cay, Port Royal Cay and South Cay (Honduras), and the territorial sea of Edinburgh Cay (Nicaragua), respectively. The territorial sea of Savanna Cay (Honduras) does not overlap with the territorial sea of Edinburgh Cay. The Court does not consider there to be any legally relevant "special circumstances" in this area that would warrant adjusting this provisional line.

The maritime boundary between Nicaragua and Honduras in the vicinity of Bobel Cay, Savanna Cay, Port Royal Cay and South Cay (Honduras) and Edinburgh Cay (Nicaragua) will thus follow the line as described below.

From the intersection of the bisector line with the 12-mile arc of the territorial sea of Bobel Cay at point A (with co-ordinates 15° 05' 25" N and 82° 52' 54" W) the boundary line follows the 12-mile arc of the territorial sea of Bobel Cay in a southerly direction until its intersection with the 12-mile arc of the territorial sea of Edinburgh Cay at point B (with co-ordinates 14° 57' 13" N and 82° 50' 03" W). From point B the boundary line continues along the median line, which is formed by the points of equidistance between Bobel Cay, Port Royal Cay and South Cay (Honduras) and Edinburgh Cay (Nicaragua), through points C (with co-ordinates 14° 56' 45" N and 82° 33' 56" W) and D (with co-ordinates 14° 56' 35" N and 82° 33' 20" W), until it meets the point of intersection of the 12-mile arcs of the territorial seas of South Cay (Honduras) and Edinburgh Cay (Nicaragua) at point E (with co-ordinates 14° 53' 15" N and 82° 29' 24" W). From point E the boundary line follows the 12-mile arc of the territorial sea of South Cay in a northerly direction until it intersects the bisector line at point F (with co-ordinates 15° 16' 08" N and 82° 21' 56" W).

Starting-point and endpoint of the maritime boundary

Having reviewed the proposals of the Parties, the Court considers it appropriate to set the starting-point 3 miles out to sea (15° 00' 52" N and 83° 05' 58" W) from the point already identified by the Mixed Commission in 1962 along the azimuth of the bisector as described above. The Parties are to agree on a line which links the end of the land boundary as fixed by the 1906 Award and the point of departure of the maritime delimitation in accordance with the present Judgment.

As for the endpoint, neither Nicaragua nor Honduras in each of their submissions specifies a precise seaward end to the boundary between them.

The Court observes that there are three possibilities open to it: it could say nothing about the endpoint of the line, stating only that the line continues until the jurisdiction of a third State is reached; it could decide that the line does not extend

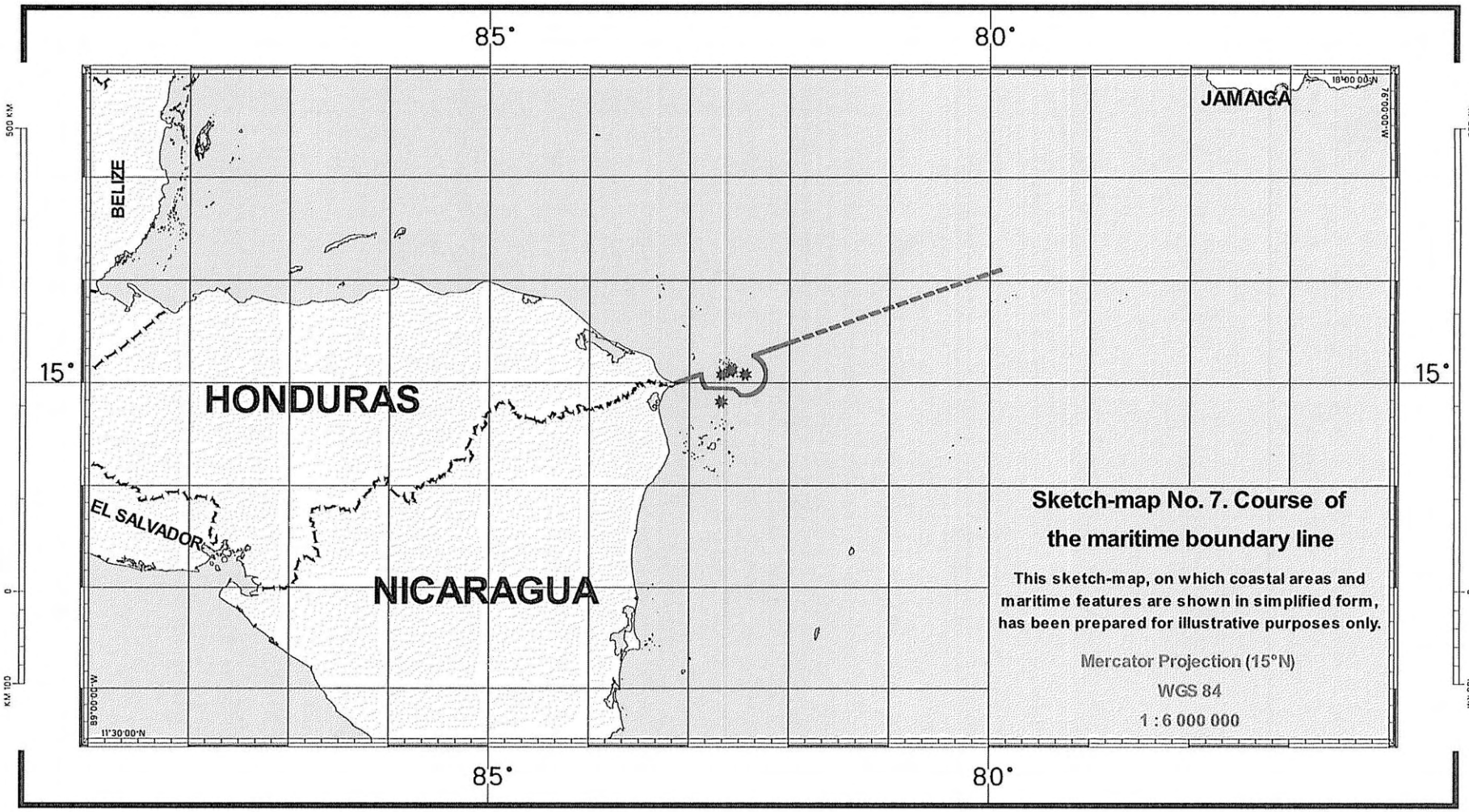
beyond the 82nd meridian; or it could indicate that the alleged third-State rights said to exist east of the 82nd meridian do not lie in the area being delimited and thus present no obstacle to deciding that the line continues beyond that meridian.

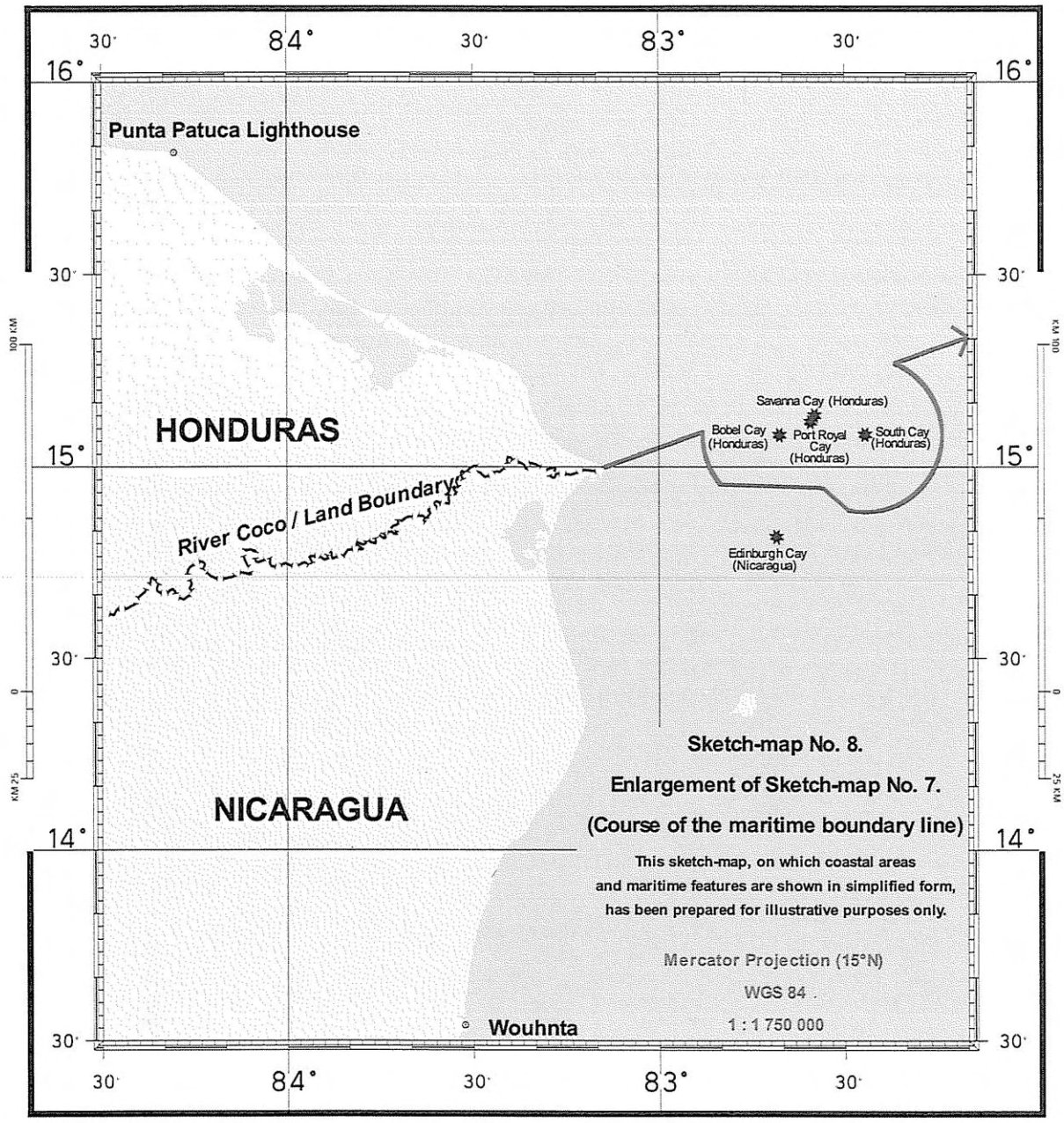
The Court considers certain interests of third States which result from some bilateral treaties between countries in the region and which may be of possible relevance to the limits to the maritime boundary drawn between Nicaragua and Honduras. The Court adds that its consideration of these interests is without prejudice to any other legitimate third party interests which may also exist in the area.

The Court may accordingly, without specifying a precise endpoint, delimit the maritime boundary and state that it extends beyond the 82nd meridian without affecting third-State rights. It should also be noted in this regard that in no case may the line be interpreted as extending more than 200 nautical miles from the baselines from which the breadth of the territorial sea is measured; any claim of 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.

Course of the maritime boundary (sketch-maps Nos. 7 and 8 in the Judgment)

The line of delimitation is to begin at the starting-point 3 nautical miles offshore on the bisector. From there it continues along the bisector until it reaches the outer limit of the 12-nautical-mile territorial sea of Bobel Cay. It then traces this territorial sea round to the south until it reaches the median line in the overlapping territorial seas of Bobel Cay, Port Royal Cay and South Cay (Honduras) and Edinburgh Cay (Nicaragua). The delimitation line continues along this median line until it reaches the territorial sea of South Cay, which for the most part does not overlap with the territorial sea of Edinburgh Cay. The line then traces the arc of the outer limit of the 12-nautical-mile territorial sea of South Cay round to the north until it again connects with the bisector, whereafter the line continues along that azimuth until it reaches the area where the rights of certain third States may be affected.


85°
80°
15°
JAMAICA
BELIZE
HONDURAS
EL SALVADOR
NICARAGUA
Sketch-map No. 7. Course of the maritime boundary line
This sketch-map, on which coastal areas and maritime features are shown in simplified form, has been prepared for illustrative purposes only.
Mercator Projection (15°N)
WGS 84
1 : 6 000 000



Sketch-map No. 8.

Enlargement of Sketch-map No. 7.

(Course of the maritime boundary line)

This sketch-map, on which coastal areas and maritime features are shown in simplified form, has been prepared for illustrative purposes only.

Mercator Projection (15°N)

WGS 84 .

1 : 1 750 000

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Separate opinion of Judge Ranjeva

Judge Ranjeva explains his vote against the third operative paragraph in a separate opinion appended to the Judgment. With respect to the line of the boundary segment beginning at the point with the co-ordinates 15° 00' 52" N and 83° 05' 58" W, which follows the azimuth 70° 14' 25" until its intersection at point A (co-ordinates 15° 05' 25" N and 82° 52' 54" W) with the 12-nautical-mile arc of the territorial sea of Bobel Cay, the Judgment challenges the law and the consistent jurisprudence on the method of delimiting territorial seas. In view of the instability of the coastlines, the Judgment abandons the method of delimitation by stages in order to attribute a directly normative function to the geomorphological circumstances of the coast. Judge Ranjeva cannot accept the approach adopted in the Judgment, in the sense that such circumstances are seen by the law of maritime delimitation as having a corrective function on the rigid effects of applying a provisional equidistance line. In attributing a normative function to these circumstances, the Judgment first creates a new category of circumstances alongside the conventional ones of special and relevant circumstances; it also reopens the now settled debate between the advocates of equidistance and those of equity. Finally, the bisector method makes the object of the judicial decision an exercise in dividing a sector, rather than one of delimitation. As for the question of the impossibility of drawing a provisional equidistance line, the arguments presented appear too subjective, inasmuch as the notion of unstable coastlines was not unknown to the Montego Bay Convention of 1982.

Separate opinion of Judge Koroma

In a separate opinion, Judge Koroma concurred with the Court's conclusion regarding the method of delimitation applied in this case, but considered that certain significant aspects of the Judgment called for emphasis and clarification. He viewed the use of the bisector to effect the delimitation as consistent with and reflective of the jurisprudence on maritime delimitation, rather than as being a departure therefrom. Under this jurisprudence, the delimitation process begins with defining the geographical context of the dispute and then applies the pertinent rules of international law and equitable principles to determine the relevance and weight of the geographical features. The choice of method thus very much depends upon the pertinent circumstances of the area.

It was in the light of the foregoing that the Court considered the bisector as the most appropriate method for the delimitation process in this case. He pointed out that equidistance cannot be applied universally and automatically as a method of delimitation irrespective of the area to be delimited and, in this case, neither Party argued, in the main, that this method should be used for delimiting their respective territorial seas given the unstable coastal geography. Thus, the Court, having carefully examined the Parties' arguments and their well-founded reluctance to embrace equidistance, decided to adopt the bisector method as a suitable delimitation method in this case.

He recalled that the use of a bisector—the line formed by bisecting the angle formed by the two lines approximating the States' coastal fronts—is a geometric method that can be used to give legal effect to the criterion long held to be as equitable as it is simple, namely that, in principle, while having regard to the special circumstances of the case, a delimitation should aim at an equal division of areas where the maritime projections of the coasts of the States converge and overlap; that while the equidistance method approximates the relationship between two parties' relevant coasts by comparing the fine relationships between acceptable pairs of base points, the bisector method likewise seeks to approximate the relevant coastal relationships on the basis of the macro-geography of a coastline. He acknowledged that care must always be taken to avoid completely refashioning nature. He pointed out that the use of the bisector method has several precedents and, in applying this approach here, the Court, rather than departing from its settled jurisprudence, has reaffirmed, applied and given effect to that jurisprudence.

On the other hand, Judge Koroma had reservations regarding the decision to attribute to Honduras areas of territorial sea lying south of the 14° 59.8' N parallel. Honduras in its submissions stated that its territorial sea would not extend south of the 14° 59.8' N parallel and there was no compelling reason not to uphold this submission when this would have prevented a potential source of future conflict and avoided giving disproportionate effect to the small islands the title to which was in dispute in this case.

Declaration of Judge Parra-Aranguren

Judge Parra-Aranguren recalls the Note of 19 March 1912 sent by the Minister for Foreign Affairs of Nicaragua to the Foreign Minister of Honduras, specifying the disagreement to be decided by the Arbitrator in application of Article III of the 1894 Treaty concluded between their countries, i.e., "from the point on the Cordillera called Teotecacinte *to its endpoint on the Atlantic coast and to the boundary in the sea marking the end of the jurisdiction of the two States*" (emphasis added), and challenging for the first time the validity and binding nature of the 1906 Arbitral Award. Nicaragua indicated several grounds for the nullity of the decision of the King of Spain, one of them being that "there is an evident inconsistency in this Award when it deals with that section of the frontier line which should separate the jurisdiction of the two countries in the territorial sea" (*I.C.J. Pleadings, Arbitral Award Made by the King of Spain on 23 December 1906* (*Honduras* v. *Nicaragua*), Vol. I, p. 294; emphasis added). [Translation by the Registry.]

Paragraph 39 of the Judgment refers to Nicaragua's Note of 19 March 1912. However, the Court only indicates that it "challenged the validity and binding character of the Arbitral Award", not mentioning the statements quoted above, even though they demonstrate Nicaragua's opinion that the 1906 Arbitral Award had established "the frontier line which should separate the jurisdiction of the two countries in the territorial sea".

Judge Parra-Aranguren agrees with Nicaragua's Note of 1912 acknowledging that the 1906 Arbitral Award determined the sovereignty of the disputed mainland and insular territories, as well as the continental and insular territorial waters appertaining to Honduras and Nicaragua. However, he cannot share Nicaragua's allegation that the decision of the King of Spain was null and void because of its "omissions, contradictions and obscurities". Nicaragua presented this contention to the Court, but it was not upheld in its Judgment of 18 November 1960, which is *res judicata* (*Arbitral Award Made by the King of Spain on 23 December 1906* (*Honduras* v. *Nicaragua*), *Judgment, I.C.J. Reports 1960*, pp. 205–217).

For these reasons, Judge Parra-Aranguren voted in favour of paragraph 321 (1) and against paragraph 321 (2), paragraph 321 (3) and paragraph 321 (4) of the Judgment.

Dissenting opinion of Judge Torres Bernárdez

1. As explained in the introduction to the opinion, Judge *ad hoc* Torres Bernárdez has voted in favour of the decision in the Judgment to the effect that sovereignty over Bobel Cay, Savanna Cay and Port Royal Cay lies with the Republic of Honduras (subparagraph (1) of the operative clause), as it is his view that these islands, all lying north of the 15th parallel, belong to Honduras for three reasons: (a) Honduras possesses a legal title to the islands pursuant to the *uti possidetis juris* position in 1821, which applies as between the Parties; (b) the post-colonial *effectivités* exercised by Honduras *à titre de souverain* over the islands and in the territorial sea around them and the absence of *effectivités* of Nicaragua; and (c) Nicaragua's acquiescence in Honduras's sovereignty over the islands until the belated assertion of a claim in the Memorial filed by the Applicant in the present proceedings on 21 March 2001.

2. Thus, in Judge Torres Bernárdez's view, the legal basis for Honduras's sovereignty over the islands is threefold, including the post-colonial *effectivités*. In the reasoning set out in the Judgment, however, Honduran sovereignty over the islands is based solely on the post-colonial *effectivités*, the evidence being deemed insufficient to allow for ascertaining which of the two Parties inherited the Spanish title to the islands by operation of the principle of *uti possidetis juris* and there being no proof of any acquiescence by Nicaragua in Honduras's sovereignty over the islands.

3. It follows that the discussion in the opinion concerning the "territorial dispute" is the statement of a separate, rather than dissenting, opinion. The reason why the present opinion is a "dissenting opinion" is to be found in the "maritime delimitation" effected in the Judgment, because on this subject Judge Torres Bernárdez is in utter disagreement, save on one point, with the majority's decisions and supporting reasoning, and this explains his vote against subparagraphs (2) and (3) of the operative clause.

4. The point in question, and Judge Torres Bernárdez acknowledges its importance, concerns the delimitation of the territorial sea surrounding the islands; he believes that this delimitation is in full accord with the 1982 United Nations Convention on the Law of the Sea, in force between the Parties. His vote against subparagraph (3) of the operative clause must be understood as thus qualified, since, had there been a separate vote on the section of the single maritime boundary around the islands, Judge Torres Bernárdez would have voted in favour of it.

I. The Territorial Dispute

A. The applicable law for determining sovereignty over the disputed islands

5. The section of the opinion concerning the "territorial dispute" begins with a reaffirmation that the applicable law for determining sovereignty over the contested islands is the law governing acquisition of land territory: in the circumstances of the case, specifically the *uti possidetis juris* position in 1821, the post-colonial *effectivités* and acquiescence. In oral argument Nicaragua invoked "adjacency" without further qualification, that is to say adjacency standing alone, but, as stated in the opinion, mere geographical adjacency by itself, without operation of the *uti possidetis juris* principle or another rule of international law incorporating the criterion, does not constitute territorial title under international law (*Island of Palmas* case).

B. The decision in the Judgment and post-colonial effectivités

6. The decision in the Judgment concerning the Republic of Honduras's sovereignty over the disputed islands based on the post-colonial *effectivités* relies on generally accepted principles articulated in the Permanent Court's decision in the case concerning *Legal Status of Eastern Greenland*, and on the present Court's recent jurisprudence on the subject of small islands that are intermittently inhabited, uninhabited or of slight economic importance (Qit'at Jaradah; Pulau Ligitan and Pulau Sipadan).

7. Judge Torres Bernárdez subscribes wholeheartedly to these findings in the Judgment, for the evidence before the Court weighs heavily in favour of Honduras. While the various evidentiary offerings are variable in number and probative value, as a whole they provide ample proof of Honduras's intent and will to act *à titre de souverain* and of the effective exercise and manifestation of its authority over the islands and in the adjacent waters. Confronted with the Respondent's post-colonial *effectivités*, Nicaragua was unable to prove the existence of a single post-colonial *effectivité* of its own in respect of the contested islands. Further, the fact that Honduras obtained title to the islands by a process of acquisition based on post-colonial *effectivités* can hardly give rise to any conflict with the holder of a title based on *uti possidetis juris*, since Nicaragua is just as lacking in post-colonial *effectivités* in the islands as it is in title by way of *uti possidetis juris*.

C. Honduras's uti possidetis juris *in the disputed islands*

8. The opinion next turns to an examination of the applicability of the international law principle of *uti possidetis juris* to the dispute as to sovereignty over the islands, noting, as observed in the Arbitral Award made on 23 December 1906 by King Alfonso XIII of Spain: "the Spanish provinces of Honduras and Nicaragua were gradually developing by historical evolution in such a manner as to be finally formed into

two distinct administrations (*intendencias*) under the Captaincy-General of Guatemala by virtue of the prescriptions of the Royal Regulations of Provincial Intendants of New Spain of 1786, which were applied to Guatemala and under whose régime they came as administered provinces till their emancipation from Spain in 1821" (United Nations, *Reports of International Arbitral Awards (RIAA)*, Vol. XI, p. 112).

9. In 1821, upon succeeding to independence, the Republic of Honduras and the Republic of Nicaragua freely accepted the *uti possidetis juris* principle, which had been formulated a few years earlier as an objective criterion to facilitate the peaceful settlement of potential territorial issues for the new Spanish-American Republics. The principle was incorporated into the constitutions of the Republic of Honduras and the Republic of Nicaragua and into their treaties. For example, Article II, paragraph 3, of the Gámez-Bonilla Treaty of 7 October 1894 pithily expresses the very core of the *uti possidetis juris* principle: "It is to be understood that each Republic is owner of the territory which at the date of independence constituted, respectively, the provinces of Honduras and Nicaragua". This provision served as the basis for the delimitation carried out between 1900 and 1904 by the Mixed Commission formed under the Treaty and for the later delimitation under the 1906 Arbitral Award.

10. The opinion notes the strong opposition historically encountered from European legal scholars to universal application of the *uti possidetis juris* principle as a positive norm of general international law. However, once the intangibility of boundaries inherited upon decolonization had gained general acceptance among African States, recognition of the principle of *uti possidetis juris* became so widespread that a Chamber of the International Court of Justice was able to state in 1986: "*Uti possidetis juris* . . . is therefore a principle of a general kind which is logically connected with this form of decolonization wherever it occurs." (*Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986*, p. 566, para. 23.) In 1992, another Chamber of the Court was prompted to apply the principle (*Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*). More recently, the principle was applied in 2005 by a third Chamber in the case concerning *Frontier Dispute* (Benin/Niger).

11. The principle has on occasion also been cited in cases coming before the full Court, notably in the case concerning *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, but there was no need for the Court to apply it because the case did not involve State succession. This problem did not arise in the present case, concerning as it does a precise instance of decolonization. Thus, the Court has had no difficulty in the present Judgment in affirming the applicability of *uti possidetis juris* as a principle of general international law to the dispute over the islands in this case, because the principle covers disputes over delimitation in the strict sense as well as those as to the holder of title to a particular land, island or maritime area (disputes over attribution).

12. On the question of applicability of the principle *per se* to the contested islands and on the notion of possession as it relates to *uti possidetis juris*, the majority and Judge Torres Bernárdez are of the same view. Where they part ways is in respect of weighing the evidence, specifically the best method for assessing the evidence in the light of the nature of the Spanish Crown's original title in its former territories in the Americas and of the characteristics and aims of the American legislation. Judge Torres Bernárdez believes that the present Judgment confirms the difficulties still encountered in applying *uti possidetis juris* to a particular area when the internal law referred to by the Latin genitive *juris* is an historical *jus* such as that which the Spanish Crown applied in America over more than three centuries.

13. In the view of the majority, it cannot be said that the application of this principle to Bobel Cay, Savanna Cay, South Cay and Port Royal Cay—islands of very minor importance lying far off the mainland—would settle the issue of sovereignty over them (paragraph 163 of the Judgment). According to the Judgment, there was no clear-cut administrative delimitation between different provinces of the Captaincy-General of Guatemala in respect of the islands; providing security, preventing smuggling and taking other steps necessary to safeguard the Crown's interests in the islands were probably the responsibility of the Captaincy-General itself.

14. Judge Torres Bernárdez does not subscribe to the majority's hypothetical conclusion on this point, as it disregards the fact that any exercise of direct authority by the Captaincy-General of Guatemala over any place or area in a province in no way altered that province's territory (see: Arbitral Award of 1906, RIAA, Vol. XI, p. 113). In his view, where the *uti possidetis juris* position must be proved retroactively, it is not always possible to obtain legislative or like documents specifying the ownership or extent of the territories in question or showing the exact location of provincial boundaries. It then becomes necessary, in attempting to reconstruct the position, to take into consideration all the evidence and additional information made available through historical and logical interpretation. Further, it must be kept in mind that evidence in respect of the territorial facet of *uti possidetis juris* is often very useful in clarifying the delimitation aspect and vice versa.

15. Identifying and proving title to the disputed islands pursuant to *uti possidetis juris* in this case is, in Judge Torres Bernárdez's opinion, greatly facilitated by the fact that the King of Spain defined the territories of the provinces of Nicaragua and Honduras on the eve of independence in the reasoning supporting his 1906 Arbitral Award made on the basis of the principle of *uti possidetis juris* as set out in the Gámez-Bonilla Treaty of 1894. On this subject the Arbitral Award states, *inter alia*: (a) that the Commission of investigation had not found that the expanding influence of Nicaragua had extended to the north of Cape Gracias a Dios, and therefore not reached Cape Camarón, there therefore being no reason to select the latter cape as a frontier boundary with Honduras on the Atlantic coast, as Nicaragua had claimed, and (b) that the Commission of investigation had found that the extension of Honduran jurisdiction to the south of Cape Gracias a Dios had never been clearly defined and that in any case it had been ephemeral, whereas Nicaragua's influence had been exercised in a real and permanent manner as far as that cape, it accordingly not being appropriate for the common boundary on the Atlantic coast to be Sandy Bay, as Honduras had claimed.

16. It was on the basis of this assessment of the fully documented *uti possidetis juris* position in 1821 that the arbitrator in the 1906 Arbitral Award determined the extreme common boundary point on the coast of the Atlantic between the Republic of Honduras and the Republic of Nicaragua to be the mouth of the River Coco, Segovia or Wanks where it flowed out in the sea, close to Cape Gracias a Dios, taking as the mouth of the river the mouth of its principal arm between Hara and the Island of San Pío where the cape is situated. The Court's Judgment of 18 November 1960 confirms that the arbitrator's decision was based on the principle of *uti possidetis juris*:

> "Nicaragua contends that the arbitrator fixed what he regarded as a natural boundary line without taking into account the Laws and Royal Warrants of the Spanish State which established the Spanish administrative divisions before the date of Independence. *In the judgment of the Court* this complaint is without foundation inasmuch as the decision of the arbitrator is based on historical and legal considerations (*derecho histórico*) in accordance with paragraphs 3 and 4 of Article II [of the Gámez-Bonilla Treaty]." (*Arbitral Award Made by the King of Spain on 23 December 1906 (Honduras* v. *Nicaragua), Judgment, I.C.J. Reports 1960*, p. 215; emphasis added.)

17. In Judge Torres Bernárdez's view, the substance of the evidence and other information supporting the Arbitral Award of 1906 and the Court's 1960 Judgment, that evidence and information being both considerable in quantity and unassailable in quality and authoritativeness, makes it essential for a judicial determination of the *uti possidetis juris* position in the contested islands. Further, these decisions are binding, for, as pointed out by a Chamber of the Court: "The award's view of the *uti possidetis juris* position prevails and cannot now be questioned juridically, even if it could be questioned historically." (*Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), Judgment, I.C.J. Reports 1992*, p. 401, para. 67.)

18. It is therefore clear to the author of the opinion that the *uti possidetis juris* position in 1821 saw the coast of Honduras stretching northwards from the extreme common point of the land boundary on the Atlantic coast, situated in the mouth of the principal arm of the River Coco where it flowed out in the sea close to Cape Gracias a Dios, up to the boundary with Guatemala, and the coast of Nicaragua extending to the south of the same extreme common boundary point up to the boundary with Costa Rica. Thus, we know precisely what were the Parties' coastlines in 1821 and, accordingly, we know the reference point allowing for unproblematic application of the notion of "adjacent island" under historical Spanish law as a general criterion for attributing islands to administrative entities; this notion, by the way, is much broader than that of "coastal island" under contemporary international law, because an island defined or treated as an "adjacent island" can lie far from the mainland.

19. For example, islands such as Aves, Clipperton, Swan, San Andrés and others have been considered "adjacent islands" even though situated a considerable distance from the mainland. Thus, the fact that the islands in dispute in the present case lie from 27 to 32 miles from the Honduran coast north of Cape Gracias a Dios does not preclude their characterization as "adjacent islands" of the province of Honduras under historical Spanish law. Further, the notion of "adjacent island" under that law was much more flexible than under contemporary international law. It was in fact merely a residual rule in that it could be set aside at any time by a specific normative provision to the contrary enacted by the King, e.g. the Royal Order of 1786 on the island of Aves or the Royal Warrant of 1803 on the islands of San Andrés.

20. But Nicaragua has offered no evidence of any specific decision by the King in favour of the province of Nicaragua in respect of the islands involved in the present case. Accordingly, in the view of Judge Torres Bernárdez, the delimitation of the land boundary effected by the Arbitral Award of 1906 enables a judicial response under the doctrine of *uti possidetis juris* to the question of sovereignty over the islands, because the four cays in question lie north of the 15th parallel, off and in the vicinity of Honduras's mainland coast and nearer to it than to Nicaragua's mainland coast south of that parallel.

21. Under these circumstances, if account is taken of the general criterion of attribution of "adjacent islands" under historical Spanish law, sovereignty over the cays pursuant to the *uti possidetis juris* principle undoubtedly belongs, in Judge Torres Bernárdez's opinion, to the Republic of Honduras, because, as determined in the Arbitral Award, the authorities in the province of Nicaragua in 1821 neither had nor exercised any jurisdiction in land, island or maritime areas north of Cape Gracias a Dios.

22. Moreover, the Parties' post-1821 conduct confirms this conclusion: for example, the diplomatic Note of 23 November 1844 to Her Britannic Majesty from the Minister representing both Honduras and Nicaragua, which recognizes Nicaragua's sovereign right along the Atlantic coast but only from Cape Gracias a Dios in the north to the boundary line separating Nicaragua and Costa Rica. Further, under treaties entered into in the nineteenth century between Spain and the Republic of Nicaragua (1856) and between Spain and the Republic of Honduras (1860), the predecessor State relinquished its title to the mainland and island territories of the colonial provinces. The Constitutions of the two Republics also include the expression "adjacent islands" in their respective definitions of national territory.

23. It is also pointed out in the opinion that Nicaragua sought in the arbitration proceedings to obtain recognition of a boundary line running along the 85th meridian west, which passes above Cape Camarón, and following that meridian to the sea, leaving Swan Island to Nicaragua. As we have seen, however, the arbitrator did not accept Nicaragua's argument and—pursuant to the principle upholding the *uti possidetis juris* position of 1821—fixed the extreme common boundary point of the two Republics in the mouth of the River Coco close to Cape Gracias a Dios, because, as observed in the Arbitral Award of 1906, the "documents" described Cape Gracias a Dios as the boundary point of the "jurisdictions" which the Royal Decrees of 1745 assigned to the Governors of the provinces of Honduras (Juan de Vera) and Nicaragua (Alonso Fernández de Heredia). Let us add that the Royal Warrant of

30 November 1803 concerning the islands of San Andrés and that part of the Mosquito Coast from Cape Gracias a Dios to the Chagres River confirms the role played by that cape as the jurisdictional boundary between the provinces of Honduras and Nicaragua.

D. Acquiescence by Nicaragua

24. If Nicaragua still believed after the Court's 1960 Judgment regarding the Arbitral Award made by the King of Spain that it was entitled to the disputed islands north of the 15th parallel, it should have said so earlier. But Nicaragua failed to make that clear either before or after the maritime delimitation dispute crystallized in 1982. For example, when the President of Nicaragua signed the original text of the 1998 Free Trade Agreement, Nicaragua had not yet expressed any claims to the islands in dispute in the present proceedings (paragraph 226 of the Judgment). It was not until 21 March 2001 that Nicaragua asserted claims to these islands.

25. In remaining silent over the years, Nicaragua engaged in conduct which could have led Honduras to believe that it accepted the *uti possidetis juris* position vis-à-vis the disputed islands, as that position had, in Judge Torres Bernárdez's opinion, been binding on the Parties ever since the 1906 Arbitral Award fixed the endpoint of the land boundary at the mouth of the River Coco in the sea close to Cape Gracias a Dios. Further, under international law, Nicaragua, to safeguard the rights claimed in the present proceedings, should have exercised greater vigilance and expressed clearer opposition in respect of Honduras's post-colonial *effectivités* in the islands.

E. Conclusion

26. It is pursuant to the foregoing considerations that Judge Torres Bernárdez is of the opinion that the legal basis for Honduras's sovereignty over Bobel Cay, Savanna Cay, Port Royal Cay and South Cay is threefold, the post-colonial *effectivités* and Nicaragua's acquiescence reinforcing the legal title to the islands held by the Republic of Honduras since 1821 by virtue of the principle of *uti possidetis juris*.

II. Delimitation of the Maritime Areas by a Single Maritime Boundary

A. The rejection of the "traditional maritime boundary" claimed by Honduras

27. Honduras defended the existence of a so-called "traditional" maritime boundary running along the 15th parallel north, through the territorial sea and beyond, based initially on the principle of *uti possidetis juris* (for the 6 nautical miles of territorial waters from the colonial period) and, subsequently, on a tacit agreement between the Parties concerning all the areas to be delimited by the Court in the present case. However, the Court, after considering the arguments and numerous evidential offerings submitted by Honduras, as well as the arguments and evidence to the contrary from Nicaragua, concludes "that there was no tacit agreement in effect between the Parties in 1982—nor *a fortiori* at any subsequent date—of a nature to establish a legally binding maritime boundary" (paragraph 258 of the Judgment).

28. For the majority, the 15th parallel, at certain periods (1961–1977), "appears to have had some relevance in the conduct of the Parties", but the events concerned spanned a short period of time. However, Judge Torres Bernárdez emphasizes in his opinion that the period in question is considerably longer than that in the *Gulf of Maine* case. In any event, he holds that the evidence submitted by Honduras, notably that concerning the oil and gas concessions and fisheries regulations and related activities, argues decisively in favour of the idea of the existence of a tacit agreement between the Parties on the "traditional" maritime boundary. He therefore does not subscribe to the negative finding of the majority on this question, although he acknowledges that it is a judge's prerogative to weigh and take a position on the evidence presented by the Parties.

29. In this respect, the opinion contains two particular comments. In the first, the judge declares his disagreement with the interpretation made by the Judgment of the Note from the Minister Dr. Paz Barnica of 3 May 1982. The second concerns Nicaragua's reaction to the Honduran Note of 21 September 1979 which stated that the seizure at sea of a Honduran vessel by the Nicaraguan navy on 18 September 1979 took place "eight miles to the north of the fifteenth parallel *that serves as the limit between Honduras and Nicaragua* (Counter-Memorial of Honduras, p. 48, para. 3.38; emphasis added). The Judgment, however, attributes no legal effect to the fact that, in its reply, Nicaragua neither contested nor qualified Honduras's assertion.

B. Non-application by the Judgment of succession to the territorial waters from the colonial period under uti possidetis juris

30. In both its written pleadings and at the hearings, Honduras also raised the question of the Parties' succession to the maritime areas of the colonial period pursuant to *uti possidetis juris*. In this respect, the Judgment declares that in certain circumstances, such as those concerning historic bays and territorial seas, the *uti possidetis juris* principle could play a role in maritime delimitation (paragraph 232), thereby confirming the relevant jurisprudence of the 1992 Judgment in the case concerning the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras; Nicaragua intervening)*. In his opinion, Judge Torres Bernárdez fully endorses this point of law set out in the Judgment. Unfortunately, the majority has not drawn the necessary conclusions from this declaration for the present case.

31. Honduras's position on the question concerned is summarized in the opinion as follows: (1) the principle of *uti possidetis juris* referred to in the Gámez-Bonilla Treaty, as well as in the 1906 Award of the King of Spain, is applicable to the maritime area off the coasts of Honduras and Nicaragua; (2) the 15th parallel constitutes the line of maritime delimitation resulting from the application of that principle; (3) Honduras and Nicaragua succeeded, in 1821, to a maritime area consisting of a 6-mile territorial sea; and (4) the *uti possidetis juris* gives rise to a presumption of Honduran title to the continental shelf and exclusive economic zone north of the 15th parallel.

32. The reactions of Judge Torres Bernárdez to each of these elements of the Honduran position are as follows:

Reaction to point (1): No doubt. At present, as a principle of general international law, *uti possidetis juris* is applicable to both land and maritime delimitations, as is upheld by the Judgment. Moreover, the Gámez-Bonilla Treaty constituted a friendly settlement of "all pending doubts and differences" in order to "demarcate on the spot the dividing line which is to constitute the boundary between the two Republics" (Art. 1 of the Treaty). The word "boundary" is thus not qualified by the adjective "land". The practice of the Parties bears out this interpretation, moreover, as the Minutes II of the Mixed Commission of 12 June 1900 effected a demarcation between the two republics in the part of the Bay or Gulf of Fonseca "contiguous to the coastline of both States without there being a distance of 33 km between their coasts" (*I.C.J. Pleadings, Arbitral Award Made by the King of Spain on 23 December 1906 (Honduras* v. *Nicaragua*), Vol. I, p. 235). See also the Note of 19 March 1912 from the Nicaraguan Minister for Foreign Affairs indicating the reasons relied on by Nicaragua in order to regard the King of Spain's Award as null and void (ibid., pp. 292–293).

Reaction to point (2): Yes, if the statement is understood to apply to the maritime area of the 6-nautical-mile territorial sea from the colonial period; no, however, as far as the whole of the "traditional maritime boundary" is concerned, as Judge Torres Bernárdez agrees with Nicaragua that title to the exclusive economic zone or the continental shelf is an obviously modern legal notion which did not exist in 1821.

Reaction to point (3): No doubt, under the principle of *uti possidetis juris*.

Reaction to point (4): Judge Torres Bernárdez understands this point as meaning that the *uti possidetis juris* principle was used to determine the coasts of each Party, which in turn form the basis of the title governing the delimitation between the Parties to the present case of the maritime areas comprising the continental shelf and exclusive economic zones.

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33. It is noted in the opinion that the Judgment of the Court acknowledges—as do both Parties—that the 1906 Arbitral Award fixed the extreme common point of the land boundary which it established on the Atlantic coast. In which case, how can it be said that nothing in the 1906 Arbitral Award indicates that the 15th parallel of latitude north has been regarded as constituting the boundary line? There is at least one point, the extreme common boundary point on the Atlantic coast resulting from the Arbitral Award, which is the "starting *uti possidetis juris* point" of a line delimiting the territorial seas between the Parties and, in that respect, it can be invoked as evidence of succession to a maritime dividing line along the horizontal line of the 15th parallel north for the 6 nautical miles under consideration here, since historical Spanish law used parallels and meridians to delimit maritime areas.

34. The fact that this point is located in the vicinity of the 15th parallel north close to Cape Gracias a Dios and not, for example, on a parallel or a meridian passing close by Cape Camarón, Punta Patuca, Cape Falso or Sandy Bay is undoubtedly, in Judge Torres Bernárdez's view, a very significant indication or piece of evidence for a judge or arbitrator involved in applying the *uti possidetis juris* principle. The Chamber formed for the case *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras; Nicaragua intervening*) understood this point well when it adopted methods of assessing and interpreting the evidence that were in keeping with the essentially historical character of that principle in Latin America.

35. According to the opinion, it is correct to say that the Arbitral Award of 1906 did not carry out any maritime delimitation in the Atlantic, but much less so to state that it "is not applicable" to the present maritime delimitation between the Parties. It is necessary to examine the reasons for the Arbitral Award in order to gain a proper view of the *uti possidetis juris* position in 1821 along the Parties' coasts and in their respective adjacent maritime areas, because the land dominates the sea. And the land—the coastal fronts of the Parties—was defined by the 1906 Arbitral Award and not by the resources of the exclusive economic zones located out beyond the territorial seas.

36. As to the very different issue of the scope of the *res judicata* of the 1906 Arbitral Award, what is required, according to Judge Torres Bernárdez, is to apply, where appropriate, the jurisprudence of the Court concerning the relationship between the operative part and the reasoning of a judgment, since *res judicata* does not apply only to what is materially indicated in the operative part of an award or a judgment (see, for example, the case concerning *Application of the Convention for the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro*), Judgment of 26 February 2007, para. 26).

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37. Judge Torres Bernárdez cannot follow the majority when the Judgment practically ignores the historical, geographical and legal facts set out in the reasoning of the 1906 Arbitral Award. He emphasizes the importance of the documentation in that arbitral case for applying the principle of *uti possidetis juris* to the delimitation of the territorial seas in the present case. In his view, an examination of the reasoning of the Arbitral Award and the documentation in question makes it possible to appreciate the full importance of the historical role of Cape Gracias a Dios as the projection separating the coast of the province of Honduras from that of the province of Nicaragua, and thus to arrive at an image of the area of the 6-mile territorial sea appertaining to one or other of these Spanish colonial provinces prior to 15 September 1821.

38. For him such an image is, moreover, sufficiently precise—for the purpose of applying the principle of the *uti possidetis juris* of 1821—to acknowledge and assert that it was indeed at the parallel running through Cape Gracias a Dios (i.e. the 15th parallel north) that, on the day of their independence, the area of the mainland territorial sea of the Republic of Honduras came to an end and the area of the mainland territorial sea of the Republic of Nicaragua began, to the north and south respectively. This is, of course, a "delimitation" from 1821 and not a "demarcation" at sea in 2007. And why? Because, according to the 1906 Arbitral Award based on the historical "documentation" provided by the Parties, it was

Cape Gracias a Dios which "fixes what has practically been the limit or expansion or encroachment of Nicaragua towards the north and of Honduras towards the south" (RIAA, Vol. XI, p. 115).

39. Reading the Judgment, Judge Torres Bernárdez sometimes has the impression that the majority demands too much as evidence of the *uti possidetis juris* of 1821 and as a definition of what constituted, at the beginning of the nineteenth century, a maritime delimitation of the territorial waters between the adjacent coasts of two States. One must ask whether it was customary at the time, even in Europe, to effect collateral delimitation of territorial seas by means of precisely defined lines in treaties concluded in due form. There is some doubt in that respect. Moreover, the evidence, information and geography are particularly clear for *uti possidetis juris* to be applied to the delimitation of the first 6 miles of territorial sea between the Parties' mainland coasts in question, along the 15th parallel.

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40. The opinion recalls the assertion by Honduras that the 15th parallel is the dividing line between the Parties of the maritime area represented by the 6-mile territorial waters inherited from Spain, on the basis of the 1906 Arbitral Award and the documentation relating to it, as well as other evidence such as the Royal Decree of 30 November 1803 regarding the islands of San Andrés and the Mosquito Coast from Cape Gracias a Dios to the Chagres River, the geographical plan of the Vice-Royalty of Santa Fé de Bogotá, New Kingdom of Granada (1774) (Rejoinder of Honduras, Vol. II, Ann. 232), the diplomatic Note of 23 November 1844 addressed to Her Britannic Majesty by the Minister representing both Honduras and Nicaragua, and two expert opinions on the general jurisdiction over land and sea of the Captaincy-Generals and Governments in historical Spanish overseas law (ibid., Ann. 266) and the issue of Honduran rights to the waters of the Atlantic Ocean (ibid., Ann. 267).

41. During the oral arguments stage, Nicaragua attacked the first of those expert opinions by invoking in this respect the Royal Order on coastguards (1802), the Instruction for the regulation of coastguard vessels in the Indies (1803), the Ordinance on privateering vessels (1796, amended in 1801) and the Ordinance concerning the régime and military governance of sailors' registration (matrícula de mar, 1802). Judge Torres Bernárdez does not see in what way the texts of these instruments alter the general conclusions resulting from the opinions expressed by the Honduran experts.

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42. However, Nicaragua did not confine itself to discussing items of evidence. It also presented arguments in the form of a proposition entitled "The sea, one area under one jurisdiction in the Spanish monarchy", according to which "the whole sea" formed a single area, over which a special jurisdiction, centralized in Madrid—that of the navy—exclusively applied, and finally asserting that the Spanish Crown's claim to a 6-mile territorial sea "tells [us] nothing with regard to the limit of this territorial sea between the Provinces of Honduras and Nicaragua" (paragraph 231 of the Judgment; emphasis in the original). Consequently, Nicaragua denies to the republics created from the former colonial provinces of Honduras and Nicaragua this 6-mile maritime area as part of their territorial inheritance from Spain, the predecessor State.

43. The opinion takes a stance on this Nicaraguan argument, as Judge Torres Bernárdez does not subscribe to it. In his view, it corresponds to admitting that the republics established on the territory of the former "colonial provinces" in the Americas received no more than "dry coasts" under the *uti possidetis juris* principle, in the same way, possibly, as the "Vice-Royalties" and "Captaincy-Generals", since the proposition that the sea was a single area administered by a centralized jurisdiction in Madrid does not lend itself to distinguishing between the "colonial provinces" and the other administrative territorial entities established by the Spanish Crown in the Americas.

44. Judge Torres Bernárdez points out that the Nicaraguan argument is constructed as a syllogism, but the premisses are incorrect. First, it is not correct to claim that the whole sea formed "one area" when historical Spanish law—in any case in the eighteenth century (Royal Decree of 17 December 1760)—distinguished between the waters under Spanish jurisdiction adjacent to the coast (the 6 miles) and the rest of the sea, without prejudice to the existence of historic waters or bays such as those of the Gulf of Fonseca on which Nicaragua has a coast. Further, the Spanish Kings of the age of enlightenment were, as elsewhere in Europe, at the head of an absolute monarchy in which the King's will alone was the beginning, middle and end of all jurisdiction. Thus in all areas, jurisdiction was centralized in the person of the King and exercised by those entitled to hold it, both in Spain and in the Americas, by delegation of the sovereign's power.

45. Within a given area, be it on land or at sea, in the Americas or in Spain, several jurisdictions coexisted, with each such holder exercising the functions or activity that had been entrusted to him by general legislation or the specific instructions of the monarch. The existence of a special jurisdiction of the navy did not in any way prevent the exercising of governmental, military or maritime powers within the 6-mile territorial sea by a Captain-General or a Governor, whose jurisdiction at sea was not curbed by that of the Spanish royal navy.

46. Judge Torres Bernárdez notes in his opinion that, in the last analysis, the argument in question is based on a conceptual confusion between the respective roles of the principle of *uti possidetis juris* in international law and the historical Spanish law of the Americas. The existence of a 6-mile territorial sea off the coasts of the Spanish Crown's territories in the Americas is a question of historical Spanish law. However, the administration of the sea by the Spanish Crown, centralized or otherwise, is not relevant at all, since the determination of the successor States to the Spanish monarchy, benefiting from the date of their independence from these 6 miles of territorial sea as part of their territorial inheritance from the predecessor State, is a question of international law.

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47. After attempting to sow doubt with the above argument, Nicaragua finally fell back on the non-division of the 6-mile maritime area of the territorial sea from the colonial period. It did so in the following terms: "[t]he only thing that can be said is that, at the date of independence, a joint sovereignty of the riparian republics arose over the waters of the Spanish Crown . . . and persists until such time as the areas corresponding to each of them are delimited" (CR 2007/3, p. 35, para. 82).

48. For Judge Torres Bernárdez, this amounts to acknowledging that the Republic of Nicaragua and the Republic of Honduras did indeed succeed to the 6 miles of territorial waters from the colonial period off Cape Gracias a Dios under the principle of *uti possidetis juris*. As the two Parties thus agree on the existence of a succession in 1821 to this maritime area, all that remains is to fix the dividing line between their territorial waters. In this respect, the opinion states that "non-division", purely as such, does not mean that we are dealing with a situation of joint sovereignty. For that, the undivided waters would have to be in a situation or state of community, which does not exist in the present case (*Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), Judgment, I.C.J. Reports 1992*, p. 599, para. 401).

49. As regards the location and orientation of this dividing line in 1821, Judge Torres Bernárdez considers that, if one examines all the points of law in the case, it stands to reason that under the *uti possidetis juris* principle of international law, the line of the parallel running through Cape Gracias a Dios, i.e. approximately the 15th parallel, acted as the dividing line between the Parties for the 6-mile area of territorial waters in the Caribbean Sea during the colonial period, since the colonial authorities of the province of Honduras did not exercise any jurisdiction south of that parallel and the colonial authorities of the province of Nicaragua did not exercise any jurisdiction north of it.

50. The Parties knew this from the early days of independence (see, for example, the diplomatic Note of 23 November 1844), and the 1906 Arbitral Award confirmed it by fixing as *res judicata* the extreme common point of the land boundary as the mouth of the River Coco close to Cape Gracias a Dios. There was thus no reason to look any further, as the conduct of the Parties confirmed by the Arbitral Award from then on constituted the authentic expression of the *uti possidetis juris* of 1821 (see, for example, *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), Judgment, I.C.J. Reports 1992*, p. 41, para. 67). Moreover, after the Court's 1960 Judgment on the validity and binding nature of the 1906 Arbitral Award, the Parties' conduct was like that following independence, i.e. as if the dividing line was effectively the 15th parallel (conduct giving rise to the "traditional" maritime boundary). In any event, since *uti possidetis juris* is a principle that automatically applies, the colonial administrative divisions on land or at sea are transformed into international boundaries "by the operation of the law". No additional deliberate act is required (*ibid.,* p. 565, para. 345).

51. Judge Torres Bernárdez is accordingly of the opinion that there are no grounds for the finding in the Judgment that Honduras ought to have shown to a greater degree that the maritime boundary should follow the 15th parallel from Cape Gracias a Dios, and produced evidence that the colonial power had used parallels and meridians in this particular case, which was its general practice at sea.

52. According to Judge Torres Bernárdez, such a standard is too demanding in terms of assessing a *uti possidetis juris* situation concerning two States which, in 1821, had the same understanding of that principle as regards the maritime area concerned. This bears out his criticism of the Judgment for opting for a rather too mechanical and unhistorical approach in its assessment of the evidence regarding application of the *uti possidetis juris* principle.

53. Here, this has the unfortunate consequence of depriving Honduras of a "historic title" which could be invoked in the present case in relation to the interpretation and application of Article 15 of the 1982 United Nations Convention on the Law of the Sea. That is the first reason for Judge Torres Bernárdez's vote against subparagraphs (2) and (3) of the operative clause.

C. The ex novo *delimitation of maritime areas effected by the Judgment*

1. The Parties' claims and the question of defining the "area in dispute"

54. In the present case, the Parties have adopted fundamentally different approaches towards the delimitation of their "single maritime boundary" in the Caribbean Sea. One initial consequence of this divergence is, according to Judge Torres Bernárdez, that the "area in dispute" defined by the Parties' claims does not correspond to the "area" in which the maritime delimitation must be effected, taking account of the geography involved.

55. In the Judge's opinion, the bisector line claimed by Nicaragua on the basis of all the coastal fronts of both Parties, the line of the 15th parallel north claimed by Honduras and, for the purposes of the argument, the 80th meridian west form a triangular "area in dispute" which is an entirely artificial one in the sense that it is divorced from the reality of the geographical, legal and historical circumstances of a case that concerns the delimitation of maritime areas situated north and south of the mouth of the River Coco close to Cape Gracias a Dios.

56. The majority of the Court appears to presuppose, in Judge Torres Bernárdez's view, that an equal or almost equal sharing of the above triangle represents, in the present circumstances, an equitable result. He does not agree, even though the ratio between the areas of the triangle attributed to Nicaragua and those attributed to Honduras is approximately 3:4 (1:1.3) in favour of Honduras (including a significant extension in terms of territorial sea because of the islands). However, it must be taken into account that the bisector claimed by Nicaragua was certainly designed to back up recent political ambitions (1994/1995), but lacked legal credibility, since it was based on all the coastal fronts of both States regardless of their relationship with the area of delimitation and, moreover, those fronts were replaced by straight lines which bore no relation to the physical geography of the coast.

57. In defining the "area in dispute", the bisector line claimed by the Applicant is a device that creates a distortion

and an inequitable result in this case. The Judgment does not correct this effect. Nor did the Respondent's main position initially help to restore a more balanced definition of the "area in dispute" as regards its southern limit (Honduras's alternative submission of an adjusted equidistance line was presented at the hearings). Consequently, Judge Torres Bernárdez notes that the area in which the Parties' principal claims overlap is situated north of the 15th parallel, whereas the area of delimitation lies north and south of that parallel.

2. The law applicable to maritime delimitation

58. Honduras and Nicaragua having become parties to the 1982 United Nations Convention on the Law of the Sea, the Convention is now in force between the Parties. The relevant articles of the Convention are therefore applicable as treaty law in the present dispute. Judge Torres Bernárdez approves of the statement to this effect in the Judgment (paragraph 261). However, he points out that, the weight of tradition being what it is, the overall structure of the Judgment is based more on the case law than on the text of the Convention, often to the detriment of the particular nature of delimitation of the territorial sea.

3. Areas to be delimited and the methodology adopted by the Judgment: the abandonment of equidistance and delimitation in stages in favour of the bisector method

59. Judge Torres Bernárdez does not agree with the Judgment as regards the methodology to be used in order to determine the course of the single maritime boundary. His assumption is that the Court must first and foremost apply the rules on delimitation of the territorial sea, without forgetting that the ultimate task is to draw a single maritime boundary between the Parties that will also be valid for other purposes (*Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain), I.C.J. Reports 2001*, p. 93, para. 174). However, the Judgment does not do this.

60. Judge Torres Bernárdez also criticizes the fact that the Judgment rejects out of hand the equidistance method that is specifically and expressly referred to in Article 15 (Delimitation of the territorial sea) of the 1982 Convention on the Law of the Sea, relying in the first place on the existence of "special circumstances" in order to consider the issue thereafter in terms of the Convention's rules on delimitation of the exclusive economic zone (Art. 74) and the continental shelf (Art. 83), and indeed in terms of the customary rule which it calls the "equitable principles/relevant circumstances method" (paragraph 271 of the Judgment).

61. The efforts of recent years to make judicial decisions in this field more objective by firstly drawing a provisional equidistance line, even if this subsequently has to be adjusted in the light of "special" or "relevant" circumstances, have thus been set aside. This is a relapse into sui generis solutions, i.e. into pragmatism and subjectivity. The least that can be said is that the Judgment does not put the equidistance method at the centre of the approach to be followed, relying to this end on "difficulties" which are said to make it impossible for the Court to identify base points and construct a provisional equidistance line (paragraph 280 of the Judgment).

62. It is true that neither Party has as its main argument a call for a provisional equidistance line as the most suitable method of delimitation. However, this in no way means that the Parties' positions regarding the equidistance method are the same.

63. One of the Parties, Honduras, put forward a provisional equidistance line drawn from two base points, situated on the Parties' mainland coasts respectively north and south of the mouth of the River Coco, and also presented to the Court in its final submissions, as an alternative to the line of the 15th parallel, an adjusted equidistance line (approximately azimuth 78° 48'). On the other hand, Nicaragua maintained throughout the proceedings and in its final submissions that the method of equidistance/special or relevant circumstances is not appropriate for the purposes of delimitation in the present case because of the instability of the mouth of the River Coco. For Nicaragua, the Court was to draw the whole of the single maritime boundary on the basis of the bisector of the angle formed by two straight lines that were deemed to represent the entire coastal front of both Parties (approximately azimuth 52° 45' 21").

64. In order to justify the Court's decision not to use the equidistance method in the present case, even as an initial provisional measure, the Judgment points to the geographical configuration of the coastline either side of Cape Gracias a Dios and to the marked instability of the delta of the River Coco at its mouth. Judge Torres Bernárdez agrees that these are physical circumstances to be taken into account in the delimitation exercise, but in his view, neither of them justifies abandoning the equidistance method in favour of one such as the bisector, which creates far more serious problems of law and equity in this case than equidistance.

65. In this context, Judge Torres Bernárdez points out that where physical circumstances of this type are present, the solution advocated by the 1982 Convention on the Law of the Sea is to use the "straight baselines" method to identify the base points (Arts. 7 and 9 of the Convention), rather than a method such as the bisector, based on macro-geography, which is unable in the present circumstances to safeguard the principle of non-encroachment in the areas situated off the Honduran mainland coastal front.

66. As explained in the opinion, the line of the single maritime boundary in the Judgment, which begins by delimiting only the territorial seas of the two States for a certain distance, passes too close to the mainland coast of Honduras because of the use of the bisector method. For Judge Torres Bernárdez, this line is therefore inequitable, especially in a maritime area in which security and defence interests are bound to prevail over economic considerations. Moreover, Judge Torres Bernárdez is not at all convinced that "the construction of an equidistance line from the mainland is not feasible" (paragraph 283), nor by the argument that the existence of only two base points is a circumstance that precludes the equidistance method (see *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), I.C.J. Reports 2002*, p. 443, para. 292).

4. The bisector in the Judgment and its construction (coastal fronts)

67. The Judgment has not adopted the delimitation lines requested by either of the Parties. With regard to Honduras, it rejects both the line of the 15th parallel and an adjusted equidistance line. But the Judgment also rejects the bisector of azimuth 52° 45' 21" requested by Nicaragua, which was based on lines representing the entire coastal front of both countries, which the Applicant constructed as straight lines through a process of "planing" or "smoothing" the coastal geography of Honduras.

68. However, the Judgment has chosen to use the bisector method to determine the course of the single maritime boundary established by the Court itself, since for the majority, such a method has proved viable in circumstances where equidistance is not possible or appropriate (paragraph 287 of the Judgment). Judge Torres Bernárdez nevertheless notes that the Court's jurisprudence referred to in the Judgment in support of this finding does not concern cases in which delimitation of the territorial sea was at issue.

69. In his opinion, Judge Torres Bernárdez points out that there is a total symmetry in the Judgment between the reasoning which has led the majority to reject the equidistance method and that which has persuaded it to adopt the bisector method. For him, however, there is no cause and effect relationship between these two methods. A bisector is not the only possible means of achieving an equitable solution in this case. In fact it does the opposite, since in terms of maritime areas, the bisector method imposes on one Party alone, Honduras, the burden of a geographical and morphological situation (the coastal configuration; the instability of the mouth of the River Coco) (paragraph 292 of the Judgment) that is shared by both Parties, as it exists along the entire coastline, both north and south of the mouth of the River Coco, as the Judgment itself acknowledges.

70. But the Judgment does not make any equitable adjustment of the bisector line in favour of Honduras, to compensate for this burden which Honduras has to bear alone. The rejection of Nicaragua's straight line from Cape Gracias a Dios to the frontier with Guatemala has nothing to do with equity. All the Judgment has done in this respect is to restore the actual coastal geography of Honduras which had been "planed' in the Applicant's proposal. Furthermore, the choice of the bisector method has had the effect of extending the relevant coasts beyond those directly concerned by the area of delimitation. Hence the coast from Cape Falso to Laguna Wano put forward by Honduras was rejected in favour of longer coastal fronts.

71. In this context, the Judgment rejects a coastal front extending from Cape Camarón to the Río Grande (producing a bisector of azimuth 64° 02'), because the line would run entirely over the Honduran mainland. But the Judgment also rejects the front from Cape Falso to Punta Gorda, on the grounds that its length (some 100 km) is not sufficient to reflect a coastal front more than 100 nautical miles out to sea, although the azimuth of the angle of the bisector is nonetheless 70° 54'. This was not enough for the majority, which finally settled on a Honduran coastal front extending from Cape Gracias a Dios to Punta Patuca (even though the coast between Cape Falso and Punta Patuca does not directly adjoin the area of delimitation) and a Nicaraguan front from Cape Gracias a Dios to Wouhnta, which the Judgment considers to be of sufficient length to account properly for the coastal configuration in the disputed area. The bisector of the angle formed by these two coastal fronts has an azimuth of 70° 14' 41.25". This is the azimuth of the bisector in the Judgment.

72. Judge Torres Bernárdez compares this azimuth in the Judgment with that of a provisional equidistance line (approximately 78° 48') drawn from base points situated north and south of the mouth of the River Coco, noting that the difference between the two azimuths is more than 8°. For the judge, this is a huge disparity. He cannot accept it as the equitable solution advocated by the 1982 Convention on the Law of the Sea. Choosing a method to overcome the physical problems that are shared by both Parties' coastal fronts cannot justify a delimitation that is inequitable for one of the Parties.

5. Application of equidistance to the delimitation around the islands

73. Having rejected Nicaragua's claim that would enclose the islands attributed to Honduras within a territorial sea of 3 nautical miles, the Court then turns to delimiting the territorial sea around the islands, in accordance with Articles 3, 15 and 21 of the 1982 United Nations Convention on the Law of the Sea, which is the law applicable between the Parties. Judge Torres Bernárdez entirely agrees with the Court's decisions, and therefore with the course of that section of the maritime boundary which effects the delimitation around the islands.

74. Each of the islands concerned—Bobel Cay, Savanna Cay, Port Royal Cay and South Cay for Honduras and Edinburgh Cay for Nicaragua—is accorded a 12-mile territorial sea, and the overlapping areas between these territorial seas of Honduras and Nicaragua, both north and south of the 15th parallel, are delimited by application of the equidistance method. The Court first drew a provisional equidistance line, using the co-ordinates for these islands as the base points for their territorial seas, and then constructed the median line in the overlapping areas. Lastly, having established that there were no special circumstances warranting an adjustment, it adopted this provisional line as the line of delimitation (paragraph 304 of the Judgment).

75. As a result of the application of equidistance, the course of the delimitation line around the islands lies partly south of the 15th parallel. This is not surprising, as the existence of any kind of maritime boundary along that parallel, based on the tacit agreement of the Parties, had already been rejected by the majority of the Court (see above).

6. The demarcation by the Mixed Commission of 1962 and the starting-point of the single maritime boundary

76. The two Parties left the Court the task of establishing the starting-point of the single maritime boundary, and the Judgment sets it 3 miles out to sea from the point identified in the River Coco by the Mixed Commission in 1962, as Honduras wished, but the majority has placed it along the azimuth of the bisector, as proposed by Nicaragua (paragraph 311 of the Judgment). The co-ordinates of the starting-point thus

decided by the Court are 15° 00' 52" of latitude north and 83° 05' 58" of longitude west (subparagraph (2) of the operative clause of the Judgment).

77. Judge Torres Bernárdez disagrees with the location of this point as decided by the Judgment because, in his view, it should have been a point equidistant from the base points situated north and south of the mouth of the River Coco. The point chosen by the majority is not a neutral one in relation to the principal claims of the Parties, which is the reason why he has voted against subparagraph (2) of the operative clause of the Judgment.

78. On the other hand, Judge Torres Bernárdez endorses the Court's finding that the Parties must negotiate in good faith with a view to agreeing on the course of the delimitation line in the territorial sea between the endpoint of the land boundary as established by the 1906 Arbitral Award and the starting-point of the maritime delimitation in the present Judgment.

7. The endpoint of the single maritime boundary, bilateral treaties and third States

79. In paragraphs 314 to 319 of the Judgment, the Court considers the various possibilities open to it as regards the question of the endpoint of the line and analyses the potential third-State interests beyond the 82nd meridian, namely those of Colombia and Jamaica. Following this analysis, it arrives at the conclusion that it cannot draw a delimitation line that would intersect with the line established by the 1993 Treaty between Colombia and Jamaica, but that it can state that the maritime delimitation between Honduras and Nicaragua extends beyond the 82nd meridian without prejudicing Colombia's rights under its treaty with Nicaragua of 1928 and with Honduras of 1986.

80. Hence the Judgment states that the Court may, without specifying a precise endpoint, delimit the maritime boundary beyond the 82nd meridian without affecting third-State rights (paragraph 319 of the Judgment and sketch-map No. 7). Unfortunately, Judge Torres Bernárdez does not have the same certainty as the Judgment as regards this finding. It is true that, in its reasoning, the Judgment adds an important detail, namely that "[the Court's] consideration of these interests is without prejudice to any other legitimate third party interests which may also exist in the area" (paragraph 318). The legitimate interests of third States "in the area" delimited by the Judgment would thus seem duly protected. However, there remains the question of the rights and legitimate interests of third States in the maritime areas adjacent to the area that has been delimited.

81. In Judge Torres Bernárdez's view, the presence of Nicaragua north of the 15th parallel and east of the 82nd meridian can only prejudice the rights and interests of Colombia, since the latter is no longer protected by the delimitation line of the 1986 Treaty with Honduras and is therefore exposed to claims from Nicaragua to the south and east of that line. This is the first reason why Judge Torres Bernárdez is opposed to the delimitation east of the 82nd meridian that is contained in the Judgment.

82. There is a second reason, however, since the delimitation effected by the present Judgment takes no account of the maritime delimitation treaty concluded in 1986 between Honduras and Colombia, even though this is a treaty in force between the two States, registered with the Secretariat of the United Nations and invoked by Honduras in the present case. Judge Torres Bernárdez finds this surprising. Why should it be so? Because the dispute that exists regarding this treaty between the Parties to the present case was not included by the Applicant, Nicaragua, within the subject of the dispute as defined in its Application instituting proceedings, and nor did it ask the Court, in its final submissions, to rule on any legal aspect of the dispute between the Parties concerning that treaty. Yet this raises a jurisdictional issue deserving of particular consideration which is absent from the Judgment.

83. In other words, the status of the treaty instrument in question should have been determined beforehand, since a maritime delimitation line cannot settle a dispute concerning the treaty-making power of States and/or the validity of the treaties thus concluded, just as it could not settle in the present case the dispute between the Parties concerning sovereignty over the contested islands. In this respect, Judge Torres Bernárdez recalls that, according to Articles 74 and 83 of the 1982 United Nations Convention on the Law of the Sea, the delimitation of the exclusive economic zone and of the continental shelf must be effected "on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution".

8. Conclusion

84. Judge Torres Bernárdez has voted against subparagraphs (2) and (3) of the Judgment's operative clause because he believes that the line of single maritime delimitation contained in the Judgment does not entirely comply with the relevant requirements of the 1982 United Nations Convention on the Law of the Sea, except as regards the section around the islands (the second section of the line).

85. For the first section, which begins by delimiting for a certain distance the Parties' mainland territorial seas, it is obvious that the general rule of equidistance contained in Article 15 of the 1982 Convention has not been applied. This has been rejected for the first time in the Court's jurisprudence in relation to the territorial sea, and from the start of the delimitation exercise, in favour of a bisector which is unable to secure the principle of non-encroachment with regard to Honduras's mainland coasts. In the Judgment, the bisector method chosen is justified on the grounds that the configuration of the mainland coasts in question and the instability of the mouth of the River Coco are said to constitute "special circumstances" within the meaning of the second sentence of the above-mentioned Article 15. Judge Torres Bernárdez cannot accept this justification, since the remedy for such situations under the 1982 Convention is not the bisector method, but that of straight baselines (Art. 7, para. 2, and Art. 9 of the Convention). That being so, and the Judgment having rejected the historic titles (*uti possidetis juris*) relied upon by Honduras, Judge Torres Bernárdez does not find it in any way "necessary" to delimit the territorial sea other than by the median

line (equidistance method) provided for in Article 15 of the 1982 Convention.

86. As regards the third section, which delimits only the exclusive economic zone and the continental shelf, the bisector in the Judgment is likewise unable, in Judge Torres Bernárdez's view, to achieve an equitable solution. Firstly, the construction of the bisector makes it necessary to bring into play a Honduran coast (from Cape Falso to Punta Patuca) which does not directly adjoin the area of delimitation. Secondly, and above all, the azimuth of the angle of the Judgment's bisector line is not justified by the relationship between the coasts directly involved in the delimitation, nor by the historical circumstances of the dispute. A bisector line where the azimuth of its angle favours one of the Parties by a difference of 8° compared with the azimuth of the angle of the provisional equidistance line drawn from base points situated north and south of the River Coco is not an equitable result, since in the present case, the Judgment invokes no "relevant circumstance" that would warrant adjusting the provisional equidistance line on such a scale. This is particularly true when one bears in mind that the circumstance of the coasts and river mouth referred to above is common to the coastal fronts of both States. Finally, the fact that the line delimiting the third section extends beyond the 82nd meridian raises jurisdictional questions concerning the treaty concluded in 1986 between Honduras and Colombia, and as regards Colombia's rights and legal interests in the maritime areas lying south and east of the delimitation effected by that treaty.

Declaration of Judge Gaja

Judge *ad hoc* Gaja declared that, while he was in agreement with the rest of the operative part of the Judgment and with most of the reasons given, he did not share the view that maritime areas lying south of the 14° 59.8' N parallel should be attributed to Honduras as part of its territorial sea. Under Article 3 of the United Nations Convention on the Law of the Sea, every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles. Honduras constantly considered—also in its final submissions—that the territorial sea pertaining to the cays in the Media Luna group did not extend in a southerly direction beyond the 14° 59.8' N parallel.

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167. TERRITORIAL AND MARITIME DISPUTE (NICARAGUA *v.* COLOMBIA) (PRELIMINARY OBJECTIONS)

Judgment of 13 December 2007

In the case concerning *Territorial and Maritime Dispute* (*Nicaragua* v. *Colombia*), the Court delivered its judgment in respect of preliminary objections to its jurisdiction on 13 December 2007. The Court found that it has jurisdiction over the case.

*

* *

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

*

* *

Paragraph 142 of the judgment reads as follows:

" . . .

The Court,

(1) As regards the first preliminary objection to jurisdiction raised by the Republic of Colombia on the basis of Articles VI and XXXIV of the Pact of Bogotá:

(a) By thirteen votes to four,

Upholds the objection to its jurisdiction in so far as it concerns sovereignty over the islands of San Andrés, Providencia and Santa Catalina;

IN FAVOUR: President Higgins; Judges Shi, Koroma, Parra-Aranguren, Buergenthal, Owada, Simma, Tomka, Keith, Sepúlveda-Amor, Skotnikov; Judges *ad hoc* Fortier, Gaja;

AGAINST: Vice-President Al-Khasawneh; Judges Ranjeva, Abraham, Bennouna;

(b) Unanimously,

Rejects the objection to its jurisdiction in so far as it concerns sovereignty over the other maritime features in dispute between the Parties;

(c) Unanimously,

Rejects the objection to its jurisdiction in so far as it concerns the maritime delimitation between the Parties;

(2) As regards the second preliminary objection to jurisdiction raised by the Republic of Colombia relating to the declarations made by the Parties recognizing the compulsory jurisdiction of the Court:

(a) By fourteen votes to three,

Upholds the objection to its jurisdiction in so far as it concerns sovereignty over the islands of San Andrés, Providencia and Santa Catalina;

IN FAVOUR: President Higgins; Judges Shi, Koroma, Parra-Aranguren, Buergenthal, Owada, Simma, Tomka, Abraham, Keith, Sepúlveda-Amor, Skotnikov; Judges *ad hoc* Fortier, Gaja;

AGAINST: Vice-President Al-Khasawneh; Judges Ranjeva, Bennouna;

(b) By sixteen votes to one,

Finds that it is not necessary to examine the objection to its jurisdiction in so far as it concerns sovereignty over the other maritime features in dispute between the Parties and the maritime delimitation between the Parties;

IN FAVOUR: President Higgins; Vice-President Al-Khasawneh; Judges Ranjeva, Shi, Koroma, Parra-Aranguren, Buergenthal, Owada, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov; Judges *ad hoc* Fortier, Gaja;

AGAINST: Judge Simma;

(3) As regards the jurisdiction of the Court,

(a) Unanimously,

Finds that it has jurisdiction, on the basis of 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;

(b) Unanimously,

Finds that it has jurisdiction, on the basis of Article XXXI of the Pact of Bogotá, to adjudicate upon the dispute concerning the maritime delimitation between the Parties.

*

* *

Vice-President Al-Khasawneh appended a dissenting opinion to the Judgment of the Court; Judge Ranjeva appended a separate opinion; Judges Parra-Aranguren, Simma and Tomka appended declarations; Judge Abraham appended a separate opinion; Judge Keith appended a declaration; Judge Bennouna appended a dissenting opinion; Judge *ad hoc* Gaja appended a declaration.

*

* *

Chronology of the procedure and submissions of the Parties (paras. 1–14)

On 6 December 2001, Nicaragua filed in the Registry of the Court an Application instituting proceedings against 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.

In its Application, Nicaragua sought to found the jurisdiction of the Court on the provisions of Article XXXI of the American Treaty on Pacific Settlement, officially known as the "Pact of Bogotá", as well as on 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.

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 in the case. Nicaragua first chose Mr. Mohammed Bedjaoui, who resigned on 2 May 2006, and subsequently Mr. Giorgio Gaja. Colombia chose Mr. Yves Fortier.

By an Order dated 26 February 2002, the Court fixed 28 April 2003 as the time-limit for the filing of the Memorial of Nicaragua and 28 June 2004 as the time-limit for the filing of the Counter-Memorial of Colombia. Nicaragua filed its Memorial within the time-limit so prescribed.

On 21 July 2003, within the time-limit set by Article 79, paragraph 1, of the Rules of Court, as amended on 5 December 2000, Colombia raised preliminary objections to the jurisdiction of the Court. Consequently, by an Order dated 24 September 2003, the Court, noting that by virtue of Article 79, paragraph 5, of the Rules of Court, the proceedings on the merits were suspended, fixed 26 January 2004 as the time-limit for the presentation by Nicaragua of a written statement of its observations and submissions on the preliminary objections made by Colombia. Nicaragua 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 were held between 4 June and 8 June 2007. At the conclusion of the oral proceedings, the Parties presented the following final submissions to the Court:

On behalf of the Government of Colombia,

"Pursuant to Article 60 of the Rules of the Court, having regard to Colombia's pleadings, written and oral, Colombia respectfully requests the Court to adjudge and declare that

(1) under the Pact of Bogotá, and in particular in pursuance of Articles VI and XXXIV, the Court declares itself to be without jurisdiction to hear the controversy submitted to it by Nicaragua under Article XXXI, and declares that controversy ended;

(2) under Article 36, paragraph 2, of the Statute of the Court, the Court has no jurisdiction to entertain Nicaragua's Application;

and that

(3) Nicaragua's Application is dismissed."

On behalf of the Government of Nicaragua,

"In accordance with Article 60 of the Rules of Court and having regard to the pleadings, written and oral, the Republic of Nicaragua respectfully requests the Court, to adjudge and declare that:

1. The Preliminary Objections submitted by the Republic of Colombia, both in respect of the jurisdiction based upon the Pact of Bogotá, and in respect of the jurisdiction based upon Article 36, paragraph 2, of the Statute of the Court, are invalid.

2. In the alternative, the Court is requested to adjudge and declare, in accordance with the provisions of Article 79, paragraph 9, of the Rules of Court that the objections

submitted by the Republic of Colombia do not have an exclusively preliminary character.

3. In addition, the Republic of Nicaragua requests the Court to reject the request of the Republic of Colombia to declare the controversy submitted to it by Nicaragua under Article XXXI of the Pact of Bogotá 'ended', in accordance with Articles VI and XXXIV of the same instrument.

4. Any other matters not explicitly dealt with in the foregoing Written Statement and oral pleadings, are expressly reserved for the merits phase of this proceeding."

Historical background
(paras. 15–32)

The Court gives a brief account of the history which forms the background of the dispute between the Parties (only parts of which are referred to below).

It notes that on 24 March 1928, a "Treaty concerning Territorial Questions at Issue between Colombia and Nicaragua" was signed at Managua (hereinafter the "1928 Treaty"), in which both countries expressed their desire to put "an end to the territorial dispute between them". Article I of that Treaty provided as follows:

"The Republic of Colombia recognises the full and entire sovereignty of the Republic of Nicaragua over the Mosquito Coast between Cape Gracias a Dios and the San Juan River, and over Mangle Grande and Mangle Chico Islands in the Atlantic Ocean (Great Corn Island and Little Corn Island). The Republic of Nicaragua recognises the full and entire sovereignty of the Republic of Colombia over the islands of San Andrés, Providencia and Santa Catalina and over the other islands, islets and reefs forming part of the San Andrés Archipelago.

The present Treaty does not apply to the reefs of Roncador, Quitasueño and Serrana, sovereignty over which is in dispute between Colombia and the United States of America." [Translation by the Secretariat of the League of Nations, for information.]

The instruments of ratification of the 1928 Treaty were exchanged at Managua on 5 May 1930. The Parties signed on that occasion a Protocol of Exchange of Ratifications (hereinafter the "1930 Protocol"). The Protocol noted that the 1928 Treaty was concluded between Colombia and Nicaragua "with a view to putting an end to the dispute between both Republics concerning the San Andrés Archipelago and the Nicaraguan Mosquito Coast". The Protocol stipulated as follows:

"The undersigned, in virtue of the full powers which have been granted to them and on the instructions of their respective Governments, hereby declare that the San Andrés and Providencia Archipelago mentioned in the first Article of the said Treaty does not extend west of the 82nd degree of longitude west of Greenwich." [Translation by the Secretariat of the League of Nations, for information.]

In a diplomatic Note dated 4 June 1969, Colombia protested against the granting of certain oil exploration concessions and reconnaissance permits by Nicaragua, which allegedly covered Quitasueño and the waters surrounding it as well as maritime zones that surpassed the 82nd meridian to the east. With respect to Quitasueño, Colombia pointed out that the 1928 Treaty explicitly declared that the Roncador, Quitasueño and Serrana cays were in dispute between Colombia and the United States. Colombia also made "a formal reservation . . . of its rights over the referenced territory, as well as over the adjacent maritime zone". With respect to the maritime zones over which oil exploration concessions had been granted, Colombia observed that the 82nd meridian had been noted in the 1930 Protocol as the western boundary of the Archipelago of San Andrés and Providencia.

In a diplomatic Note dated 12 June 1969, Nicaragua asserted, with respect to the oil exploration concessions, that the areas concerned were part of its continental shelf and that the concessions had therefore been granted "in use of the sovereign rights [Nicaragua] fully and effectively exercises in accordance with the norms of international law". As to the reference to the 82nd meridian in the 1930 Protocol, Nicaragua asserted that "[a] simple reading of the . . . texts makes it clear that the objective of this provision is to clearly and specifically establish in a restrictive manner, the extension of the Archipelago of San Andrés, and by no valid means can it be interpreted as a boundary of Nicaraguan rights or creator of a border between the two countries. On the contrary, it acknowledges and confirms the sovereignty and full domain of Nicaragua over national territory in that zone".

In a Note in response dated 22 September 1969, Colombia *inter alia* made a "formal declaration of sovereignty in the maritime areas located East of Meridian 82 of Greenwich", relying on the 1928 Treaty and 1930 Protocol. Colombia also pointed to the exclusion in the 1928 Treaty of the Roncador, Quitasueño and Serrana cays "from any negotiations between Colombia and Nicaragua".

On 23 June 1971, Nicaragua sent a memorandum to the Department of State of the United States formally reserving its rights over its continental shelf in the area around Roncador, Quitasueño and Serrana and noting that it considered those banks to be part of its continental shelf. It further stated that it could not accept Colombia's contention that the 82nd meridian referred to in the 1930 Protocol set the dividing line between the respective maritime zones of the two States since it only constituted the limit of the San Andrés Archipelago.

On 8 September 1972, Colombia and the United States signed the Treaty concerning the status of Quitasueño, Roncador and Serrana (also known as the Vásquez-Saccio Treaty). Article 1 of the Treaty provided that "the Government of the United States hereby renounces any and all claims to sovereignty over Quita Sueño, Roncador and Serrana". On the same day, there was an Exchange of Notes between Colombia and the United States concerning their "legal position respecting Article 1 of [the] Treaty". The United States affirmed that its legal position was, *inter alia*, that "Quita Sueño, being permanently submerged at high tide, is at the present time not subject to the exercise of sovereignty" and that the 1928 Treaty did not apply to Roncador, Quitasueño and Serrana. For its part, Colombia stated that its position was that the "[t]he physical status of Quita Sueño is not incompatible with the exercise of sovereignty" and that "with the renunciation of sovereignty by the United States over Quita Sueño, Roncador, and Serrana,

the Republic of Colombia is the only legitimate title holder on those banks or cays, in accordance with the [1928 Treaty and 1930 Protocol] and international law".

On 4 October 1972, the National Assembly of Nicaragua adopted a formal declaration proclaiming Nicaraguan sovereignty over Roncador, Quitasueño and Serrana. On 7 October 1972, Nicaragua formally protested, in diplomatic Notes to Colombia and the United States, against the signing of the Vásquez-Saccio Treaty and maintained that "the banks located in that zone . . . [were] part of [Nicaragua's] territory and therefore subject to its sovereignty". It added that it could not accept Colombia's contention that the 82nd meridian referred to in the 1930 Protocol constituted the boundary line of the respective maritime areas of the two States since it did not coincide with the letter or spirit of the Protocol, the clear intention of which was to specify that the San Andrés Archipelago did not extend west further than the 82nd meridian.

In July 1979 the Sandinista Government came to power in Nicaragua. On 4 February 1980, the Minister for Foreign Affairs of Nicaragua published an official declaration and a "Libro Blanco" (hereinafter "White Paper") in which Nicaragua declared

> "the nullity and lack of validity of the Bárcenas-Meneses-Esguerra Treaty [the 1928 Treaty] . . . [concluded] in a historical context which incapacitated as rulers the presidents imposed by the American forces of intervention in Nicaragua and which infringed . . . the principles of the National Constitution in force . . .".

In a diplomatic Note sent to Nicaragua on 5 February 1980, Colombia rejected the declaration of 4 February 1980 as "an unfounded claim that counters historical reality and breaches the most elementary principles of public international law". In the view of the Colombian Government, the 1928 Treaty "[was] a valid, perpetual instrument, and in full force in light of the universally recognized legal norms".

The new government which came to power in Nicaragua in 1990 and subsequent governments maintained the position with regard to the meaning of certain provisions of the 1928 Treaty and 1930 Protocol which had been stated from 1969 onwards and the position with regard to the invalidity of the 1928 Treaty which had been set out in the 1980 White Paper.

Subject-matter of the dispute
(paras. 33–42)

The Court initially notes that the Parties have presented different views about whether there is an extant dispute between them and, if so, the subject-matter of that dispute. Consequently, before addressing Colombia's preliminary objections, it needs to examine these issues.

The Court recalls that according to Nicaragua, the dispute submitted to the Court concerned (i) the validity of the 1928 Treaty and its termination due to material breach; (ii) the interpretation of the 1928 Treaty, particularly regarding the geographical scope of the San Andrés Archipelago; (iii) the legal consequences of the exclusion from the scope of the 1928 Treaty of Roncador, Quitasueño and Serrana; and (iv) the maritime delimitation between the Parties including the legal significance of the reference to the 82nd meridian in the 1930 Protocol. In Nicaragua's view, the fourth element "implie[d] and encompasse[d] all the others". In this regard, Nicaragua contended that the question of sovereignty over the maritime features was both accessory and preliminary to that of maritime delimitation. Finally, Nicaragua also submitted that the question whether the 1928 Treaty has settled all questions between the Parties is "the very object of the dispute" and "the substance of the case".

Colombia, for its part, denied that there was an extant dispute over which the Court could have jurisdiction, claiming that the matters in issue had already been settled by the 1928 Treaty. It further contended that the real purpose behind Nicaragua's Application was maritime delimitation rather than the determination of sovereignty over the maritime features.

The Court notes that, while the Applicant must present its view of the "subject of the dispute" pursuant to Article 40, paragraph 1, of the Statute of the Court, it is for the Court itself to determine the subject-matter of the dispute before it, taking account of the submissions of the Parties. As a preliminary point, the Court recalls that the Parties disagree on whether or not the dispute between them had been "settled" by the 1928 Treaty within the meaning of Article VI of the Pact of Bogotá. The Court first notes that Article VI of the Pact provides that the dispute settlement procedures in the Pact "may not be applied to matters already settled by arrangement between the parties, or by arbitral award or by decision of an international court, or which are governed by agreements or treaties in force on the date of the conclusion of the present Treaty" (emphasis added). The Court also notes that according to Article XXXIV of the Pact controversies over matters which are governed by agreements or treaties shall be declared "ended" in the same way as controversies over matters settled by arrangement between the parties, arbitral award or decision of an international court. The Court considers that, in the specific circumstances of the case, there is no difference in legal effect, for the purpose of applying Article VI of the Pact, between a given matter being "settled" by the 1928 Treaty and being "governed" by that Treaty. In light of the foregoing, the Court decides to use the word "settled" in its Judgment.

After having examined Nicaragua's arguments, the Court considers that the question whether the 1928 Treaty and 1930 Protocol settled the matters in dispute between the Parties concerning sovereignty over the islands and maritime features and the course of the maritime boundary does not form the subject-matter of the dispute between the Parties and that, in the circumstances of the case, the question is a preliminary one.

With respect to Colombia's contention that Nicaragua's true interest lay in the maritime delimitation rather than in sovereignty over the maritime features, the Court notes that nonetheless "the claim of one party is positively opposed by the other" as to sovereignty over the maritime features.

The Court thus concludes that the questions which constitute the subject-matter of the dispute between the Parties on the merits are, first, sovereignty over territory (namely the islands and other maritime features claimed by the Parties)

and, second, the course of the maritime boundary between the Parties.

First preliminary objection
(paras. 43–120)

General overview of the arguments of the Parties

The Court recalls that in its first preliminary objection, Colombia claims that pursuant to Articles VI and XXXIV of the Pact of Bogotá, the Court is without jurisdiction under Article XXXI of the Pact to hear the controversy submitted to it by Nicaragua and should declare the controversy ended. In this regard, Colombia, referring to Article VI of the Pact, argues that the matters raised by Nicaragua were settled by a treaty in force on the date on which the Pact was concluded, namely the 1928 Treaty and the 1930 Protocol. Colombia adds that this question can and must be considered at the preliminary objections stage.

Nicaragua claims that the Court has jurisdiction under Article XXXI of the Pact of Bogotá. In this regard, Nicaragua argues that the 1928 Treaty and its 1930 Protocol did not settle the dispute between Nicaragua and Colombia within the meaning of Article VI of the Pact of Bogotá because the 1928 Treaty was invalid or had been terminated and that, even if that was not the case, the 1928 Treaty did not cover all the matters now in dispute between the Parties. Moreover, Nicaragua contends that the Court may not pronounce upon these issues at this stage of the proceedings since that would require an examination of the merits of the case.

The appropriate stage of proceedings for examination of the preliminary objection

The Court recalls that, under Article 79, paragraph 9, of the Rules of Court, there are three ways in which it may dispose of a preliminary objection: the Court "shall either uphold the objection, reject it, or declare that the objection does not possess, in the circumstances of the case, an exclusively preliminary character". The Court further recalls that, in the Nuclear Tests cases (albeit in slightly different circumstances), it emphasized that while examining questions of jurisdiction and admissibility, it is entitled, and in some circumstances may be required, to go into other questions which may not be strictly capable of classification as matters of jurisdiction or admissibility but are of such a nature as to require examination before those matters.

The Court believes that it is not in the interest of the good administration of justice for it to limit itself at that juncture to stating merely that there is a disagreement between the Parties as to whether the 1928 Treaty and 1930 Protocol settled the matters which are the subject of the controversy within the meaning of Article VI of the Pact of Bogotá, leaving every aspect thereof to be resolved on the merits.

In principle, a party raising preliminary objections is entitled to have these objections answered at the preliminary stage of the proceedings unless the Court does not have before it all facts necessary to decide the questions raised or if answering the preliminary objection would determine the dispute, or some elements thereof, on the merits. The Court finds itself in neither of these situations in the case at hand. The determination by the Court of its jurisdiction may touch upon certain aspects of the merits of the case. Moreover, the Court has already found that the question of whether the 1928 Treaty and the 1930 Protocol settled the matters in dispute does not constitute the subject-matter of the dispute on the merits. It is rather a preliminary question to be decided in order to ascertain whether the Court has jurisdiction.

In light of the foregoing, the Court finds that it is unable to uphold Nicaragua's contention that it is precluded from addressing Colombia's first preliminary objection at this stage of the proceedings.

Jurisdictional system of the Pact of Bogotá

The Court makes mention of the relevant provisions of the Pact of Bogotá in the case, beginning with Article XXXI, which reads as follows:

"In conformity with Article 36, paragraph 2, of the Statute of the International Court of Justice, the High Contracting Parties declare that they recognize, in relation to any other American State, the jurisdiction of the Court as compulsory *ipso facto*, without the necessity of any special agreement so long as the present Treaty is in force, in all disputes of a juridical nature that arise among them concerning:

(a) The interpretation of a treaty;

(b) Any question of international law;

(c) The existence of any fact which, if established, would constitute the breach of an international obligation; or

(d) The nature or extent of the reparation to be made for the breach of an international obligation."

The other relevant provisions are Articles VI and XXXIV of the Pact.

Article VI provides that:

"The aforesaid procedures, furthermore, may not be applied to matters already settled by arrangement between the parties, or by arbitral award or by decision of an international court, or which are governed by agreements or treaties in force on the date of the conclusion of the present Treaty."

Article XXXIV reads as follows:

"If the Court, for the reasons set forth in Articles V, VI and VII of this Treaty, declares itself to be without jurisdiction to hear the controversy, such controversy shall be declared ended."

These provisions indicate that if the Court were to find that the matters referred to it by Nicaragua pursuant to Article XXXI of the Pact of Bogotá had previously been settled by one of the methods spelled out in Article VI thereof, it would lack the requisite jurisdiction under the Pact to decide the case.

The question whether the 1928 Treaty and 1930 Protocol settled the matters in dispute between the Parties

The Court considers the arguments of the Parties and examines the factual background of the conclusion of the 1928 Treaty and the signature of the 1930 Protocol. It states that, in order to ascertain whether it has jurisdiction, it has to decide the question whether, on the date of the conclusion of the

Pact of Bogotá in 1948, the matters raised by Nicaragua were, pursuant to Article VI thereof, "governed by agreements or treaties in force". For this purpose, the first point for the Court to consider is whether the treaty, which Colombia alleges to have settled the matters constituting the subject-matter of the dispute, was in force in 1948.

The Court notes that, with respect to the validity of the 1928 Treaty, Nicaragua first contends that the Treaty was "concluded in manifest violation of the Nicaraguan Constitution of 1911 that was in force in 1928" and, secondly, that at the time the Treaty was concluded, Nicaragua was under military occupation by the United States and was precluded from concluding treaties that ran contrary to the interests of the United States and from rejecting the conclusion of treaties that the United States demanded it to conclude. Nicaragua submits in this respect that Colombia was aware of this situation and "took advantage of the US occupation of Nicaragua to extort from her the conclusion of the 1928 Treaty". Nicaragua claims that it remained under the influence of the United States even after the withdrawal of the last United States troops at the beginning of 1933.

Colombia, for its part, maintains that Nicaragua's assertion relating to the invalidity of the 1928 Treaty is unfounded. It observes that, even assuming that the 1928 Treaty was incompatible with Nicaragua's 1911 Constitution or that Nicaragua lacked competence to freely conclude treaties due to occupation by the United States, these claims were not raised during the ratification process in the Nicaraguan Congress in 1930, nor for some 50 years thereafter. It points out that, in fact, these arguments were raised for the first time in 1980. Colombia further notes that in 1948, when the Pact of Bogotá was concluded, Nicaragua made no reservation with regard to the 1928 Treaty, despite the fact that Nicaragua knew that it had the right to make such a reservation and made a reservation with regard to the validity of an arbitral award. Finally, Colombia contends that, as a consequence, Nicaragua is now precluded from raising the question of validity of the 1928 Treaty and its 1930 Protocol.

The Court recalls that the clear purpose of Article VI of the Pact of Bogotá was to preclude the possibility of using the procedures provided for in the Pact, and in particular judicial remedies, in order to reopen such matters as were settled between the parties to the Pact, because they had been the object of an international judicial decision or a treaty. When ratifying the Pact, States envisaged bringing within its procedures matters not yet so settled.

States parties to the Pact of Bogotá would have considered that matters settled by a treaty or international judicial decision had been definitively resolved unless a specific reservation relating thereto was made under Articles LIV and LV of the Pact. Nicaragua did not enter any reservation regarding the 1928 Treaty when it became a party to the Pact of Bogotá, the treaty it now invokes as a basis of jurisdiction, although it did enter a reservation with regard to arbitral decisions the validity of which it contested. The Court notes that there is no evidence that the States parties to the Pact of Bogotá of 1948, including Nicaragua, considered the 1928 Treaty to be invalid. On 25 May 1932, Nicaragua registered the Treaty and Protocol with the League of Nations as a binding agreement, pursuant to Article 18 of the Covenant of the League, Colombia having already registered the Treaty on 16 August 1930.

The Court recalls that Nicaragua advanced "the nullity and lack of validity" of the 1928 Treaty for the first time in an official declaration and White Paper published on 4 February 1980. The Court thus notes that, for more than 50 years, Nicaragua has treated the 1928 Treaty as valid and never contended that it was not bound by the Treaty, even after the withdrawal of the last United States troops at the beginning of 1933. At no time in those 50 years, even after it became a Member of the United Nations in 1945 and even after it joined the Organization of American States in 1948, did Nicaragua contend that the Treaty was invalid for whatever reason, including that it had been concluded in violation of its Constitution or under foreign coercion. On the contrary, Nicaragua has, in significant ways, acted as if the 1928 Treaty was valid. Thus, in 1969, when Nicaragua responded to Colombia's claim that the 82nd meridian, referred to in the 1930 Protocol, constituted the maritime boundary between the two States, Nicaragua did not invoke the invalidity of the Treaty but argued instead that the 1928 Treaty and 1930 Protocol did not effect a maritime delimitation. Similarly, in 1971 when Nicaragua made representations to the United States reserving its rights over Roncador, Quitasueño and Serrana, it did not call into question the validity of the 1928 Treaty. The Court thus finds that Nicaragua cannot today be heard to assert that the 1928 Treaty was not in force in 1948.

The Court accordingly finds that the 1928 Treaty was valid and in force on the date of the conclusion of the Pact of Bogotá in 1948, the date by reference to which the Court must decide on the applicability of the provisions of Article VI of the Pact of Bogotá setting out an exception to the Court's jurisdiction under Article XXXI thereof.

The Court recalls that Nicaragua argues that, even if the 1928 Treaty was valid, it has been terminated due to Colombia's interpretation of the Treaty in 1969, which Nicaragua characterized as a material breach thereof. This contention is denied by Colombia. The Court considers that the question whether the Treaty was terminated in 1969 is not relevant to the question of its jurisdiction since what is determinative, under Article VI of the Pact of Bogotá, is whether the 1928 Treaty was in force on the date of the conclusion of the Pact, i.e. in 1948, and not in 1969. Accordingly, there is no need for the Court to address the question of the purported termination of the 1928 Treaty in 1969 for the purposes of the ascertainment of its jurisdiction.

The Court then turns to the question whether the Treaty and its 1930 Protocol settled the matters in dispute between the Parties and consequently whether the Court has jurisdiction in the case under Article XXXI of the Pact. It recalls that it has already concluded that there are two questions in dispute between the Parties on the merits: first, territorial sovereignty over islands and other maritime features and, second, the course of the maritime boundary between the Parties. The Court notes that the Parties disagree about whether various matters relating to territorial sovereignty were settled by the 1928 Treaty, namely sovereignty over the three islands of the

San Andrés Archipelago expressly named in the Treaty, the scope and composition of the rest of the San Andrés Archipelago and sovereignty over Roncador, Quitasueño and Serrana. The Parties also disagree about whether the 1930 Protocol effected a maritime delimitation between them.

With respect to the question of its jurisdiction as regards the issue of sovereignty over the named islands of the San Andrés Archipelago, the Court considers that it is clear on the face of the text of Article I that the matter of sovereignty over the islands of San Andrés, Providencia and Santa Catalina has been settled by the 1928 Treaty within the meaning of Article VI of the Pact of Bogotá. In the Court's view there is no need to go further into the interpretation of the Treaty to reach that conclusion and there is nothing relating to this issue that could be ascertained only on the merits.

Nicaragua's contention that the 1928 Treaty is invalid has already been dealt with by the Court. With regard to Nicaragua's further assertion that the 1928 Treaty has been terminated by material breach due to the interpretation adopted by Colombia from 1969 onwards, that issue has not been addressed by the Court at this stage since it is not relevant to the question of its jurisdiction by reference to Article VI of the Pact of Bogotá. Even if the Court were to find that the 1928 Treaty has been terminated, as claimed by Nicaragua, this would not affect the sovereignty of Colombia over the islands of San Andrés, Providencia and Santa Catalina. The Court recalls that it is a principle of international law that a territorial régime established by treaty "achieves a permanence which the treaty itself does not necessarily enjoy" and that the continued existence of that régime is not dependent upon the continuing life of the treaty under which the régime is agreed.

In the light of the foregoing, the Court finds that it can dispose of the issue of the three islands of the San Andrés Archipelago expressly named in the first paragraph of Article I of the 1928 Treaty at the current stage of the proceedings. That matter has been settled by the Treaty. Consequently, Article VI of the Pact is applicable on this point and therefore the Court does not have jurisdiction under Article XXXI of the Pact of Bogotá over the question of sovereignty over the three named islands. Accordingly, the Court upholds the first preliminary objection raised by Colombia in so far as it concerns the Court's jurisdiction as regards the question of sovereignty over the islands of San Andrés, Providencia and Santa Catalina.

As regards the question of the scope and composition of the rest of the San Andrés Archipelago, the Court recalls that there is agreement between the Parties that the San Andrés Archipelago includes the islands of San Andrés, Providencia and Santa Catalina as well as adjacent islets and cays. However, the Parties disagree as to which maritime features other than those named islands form part of the Archipelago.

The Court considers that it is clear on the face of the text of the first paragraph of Article I of the 1928 Treaty that its terms do not provide the answer to the question as to which maritime features apart from the islands of San Andrés, Providencia and Santa Catalina form part of the San Andrés Archipelago over which Colombia has sovereignty. That being so, this matter has not been settled within the meaning of Article VI of the Pact of Bogotá and the Court has jurisdiction under Article XXXI of the Pact of Bogotá. Therefore, the Court cannot uphold the first preliminary objection raised by Colombia in so far as it concerns the Court's jurisdiction as regards the question of sovereignty over the maritime features forming part of the San Andrés Archipelago, save for the islands of San Andrés, Providencia and Santa Catalina.

With respect to the question of its jurisdiction as regards the matter of sovereignty over Roncador, Quitasueño and Serrana, the Court observes that the meaning of the second paragraph of Article I of the 1928 Treaty is clear: this treaty does not apply to the three maritime features in question. Therefore, the limitations contained in Article VI of the Pact of Bogotá do not apply to the question of sovereignty over Roncador, Quitasueño and Serrana. The Court thus has jurisdiction over this issue under Article XXXI of the Pact of Bogotá and cannot uphold the first preliminary objection raised by Colombia in so far as it concerns the Court's jurisdiction as regards the question of sovereignty over Roncador, Quitasueño and Serrana.

With respect to the question of its jurisdiction as regards the issue of the maritime delimitation, the Court, after examining the arguments presented by the Parties and the material submitted to it, concludes that the 1928 Treaty and 1930 Protocol did not effect a general delimitation of the maritime boundary between Colombia and Nicaragua. Since the dispute concerning maritime delimitation has not been settled by the 1928 Treaty and 1930 Protocol within the meaning of Article VI of the Pact of Bogotá, the Court has jurisdiction under Article XXXI of the Pact. Therefore, the Court cannot uphold Colombia's first preliminary objection in so far as it concerns the Court's jurisdiction as regards the question of the maritime delimitation between the Parties.

Second preliminary objection
(paras. 121–140)

In addition to Article XXXI of the Pact of Bogotá, Nicaragua invoked as a basis of the Court's jurisdiction 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 for 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.

In its second preliminary objection, Colombia asserts that the Court has no jurisdiction on this basis. It claims that jurisdiction under the Pact of Bogotá is governing and hence exclusive. In its view, since the Court has jurisdiction under Article XXXIV of the Pact to declare the controversy ended and must do so in the case at hand, the Court may not proceed further to consider whether it might have jurisdiction under the optional clause. In support of its claim, Colombia relies on the Court's Judgment in the Border and Transborder Armed Actions (Nicaragua v. Honduras) case, in which Nicaragua also asserted jurisdiction on the basis of Article XXXI of the Pact of Bogotá and on the basis of optional clause declarations. Colombia notes that, in the Armed Actions case, the Court declared that "in relations between the States parties to the Pact of Bogotá, that Pact is governing" and that

"the commitment in Article XXXI . . . is an autonomous commitment, independent of any other which the parties may have undertaken or may undertake by depositing with the United Nations Secretary-General a declaration of acceptance of compulsory jurisdiction under Article 36, paragraphs 2 and 4, of the Statute" (*Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 82, para. 27 and p. 85, para. 36).

Colombia considers that the Court thus laid down the principle of primacy of the title of jurisdiction under the Pact of Bogotá. It concludes that, when an Applicant invokes both the Pact of Bogotá and optional clause declarations, it is the Pact of Bogotá, as *lex specialis*, which governs or, in other words, is determinative and conclusive.

Colombia claims that in the Armed Actions case, the Court held that the title of jurisdiction under the Pact of Bogotá prevailed over subsequent optional clause declarations. Colombia points out that, in the case at hand, the argument that the Pact of Bogotá takes precedence is even stronger since the optional clause declarations of Nicaragua and Colombia were made before the entry into force of the Pact of Bogotá. Therefore, the Pact of Bogotá is not only *lex specialis* but also *lex posterior*.

In Colombia's view, "it is the Pact of Bogotá which constitutes the Court's title of jurisdiction in our case" and were the Court to conclude that it had no jurisdiction to adjudicate upon the dispute, the application of the Pact would require the Court to declare the controversy ended pursuant to Article XXXIV thereof, "not only for the purposes of the Court's jurisdiction under the Pact, but for all purposes". In this regard, Colombia claims that a dispute cannot be settled and ended and yet at the same time be a dispute capable of adjudication by the Court pursuant to jurisdiction accorded under the optional clause. Consequently, once the controversy between the Parties has been declared by the Court to be ended under the Pact of Bogotá, there would be no controversy outstanding to which jurisdiction could attach under any other title, including the declarations of the Parties under the optional clause.

Colombia further argues that, in any event, the Court would have no jurisdiction on the basis of the Parties' optional clause declarations since Colombia's declaration had been withdrawn (December 2001) by the date of the filing of Nicaragua's Application. Colombia finally contends that even if its declaration were found to be in force at the time when Nicaragua filed its Application, the alleged dispute would fall outside the scope of the declaration as a result of a reservation which excluded disputes arising out of facts prior to 6 January 1932.

Nicaragua, for its part, submits that although the Court stated in its Judgment in the Armed Actions case that "in relations between the States parties to the Pact of Bogotá, that Pact is governing", this cannot "destroy the value of the Optional Clause declarations as an independent basis of jurisdiction" since they "have an intrinsic value in and of themselves, and their operation is not predetermined by other titles of jurisdiction". It considers that the primacy of the Pact does not signify exclusiveness. Nicaragua contends that this was recognized by the Court itself in the Armed Actions case when it stated that the commitment under the Pact of Bogotá is "independent of any other which the parties may have undertaken . . . by depositing . . . a declaration of acceptance of compulsory jurisdiction" (emphasis added). It points out that in the Armed Actions case, the Court did not rule out the possibility that it also had jurisdiction under the Parties' optional clause declarations but simply concluded that it "[did] not need to consider" that question since it had already found that it had jurisdiction under the Pact of Bogotá.

In Nicaragua's view, if the Court were to declare the controversy ended pursuant to Article XXXIV of the Pact, that finding would have to be understood within the framework of the Pact itself. Thus the controversy would be ended only to the extent that it would no longer be possible to invoke the Pact as a basis of jurisdiction. It underlines that such a finding pursuant to Article XXXIV of the Pact does not exclude the existence of other bases of jurisdiction such as the declarations by the Parties under the optional clause.

Nicaragua argues that the two bases of jurisdiction, namely Article XXXI of the Pact of Bogotá and the declarations made by the Parties under the optional clause are complementary and that it is for the Court to decide whether to rely upon only one of them or to combine them. It points out that the States parties to the Pact of Bogotá intended to broaden the jurisdiction of the Court not to limit existing obligations deriving from other instruments. In this context, Nicaragua refers to the statement of the Permanent Court of International Justice in the Electricity of Sofia and Bulgaria case regarding multiple agreements accepting compulsory jurisdiction.

Nicaragua denies that Colombia's declaration was not in force at the time of the filing of the Application. It contends that reasonable notice is required for the withdrawal of declarations and that this condition was not complied with by Colombia. Nicaragua does not dispute that Colombia's declaration applied only to disputes arising from facts subsequent to 6 January 1932; it argues, however, that the generating fact of the dispute, namely the interpretation of the 1928 Treaty and 1930 Protocol adopted by Colombia from 1969 onwards, arose after 6 January 1932. Finally, Nicaragua asserts, referring to the provisions of Article 79, paragraph 9, of the Rules of Court, that in any event the objection submitted by Colombia does not have an exclusively preliminary character.

The Court notes initially that the question of whether the optional clause declarations of the Parties can provide a distinct and sufficient basis of jurisdiction in the case now only arises in respect of that part of the dispute relating to the sovereignty over the three islands expressly named in Article I of the 1928 Treaty: San Andrés, Providencia and Santa Catalina. Having first examined the preliminary objection raised by Colombia to jurisdiction under the Pact of Bogotá, the Court has concluded that it has jurisdiction on the basis of Article XXXI of the Pact to deal with all the other aspects of the dispute. Consequently, no purpose is served by examining whether, in relation to those aspects, the declarations of the Parties under the optional clause could also provide a basis of the Court's jurisdiction.

The Court recalls that in the Armed Actions case it stated that "[s]ince, in relations between the States parties to the Pact

of Bogotá, that Pact is governing, the Court will first examine the question whether it has jurisdiction under Article XXXI of the Pact" (emphasis added). However, this cannot be interpreted in any way other than that the Court, faced with the two titles of jurisdiction invoked, could not deal with them simultaneously and decided to proceed from the particular to the more general, without thereby implying that the Pact of Bogotá prevailed over and excluded the second title of jurisdiction, namely the optional clause declarations.

The Court thus considers that the provisions of the Pact of Bogotá and the declarations made under the optional clause represent two distinct bases of the Court's jurisdiction which are not mutually exclusive. It notes that the scope of its jurisdiction could be wider under the optional clause than under the Pact of Bogotá.

The Court observes that neither Colombia nor Nicaragua has made a reservation to their respective optional clause declarations identical or similar to the restriction contained in Article VI of the Pact of Bogotá. Accordingly, the limitation imposed by Article VI of the Pact would not be applicable to jurisdiction under the optional clause.

The Court notes that its acknowledgment of the fact that sovereignty over the islands of San Andrés, Providencia and Santa Catalina was attributed to Colombia under the 1928 Treaty was made for the purposes of ascertaining whether or not the Court had jurisdiction over the matter under the Pact of Bogotá. However, it is equally relevant for the purposes of determining whether the Court has jurisdiction on the basis of the optional clause declarations. In this regard, the Court notes that Article 36, paragraph 2, of the Statute expressly requires that, in order for the Court to have jurisdiction on the basis of optional clause declarations, there must exist a "legal dispute" between the Parties.

Given the Court's finding that there is no extant legal dispute between the Parties on the question of sovereignty over the three islands, the Court cannot have jurisdiction over this question either under the Pact of Bogotá or on the basis of the optional clause declarations.

In the light of the foregoing, the Court finds that no practical purpose would be served by proceeding further with the other matters raised in the second preliminary objection filed by Colombia. The Court thus upholds the second preliminary objection relating to jurisdiction under the optional clause declarations raised by Colombia in so far as it concerns the Court's jurisdiction as regards the question of sovereignty over the islands of San Andrés, Providencia and Santa Catalina, and finds that it is not necessary to examine the objection in so far as it concerns sovereignty over the other maritime features in dispute between the Parties and the maritime delimitation between the Parties.

Subsequent procedure
(para. 141)

In accordance with Article 79, paragraph 9, of the Rules of Court, time-limits for the further proceedings shall subsequently be fixed by Order of the Court.

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Dissenting opinion of Vice-President Al-Khasawneh

Vice-President Al-Khasawneh found himself unable to concur with the arguments and findings in the Judgment upholding Colombia's preliminary objections to jurisdiction in so far as they concern sovereignty over the islands of San Andrés, Providencia and Santa Catalina. While acknowledging that the Court may need to touch on the merits of a case in order to ascertain its jurisdiction at the preliminary objections phase of proceedings, Vice-President Al-Khasawneh is of the view that the circumstances of this case were such that a decision on jurisdiction under the Pact of Bogotá and under Article 36, paragraph 2, of the Statute of the Court did not possess an exclusively preliminary character (see Article 79, paragraph 9).

The particular circumstances of the case leading to this conclusion are as follows: in order to determine whether the Court has jurisdiction under the Pact of Bogotá in respect of the dispute relating to the three above-mentioned islands, the Court must decide upon the validity of the 1928 Treaty and the 1930 Protocol (which validity is contested by Nicaragua). This analysis is required because Article VI of the Pact of Bogotá excludes the jurisdiction of the International Court of Justice in respect of matters "governed by agreements or treaties in force on the date of the conclusion of the present Treaty". The validity of the 1928 Treaty and of the 1930 Protocol are, however, also central to resolving, on the merits, the dispute with respect to sovereignty over the three named islands of the San Andrés Archipelago. Thus, the finding in the Judgment that the Court lacks jurisdiction under the Pact of Bogotá, because the 1928 Treaty and 1930 Protocol are valid, has the effect of prejudging an important aspect of the merits of the dispute before this has been fully argued.

The finding also has the effect of disposing of a range of complex factual and legal issues raised by Nicaragua, via her allegation that the 1928 Treaty and 1930 Protocol are invalid because procured by coercion, without allowing the Parties the opportunity to fully argue the case before the Court, and without adequately setting out the reasons for the decision reached.

Vice-President Al-Khasawneh does not agree with the Court that Article 79, paragraph 9, of the Rules of the Court includes a presumption in favour of the party making a preliminary objection.

Finally, Vice-President Al-Khasawneh considers that the Court was only able to reach the position that deciding the question of the validity of the 1928 Treaty and the 1930 Protocol "would not determine the dispute on the merits" by defining the dispute narrowly and creating an artificial distinction between the subject-matter of the dispute and the questions in dispute. While acknowledging that the Court retains freedom to define the subject-matter of the dispute on the basis of the submissions of the parties, the Vice-President considers that in this case the Court has acted beyond the limits of that freedom; limits imposed by considerations of legitimacy and common sense.

Separate opinion of Judge Ranjeva

The first preliminary objection raised by Colombia does not possess an exclusively preliminary character, states Judge Ranjeva in his opinion. The arguments presented by the Parties confirm the intimate connections between the procedural issues. Indeed, by declaring that the 1928 Treaty put an end to the dispute between Nicaragua and Colombia when it attributed the three islands of San Andrés, Providencia and Santa Catalina, the Court in the Judgment adjudicates two of the Applicant's submissions on the merits: the claim to sovereignty over those islands and the nullity of the treaty owing to substantive defects resulting from coercion and infringement of internal constitutional provisions. Judge Ranjeva holds that the Judgment confuses enforceability of the Treaty against Nicaragua and nullity as a sanction for the invalidity of the Treaty. Aside from failing to respect the adversary principle, the Judgment contains a lacuna: a statement of reasons for choosing Article VI of the Pact of Bogotá as the basis for jurisdiction rather than the optional clause.

Declaration of Judge Parra-Aranguren

1. Notwithstanding his vote in favour of the operative clause of the Judgment, Judge Parra-Aranguren does not agree with paragraph 136 which states: "the Court considers that the provisions of the Pact of Bogotá and the declarations made under the optional clause represent two distinct bases of the Court's jurisdiction which are not mutually exclusive".

2. The conclusion reached in paragraph 136 is supported by making reference to the Judgment in the case Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility (*I.C.J. Reports 1988*, p. 85, para. 36) and to a quotation from the 1939 Judgment of the Permanent Court in the case Electricity Company of Sofia and Bulgaria (*Belgium* v. *Bulgaria*) (*P.C.I.J., Series A/B, No. 77*, p. 76).

3. However, Judge Parra-Aranguren considers that the Armed Actions decision does not support this conclusion in the present Judgment, because as is indicated in paragraph 134, "the Court was merely responding to and rejecting the arguments by Honduras"; and the quotation from the Electricity Company of Sofia and Bulgaria (Belgium v. Bulgaria) Judgment of 1939 is not applicable, because in the present case there is no "multiplicity of agreements concluded accepting the compulsory jurisdiction" of the Court.

4. Judge Parra-Aranguren observes, as indicated in paragraph 122 of the Judgment, that Nicaragua and Colombia made declarations on 24 September 1929 and 30 October 1937 respectively, under Article 36 of the Statute of the Permanent Court of International Justice, which are deemed to be acceptances of the compulsory jurisdiction of this Court under Article 36, paragraph 5, of its Statute; they then made new declarations under Article 36, paragraph 2, of the Statute of the Court as prescribed in Article XXXI of the Pact of Bogotá when they ratified the latter in 1950 and 1968 respectively. In his opinion, it is not possible for two different declarations to continue to be simultaneously in force in the relations between Nicaragua and Colombia, because the second declaration necessarily replaced the first one in their reciprocal relations.

5. Therefore Judge Parra-Aranguren considers that the optional clause declarations made by Nicaragua and Colombia in 1929 and 1937 respectively are no longer in force, and for this reason they cannot be invoked as a basis for the jurisdiction of the Court.

Declaration of Judge Simma

While Judge Simma considers the present Judgment generally satisfactory, he expresses doubts whether the Court has applied Article VI of the Pact of Bogotá to the 1928 Treaty between Nicaragua and Colombia in a correct way. In the same context, Judge Simma has considerable difficulties with the Court's reading of the relationship between, on the one hand, the notion of a matter being "governed by . . . treaties in force" at the time of the conclusion of the Pact in 1948 and that of the continued existence of a "legal dispute" as a precondition for the jurisdiction of the Court on the basis of a declaration of acceptance under the optional clause on the other.

The matter turns on the question of sovereignty over the islands of San Andrés, Providencia and Santa Catalina. The Court concludes that the 1928 Treaty has resolved this question definitively, whereas Nicaragua had argued, *inter alia*, the invalidity of this Treaty *ab initio*. However, according to the Judgment, Nicaragua, through its behaviour towards the Treaty for over 50 years, lost the right to invoke such invalidity; therefore the Treaty is to be regarded as having been "valid and in force" in 1948, with the consequence that the Court does not have jurisdiction under the Pact of Bogotá. In Judge Simma's view, the loss of the right to assert the Treaty's invalidity according to the conditions of the Pact of Bogotá can only be the end of the matter within the framework of that Pact; if a second, independent, basis of jurisdiction existed and actually yielded the jurisdiction of the Court, the issue of the invalidity of the 1928 Treaty would remain open and could be re-argued, this time fully, by Nicaragua. In the present instance, this could possibly have been the case, in view of the Article 36, paragraph 2, declarations of acceptance submitted by both Parties. According to the Court, however, its conclusion that there is no jurisdiction under the Pact of Bogotá at the same time also disposes of jurisdiction under the optional clause system, even though the Court recognizes that we are in presence of two distinct bases of jurisdiction which are not mutually exclusive. Judge Simma therefore considers that the Court should have continued the examination of its jurisdiction by turning to the optional clause declarations of the Parties and scrutinizing the effect of the reservation *ratione temporis* made to the Colombian declaration as well as that of Colombia's denunciation of that declaration. If the Court had followed this course, either the issue of jurisdiction would have been decided in the negative once and for all, or the Nicaraguan law of treaties arguments would have experienced their due fate at the merits stage of the case.

Declaration of Judge Tomka

Judge Tomka concurs with the view of the Court that Nicaragua has treated the 1928 Treaty as valid for more than 50 years and thus acquiesced in its validity. Therefore, Nicaragua's first argument alleging that the 1928 Treaty was invalid

because it was concluded in violation of its Constitution then in force cannot be accepted.

Nicaragua also submitted that it was deprived of its international capacity during the pertinent period since it could not freely express its consent to be bound by international treaties. It seems that the majority has treated this second argument like the first, but Judge Tomka considers that it requires a distinct response.

The second ground of invalidity invoked by Nicaragua is not without difficulty. If it is to be understood broadly, then it would run counter to the other basis of the Court's jurisdiction invoked by Nicaragua: the optional clause declaration under Article 36, paragraph 2, of the Statute. Indeed, Nicaragua made such declaration in 1929, exactly in the pertinent period when its government was allegedly deprived of its international capacity. Nicaragua however admits that it was not prevented from concluding international treaties in general. But then it is difficult to accept its contention that the Nicaraguan Government was deprived of its international capacity during the relevant period. Nicaragua therefore specifies that while it was under occupation by the United States, it was prevented from concluding treaties that ran against the interest of the United States and from rejecting the conclusion of treaties that the United States demanded it to conclude. The interests or demands of a third State are not however sufficient grounds to render a treaty null and void *ab initio*. Furthermore, the Court would not have been able to reach a decision about the alleged coercion without examining the lawfulness of the conduct of the United States which is not a party to these proceedings.

Judge Tomka therefore agrees with the conclusions of the Court that the issue of sovereignty over the islands of San Andrés, Providencia and Santa Catalina is not to be adjudicated at the merits stage.

Separate opinion of Judge Abraham

Judge Abraham expresses his agreement with the substance of the solutions adopted in the Judgment in respect of all aspects of the dispute other than sovereignty over the three islands referred to by name in Article I of the 1928 Treaty (San Andrés, Providencia and Santa Catalina). As to all such aspects, he approves of the Court's decision that the questions raised by Nicaragua's claim were not settled by the 1928 Treaty, that the Court therefore has jurisdiction over them pursuant to Article XXXI of the Pact of Bogotá, and that there is no need for the Court to determine whether it might also have jurisdiction pursuant to the two Parties' optional declarations recognizing the compulsory jurisdiction of the Court.

On the other hand, Judge Abraham distances himself from the way in which the Court has treated the question of sovereignty over the three islands referred to above.

First, in his view the Court should have found that Colombia's first objection—challenging the Court's jurisdiction under the Pact of Bogotá—did not, in this regard, possess an exclusively preliminary character, and that the examination of it should be deferred to the later phase of the proceedings, after the debate on the merits. Indeed, to rule thoroughly on this objection, the Court has had to take a position on Nicaragua's argument based on the alleged invalidity of the 1928 Treaty, specifically on the ground that it was concluded under coercion. According to Judge Abraham, the Court did not at this stage have before it all the information necessary to decide this question, and the manner in which it resolved the issue creates as many difficulties as it solves. Specifically, Judge Abraham regrets that, already at the preliminary stage, the Court, needlessly and without adequately explaining its reasoning, addressed the delicate question whether a State claiming to have been coerced through the unlawful use or threat of force can rely on that coercion as a cause for the nullity of a treaty, when, by its conduct after conclusion of the treaty, it manifested its acquiescence over a period of time in the validity of the treaty.

Secondly, in respect of Colombia's second preliminary objection—challenging the Court's jurisdiction under the optional declarations—Judge Abraham approves of the Court's decision that it is without jurisdiction on this basis over that part of the dispute concerning the three islands, but not of the grounds on which the Court justified its decision.

According to Judge Abraham, the Pact of Bogotá is the sole basis for jurisdiction applicable in the relations between the States parties to it, and the optional declarations are ineffective. On the other hand, in his view it is incorrect to say, as the Judgment does, that there is no extant dispute between the Parties over the three islands, any dispute having been settled by the 1928 Treaty. In Judge Abraham's opinion, this reasoning originates in a worrying confounding of the substantive issues—the 1928 Treaty may perhaps lead to deciding the dispute in favour of Colombia—and the issues of jurisdiction and admissibility—the foregoing observation should not, by itself, prevent the Court from exercising its jurisdiction over a very real dispute.

Declaration of Judge Keith

Judge Keith emphasized that, in accordance with the principle of the good administration of justice, the Court should decide at a preliminary stage a matter in dispute if it may properly be decided at that stage and if deciding that matter would facilitate the resolution of the case. In exercising that power and responsibility the Court must have before it the material it needs to decide that matter and it must accord to each party equal rights to present its case and rebut the case against it.

In the circumstances of this case, in Judge Keith's opinion, the Court could properly decide, as it has, that the matter of sovereignty over the three named islands has been settled in favour of Colombia. There is now no dispute in respect of that matter and the Court accordingly does not have jurisdiction in respect of it.

Dissenting opinion of Judge Bennouna

Judge Bennouna voted against the first decision of the Court, whereby it upheld the preliminary objection to its jurisdiction raised by Colombia on the basis of the Pact of Bogotá, in so far as it concerns sovereignty over the islands of San Andrés, Providencia and Santa Catalina (operative clause, sub-paragraph (1) (a)). In his view, this objection does not possess, in the circumstances of the case, an exclusively prelimi-

nary character within the meaning of Article 79, paragraph 9, of the Rules of Court. While the Pact of Bogotá excludes from the Court's jurisdiction issues "governed by agreements or treaties in force", Nicaragua has disputed the validity of the Treaty signed with Colombia in 1928 and ratified in 1930, on which the latter relies as the basis of its sovereignty over the three islands.

In so far as Nicaragua relies on the coercion to which it is said to have been subjected when it was under occupation by the United States in order to contend that the 1928 Treaty was invalid *ab initio*, Judge Bennouna considers that the Court could not at this stage investigate such coercion of the State and its consequences on the capacity of Nicaragua to enter into a treaty without addressing the merits of the dispute.

Judge Bennouna also voted against sub-paragraph (2) (a), of the operative clause, according to which the Court similarly lacks jurisdiction on the basis of the optional declarations of the Parties recognizing the compulsory jurisdiction of the Court (Statute, Art. 36, para. 2). In upholding this objection, the Court again declined to exercise its jurisdiction concerning the three islands. Judge Bennouna notes that the Court, after holding that it was before "two distinct bases of . . . jurisdiction which are not mutually exclusive", has nonetheless managed to reject the second of these, based on the optional declarations, by reference to an examination of the first, based on the Pact of Bogotá, by concluding that there is no dispute between the Parties.

For Judge Bennouna, the optional declarations must be appreciated *per se*, and can only be limited by the specific reservations made to them by the Parties. On that basis, there is indeed, in his opinion, a dispute, a conflict of legal argument between the Parties regarding the validity of the 1928 Treaty.

Declaration of Judge Gaja

In his declaration Judge *ad hoc* Gaja criticized the Court's finding that it had no jurisdiction under the optional clause declarations because there was no "extant dispute" on the question of sovereignty over the islands that were expressly attributed to Colombia by the 1928 Treaty. However, he concurred with the Court's conclusions also on this point in view of the Colombian reservation to the effect that its declaration applied "only to disputes arising out of facts subsequent to 6 January 1932". He considered that all the facts relating to the content and validity of the 1928 Treaty predated 1932.

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