# Annex 26

United Nations A/HRC/49/53

General Assembly

Distr.: General
12 January 2022

Original: English

**Human Rights Council**
**Forty-ninth session**
28 February–1 April 2022
Agenda item 3
**Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development**

# The right to a clean, healthy and sustainable environment: non-toxic environment

## Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment

*Summary*

In the present report, the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, David R. Boyd – with the collaboration of the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes, Marcos Orellana – identifies a non-toxic environment as one of the substantive elements of the right to a safe, clean, healthy and sustainable environment. The Special Rapporteur describes the ongoing toxification of people and the planet, which is causing environmental injustices and creating "sacrifice zones", extremely contaminated areas where vulnerable and marginalized groups bear a disproportionate burden of the health, human rights and environmental consequences of exposure to pollution and hazardous substances. The Special Rapporteur highlights State obligations, business responsibilities and good practices related to ensuring a non-toxic environment by preventing pollution, eliminating the use of toxic substances and rehabilitating contaminated sites.

# I. Introduction

1. On 8 October 2021, marking a turning point in the evolution of human rights, the Human Rights Council adopted an historic resolution recognizing, for the first time at the global level, the human right to a clean, healthy and sustainable environment (resolution 48/13). While this right is already recognized in law by more than 80 per cent of States Members of the United Nations,[1] the new resolution should be a catalyst for universal recognition in constitutions, legislation and regional human rights treaties, as well as for accelerated action to address the global environmental crisis.

2. As highlighted in the present report, the world is plagued by unconscionable environmental injustices, including "sacrifice zones", where communities are exposed to extreme levels of pollution and toxic contamination. As stated by a resident of Quintero-Puchuncaví sacrifice zone in Chile: "They are giving us a bad life, every day they are sacrificing us, killing us slowly with cancer, with illness, and so on." Urgent clean-up actions are required to protect people's health and human rights in these extraordinarily hazardous places. Employing rights-based approaches to detoxify people's bodies and the planet will require systemic and transformative changes to environmental law. States and businesses must vigorously pursue zero pollution and the elimination of toxic substances, rather than merely trying to minimize, reduce and mitigate exposure to these hazards. Prevention, precaution and non-discrimination must be the paramount principles in environmental policymaking.

3. The present report on the right to a non-toxic environment in which people can safely live, work, study and play is the sixth in a series of thematic reports addressing the substantive elements of the right to a safe, clean, healthy and sustainable environment, including clean air,[2] a safe climate,[3] healthy ecosystems and biodiversity,[4] safe and sufficient water[5] and healthy and sustainable food.[6]

4. The present report was developed in collaboration with the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes. A call for input was circulated in January 2021. Submissions were received from Argentina, Austria, Azerbaijan, Brazil, Cambodia, Chile, Costa Rica, Côte d'Ivoire, El Salvador, Finland, Greece, Guatemala, Malta, the Marshall Islands, Mauritius, Mexico, Montenegro, the Niger, Poland, Qatar, Singapore, Switzerland and Togo, and from youth, Indigenous peoples, students, academics, civil society and human rights institutions.[7]

# II. Pervasive pollution and toxic contamination of people and the planet

5. While the climate emergency, the global biodiversity crisis and the coronavirus disease (COVID-19) pandemic garner headlines, the devastating toll inflicted upon health, human rights and ecosystem integrity by pollution and hazardous substances continues to be largely overlooked. Yet pollution and toxic substances cause at least 9 million premature deaths, double the number of deaths inflicted by the COVID-19 pandemic during its first 18 months. One in six deaths in the world involves diseases caused by pollution, three times more than deaths from AIDS, malaria and tuberculosis combined and 15 times more than from all wars, murders and other forms of violence.[8] Air pollution is the largest

[1] A/HRC/43/53, para. 13.
[2] A/HRC/40/55.
[3] A/74/161.
[4] A/75/161.
[5] A/HRC/46/28.
[6] A/76/179.
[7] See https://www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/ToxicFree.aspx.
[8] See Philip J. Landrigan and others, "The *Lancet* Commission on pollution and health", *The Lancet*, vol. 391, No. 10119 (February 2018).

environmental contributor to premature deaths, causing an estimated 7 million annually.[9] Low- and middle-income countries bear the brunt of pollution-related illnesses, with nearly 92 per cent of pollution-related deaths.[10] Over 750,000 workers die annually because of exposure to toxic substances on the job, including particulate matter, asbestos, arsenic and diesel exhaust.[11]

6. The toxification of planet Earth is intensifying. While a few toxic substances have been banned or are being phased out, the overall production, use and disposal of hazardous chemicals continues to increase rapidly. Hundreds of millions of tons of toxic substances are released into air, water and soil annually. Production of chemicals doubled between 2000 and 2017, and is expected to double again by 2030 and triple by 2050, with the majority of growth in non-members of the Organisation for Economic Co-operation and Development (OECD).[12] According to the United Nations Environment Programme (UNEP), the result of this growth will be increased exposure and worsening health and environmental impacts unless ambitious, urgent and worldwide collaborative action is taken by all stakeholders and in all countries.[13]

7. The world is struggling to address both old and new chemical threats. For example, lead is still widely used despite long-standing knowledge regarding its toxicity and devastating consequences for the neurological development of children. Lead causes close to 1 million deaths annually, as well as immense and irreversible damage to the health of millions of children.

8. Emerging issues of concern include per- and polyfluoroalkyl substances, endocrine disruptors, microplastics, neonicotinoid pesticides, polycyclic aromatic hydrocarbons, pharmaceutical residues and nanoparticles. Per- and polyfluoroalkyl substances are a group of thousands of chemicals widely used in industrial and consumer applications, such as firefighting foams and water- and grease-repellent coatings for textiles, paper and cookware. Known as “forever chemicals” owing to their persistence in the environment, they are also toxic and bioaccumulative, building up in the tissue of living organisms and increasing in concentration higher in the food chain. Virtually everyone in industrialized nations has per- and polyfluoroalkyl substances in their body. Exposure is linked to liver damage, hypertension, decreased immune response, decreased fertility, lower birth weight, and testicular and kidney cancer. In the European Union, the health-related costs of per- and polyfluoroalkyl substances range from 52 billion to 84 billion euros annually, while treatment and remediation costs for contaminated water and soil range from 10 billion to 170 billion euros.[14]

9. The extraction, processing, distribution and combustion of fossil fuels – coal, oil and natural gas – produces prodigious volumes of pollution and toxic chemicals. Fossil fuels are also the primary feedstock for the heavily polluting petrochemical and plastic industries. Industrial agriculture contaminates air, water, soil and the food chain with hazardous pesticides, herbicides, synthetic fertilizers and drugs.[15] Other industries that produce immense volumes of pollution and toxic substances are mining and smelting, manufacturing, textiles, construction and transportation. Unsafe waste management, including dumping, open burning and informal processing of electronic waste, lead-acid batteries and plastic, exposes hundreds of millions of people in the global South to chemical cocktails, including brominated flame retardants, phthalates, dioxins, heavy metals, polycyclic aromatic hydrocarbons and bisphenol A.

[9] Ibid., and https://www.who.int/health-topics/air-pollution#tab=tab_1.

[10] Ibid., and UNEP/EA.4/3.

[11] See https://www.who.int/publications/i/item/9789240034945.

[12] See United Nations Environment Programme (UNEP), *Global Chemicals Outlook II: From Legacies to Innovative Solutions – Implementing the 2030 Agenda for Sustainable Development* (Nairobi, 2019).

[13] Ibid.

[14] See Nordic Council of Ministers, *The Cost of Inaction: A Socioeconomic Analysis of Environmental and Health Impacts Linked to Exposure to PFAS* (Copenhagen, 2019).

[15] See A/76/179.

10. Chemical accidents can have a catastrophic impact on health human rights and the environment. A well-known example is the exposure in 1984 of more than half a million people in Bhopal, India, to methyl isocyanate gas released from a Union Carbide pesticide plant, causing thousands of deaths. Accidents at mining sites also cause massive releases of toxic substances, illustrated by the collapse of tailings ponds at Mariana and Brumadinho in Brazil (2015 and 2019 respectively) and the Baia Mare disaster in Romania (2000). Explosions of warehouses containing toxic substances have taken on greater prominence in the aftermath of the catastrophes in Beirut (2020) and Tianjin, China (2015).

11. Toxic contaminants are ubiquitous today, from the highest Himalayan peaks to the depths of the Mariana Trench. Humans are exposed to toxic substances through breathing, eating and drinking, through skin contact and via the umbilical cord to the unborn child. Biomonitoring studies reveal pesticide residues, phthalates, flame retardants, per- and polyfluoroalkyl substances, heavy metals and microplastics in our bodies. Toxic substances can even be found in newborn infants.[16]

12. Exposure to toxic substances raises the risks of premature death, acute poisoning, cancer, heart disease, stroke, respiratory illnesses, adverse effects on the immune, endocrine and reproductive systems, birth defects and lifelong negative impacts on neurological development. One quarter of the total global burden of disease is attributed to preventable environmental risk factors, the overwhelming majority of which involve exposure to pollution and toxic substances.[17]

13. It is important to highlight the connections between toxic substances and the other two aspects of the world's triple environmental crisis (the climate emergency and the decline in biodiversity). The chemical industry exacerbates the climate emergency by consuming more than 10 per cent of fossil fuels produced globally and emitting an estimated 3.3 billion tons of greenhouse gas emissions annually. Global warming contributes to the release and remobilization of hazardous pollutants from melting glaciers and thawing permafrost.[18] Pollution and toxic substances are also one of the five main drivers of the catastrophic decline in biodiversity, with particularly negative impacts on pollinators, insects, freshwater and marine ecosystems (including coral reefs) and bird populations.[19]

14. At the World Summit on Sustainable Development in 2002, States committed to minimizing the adverse effects of chemicals and waste on human health and the environment by 2020. This pledge informed the overall objective of the Strategic Approach to International Chemicals Management, adopted in 2006. However, the goal was clearly not fulfilled.[20] The post-2020 framework for chemicals and waste offers an opportunity to rethink the global goal, since the goal of minimizing adverse effects implies that people will continue to be harmed by exposure to pollution, toxic chemicals and waste. Instead, the right to a non-toxic environment requires a focus on preventing exposure to pollution and toxic substances.

15. An extensive body of international law addresses pollution and toxic substances, including the following instruments:

(a) Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter;

(b) International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto;

(c) Montreal Protocol on Substances that Deplete the Ozone Layer;

[16] See A/HRC/33/41.

[17] See Annette Prüss-Ustün and others, *Preventing Disease through Healthy Environments: A Global Assessment of the Burden of Disease from Environmental Risks* (Geneva, World Health Organization, 2016).

[18] See UNEP, *Global Chemicals Outlook II*.

[19] See Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services, *Global Assessment Report on Biodiversity and Ecosystem Services: Summary for Policymakers* (Bonn, 2019).

[20] See UNEP, *Global Chemicals Outlook II*.

(d) Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal;

(e) International Labour Organization (ILO) Chemicals Convention, 1990 (No. 170);

(f) ILO Prevention of Major Industrial Accidents Convention, 1993 (No. 174);

(g) Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade;

(h) Stockholm Convention on Persistent Organic Pollutants;

(i) International Health Regulations (2005);

(j) Minamata Convention on Mercury.

16. Several voluntary instruments adopted by international organizations also address pollution and toxic chemicals. Prominent examples include the World Health Organization (WHO) air quality guidelines, the International Code of Conduct on Pesticide Management and the Globally Harmonized System of Classification and Labelling of Chemicals.

17. The effectiveness of these instruments is undermined by many major gaps and weaknesses, including the fact that none of them mention human rights, the vast majority of toxic substances are not controlled and few nations are fulfilling all of their obligations. For example, OECD estimates that between 20,000 and 100,000 existing chemicals have not been adequately assessed to determine their risks because of information gaps.[21] Fewer than half of States have implemented the Globally Harmonized System of Classification and Labelling of Chemicals and fewer than half compile and publish data on pollutant releases and transfers. Many parties to the Basel, Rotterdam and Stockholm Conventions are not fulfilling their reporting obligations.[22]

18. While most nations have laws and policies intended to protect human and ecosystem health from toxic substances the focus is on reduction, not elimination. Many gaps remain, and institutions often lack the expertise and resources to carry out their duties. Laws, policies, implementation and enforcement are highly inconsistent across the world. Permitted levels of sulfur in diesel fuel range from fewer than 10 parts per million in some high-income States to more than 10,000 parts per million in some low-income States, meaning that fuel can be 1,000 times dirtier in the latter. Most countries still lack legally binding limits for lead in paints, yet where limits do exist, they range from 90 to 20,000 parts per million.[23]

19. Preventing exposure to toxic substances is vital to fulfilling many of the Sustainable Development Goals, including those related to health (Goal 3), clean water (Goal 6) and sustainable consumption and production (Goal 12). Key targets include target 3.9, on substantially reducing the number of deaths and illnesses from hazardous chemicals and pollution; target 6.3, on improving water quality by reducing pollution, eliminating dumping and minimizing release of hazardous chemicals; and target 12.4, on achieving the environmentally sound management of chemicals and all wastes throughout their life cycle and significantly reducing their release to air, water and soil. Effectively managing chemicals and waste is necessary for many other Goals, including those related to biodiversity, climate action and clean energy.

20. Overall, while progress has been made in certain areas, the goal of protecting all humans and ecosystems from the adverse effects of chemicals has not been achieved.[24] States are not on track to achieve the above-noted Sustainable Development Goals. The costs associated with pollution and toxic chemicals are trillions of dollars annually.

[21] Ibid.

[22] Ibid.

[23] See UNEP, “Update on the global status of legal limits on lead in paint”, September 2019.

[24] See UNEP, *Global Chemicals Outlook II*.

# III. Environmental injustices and sacrifice zones

## A. Environmental injustices

21. While all humans are exposed to pollution and toxic chemicals, there is compelling evidence that the burden of contamination falls disproportionately upon the shoulders of individuals, groups and communities that are already enduring poverty, discrimination and systemic marginalization. Women, children, minorities, migrants, Indigenous peoples, older persons and persons with disabilities are potentially vulnerable, for a variety of economic, social, cultural and biological reasons. Workers, especially in low- and middle-income nations, are at risk because of elevated exposures on the job, poor working conditions, limited knowledge about chemical risks and lack of access to health care. Millions of children are employed in potentially hazardous sectors including agriculture, mining and tanning. Low-income housing may contain asbestos, lead, formaldehyde and other toxic substances.

22. The disturbing phenomenon of poor and marginalized communities being more heavily affected by pollution is a form of environmental injustice. Environmental injustices related to pollution and the production, export, use and disposal of toxic substances are rooted in racism, discrimination, colonialism, patriarchy, impunity and political systems that systematically ignore human rights.[25]

23. Contaminated sites are usually found in disadvantaged communities. It is estimated that there are 2.8 million contaminated sites in Europe,[26] while the United States of America has identified more than 1,000 national priority sites for remediation, out of hundreds of thousands of contaminated sites. In low- and middle-income countries, new contaminated sites are being created through industrialization (for example, coal-fired power plants) and extractivism (for example, artisanal and small-scale gold mining). In many States, clean-up and remediation are delayed by a lack of available funds.

24. Many environmental injustices are transnational, with consumption in wealthy States resulting in severe impacts on health, ecosystems and human rights in other States. High-income States continue to irresponsibly export hazardous materials such as pesticides,[27] plastic waste,[28] electronic waste, used oil and derelict vehicles, along with the associated health and environmental risks, to low- and middle-income countries, taking advantage of the fact that these countries often have weaker regulations and limited enforcement.[29] Businesses in the European Union planned to export more than 81 thousand tons of banned pesticides in 2018.[30] Approximately 80 per cent of shipbreaking occurs on the beaches of Bangladesh, India and Pakistan, exposing unprotected workers to toxic chemicals.[31] In some countries, up to 95 per cent of electronic waste is processed informally by untrained workers lacking appropriate equipment, resulting in significant releases of heavy metals, polychlorinated biphenyls, brominated flame retardants, polycyclic aromatic hydrocarbons and dioxins.[32]

25. Poor, vulnerable and marginalized communities are less likely to enjoy access to environmental information, to participate in decision-making related to the environment or to have access to justice and effective remedies when their rights are jeopardized or violated by pollution and toxic chemicals. While the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention) and the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (Escazú Agreement)

[25] See A/75/290.
[26] See European Court of Auditors, *The Polluter Pays Principle: Inconsistent Application across EU Environmental Policies and Actions* (Luxembourg, 2021).
[27] See A/HRC/34/48.
[28] See A/76/207.
[29] Submissions by Costa Rica and Cote d'Ivoire.
[30] See Swagata Sarkar and others, *The Use of Pesticides in Developing Countries and Their Impact on Health and the Right to Food* (Brussels, European Union, 2021).
[31] See A/HRC/12/26.
[32] See UNEP, *Global Chemicals Outlook II*.

focus on rectifying these injustices and ensuring that everyone enjoys their right to a clean, healthy and sustainable environment, fewer than 60 States are parties to these treaties and implementation challenges are ongoing.

## B. Sacrifice zones

26. Some communities suffer from environmental injustices whereby the exposure to pollution and toxic substances is so extreme in the areas in which they live that they are described as "sacrifice zones".[33] The phrase originated in the cold war era, when it was used to describe areas rendered uninhabitable by nuclear experiments, conducted by the United States, the Soviet Union, France and the United Kingdom of Great Britain and Northern Ireland, that caused high and lasting levels of radiation.

27. Today, a sacrifice zone can be understood to be a place where residents suffer devastating physical and mental health consequences and human rights violations as a result of living in pollution hotspots and heavily contaminated areas. The climate crisis is creating a new category of sacrifice zones as a result of unabated greenhouse gas emissions, as communities have become, and are becoming, uninhabitable because of extreme weather events or slow-onset disasters, including drought and rising sea levels.

28. The most heavily polluting and hazardous facilities, including open-pit mines, smelters, petroleum refineries, chemical plants, coal-fired power stations, oil- and gas fields, steel plants, garbage dumps and hazardous waste incinerators, as well as clusters of these facilities, tend to be located in close proximity to poor and marginalized communities. Health, quality of life and a wide range of human rights are compromised, ostensibly for "growth", "progress" or "development" but in reality to serve private interests. Shareholders in polluting companies benefit from higher profits, while consumers benefit through lower-cost energy and goods. Prolonging the jobs of workers in polluting industries is used as a form of economic blackmail to delay the transition to a sustainable future, while the potential of green jobs is unjustifiably discounted.

29. The continued existence of sacrifice zones is a stain upon the collective conscience of humanity. Often created through the collusion of Governments and businesses, sacrifice zones are the diametric opposite of sustainable development, harming the interests of present and future generations. The people who inhabit sacrifice zones are exploited, traumatized and stigmatized. They are treated as disposable, their voices ignored, their presence excluded from decision-making processes and their dignity and human rights trampled upon. Sacrifice zones exist in States rich and poor, North and South, as described in the examples below. Descriptions of additional sacrifice zones are contained in annex I.[34]

### Africa

30. In Kabwe, Zambia, 95 per cent of children suffer from elevated blood lead levels caused by lead mining and smelting.[35] Experts described the situation as a severe environmental health crisis,[36] and Kabwe was named as one of the most polluted places on Earth. Exposure to lead during childhood impairs neurological development, causing lifelong cognitive deficits. Extremely high levels of exposure, such as those seen in Kabwe, can cause blindness, paralysis and death.

31. The people of the Niger Delta in Nigeria have lived with oil pollution and gas flaring for decades, resulting in extensive physical and mental health problems caused by

[33] See Steve Lerner, *Sacrifice Zones: The Front Lines of Toxic Chemical Exposure in the United States* (Cambridge, Massachusetts, MIT Press, 2010).

[34] The annexes will be made available at https://www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/AnnualReports.aspx.

[35] See Human Rights Watch, *"We Have to Be Worried": The Impact of Lead Contamination on Children's Rights in Kabwe, Zambia* (New York, 2019).

[36] Stephan Bose-O'Reilly and others, "Lead intoxicated children in Kabwe, Zambia", *Environmental Research*, vol. 165, 2018, pp. 420–424.

contaminated air, water and food.[37] Adverse health effects of exposure to oil pollution include abnormalities in blood, liver, kidney, respiratory and brain functions, as well as asthma attacks, headaches, diarrhoea, dizziness, abdominal pain and back pain.[38] Average life expectancy for residents of the Niger Delta is only 40 years, compared to 55 years for Nigeria as a whole.[39]

32. In 2006, thousands of people in Abidjan, Côte d'Ivoire, were harmed and 15 killed by the illegal dumping of toxic waste containing high levels of hydrogen sulfide offloaded from the vessel *Probo Koala*.[40] A review of the hospital records of more than 10,000 patients determined that the main impacts included respiratory problems (such as coughs and chest pains) and digestive symptoms (such as abdominal pain, diarrhoea and vomiting).[41]

### Asia and the Pacific

33. Astronomical levels of air pollution have harmed the health of billions of people in Asia. The majority of the world's most polluted cities are in China and India. In New Delhi, thick smog provoked a weeks-long closure of all schools in November 2021, with levels of fine particulate matter (PM2.5) 20 times higher than the maximum daily limit recommended by WHO.[42]

34. China extracts the majority of the world's rare earth minerals, elements used in products including electric vehicles, wind turbines and mobile phones. These minerals are mined in Bayan Obo and processed in Baotou, a nearby city. Air quality is very poor, and toxic emissions cause a substantial lifetime risk of lung cancer for local residents, especially children.[43] Residents have elevated levels of rare earth minerals (lanthanum, cerium and neodymium) in their blood, urine and hair.[44] Elevated concentrations of heavy metals in dust and soil threaten people's health.[45]

35. People in the Marshall Islands, in Kazakhstan, in Chernobyl, Ukraine, and in Fukushima, Japan,[46] continue to suffer the adverse effects of radiation from nuclear tests and disasters at nuclear reactors. Between 1946 and 1958, the United States tested more than 60 nuclear weapons on or near Bikini and Enewetak atolls in the Marshall Islands, resulting in elevated levels of cancer, birth defects and psychological trauma that continue to this day.[47] Marshallese women and girls suffer disproportionately from thyroid and other cancers and

[37] Jerome O. Nriagu, "Oil industry and the health of communities in the Niger Delta of Nigeria", in *Encyclopedia of Environmental Health*, Jerome O. Nriagu, ed. (Amsterdam, Elsevier B.V., 2011), pp. 240–250.

[38] Jerome O. Nriagu and others, "Health risks associated with oil pollution in the Niger Delta, Nigeria", *International Journal of Environmental Research and Public Health*, vol. 13, No. 3 (March 2016), art. No. 346.

[39] Orish Ebere Orisakwe, "Crude oil and public health issues in Niger Delta, Nigeria: much ado about the inevitable", *Environmental Research*, vol. 194, March 2021, art. no. 110725.

[40] See A/HRC/12/26/Add.2.

[41] Boko Kouassi and others, "Manifestations cliniques chez les sujets exposés à un accident toxique environnemental (Abidjan, Côte d'Ivoire 2006)", *Revues des Maladies Respiratoires*, vol. 32, No. 1 (January 2015), pp. 38–47.

[42] See https://www.aljazeera.com/news/2021/11/13/delhi-shuts-schools-as-government-considers-pollution-lockdown and https://www.theguardian.com/world/2021/nov/16/soaring-pollution-has-delhi-considering-full-weekend-lockdown.

[43] Kexin Li and others. "Risk assessment of atmospheric heavy metals exposure in Baotou, a typical industrial city in northern China", *Environmental Geochemistry and Health*, vol. 38, No. 3 (June 2015), pp. 843–853.

[44] T.M. Bao and others, ["An investigation of lanthanum and other metals levels in blood, urine and hair among residents in the rare earth mining area of a city in China"] (article in Chinese; abstract available in English), *Zhonghua Lao Dong Wei Sheng Zhi Ye Bing Za Zhi*, vol. 36, No. 2 (February 2018), pp. 99–101.

[45] Xiufeng Han and others, "Health risks and contamination levels of heavy metals in dusts from parks and squares of an industrial city in semi-arid area of China", *International Journal of Environmental Research and Public Health*, vol. 14, No. 8 (August 2017), art. No. 886.

[46] CEDAW/C/JPN/CO/7-8, paras. 36–37.

[47] Submission by the Marshall Islands.

from reproductive health problems.[48] The former Soviet Union conducted 456 nuclear testing explosions in the former Semipalatinsk region (now Semey, Kazakhstan). People in the region, living in poverty and not informed about the tests, were exposed to high levels of radiation, leading to large numbers of birth defects, elevated rates of cancer and extensive psychological trauma.[49]

**Eastern Europe**

36. Bor, Serbia, is one of the most polluted European cities, largely because of a huge copper mining and smelting complex that emits massive amounts of sulfur dioxide, particulates, arsenic, lead, zinc and mercury.[50] UNEP described a devastating legacy of environmental problems, with sulfur dioxide concentrations occasionally exceeding the measuring range of monitoring equipment.[51] The Borska Reka River is so contaminated with heavy metals that experts described it as without any trace of life.[52] Metallurgical workers have high levels of arsenic in their hair and urine, with nearly 80 per cent suffering from an average of two chronic diseases.[53]

37. Norilsk is among the most polluted cities in the Russian Federation, suffering very high levels of air pollution, acid rain, water pollution and soil contamination.[54] The main source of pollution is the mining and smelting company Norilsk Nickel, which caused a catastrophic diesel spill in 2020 affecting the Pyasina River. Very high levels of heavy metals have been found in fish, moss, soil and snow in the region.[55] The most adversely affected communities are Indigenous peoples from Taymyr, who face high rates of respiratory diseases, cancer, weakened immune system, premature births, reproductive failure, increased childhood morbidity and life expectancy 10 years below the national average.[56]

38. Although the Pata Rât landfill in Cluj-Napoca, Romania, closed in 2015, thousands of marginalized Roma people still live in the area, regarded as one of the worst waste dumps in Europe. They lack access to safe drinking water, sanitation or decent housing, leading researchers to describe Pata Rât as a desolate scenario of dehumanization.[57] People are exposed to arsenic, benzene, cadmium, chromium, creosote, dioxins, hexane, hydrogen sulfide, lead, mercury, styrene and zinc. Residents report suffering from infections of the ears, eyes and skin, asthma, bronchitis, high blood pressure, cancer, and heart, liver and stomach ailments.[58]

[48] CEDAW/C/MHL/CO/1-3, para. 8.

[49] "Four decades of nuclear testing: the legacy of Semipalatinsk", editorial, *EClinicalMedicine*, vol. 13, August 2019, p. 1.

[50] Snežana M. Šerbula and others, "Extreme air pollution with contaminants originating from the mining–metallurgical processes", *Science of the Total Environment*, vol. 586, May 2017, pp. 1066–1075.

[51] UNEP, *From Conflict to Sustainable Development: Assessment of Environmental Hot Spots – Serbia and Montenegro*, (Nairobi, 2004), pp. 49–50.

[52] Jovana Brankov, Dragana Milijašević and Ana Milanović Pešić, "The assessment of the surface water quality using the Water Pollution Index: a case study of the Timok River (Danube River Basin), Serbia", *Archives of Environmental Protection*, vol. 38, No. 1 (January 2012), pp. 49–61.

[53] UNEP, "Municipality of Bor, Serbia-Montenegro: Local Environmental Action Plan – booklet (draft summary)", March 2003.

[54] Alexander V. Kirdyanov and others, "Ecological and conceptual consequences of Arctic pollution", *Ecology Letters*, vol. 23, No. 12 (September 2020), pp. 1827–1837.

[55] Alexander Zhulidov and others, "Long-term changes of heavy metal and sulphur concentrations in ecosystems of the Taymyr Peninsula (Russian Federation) north of the Norilsk industrial complex", *Environmental Monitoring and Assessment*, vol. 181, Nos. 1–4 (January 2011), pp. 539–553.

[56] See Brian Walsh, "Urban wastelands: the world's 10 most polluted places", Time, 4 November 2013.

[57] Ruxandra Mălina Petrescu-Mag and others, "Environmental equity through negotiation: a case study on urban landfills and the Roma community", *International Journal of Environmental Research and Public Health*, vol. 13, No. 6 (June 2016), art. No. 591.

[58] Jennifer L. Hall and Catherine Zeman, "Community-based participatory research with the Roma of Pata Rât, Romania: exploring toxic environmental health conditions", *Journal of Ethnographic and Qualitative Research*, vol. 13, No. 2 (2018), pp. 92–106.

### Latin America and the Caribbean

39. Quintero-Puchuncaví, the most notorious sacrifice zone in Chile, is home to the Ventanas industrial complex, comprising more than 15 industrial businesses (oil refineries, petrochemical facilities, coal-fired power plants, gas terminals and a copper smelter). In 2018, a major air pollution incident in Quintero-Puchuncaví made hundreds of schoolchildren ill. In the universal periodic review process, the United Nations country team recommended that Chile investigate the negative effects on the inhabitants of sacrifice zones, accelerate the implementation of remediation programmes and develop environmental quality standards in accordance with WHO international standards.[59] The Supreme Court of Chile concluded that the egregious air pollution in Quintero-Puchuncaví violated the right to a pollution-free environment and ordered the Government to take steps to address the problem.[60]

40. In La Oroya, Peru, generations of children have been poisoned by a huge lead smelter. A shocking 99 per cent of children have levels of lead in their blood that exceed acceptable limits. Despite interventions by the Constitutional Court of Peru and the Inter-American Commission on Human Rights, levels of contamination in La Oroya remain hazardous. Also located in Peru, in Cerro de Pasco, is a massive open-pit mine adjacent to an impoverished community exposed to elevated levels of heavy metals. In 2018, the Government of Peru declared a state of emergency in Cerro de Pasco because of the pollution, but children in the region continue to suffer adverse health effects.[61]

41. Water and soil in Guadeloupe and Martinique, France, are contaminated by unsafe levels of the pesticide chlordecone. Although the manufacturing and use of this pesticide was banned in the 1970s in the United States, it continued to be used in the West Indies into the 1990s. Residents are still exposed to chlordecone through drinking water and the food that they grow because of the pesticide's persistence in the environment. Ninety per cent of people living in Guadeloupe and Martinique have been found to have chlordecone in their blood, raising their risk of cancer.[62]

42. Garbage dumps in numerous Caribbean nations are regularly set on fire, despite the presence of plastics, used tyres and other items that generate extremely hazardous chemicals when burned. This practice creates massive, lingering clouds of toxic smoke that envelope neighbouring residents and jeopardize their health. Examples include the landfills at Parkietenbos in Aruba, (Netherlands), Riverton (Jamaica) and Truitier (Haiti). A major fire at the Riverton dump in Jamaica in 2015 led to 50 schools being closed and hundreds of persons hospitalized.

### Western Europe and North America

43. One of the most notorious pollution hotspots in Canada – "Chemical Valley", in Sarnia, Ontario – has disturbing health effects on the Aamjiwnaang First Nation. There are more than 40 large petrochemical, polymer, oil-refining and chemical facilities in close proximity to Aamjiwnaang, as well as a coal-fired power plant. This Indigenous community endures some of the worst air quality in Canada. Physical and psychological health problems are common, including high rates of miscarriages, childhood asthma, and cancer.[63]

44. In the United States, cancer rates are far higher than the national average in predominantly Black communities such as Mossville, St. Gabriel, St. James Parish and St. John the Baptist Parish, located in Louisiana's "Cancer Alley", which is home to more than 150 refineries and petrochemical plants, including the world's largest producer of

[59] A/HRC/WG.6/32/CHL/2, para. 16.

[60] *Francisco Chahuan contra Empresa Nacional de Petróleos, ENAP S.A.*, Case No. 5888-2019, Judgment, 28 May 2019.

[61] Xulia Fandiño Piñeiro and others, "Heavy metal contamination in Peru: implications on children's health", *Scientific Reports*, vol. 11, November 2021, art. No. 22729.

[62] Luc Multigner and others, "Chlordecone exposure and adverse effects in French West Indies populations", *Environmental Science and Pollution Research International*, vol. 23, No. 1 (January 2016), pp. 3–8.

[63] Deborah Davis Jackson, "Shelter in place: a First Nation community in Canada's Chemical Valley", *Interdisciplinary Environmental Review*, vol. 11, No. 4 (January 2010), pp. 249–262.

Styrofoam.[64] Large polluting industrial facilities in the United States are disproportionately located in communities with the highest percentages of persons of African descent, the lowest household incomes and the highest proportion of residents who did not graduate from high school. A leading scholar wrote that, "[e]nabled by state zoning, a wave of chemical plants dropped on African American communities like a bomb".[65] Cancer Alley contains 7 of the 10 United States census tracts with the highest risk of cancer from air pollution.[66] In 2020, air concentrations of cancer-causing chloroprene in St. John the Baptist Parish were 8,000 times higher than the acceptable level established by the United States Environmental Protection Agency.[67]

45. The Ilva steel plant in Taranto, Italy, has compromised people's health and violated human rights for decades by discharging vast volumes of toxic air pollution.[68] Nearby residents suffer from elevated levels of respiratory illnesses, heart disease, cancer, debilitating neurological ailments and premature mortality. Clean-up and remediation activities that were supposed to commence in 2012 have been delayed to 2023, with the Government introducing special legislative decrees allowing the plant to continue operating.[69] In 2019, the European Court of Human Rights concluded that environmental pollution was continuing, endangering the health of the applicants and, more generally, that of the entire population living in the areas at risk.[70]

46. The foregoing examples of sacrifice zones represent some of the most polluted and hazardous places in the world, illustrating egregious human rights violations, particularly of poor, vulnerable and marginalized populations. Sacrifice zones represent the worst imaginable dereliction of a State's obligation to respect, protect and fulfil the right to a clean, healthy and sustainable environment.

# IV. Human rights obligations related to pervasive pollution and toxic substances

47. United Nations treaty bodies, regional courts, national courts, national human rights institutions and special procedure mandate holders have expressed concerns about the impacts of pollution and toxic substances upon the enjoyment of a wide range of human rights, including the rights to life, health, water, food, housing, cultural rights and an adequate standard of living, the rights of the child and the rights of Indigenous peoples.[71] The recent recognition of the right to a clean, healthy and sustainable environment should mark a turning point in society's approach to managing pollution and toxic substances. From a human rights perspective, achieving a non-toxic environment is a legally binding obligation rather than a policy option.

48. As a corollary to the right to a clean, healthy and sustainable environment, States and businesses have a comprehensive suite of corresponding obligations and responsibilities. States should apply a human rights-based approach to all laws, regulations, policies and actions governing the production, import, sale, use, release and disposal of substances that may harm human health or the environment, in order to eliminate negative impacts on human

[64] See communication AL USA 33/2020, available at https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=25814.

[65] Oliver Houck, "Shintech: environmental justice at ground zero", *Georgetown Environmental Law Review*, vol. 31, No. 3 (2019), p. 455.

[66] See https://www.epa.gov/national-air-toxics-assessment/2014-nata-assessment-results.

[67] See https://earthjustice.org/sites/default/files/files/ccsj_petition_for_emergency_action_petition_for_rule making_05-06-2021_1.pdf.

[68] See https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=27957&LangID=E. https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=27607&LangID=E.

[69] Roberta Greco, "*Cordella et al. v. Italy* and the effectiveness of human rights law remedies in cases of environmental pollution", *Review of European, Comparative and International Environmental Law*, vol. 29, No. 3 (2020), pp. 491–497.

[70] *Cordella et al. v. Italy*, applications No. 544141/13 and No. 54624/15, Judgment, 24 January 2019, para. 172.

[71] See A/HRC/25/53.

rights. A rights-based approach should also govern clean-up, remediation, restoration and, where necessary, relocation of affected communities. The rights-based approach clarifies the obligations of States and responsibilities of businesses, prioritizes the most disadvantaged and catalyses ambitious action.

49. The framework principles on human rights and the environment[72] clarify three categories of State obligations: procedural obligations, substantive obligations, and special obligations towards those in vulnerable situations. In terms of procedural obligations regarding pollution and toxic substances, States must:

(a) Establish monitoring programmes, assess major sources of exposure and provide the public with accurate, accessible information about risks to health;

(b) Ensure meaningful, informed and equitable public participation in decision-making;

(c) Use the best available scientific evidence to develop laws, regulations, standards and policies;[73]

(d) Enable affordable and timely access to justice and effective remedies for all;

(e) Assess the potential environmental, social, health, cultural and human rights impacts of all plans, policies, projects and proposals that could foreseeably result in exposure to pollution or toxic substances;

(f) Integrate gender equality into all plans and actions and empower women to play leadership roles at all levels;

(g) Provide strong protection for environmental human rights defenders, vigilantly protect defenders from intimidation, criminalization and violence, diligently investigate, prosecute and punish the perpetrators of these crimes, and address the root causes of social-environmental conflict.

50. Regarding substantive obligations, States must not cause pollution or exposure to toxic substances that violates the right to a clean, healthy and sustainable environment; protect this right from being violated by third parties, in particular businesses; and take positive actions to fulfil this right. Given that current efforts to minimize or mitigate pollution and waste are grossly inadequate, States should establish or strengthen legislation, regulations, standards and policies to prevent exposure to toxic substances, and develop action plans for preventing pollution, eliminating toxic substances and rehabilitating contaminated sites.

51. Under framework principle 11, States should establish and maintain substantive environmental standards that are non-discriminatory and non-retrogressive and otherwise respect, protect and fulfil human rights. National standards must take into consideration the best interests of children.[74] States should incorporate, as legally binding national standards, WHO guidelines on ambient air quality (updated in 2021), indoor air quality, drinking water quality and toxic chemicals.[75] From the perspective of the right to a clean, healthy and sustainable environment, it is unacceptable that 80 States have no air quality standards.[76]

52. The Human Rights Committee has made it clear that States must investigate situations of serious pollution or release of toxic substances and impose sanctions where violations occur.[77] Failing to prevent foreseeable human rights harms caused by exposure to pollution and toxic substances, or failing to mobilize the maximum available resources in an effort to do so, could constitute a breach of States' obligations. States must also make full reparation to victims and other community members for harms suffered, including through adequate

[72] A/HRC/37/59, annex.
[73] See A/HRC/48/61.
[74] Convention on the Rights of the Child, art. 3.
[75] See WHO, *Compendium of WHO and Other UN Guidance on Health and Environment* (Geneva, 2021).
[76] Meltam Kutlar Joss and others, "Time to harmonize national ambient air quality standards", *International Journal of Public Health*, vol. 62, No. 4 (May 2017), pp. 453–462.
[77] See *Portillo Cáceres et al. v. Paraguay* (CCPR/C/126/D/2751/2016).

compensation, take all necessary measures – in close consultation with the community – to remedy the environmental degradation, and prevent similar transgressions in the future. According to the Supreme Court of Mexico, it is indispensable that the State monitor compliance with environmental norms and, if necessary, sanction or limit the actions of private individuals; otherwise, the human right to a healthy environment would be void of content.[78]

53. States can no longer countenance the creation of sacrifice zones, nor allow existing sacrifice zones to continue. Immediate action must be taken to eliminate residents' exposure to environmental hazards. It is unacceptable for States to exacerbate ongoing human rights violations in sacrifice zones by approving additional sources of pollution and toxic substances. For example, St. James Parish, Louisiana, is one of the most polluted communities in the United States. Yet in 2018, the government approved a massive new $9.4 billion chemical plant by Formosa Plastics Group in this community that would discharge vast volumes of toxic substances. Fortunately, in 2020, the United States Army Corps of Engineers rescinded a permit that it had granted for the project, citing errors in the review process and the need for a comprehensive environmental impact assessment.[79]

54. The Human Rights Committee has clarified that States' obligation to respect and ensure the right to life should inform their obligations under international environmental law, and vice versa.[80] The application and interpretation of the right to a safe, clean, healthy and sustainable environment in the context of pollution and toxic substances should be guided by the principles of prevention, precaution, non-discrimination and non-regression, and the polluter pays principle.

### Prevention

55. Prevention is paramount. States should enact measures to achieve zero pollution and zero waste. States should eliminate the production, use and release of toxic substances, except for essential uses in society. States must prevent exposure, by regulating industries, emissions, chemicals and waste management, and promote innovation and acceleration of safe substitutes.[81] The Inter-American Commission on Human Rights has found that for States to fulfil the right to a non-toxic environment, compliance with the duty of prevention is closely linked to the existence of a robust regulatory framework and a coherent system of supervision and oversight.[82] The Human Rights Committee reached a similar conclusion.[83] States should enact legislation requiring businesses that generate pollution or use toxic substances to conduct human rights due diligence.[84]

### Precaution

56. Knowledge about pollution and toxic substances will never be complete, necessitating recourse to the precautionary principle, which holds that where there are threats of harm to human health or the environment, lack of full scientific certainty must not be used as a reason for postponing preventive action. Application of the precautionary principle in the context of human rights obligations related to a healthy environment has been endorsed by the Inter-American Court of Human Rights.[85]

### Non-discrimination

57. Non-discrimination requires States to avoid exacerbating, and actively improve, existing situations of environmental injustice, with special urgency in sacrifice zones. The

[78] *Amparo* review No. 641/2017, 18 October 2017.
[79] Rick Mullin, "Community groups score against Formosa in St James Parish, Louisiana", Chemical and Engineering News, 19 August 2021.
[80] General comment No. 36 (2018), para. 62.
[81] See CRC/C/KOR/CO/5-6.
[82] Inter-American Commission on Human Rights, "Caso No. 12.718: Comunidad de La Oroya, Perú – informe No. 330/20", September 2021, para. 169.
[83] See *Portillo Cáceres et al. v. Paraguay*.
[84] Inter-American Commission, "La Oroya".
[85] See Inter-American Court of Human Rights, advisory opinion OC-23/17, 15 November 2017.

principle of non-discrimination also requires States to prioritize clean-up and restoration measures for disadvantaged communities that bear a disproportionate burden of exposure to pervasive pollution and toxic contamination.

**Non-regression**

58. States must adopt science-based standards for pollution and toxic substances, based on international guidance from organizations including WHO, the Food and Agriculture Organization of the United Nations (FAO) and UNEP. Once these standards are in place, the principle of non-regression means the State cannot ignore them or establish levels that are less protective without adequate justification, which would compromise its obligation to ensure the progressive development of the rights to health and the environment.[86] The weakening by Peru of national air quality standards was identified by the Inter-American Commission on Human Rights as unjustified and inconsistent with its human rights obligations.

**Special duties towards vulnerable populations**

59. Children are uniquely vulnerable to the adverse health effects of exposure to pollution and toxic substances. Under the Convention on the Rights of the Child (art. 24), States parties are required to provide adequate nutritious foods and clean drinking water, taking into consideration the dangers and risks of environmental pollution. Yet more than 1 million premature deaths among children under the age of 5 are caused by pollution and toxic substances annually. According to the Committee on the Rights of the Child, if children are identified as victims of environmental pollution, immediate steps should be taken by all relevant parties to prevent further damage to the health and development of children and repair any damage done.[87] States have a duty to consider the best interests of the child when making decisions that could affect them, and a non-toxic environment is unequivocally a fundamental element of all children's best interests.

60. It is important to consider the perspectives of children and youth themselves. Statements gathered for the present report by the Children's Environmental Rights Initiative include the following:

(a) "The field of grass where I once used to run around is now an industrial complex. The sky full of stars that I once used to look up to is now full of smoke."

(b) "Boys and girls have the right to live on a planet free from pollution."

(c) "World leaders need to be responsible for their countries' health and attempt to decrease pollution levels, which will save lives."

61. In addition to children, States should give special attention to other vulnerable or marginalized groups whose rights are jeopardized by pervasive pollution and toxic contamination, including women, Indigenous peoples, minorities, refugees, migrants, persons with disabilities, older persons, people living in protracted armed conflicts, and people living in poverty. These groups are often disproportionately affected, have fewer resources, and have less access to health-care services, increasing the risk of illness or death.

**Progressive realization**

62. The right to a clean, healthy and sustainable environment is subject to progressive realization, although States are obligated to use the maximum available resources to realize it. However, some specific obligations flowing from this right, such as non-discrimination and non-regression, are of immediate effect. According to the Inter-American Commission on Human Rights, the obligation of progressive development requires the State to develop strategies, plans or policies with indicators and criteria that allow for strict monitoring of the progress made. This requires ensuring that the State carries out actions to advance or take steps (obligation of immediate enforceability) with a view to achieving the full and effective enjoyment of the right involved (obligation of result conditioned to a gradual and continuous

[86] Inter-American Commission, "La Oroya", para. 188.
[87] General comment No. 16 (2013), para. 31.

materialization).[88] In 2017, the Supreme Court of Mexico concluded that the Government had failed to take all possible measures, to the maximum of available resources, to prevent and control processes of water degradation, to monitor compliance of wastewater discharges with current regulations in quantity and quality, and to carry out the necessary corrective actions to clean up the water.[89] As a result, the Government had violated the right to a healthy environment.

63. In some sacrifice zones, pollution or contamination is so extreme that relocation of residents or communities may be contemplated. Relocation processes must employ a rights-based approach so that affected persons are involved in planning from the outset, are engaged throughout the process and provide informed consent. In Fiji, the guidelines for relocating communities affected by the climate crisis are an exemplary good practice.

**Business responsibilities related to pollution and toxic substances**

64. Businesses should conduct human rights and environmental due diligence and respect human rights in all aspects of their operations, yet there are countless examples of businesses violating the right to a clean, healthy and sustainable environment by generating pollution or causing exposure to toxic substances. For example, some businesses sell extremely dirty diesel and gasoline in West Africa, containing sulfur levels hundreds of times higher than European law permits.[90] Some vehicle manufacturers fraudulently sold millions of vehicles equipped with "defeat devices" that enabled vehicles to pass emission tests but produced illegal quantities of pollution under normal driving conditions. Some businesses continue to add millions of kilograms of lead to paint every year. In terms of their environmental impacts, businesses should comply with the Guiding Principles on Business and Human Rights and the Children's Rights and Business Principles.

65. Businesses have a disturbing track record of lobbying against the enactment or strengthening of environmental standards, limits on pollution, and prohibition or restriction of the production, sale and use of toxic substances.[91] Using their power and influence, businesses have undermined science, denied and fraudulently misrepresented the adverse health and environmental impacts of their products and misled Governments about the availability of solutions and substitutes.[92] Businesses should not lobby against stronger environmental laws and policies and must refrain from publishing or supporting inaccurate, false or misleading information about the risks posed by toxic substances.

66. Large businesses contributing to the burden of pollution and toxic exposure in sacrifice zones are not meeting their human rights responsibilities. In sacrifice zones there is a catastrophic market failure, as businesses maximize profits while externalizing health and environmental costs onto vulnerable and marginalized communities. Businesses operating in sacrifice zones should install pollution-abatement equipment, switch to clean fuels, change processes, reduce production and, if necessary, relocate. Businesses are also responsible for cleaning up and rehabilitating communities, lands, waters and ecosystems polluted or contaminated by their operations.

# V. Implementation of the right to a clean, healthy and sustainable environment

67. After decades of recognition at the regional and national levels, there is a substantial track record of implementation of the right to a clean, healthy and sustainable environment by national human rights institutions, regional courts and tribunals and national courts in cases involving pollution and toxic substances.

[88] Inter-American Commission, "La Oroya", para. 186.
[89] *Amparo* review No. 641/2017.
[90] See Public Eye, *Dirty Diesel: How Swiss Traders Flood Africa with Dirty Fuel* (Lausanne, 2016).
[91] See David Michaels, *Doubt Is Their Product: How Industry's Assault on Science Threatens Your Health* (Oxford, Oxford University Press, 2008).
[92] See A/HRC/48/61.

68. National human rights institutions play a vital role in defending the right to a clean, healthy and sustainable environment. Those in Chile, Colombia, Costa Rica, Croatia, France, Hungary, India, Kenya, Mexico, Norway, the Philippines and South Africa, among others, have been active in addressing threats to people's right to a healthy and non-toxic environment.

69. In 2018, the National Human Rights Commission of Mexico published the results of an extensive investigation into air quality in Mexico. It determined that there were systemic and ongoing violations of the constitutional right to a healthy environment regarding air quality, including inadequate monitoring, failure to update standards, lack of timely public information and failure to take effective actions to ensure clean air.[93]

70. The African Commission on Human and Peoples' Rights issued a ground-breaking decision in 2001 in a case involving toxic pollution caused by the oil industry in Nigeria. It determined that pollution violated the Ogoni people's right to a healthy environment under the African Charter on Human and Peoples' Rights and held that Governments had clear obligations to take reasonable and other measures to prevent pollution and ecological degradation.[94]

71. In 2021, the Inter-American Commission on Human Rights determined that catastrophic pollution from a lead smelter in La Oroya, Peru, was responsible for pollution that caused virtually every child in the community to have blood lead levels far above levels considered safe by WHO. Children suffered developmental setbacks, cancer, anaemia, depression and other ailments as a result. The Inter-American Commission concluded that the Government of Peru had deliberately prioritized the economic benefits that could be obtained, ignoring its primary responsibility to enforce domestic environmental regulations and to adopt regulatory provisions that corresponded to its international human rights obligations.[95] Putting economic considerations ahead of human rights is precisely the kind of fundamentally flawed decision-making that creates sacrifice zones.

72. The Inter-American Commission recently requested that Mexico take precautionary measures to address severe pollution affecting the right to a healthy environment in two cases. The first case involved contamination from a notorious landfill and the second industrial water pollution from more than 300 facilities that had caused alarming levels of toxicity in the Santiago River.[96]

73. In a landmark 2008 decision, the Supreme Court of Argentina found that severe air, water and soil pollution in a poor area of Buenos Aires bearing the hallmarks of a sacrifice zone violated the constitutional right to a healthy environment. The Court ordered State and local governments to cooperate to produce public information about the state of the environment and threats to health, control industrial pollution, clean up unauthorized garbage dumps, improve water services infrastructure, restore the health of the watershed and prevent future damage.[97] Since the Court's decision, millions of people have gained access to safe drinking water and sanitation, hundreds of polluting businesses and illegal garbage dumps have been closed, parks and riverside pathways have been built and thousands of people have acquired new homes in social housing developments. Implementation is ongoing, but the progress is significant in remediating a former sacrifice zone and fulfilling people's human rights.

74. In 2019, the Supreme Court of Chile issued a strong decision, rooted in the constitutional right to live in a pollution-free environment, regarding the air pollution crisis in the Quintero-Puchuncaví sacrifice zone.[98] The Court held that economic development,

[93] General recommendation No. 32/2018, July 2018, paras. 445–459.

[94] See *Social and Economic Rights Action Centre and Centre for Economic and Social Rights v. Nigeria*, communication No. 155/96, October 2001.

[95] Inter-American Commission, "La Oroya", para. 175.

[96] *Marcelino Díaz Sánchez y otros respecto de México*, resolution 24/2019, precautionary measure No. 1498-18, 23 April 2019; and *Inhabitants of the areas near the Santiago River regarding Mexico*, resolution 7/2020, precautionary measure No. 708-19, 5 February 2020.

[97] *Mendoza, Beatriz Silvia y otros c/ Estado Nacional y otros*, Case No. M.1569.XL, Ruling, 8 July 2008.

[98] *Francisco Chahuan contra Empresa Nacional de Petróleos*.

such as that represented by the creation of Ventanas industrial complex, even when it legitimately aimed to improve the quality of life of people, including those who lived in Quintero, Ventanas and Puchuncaví, could not be implemented by ignoring or abandoning the conservation and protection of the environment, and could not compromise the expectations of future generations.[99] This is tacit recognition that sacrifice zones cannot be reconciled with human rights obligations, even if there are purported economic benefits. In another case, the Supreme Court of Chile ruled that legal recognition of the right to a healthy environment required the Government to consider WHO guidelines when establishing air quality standards.[100]

75. In 2008, the Supreme Court of the Philippines ruled that environmental degradation in Manila Bay violated the right to a healthy environment and ordered 13 government agencies to take remedial action.[101] In 2021, the Supreme Court of India ordered government officials to institute emergency actions to address the air pollution crisis in New Delhi, improve air quality and protect human rights. The Administrative Court of Thailand plays a vital role in protecting the right to a healthy environment in cases brought by citizens and local communities, having issued orders in more than 65 cases involving human rights harmed by pollution and toxic substances.[102]

76. In a case brought by the South African Human Rights Commission, a court found that air and water pollution caused by a poorly managed landfill violated the constitutional right of nearby residents to a healthy environment.[103] The court ordered the municipal government to develop an action plan within one month to address the problem, and to report back to the court monthly on the implementation of the plan.

77. The foregoing cases illustrate the potential for the right to a clean, healthy and sustainable environment to be used to prevent and rehabilitate sacrifice zones and environmental injustices. As the Supreme Court of Mexico recently acknowledged, courts are obligated to ensure that the authorities comply with human rights, such as the right to a healthy environment, so that these fundamental rights have a real impact and are not reduced to mere ideals or good intentions.[104]

# VI. Good practices

78. It is encouraging to recognize that there are examples of both the prevention of future environmental injustices and the remediation of past and current ones, including some sacrifice zones. Dozens of additional good practices are highlighted in annex II.[105]

79. Important global treaties that control certain toxic substances and wastes include the Basel Convention, the Stockholm Convention, the Rotterdam Convention and the Minamata Convention. Exposure to persistent organic pollutants covered by the Stockholm Convention declined substantially in many countries following its adoption. Important regional treaties include the Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa, the Aarhus Convention, the Escazú Agreement and the Convention on Long-range Transboundary Air Pollution. The effective implementation of these treaties contributes to realizing the right to a clean, healthy and sustainable environment.

[99] Ibid., para 34.

[100] *Fernando Dougnac y otros*, Case No. 1119-2015, Judgment, 30 September 2015. See also UNEP, 2021, *Regulating Air Quality: The First Global Assessment of Air Pollution Legislation* (Nairobi, 2021), p. 52.

[101] *Metropolitan Manila Development Authority and others v. Concerned Residents of Manila Bay*, General Register Nos. 171947-48, Decision, 18 December 2008.

[102] See A/HRC/43/53, annex II.

[103] High Court of South Africa, *South African Human Rights Commission v. Msunduzi Municipality et al.*, Case No. 8407/2020P, Order, 17 June 2021.

[104] Amparo review No. 610/2019, 22 January 2020.

[105] The annexes will be made available at https://www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/AnnualReports.aspx.

80. Consistent with WHO recommendations, more than 60 States have prohibited all uses of all types of asbestos, which causes mesothelioma, lung cancer and asbestosis. Estimated worldwide consumption of asbestos fell from approximately 2 million tons in 2010 to 1.4 million tons in 2016. Unfortunately, parties to the Rotterdam Convention have repeatedly failed to establish the controls necessary to prevent harm to human health from chrysotile asbestos.[106]

81. The European Union has a relatively strong regulatory framework for toxic substances, involving approximately 40 instruments. A hazard-based approach to chemical management is adopted in the regulations on the registration, evaluation, authorization and restriction of chemicals and on the classification, labelling and packaging of chemical substances and mixtures.[107] It is estimated that European regulations have prevented more than one million cancer cases in the past 20 years.[108] However, the European Union acknowledges that this regulatory framework must be strengthened to protect human and environmental health. As a result, it is implementing the European Green Deal, to achieve a circular economy, and a strategy entitled "Chemicals strategy for sustainability: towards a toxic-free environment". These ambitious policies aim to maximize the contribution of safe chemicals to society while achieving zero pollution and a non-toxic environment for the benefit of current and future generations.[109]

82. Sustainable remediation of contaminated sites involves cleaning up sacrifice zones and alleviating environmental injustices.[110] In the United States, the Comprehensive Environmental Response, Compensation and Liability Act and the Superfund Redevelopment Initiative have transformed some of the nation's most contaminated sites (former mines, smelters and landfills) into residential developments, recreation areas, renewable energy projects and commercial properties such as shopping centres.[111] Similar legislation in British Columbia, Canada, authorizes the provincial government to apply the polluter pays principle by seeking payments for contaminated site remediation from a "responsible person", including present and past owners and operators of a property, creditors and persons who produced or transported the substances that caused a site to become contaminated.[112]

83. The closure of coal-fired power plants can contribute to dramatic improvements in air quality and reductions in mercury emissions, preventing premature deaths, reducing cases of respiratory illness, cardiovascular disease and cancer, and spurring progress in fulfilling the right to a healthy environment. More than 40 States have committed to eliminating coal-fired power production by 2030.[113] Ten OECD members plus the European Union pledged to end financial support (including export credits and tied aid) for unabated coal-fired power plants from November 2021.[114]

84. FAO assists States in eliminating the use of highly hazardous pesticides. Mozambique cancelled the registrations of 61 such pesticides. Botswana, Malawi, Tanzania and Zimbabwe have developed shortlists and started to phase them out. China banned the use of 23 highly hazardous pesticides. After Bangladesh and Sri Lanka banned them, suicides declined and agricultural productivity was unaffected.[115]

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106 A/HRC/48/61, para, 71.

107 Regulations (EC) No. 1907/2006 and No. 1272/2008.

108 European Commission, "Chemicals strategy for sustainability: towards a toxic-free environment", communication, 14 October 2020.

109 See European Commission, "Pathway to a healthy planet for all – EU Action Plan: towards zero pollution for air, water and soil", communication, 12 May 2021.

110 See https://www.sustainableremediation.org.

111 See https://www.epa.gov/superfund-redevelopment.

112 Contaminated Sites Regulation, B.C. Reg. 375/96, 16 December 1996 (as amended).

113 See https://poweringpastcoal.org.

114 See communication AL OTH 249/2021 and the reply, available at https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=26751 and https://spcommreports.ohchr.org/TMResultsBase/DownLoadFile?gId=36695.

115 See UNEP, *Global Chemicals Outlook II*.

85. There is a compelling economic case for eliminating pollution and exposure to toxic substances. For example, air pollution costs 330 billion to 940 billion euros annually in the European Union, including lost workdays, health-care costs, crop-yield losses and damage to buildings,[116] whereas measures to improve air quality cost an estimated 70 billion to 80 billion euros annually.[117]

# VII. Conclusions and recommendations

86. **Current approaches to managing the risks posed by pollution and toxic substances are clearly failing, resulting in widespread violations of the right to a clean, healthy and sustainable environment. The deeply disturbing evidence – millions of premature deaths, impaired health for billions of people and lives lived in the purgatory of sacrifice zones – demonstrates a systematic denial of dignity and human rights. The substantive obligations stemming from the right to a non-toxic environment require immediate and ambitious action to detoxify people's bodies and the planet. States must prevent toxic exposure by eliminating pollution, terminating the use or release of hazardous substances, and rehabilitating contaminated communities.**

87. **If the promises of the 2030 Agenda for Sustainable Development are to have any real meaning, people living in sacrifice zones must be prioritized, not left behind. A zero-pollution, non-toxic environment must be more than a slick slogan. It must be the vision that inspires Governments, businesses and citizens to make the systemic and transformative changes required to create a new generation of rights-based environmental laws, fulfil the Sustainable Development Goals and achieve a cleaner, greener, healthier future for all. Today's environmental injustices must be rectified, and tomorrow's prevented.**

88. **A human rights-based approach to preventing exposure to pollution and toxic chemicals could save millions of lives every year, while avoiding billions of episodes of illness. The costs of prevention will be billions of dollars, but the benefits will be measured in the trillions. Safe chemicals will play an important role in the transition to a sustainable, low-carbon, zero-pollution future and a circular economy. Society has the requisite knowledge and ingenuity to fulfill the right to a clean, healthy and sustainable environment, but must overcome powerful vested interests in order to do so.**

89. **To fulfil their obligations related to ensuring a non-toxic environment, States should:**

(a) **Urgently detoxify sacrifice zones and eliminate environmental injustices:**

(i) **Take immediate action to address human rights violations occurring in sacrifice zones by dramatically reducing pollution to levels that meet international standards, closing polluting facilities, remediating contaminated sites, providing medical treatment and, where necessary, relocating affected communities (with informed consent and adequate compensation);**

(ii) **Prevent the creation of new sacrifice zones and prohibit new sources of pollution in areas where a disadvantaged population already endures a disproportionate burden of pollution, in part by amending environmental impact assessment legislation to require consideration of environmental justice issues;**

(iii) **Produce a national report on environmental injustices and, where relevant, sacrifice zones, ideally by the national human rights institution, and update it regularly;**

(iv) **Establish or strengthen laws and policies to establish liability (based on the polluter pays principle) for the clean-up and restoration of contaminated sites, including retroactive liability for all responsible parties;**

[116] See https://ec.europa.eu/governance/impact/ia_carried_out/docs/ia_2013/swd_2013_0531_en.pdf.
[117] See https://ec.europa.eu/environment/air/pdf/clean_air_outlook_economic_impact_report.pdf.

(b) **Strengthen national efforts:**

(i) **Incorporate an enforceable right to a safe, clean, healthy and sustainable environment in constitutions and legislation;**

(ii) **Reform environmental laws and policies to achieve a non-toxic environment, rather than merely reducing some types of pollution and restricting some toxic substances;**

(iii) **Apply the principles of prevention, precaution, non-discrimination and non-regression, the polluter pays principle and the best interests of the child;**

(iv) **Prohibit the production and use of substances that are highly toxic, bioaccumulative and persistent (including carcinogens, mutagens, endocrine disruptors, reproductive toxins, immune system toxins and neurotoxins) with limited exemptions where uses are essential for society; eliminate all uses of highly hazardous pesticides; ban all uses of per- and polyfluoroalkyl substances; and phase out the manufacture, sale and use of lead in paint, toys, cosmetics, costume jewellery, glassware, cooking equipment and other consumer items;**

(v) **Establish or strengthen national air and water quality standards, giving effect to WHO guidelines;**

(vi) **Prohibit the export of toxic substances that are banned domestically;**

(vii) **Require businesses to warn regulators and the public about accidents, spills, pollutant releases and toxic chemicals in products;**

(viii) **Require businesses to post mandatory bonds or insurance of sufficient magnitude to cover future pollution and contamination liabilities;**

(ix) **Strengthen regulatory requirements and institutional capacities for solid, liquid and hazardous waste collection, treatment and management, financed by implementation of the polluter pays principle;**

(x) **Implement policies to reduce the risk of chemical accidents;**

(xi) **Take steps to prepare for natural disasters and climate impacts that could trigger chemical accidents;**[118]

(c) **Fulfil the right to information:**

(i) **Fill knowledge gaps through independent research, with an emphasis on understanding the health and environmental effects of chemical mixture;**

(ii) **Share knowledge about pollution and toxic chemicals through accessible platforms, recognizing that human rights, public health and environmental protection must take priority over business confidentiality;**

(iii) **Implement worker, community and citizen right-to-know laws and policies, to ensure that relevant and complete information concerning chemical hazards, risks and possible exposure is available and easily accessible;**

(d) **Accelerate the transition to a circular economy:**

(i) **Require businesses to redesign products so that they can be safely repaired, repurposed, reused, recycled or composted;**

(ii) **Employ market-based regulations, including extended producer responsibility, to internalize the health and environmental costs of pollution and toxic contamination, recognizing that if health or environmental risks are high, bans are more appropriate;**

(iii) **Redirect subsidies away from activities and products that produce pollution and release toxic substances, to support non-toxic and sustainable products;**

[118] See UNEP, *Global Chemicals Outlook II*.

(iv) **Invest in innovation to identify safe substitutes, accelerate the elimination of the most hazardous chemicals, advance green and sustainable chemistry and spur sustainable remediation;**

(e) **Take international action:**

(i) **Support United Nations resolutions recognizing the right to a safe, clean, healthy and sustainable environment;**

(ii) **Ratify and fully implement international treaties, such as the Basel Convention, the Rotterdam Convention, the Stockholm Convention, the Minamata Convention, the Aarhus Convention and the Escazú Agreement;**

(iii) **Support new treaties on the prevention of plastic pollution and on human rights due diligence for transnational businesses;**

(iv) **Implement a global tax on chemical feed stocks to support low- and middle-income countries in developing the capacity to effectively eliminate pollution, toxic substances and waste;**[119]

(v) **Establish an international science-policy body to synthesize evidence about pollution, toxic substances and waste, similar to the Intergovernmental Panel on Climate Change and the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services;**[120]

(vi) **Create a global pollutant release and transfer registry, or an internationally harmonized network of national registries.**

[119] See https://www.ciel.org/wp-content/uploads/2020/09/ipen-ciel-producer-responsibility-vf1_9e-web-en.pdf.

[120] A/HRC/48/61, para. 110; and Zhanyun Wang and others, "We need a global science-policy body on chemicals and waste", *Science*, vol. 371, No. 6531 (February 2021), pp. 774–776.

# Annex 27

United Nations A/77/549

General Assembly

Distr.: General
25 October 2022

Original: English

**Seventy-seventh session**
Agenda item 66 (a)
**Elimination of racism, racial discrimination, xenophobia and related intolerance**

# Contemporary forms of racism, racial discrimination, xenophobia and related intolerance

## Note by the Secretary-General*

The Secretariat has the honour to transmit to the General Assembly the report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, E. Tendayi Achiume, in accordance with Human Rights Council resolution 43/36.

* The present report was submitted after the deadline in order to reflect recent developments.

# Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, E. Tendayi Achiume

## Ecological crisis, climate justice and racial justice

*Summary*

In the present report, the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, E. Tendayi Achiume, highlights the racially discriminatory and unjust roots and consequences of environmental degradation, including climate change. In the report, she explains why there can be no meaningful mitigation or resolution of the global ecological crisis without specific action to address systemic racism, in particular the historic and contemporary racial legacies of colonialism and slavery.

# I. Introduction

1. The global ecological crisis is simultaneously a racial justice crisis. As countless studies and submissions received show, the devastating effects of ecological crisis are disproportionately borne by racially, ethnically and nationally marginalized groups – those who face discrimination, exclusion and conditions of systemic inequality because of their race, ethnicity or national origin. Across nations, these groups overwhelmingly comprise the residents of the areas hardest hit by pollution, biodiversity loss and climate change.[1] These groups are disproportionately concentrated in global "sacrifice zones" – regions rendered dangerous and even uninhabitable owing to environmental degradation. Whereas sacrifice zones are concentrated in the formerly colonized territories of the global South, the global North is largely to blame for these conditions. As noted by the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment: "high-income States continue to irresponsibly export hazardous materials … along with the associated health and environmental risks, to low- and middle-income countries".[2] Notably, the distinction between "high-income" and "low-income" countries is directly related to the racist economic extraction and exploitation that occurred during the colonial era, for which colonial powers have not been held accountable.[3]

2. "Sacrifice zones," as illustrated in this report, are more accurately described as "racial sacrifice zones". Racial sacrifice zones include the ancestral lands of Indigenous Peoples, territories of the small island developing States, racially segregated neighbourhoods in the global North and occupied territories facing drought and environmental devastation. The primary beneficiaries of these racial sacrifice zones are transnational corporations that funnel wealth towards the global North and privileged national and local elites globally.[4]

3. In addition to documenting racial sacrifice zones, the Special Rapporteur highlights coerced displacement and immobility in the context of ecological crisis and how racially, ethnically and nationally marginalized groups are disparately subjected to this coercion and immobility. Submissions received show how climate-induced migration cannot be divorced from the racially unjust hierarchies and regimes of colonial and imperial extraction and exploitation that have significantly determined who is forced to move and who has the privilege of keeping their homes and nations.

4. Within the broader movement for environmental justice, climate justice seeks historical accountability from those nations and entities responsible for climate change. Climate justice also seeks radical transformation of the contemporary systems that enable global ecological crisis and distribute the suffering associated with this crisis on a racially discriminatory basis. Because climate change today is driven by the accumulation of greenhouse gases in the atmosphere, historical emissions are an existential contemporary problem. From 1850 to 2002, industrialized countries produced three times the carbon dioxide produced by the entire global South.[5] However, it is the global South and colonially designated non-white regions of the world that are most affected and least able to mitigate and survive global ecological crisis, in significant part owing to the colonial processes that caused historical emissions in the first place.

[1] Owing to space constraints, this report is focused on environmental human rights harms related to extractivism and climate change. The Special Rapporteur highlights the urgency of a broader and more comprehensive analysis of the intersection of environmental and racial justice.

[2] See A/HRC/49/53.

[3] See A/HRC/50/60; and A/HRC/41/54.

[4] See A/HRC/50/60. See also, submission from the Centre for Economic and Social Rights.

[5] Sarah Mason-Case and Julia Dehm, "Redressing historical responsibility for the unjust precarities of climate change in the present", in *Debating Climate Law*, Benoit Mayer and Alexander Zahar, eds. (New York, Cambridge University Press, 2021).

5. The Secretary-General appropriately described the recent flooding in Pakistan as "a level of climate carnage beyond imagination", noting that Pakistan is responsible for less than 1 per cent of global greenhouse emissions. One country – the United States of America – is responsible for 20 per cent of total cumulative carbon dioxide emissions.[6] The European Union is responsible for 17 per cent, and 90 transnational corporations, predominantly headquartered in the global North, are responsible for 63 per cent of cumulative industrial emissions from 1751 to 2010.[7]

6. As experts note, global North historical emissions did not benefit all equally. Instead, their production relied upon and enabled racist colonial subordination in the global South, and in the settler colonies of the global North. Inequity persists in the present. According to one submission, the average person's carbon dioxide emissions in the United Kingdom of Great Britain and Northern Ireland over a two-week period is more than a resident of Burkina Faso, Ethiopia, Guinea, Madagascar, Malawi or Uganda will emit in a year. Africa's energy-related emissions account for about 2 per cent of global emissions, but it is likely to shoulder almost 50 per cent of the estimated global climate change adaptation costs. As noted by the President of the African Development Bank, Africa should not have to beg for help to address climate change – polluting global powers should have to pay.[8] The same is true for other parts of the global South.

7. Both within and outside the United Nations, Member States are championing initiatives to develop responses to the global ecological crisis. In this context, a racial justice approach to this crisis is both urgent and necessary, and yet within the global framework it remains thoroughly marginalized. Notwithstanding the important efforts of environmental justice advocates globally, the Special Rapporteur finds that those with authority, control, influence and decision-making power within the global climate governance regimes have largely neglected racial equality and non-discrimination norms that are foundational to international human rights and the international order more broadly. To put it bluntly, the interests and concerns of non-white peoples in particular have been successfully sidelined within United Nations frameworks for coordinating the global response to ecological crisis. The predominant global responses to environmental crises are characterized by the same forms of systemic racism that are driving these crises in the first place. Environmental, climate and racial injustice are the institutionalized status quo.

8. "Techno-chauvinism", the conviction that technology can solve all societal problems, and overrreliance on market-based solutions in responses to climate change are reinforcing racial injustice. The reasons for this relate in part to how technocratic and technological fields and the global capitalist economy remain characterized by forms of systemic racism that are then reproduced even in well-intentioned "green" initiatives.[9] Owing to space constraints, the Special Rapporteur refers readers to her prior analyses of systemic racism, technology and global political economy.[10] Technology has a critical role to play in addressing the ecological crisis, but technological solutions should neither be implemented at the expense of the racially and ethnically marginalized groups that are already disproportionately impacted by ecological crisis, nor advanced in pursuit of "false solutions".[11]

9. The Special Rapporteur acknowledges references to vulnerability or "vulnerable groups" generally in environmental human rights analysis. She stresses the normative

[6] Ibid.

[7] Ibid.

[8] Cara Anna, "Africa shouldn't need to beg for climate aid, says bank president", PBS News Hour, 11 February 2020.

[9] Submissions from Dehm, Sealey-Huggings and Gonzalez.

[10] See A/HRC/44/57; A/HRC/50/60; and A/HRC/41/54.

[11] Submissions from Desmond D'sa (South Durban Community Environmental Alliance) and Patrick Bond (University of Johannesburg).

and pragmatic urgency of engaging racism, racial discrimination and racial injustice explicitly and directly. The Special Rapporteur has warned of the dominance of "colour-blind" approaches to global governance and political economy, including human rights analyses and responses. A colour-blind analysis of legal, social, economic and political conditions professes a commitment to an even-handedness that entails avoiding explicit racial analysis in favour of treating all individuals and groups the same, even if these individuals and groups are differently situated, including because of historical projects of racial subordination.[12] Even when colour-blind approaches are well-intentioned, their ultimate effect is failure to challenge and dismantle persisting structures of entrenched racial discrimination. The Special Rapporteur emphasizes that, in order to address the racially and ethnically disparate impacts of ecological crises, United Nations Member States, officials and other stakeholders must explicitly account for these impacts.

10. The General Assembly and Human Rights Council have recognized the human right to a clean, healthy and sustainable environment,[13] and the Council has noted the human rights impacts of climate change in a number of resolutions. The Office of the United Nations High Commissioner for Human Rights (OHCHR) and various special procedures of the Council have produced vital human rights knowledge, upon which this report builds.[14] They have highlighted equality and non-discrimination concerns, especially in relation to gender,[15] age,[16] disability,[17] sexual orientation and gender identity,[18] Indigenous people[19] and people of African descent.[20]

11. The Special Rapporteur benefited from valuable input from expert group meetings and additional submissions from targeted calls, interviews with representatives of United Nations agencies and submissions from a range of stakeholders in response to a public call. She thanks all stakeholders for their submissions. Non-confidential submissions will be available on the website of the Special Rapporteur. The Special Rapporteur emphasizes that the expertise of directly affected communities was invaluable in the preparation of her report.

# II. Why ongoing climate and environmental crises require racial equality and justice lenses

## A. Racist colonial foundations of ecological crisis

12. Systemic racism served as a foundational organizing principle for the global systems and processes at the heart of the climate and environmental crises. Understanding and addressing contemporary climate and environmental injustice alongside the racially discriminatory landscape requires a historicized approach to how "race" and racism have shaped the political economy of climate and

[12] A/HRC/41/54, para. 14.
[13] See General Assembly resolution 76/300; and Human Rights Council resolution 48/13.
[14] See www.ohchr.org/en/climate-change/reports-human-rights-and-climate-change. See also A/74/161; A/HRC/31/52; A/HRC/49/53; A/HRC/41/39; A/71/281; A/66/285; A/75/207; A/67/299; A/HRC/44/44; A/76/222; A/HRC/48/56; A/HRC/40/53; A/74/164; A/70/287; and A/HRC/47/43.
[15] See A/77/136.
[16] See A/HRC/37/58; and A/HRC/42/43.
[17] See A/71/314.
[18] Office of the United Nations High Commissioner for Human Rights (OHCHR), special procedures, "Forcibly displaced LGBT persons face major challenges in search of safe haven", joint statement by human rights experts on the International Day against Homophobia, Transphobia and Biphobia, May 2022.
[19] See A/77/238.
[20] See A/HRC/48/78.

environmental realities, as well as the governing legal frameworks and worldviews that these frameworks represent. At the centre of the climate crisis are levels of greenhouse emissions that are the product of centuries of natural resource extraction, industrialization and industrial processes and consumption of the outputs of these processes.[21] In their submissions, a number of experts summarized an extensive body of research that charts the racist colonial regimes that underpinned the extraction of coal, gas and oil, forged a global capitalist system dependent on the maintenance of racial hierarchies, and are thus at the heart of the global ecological crisis.[22] In her 2019 report on global extractivism and racial equality, the Special Rapporteur also outlined the racist colonial foundations of the extractivist and industrialization processes that have caused the global ecological crisis.[23]

## B. Contemporary manifestations of transnational environmental racism and climate injustice

13. The formal international repudiation of colonialism has by no means eradicated colonial domination and its racist legacies, including as they relate to the contemporary global ecological crisis. The Special Rapporteur on human rights and the environment has highlighted that, although all humans are exposed to ecological crisis, the burden of this crisis falls disproportionately on systemically marginalized groups, and that many environmental injustices are rooted in "racism, discrimination, colonialism, patriarchy, impunity and political systems that systematically ignore human rights".[24]

14. Peoples in formerly colonized territories who were racially designated as non-white bear the disproportionate environmental burdens of extraction, processing and combustion of fossil fuels.[25] In her 2019 report on global extractivism and racial equality, the Special Rapporteur explained how the contemporary global extractivism economy remains racially stratified because of its colonial origins and the ongoing failure of Member States – especially those who benefited the most from colonial domination – to decolonize the international system and provide reparations for racial discrimination rooted in slavery and colonialism.[26]

15. The territories subject to the most rapacious forms of extraction are those belonging to groups and nations that were colonially designated as racially inferior. The nations least capable of mitigating and responding to ecological crisis have been rendered so both by histories of colonial domination, and in the postcolonial era by externally neoliberal and other economic policies.[27] In the global North, racially and ethnically marginalized groups are similarly on the front lines.

16. The Working Group of Experts on People of African Descent has detailed how environmental racism and the climate crisis have disproportionately affected people of African descent, owing in part to racialized histories of colonial domination, the trade in enslaved Africans and systematic discrimination against and segregation of people of African descent.[28] The Special Rapporteur on the rights of Indigenous Peoples has shed a similar light on environmental racism and climate injustice as they

[21] Submission from Gonzalez.
[22] E.g., submissions from Dehm, Gonzalez and Sealey Huggins, including Greenpeace, *Confronting Injustice: Racism and the Environmental Emergency* (2022).
[23] See A/HRC/41/54.
[24] See A/HRC/49/53.
[25] Submission from Gonzalez.
[26] See A/HRC/41/54; and A/74/321.
[27] See A/HRC/50/60.
[28] See A/HRC/48/78.

affect the lives and very existence of Indigenous Peoples.[29] A number of submissions highlight the ongoing racially disparate effects of the ecological crisis and its drivers, some of them highlighting colonial legacies.[30]

17. Highlighting the salience of colonial legacies should not eclipse the role played by powerful countries in the global South in producing contemporary greenhouse emissions and fuelling environmental degradation. Brazil, China and India are among the top global carbon dioxide emitters. Transnational and cross-border activities within the global South bring their own set of geopolitical and environmental challenges. For example, the Belt and Road Initiative of China in Africa entails industrial megaprojects linked both to African debt entrapment and environmental degradation,[31] and in some places irreparable ecological damage.[32]

*Race, ethnicity, national origin and "sacrifice zones"*

18. The term "sacrifice zones" is derived from a designation used during the cold war to describe areas irradiated due to production of nuclear weapons.[33] Racially marginalized and formerly colonized peoples were among those whose communities were disproportionately "sacrificed" to the demands of nuclear proliferation, as prominently illustrated by the impacts of nuclear testing on the people of the Marshall Islands, as well as Indigenous Peoples and ethnic minorities living in territories controlled by military superpowers.[34]

19. According to the Special Rapporteur on human rights and the environment, "today, a sacrifice zone can be understood to be a place where residents suffer devastating physical and mental health consequences and human rights violations as a result of living in pollution hotspots and heavily contaminated areas".[35] Climate change is driving the proliferation of sacrifice zones,[36] which in many places are, in effect, racial sacrifice zones.

20. In the Amazon and elsewhere in South America, Indigenous environmental human rights defenders are frequently targeted for persecution for protesting industrial projects that destroy their homelands. In several cases, environmental protectors have been threatened or murdered for their advocacy.[37] At the same time, according to one submission, environmental disruption caused by development mega-projects in Brazil, for example, threaten long-time quilombola and Indigenous communities.[38]

[29] See A/HRC/36/46; and A/HRC/4/32.

[30] Submissions from Maat for Peace, Development and Human Rights; Heinrich Böll Foundation; European Network Against Racism; Black Coalition for Rights; Global Justice Clinic; Sabantho Aderi (Lokono-Arawak); and Gonzalez.

[31] OHCHR, *Baseline Study on the Human Rights Impacts and Implications of Mega-Infrastructure Investment* (2017).

[32] Gong Sen, Melissa Leach and Jing Gu, "The Belt and Road Initiative and the SDGs: towards equitable, sustainable development", *IDS Bulletin*, vol. 50, No. 4 (December 2019).

[33] Steve Lerner, *Sacrifice Zones: The Front Lines of Toxic Chemical Exposure in the United States* (Cambridge, Massachusetts, MIT Press, 2010), p. 2.

[34] Jessica Barkas Threet, "Testing the bomb: disparate impacts on Indigenous Peoples in the American West, the Marshall Islands, and in Kazakhstan", *University of Baltimore Journal of Environmental Law*, vol. 13, No. 1 (2005).

[35] See A/HRC/49/53.

[36] Ibid.

[37] OHCHR, "Colombia: extreme risks for rights defenders who challenge corporate activity", 4 August 2022; A/HRC/46/35; and Inter-American Commission on Human Rights, "IACHR and UN human rights condemn murders of environmental activists and Quilombolas in Brazil", 24 January 2022.

[38] Submission from the Brazilian Black Coalition for Rights.

21. In South Asia, Indigenous peoples and those subject to caste-based discrimination face environmental devastation from development projects over which they have limited free, prior and informed consent. In Indonesia, the legacy of colonial-era racist urban planning, combined with excessive ground water extraction and pro-capital adaptive responses, subjects low-income residents of Kampungs in Jakarta to flooding and to the threat of forced displacement.[39] Throughout South-East Asia, rampant industrial activity has transferred the harms of environmental degradation and toxic waste from industrial hotspots in the global North to non-white communities in the global South.[40]

22. A number of submissions highlighted the prevalence of racial sacrifice zones in the United States.[41] For example, "Cancer Alley" is a petrochemical corridor along the Mississippi River, where 150 petrochemical facilities operate. With a predominantly African American population, it is a region with the highest rates of multiple forms of cancers in the United States. Racist legacies loom large over Cancer Alley. It was originally called Plantation Country, a place where enslaved Africans were forced to labour. New facilities like the "Sunshine Project" stretch over at least four ancestral burial grounds and are concentrated in the Fifth District, whose residents are 86.3 per cent African American. The land use plan for the District has been changed from "residential" to "residential/future industrial" without notice, allowing for one of the largest plastics facilities to be approved. By contrast, chemical companies are barred from constructing new facilities in the Third District, whose residents are 78.4 per cent white.[42]

23. A 1987 study revealed a nationwide pattern, with racially marginalized communities in the United States five times more likely than white communities to live near toxic waste.[43] As noted in a submission, these disparities cannot be explained solely on the basis of income inequality: an in-depth study in 2008 found that Black people in the United States with an annual household income of $50,000 to $60,000 live in neighbourhoods subject to greater pollution than the average white people with household incomes under 10,000 dollars.[44]

24. In one submission it was reported that, in Canada, the Aamjiwnaang First Nation is surrounded by Sarnia, Ontario's so-called "Chemical Valley". Residents experience low air quality and high rates of negative health outcomes, such as miscarriages, childhood asthma and cancer.[45]

25. Throughout Europe, Roma communities are forced to live near hazardous waste sites or in areas that are prone to climate change-related disasters, often to make way for industrial development or tourism. At the same time, Irish Travellers often lack access to culturally specific accommodation and are denied reliable access to water,

[39] Michelle Kooy and Karen Bakker, "Splintered networks: the colonial and contemporary waters of Jakarta", *Geoforum*, vol. 39, No. 6 (November 2008); Jeroen Frank Warner and Hanne Wiegel, "Displacement induced by climate change adaptation: the case of 'climate buffer' infrastructure", *Sustainability*, vol. 13, No. 16 (August 2021); and Kian Goh, "Urban waterscapes: the hydro-politics of flooding in a sinking city", *International Journal of Urban and Regional Research*, vol. 43, No. 2 (March 2019).

[40] Benedetta Cotta, "What goes around, comes around? Access and allocation problems in Global North-South waste trade", *International Environmental Agreements: Politics, Law and Economics*, vol. 20 (2020).

[41] Submissions from Ms. Shirley and Heinrich Böll Foundation.

[42] See submission from Human Rights Advocacy Project; and communication No. JAL USA 33/2020.

[43] United Church of Christ, "Toxic wastes and race in the United States: a national report on the racial and socio-economic characteristics of communities with hazardous waste sites", 1987.

[44] Liam Downey and Brian Hawkins, "Race, income, and environmental inequality in the United States", *Sociological Perspectives*, vol. 51, No. 4 (December 2008).

[45] See submission from Maat for Peace, Development and Human Rights; and A/HRC/49/53.

affordable heating and electricity.[46] In the Arctic, Indigenous peoples such as the Inuit and Sami are faced with rising sea levels and the total destruction of their livelihoods owing to changing climate patterns.[47]

26. In one submission[48] it was noted that European research on environmental justice is focused almost exclusively on the issue of income inequality. Race and ethnicity are largely absent, and data disaggregated on these bases is not collected. The submission provided examples of such omissions in Germany, notwithstanding the persisting evidence of environmental racism against Rom*nja and Sinti*zza. In the submission it is also noted that a number of German studies reveal that polluting industries are more frequently located in cities and neighbourhoods with higher proportions of migrants. These national and European studies show that the correlation between a migration background or non-German citizenship and environmental pollution is more significant than the correlation between socioeconomic status or income and environmental pollution.

27. In one submission it was reported that, in the United Kingdom, racially and ethnically marginalized groups are disproportionately subjected to higher levels of air pollution than white British people, and more susceptible to pollution health impacts. Furthermore, the placement of waste incinerators disproportionately affects racially and ethnically marginalized groups.[49]

28. In one submission[50] it was reported how the military occupation by Israel of the Occupied Palestinian Territories contributed to the ecological devastation and transformation of the Palestinian territories, and continues to deny Palestinians their fundamental right to self-determination, including regarding indigenous Palestinian approaches to mitigating climate impacts. Israeli settler expansion into Palestinian territories has led to the destruction of hundreds of Palestinian villages.[51] In addition to the devastation caused by this destruction, native trees have been eliminated in favour of European pine trees. In the submission tax incentives were reported that encourage high-polluting industry to relocate to the Occupied Palestinian Territories, with immense, documented genotoxic effects for Palestinian residents. Furthermore, the submission reported the pretextual use of environmental considerations to justify further Israeli settlement of the Occupied Palestinian Territories.

29. Extensive pollution of the air and water has also caused the higher incidence of serious diseases among Palestinians. Environmental protection policies have allegedly been used to justify the use of land by occupation authorities. It is reported in the submission that Israel has been using the claim of protecting nature reserves to confiscate more land for the purpose of building additional settlements, via a practice which has been described as “greenwashing”. It is also reported in the submission that 91 per cent of the total water of the West Bank is being expropriated solely for Israeli settler use, while Palestinians face serious water insecurity.[52] OHCHR has reported that: “Israeli authorities treat the nearly 450,000 Israeli settlers and 2.7 million Palestinians residing in the West Bank (excluding East Jerusalem) under two distinct bodies of law, resulting in unequal treatment on a range of issues including access to water”.[53] Indeed, Israeli practices and policies in the Occupied

[46] Submission from European Network against Racism.
[47] Ibid.
[48] Submission from the Heinrich Böll Foundation.
[49] Submission from Sealey Huggins (Greenpeace, *Confronting Injustice: Racism and the Environmental Emergency*).
[50] Submission from Al-Haq.
[51] Communication No. JAL ISR 2/2022.
[52] Submission from Al-Haq.
[53] See A/HRC/48/43.

Palestinian Territories amount to apartheid,[54] with extreme environmental and human rights consequences for Palestinians.

30. In one submission it was noted that the historical legacy of militarized occupation and neocolonial extraction also plays a key role in the climate vulnerability of States in Central America and the Caribbean. A deadly history of intervention, neoliberal coercion and unequal relationships between Latin America and military superpowers, in particular the United States, has rendered this region particularly vulnerable to climate change slow-onset disasters.[55] In the Caribbean, farmers and peasants are confronted with catastrophic changes in the weather that make agricultural labour increasingly difficult and that predominately affect poor farmers and rural women.[56] In Central America, climatic changes have led to violence and climate migration, often through dangerous climate pathways, defined by racialized exclusion, in North America.[57]

31. In the Middle East, colonial and neocolonial invasions and military interventions have been motivated in large part by the extensive reserves of fossil fuels in that region. States and transnational corporations of the global North have collaborated with authoritarian elites to extract and exploit the region's fossil fuels – contributing to climate change and perpetuating human rights violations against local communities and racially marginalized migrant labourers.[58]

32. Across the African continent, extractive projects and toxic waste dumping have wreaked havoc on natural environments,[59] as African States, with arid ecosystems, struggle to maintain local livelihoods in the midst of climate change.[60] In a submission it was reported that the prevalence of sacrifice zones in Africa, including the example of Kabwe in Zambia, which is among the most polluted places in the world owing in part to abandoned mining residue. According to estimates, more than 95 per cent of children living there have elevated levels of lead in their blood.[61] In another submission highlighted communities' decades-long battles against transnational corporations for pollution from offshore oil and gas drilling, and ever-leaking petrol pipelines in Durban, South Africa.[62]

33. Small island developing States face extreme risks, as rising sea levels, intensifying natural disasters and the destruction of natural ecologies threaten lives and livelihoods.[63] The multidimensional vulnerability index, a newly developed metric measuring the economic, geographic, financial and environmental vulnerabilities of small island developing States, put the average score of small island developing States 50 to 60 per cent higher than the global average, indicating a starker vulnerability than would be implied by income levels.[64] For small island developing States, the

[54] See A/HRC/49/87.
[55] Submission from Gonzalez.
[56] Submissions from the Haitian Civil Society Consultation; and Sealey-Huggins.
[57] Submissions from Sabantho Aderi (Lokono-Arawak); and the Global Justice Clinic.
[58] Submission from Gonzalez.
[59] Amnesty International, "Trafigura: a toxic journey", 2016.
[60] Intergovernmental Panel on Climate Change, *Climate Change 2022: Impacts, Adaptation and Vulnerability Working Group II Contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge, United Kingdom of Great Britain and Northern Ireland, Cambridge University Press, 2022).
[61] Submission from Maat for Peace, Development and Human Rights.
[62] Submissions from D'sa and Bond.
[63] Michelle Mycoo and others, "Small islands", in *Climate Change 2022* (Cambridge, United Kingdom, Cambridge University Press, 2022).
[64] UNDP, "Towards a multidimensional vulnerability index", discussion paper, February 2021.

global ecological crisis is predicted to wipe out some of their territories before the end of the twenty-first century.[65]

*Race, ethnicity, national origin and climate-induced displacement*

34. As the Special Rapporteur has detailed in prior reports, racial and xenophobic discrimination are root causes of forced displacement, but they also significantly determine who can move within and across borders, and who is immobilized against their will.[66] This is true in the context of environmental and climate induced displacement.[67] Manifestations of environmental racism and climate injustice include forced displacement, as well as the inability of racially marginalized peoples to flee contamination hotspots or areas of escalated natural disaster risk.

35. According to the Office of the United Nations High Commissioner for Refugees (UNHCR), 90 per cent of refugees and most internally displaced persons come from highly climate vulnerable countries.[68] At the same time, highly climate vulnerable countries host over 40 per cent of refugees, while internally displaced persons in conflict-affected and climate vulnerable countries are often displaced to areas where they are exposed and vulnerable to climate-related hazards.[69] The risk for refugees and internally displaced persons is two-fold: on the one hand, settlements are disproportionately concentrated in regions that are exposed to higher-than-average warming levels and specific climate hazards, including temperature extremes and drought; on the other hand, these populations frequently inhabit settlements and legal circumstances that are intended to be temporary but are protracted across generations, all the while facing legal and economic barriers in their ability to migrate away from climate impacts. Large concentrations of these settlements are in the Sahel,[70] the Near East and Central Asia,[71] where temperatures will rise higher than the global average, and extreme temperatures will exceed thresholds for safe habitation. Many refugees are racially and ethnically marginalized people. Systemic racism in international border regimes constrains the movement of racially marginalized peoples, while allowing citizens of the global North unprecedented autonomy to travel, migrate[72] and avoid environmentally unsafe areas. With climate change being framed as a security issue, security corporations and other actors are contributing to border militarization that further prevents many displaced by climate conditions from finding safety.[73] Within countries, spatial segregation and discrimination in housing or economic opportunities traps racially marginalized communities in specific locations within the country.[74]

36. A number of submissions highlighted forced displacement from racial sacrifice zones, as well as the racist and xenophobic treatment of migrants and refugees who

[65] Ibid.

[66] See A/HRC/38/52; A/HRC/48/76; A/75/590; A/HRC/44/57; and A/HRC/35/41.

[67] Carmen Gonzalez, “Climate change, race, and migration”, *Journal of Law and Political Economy*, vol. 109 (2020).

[68] UN News, “Climate change link to displacement of most vulnerable is clear: UNHCR”, 22 April 2021.

[69] Based on analysis of available data from Internal Displacement Monitoring Centre, Global Internal Displacement database, available at www.internal-displacement.org/database/displacement-data; and the Notre Dame Global Adaptation Initiative, Country Index database, available at https://gain.nd.edu/our-work/country-index/.

[70] Office of the United Nations High Commissioner for Refugees (UNHCR), “Decade of Sahel conflict leaves 2.5 million people displaced”, 14 January 2022.

[71] UNHCR, “Displaced on the frontlines of the climate emergency”, 2021.

[72] E. Tendayi Achiume, “Racial borders”, *The Georgetown Law Journal*, vol. 110, No. 3 (2022).

[73] Submission from Francis.

[74] See A/HRC/49/48.

are able and choose to leave. According to one submission,[75] climate change is increasing displacement and migration to urban areas and out of Haiti, owing to negative economic impact on the livelihoods of farmers. Racism limits Haitians' freedom of movement, limiting their ability to escape climate harms through dignified migration. In the United States, Haitians are targeted for deportation under Title 42 of the United States Code, which has been used to detain and exclude Haitian migrants at the border.[76]

37. According to one submission,[77] in Mozambique, the expansion of large international mining projects has intensified, and they have been a main source of socioenvironmental conflicts causing internal displacement. A total of 1,365 families from the communities of Mithethe, Chipanga, Bagamoyo and Malabue were displaced by a coal exploration project operated by the Brazilian multinational Vale in Moatize, Tete province. The treatment of displaced populations by multinational companies in the region mimic violent colonial practices. The decision to implement the project was imposed upon the affected communities, who were excluded from decision-making, and subject to police intimidation. Most of the population harmed by transnational corporations are peasants, low-income, Indigenous Peoples and racially marginalized groups. Locals live in constant fear of reprisals for speaking against the company.

38. Another submission[78] highlighted the long history of racism in the agricultural sector in the United States, which includes the forceful removal of Native Americans from their homelands, enslaving Africans and their descendants and exploiting Latinx farmworkers under inhumane conditions. Federal and state policy has historically favoured white men, with some states blocking reparations or ownership of land by non-white individuals. White individuals owe 98 per cent of farmland, while 80 per cent of the labour force is Latinx. Homestead acts have disproportionately given subsidized farms to white individuals and corporations while the federal Government has discriminated in lending to non-white farmers. The Southern landowners' efforts to exclude Black sharecroppers from the New Deal legislation during the Great Depression began an enduring phenomenon known as "agricultural exceptionalism", a systematic exclusion of farmworkers from federal labour protections, such as the National Labor Relations Act and Fair Labor Standards Act. According to the submission, climate change is forcing more people to migrate and increasing the number of individuals seeking work in the United States. However, over half of farmworkers lack immigration status, and those who enter the country legally are vulnerable to abuse. Workers are commonly subjected to poor wages and unsafe working conditions.

39. In one submission[79] it was reported that, in Central America and Mexico, Indigenous and Black communities have been involuntarily displaced by their disparate exposure to the impacts of extractivism and their general socioeconomic marginalization. According to the International Organization for Migration (IOM), Central America is at great risk of hydro-meteorological events related to climate change. The level of risk of humanitarian crises and disasters in six out of the seven countries in the region, namely, Cuba, El Salvador, Haiti, Honduras, Mexico and Nicaragua are at medium and high levels.[80] There are no effective policies in place to

[75] Submission from the Global Justice Clinic.
[76] Communication No. JAL USA 27/2021.
[77] Submission from Eusébio.
[78] Submissions from the Florida State University; University of Bologna; and the Bread for the World USA.
[79] Submission from the Observatorio de Racismo en México y Centroamérica.
[80] Lilian Yamamota and others, *La Movilidad Humana Derivada de Desastres y el Cambio Climático en Centroamérica* (Geneva, International Organization for Migration, 2021).

protect displaced people, and their human rights are further jeopardized by racial and ethnic criminalization when they attempt to migrate. Indigenous, non-Spanish-speaking and Black migrants face barriers in accessing jobs, education, health and housing services owing to institutionalized discrimination.

40. In many submissions to the Special Rapporteur it was noted that Indigenous peoples faced the prospect of being forced out of their ancestral and traditional homelands owing to rising sea levels and natural disasters. In one submission it was reported that, in India, Indigenous Peoples account for 40 per cent to 50 per cent of those displaced despite making up just 8 per cent of the total population.[81] The disruptive impacts of industrial projects in their territories are a main cause. Entire Indigenous territories, in particular those in the small island developing States, are at risk, and even the full-scale relocation of entire State populations will not rectify the fallout from the destruction of their islands.[82] The permanent loss of Indigenous homelands is and will remain a massive global failure and a deep racial injustice in the absence of urgent rectificatory action.

# III. Racially discriminatory environmental human rights violations

## A. Applicable legal frameworks

41. Non-discrimination and the prohibition on racial discrimination are peremptory norms of public international law.[83] Non-discrimination and equality obligations are also broadly enshrined in international human rights treaties including the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child and the Convention on the Rights of Persons with Disabilities.[84]

42. The most comprehensive prohibition of racial discrimination can be found in the International Convention on the Elimination of All Forms of Racial Discrimination. In article 1 (1), racial discrimination is defined as “any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin that has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life”. In its general recommendation, the Committee on the Elimination of Racial Discrimination has clarified that the prohibition of racial discrimination cannot be interpreted restrictively.[85] The Committee has also stated that the Convention applies

[81] Submission from Gupta.

[82] Submission from Vano.

[83] See A/77/10; and A/CN.4/727. See also, *Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970*, p. 3; and *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 16. Regional human rights mechanisms have reiterated the status of non-discrimination and equality principles and obligations as foundational to enjoyment of human rights. See e.g., African Commission on Human and People’s Rights, communication No. 245/2002, para. 169; and Inter-American Court on Human Rights, Advisory Opinion OC-18/03 of September 2003, para. 101.

[84] See International Covenant on Civil and Political Rights, art. 2; International Covenant on Economic, Social and Cultural Rights, art. 2; Convention on the Rights of the Child, art. 2; International Convention on the Elimination of All Forms of Racial Discrimination, art. 1; Convention on the Elimination of All Forms of Discrimination against Women, art. 1; Convention on the Rights of Persons with Disabilities, art. 2; and International Labour Organization, Convention No. 111 (1958) concerning discrimination in respect of employment and occupation, para. 1(a).

[85] Committee on the Elimination of Racial Discrimination, general recommendation No. 32 (2009).

to purposive or intentional discrimination, as well as discrimination in effect and structural discrimination. This substantive, non-formalistic approach to equality is especially important in the context of environmental degradation and climate change, where discriminatory intent is difficult to prove but disparate impacts of environmental harm are clearly apparent.

43. Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination requires States parties to eliminate racial discrimination in the enjoyment of economic, social, cultural, civil and political rights. Article 2 requires States parties, inter alia, to "take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists" and to "prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization".

44. Under international human rights law, States are in breach of their obligations if they fail to adopt or enforce anti-discrimination legislation regulating the conduct of both public and private actors; fail to amend, rescind or nullify any laws and regulations that have the effect of creating or perpetuating discrimination;[86] or fail to adopt all appropriate immediate and effective measures to prevent, diminish and eliminate the conditions, attitudes and prejudices which cause or perpetuate discrimination in all its forms, or, where necessary, fail to implement concrete special measures aimed at realizing de facto, substantive equality.[87] Special measures or "affirmative action" – specific steps taken by a State aimed at achieving equality in effect, correcting inequality and discrimination, and/or securing advancement of disadvantaged groups or individuals[88] – are a protected human rights remedy[89] that States are required to implement where necessary.[90]

45. The term "environmental racism" describes institutionalized discrimination involving "environmental policies, practices or directives that differentially affect or disadvantage (whether intentionally or unintentionally) individuals, groups or communities based on race or colour".[91] Environmental racism occurs within nations and across borders, as noted by the Working Group of Experts on People of African

[86] Committee on Economic, Social and Cultural Rights, general comments No. 20 (2009), paras. 11, 37, and 39–40; and Human Rights Committee general comments No. 31 (2004), para. 8.

[87] CCPR/C/21/Rev.1/Add.1, para. 10; Committee on Economic, Social and Cultural Rights, general comments No. 16 (2005), para. 15; Committee on Economic, Social and Cultural Rights, general comments No. 20 (2009), paras. 8(b), 9 and 39; Committee on the Elimination of Discrimination against Women, general recommendation No. 25 (2004). See also International Convention on the Elimination of All Forms of Racial Discrimination, art. 7; Committee on the Elimination of Racial Discrimination, general recommendation No. 32 (2009); and CRPD/C/DOM/CO/1, para. 50.

[88] Convention on the Elimination of All Forms of Discrimination against Women, art. 4(1); Convention on the Rights of Persons with Disabilities, art. 5(4); International Convention on the Elimination of All Forms of Racial Discrimination, art. 2(2); Committee on the Rights of Persons with Disabilities, general comments No. 6 (2018), para. 29; and Human Rights Committee general comment No. 18 (1989), para. 10.

[89] See the compilation of general comments and general recommendations adopted by the Human Rights Treaty bodies in HRI/GEN/1/Rev.9 (Vol. I), in particular Committee on Economic, Social and Cultural Rights, general comment No. 16 (2005), paras. 9 and 39; and Committee on the Rights of the Child, general comment No. 4 (2003), paras. 1 and 12.

[90] International Convention on the Elimination of All Forms of Racial Discrimination, art. 2(2); Committee on the Elimination of Racial Discrimination, general recommendation No. 32 (2009), para. 30; Committee on Economic, Social and Cultural Rights, general comments No. 20 (2009), paras. 8(b) and 9; and Human Rights Committee general comment No. 28 (2000), para. 3.

[91] Robert D. Bullard, "Confronting environmental racism in the twenty-first century", *Global Dialogue*, vol. 4, No. 1 (Winter 2002), p. 35.

Descent.[92] People of African and Asian descent, Indigenous peoples, Roma, refugees, migrants, stateless persons and other racially and ethnically marginalized groups are all affected by environmental racism, which must be addressed to the fullest extent possible under international human rights law.

46. The Durban Declaration and Programme of Action, which remains the international community's most comprehensive plan to eliminate racism and racial discrimination, offers recommendations on tackling environmental racism. For example, it calls for increased support for people of African descent to invest in "environmental control measures" and offers several recommendations for "non-discriminatory measures to provide a safe and healthy environment for individuals and groups of individuals victims of or subject to racism, racial discrimination, xenophobia and related intolerance".[93]

47. Environmental racism and climate injustice interact with other forms of social exclusion, such as discrimination on the grounds of gender, age and disability. It should be recognized in intersectional analyses of environmental and climate-related human rights violations that women, older persons, persons with disabilities and gender and sexually diverse persons who are members of racially marginalized peoples face distinct human rights violations. In several submissions this point is made explicitly. Women in particular play important roles in rural and agricultural life, and they are typically on the front line of environmental and climate-related human rights violations. Indeed, the Special Rapporteur on violence against women and girls, its causes and consequences has reported that climate change-induced violence against women is a distinct phenomenon caused by the feminization of intersecting vulnerabilities.[94] Elderly persons and children are also vulnerable to climate harms, in particular when they live in economically marginalized communities or States with limited economic resources to support their specific needs. Persons with disabilities similarly require resources to adapt and mitigate harms caused by climate change, and these resources are typically denied to certain States and racially marginalized communities owing to systemic discrimination.

48. Environmental justice and climate justice are often linked to the right to development on sustainable terms. The right to development is intended to guarantee both a right to social and economic progress and the realization of all other human rights through self-determination and equal sovereignty. In the Declaration on the Right to Development, the General Assembly states that the right of peoples to self-determination includes the exercise of their inalienable right to full sovereignty over all their natural wealth and resources. The right to development "implies the full realization of the right of peoples to self-determination", which includes the right freely to determine their political status and to pursue their economic, social and cultural development.[95]

49. In the United Nations Declaration on the Rights of Indigenous Peoples,[96] the General Assembly explicitly recognizes the importance of environmental protection in preventing discrimination against Indigenous Peoples. In article 29 it affirms that "Indigenous Peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for Indigenous Peoples for such conservation and protection, without discrimination." In article 29 it also applies the "free, prior and informed consent" principle to the storage or disposal of hazardous materials in the lands or territories of Indigenous Peoples. In article 32 it

[92] See A/HRC/48/78.
[93] Durban Programme of Action, paras. 5, 8(c) and 111.
[94] See A/77/136.
[95] General Assembly resolution 41/128, art. 1(2).
[96] General Assembly resolution 61/295.

calls on States “to provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact”.

## B. Racially discriminatory denial of economic and social rights, the right to self-determination and principles related to the right to development

50. In many national contexts, environmental injustice is often analysed in terms of socioeconomic inequities with limited attention to racial and ethnic inequities, and there is widespread resistance to collection of data disaggregated on racial and ethnic bases.[97] Without discounting the importance of poverty, gender, age and other social characteristics in exposing communities to environmental and climate change harms, discrimination on the grounds of race, colour, descent and national and ethnic origin remains a critical determinant of climate and environmental harms experienced by individuals and communities. Systemic racial discrimination results in economic marginalization, and in many places racially, ethnically and nationally marginalized groups are trapped in low-income brackets. The economic marginalization of racially marginalized peoples plays a major role in constraining their control over the development of their communities and their exposure to toxic waste and climate disasters. Relatedly, racially marginalized peoples frequently lack true self-determination over economic development that occurs on or near their communities, making them frequent victims of racial sacrifice zones created by national authorities or transnational corporations.

51. In a submission from a coalition of civil society organizations in Haiti, it was explained that those most harmed by climate change and environmental degradation are frequently *peyizan* (peasant farmers), rural women and residents of poor urban communities.[98] Haiti is considered one of the five countries most affected by the climate crisis globally, yet it has contributed only approximately 0.003 per cent to global greenhouse gas emissions. Furthermore, the history of racialized economic and political domination of Haiti by imperial powers is well known and has contributed immensely to its contemporary economic conditions.[99] According to predictions, the effects of climate change will eventually double the length of the dry season in Haiti, while floods and hurricanes are likely to increase. Haitians face the prospect of declining agricultural livelihoods, malnutrition and severe mental and physical health impacts.

52. In submissions from the United States it was noted how Black, Latinx and Indigenous communities are disproportionately more likely to live in communities near contamination hotspots, owing to the legacy of economic marginalization, segregation, slavery and colonialism. They are more likely to face the effects of pesticide poisoning owing to economic marginalization that concentrates poor, racially marginalized peoples in dangerous agricultural labour. While transnational corporations continue their industrial activities, residents are often unable to achieve accountability using local or state government forums. In other parts of the country, companies continue plans to extract and transport fossil fuels over Indigenous territories and sacred lands, fully supported by international financial actors eager to derive profits from fossil fuels.[100] In these scenarios, marginalization along economic and political lines has prevented Black, Latino and Indigenous Peoples from exercising their right to development and asserting their right to self-determination. As a result,

[97] Submission from European Network against Racism.
[98] Submission from the Global Justice Clinic.
[99] See A/74/321.
[100] Submission from Saldamando.

they are unable to protect their territories from economic development that will largely benefit transnational corporations and elites outside their communities.[101]

53. In one submission it was noted how impoverished Afro-descendants in Brazil are disproportionately exposed to floods and landslides because of their economic marginalization and segregation into dangerous areas. Afro-Brazilians are the disproportionate victims of such disasters because of a sociopolitical structure in Brazil that places racialized peoples in living conditions of enhanced vulnerability, while public policymakers fail to address precarious living conditions.[102]

## C. Racially discriminatory civil and political persecution

54. Environmental racism results in routinized persecution of human rights defenders and environmental protectors who work to protect their communities from environmental harm. Around the world, these defenders frequently come from Indigenous communities or other racially marginalized groups. As discussed previously, racial marginalization entails economic and political marginalization, and when marginalized groups make efforts to assert their rights in the face of exploitative Governments and transnational corporations, these groups are heavily persecuted. Often, there is limited accountability for human rights defenders from racially and ethnically marginalized groups. In documenting deaths and violence against environmental human rights defenders, the former Special Rapporteur on human rights defenders explained that "one of the systemic causes of conflicts around environmental rights is the imbalance of power between States, companies and environmental human rights defenders".[103] A structural underpinning of this imbalance in power is systemic racism, which excludes racially marginalized peoples from full political decision-making and exposes activists and leaders to racialized violence.

55. According to one submission, in Brazil, Indigenous and Afro-Brazilian leaders have been targeted by both public and private actors for their advocacy against industrial projects near their lands.[104] Global Witness reports that Brazil has the fourth highest number of murdered environmentalists in the world. Traditional peoples, quilombola, riverine and Indigenous communities suffer constant pressure from various economic activities in their territories and have been threatened or cruelly assassinated.[105] In Pará, a region with heightened environmental conflicts, several cases of commissioned murders of environmental activists have been reported. In these incidents, all the victims were Black women who fought for a balanced way of life with forest conservation. Reported in another submission was the assassination of a South African environmental activist, also a Black woman, fighting against coal mining expansion.[106] Yet another submission highlighted murder, rape and torture of Ogoni community activists in Nigeria, where Shell has destroyed the lives and livelihoods of Indigenous Peoples.[107]

56. In another submission, it is reported that, in India, Indigenous and Dalit leaders have also faced detention and criminalization owing to their advocacy against local environmental policies which impinge upon their cultural autonomy.[108]

[101] Submission from the Indigenous Environmental Network.
[102] Submission from the Coalition of Black Brazilians for Rights.
[103] See A/71/281.
[104] Submission from the Coalition of Black Brazilians for Rights.
[105] Monica Nunes, "Família de ambientalistas é assassinada no Pará: pai, mãe e filha tinham projeto de soltura de quelônios no Rio Xingu", 11 January 2022.
[106] Submissions from D'sa and Bond.
[107] Submission from the Centre for Economic and Social Rights.
[108] Submission from Gupta.

## D. Dispossession of Indigenous and Afro-descendant peoples

57. As noted in the Special Rapporteur's report on global extractivism, Indigenous and Afro-descendant peoples are frequently on the front lines of extractive projects, and thus bear an outsized risk of harm from environmental degradation. At the same time, climate change threatens indigenous peoples in the Pacific, the Americas, the Caribbean, Asia and Africa with the loss of their homelands. The profusion of extractive projects and the subsequent emission of greenhouse gases can be attributed to the systematic dispossession of Indigenous and Afro-descendant peoples and the denial of their lands and right to self-determination.

58. According to one submission,[109] in Brazil, Sapê do Norte, certified as protected "quilombos" territory, has been the home of quilombo communities since 1960. Inhabitants of this region have been experiencing a drastic reduction in biodiversity, large-scale deforestation, drying up of streams and filling of springs, death of animals and high dumping of pesticides in the water and soil, owing to highway construction, agribusiness attacks, installation of a gas pipeline by Petrobras, and the rupture of the Fundão dam, operated by Samarco. The construction of the Alcântara Launch Center over the largest quilombola territory in Brazil resulted in the mandatory removal of 312 quilombola families, and more continue to be displaced across the country.

59. In another submission, grave human rights violations against the Chepang Indigenous community in Nepal were reported, including construction and development in their territories without free, prior informed consent, destruction of their homes and livelihood and brutal violence against community members.[110] Notwithstanding the promulgation of laws intended to protect Indigenous peoples in Nepal, one submission highlights the absence of dedicated resources to give effect to these laws. It reported the case of the Sonaha and Haliya communities, who remain outside of the government framework intended to protect Indigenous communities.[111]

## E. Eco-fascism

60. An ideological strand of racism known as "eco-fascism" has been observed in far-right and neo-Nazi circles around the world.[112] The eco-fascist movement targets racially marginalized groups and ethnic and national minorities and excluded groups as scapegoats for environmental problems. They also utilize environmental concerns to support generalized xenophobia. Eco-fascist rhetoric has been associated with white supremacist terrorism, in particular in settler-colonial nations. The Christchurch, El Paso and Buffalo shootings in New Zealand and the United States, which were explicitly targeted at racially marginalized peoples, were linked to eco-fascist rhetoric.[113]

[109] Submission from the Coalition of Black Brazilians for Rights.
[110] Submission from FIAN.
[111] Submission from FIAN Nepal (Dalits).
[112] Submission from European Network against Racism.
[113] Kate Aronoff, "The Buffalo shooter and the rise of ecofascist extremists", The New Republic, 2022.

# IV. Towards environmental justice, climate justice and racial justice

## A. Concerns with the dominant approaches

61. The responses and momentum of the global system remains woefully ill-equipped to halt racially discriminatory and unjust features and consequences of ecological crisis. The Special Rapporteur is concerned that dominant international approaches to governing environmental and climate issues amount to a doubling down on racial inequality and injustice.

*Racially discriminatory mitigation and overreliance on market-based solutions*

62. In several submissions it was noted that some "green" solutions to climate change challenges actually reinforce or perpetuate racial marginalization and inequities. The transition to alternatives to fossil fuels in some contexts is resulting in "green sacrifice zones"[114] meaning that racially and ethnically marginalized groups are disproportionately exposed to human rights violations associated with the extraction or processing of these alternatives.[115] Critiques of "green capitalism" or "green growth" point out that these approaches promote energy transitions that "tend to presuppose the perpetuation of colonial arrangements".[116] They seek to maintain unsustainable levels of consumption in the global North through transitions that require tremendous destructive extraction from the global South. As "green new deals" proliferate in the global North, their efficacy is contingent on their capacity to address the root causes of ecological crisis and undo the systemic racism embedded in fossil fuel economies.[117] Even development initiatives and seemingly "green" private ventures in global South countries can mask their profit-seeking arc, resulting in worsened environmental conditions and conflicts.[118]

63. Consultation participants reported that, in large part, because many climate-related initiatives are designed without the input, consideration or leadership of racially marginalized peoples, they can reinforce patterns of racial discrimination already present in national and international economies. Overreliance on technocratic knowledge and the exclusion of local communities from climate change leadership have worked to distract from the systemic changes demanded by front-line communities and required to truly solve the ongoing crisis.[119]

64. For example, carbon capture and storage technologies are increasingly promoted as processes that can collect carbon dioxide generated by industrial activities before they reach the atmosphere, and transport captured emissions to sites where they can be used or stored. However, in one submission it was reported that carbon capture is neither necessary to avoid catastrophic levels of warming nor feasible at scale.[120] In fact, it warns that carbon capture distracts from the reforms needed to ensure a fossil fuel-free future, an outcome which is essential to the health and rights of the marginalized communities on the front lines of the climate and environmental crisis.

[114] Christos Zografos and Paul Robbins, "Green sacrifice zones, or why a green new deal cannot ignore the cost shifts of just transitions", *One Earth*, vol. 3, No. 5 (November 2020).

[115] Claire Burgess, "Australia's lithium extractivism is costing the Earth", Medium, 10 June 2022.

[116] Jason Hickel, "The anti-colonial politics of degrowth", *Political Geography*, vol. 88, supplement C (June 2021).

[117] Submission from Sealey Huggins.

[118] Guiseppina Siciliano and others, "Environmental justice and Chinese dam-building in the global south", *Current Opinion in Environmental Sustainability*, vol. 37 (April 2019); and Shun Deng Fam, "China came, China built, China left? The Sarawakian experience with Chinese dam building", *Journal of Current Chinese Affairs*, vol. 46, No. 3 (December 2017).

[119] Submission from Gonzalez.

[120] Submission from the Center for International Environmental Law.

Carbon capture can lock current pollution in place, rather than facilitating energy transition. It is reported in the submission that many carbon capture programmes are launched in places already overburdened by the heavy concentration of toxic industrial pollution. These places overlap with the "racial sacrifice zones" described above. This trend is especially concerning because carbon capture can increase the emission of harmful air pollutants at the site of capture because of the increased energy required to power the capture equipment and the chemicals used in the process.

65. Other experimental or speculative technologies proposed in response to climate change potentially pose significant risks to human rights. For example, experts believe that some "geoengineering" projects meant to adapt to climate change may have significant adverse impacts, including termination shock, rainfall disruption, water depletion and the erosion of human and ecological resilience. The Intergovernmental Panel on Climate Change (IPCC) has warned against overreliance on unproven technologies that could disrupt natural systems and disproportionately harm global South communities.[121]

66. Other programmes and policies could similarly have negative impacts on Indigenous Peoples and racially marginalized peoples in the global South. For example, some experts have extensively criticized the REDD+ programme for its use of over-optimistic projections but also its use of Indigenous territories and denial of certain communities' rights of self-determination.[122] In one submission the role of REDD+ is reported in providing cover for land grabs against Indigenous Peoples.[123]

67. In one submission it was noted that access to available climate financing, especially at the local level, remains a critical challenge. It was also reported in the submission that experts have described the operation of international climate institutions as a form of indirect colonization. Projects are often envisioned and directed by international institutions that tend to privilege global North perspectives over global South contributions.[124]

*Climate and racial injustice rooted in existing international frameworks*

68. A complex framework on international environmental law exists, and with the creation of the United Nations Environmental Programme (UNEP) and the adoption of the Stockholm Declaration and Action Plan for the Human Environment at the United Nations Conference on the Human Environment, held in Stockholm in 1972, United Nations Member States initiated a regime for global environmental coordination. Multiple treaties address pollution and biodiversity, although this section is focused on climate change governance, including through the United Nations Framework Convention on Climate Change, the Kyoto Protocol thereto and the Paris Agreement. In the Framework Convention three pillars in the fight against climate change are advanced: adaptation, mitigation and "loss and damage".

69. In United Nations environmental and climate negotiations, global South States have consistently advocated for an international environmental framework in which structural disparities in the global economic and political system are recognized. In her address at the Stockholm Conference, whose outcomes were greatly influenced by global North economists,[125] the Prime Minister of India, Indira Gandhi, called for

[121] Ibid.

[122] Submission from Dehm.

[123] Submission from the Indigenous Environmental Network.

[124] Submission from the Centre for Economic and Social Rights.

[125] See Karin Mickelson, "The Stockholm Conference and the creation of the North-South divide in international environmental law and policy", in *International Environmental Law and the Global South*, Shawkat Alam and others, eds. (New York, Cambridge University Press, 2015); and Philip Mcmichael, "Contemporary contradictions of the global development project: geopolitics, global ecology and the 'development climate'", *Third World Quarterly*, vol. 30, No. 1 (2009).

a collective approach to address environmental issues while emphasizing the need for appreciating power inequities and historical domination.[126] At the Stockholm Conference, global South States raised concerns about environmental degradation and human rights impacts caused by industrial activities of global North transnational corporations. Some negotiators consistently argued that environmental issues must be considered in light of historical and geopolitical structures,[127] and even at the United Nations Conference on Environment and Development (Earth Summit), held in Rio de Janeiro, Brazil, in 1992, the Prime Minister of Malaysia highlighted the emergence of climate colonialism perpetuated by States in the global North.[128] However, the global climate framework offers no real path forward for climate justice, which entails racial justice.

70. At the Rio Summit, the Conference secretariat estimated that developing countries required $100 billion per year in external assistance to meet the Summit action plan, Agenda 21.[129] Notwithstanding their role in creating the climate crisis, some powerful States in the global North refused to contribute the requisite aid to global South States.[130] At the United Nations Conference on Sustainable Development (Rio+20), held in 2012, the twentieth anniversary of the Rio Summit, global North States refused requests from the Group of 77 and China to increase financial assistance to meet their environmental commitments.[131]

71. The framing of climate change within international forums frequently elides the historical responsibility borne by some States and transnational corporations. Although the common but differentiated responsibility principle has been enshrined in the Rio Declaration and carried through the United Nations Framework Convention on Climate Change, the Kyoto Protocol and the Paris Agreement, global North States have accepted the language on the basis of differential or superior capacity, rather than as an indication of State responsibility for historical harm.[132]

72. Questions of reparation and remediation for loss and damage caused by climate change and environmental degradation have purposefully been excluded from relevant frameworks by the powerful countries most responsible for the harm.[133] The eventual inclusion of loss and damage within the Paris Agreement was due to a compromise that shields wealthy countries from accountability.[134] The trajectory of the loss and damage framework after the Paris Agreement has thus continued its transition away from confronting historical responsibility and reparation.[135]

[126] Malavika Rao, “A TWAIL perspective on loss and damage from climate change: reflections from Indira Gandhi’s speech at Stockholm”, *Asian Journal of International Law*, vol 12, No. 1 (January 2022).

[127] Ibid.

[128] Mcmichael, “Contemporary contradictions”.

[129] Martin Khor, “An assessment of the Rio Summit on sustainable development”, *Economic and Political Weekly*, vol. 47, No. 28 (July 2012).

[130] John Vogler and Hannes R. Stephan, “The European Union in global environmental governance: leadership in the making?”, *International Environmental Agreements: Politics, Law and Economics*, vol. 7, No. 4 (December 2007).

[131] Khor, “An assessment of the Rio Summit”. See also, submission from the Centre for Economic and Social Rights.

[132] Sumudu Atapattu and Carmen G. Gonzalez, “The North–South divide in international environmental law: framing the issues”, in *International Environmental Law and the Global South*, Alam and others, eds.

[133] Submission from Dehm.

[134] Maxine Burkett, “Reading between the red lines: loss and damage and the Paris outcome”, *Climate Law*, vol. 6, Nos. 1–2 (May 2016), p. 124.

[135] Julia Dehm, “Climate change, ‘slow violence’ and the indefinite deferral of responsibility for ‘loss and damage’”, *Griffith Law Review*, vol. 29, No. 2 (2020).

73. The massive power and resource imbalances among States participating in climate change negotiations have led to compromises that benefit politically powerful States – including former colonial powers – at the expense of global South States, especially small island developing States. One submission highlighted how existing climate mitigation interventions, which are delivered only in English and remain highly technical, widen the gap between traditional and scientific approaches to climate response.[136] Although States in the global North are typically capable of fielding large negotiating teams and relying upon well-resourced national bureaucracies operating in English, other States are limited to smaller negotiating teams with limited support from their capitals.[137] This imbalance is magnified by the outsized economic capacity of global North States, which was built in significant part through racist domination of the global South, and allows the North to exert greater leverage on the global South. At the same time, global South States have no effective, reliable means of holding global North States accountable for failing to meet their climate obligations or to provide reparations for historical and ongoing climate injustice.

74. There are vital debates about the need for greater compliance with existing international standards in the face of ecological crisis but, as highlighted by submissions received, a central problem is the existing international legal frameworks. For example, in addition to the above, international law fails to provide robust provisions for holding transnational corporations accountable for human rights violations that disproportionately affect peoples and territories colonially designated as non-white. International investment law presently serves as a deterrent to environmentally responsible extractivism regulation because of the costly arbitral proceedings that can result from national environmental and other regulations that diminish the value of foreign investment. An additional concern is that the applicable legal and policy frameworks have operated as "hyper-technocratic silo[s]"[138] that are disconnected both from the bodies of law that are major contributors to the problem, and from the economic, social and political fields that shape and are impacted from ecological crisis. Even the way nature and the environment are conceptualized in international environmental discussions is limited to the commercial, human-centric understandings of nature that can be traced to early European scholars, and that remain the dominant frames in international law.[139] The worldviews that have precipitated ecological disaster and that are determining the global response remain anchored in Eurocentrism and continue to exclude the worldviews of other peoples. This epistemic imperialism is itself a racial justice issue.

## B. Recommendations

75. **The present report conveys the grim picture on the ground, but there are racially and ethnically marginalized groups that challenge environmental racism and climate injustice on a daily basis, and that are charting paths toward climate justice and environmental justice more broadly. From consultations, the Global Tapestry of Alternatives[140] offers one example. It is a "network of networks", that is a non-hierarchical, horizontal initiative focused on solidarity, strategic alliances and systemic solutions at the local, regional and global levels. Other examples include Oil Change International and the Indigenous Environmental**

[136] Submission from Vano.

[137] Danielle Falzon, "The ideal delegation: how institutional privilege silences 'developing' nations in the UN climate negotiations", *Social Problems*, spab040 (2021).

[138] Submissions from Gonzalez and the Centre for Economic and Social Rights.

[139] Ushu Natarajan and Kishan Khoday, "Locating nature: making and unmaking international law", *Leiden Journal of International Law*, vol. 27, No. 3 (2014).

[140] See https://kalpavriksh.org/our-work/alternatives/global-tapestry-of-alternatives/.

**Network,** [141] **Native Conservancy, GenderCC Women for Climate Justice Southern Africa, the Global Alliance of Territorial Communities and Mouvman Peyizan Papay, which are but a few examples of grass-roots environmental and climate-justice initiatives that are also forging transnational alliances and centring racially and ethnically marginalized groups in environmental and climate-related knowledge production. Localism alone cannot be a solution to global ecological crisis, but global approaches to adaptation, mitigation and loss and damage must be shaped by and responsive to grass-roots organizations and networks of racially, ethnically and nationally marginalized groups which are on the front lines of the global ecological crisis.**

76. **The Special Rapporteur additionally recommends the following to Member States, and stakeholders within the United Nations environmental and climate governance regimes:**

77. **Adopt a global approach that effectively responds to the fact that climate justice requires racial justice, and that racial justice requires climate justice. The racially disparate impacts of environmental degradation and climate injustice require fundamental reorientation of political institutions, economic systems and legal principles to include racial justice and equality priorities. "Green transitions" must also be racially just transitions. Transitions to cleaner forms of energy, climate adaptations and other programmes must take steps, including special measures, to ensure that climate change responses do not continue patterns of racial marginalization and discrimination. True racial justice entails an end to environmental racism, and also entails adaptation, mitigation and loss and damage frameworks that uproot the systemic racism built into the global economy, political hierarchies and legal frameworks. This includes wholesale decolonization of legal and economic systems to ensure that racially marginalized peoples, including Indigenous Peoples, possess true self-determination, including sovereignty over their territories. As noted in one submission, racial justice and climate justice require fiscal justice.**[142]

78. **Prioritize reparations for historical environmental and climate harms and for contemporary harms rooted in historic injustice. The Special Rapporteur urges Member States and stakeholders to consult her 2019 report on reparations for racial discrimination rooted in slavery and colonialism, which also applies to the context of climate and environmental justice. Reparations require addressing historic climate injustice, as well as eradicating contemporary systemic racism that is a legacy of historic injustice in the context of the global ecological crisis. To the extent that contemporary international legal principles present barriers to historical responsibility for climate change, United Nations Member States must decolonize or transform this law in a manner that makes it capable of guaranteeing genuine equality and self-determination for all peoples. Reparations, which entail equitable international economic, political and legal frameworks, are a precondition for reorienting the global order away from ecological crisis. Proposals for pathways to reparations are growing, and progress requires global, national and local collaboration and partnership with racially, ethnically and nationally marginalized groups.**

79. **The Special Rapporteur emphasizes that the right to self-determination includes Indigenous Peoples' right to development on their own terms and timelines and in accordance with their ideologies. Indigenous Peoples are diverse, with varied needs, priorities and governance structures. Indigenous**

[141] Indigenous Environmental Network and Oil Change International, "Indigenous resistance against carbon", August 2021. See also, submission from Kaswan.

[142] Submission from the Centre for Economic and Social Rights.

**Peoples should not be forced into categorical or stereotypical roles as “full-time stewards of the natural environment”, nor should they be trapped into paternalistic development arrangements driven by State Governments.**

80. **Stop racially discriminatory human rights violations relating to climate and the environment and provide effective remedies to the individuals and groups affected. The Special Rapporteur urges States to implement the recommendations of the many special procedures mandates that have offered technical and other recommendations that can assist in this regard. Climate migrants and refugees should be provided with the requisite legal and substantive protections, especially in countries with historic responsibility for climate injustice. Racial equality and non-discrimination require that all necessary measures be taken to preserve Indigenous homelands and mitigate the effects of climate change on small island developing States. States and other stakeholders must also ensure human rights-complaint data collection on environmental and climate impacts, disaggregated on the basis of race, ethnicity and national origin.**

81. **Systematically hold transnational corporations accountable for environmental racism and climate injustice.**

82. **Institutionalize meaningful participation and decision-making of racially, ethnically and nationally marginalized persons and peoples in global and national climate governance, including women, gender-diverse persons, persons with disabilities, refugees, migrants and stateless persons.**

# Annex 28

ScienceDirect

One Earth

Volume 3, Issue 5, 20 November 2020, Pages 543-546

Commentary

# Green Sacrifice Zones, or Why a Green New Deal Cannot Ignore the Cost Shifts of Just Transitions

Christos Zografos [1 2], Paul Robbins [3]

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https://doi.org/10.1016/j.oneear.2020.10.012

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A Green New Deal could put severe pressure on lands held by Indigenous and marginalized communities and reshape their ecologies into “green sacrifice zones.” Such cost shifting risks reproducing a form of climate colonialism in the name of just transition. Avoiding cost shifts opens interdisciplinary research questions regarding land-use policy, economics, politics, and non-Eurocentric knowledge and leadership.

Previous Next

## Main Text

Green New Deal (GND) proposals are among the boldest initiatives for a large-scale, equality-oriented systemic transformation of Global North economies in order to address the climate crisis. The GND is used here as an umbrella term for a package of measures meant to deliver such transformation. Several versions of a GND have emerged in the last 2 years, and despite their differences, all versions explicitly include “just transition” as an essential goal (Table 1).

Table 1. GND Versions and Just Transition

| GND Version | Description | Just Transition Claims |
|---|---|---|
| H. Res. 109 (2019) introduced by Rep. Alexandria Ocasio-Cortez at the 116th Congress (US) (https://www.congress.gov/bill/116th-congress/house-resolution/109/text) | failed attempt to establish a commitment by the US federal government to create a GND | “Resolved, That it is the sense of the House of Representatives that—(1) it is the duty of the Federal Government to create a Green New Deal —(A) to achieve net-zero greenhouse gas |

| GND Version | Description | Just Transition Claims |
|---|---|---|
| | | emissions through a fair and just transition for all communities and workers" |
| European Green Deal (EU) (https://ec.europa.eu/info/news/launching-just-transition-mechanism-green-transition-based-solidarity-and-fairness-2020-jan-15_en?pk_campaign=DG%20ENER%20Newsletter%20january%202020↗) | EU's roadmap for making Europe the first carbon-neutral continent by 2050; it's already at an early implementation stage | "On 14th January 2020, the European Commission presented the European Green Deal's Just Transition Mechanism and the Sustainable Europe Investment Plan. The Just Transition Mechanism will … assure that no one is left behind in the green transition …" |
| Bernie Sanders's GND (US) (https://berniesanders.com/issues/green-new-deal/↗) | the most ambitious GND plan by a US Democratic candidate for the 2020 presidential election | "Rebuild Our Economy and Ensure Justice for Frontline Communities and a Just Transition for Workers" (one of the three basic pillars of the proposal) |
| UK Labour Party (https://www.labourgnd.uk/policy↗) | political party commitment; motion passed at 2019 Labour conference as party policy | "in power Labour will … oversee a just transition, increasing the number of well-paid, unionised green jobs in the UK through … large-scale investment in renewables and low-carbon energy" |
| Australian Greens (https://greens.org.au/greennewdeal↗) | political party campaign platform | "Just & Fair: Government has a responsibility to ensure this transition is inclusive, delivers climate justice and ensures no one is left behind" |
| K-New Deal (South Korea) | government program for post-coronavirus disease 2019 (COVID-19) recovery | the South Korean government has set up a Regional Energy Transition Centre to support workers' transition to green jobs |

Just transition highlights the need for the shift to low-carbon societies to be as equitable as possible by ensuring decent work, social inclusion, and poverty eradication together with environmental sustainability as that shift's central goals. Within all major GND proposals, just transition involves pursuing two key priorities: first, a transition of energy systems away from fossil fuels by emphasizing clean energy and massive expansion of renewable power resources; second, the impulse to avoid transferring the costs of transition to workers (e.g., those losing their jobs from the closure of carbon-intensive industries) and their communities or to communities that are vulnerable and at "the frontline" of climate change impacts.

As such, GND proposals represent an admirable effort to produce a much-needed, equality-minded U-turn in the public policy of some of the world's biggest economies. Yet, despite their transformative potential, GND plans have been criticized as potentially colonial by critical scholars and grassroots organizations belonging to the very groups that in theory stand to benefit from them, such as frontline and vulnerable communities. Activists raise the concern that despite its intentions, the GND could lead "to a new form of green colonialism that will continue to sacrifice the people of the global south to maintain our broken economic model."[1] The worry is that climate colonialism could occur. Climate colonialism involves the deepening or expanding of domination of less powerful countries and peoples through initiatives that intensify foreign exploitation of poorer nations' resources or undermine the sovereignty of native and Indigenous communities in the course of responding to the climate crisis.[2]

Taking seriously those concerns is essential if the GND is to avoid replicating the very same logics that produced the climate crisis[3] in the first instance. Specifically, increased pressure on Indigenous and marginalized lands, livelihoods, and sovereignties in the effort to supply material resources for just low-carbon transitions could generate what we here call "green sacrifice zones" (GSZs), that is, ecologies and spaces where "the possibility that the political economy of green energy contains its own sacrifice zones"[4] physically manifests itself.

## Green Sacrifice Zones

Originally used as a label for areas dangerously contaminated by the mining and processing of uranium for developing nuclear weapons during the Cold War, the meaning of the term "sacrifice zones" has been expanded to include "communities or hotspots of chemical pollution where residents live immediately adjacent to heavily polluted industries or military bases."[5] With the term GSZ, we propose that the logic of sacrificing a certain space or ecology can be expanded to include places and populations that will be affected by the sourcing, transportation, installation, and operation of solutions for powering low-carbon transitions, as well as end-of-life treatment of related material waste.

The implications of producing GSZs in the course of seeking just transitions cannot be overlooked. The question of who will bear the social, environmental, health, and economic costs of decarbonizing economies, and the fear that the burdens of transitions to low-carbon economies will be unevenly distributed,[6] cannot be left unaddressed.

We explore the GSZ hypothesis by looking at the two most prominent versions of the GND, namely, H. Res. 109 in the US and the EU's European Green Deal (EGD). While doing so, we acknowledge that other, less prominent versions of the GND—such as the Green New Deal for Europe or Global South initiatives such as the Pacto Ecosocial del Sur—seem to be mindful of that danger.

## Cost Shifts

There are two key components of GSZs. First, cost shifts. Cost shifting refers to the practice where private enterprises pass the harmful consequences and damages of economic production to third parties (within or outside the economic production circuit) and communities. K.W. Kapp, who coined the term, concluded that cost shifting is a pervasive rather than exceptional practice for production systems oriented toward increasing profit margins. This distinguishes the notion of cost shifting from that of externality, which denotes an accidental and unintended effect. This also means that policy responses that simply seek to correct or internalize externalities into the market cannot properly address cost shifting because its causes are systemic rather than incidental.

The mining necessary for powering GNDs could generate such cost shifts. For example, a 100% renewable energy supply of electric grids and transportation systems by 2030, as envisaged by certain US versions of the GND, would put considerable stress on ecosystems containing lithium and cobalt, two metals necessary in lithium-ion batteries for electric vehicles. Currently, and without a US GND—some versions of which (e.g., that of Bernie Sanders) aspired for 100% transition to electric vehicles—the world's stock of electric vehicles is expected to grow to 130 million in 2030, and the overall demand for cobalt is expected to outstrip supply by 64,000 metric tons in 2030.[7] And although improving efficiency or substituting cobalt is possible, it could increase demand for other metals, including lithium, which is among the most challenging metals when it comes to reducing or offsetting its demand because it is used in the dominant battery technologies and those predicted to be important in the future, and it currently only has limited recycling from batteries.[8]

This implies that the risk of cost shifts increases with such dramatic increases in demand. Consider that nearly 50% of cobalt reserves are located in the Democratic Republic of the Congo (DRC) (Table 2), where the cobalt mining region is one of the ten most polluted areas in the world.[9] Cobalt extraction in the DRC involves extremely dangerous and precarious working conditions, including extensive child labor.[8] Links have been established between cobalt mining and the DRC civil war,[10] which has claimed some 6 million lives.

Table 2. Where Would the Material Come from? Top Concerning Minerals for Low-Carbon Transitions

| Mineral | Reserves in Developing Countries (without China) | Country with Biggest Reserves |
|---|---|---|
| Lithium | 91% (68%) | Chile (53%) |
| Cobalt | 68% (67%) | Democratic Republic the Congo (47%) |
| Rare earths | 62% (19%) | China (43%) |

Own elaboration based on data from Dominish et al.[8] and Arrobas et al.[11]

Similarly, more than half of the world's lithium reserves are located in the salt flats of the Lithium Triangle, which lies among Argentina, Bolivia, and Chile, one of the driest places on the planet, where lithium extraction has put significant stress on limited water resources. Currently, i.e., in the absence of a major GND in large economies such as the US, industry analysts expect South American lithium production to increase by 199% by 2025[12] to meet demand.

Unsurprisingly, mining companies are concerned about their capacity to provide long-term supply of cobalt and lithium at stable prices and about securing adequate volumes from responsibly sourced mines.[8] At the same time, mining companies already justify the adverse effects of their operations upon local communities (such as endangering vital ecosystems and water supplies) by claiming that their "products are essential to the transition to a low-carbon economy."[1]

Some governments also facilitate cost shifts. Morocco is building the world's largest concentrated solar power plant, the Noor Power Station, expected to cover an area as large as the country's capital, Rabat. Noor involved the acquisition of 3,000 ha of communally owned land by characterizing land that was used for pasture as "marginal" and "underutilized," a possible case of "green grabbing" according to the Environmental Justice Atlas. Beyond covering energy needs in Morocco, the project is expected to export green energy northward to Europe and eastward to other regional states.

## Coloniality

Coloniality is the second component of GSZs, a key colonial logic that can both encourage and justify the production of such sacrifice zones. Coloniality here refers to forms of knowledge and practice inherited from European colonial order and premised on a mental order that privileges both the material entitlements and cultural elements associated with "whiteness," which are placed at the top of its hierarchy.

Detailed GND plans are a recent development, and systematic studies linking them to coloniality are lacking. Still, a close reading of H. Res. 109 and the EGD exposes traces of basic coloniality tropes that attempt to legitimize and establish those initiatives.

Salvation, in particular a rhetoric of "salvation by newness," is a core element of coloniality.[13] Historically, imperial projects proclaimed as their objective the salvation of those colonized by casting anew their spiritual existence through Christianity (Spanish Empire), their cultural condition through civilization

(British and French empires), and their economic condition (poverty) through institutional and material development (post-WWII US geo-political hegemony). In all those projects, whiteness, or the material and spiritual conditions characterizing a privileged European life, has been the rod for assessing the state and progress of non-Europeans and their culture, values, norms, and practices with respect to salvation.

GNDs reflect a rhetoric of salvation by newness for responding to grand challenges. For example, the EGD webpage asserts the following:
Climate change and environmental degradation are an *existential threat* to Europe and the world. *To overcome* these challenges, Europe needs a *new* growth strategy that *transforms* the Union into a modern, resource-efficient and competitive economy… (emphasis added)

Additionally, elements of whiteness appear in the ways that climate change vulnerability and response capacity are casted. For example, H. Res. 109's "frontline and vulnerable communities," which include Indigenous peoples, communities of color, migrant communities, low-income workers, and women, are described as "left behind" by past development efforts (notably, the New Deal), a mistake that GND policies would redress. Raising those communities to the standards of affluent, white communities through, e.g., economic development, building wealth, and high-quality jobs, is one way in which the GND seeks to reduce their vulnerability.

Exposing and seeking to address the highly unequal effects of past policies and climate change are fundamental. Yet, frontline and vulnerable communities are not only communities in an arrested state of development but also climate pioneers with numerous just-transition initiatives already happening under their leadership. Well-recorded examples of such leadership include Indigenous-knowledge-based sustainable forestry,[14] Indigenous climate-resiliency policy plans,[15] and frontline-community energy-democracy projects.[16]

Those are initiatives to scale up and communities to learn from, and they highlight the potential for non-Eurocentric knowledge, practices, and value systems to successfully shape climate action. Just transition should steer clear of colonial "moves to innocence" that present publicpolicy as an opportunity for "redressing 'past' wrongs against non-white Others"[17] while leaving unexamined the socio-political and material infrastructure that has generated those wrongs. If climate change really changes everything, as claimed by Naomi Klein, in the sense that dealing with it requires us to look hard for solutions that are not in store, revisiting the logic of policy action is essential for crafting effective responses.

## Entering the Aporia: Research and Policy Priorities

We argue that colonialism-related concerns point at a key contradiction, indeed an aporia of predominant expressions of just transitions (such as in H. Res. 109 and the EGD): they depend upon colonial practices and logics in order to materialize, but at the same time, dependency on colonial practices and logics renders those transitions unjust. Left unchecked, this contradiction can generate GSZs.

Concerns about cost shifts and salvation logics in the GND discourse mark the conditions of aporia of just transition. Similarly to historical colonial projects, a pattern of shifting costs and a rhetoric of salvation currently lend the GND momentum and political power. Shifting the costs of green transitions permits the sourcing of certain materials (minerals) that are indispensable for those transitions. Assuming a salvation by development discourse permits deploying the powerful ideals of improvement and universality for achieving a GND.

But at the same time, these cost shifts and salvation logics are precisely just transition's conditions of impossibility. They undermine its own universalist ambitions (such as equal inclusion in benefit sharing or equal participation in decision making) and expose links to colonialism, a project replete with exclusions.

Despite their impassability, aporias such as these—difficulty, contradiction, and points of doubt—are fertile grounds because they help raise fundamental questions and drive us to explore and interrogate alternatives. What do we need to know to determine whether and under what conditions a non-colonial GND would be possible? Interdisciplinary environmental research should explore the pathways of cost shifting in just transitions within at least four domains.

First, land-use policy. Spatial-quantitative analysis should seek to establish what land-use policies would be necessary for avoiding or minimizing the generation of cost shifts and GSZs. It is important to visualize asymmetries of sacrifice, establish a base for exploring fairer cost distributions, and help design land-use policies that do not risk reproducing colonial effects and Indigenous land dispossession in the course of just transition.

Second, economics. We must explore what would be economically feasible for a GND-based just transition that avoids generating GSZs and stripping land from Indigenous and marginalized peoples. Sketching the political economy of cost shifting, looking at circulations of capital and added values for diverse stakeholders and localities at each stage of the green economy, and the institutional arrangements that facilitate these are crucial.

Third, politics. What green governance mechanisms are mobilized in the course of just transitions at diverse levels of decision making, ranging from the global to the personal? Who mobilizes these, to what ends, and who are the winners and losers from the mobilization of those mechanisms? Case analyses of either minerals (e.g., lithium and rare earths) or energy solutions (e.g., wind and solar power) should illustrate how material extraction, transportation, waste treatment, and project implementation mobilize different logics and forms of political power and authority, as well as how those are received (e.g., by social movements and affected communities), in ways that facilitate or block cost shifts.

Fourth, alternatives. Qualitative and ethnographic research should examine climate initiatives led by frontline and vulnerable communities that mobilize logics alternative to salvation and coloniality to establish how they deal with cost shifting, land control and the GSZ effect, and the challenges they face. What role can non-Eurocentric knowledge and leadership[18] in climate action play in just transitions? This research should beware to neither romanticize nor essentialize non-Eurocentric knowledges by brushing away their diversity, complexities, and dialogues (not only conflicts) with modernity.

Informed by such research, policy emerging from any GND might yet be built on a solid decolonial foundation rooted in rigorous empirical efforts to address the tendency for development to proliferate sacrifice zones, shift costs, and hide these effects beneath a rhetoric of salvation.

## Acknowledgments

We would like to thank Dana Powell, Isabelle Anguelovski, and Diego Andreucci for comments to earlier drafts of this article. Support was provided by the Ramón y Cajal Programme (contract number RYC-2015-17372), funded by the Spanish State Research Agency (AEI), the Spanish Ministry of Science, Innovation and Universities, and the European Social Fund (ESF).

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# Annex 29

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

# ACCORDANCE WITH INTERNATIONAL LAW OF THE UNILATERAL DECLARATION OF INDEPENDENCE IN RESPECT OF KOSOVO

**ADVISORY OPINION OF 22 JULY 2010**

# 2010

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

# CONFORMITÉ AU DROIT INTERNATIONAL DE LA DÉCLARATION UNILATÉRALE D'INDÉPENDANCE RELATIVE AU KOSOVO

**AVIS CONSULTATIF DU 22 JUILLET 2010**

Official citation:
*Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010*, p. 403

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Mode officiel de citation:
*Conformité au droit international de la déclaration unilatérale d'indépendance relative au Kosovo, avis consultatif, C.I.J. Recueil 2010*, p. 403

ISSN 0074-4441
ISBN 978-92-1-071107-4

**Sales number**
**N° de vente: 997**

22 JULY 2010

ADVISORY OPINION

# ACCORDANCE WITH INTERNATIONAL LAW OF THE UNILATERAL DECLARATION OF INDEPENDENCE IN RESPECT OF KOSOVO

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# CONFORMITÉ AU DROIT INTERNATIONAL DE LA DÉCLARATION UNILATÉRALE D'INDÉPENDANCE RELATIVE AU KOSOVO

22 JUILLET 2010

AVIS CONSULTATIF

TABLE OF CONTENTS

INTERNATIONAL COURT OF JUSTICE

YEAR 2010

2010
22 July
General List
No. 141

**22 July 2010**

# ACCORDANCE WITH INTERNATIONAL LAW OF THE UNILATERAL DECLARATION OF INDEPENDENCE IN RESPECT OF KOSOVO

*Jurisdiction of the Court to give the advisory opinion requested.*

*Article 65, paragraph 1, of the Statute — Article 96, paragraph 1, of the Charter — Power of General Assembly to request advisory opinions — Articles 10 and 11 of the Charter — Contention that General Assembly acted outside its powers under the Charter — Article 12, paragraph 1, of the Charter — Authorization to request an advisory opinion not limited by Article 12.*

*Requirement that the question on which the Court is requested to give its opinion is a "legal question" — Contention that the act of making a declaration of independence is governed by domestic constitutional law — The Court can respond to the question by reference to international law without the need to address domestic law — The fact that a question has political aspects does not deprive it of its character as a legal question — The Court is not concerned with the political motives behind a request or the political implications which its opinion may have.*

*The Court has jurisdiction to give the advisory opinion requested.*

* *

*Discretion of the Court to decide whether it should give an opinion.*

*Integrity of the Court's judicial function — Only "compelling reasons" should lead the Court to decline to exercise its judicial function — The motives of individual States which sponsor a resolution requesting an advisory opinion are not relevant to the Court's exercise of its discretion — Requesting organ to assess purpose, usefulness and political consequences of opinion.*

*Delimitation of the respective powers of the Security Council and the General*

*Assembly — Nature of the Security Council's involvement in relation to Kosovo — Article 12 of the Charter does not bar action by the General Assembly in respect of threats to international peace and security which are before the Security Council — General Assembly has taken action with regard to the situation in Kosovo.*

*No compelling reasons for Court to use its discretion not to give an advisory opinion.*

* *

*Scope and meaning of the question.*

*Text of the question in General Assembly resolution 63/3 — Power of the Court to clarify the question — No need to reformulate the question posed by the General Assembly — For the proper exercise of its judicial function, the Court must establish the identity of the authors of the declaration of independence — No intention by the General Assembly to restrict the Court's freedom to determine that issue — The Court's task is to determine whether or not the declaration was adopted in violation of international law.*

* *

*Factual background.*

*Framework for interim administration of Kosovo put in place by the Security Council — Security Council resolution 1244 (1999) — Establishment of the United Nations Interim Administration Mission in Kosovo (UNMIK) — Role of Special Representative of the Secretary-General — "Four pillars" of the UNMIK régime — Constitutional Framework for Provisional Self-Government — Relations between the Provisional Institutions of Self-Government and the Special Representative of the Secretary-General.*

*Relevant events in the final status process — Appointment by Secretary-General of Special Envoy for the future status process for Kosovo — Guiding Principles of the Contact Group — Failure of consultative process — Comprehensive Proposal for the Kosovo Status Settlement by Special Envoy — Failure of negotiations on the future status of Kosovo under the auspices of the Troika — Elections held for the Assembly of Kosovo on 17 November 2007 — Adoption of the declaration of independence on 17 February 2008.*

* *

*Whether the declaration of independence is in accordance with international law.*

*No prohibition of declarations of independence according to State practice — Contention that prohibition of unilateral declarations of independence is implicit in the principle of territorial integrity — Scope of the principle of territorial integrity is confined to the sphere of relations between States — No general prohibition may be inferred from the practice of the Security Council with regard to declarations of independence — Issues relating to the extent of the right of self-*

*determination and the existence of any right of "remedial secession" are beyond the scope of the question posed by the General Assembly.*

*General international law contains no applicable prohibition of declarations of independence — Declaration of independence of 17 February 2008 did not violate general international law.*

*Security Council resolution 1244 and the Constitutional Framework — Resolution 1244 (1999) imposes international legal obligations and is part of the applicable international law — Constitutional Framework possesses international legal character — Constitutional Framework is part of specific legal order created pursuant to resolution 1244 (1999) — Constitutional Framework regulates matters which are the subject of internal law — Supervisory powers of the Special Representative of the Secretary-General — Security Council resolution 1244 (1999) and the Constitutional Framework were in force and applicable as at 17 February 2008 — Neither of them contains a clause providing for termination and neither has been repealed — The Special Representative of the Secretary-General continues to exercise his functions in Kosovo.*

*Security Council resolution 1244 (1999) and the Constitutional Framework form part of the international law to be considered in replying to the question before the Court.*

*Interpretation of Security Council resolutions — Resolution 1244 (1999) established an international civil and security presence in Kosovo — Temporary suspension of exercise of Serbia's authority flowing from its continuing sovereignty over the territory of Kosovo — Resolution 1244 (1999) created an interim régime — Object and purpose of resolution 1244 (1999).*

*Identity of the authors of the declaration of independence — Whether the declaration of independence was an act of the Assembly of Kosovo — Authors of the declaration did not seek to act within the framework of interim self-administration of Kosovo — Authors undertook to fulfil the international obligations of Kosovo — No reference in original Albanian text to the declaration being the work of the Assembly of Kosovo — Silence of the Special Representative of the Secretary-General — Authors of the declaration of independence acted together in their capacity as representatives of the people of Kosovo outside the framework of the interim administration.*

*Whether or not the authors of the declaration of independence acted in violation of Security Council resolution 1244 (1999) — Resolution 1244 (1999) addressed to United Nations Member States and organs of the United Nations — No specific obligations addressed to other actors — The resolution did not contain any provision dealing with the final status of Kosovo — Security Council did not reserve for itself the final determination of the situation in Kosovo — Security Council resolution 1244 (1999) did not bar the authors of the declaration of 17 February 2008 from issuing a declaration of independence — Declaration of independence did not violate Security Council resolution 1244 (1999).*

*Declaration of independence was not issued by the Provisional Institutions of Self-Government — Declaration of independence did not violate the Constitutional Framework.*

*Adoption of the declaration of independence did not violate any applicable rule of international law.*

# ADVISORY OPINION

*Present:* *President* OWADA; *Vice-President* TOMKA; *Judges* KOROMA, AL-KHASAWNEH, BUERGENTHAL, SIMMA, ABRAHAM, KEITH, SEPÚLVEDA-AMOR, BENNOUNA, SKOTNIKOV, CANÇADO TRINDADE, YUSUF, GREENWOOD; *Registrar* COUVREUR.

On the accordance with international law of the unilateral declaration of independence in respect of Kosovo,

THE COURT,

composed as above,

*gives the following Advisory Opinion:*

1. The question on which the advisory opinion of the Court has been requested is set forth in resolution 63/3 adopted by the General Assembly of the United Nations (hereinafter the General Assembly) on 8 October 2008. By a letter dated 9 October 2008 and received in the Registry by facsimile on 10 October 2008, the original of which was received in the Registry on 15 October 2008, the Secretary-General of the United Nations officially communicated to the Court the decision taken by the General Assembly to submit the question for an advisory opinion. Certified true copies of the English and French versions of the resolution were enclosed with the letter. The resolution reads as follows:

> "*The General Assembly*,
>
> *Mindful* of the purposes and principles of the United Nations,
>
> *Bearing in mind* its functions and powers under the Charter of the United Nations,
>
> *Recalling* that on 17 February 2008 the Provisional Institutions of Self-Government of Kosovo declared independence from Serbia,
>
> *Aware* that this act has been received with varied reactions by the Members of the United Nations as to its compatibility with the existing international legal order,
>
> *Decides*, in accordance with Article 96 of the Charter of the United Nations to request the International Court of Justice, pursuant to Article 65 of the Statute of the Court, to render an advisory opinion on the following question:
>
> > 'Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?'"

2. By letters dated 10 October 2008, the Registrar, pursuant to Article 66, paragraph 1, of the Statute, gave notice of the request for an advisory opinion to all States entitled to appear before the Court.

3. By an Order dated 17 October 2008, in accordance with Article 66, paragraph 2, of the Statute, the Court decided that the United Nations and its Member States were likely to be able to furnish information on the question.

By the same Order, the Court fixed, respectively, 17 April 2009 as the time-limit within which written statements might be submitted to it on the question, and 17 July 2009 as the time-limit within which States and organizations having presented written statements might submit written comments on the other written statements in accordance with Article 66, paragraph 4, of the Statute.

The Court also decided that, taking account of the fact that the unilateral declaration of independence of 17 February 2008 is the subject of the question submitted to the Court for an advisory opinion, the authors of the above declaration were considered likely to be able to furnish information on the question. It therefore further decided to invite them to make written contributions to the Court within the same time-limits.

4. By letters dated 20 October 2008, the Registrar informed the United Nations and its Member States of the Court's decisions and transmitted to them a copy of the Order. By letter of the same date, the Registrar informed the authors of the above-mentioned declaration of independence of the Court's decisions, and transmitted to them a copy of the Order.

5. Pursuant to Article 65, paragraph 2, of the Statute, on 30 January 2009 the Secretary-General of the United Nations communicated to the Court a dossier of documents likely to throw light upon the question. The dossier was subsequently placed on the Court's website.

6. Within the time-limit fixed by the Court for that purpose, written statements were filed, in order of their receipt, by: Czech Republic, France, Cyprus, China, Switzerland, Romania, Albania, Austria, Egypt, Germany, Slovakia, Russian Federation, Finland, Poland, Luxembourg, Libyan Arab Jamahiriya, United Kingdom, United States of America, Serbia, Spain, Islamic Republic of Iran, Estonia, Norway, Netherlands, Slovenia, Latvia, Japan, Brazil, Ireland, Denmark, Argentina, Azerbaijan, Maldives, Sierra Leone and Bolivia. The authors of the unilateral declaration of independence filed a written contribution. On 21 April 2009, the Registrar communicated copies of the written statements and written contribution to all States having submitted a written statement, as well as to the authors of the unilateral declaration of independence.

7. On 29 April 2009, the Court decided to accept the written statement filed by the Bolivarian Republic of Venezuela, submitted on 24 April 2009, after expiry of the relevant time-limit. On 15 May 2009, the Registrar communicated copies of this written statement to all States having submitted a written statement, as well as to the authors of the unilateral declaration of independence.

8. By letters dated 8 June 2009, the Registrar informed the United Nations and its Member States that the Court had decided to hold hearings, opening on 1 December 2009, at which they could present oral statements and comments, regardless of whether or not they had submitted written statements and, as the case may be, written comments. The United Nations and its Member States were invited to inform the Registry, by 15 September 2009, if they intended to take part in the oral proceedings. The letters further indicated that the authors of the unilateral declaration of independence could present an oral contribution.

By letter of the same date, the Registrar informed the authors of the unilateral declaration of independence of the Court's decision to hold hearings, inviting them to indicate, within the same time-limit, whether they intended to take part in the oral proceedings.

9. Within the time-limit fixed by the Court for that purpose, written comments were filed, in order of their receipt, by: France, Norway, Cyprus, Serbia, Argentina, Germany, Netherlands, Albania, Slovenia, Switzerland, Bolivia, United Kingdom, United States of America and Spain. The authors of the unilateral declaration of independence submitted a written contribution regarding the written statements.

10. Upon receipt of the above-mentioned written comments and written contribution, the Registrar, on 24 July 2009, communicated copies thereof to all States having submitted written statements, as well as to the authors of the unilateral declaration of independence.

11. By letters dated 30 July 2009, the Registrar communicated to the United Nations, and to all of its Member States that had not participated in the written proceedings, copies of all written statements and written comments, as well as the written contributions of the authors of the unilateral declaration of independence.

12. By letters dated 29 September 2009, the Registry transmitted a detailed timetable of the hearings to those who, within the time-limit fixed for that purpose by the Court, had expressed their intention to take part in the aforementioned proceedings.

13. Pursuant to Article 106 of the Rules of Court, the Court decided to make the written statements and written comments submitted to the Court, as well as the written contributions of the authors of the unilateral declaration of independence, accessible to the public, with effect from the opening of the oral proceedings.

14. In the course of hearings held from 1 to 11 December 2009, the Court heard oral statements, in the following order, by:

*for the Republic of Serbia:*

H.E. Mr. Dušan T. Bataković, Ph.D. in History, University of Paris-Sorbonne (Paris IV), Ambassador of the Republic of Serbia to France, Vice-Director of the Institute for Balkan Studies and Assistant Professor at the University of Belgrade, Head of Delegation,

Mr. Vladimir Djerić, S.J.D. (Michigan), Attorney at Law, Mikijelj, Janković & Bogdanović, Belgrade, Counsel and Advocate,

Mr. Andreas Zimmermann, LL.M. (Harvard), Professor of International Law, University of Potsdam, Director of the Potsdam Center of Human Rights, Member of the Permanent Court of Arbitration, Counsel and Advocate,

Mr. Malcolm N. Shaw Q.C., Sir Robert Jennings Professor of International Law, University of Leicester, United Kingdom, Counsel and Advocate,

Mr. Marcelo G. Kohen, Professor of International Law, Graduate Institute of International and Development Studies, Geneva, Associate Member of the Institut de droit international, Counsel and Advocate,

Mr. Saša Obradović, Inspector General in the Ministry of Foreign Affairs, Deputy Head of Delegation;

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| *for the authors of the unilateral declaration of independence:* | Mr. Skender Hyseni, Head of Delegation,<br>Sir Michael Wood, K.C.M.G., Member of the English Bar Member of the International Law Commission, Counsel,<br>Mr. Daniel Müller, Researcher at the Centre de droit international de Nanterre (CEDIN), University of Paris Ouest, Nanterre-La Défense, Counsel,<br>Mr. Sean D. Murphy, Patricia Roberts Harris Research Professor of Law, George Washington University, Counsel; |
| *for the Republic of Albania:* | H.E. Mr. Gazmend Barbullushi, Ambassador Extraordinary and Plenipotentiary of the Republic of Albania to the Kingdom of the Netherlands, Legal Adviser,<br>Mr. Jochen A. Frowein, M.C.L., Director emeritus of the Max Planck Institute for International Law, Professor emeritus of the University of Heidelberg, Member of the Institute of International Law, Legal Adviser,<br>Mr. Terry D. Gill, Professor of Military Law at the University of Amsterdam and Associate Professor of Public International Law at Utrecht University, Legal Adviser; |
| *for the Federal Republic of Germany:* | Ms Susanne Wasum-Rainer, Legal Adviser, Federal Foreign Office (Berlin); |
| *for the Kingdom of Saudi Arabia:* | H.E. Mr. Abdullah A. Alshaghrood, Ambassador of the Kingdom of Saudi Arabia to the Kingdom of the Netherlands, Head of Delegation; |
| *for the Argentine Republic:* | H.E. Madam Susana Ruiz Cerutti, Ambassador, Legal Adviser to the Ministry of Foreign Affairs, International Trade and Worship, Head of Delegation; |
| *for the Republic of Austria:* | H.E. Mr. Helmut Tichy, Ambassador, Deputy Legal Adviser, Federal Ministry of European and International Affairs; |
| *for the Republic of Azerbaijan:* | H.E. Mr. Agshin Mehdiyev, Ambassador and Permanent Representative of Azerbaijan to the United Nations; |
| *for the Republic of Belarus:* | H.E. Madam Elena Gritsenko, Ambassador of the Republic of Belarus to the Kingdom of the Netherlands, Head of Delegation; |
| *for the Plurinational State of Bolivia:* | H.E. Mr. Roberto Calzadilla Sarmiento, Ambassador of the Plurinational State of Bolivia to the Kingdom of the Netherlands; |
| *for the Federative Republic of Brazil:* | H.E. Mr. José Artur Denot Medeiros, Ambassador of the Federative Republic of Brazil to the Kingdom of the Netherlands; |

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| *for the Republic of Bulgaria:* | Mr. Zlatko Dimitroff, S.J.D., Director of the International Law Department, Ministry of Foreign Affairs, Head of Delegation; |
| *for the Republic of Burundi:* | Mr. Thomas Barankitse, Legal Attaché, Counsel,<br>Mr. Jean d'Aspremont, Associate Professor, University of Amsterdam, Chargé de cours invité, Catholic University of Louvain, Counsel; |
| *for the People's Republic of China:* | H.E. Madam Xue Hanqin, Ambassador to the Association of Southeast Asian Nations (ASEAN), Legal Counsel of the Ministry of Foreign Affairs, Member of the International Law Commission, Member of the Institut de droit international, Head of Delegation; |
| *for the Republic of Cyprus:* | H.E. Mr. James Droushiotis, Ambassador of the Republic of Cyprus to the Kingdom of the Netherlands,<br>Mr. Vaughan Lowe Q.C., Member of the English Bar, Chichele Professor of International Law, University of Oxford, Counsel and Advocate,<br>Mr. Polyvios G. Polyviou, Counsel and Advocate; |
| *for the Republic of Croatia:* | H.E. Madam Andreja Metelko-Zgombić, Ambassador, Chief Legal Adviser in the Ministry of Foreign Affairs and European Integration; |
| *for the Kingdom of Denmark:* | H.E. Mr. Thomas Winkler, Ambassador, Under-Secretary for Legal Affairs, Ministry of Foreign Affairs, Head of Delegation; |
| *for the Kingdom of Spain:* | Ms Concepción Escobar Hernández, Legal Adviser, Head of the International Law Department, Ministry of Foreign Affairs and Co-operation, Head of Delegation and Advocate; |
| *for the United States of America:* | Mr. Harold Hongju Koh, Legal Adviser, Department of State, Head of Delegation and Advocate; |
| *for the Russian Federation:* | H.E. Mr. Kirill Gevorgian, Ambassador, Head of the Legal Department, Ministry of Foreign Affairs, Head of Delegation; |
| *for the Republic of Finland:* | Ms Päivi Kaukoranta, Director General, Legal Service, Ministry of Foreign Affairs,<br>Mr. Martti Koskenniemi, Professor at the University of Helsinki; |
| *for the French Republic:* | Ms Edwige Belliard, Director of Legal Affairs, Ministry of Foreign and European Affairs,<br>Mr. Mathias Forteau, Professor at the University of Paris Ouest, Nanterre-La Défense; |
| *for the Hashemite Kingdom of Jordan:* | H.R.H. Prince Zeid Raad Zeid Al Hussein, Ambassador of the Hashemite Kingdom of Jordan to the United States of America, Head of Delegation; |

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| *for the Kingdom of Norway:* | Mr. Rolf Einar Fife, Director General, Legal Affairs Department, Ministry of Foreign Affairs, Head of Delegation; |
| *for the Kingdom of the Netherlands:* | Ms Liesbeth Lijnzaad, Legal Adviser, Ministry of Foreign Affairs; |
| *for Romania:* | Mr. Bogdan Aurescu, Secretary of State, Ministry of Foreign Affairs,<br>Mr. Cosmin Dinescu, Director-General for Legal Affairs, Ministry of Foreign Affairs; |
| *for the United Kingdom of Great Britain and Northern Ireland:* | Mr. Daniel Bethlehem Q.C., Legal Adviser to the Foreign and Commonwealth Office, Representative of the United Kingdom of Great Britain and Northern Ireland, Counsel and Advocate,<br>Mr. James Crawford, S.C., Whewell Professor of International Law, University of Cambridge, Member of the Institut de droit international, Counsel and Advocate; |
| *for the Bolivarian Republic of Venezuela:* | Mr. Alejandro Fleming, Deputy Minister for Europe of the Ministry of the People's Power for Foreign Affairs; |
| *for the Socialist Republic of Viet Nam:* | H.E. Madam Nguyen Thi Hoang Anh, Doctor of Law, Director-General, Department of International Law and Treaties, Ministry of Foreign Affairs. |

15. Questions were put by Members of the Court to participants in the oral proceedings; several of them replied in writing, as requested, within the prescribed time-limit.

16. Judge Shi took part in the oral proceedings; he subsequently resigned from the Court with effect from 28 May 2010.

* * *

## I. Jurisdiction and Discretion

17. When seised of a request for an advisory opinion, the Court 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 the Court, in its discretion, should decline to exercise any such jurisdiction in the case before it (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 232, para. 10; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 144, para. 13).

### *A. Jurisdiction*

18. The Court will thus first address the question whether it possesses

jurisdiction to give the advisory opinion requested by the General Assembly on 8 October 2008. The power of the Court to give an advisory opinion is based upon Article 65, paragraph 1, of its Statute, which provides that:

> "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."

19. In its application of this provision, the Court has indicated that:

> "It is . . . a precondition of the Court's competence that the advisory opinion be requested by an organ duly authorized to seek it under the Charter, that it be requested on a legal question, and that, except in the case of the General Assembly or the Security Council, that question should be one arising within the scope of the activities of the requesting organ." (*Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1982*, pp. 333-334, para. 21.)

20. It is for the Court to satisfy itself that the request for an advisory opinion comes from an organ of the United Nations or a specialized agency having competence to make it. The General Assembly is authorized to request an advisory opinion by Article 96 of the Charter, which provides that:

> "1. The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.
> 2. Other organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities."

21. While paragraph 1 of Article 96 confers on the General Assembly the competence to request an advisory opinion on "any legal question", the Court has sometimes in the past given certain indications as to the relationship between the question which is the subject of a request for an advisory opinion and the activities of the General Assembly (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 70; *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, pp. 232-233, paras. 11-12; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 145, paras. 16-17).

22. The Court observes that Article 10 of the Charter provides that:

> "The General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and

> functions of any organs provided for in the present Charter, and, except as provided in Article 12, may make recommendations to the Members of the United Nations or to the Security Council or to both on any such questions or matters."

Moreover, Article 11, paragraph 2, of the Charter has specifically provided the General Assembly with competence to discuss "any questions relating to the maintenance of international peace and security brought before it by any Member of the United Nations" and, subject again to the limitation in Article 12, to make recommendations with respect thereto.

23. Article 12, paragraph 1, of the Charter 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."

24. In the present proceedings, it was suggested that, since the Security Council was seised of the situation in Kosovo, the effect of Article 12, paragraph 1, was that the General Assembly's request for an advisory opinion was outside its powers under the Charter and thus did not fall within the authorization conferred by Article 96, paragraph 1. As the Court has stated on an earlier occasion, however, "[a] request for an advisory opinion is not in itself a 'recommendation' by the General Assembly 'with regard to [a] dispute or situation'" (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 148, para. 25). Accordingly, while Article 12 may limit the scope of the action which the General Assembly may take subsequent to its receipt of the Court's opinion (a matter on which it is unnecessary for the Court to decide in the present context), it does not in itself limit the authorization to request an advisory opinion which is conferred upon the General Assembly by Article 96, paragraph 1. Whether the delimitation of the respective powers of the Security Council and the General Assembly — of which Article 12 is one aspect — should lead the Court, in the circumstances of the present case, to decline to exercise its jurisdiction to render an advisory opinion is another matter (which the Court will consider in paragraphs 29 to 48 below).

25. It is also for the Court to satisfy itself that the question on which it is requested to give its opinion is a "legal question" within the meaning of Article 96 of the Charter and Article 65 of the Statute. In the present case, the question put to the Court by the General Assembly asks whether the declaration of independence to which it refers is "in accordance with international law". A question which expressly asks the Court whether or not a particular action is compatible with international law

certainly appears to be a legal question; as the Court has remarked on a previous occasion, questions "framed in terms of law and rais[ing] problems of international law . . . are by their very nature susceptible of a reply based on law" (*Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 18, para. 15) and therefore appear to be questions of a legal character for the purposes of Article 96 of the Charter and Article 65 of the Statute.

26. Nevertheless, some of the participants in the present proceedings have suggested that the question posed by the General Assembly is not, in reality, a legal question. According to this submission, international law does not regulate the act of making a declaration of independence, which should be regarded as a political act; only domestic constitutional law governs the act of making such a declaration, while the Court's jurisdiction to give an advisory opinion is confined to questions of international law. In the present case, however, the Court has not been asked to give an opinion on whether the declaration of independence is in accordance with any rule of domestic law but only whether it is in accordance with international law. The Court can respond to that question by reference to international law without the need to enquire into any system of domestic law.

27. Moreover, the Court has repeatedly stated that the fact that a question has political aspects does not suffice to deprive it of its character as a legal question (*Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1973*, p. 172, para. 14). Whatever its political aspects, the Court cannot refuse to respond to the legal elements of a question which invites it to discharge an essentially judicial task, namely, in the present case, an assessment of an act by reference to international law. The Court has also made clear that, in determining the jurisdictional issue of whether it is confronted with a legal question, it is not concerned with the political nature of the motives which may have inspired the request or the political implications which its opinion might have (*Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), Advisory Opinion, 1948, I.C.J. Reports 1947-1948*, p. 61, and *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 234, para. 13).

28. The Court therefore considers that it has jurisdiction to give an advisory opinion in response to the request made by the General Assembly.

### *B. Discretion*

29. The fact that the Court has jurisdiction does not mean, however, that it is obliged to exercise it:

> "The Court has recalled many times in the past that Article 65, paragraph 1, of its Statute, which provides that 'The Court *may* give an advisory opinion . . .' (emphasis added), should be interpreted to

> mean that the Court has a discretionary power to decline to give an advisory opinion even if the conditions of jurisdiction are met." (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 156, para. 44.)

The discretion whether or not to respond to a request for an advisory opinion exists so as to protect the integrity of the Court's judicial function and its nature as the principal judicial organ of the United Nations (*Status of Eastern Carelia, Advisory Opinion, 1923, P.C.I.J., Series B, No. 5*, p. 29; *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1973*, p. 175, para. 24; *Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1982*, p. 334, para. 22; and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, pp. 156-157, paras. 44-45).

30. The Court is, nevertheless, mindful 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" (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 71; *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I.C.J. Reports 1999 (I)*, pp. 78-79, para. 29; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 156, para. 44). Accordingly, the consistent jurisprudence of the Court has determined that only "compelling reasons" should lead the Court to refuse its opinion in response to a request falling within its jurisdiction (*Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco, I.C.J. Reports 1956*, p. 86; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 156, para. 44).

31. The Court must satisfy itself as to the propriety of the exercise of its judicial function in the present case. It has therefore given careful consideration as to whether, in the light of its previous jurisprudence, there are compelling reasons for it to refuse to respond to the request from the General Assembly.

32. One argument, advanced by a number of participants in the present proceedings, concerns the motives behind the request. Those participants drew attention to a statement made by the sole sponsor of the resolution by which the General Assembly requested the Court's opinion to the effect that

> "the Court's advisory opinion would provide politically neutral, yet judicially authoritative, guidance to many countries still deliberating how to approach unilateral declarations of independence in line with international law.

. . . . . .

> Supporting this draft resolution would also serve to reaffirm a fundamental principle: the right of any Member State of the United Nations to pose a simple, basic question on a matter it considers vitally important to the Court. To vote against it would be in effect a vote to deny the right of any country to seek — now or in the future — judicial recourse through the United Nations system." (A/63/PV.22, p. 1.)

According to those participants, this statement demonstrated that the opinion of the Court was being sought not in order to assist the General Assembly but rather to serve the interests of one State and that the Court should, therefore, decline to respond.

33. The advisory jurisdiction is not a form of judicial recourse for States but the means by which the General Assembly and the Security Council, as well as other organs of the United Nations and bodies specifically empowered to do so by the General Assembly in accordance with Article 96, paragraph 2, of the Charter, may obtain the Court's opinion in order to assist them in their activities. The Court's opinion is given not to States but to the organ which has requested it (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 71). Nevertheless, precisely for that reason, the motives of individual States which sponsor, or vote in favour of, a resolution requesting an advisory opinion are not relevant to the Court's exercise of its discretion whether or not to respond. As the Court put it in its Advisory Opinion on *Legality of the Threat or Use of Nuclear Weapons*,

> "once the Assembly has asked, by adopting a resolution, for an advisory opinion on a legal question, the Court, in determining whether there are any compelling reasons for it to refuse to give such an opinion, will not have regard to the origins or to the political history of the request, or to the distribution of votes in respect of the adopted resolution" (*I.C.J. Reports 1996 (I)*, p. 237, para. 16).

34. It was also suggested by some of those participating in the proceedings that resolution 63/3 gave no indication of the purpose for which the General Assembly needed the Court's opinion and that there was nothing to indicate that the opinion would have any useful legal effect. This argument cannot be accepted. The Court has consistently made clear that it is for the organ which requests the opinion, and not for the Court, to determine whether it needs the opinion for the proper performance of its functions. In its Advisory Opinion on *Legality of the Threat or Use of Nuclear Weapons*, the Court rejected an argument that it

should refuse to respond to the General Assembly's request on the ground that the General Assembly had not explained to the Court the purposes for which it sought an opinion, stating that

> "it is not for the Court itself to purport to decide whether or not an advisory opinion is needed by the Assembly for the performance of its functions. The General Assembly has the right to decide for itself on the usefulness of an opinion in the light of its own needs." (*I.C.J. Reports 1996 (I)*, p. 237, para. 16.)

Similarly, in the Advisory Opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the Court commented that "[t]he Court cannot substitute its assessment of the usefulness of the opinion requested for that of the organ that seeks such opinion, namely the General Assembly" (*I.C.J. Reports 2004 (I)*, p. 163, para. 62).

35. Nor does the Court consider that it should refuse to respond to the General Assembly's request on the basis of suggestions, advanced by some of those participating in the proceedings, that its opinion might lead to adverse political consequences. Just as the Court cannot substitute its own assessment for that of the requesting organ in respect of whether its opinion will be useful to that organ, it cannot — in particular where there is no basis on which to make such an assessment — substitute its own view as to whether an opinion would be likely to have an adverse effect. As the Court stated in its Advisory Opinion on *Legality of the Threat or Use of Nuclear Weapons*, in response to a submission that a reply from the Court might adversely affect disarmament negotiations, faced with contrary positions on this issue "there are no evident criteria by which it can prefer one assessment to another" (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 237, para. 17; see also *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 37, para. 73; and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, pp. 159-160, paras. 51-54).

36. An important issue which the Court must consider is whether, in view of the respective roles of the Security Council and the General Assembly in relation to the situation in Kosovo, the Court, as the principal judicial organ of the United Nations, should decline to answer the question which has been put to it on the ground that the request for the Court's opinion has been made by the General Assembly rather than the Security Council.

37. The situation in Kosovo had been the subject of action by the Security Council, in the exercise of its responsibility for the maintenance of international peace and security, for more than ten years prior to the present request for an advisory opinion. The Council first took action specifically relating to the situation in Kosovo on 31 March 1998, when it

adopted resolution 1160 (1998). That was followed by resolutions 1199 (1998), 1203 (1998) and 1239 (1999). On 10 June 1999, the Council adopted resolution 1244 (1999), which authorized the creation of an international military presence (subsequently known as "KFOR") and an international civil presence (the United Nations Interim Administration Mission in Kosovo, "UNMIK") and laid down a framework for the administration of Kosovo. By resolution 1367 (2001), the Security Council decided to terminate the prohibitions on the sale or supply of arms established by paragraph 8 of resolution 1160 (1998). The Security Council has received periodic reports from the Secretary-General on the activities of UNMIK. The dossier submitted to the Court by the Secretary-General records that the Security Council met to consider the situation in Kosovo on 29 occasions between 2000 and the end of 2008. Although the declaration of independence which is the subject of the present request was discussed by the Security Council, the Council took no action in respect of it (Security Council, provisional verbatim record, 18 February 2008, 3 p.m. (S/PV.5839); Security Council, provisional verbatim record, 11 March 2008, 3 p.m. (S/PV.5850)).

38. The General Assembly has also adopted resolutions relating to the situation in Kosovo. Prior to the adoption by the Security Council of resolution 1244 (1999), the General Assembly adopted five resolutions on the situation of human rights in Kosovo (resolutions 49/204, 50/190, 51/111, 52/139 and 53/164). Following resolution 1244 (1999), the General Assembly adopted one further resolution on the situation of human rights in Kosovo (resolution 54/183 of 17 December 1999) and 15 resolutions concerning the financing of UNMIK (resolutions 53/241, 54/245A, 54/245B, 55/227A, 55/227B, 55/295, 57/326, 58/305, 59/286A, 59/286B, 60/275, 61/285, 62/262, 63/295 and 64/279). However, the broader situation in Kosovo was not part of the agenda of the General Assembly at the time of the declaration of independence and it was therefore necessary in September 2008 to create a new agenda item for the consideration of the proposal to request an opinion from the Court.

39. Against this background, it has been suggested that, given the respective powers of the Security Council and the General Assembly, if the Court's opinion were to be sought regarding whether the declaration of independence was in accordance with international law, the request should rather have been made by the Security Council and that this fact constitutes a compelling reason for the Court not to respond to the request from the General Assembly. That conclusion is said to follow both from the nature of the Security Council's involvement and the fact that, in order to answer the question posed, the Court will necessarily have to interpret and apply Security Council resolution 1244 (1999) in order to determine whether or not the declaration of independence is in accordance with international law.

40. While the request put to the Court concerns one aspect of a situation which the Security Council has characterized as a threat to interna-

tional peace and security and which continues to feature on the agenda of the Council in that capacity, that does not mean that the General Assembly has no legitimate interest in the question. Articles 10 and 11 of the Charter, to which the Court has already referred, confer upon the General Assembly a very broad power to discuss matters within the scope of the activities of the United Nations, including questions relating to international peace and security. That power is not limited by the responsibility for the maintenance of international peace and security which is conferred upon the Security Council by Article 24, paragraph 1. As the Court has made clear in its Advisory Opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, paragraph 26, "Article 24 refers to a primary, but not necessarily exclusive, competence". The fact that the situation in Kosovo is before the Security Council and the Council has exercised its Chapter VII powers in respect of that situation does not preclude the General Assembly from discussing any aspect of that situation, including the declaration of independence. The limit which the Charter places upon the General Assembly to protect the role of the Security Council is contained in Article 12 and restricts the power of the General Assembly to make recommendations following a discussion, not its power to engage in such a discussion.

41. Moreover, Article 12 does not bar all action by the General Assembly in respect of threats to international peace and security which are before the Security Council. The Court considered this question in some detail in paragraphs 26 to 27 of its Advisory Opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, in which the Court noted that there has been an increasing tendency over time for the General Assembly and the Security Council to deal in parallel with the same matter concerning the maintenance of international peace and security and observed that it is often the case that, while the Security Council has tended to focus on the aspects of such matters related to international peace and security, the General Assembly has taken a broader view, considering also their humanitarian, social and economic aspects.

42. The Court's examination of this subject in its Advisory Opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* was made in connection with an argument relating to whether or not the Court possessed the jurisdiction to give an advisory opinion, rather than whether it should exercise its discretion not to give an opinion. In the present case, the Court has already held that Article 12 of the Charter does not deprive it of the jurisdiction conferred by Article 96, paragraph 1 (paragraphs 23 to 24 above). It considers, however, that the analysis contained in the 2004 Advisory Opinion is also pertinent to the issue of discretion in the present case. That analysis demonstrates that the fact that a matter falls within the primary responsibility of the Security Council for situations which may affect the maintenance of international peace and security and that the Council has been exercising its powers in that respect does not preclude the General Assembly from

discussing that situation or, within the limits set by Article 12, making recommendations with regard thereto. In addition, as the Court pointed out in its 2004 Advisory Opinion, General Assembly resolution 377A (V) ("Uniting for Peace") provides for the General Assembly to make recommendations for collective measures to restore 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 and the Security Council is unable to act because of lack of unanimity of the permanent members (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 150, para. 30). These considerations are of relevance to the question whether the delimitation of powers between the Security Council and the General Assembly constitutes a compelling reason for the Court to decline to respond to the General Assembly's request for an opinion in the present case.

43. It is true, of course, that the facts of the present case are quite different from those of the Advisory Opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*. The situation in the occupied Palestinian territory had been under active consideration by the General Assembly for several decades prior to its decision to request an opinion from the Court and the General Assembly had discussed the precise subject on which the Court's opinion was sought. In the present case, with regard to the situation in Kosovo, it was the Security Council which had been actively seised of the matter. In that context, it discussed the future status of Kosovo and the declaration of independence (see paragraph 37 above).

44. However, the purpose of the advisory jurisdiction is to enable organs of the United Nations and other authorized bodies to obtain opinions from the Court which will assist them in the future exercise of their functions. The Court cannot determine what steps the General Assembly may wish to take after receiving the Court's opinion or what effect that opinion may have in relation to those steps. As the preceding paragraphs demonstrate, the General Assembly is entitled to discuss the declaration of independence and, within the limits considered in paragraph 42, above, to make recommendations in respect of that or other aspects of the situation in Kosovo without trespassing on the powers of the Security Council. That being the case, the fact that, hitherto, the declaration of independence has been discussed only in the Security Council and that the Council has been the organ which has taken action with regard to the situation in Kosovo does not constitute a compelling reason for the Court to refuse to respond to the request from the General Assembly.

45. Moreover, while it is the scope for future discussion and action which is the determining factor in answering this objection to the Court rendering an opinion, the Court also notes that the General Assembly has taken action with regard to the situation in Kosovo in the past. As stated in paragraph 38 above, between 1995 and 1999, the General

Assembly adopted six resolutions addressing the human rights situation in Kosovo. The last of these, resolution 54/183, was adopted on 17 December 1999, some six months after the Security Council had adopted resolution 1244 (1999). While the focus of this resolution was on human rights and humanitarian issues, it also addressed (in para. 7) the General Assembly's concern about a possible "cantonization" of Kosovo. In addition, since 1999 the General Assembly has each year approved, in accordance with Article 17, paragraph 1, of the Charter, the budget of UNMIK (see paragraph 38 above). The Court observes therefore that the General Assembly has exercised functions of its own in the situation in Kosovo.

46. Further, in the view of the Court, the fact that it will necessarily have to interpret and apply the provisions of Security Council resolution 1244 (1999) in the course of answering the question put by the General Assembly does not constitute a compelling reason not to respond to that question. While the interpretation and application of a decision of one of the political organs of the United Nations is, in the first place, the responsibility of the organ which took that decision, the Court, as the principal judicial organ of the United Nations, has also frequently been required to consider the interpretation and legal effects of such decisions. It has done so both in the exercise of its advisory jurisdiction (see for example, *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962*, p. 175; and *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, pp. 51-54, paras. 107-116), and in the exercise of its contentious jurisdiction (see for example, *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Provisional Measures, Order of 14 April 1992, I.C.J. Reports 1992*, p. 15, paras. 39-41; *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), Provisional Measures, Order of 14 April 1992, I.C.J. Reports 1992*, pp. 126-127, paras. 42-44).

47. There is, therefore, nothing incompatible with the integrity of the judicial function in the Court undertaking such a task. The question is, rather, whether it should decline to undertake that task unless it is the organ which has taken the decision that asks the Court to do so. In its Advisory Opinion on *Certain Expenses of the United Nations*, however, the Court responded to the question posed by the General Assembly, even though this necessarily required it to interpret a number of Security Council resolutions (namely, resolutions 143, 145 and 146 of 1960 and 161 and 169 of 1961) (*Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962*, pp. 175-177). The Court also notes that, in its Advisory Opinion on

*Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)* (*I.C.J. Reports 1947-1948*, pp. 61-62), it responded to a request from the General Assembly even though that request referred to statements made in a meeting of the Security Council and it had been submitted that the Court should therefore exercise its discretion to decline to reply *(I.C.J. Pleadings, Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)*, p. 90). Where, as here, the General Assembly has a legitimate interest in the answer to a question, the fact that that answer may turn, in part, on a decision of the Security Council is not sufficient to justify the Court in declining to give its opinion to the General Assembly.

48. Accordingly, the Court considers that there are no compelling reasons for it to decline to exercise its jurisdiction in respect of the present request.

## II. Scope and Meaning of the Question

49. The Court will now turn to the scope and meaning of the question on which the General Assembly has requested that it give its opinion. The General Assembly has formulated that question in the following terms:

> "Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?"

50. The Court recalls that in some previous cases it has departed from the language of the question put to it where the question was not adequately formulated (see for example, in *Interpretation of the Greco-Turkish Agreement of 1 December 1926 (Final Protocol, Article IV), Advisory Opinion, 1928, P.C.I.J., Series B, No. 16*) or where the Court determined, on the basis of its examination of the background to the request, that the request did not reflect the "legal questions really in issue" (*Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980*, p. 89, para. 35). Similarly, where the question asked was unclear or vague, the Court has clarified the question before giving its opinion (*Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1982*, p. 348, para. 46).

51. In the present case, the question posed by the General Assembly is clearly formulated. The question is narrow and specific; it asks for the Court's opinion on whether or not the declaration of independence is in accordance with international law. It does not ask about the legal consequences of that declaration. In particular, it does not ask whether or not Kosovo has achieved statehood. Nor does it ask about the validity or legal effects of the recognition of Kosovo by those States which have recognized it as an independent State. The Court notes that, in past requests

for advisory opinions, the General Assembly and the Security Council, when they have wanted the Court's opinion on the legal consequences of an action, have framed the question in such a way that this aspect is expressly stated (see, for example, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 16 and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 136). Accordingly, the Court does not consider that it is necessary to address such issues as whether or not the declaration has led to the creation of a State or the status of the acts of recognition in order to answer the question put by the General Assembly. The Court accordingly sees no reason to reformulate the scope of the question.

52. There are, however, two aspects of the question which require comment. First, the question refers to "the unilateral declaration of independence *by the Provisional Institutions of Self-Government of Kosovo*" (General Assembly resolution 63/3 of 8 October 2008, single operative paragraph; emphasis added). In addition, the third preambular paragraph of the General Assembly resolution "*[r]ecall[s]* that on 17 February 2008 the Provisional Institutions of Self-Government of Kosovo declared independence from Serbia". Whether it was indeed the Provisional Institutions of Self-Government of Kosovo which promulgated the declaration of independence was contested by a number of those participating in the present proceedings. The identity of the authors of the declaration of independence, as is demonstrated below (paragraphs 102 to 109), is a matter which is capable of affecting the answer to the question whether that declaration was in accordance with international law. It would be incompatible with the proper exercise of the judicial function for the Court to treat that matter as having been determined by the General Assembly.

53. Nor does the Court consider that the General Assembly intended to restrict the Court's freedom to determine this issue for itself. The Court notes that the agenda item under which what became resolution 63/3 was discussed did not refer to the identity of the authors of the declaration and was entitled simply "Request for an advisory opinion of the International Court of Justice on whether the declaration of independence *of Kosovo* is in accordance with international law" (General Assembly resolution 63/3 of 8 October 2008; emphasis added). The wording of this agenda item had been proposed by the Republic of Serbia, the sole sponsor of resolution 63/3, when it requested the inclusion of a supplementary item on the agenda of the 63rd session of the General Assembly (Letter of the Permanent Representative of Serbia to the United Nations addressed to the Secretary-General, 22 August 2008, A/63/195). That agenda item then became the title of the draft resolution and, in turn, of resolution 63/3. The common element in the agenda item and the

title of the resolution itself is whether the declaration of independence is in accordance with international law. Moreover, there was no discussion of the identity of the authors of the declaration, or of the difference in wording between the title of the resolution and the question which it posed to the Court during the debate on the draft resolution (A/63/PV.22).

54. As the Court has stated in a different context:

> "It is not to be assumed that the General Assembly would . . . seek to fetter or hamper the Court in the discharge of its judicial functions; the Court must have full liberty to consider all relevant data available to it in forming an opinion on a question posed to it for an advisory opinion." (*Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962*, p. 157.)

This consideration is applicable in the present case. In assessing whether or not the declaration of independence is in accordance with international law, the Court must be free to examine the entire record and decide for itself whether that declaration was promulgated by the Provisional Institutions of Self-Government or some other entity.

55. While many of those participating in the present proceedings made reference to the opinion of the Supreme Court of Canada in *Reference by the Governor in Council concerning Certain Questions relating to the Secession of Quebec from Canada* ([1998] 2 *Supreme Court Reporter (SCR)* 217; 161 *Dominion Law Reports (DLR)* (4th) 385; 115 *International Law Reports (ILR)* 536), the Court observes that the question in the present case is markedly different from that posed to the Supreme Court of Canada.

The relevant question in that case was:

> "Does international law give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally? In this regard, is there a right to self-determination under international law that would give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally?"

56. The question put to the Supreme Court of Canada inquired whether there was a right to "effect secession", and whether there was a rule of international law which conferred a positive entitlement on any of the organs named. By contrast, the General Assembly has asked whether the declaration of independence was "in accordance with" international law. The answer to that question turns on whether or not the applicable international law prohibited the declaration of independence. If the Court concludes that it did, then it must answer the question put by saying that the declaration of independence was not in accordance with international law. It follows that the task which the Court is called upon to perform is

to determine whether or not the declaration of independence was adopted in violation of international law. The Court is not required by the question it has been asked to take a position on whether international law conferred a positive entitlement on Kosovo unilaterally to declare its independence or, *a fortiori*, on whether international law generally confers an entitlement on entities situated within a State unilaterally to break away from it. Indeed, it is entirely possible for a particular act — such as a unilateral declaration of independence — not to be in violation of international law without necessarily constituting the exercise of a right conferred by it. The Court has been asked for an opinion on the first point, not the second.

## III. Factual Background

57. The declaration of independence of 17 February 2008 must be considered within the factual context which led to its adoption. The Court therefore will briefly describe the relevant characteristics of the framework put in place by the Security Council to ensure the interim administration of Kosovo, namely, Security Council resolution 1244 (1999) and the regulations promulgated thereunder by the United Nations Mission in Kosovo. The Court will then proceed with a brief description of the developments relating to the so-called "final status process" in the years preceding the adoption of the declaration of independence, before turning to the events of 17 February 2008.

### *A. Security Council Resolution 1244 (1999) and the Relevant UNMIK Regulations*

58. Resolution 1244 (1999) was adopted by the Security Council, acting under Chapter VII of the United Nations Charter, on 10 June 1999. In this resolution, the Security Council, "determined to resolve the grave humanitarian situation" which it had identified (see the fourth preambular paragraph) and to put an end to the armed conflict in Kosovo, authorized the United Nations Secretary-General to establish an international civil presence in Kosovo in order to provide "an interim administration for Kosovo . . . which will provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions" (para. 10).

Paragraph 3 demanded

> "in particular that the Federal Republic of Yugoslavia put an immediate and verifiable end to violence and repression in Kosovo, and begin and complete verifiable phased withdrawal from Kosovo of all military, police and paramilitary forces according to a rapid timetable".

Pursuant to paragraph 5 of the resolution, the Security Council decided

on the deployment in Kosovo, under the auspices of the United Nations, of international civil and security presences and welcomed the agreement of the Federal Republic of Yugoslavia to such presences. The powers and responsibilities of the security presence were further clarified in paragraphs 7 and 9. Paragraph 15 of resolution 1244 (1999) demanded that the Kosovo Liberation Army (KLA) and other armed Kosovo Albanian groups end immediately all offensive actions and comply with the requirements for demilitarization. Immediately preceding the adoption of Security Council resolution 1244 (1999), various implementing steps had already been taken through a series of measures, including, *inter alia*, those stipulated in the Military Technical Agreement of 9 June 1999, whose Article I.2 provided for the deployment of KFOR, permitting these to

> "operate without hindrance within Kosovo and with the authority to take all necessary action to establish and maintain a secure environment for all citizens of Kosovo and otherwise carry out its mission".

The Military Technical Agreement also provided for the withdrawal of FRY ground and air forces, save for "an agreed number of Yugoslav and Serb military and police personnel" as foreseen in paragraph 4 of resolution 1244 (1999).

59. Paragraph 11 of the resolution described the principal responsibilities of the international civil presence in Kosovo as follows:

> "*(a)* Promoting the establishment, pending a final settlement, of substantial autonomy and self-government in Kosovo, taking full account of annex 2 and of the Rambouillet accords (S/1999/648);
>
> *(b)* Performing basic civilian administrative functions where and as long as required;
>
> *(c)* Organizing and overseeing the development of provisional institutions for democratic and autonomous self-government pending a political settlement, including the holding of elections;
>
> *(d)* Transferring, as these institutions are established, its administrative responsibilities while overseeing and supporting the consolidation of Kosovo's local provisional institutions and other peace-building activities;
>
> *(e)* Facilitating a political process designed to determine Kosovo's future status, taking into account the Rambouillet accords (S/1999/648);

*(f)* In a final stage, overseeing the transfer of authority from Kosovo's provisional institutions to institutions established under a political settlement . . . ".

60. On 12 June 1999, the Secretary-General presented to the Security Council "a preliminary operational concept for the overall organization of the civil presence, which will be known as the United Nations Interim Administration Mission in Kosovo (UNMIK)", pursuant to paragraph 10 of resolution 1244 (1999), according to which UNMIK would be headed by a Special Representative of the Secretary-General, to be appointed by the Secretary-General in consultation with the Security Council (Report of the Secretary-General of 12 June 1999 (United Nations doc. S/1999/672, 12 June 1999)). The Report of the Secretary-General provided that there would be four Deputy Special Representatives working within UNMIK, each responsible for one of four major components (the so-called "four pillars") of the UNMIK régime (para. 5): *(a)* interim civil administration (with a lead role assigned to the United Nations); *(b)* humanitarian affairs (with a lead role assigned to the Office of the United Nations High Commissioner for Refugees (UNHCR)); *(c)* institution building (with a lead role assigned to the Organization for Security and Co-operation in Europe (OSCE)); and *(d)* reconstruction (with a lead role assigned to the European Union).

61. On 25 July 1999, the first Special Representative of the Secretary-General promulgated UNMIK regulation 1999/1, which provided in its Section 1.1 that "[a]ll legislative and executive authority with respect to Kosovo, including the administration of the judiciary, is vested in UNMIK and is exercised by the Special Representative of the Secretary-General". Under Section 3 of UNMIK regulation 1999/1, the laws applicable in the territory of Kosovo prior to 24 March 1999 were to continue to apply, but only to the extent that these did not conflict with internationally recognized human rights standards and non-discrimination or the fulfilment of the mandate given to UNMIK under resolution 1244 (1999). Section 3 was repealed by UNMIK regulation 1999/25 promulgated by the Special Representative of the Secretary-General on 12 December 1999, with retroactive effect to 10 June 1999. Section 1.1 of UNMIK regulation 1999/24 of 12 December 1999 provides that "[t]he law applicable in Kosovo shall be: *(a)* the regulations promulgated by the Special Representative of the Secretary-General and subsidiary instruments issued thereunder; and *(b)* the law in force in Kosovo on 22 March 1989". Section 4, entitled "Transitional Provision", reads as follows:

> "All legal acts, including judicial decisions, and the legal effects of events which occurred, during the period from 10 June 1999 up to the date of the present regulation, pursuant to the laws in force during that period under section 3 of UNMIK Regulation No. 1999/1 of 25 July 1999, shall remain valid, insofar as they do not conflict

> with the standards referred to in section 1 of the present regulation or any UNMIK regulation in force at the time of such acts."

62. The powers and responsibilities thus laid out in Security Council resolution 1244 (1999) were set out in more detail in UNMIK regulation 2001/9 of 15 May 2001 on a Constitutional Framework for Provisional Self-Government (hereinafter "Constitutional Framework"), which defined the responsibilities relating to the administration of Kosovo between the Special Representative of the Secretary-General and the Provisional Institutions of Self-Government of Kosovo. With regard to the role entrusted to the Special Representative of the Secretary-General under Chapter 12 of the Constitutional Framework,

> "[t]he exercise of the responsibilities of the Provisional Institutions of Self-Government under this Constitutional Framework shall not affect or diminish the authority of the SRSG to ensure full implementation of UNSCR 1244 (1999), including overseeing the Provisional Institutions of Self-Government, its officials and its agencies, and taking appropriate measures whenever their actions are inconsistent with UNSCR 1244 (1999) or this Constitutional Framework".

Moreover, pursuant to Chapter 2 *(a)*, "[t]he Provisional Institutions of Self-Government and their officials shall . . . [e]xercise their authorities consistent with the provisions of UNSCR 1244 (1999) and the terms set forth in this Constitutional Framework". Similarly, according to the ninth preambular paragraph of the Constitutional Framework,

> "the exercise of the responsibilities of the Provisional Institutions of Self-Government in Kosovo shall not in any way affect or diminish the ultimate authority of the SRSG for the implementation of UNSCR 1244 (1999)".

In his periodical report to the Security Council of 7 June 2001, the Secretary-General stated that the Constitutional Framework contained

> "broad authority for my Special Representative to intervene and correct any actions of the provisional institutions of self-government that are inconsistent with Security Council resolution 1244 (1999), including the power to veto Assembly legislation, where necessary" (Report of the Secretary-General on the United Nations Interim

Administration Mission in Kosovo, United Nations doc. S/2001/565, 7 June 2001).

63. Having described the framework put in place by the Security Council to ensure the interim administration of the territory of Kosovo, the Court now turns to the relevant events in the final status process which preceded the declaration of independence of 17 February 2008.

### *B. The Relevant Events in the Final Status Process Prior to 17 February 2008*

64. In June 2005, the Secretary-General appointed Kai Eide, Permanent Representative of Norway to the North Atlantic Treaty Organization, as his Special Envoy to carry out a comprehensive review of Kosovo. In the wake of the Comprehensive Review report he submitted to the Secretary-General (attached to United Nations doc. S/2005/635 (7 October 2005)), there was consensus within the Security Council that the final status process should be commenced:

> "The Security Council agrees with Ambassador Eide's overall assessment that, notwithstanding the challenges still facing Kosovo and the wider region, the time has come to move to the next phase of the political process. The Council therefore supports the Secretary-General's intention to start a political process to determine Kosovo's Future Status, as foreseen in Security Council resolution 1244 (1999)." (Statement by the President of the Security Council of 24 October 2005, United Nations doc. S/PRST/2005/51.)

65. In November 2005, the Secretary-General appointed Mr. Martti Ahtisaari, former President of Finland, as his Special Envoy for the future status process for Kosovo. This appointment was endorsed by the Security Council (see Letter dated 10 November 2005 from the President of the Security Council addressed to the Secretary-General, United Nations doc. S/2005/709). Mr. Ahtisaari's Letter of Appointment included, as an annex to it, a document entitled "Terms of Reference" which stated that the Special Envoy "is expected to revert to the Secretary-General at all stages of the process". Furthermore, "[t]he pace and duration of the future status process will be determined by the Special Envoy on the basis of consultations with the Secretary-General, taking into account the co-operation of the parties and the situation on the ground" (Terms of Reference, dated 10 November 2005, as an appendix to the Letter of the Secretary-General to Mr. Martti Ahtisaari of 14 November 2005, United Nations dossier No. 198).

66. The Security Council did not comment on these Terms of Reference. Instead, the members of the Council attached to their approval of

Mr. Ahtisaari's appointment the Guiding Principles of the Contact Group (an informal grouping of States formed in 1994 to address the situation in the Balkans and composed of France, Germany, Italy, the Russian Federation, the United Kingdom and the United States). Members of the Security Council further indicated that the Guiding Principles were meant for the Secretary-General's (and therefore also for the Special Envoy's) "reference". These Principles stated, *inter alia*, that

> "[t]he Contact Group . . . welcomes the intention of the Secretary-General to appoint a Special Envoy to lead this process . . .
>
> A negotiated solution should be an international priority. Once the process has started, it cannot be blocked and must be brought to a conclusion. The Contact Group calls on the parties to engage in good faith and constructively, to refrain from unilateral steps and to reject any form of violence.
>
> . . . . . .
>
> The Security Council will remain actively seized of the matter. The final decision on the status of Kosovo should be endorsed by the Security Council." (Guiding Principles of the Contact Group for a Settlement of the Status of Kosovo, as Annexed to the Letter Dated 10 November 2005 from the President of the Security Council addressed to the Secretary-General, United Nations doc. S/2005/709.)

67. Between 20 February and 8 September 2006, several rounds of negotiations were held, at which delegations of Serbia and Kosovo addressed, in particular, the decentralization of Kosovo's governmental and administrative functions, cultural heritage and religious sites, economic issues, and community rights (Reports of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, United Nations docs. S/2006/361, S/2006/707 and S/2006/906). According to the Reports of the Secretary-General, "the parties remain[ed] far apart on most issues" (Reports of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2006/707; S/2006/906).

68. On 2 February 2007, the Special Envoy of the Secretary-General submitted a draft comprehensive proposal for the Kosovo status settlement to the parties and invited them to engage in a consultative process (recalled in the Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, United Nations doc. S/2007/134, 9 March 2007). On 10 March 2007, a final round of negotiations was held in Vienna to discuss the settlement proposal. As reported by the Secretary-General, "the parties were unable to make any additional progress" at those negotiations (Report of the Secretary-General on the United

Nations Interim Administration Mission in Kosovo, United Nations doc. S/2007/395, 29 June 2007, p. 1).

69. On 26 March 2007, the Secretary-General submitted the report of his Special Envoy to the Security Council. The Special Envoy stated that "after more than one year of direct talks, bilateral negotiations and expert consultations, it [had] become clear to [him] that the parties [were] not able to reach an agreement on Kosovo's future status" (Letter dated 26 March 2007 from the Secretary-General addressed to the President of the Security Council attaching the Report of the Special Envoy of the Secretary-General on Kosovo's future status, United Nations doc. S/2007/168, 26 March 2007). After emphasizing that his

> "mandate explicitly provides that [he] determine the pace and duration of the future status process on the basis of consultations with the Secretary-General, taking into account the co-operation of the parties and the situation on the ground" (*ibid.*, para. 3),

the Special Envoy concluded:

> "It is my firm view that the negotiations' potential to produce any mutually agreeable outcome on Kosovo's status is exhausted. No amount of additional talks, whatever the format, will overcome this impasse.
>
> . . . . . .
>
> The time has come to resolve Kosovo's status. Upon careful consideration of Kosovo's recent history, the realities of Kosovo today and taking into account the negotiations with the parties, I have come to the conclusion that the only viable option for Kosovo is independence, to be supervised for an initial period by the international community." (*Ibid.*, paras. 3 and 5.)

70. The Special Envoy's conclusions were accompanied by his finalized Comprehensive Proposal for the Kosovo Status Settlement (United Nations doc. S/2007/168/Add. 1, 26 March 2007), which, in his words, set forth "international supervisory structures, [and] provide[d] the foundations for a future independent Kosovo" (United Nations doc. S/2007/168, para. 5). The Comprehensive Proposal called for the immediate convening of a Constitutional Commission to draft a Constitution for Kosovo (*ibid.*, Add. 1, 26 March 2007, Art. 10.1), established guidelines concerning the membership of that Commission (*ibid.*, Art. 10.2), set numerous requirements concerning principles and provisions to be contained in that Constitution (*ibid.*, Art. 1.3 and Ann. I), and required that the Assembly of Kosovo approve the Constitution by a two-thirds vote within 120 days (*ibid.*, Art. 10.4). Moreover, it called for the expiry of the UNMIK mandate after a 120-day transition period, after which "all legislative and executive authority vested in UNMIK shall be transferred *en bloc* to the governing authorities of Kosovo, unless otherwise provided for in this Settlement" (*ibid.*, Art. 15.1). It mandated the holding of general and municipal elections no later than nine months from the entry into force

of the Constitution (UN doc. S/2007/168/Add. 1, 26 March 2007, Art. 11.1). The Court further notes that the Comprehensive Proposal for the Kosovo Status Settlement provided for the appointment of an International Civilian Representative (ICR), who would have the final authority in Kosovo regarding interpretation of the Settlement (*ibid.*, Art. 12). The Comprehensive Proposal also specified that the mandate of the ICR would be reviewed "no later than two years after the entry into force of [the] Settlement, with a view to gradually reducing the scope of the powers of the ICR and the frequency of intervention" (*ibid.*, Ann. IX, Art. 5.1) and that

> "[t]he mandate of the ICR shall be terminated when the International Steering Group [a body composed of France, Germany, Italy, the Russian Federation, the United Kingdom, the United States, the European Union, the European Commission and NATO] determine[d] that Kosovo ha[d] implemented the terms of [the] Settlement" (*ibid.*, Art. 5.2).

71. The Secretary-General "fully support[ed] both the recommendation made by [his] Special Envoy in his report on Kosovo's future status and the Comprehensive Proposal for the Kosovo Status Settlement" (letter dated 26 March 2007 from the Secretary-General addressed to the President of the Security Council, United Nations doc. S/2007/168). The Security Council, for its part, decided to undertake a mission to Kosovo (see Report of the Security Council mission on the Kosovo issue, United Nations doc. S/2007/256, 4 May 2007), but was not able to reach a decision regarding the final status of Kosovo. A draft resolution was circulated among the Council's members (see draft resolution sponsored by Belgium, France, Germany, Italy, the United Kingdom and the United States, United Nations doc. S/2007/437 Prov., 17 July 2007) but was withdrawn after some weeks when it had become clear that it would not be adopted by the Security Council.

72. Between 9 August and 3 December 2007, further negotiations on the future status of Kosovo were held under the auspices of a Troika comprising representatives of the European Union, the Russian Federation and the United States. On 4 December 2007, the Troika submitted its report to the Secretary-General, which came to the conclusion that, despite intensive negotiations, "the parties were unable to reach an agreement on Kosovo's status" and "[n]either side was willing to yield on the basic question of sovereignty" (Report of the European Union/United States/Russian Federation Troika on Kosovo, 4 December 2007, annexed to S/2007/723).

73. On 17 November 2007, elections were held for the Assembly of Kosovo, 30 municipal assemblies and their respective mayors (Report of

the Secretary-General on the United Nations Interim Administration Mission in Kosovo, United Nations doc. S/2007/768). The Assembly of Kosovo held its inaugural session on 4 and 9 January 2008 (Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, United Nations doc. S/2008/211).

### *C. The Events of 17 February 2008 and Thereafter*

74. It is against this background that the declaration of independence was adopted on 17 February 2008. The Court observes that the original language of the declaration is Albanian. For the purposes of the present Opinion, when quoting from the text of the declaration, the Court has used the translations into English and French included in the dossier submitted on behalf of the Secretary-General.

In its relevant passages, the declaration of independence states that its authors were "*[c]onvened* in an extraordinary meeting on 17 February 2008, in Pristina, the capital of Kosovo" (first preambular paragraph); it "*[r]ecall[ed]* the years of internationally-sponsored negotiations between Belgrade and Pristina over the question of [Kosovo's] future political status" and "*[r]egrett[ed]* that no mutually-acceptable status outcome was possible" (tenth and eleventh preambular paragraphs). It further declared that the authors were "*[d]etermin[ed]* to see [Kosovo's] status resolved in order to give [its] people clarity about their future, move beyond the conflicts of the past and realise the full democratic potential of [its] society" (thirteenth preambular paragraph).

75. In its operative part, the declaration of independence of 17 February 2008 states:

> "1. We, the democratically-elected leaders of our people, hereby declare Kosovo to be an independent and sovereign state. This declaration reflects the will of our people and it is in full accordance with the recommendations of UN Special Envoy Martti Ahtisaari and his Comprehensive Proposal for the Kosovo Status Settlement.
>
> 2. We declare Kosovo to be a democratic, secular and multi-ethnic republic, guided by the principles of non-discrimination and equal protection under the law. We shall protect and promote the rights of all communities in Kosovo and create the conditions necessary for their effective participation in political and decision-making processes.
>
> . . . . . .
>
> 5. We welcome the international community's continued support

of our democratic development through international presences established in Kosovo on the basis of UN Security Council resolution 1244 (1999). We invite and welcome an international civilian presence to supervise our implementation of the Ahtisaari Plan, and a European Union-led rule of law mission.

. . . . . .

9. We hereby undertake the international obligations of Kosovo, including those concluded on our behalf by the United Nations Interim Administration Mission in Kosovo (UNMIK) . . .

. . . . . .

12. We hereby affirm, clearly, specifically, and irrevocably, that Kosovo shall be legally bound to comply with the provisions contained in this Declaration, including, especially, the obligations for it under the Ahtisaari Plan . . . We declare publicly that all States are entitled to rely upon this declaration . . .”

76. The declaration of independence was adopted at a meeting held on 17 February 2008 by 109 out of the 120 members of the Assembly of Kosovo, including the Prime Minister of Kosovo and by the President of Kosovo (who was not a member of the Assembly). The ten members of the Assembly representing the Kosovo Serb community and one member representing the Kosovo Gorani community decided not to attend this meeting. The declaration was written down on two sheets of papyrus and read out, voted upon and then signed by all representatives present. It was not transmitted to the Special Representative of the Secretary-General and was not published in the Official Gazette of the Provisional Institutions of Self-Government of Kosovo.

77. After the declaration of independence was issued, the Republic of Serbia informed the Secretary-General that it had adopted a decision stating that that declaration represented a forceful and unilateral secession of a part of the territory of Serbia, and did not produce legal effects either in Serbia or in the international legal order (United Nations doc. S/PV.5839; Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, United Nations doc. S/2008/211). Further to a request from Serbia, an emergency public meeting of the Security Council took place on 18 February 2008, in which Mr. Boris Tadić, the President of the Republic of Serbia, participated and denounced the declaration of independence as an unlawful act which had been declared null and void by the National Assembly of Serbia (United Nations doc. S/PV.5839).

## IV. The Question whether the Declaration of Independence Is in Accordance with International Law

78. The Court now turns to the substance of the request submitted by the General Assembly. The Court recalls that it has been asked by the General Assembly to assess the accordance of the declaration of independence of 17 February 2008 with "international law" (resolution 63/3 of the General Assembly, 8 October 2008). The Court will first turn its attention to certain questions concerning the lawfulness of declarations of independence under general international law, against the background of which the question posed falls to be considered, and Security Council resolution 1244 (1999) is to be understood and applied. Once this general framework has been determined, the Court will turn to the legal relevance of Security Council resolution 1244 (1999), and determine whether the resolution creates special rules, and ensuing obligations, under international law applicable to the issues raised by the present request and having a bearing on the lawfulness of the declaration of independence of 17 February 2008.

### *A. General International Law*

79. During the eighteenth, nineteenth and early twentieth centuries, there were numerous instances of declarations of independence, often strenuously opposed by the State from which independence was being declared. Sometimes a declaration resulted in the creation of a new State, at others it did not. In no case, however, does the practice of States as a whole suggest that the act of promulgating the declaration was regarded as contrary to international law. On the contrary, State practice during this period points clearly to the conclusion that international law contained no prohibition of declarations of independence. During the second half of the twentieth century, the international law of self-determination developed in such a way as to create a right to independence for the peoples of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation (cf. *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, pp. 31-32, paras. 52-53; *East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 102, para. 29; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, pp. 171-172, para. 88). A great many new States have come into existence as a result of the exercise of this right. There were, however, also instances of declarations of independence outside this context. The practice of States in these latter cases does not point to the emergence in international law of a new rule prohibiting the making of a declaration of independence in such cases.

80. Several participants in the proceedings before the Court have contended that a prohibition of unilateral declarations of independence is implicit in the principle of territorial integrity.

The Court recalls that the principle of territorial integrity is an important part of the international legal order and is enshrined in the Charter of the United Nations, in particular in Article 2, paragraph 4, which provides that:

> "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations."

In General Assembly resolution 2625 (XXV), entitled "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations", which reflects customary international law (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, pp. 101-103, paras. 191-193), the General Assembly reiterated "[t]he principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State". This resolution then enumerated various obligations incumbent upon States to refrain from violating the territorial integrity of other sovereign States. In the same vein, the Final Act of the Helsinki Conference on Security and Co-operation in Europe of 1 August 1975 (the Helsinki Conference) stipulated that "[t]he participating States will respect the territorial integrity of each of the participating States" (Art. IV). Thus, the scope of the principle of territorial integrity is confined to the sphere of relations between States.

81. Several participants have invoked resolutions of the Security Council condemning particular declarations of independence: see, *inter alia*, Security Council resolutions 216 (1965) and 217 (1965), concerning Southern Rhodesia; Security Council resolution 541 (1983), concerning northern Cyprus; and Security Council resolution 787 (1992), concerning the Republika Srpska.

The Court notes, however, that in all of those instances the Security Council was making a determination as regards the concrete situation existing at the time that those declarations of independence were made; the illegality attached to the declarations of independence thus stemmed not from the unilateral character of these declarations as such, but from the fact that they were, or would have been, connected with the unlawful use of force or other egregious violations of norms of general international law, in particular those of a peremptory character *(jus cogens)*. In the context of Kosovo, the Security Council has never taken this position. The exceptional character of the resolutions enumerated above

appears to the Court to confirm that no general prohibition against unilateral declarations of independence may be inferred from the practice of the Security Council.

*

82. A number of participants in the present proceedings have claimed, although in almost every instance only as a secondary argument, that the population of Kosovo has the right to create an independent State either as a manifestation of a right to self-determination or pursuant to what they described as a right of "remedial secession" in the face of the situation in Kosovo.

The Court has already noted (see paragraph 79 above) that one of the major developments of international law during the second half of the twentieth century has been the evolution of the right of self-determination. Whether, outside the context of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation, the international law of self-determination confers upon part of the population of an existing State a right to separate from that State is, however, a subject on which radically different views were expressed by those taking part in the proceedings and expressing a position on the question. Similar differences existed regarding whether international law provides for a right of "remedial secession" and, if so, in what circumstances. There was also a sharp difference of views as to whether the circumstances which some participants maintained would give rise to a right of "remedial secession" were actually present in Kosovo.

83. The Court considers that it is not necessary to resolve these questions in the present case. The General Assembly has requested the Court's opinion only on whether or not the declaration of independence is in accordance with international law. Debates regarding the extent of the right of self-determination and the existence of any right of "remedial secession", however, concern the right to separate from a State. As the Court has already noted (see paragraphs 49 to 56 above), and as almost all participants agreed, that issue is beyond the scope of the question posed by the General Assembly. To answer that question, the Court need only determine whether the declaration of independence violated either general international law or the *lex specialis* created by Security Council resolution 1244 (1999).

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84. For the reasons already given, the Court considers that general international law contains no applicable prohibition of declarations of independence. Accordingly, it concludes that the declaration of independence of 17 February 2008 did not violate general international

law. Having arrived at that conclusion, the Court now turns to the legal relevance of Security Council resolution 1244, adopted on 10 June 1999.

### *B. Security Council Resolution 1244 (1999) and the UNMIK Constitutional Framework Created Thereunder*

85. Within the legal framework of the United Nations Charter, notably on the basis of Articles 24, 25 and Chapter VII thereof, the Security Council may adopt resolutions imposing obligations under international law. The Court has had the occasion to interpret and apply such Security Council resolutions on a number of occasions and has consistently treated them as part of the framework of obligations under international law (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 16; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Provisional Measures, Order of 14 April 1992, I.C.J. Reports 1992*, p. 15, paras. 39-41; *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), Provisional Measures, Order of 14 April 1992, I.C.J. Reports 1992*, pp. 126-127, paras. 42-44). Resolution 1244 (1999) was expressly adopted by the Security Council on the basis of Chapter VII of the United Nations Charter, and therefore clearly imposes international legal obligations. The Court notes that none of the participants has questioned the fact that resolution 1244 (1999), which specifically deals with the situation in Kosovo, is part of the law relevant in the present situation.

86. The Court notes that there are a number of other Security Council resolutions adopted on the question of Kosovo, notably Security Council resolutions 1160 (1998), 1199 (1998), 1203 (1998) and 1239 (1999); however, the Court sees no need to pronounce specifically on resolutions of the Security Council adopted prior to resolution 1244 (1999), which are, in any case, recalled in the second preambular paragraph of the latter.

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87. A certain number of participants have dealt with the question whether regulations adopted on behalf of UNMIK by the Special Representative of the Secretary-General, notably the Constitutional Framework (see paragraph 62 above), also form part of the applicable international law within the meaning of the General Assembly's request.

88. In particular, it has been argued before the Court that the Constitutional Framework is an act of an internal law rather than an interna-

tional law character. According to that argument, the Constitutional Framework would not be part of the international law applicable in the present instance and the question of the compatibility of the declaration of independence therewith would thus fall outside the scope of the General Assembly's request.

The Court observes that UNMIK regulations, including regulation 2001/9, which promulgated the Constitutional Framework, are adopted by the Special Representative of the Secretary-General on the basis of the authority derived from Security Council resolution 1244 (1999), notably its paragraphs 6, 10, and 11, and thus ultimately from the United Nations Charter. The Constitutional Framework derives its binding force from the binding character of resolution 1244 (1999) and thus from international law. In that sense it therefore possesses an international legal character.

89. At the same time, the Court observes that the Constitutional Framework functions as part of a specific legal order, created pursuant to resolution 1244 (1999), which is applicable only in Kosovo and the purpose of which is to regulate, during the interim phase established by resolution 1244 (1999), matters which would ordinarily be the subject of internal, rather than international, law. Regulation 2001/9 opens with the statement that the Constitutional Framework was promulgated

> "[f]or the purposes of developing meaningful self-government in Kosovo pending a final settlement, and establishing provisional institutions of self-government in the legislative, executive and judicial fields through the participation of the people of Kosovo in free and fair elections".

The Constitutional Framework therefore took effect as part of the body of law adopted for the administration of Kosovo during the interim phase. The institutions which it created were empowered by the Constitutional Framework to take decisions which took effect within that body of law. In particular, the Assembly of Kosovo was empowered to adopt legislation which would have the force of law within that legal order, subject always to the overriding authority of the Special Representative of the Secretary-General.

90. The Court notes that both Security Council resolution 1244 (1999) and the Constitutional Framework entrust the Special Representative of the Secretary-General with considerable supervisory powers with regard to the Provisional Institutions of Self-Government established under the authority of the United Nations Interim Administration Mission in Kosovo. As noted above (see paragraph 58), Security Council resolution 1244 (1999) envisages "an interim administration for Kosovo . . . which will provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions" (para. 10). Resolution 1244 (1999) further states that "the main responsibilities of the international civil presence will include . . . [o]rganizing and overseeing the development of provisional institutions for demo-

cratic and autonomous self-government pending a political settlement, including the holding of elections" (paragraph 11 *(c)*). Similarly, as described above (see paragraph 62), under the Constitutional Framework, the Provisional Institutions of Self-Government were to function in conjunction with and subject to the direction of the Special Representative of the Secretary-General in the implementation of Security Council resolution 1244 (1999).

91. The Court notes that Security Council resolution 1244 (1999) and the Constitutional Framework were still in force and applicable as at 17 February 2008. Paragraph 19 of Security Council resolution 1244 (1999) expressly provides that "the international civil and security presences are established for an initial period of 12 months, to continue thereafter unless the Security Council decides otherwise". No decision amending resolution 1244 (1999) was taken by the Security Council at its meeting held on 18 February 2008, when the declaration of independence was discussed for the first time, or at any subsequent meeting. The Presidential Statement of 26 November 2008 (S/PRST/2008/44) merely "welcom[ed] the co-operation between the UN and other international actors, *within* the framework of Security Council resolution 1244 (1999)" (emphasis added). In addition, pursuant to paragraph 21 of Security Council resolution 1244 (1999), the Security Council decided "to remain actively seized of the matter" and maintained the item "Security Council resolutions 1160 (1998), 1199 (1998), 1203 (1998), 1239 (1999) and 1244 (1999)" on its agenda (see, most recently, Report of the Security Council, 1 August 2008-31 July 2009, General Assembly, Official Records, 64th session, Supplement No. 2, pp. 39 ff. and 132 ff.). Furthermore, Chapter 14.3 of the Constitutional Framework sets forth that "[t]he SRSG . . . may effect amendments to this Constitutional Framework". Minor amendments were effected by virtue of UNMIK regulations UNMIK/REG/2002/9 of 3 May 2002, UNMIK/REG/2007/29 of 4 October 2007, UNMIK/REG/2008/1 of 8 January 2008 and UNMIK/REG/2008/9 of 8 February 2008. Finally, neither Security Council resolution 1244 (1999) nor the Constitutional Framework contains a clause providing for its termination and neither has been repealed; they therefore constituted the international law applicable to the situation prevailing in Kosovo on 17 February 2008.

92. In addition, the Special Representative of the Secretary-General continues to exercise his functions in Kosovo. Moreover, the Secretary-General has continued to submit periodic reports to the Security Council, as required by paragraph 20 of Security Council resolution 1244 (1999) (see the most recent quarterly Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2010/169, 6 April 2010, as well as the preceding Reports S/2008/692 of 24 Novem-

ber 2008, S/2009/149 of 17 March 2009, S/2009/300 of 10 June 2009, S/2009/497 of 30 September 2009 and S/2010/5 of 5 January 2010).

93. From the foregoing, the Court concludes that Security Council resolution 1244 (1999) and the Constitutional Framework form part of the international law which is to be considered in replying to the question posed by the General Assembly in its request for the advisory opinion.

1. *Interpretation of Security Council resolution 1244 (1999)*

94. Before continuing further, the Court must recall several factors relevant in the interpretation of resolutions of the Security Council. While the rules on treaty interpretation embodied in Articles 31 and 32 of the Vienna Convention on the Law of Treaties may provide guidance, differences between Security Council resolutions and treaties mean that the interpretation of Security Council resolutions also require that other factors be taken into account. Security Council resolutions are issued by a single, collective body and are drafted through a very different process than that used for the conclusion of a treaty. Security Council resolutions are the product of a voting process as provided for in Article 27 of the Charter, and the final text of such resolutions represents the view of the Security Council as a body. Moreover, Security Council resolutions can be binding on all Member States (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 54, para. 116), irrespective of whether they played any part in their formulation. The interpretation of Security Council resolutions may require the Court to analyse statements by representatives of members of the Security Council made at the time of their adoption, other resolutions of the Security Council on the same issue, as well as the subsequent practice of relevant United Nations organs and of States affected by those given resolutions.

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95. The Court first notes that resolution 1244 (1999) must be read in conjunction with the general principles set out in annexes 1 and 2 thereto, since in the resolution itself, the Security Council: "1. *Decide[d]* that a political solution to the Kosovo crisis shall be based on the general principles in annex 1 and as further elaborated in the principles and other required elements in annex 2." Those general principles sought to defuse the Kosovo crisis first by ensuring an end to the violence and repression in Kosovo and by the establishment of an interim administration. A

longer-term solution was also envisaged, in that resolution 1244 (1999) was to initiate

> "[a] political process towards the establishment of an interim political framework agreement providing for a substantial self-government for Kosovo, taking full account of the Rambouillet accords and the principles of sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other countries of the region, and the demilitarization of the KLA" (Security Council resolution 1244 (1999) of 10 June 1999, Ann. 1, sixth principle; *ibid.*, Ann. 2, para. 8).

Further, it bears recalling that the tenth preambular paragraph of resolution 1244 (1999) also recalled the sovereignty and the territorial integrity of the Federal Republic of Yugoslavia.

96. Having earlier outlined the principal characteristics of Security Council resolution 1244 (1999) (see paragraphs 58 to 59), the Court next observes that three distinct features of that resolution are relevant for discerning its object and purpose.

97. First, resolution 1244 (1999) establishes an international civil and security presence in Kosovo with full civil and political authority and sole responsibility for the governance of Kosovo. As described above (see paragraph 60), on 12 June 1999, the Secretary-General presented to the Security Council his preliminary operational concept for the overall organization of the civil presence under UNMIK. On 25 July 1999, the Special Representative of the Secretary-General promulgated UNMIK regulation 1999/1, deemed to have entered into force as of 10 June 1999, the date of adoption of Security Council resolution 1244 (1999). Under this regulation, "[a]ll legislative and executive authority with respect to Kosovo, including the administration of the judiciary", was vested in UNMIK and exercised by the Special Representative. Viewed together, resolution 1244 (1999) and UNMIK regulation 1999/1 therefore had the effect of superseding the legal order in force at that time in the territory of Kosovo and setting up an international territorial administration. For this reason, the establishment of civil and security presences in Kosovo deployed on the basis of resolution 1244 (1999) must be understood as an exceptional measure relating to civil, political and security aspects and aimed at addressing the crisis existing in that territory in 1999.

98. Secondly, the solution embodied in resolution 1244 (1999), namely, the implementation of an interim international territorial administration, was designed for humanitarian purposes; to provide a means for the stabilization of Kosovo and for the re-establishment of a basic public order in an area beset by crisis. This becomes apparent in the text of resolution 1244 (1999) itself which, in its second preambular paragraph, recalls Security Council resolution 1239, adopted on 14 May 1999, in which the Security Council had expressed "grave concern at the humanitarian crisis

in and around Kosovo". The priorities which are identified in paragraph 11 of resolution 1244 (1999) were elaborated further in the so-called "four pillars" relating to the governance of Kosovo described in the Report of the Secretary-General of 12 June 1999 (paragraph 60 above). By placing an emphasis on these "four pillars", namely, interim civil administration, humanitarian affairs, institution building and reconstruction, and by assigning responsibility for these core components to different international organizations and agencies, resolution 1244 (1999) was clearly intended to bring about stabilization and reconstruction. The interim administration in Kosovo was designed to suspend temporarily Serbia's exercise of its authority flowing from its continuing sovereignty over the territory of Kosovo. The purpose of the legal régime established under resolution 1244 (1999) was to establish, organize and oversee the development of local institutions of self-government in Kosovo under the aegis of the interim international presence.

99. Thirdly, resolution 1244 (1999) clearly establishes an interim régime; it cannot be understood as putting in place a permanent institutional framework in the territory of Kosovo. This resolution mandated UNMIK merely to facilitate the desired negotiated solution for Kosovo's future status, without prejudging the outcome of the negotiating process.

100. The Court thus concludes that the object and purpose of resolution 1244 (1999) was to establish a temporary, exceptional legal régime which, save to the extent that it expressly preserved it, superseded the Serbian legal order and which aimed at the stabilization of Kosovo, and that it was designed to do so on an interim basis.

2. *The question whether the declaration of independence is in accordance with Security Council resolution 1244 (1999) and the measures adopted thereunder*

101. The Court will now turn to the question whether Security Council resolution 1244 (1999), or the measures adopted thereunder, introduces a specific prohibition on issuing a declaration of independence, applicable to those who adopted the declaration of independence of 17 February 2008. In order to answer this question, it is first necessary, as explained in paragraph 52 above, for the Court to determine precisely who issued that declaration.

(a) *The identity of the authors of the declaration of independence*

102. The Court needs to determine whether the declaration of independence of 17 February 2008 was an act of the "Assembly of Kosovo", one of the Provisional Institutions of Self-Government, established under

Chapter 9 of the Constitutional Framework, or whether those who adopted the declaration were acting in a different capacity.

103. The Court notes that different views have been expressed regarding this question. On the one hand, it has been suggested in the proceedings before the Court that the meeting in which the declaration was adopted was a session of the Assembly of Kosovo, operating as a Provisional Institution of Self-Government within the limits of the Constitutional Framework. Other participants have observed that both the language of the document and the circumstances under which it was adopted clearly indicate that the declaration of 17 February 2008 was not the work of the Provisional Institutions of Self-Government and did not take effect within the legal framework created for the Government of Kosovo during the interim phase.

104. The Court notes that, when opening the meeting of 17 February 2008 at which the declaration of independence was adopted, the President of the Assembly and the Prime Minister of Kosovo made reference to the Assembly of Kosovo and the Constitutional Framework. The Court considers, however, that the declaration of independence must be seen in its larger context, taking into account the events preceding its adoption, notably relating to the so-called "final status process" (see paragraphs 64 to 73). Security Council resolution 1244 (1999) was mostly concerned with setting up an interim framework of self-government for Kosovo (see paragraph 58 above). Although, at the time of the adoption of the resolution, it was expected that the final status of Kosovo would flow from, and be developed within, the framework set up by the resolution, the specific contours, let alone the outcome, of the final status process were left open by Security Council resolution 1244 (1999). Accordingly, its paragraph 11, especially in its subparagraphs *(d)*, *(e)* and *(f)*, deals with final status issues only in so far as it is made part of UNMIK's responsibilities to "[f]acilitat[e] a political process designed to determine Kosovo's future status, taking into account the Rambouillet accords" and "[i]n a final stage, [to oversee] the transfer of authority from Kosovo's provisional institutions to institutions established under a political settlement".

105. The declaration of independence reflects the awareness of its authors that the final status negotiations had failed and that a critical moment for the future of Kosovo had been reached. The preamble of the declaration refers to the "years of internationally-sponsored negotiations between Belgrade and Pristina over the question of our future political status" and expressly puts the declaration in the context of the failure of the final status negotiations, inasmuch as it states that "no mutually-acceptable status outcome was possible" (tenth and eleventh preambular paragraphs). Proceeding from there, the authors of the declaration of independence emphasize their determination to "resolve" the status of Kosovo and to give the people of Kosovo "clarity about their future"

(thirteenth preambular paragraph). This language indicates that the authors of the declaration did not seek to act within the standard framework of interim self-administration of Kosovo, but aimed at establishing Kosovo "as an independent and sovereign State" (para. 1). The declaration of independence, therefore, was not intended by those who adopted it to take effect within the legal order created for the interim phase, nor was it capable of doing so. On the contrary, the Court considers that the authors of that declaration did not act, or intend to act, in the capacity of an institution created by and empowered to act within that legal order but, rather, set out to adopt a measure the significance and effects of which would lie outside that order.

106. This conclusion is reinforced by the fact that the authors of the declaration undertook to fulfil the international obligations of Kosovo, notably those created for Kosovo by UNMIK (para. 9), and expressly and solemnly declared Kosovo to be bound vis-à-vis third States by the commitments made in the declaration (para. 12). By contrast, under the régime of the Constitutional Framework, all matters relating to the management of the external relations of Kosovo were the exclusive prerogative of the Special Representative of the Secretary-General:

> "*(m)* concluding agreements with states and international organizations in all matters within the scope of UNSCR 1244 (1999);
>
> *(n)* overseeing the fulfilment of commitments in international agreements entered into on behalf of UNMIK;
>
> *(o)* external relations, including with States and international organizations . . ." (Chap. 8.1 of the Constitutional Framework, "Powers and Responsibilities Reserved to the SRSG"),

with the Special Representative of the Secretary-General only consulting and co-operating with the Provisional Institutions of Self-Government in these matters.

107. Certain features of the text of the declaration and the circumstances of its adoption also point to the same conclusion. Nowhere in the original Albanian text of the declaration (which is the sole authentic text) is any reference made to the declaration being the work of the Assembly of Kosovo. The words "Assembly of Kosovo" appear at the head of the declaration only in the English and French translations contained in the dossier submitted on behalf of the Secretary-General. The language used in the declaration differs from that employed in acts of the Assembly of Kosovo in that the first paragraph commences with the phrase "We, the democratically-elected leaders of our people . . .", whereas acts of the Assembly of Kosovo employ the third person singular.

Moreover, the procedure employed in relation to the declaration differed from that employed by the Assembly of Kosovo for the adoption of legislation. In particular, the declaration was signed by all those present when it was adopted, including the President of Kosovo, who (as noted in paragraph 76 above) was not a member of the Assembly of Kosovo. In fact, the self-reference of the persons adopting the declaration of independence as "the democratically-elected leaders of our people" immediately precedes the actual declaration of independence within the text ("hereby declare Kosovo to be an independent and sovereign State"; para. 1). It is also noticeable that the declaration was not forwarded to the Special Representative of the Secretary-General for publication in the Official Gazette.

108. The reaction of the Special Representative of the Secretary-General to the declaration of independence is also of some significance. The Constitutional Framework gave the Special Representative power to oversee and, in certain circumstances, annul the acts of the Provisional Institutions of Self-Government. On previous occasions, in particular in the period between 2002 and 2005, when the Assembly of Kosovo took initiatives to promote the independence of Kosovo, the Special Representative had qualified a number of acts as being incompatible with the Constitutional Framework on the grounds that they were deemed to be "beyond the scope of [the Assembly's] competencies" (United Nations dossier No. 189, 7 February 2003) and therefore outside the powers of the Assembly of Kosovo.

The silence of the Special Representative of the Secretary-General in the face of the declaration of independence of 17 February 2008 suggests that he did not consider that the declaration was an act of the Provisional Institutions of Self-Government designed to take effect within the legal order for the supervision of which he was responsible. As the practice shows, he would have been under a duty to take action with regard to acts of the Assembly of Kosovo which he considered to be *ultra vires*.

The Court accepts that the Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, submitted to the Security Council on 28 March 2008, stated that "the Assembly of Kosovo held a session during which it adopted a 'declaration of independence', declaring Kosovo an independent and sovereign State" (United Nations doc. S/2008/211, para. 3). This was the normal periodic report on UNMIK activities, the purpose of which was to inform the Security Council about developments in Kosovo; it was not intended as a legal analysis of the declaration or the capacity in which those who adopted it had acted.

109. The Court thus arrives at the conclusion that, taking all factors together, the authors of the declaration of independence of 17 February 2008 did not act as one of the Provisional Institutions of Self-Government within the Constitutional Framework, but rather as persons who

acted together in their capacity as representatives of the people of Kosovo outside the framework of the interim administration.

(b) *The question whether the authors of the declaration of independence acted in violation of Security Council resolution 1244 (1999) or the measures adopted thereunder*

110. Having established the identity of the authors of the declaration of independence, the Court turns to the question whether their act in promulgating the declaration was contrary to any prohibition contained in Security Council resolution 1244 (1999) or the Constitutional Framework adopted thereunder.

111. The Court recalls that this question has been a matter of controversy in the present proceedings. Some participants to the proceedings have contended that the declaration of independence of 17 February 2008 was a unilateral attempt to bring to an end the international presence established by Security Council resolution 1244 (1999), a result which it is said could only be effectuated by a decision of the Security Council itself. It has also been argued that a permanent settlement for Kosovo could only be achieved either by agreement of all parties involved (notably including the consent of the Republic of Serbia) or by a specific Security Council resolution endorsing a specific final status for Kosovo, as provided for in the Guiding Principles of the Contact Group. According to this view, the unilateral action on the part of the authors of the declaration of independence cannot be reconciled with Security Council resolution 1244 (1999) and thus constitutes a violation of that resolution.

112. Other participants have submitted to the Court that Security Council resolution 1244 (1999) did not prevent or exclude the possibility of Kosovo's independence. They argued that the resolution only regulates the interim administration of Kosovo, but not its final or permanent status. In particular, the argument was put forward that Security Council resolution 1244 (1999) does not create obligations under international law prohibiting the issuance of a declaration of independence or making it invalid, and does not make the authors of the declaration of independence its addressees. According to this position, if the Security Council had wanted to preclude a declaration of independence, it would have done so in clear and unequivocal terms in the text of the resolution, as it did in resolution 787 (1992) concerning the Republika Srpska. In addition, it was argued that the references, in the annexes of Security Council resolution 1244 (1999), to the Rambouillet accords and thus indirectly to the "will of the people" (see Chapter 8.3 of the Rambouillet accords) of Kosovo, support the view that Security Council resolution 1244 (1999) not only did not oppose the declaration of independence, but indeed contemplated it. Other participants contended that at least once the negoti-

ating process had been exhausted, Security Council resolution 1244 (1999) was no longer an obstacle to a declaration of independence.

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113. The question whether resolution 1244 (1999) prohibits the authors of the declaration of 17 February 2008 from declaring independence from the Republic of Serbia can only be answered through a careful reading of this resolution (see paras. 94 *et seq.*).

114. First, the Court observes that Security Council resolution 1244 (1999) was essentially designed to create an interim régime for Kosovo, with a view to channelling the long-term political process to establish its final status. The resolution did not contain any provision dealing with the final status of Kosovo or with the conditions for its achievement.

In this regard the Court notes that contemporaneous practice of the Security Council shows that in situations where the Security Council has decided to establish restrictive conditions for the permanent status of a territory, those conditions are specified in the relevant resolution. For example, although the factual circumstances differed from the situation in Kosovo, only 19 days after the adoption of resolution 1244 (1999), the Security Council, in its resolution 1251 of 29 June 1999, reaffirmed its position that a "Cyprus settlement must be based on a State of Cyprus with a single sovereignty and international personality and a single citizenship, with its independence and territorial integrity safeguarded" (para. 11). The Security Council thus set out the specific conditions relating to the permanent status of Cyprus.

By contrast, under the terms of resolution 1244 (1999) the Security Council did not reserve for itself the final determination of the situation in Kosovo and remained silent on the conditions for the final status of Kosovo.

Resolution 1244 (1999) thus does not preclude the issuance of the declaration of independence of 17 February 2008 because the two instruments operate on a different level: unlike resolution 1244 (1999), the declaration of independence is an attempt to determine finally the status of Kosovo.

115. Secondly, turning to the question of the addressees of Security Council resolution 1244 (1999), as described above (see paragraph 58), it sets out a general framework for the "deployment in Kosovo, under United Nations auspices, of international civil and security presences" (para. 5). It is mostly concerned with creating obligations and authorizations for United Nations Member States as well as for organs of the United Nations such as the Secretary-General and his Special Representative (see notably paras. 3, 5, 6, 7, 9, 10 and 11 of Security Council resolution 1244 (1999)). The only point at which resolution 1244 (1999)

expressly mentions other actors relates to the Security Council's demand, on the one hand, "that the KLA and other armed Kosovo Albanian groups end immediately all offensive actions and comply with the requirements for demilitarization" (para. 15) and, on the other hand, for the "full co-operation by all concerned, including the international security presence, with the International Tribunal for the former Yugoslavia" (para. 14). There is no indication, in the text of Security Council resolution 1244 (1999), that the Security Council intended to impose, beyond that, a specific obligation to act or a prohibition from acting, addressed to such other actors.

116. The Court recalls in this regard that it has not been uncommon for the Security Council to make demands on actors other than United Nations Member States and inter-governmental organizations. More specifically, a number of Security Council resolutions adopted on the subject of Kosovo prior to Security Council resolution 1244 (1999) contained demands addressed *eo nomine* to the Kosovo Albanian leadership. For example, resolution 1160 (1998) "[c]all[ed] upon the authorities in Belgrade *and the leadership of the Kosovar Albanian community* urgently to enter without preconditions into a meaningful dialogue on political status issues" (resolution 1160 (1998), para. 4; emphasis added). Resolution 1199 (1998) included four separate demands on the Kosovo Albanian leadership, i.e., improving the humanitarian situation, entering into a dialogue with the Federal Republic of Yugoslavia, pursuing their goals by peaceful means only, and co-operating fully with the Prosecutor of the International Criminal Tribunal for the former Yugoslavia (resolution 1199 (1998), paras. 2, 3, 6 and 13). Resolution 1203 (1998) "[d]emand[ed] . . . that the Kosovo Albanian leadership and all other elements of the Kosovo Albanian community comply fully and swiftly with resolutions 1160 (1998) and 1199 (1998) and co-operate fully with the OSCE Verification Mission in Kosovo" (resolution 1203 (1998), para. 4). The same resolution also called upon the "Kosovo Albanian leadership to enter immediately into a meaningful dialogue without preconditions and with international involvement, and to a clear timetable, leading to an end of the crisis and to a negotiated political solution to the issue of Kosovo"; demanded that "the Kosovo Albanian leadership and all others concerned respect the freedom of movement of the OSCE Verification Mission and other international personnel"; "[i]nsist[ed] that the Kosovo Albanian leadership condemn all terrorist actions"; and demanded that the Kosovo Albanian leadership "co-operate with international efforts to improve the humanitarian situation and to avert the impending humanitarian catastrophe" (resolution 1203 (1998), paras. 5, 6, 10 and 11).

117. Such reference to the Kosovo Albanian leadership or other actors, notwithstanding the somewhat general reference to "all concerned"

(para. 14), is missing from the text of Security Council resolution 1244 (1999). When interpreting Security Council resolutions, the Court must establish, on a case-by-case basis, considering all relevant circumstances, for whom the Security Council intended to create binding legal obligations. The language used by the resolution may serve as an important indicator in this regard. The approach taken by the Court with regard to the binding effect of Security Council resolutions in general is, *mutatis mutandis*, also relevant here. In this context, the Court recalls its previous statement that:

> "The language of a resolution of the Security Council should be carefully analysed before a conclusion can be made as to its binding effect. In view of the nature of the powers under Article 25, the question whether they have been in fact exercised is to be determined in each case, having regard to the terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution of the Security Council." (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 53, para. 114.)

118. Bearing this in mind, the Court cannot accept the argument that Security Council resolution 1244 (1999) contains a prohibition, binding on the authors of the declaration of independence, against declaring independence; nor can such a prohibition be derived from the language of the resolution understood in its context and considering its object and purpose. The language of Security Council resolution 1244 (1999) is at best ambiguous in this regard. The object and purpose of the resolution, as has been explained in detail (see paragraphs 96 to 100), is the establishment of an interim administration for Kosovo, without making any definitive determination on final status issues. The text of the resolution explains that the

> "main responsibilities of the international civil presence will include . . . [o]rganizing and overseeing the development of provisional institutions for democratic and autonomous self-government *pending a political settlement*" (para. 11 *(c)* of the resolution; emphasis added).

The phrase "political settlement", often cited in the present proceedings, does not modify this conclusion. First, that reference is made within the context of enumerating the responsibilities of the international civil presence, i.e., the Special Representative of the Secretary-General in Kosovo and UNMIK, and not of other actors. Secondly, as the diverging views presented to the Court on this matter illustrate, the term "political settlement" is subject to various interpretations. The Court therefore con-

cludes that this part of Security Council resolution 1244 (1999) cannot be construed to include a prohibition, addressed in particular to the authors of the declaration of 17 February 2008, against declaring independence.

119. The Court accordingly finds that Security Council resolution 1244 (1999) did not bar the authors of the declaration of 17 February 2008 from issuing a declaration of independence from the Republic of Serbia. Hence, the declaration of independence did not violate Security Council resolution 1244 (1999).

*

120. The Court therefore turns to the question whether the declaration of independence of 17 February 2008 has violated the Constitutional Framework established under the auspices of UNMIK. Chapter 5 of the Constitutional Framework determines the powers of the Provisional Institutions of Self-Government of Kosovo. It was argued by a number of States which participated in the proceedings before the Court that the promulgation of a declaration of independence is an act outside the powers of the Provisional Institutions of Self-Government as set out in the Constitutional Framework.

121. The Court has already held, however (see paragraphs 102 to 109 above), that the declaration of independence of 17 February 2008 was not issued by the Provisional Institutions of Self-Government, nor was it an act intended to take effect, or actually taking effect, within the legal order in which those Provisional Institutions operated. It follows that the authors of the declaration of independence were not bound by the framework of powers and responsibilities established to govern the conduct of the Provisional Institutions of Self-Government. Accordingly, the Court finds that the declaration of independence did not violate the Constitutional Framework.

* * *

## V. General Conclusion

122. The Court has concluded above that the adoption of the declaration of independence of 17 February 2008 did not violate general international law, Security Council resolution 1244 (1999) or the Constitutional Framework. Consequently the adoption of that declaration did not violate any applicable rule of international law.

* * *

123. For these reasons,

THE COURT,

(1) Unanimously,

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

(2) By nine votes to five,

*Decides* to comply with the request for an advisory opinion;

IN FAVOUR: *President* Owada; *Judges* Al-Khasawneh, Buergenthal, Simma, Abraham, Sepúlveda-Amor, Cançado Trindade, Yusuf, Greenwood;

AGAINST: *Vice-President* Tomka; *Judges* Koroma, Keith, Bennouna, Skotnikov;

(3) By ten votes to four,

*Is of the opinion* that the declaration of independence of Kosovo adopted on 17 February 2008 did not violate international law.

IN FAVOUR: *President* Owada; *Judges* Al-Khasawneh, Buergenthal, Simma, Abraham, Keith, Sepúlveda-Amor, Cançado Trindade, Yusuf, Greenwood;

AGAINST: *Vice-President* Tomka; *Judges* Koroma, Bennouna, Skotnikov.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this twenty-second day of July, two thousand and ten, in two copies, one of which will be placed in the archives of the Court and the other transmitted to the Secretary-General of the United Nations.

(*Signed*) Hisashi OWADA,
President.

(*Signed*) Philippe COUVREUR,
Registrar.

Vice-President TOMKA appends a declaration to the Advisory Opinion of the Court; Judge KOROMA appends a dissenting opinion to the Advisory Opinion of the Court; Judge SIMMA appends a declaration to the Advisory Opinion of the Court; Judges KEITH and SEPÚLVEDA-AMOR append separate opinions to the Advisory Opinion of the Court; Judges BENNOUNA and SKOTNIKOV append dissenting opinions to the Advisory Opinion of the Court; Judges CANÇADO TRINDADE and YUSUF append separate opinions to the Advisory Opinion of the Court.

(*Initialled*) H.O.

(*Initialled*) Ph.C.

# Annex 30

# IPCC Glossary Search

# Annex 31

## 7. UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE

*New York, 9 May 1992*

**ENTRY INTO FORCE:** 21 March 1994, in accordance with article 23(1).

**REGISTRATION:** 21 March 1994, No. 30822.

**STATUS:** Signatories: 165. Parties: 198.[1]

**TEXT:** United Nations, *Treaty Series* , vol. 1771, p. 107; and depositary notifications C.N.148.1993.TREATIES-4 of 12 July 1993 (procès-verbal of rectification of the original texts of the Convention); C.N.436.1993.TREATIES-12 of 15 December 1993 (corrigendum to C.N.148.1993.TREATIES-4 of 12 July 1993); C.N.247.1993.TREATIES-6 of 24 November 1993 (procès-verbal of rectification of the authentic French text); C.N.462.1993.TREATIES-13 of 30 December 1993 (corrigendum to C.N.247.1993.TREATIES-6 of 24 November 1993); C.N.544.1997.TREATIES-6 of 13 February 1997 (amendment to the list in annex I to the Convention); and C.N.1478.2001.TREATIES-2 of 28 December 2001 (amendment to the list in annex II to the Convention); C.N.237.2010.TREATIES-2 of 26 April 2010 (adoption of amendment to the list in the Annex I to the Convention); C.N.355.2012.TREATIES-XXVII.7 of 9 July 2012 (adoption of amendment to Annex I to the Convention) and C.N.81.2013.TREATIES-XXVII.7 of 14 January 2013 (entry into force of amendment to Annex I to the Convention).

***Note:*** The Convention was agreed upon and adopted by the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change, during its Fifth session, second part, held at New York from 30 April to 9 May 1992. In accordance with its article 20, the Convention was open for signature by States Members of the United Nations or of any of its specialized agencies or that are Parties to the Statute of the International Court of Justice and by regional economic integration organizations, at Rio de Janeiro during the United Nations Conference on Environment and Development, from 4 to 14 June 1992, and remained thereafter open at the United Nations Headquarters in New York until 19 June 1993.

| *Participant* | *Signature* | *Approval(AA), Acceptance(A), Accession(a), Succession(d), Ratification* |
|---|---|---|
| Afghanistan | 12 Jun 1992 | 19 Sep 2002 |
| Albania | | 3 Oct 1994 a |
| Algeria | 13 Jun 1992 | 9 Jun 1993 |
| Andorra | | 2 Mar 2011 a |
| Angola | 14 Jun 1992 | 17 May 2000 |
| Antigua and Barbuda | 4 Jun 1992 | 2 Feb 1993 |
| Argentina | 12 Jun 1992 | 11 Mar 1994 |
| Armenia | 13 Jun 1992 | 14 May 1993 A |
| Australia | 4 Jun 1992 | 30 Dec 1992 |
| Austria | 8 Jun 1992 | 28 Feb 1994 |
| Azerbaijan | 12 Jun 1992 | 16 May 1995 |
| Bahamas | 12 Jun 1992 | 29 Mar 1994 |
| Bahrain | 8 Jun 1992 | 28 Dec 1994 |
| Bangladesh | 9 Jun 1992 | 15 Apr 1994 |
| Barbados | 12 Jun 1992 | 23 Mar 1994 |
| Belarus | 11 Jun 1992 | 11 May 2000 AA |
| Belgium | 4 Jun 1992 | 16 Jan 1996 |
| Belize | 13 Jun 1992 | 31 Oct 1994 |
| Benin | 13 Jun 1992 | 30 Jun 1994 |
| Bhutan | 11 Jun 1992 | 25 Aug 1995 |
| Bolivia (Plurinational State of) | 10 Jun 1992 | 3 Oct 1994 |
| Bosnia and Herzegovina | | 7 Sep 2000 a |
| Botswana | 12 Jun 1992 | 27 Jan 1994 |
| Brazil | 4 Jun 1992 | 28 Feb 1994 |
| Brunei Darussalam | | 7 Aug 2007 a |
| Bulgaria | 5 Jun 1992 | 12 May 1995 |
| Burkina Faso | 12 Jun 1992 | 2 Sep 1993 |
| Burundi | 11 Jun 1992 | 6 Jan 1997 |
| Cabo Verde | 12 Jun 1992 | 29 Mar 1995 |
| Cambodia | | 18 Dec 1995 a |
| Cameroon | 14 Jun 1992 | 19 Oct 1994 |
| Canada | 12 Jun 1992 | 4 Dec 1992 |
| Central African Republic | 13 Jun 1992 | 10 Mar 1995 |
| Chad | 12 Jun 1992 | 7 Jun 1994 |

| *Participant* | *Signature* | *Approval(AA), Acceptance(A), Accession(a), Succession(d), Ratification* |
|---|---|---|
| Chile | 13 Jun 1992 | 22 Dec 1994 |
| China[2,3] | 11 Jun 1992 | 5 Jan 1993 |
| Colombia | 13 Jun 1992 | 22 Mar 1995 |
| Comoros | 11 Jun 1992 | 31 Oct 1994 |
| Congo | 12 Jun 1992 | 14 Oct 1996 |
| Cook Islands | 12 Jun 1992 | 20 Apr 1993 |
| Costa Rica | 13 Jun 1992 | 26 Aug 1994 |
| Côte d'Ivoire | 10 Jun 1992 | 29 Nov 1994 |
| Croatia | 11 Jun 1992 | 8 Apr 1996 A |
| Cuba | 13 Jun 1992 | 5 Jan 1994 |
| Cyprus | 12 Jun 1992 | 15 Oct 1997 |
| Czech Republic | 18 Jun 1993 | 7 Oct 1993 AA |
| Democratic People's Republic of Korea | 11 Jun 1992 | 5 Dec 1994 AA |
| Democratic Republic of the Congo | 11 Jun 1992 | 9 Jan 1995 |
| Denmark | 9 Jun 1992 | 21 Dec 1993 |
| Djibouti | 12 Jun 1992 | 27 Aug 1995 |
| Dominica | | 21 Jun 1993 a |
| Dominican Republic | 12 Jun 1992 | 7 Oct 1998 |
| Ecuador | 9 Jun 1992 | 23 Feb 1993 |
| Egypt | 9 Jun 1992 | 5 Dec 1994 |
| El Salvador | 13 Jun 1992 | 4 Dec 1995 |
| Equatorial Guinea | | 16 Aug 2000 a |
| Eritrea | | 24 Apr 1995 a |
| Estonia | 12 Jun 1992 | 27 Jul 1994 |
| Eswatini | 12 Jun 1992 | 7 Oct 1996 |
| Ethiopia | 10 Jun 1992 | 5 Apr 1994 |
| European Union | 13 Jun 1992 | 21 Dec 1993 AA |
| Fiji | 9 Oct 1992 | 25 Feb 1993 |
| Finland | 4 Jun 1992 | 3 May 1994 A |
| France | 13 Jun 1992 | 25 Mar 1994 |
| Gabon | 12 Jun 1992 | 21 Jan 1998 |
| Gambia | 12 Jun 1992 | 10 Jun 1994 |
| Georgia | | 29 Jul 1994 a |
| Germany | 12 Jun 1992 | 9 Dec 1993 |
| Ghana | 12 Jun 1992 | 6 Sep 1995 |
| Greece | 12 Jun 1992 | 4 Aug 1994 |
| Grenada | 3 Dec 1992 | 11 Aug 1994 |
| Guatemala | 13 Jun 1992 | 15 Dec 1995 |
| Guinea | 12 Jun 1992 | 7 May 1993 |
| Guinea-Bissau | 12 Jun 1992 | 27 Oct 1995 |
| Guyana | 13 Jun 1992 | 29 Aug 1994 |
| Haiti | 13 Jun 1992 | 25 Sep 1996 |
| Holy See | | 6 Jul 2022 a |
| Honduras | 13 Jun 1992 | 19 Oct 1995 |
| Hungary | 13 Jun 1992 | 24 Feb 1994 |
| Iceland | 4 Jun 1992 | 16 Jun 1993 |
| India | 10 Jun 1992 | 1 Nov 1993 |
| Indonesia | 5 Jun 1992 | 23 Aug 1994 |
| Iran (Islamic Republic of) | 14 Jun 1992 | 18 Jul 1996 |
| Iraq | | 28 Jul 2009 a |
| Ireland | 13 Jun 1992 | 20 Apr 1994 |
| Israel | 4 Jun 1992 | 4 Jun 1996 |
| Italy | 5 Jun 1992 | 15 Apr 1994 |
| Jamaica | 12 Jun 1992 | 6 Jan 1995 |
| Japan | 13 Jun 1992 | 28 May 1993 A |
| Jordan | 11 Jun 1992 | 12 Nov 1993 |
| Kazakhstan | 8 Jun 1992 | 17 May 1995 |
| Kenya | 12 Jun 1992 | 30 Aug 1994 |
| Kiribati | 13 Jun 1992 | 7 Feb 1995 |
| Kuwait | | 28 Dec 1994 a |
| Kyrgyzstan | | 25 May 2000 a |
| Lao People's Democratic Republic | | 4 Jan 1995 a |
| Latvia | 11 Jun 1992 | 23 Mar 1995 |
| Lebanon | 12 Jun 1992 | 15 Dec 1994 |
| Lesotho | 11 Jun 1992 | 7 Feb 1995 |
| Liberia | 12 Jun 1992 | 5 Nov 2002 |
| Libya | 29 Jun 1992 | 14 Jun 1999 |
| Liechtenstein | 4 Jun 1992 | 22 Jun 1994 |
| Lithuania | 11 Jun 1992 | 24 Mar 1995 |
| Luxembourg | 9 Jun 1992 | 9 May 1994 |
| Madagascar | 10 Jun 1992 | 2 Jun 1999 |
| Malawi | 10 Jun 1992 | 21 Apr 1994 |
| Malaysia | 9 Jun 1993 | 13 Jul 1994 |
| Maldives | 12 Jun 1992 | 9 Nov 1992 |
| Mali | 30 Sep 1992 | 28 Dec 1994 |
| Malta | 12 Jun 1992 | 17 Mar 1994 |
| Marshall Islands | 12 Jun 1992 | 8 Oct 1992 |
| Mauritania | 12 Jun 1992 | 20 Jan 1994 |
| Mauritius | 10 Jun 1992 | 4 Sep 1992 |
| Mexico | 13 Jun 1992 | 11 Mar 1993 |

| *Participant* | *Signature* | *Approval(AA), Acceptance(A), Accession(a), Succession(d), Ratification* | |
|---|---|---|---|
| Micronesia (Federated States of) | 12 Jun 1992 | 18 Nov | 1993 |
| Monaco | 11 Jun 1992 | 20 Nov | 1992 |
| Mongolia | 12 Jun 1992 | 30 Sep | 1993 |
| Montenegro[4] | | 23 Oct | 2006 d |
| Morocco | 13 Jun 1992 | 28 Dec | 1995 |
| Mozambique | 12 Jun 1992 | 25 Aug | 1995 |
| Myanmar | 11 Jun 1992 | 25 Nov | 1994 |
| Namibia | 12 Jun 1992 | 16 May | 1995 |
| Nauru | 8 Jun 1992 | 11 Nov | 1993 |
| Nepal | 12 Jun 1992 | 2 May | 1994 |
| Netherlands (Kingdom of the)[5] | 4 Jun 1992 | 20 Dec | 1993 A |
| New Zealand[6] | 4 Jun 1992 | 16 Sep | 1993 |
| Nicaragua | 13 Jun 1992 | 31 Oct | 1995 |
| Niger | 11 Jun 1992 | 25 Jul | 1995 |
| Nigeria | 13 Jun 1992 | 29 Aug | 1994 |
| Niue | | 28 Feb | 1996 a |
| North Macedonia | | 28 Jan | 1998 a |
| Norway | 4 Jun 1992 | 9 Jul | 1993 |
| Oman | 11 Jun 1992 | 8 Feb | 1995 |
| Pakistan | 13 Jun 1992 | 1 Jun | 1994 |
| Palau | | 10 Dec | 1999 a |
| Panama | 18 Mar 1993 | 23 May | 1995 |
| Papua New Guinea | 13 Jun 1992 | 16 Mar | 1993 |
| Paraguay | 12 Jun 1992 | 24 Feb | 1994 |
| Peru | 12 Jun 1992 | 7 Jun | 1993 |
| Philippines | 12 Jun 1992 | 2 Aug | 1994 |
| Poland | 5 Jun 1992 | 28 Jul | 1994 |
| Portugal[3] | 13 Jun 1992 | 21 Dec | 1993 |
| Qatar | | 18 Apr | 1996 a |
| Republic of Korea | 13 Jun 1992 | 14 Dec | 1993 |
| Republic of Moldova | 12 Jun 1992 | 9 Jun | 1995 |
| Romania | 5 Jun 1992 | 8 Jun | 1994 |
| Russian Federation | 13 Jun 1992 | 28 Dec | 1994 |
| Rwanda | 10 Jun 1992 | 18 Aug | 1998 |
| Samoa | 12 Jun 1992 | 29 Nov | 1994 |
| San Marino | 10 Jun 1992 | 28 Oct | 1994 |
| Sao Tome and Principe | 12 Jun 1992 | 29 Sep | 1999 |
| Saudi Arabia | | 28 Dec | 1994 a |
| Senegal | 13 Jun 1992 | 17 Oct | 1994 |
| Serbia | | 12 Mar | 2001 a |
| Seychelles | 10 Jun 1992 | 22 Sep | 1992 |
| Sierra Leone | 11 Feb 1993 | 22 Jun | 1995 |
| Singapore | 13 Jun 1992 | 29 May | 1997 |
| Slovakia | 19 May 1993 | 25 Aug | 1994 AA |
| Slovenia | 13 Jun 1992 | 1 Dec | 1995 |
| Solomon Islands | 13 Jun 1992 | 28 Dec | 1994 |
| Somalia | | 11 Sep | 2009 a |
| South Africa | 15 Jun 1993 | 29 Aug | 1997 |
| South Sudan | | 17 Feb | 2014 a |
| Spain | 13 Jun 1992 | 21 Dec | 1993 |
| Sri Lanka | 10 Jun 1992 | 23 Nov | 1993 |
| St. Kitts and Nevis | 12 Jun 1992 | 7 Jan | 1993 |
| St. Lucia | 14 Jun 1993 | 14 Jun | 1993 |
| St. Vincent and the Grenadines | | 2 Dec | 1996 a |
| State of Palestine | | 18 Dec | 2015 a |
| Sudan | 9 Jun 1992 | 19 Nov | 1993 |
| Suriname | 13 Jun 1992 | 14 Oct | 1997 |
| Sweden | 8 Jun 1992 | 23 Jun | 1993 |
| Switzerland | 12 Jun 1992 | 10 Dec | 1993 |
| Syrian Arab Republic | | 4 Jan | 1996 a |
| Tajikistan | | 7 Jan | 1998 a |
| Thailand | 12 Jun 1992 | 28 Dec | 1994 |
| Timor-Leste | | 10 Oct | 2006 a |
| Togo | 12 Jun 1992 | 8 Mar | 1995 A |
| Tonga | | 20 Jul | 1998 a |
| Trinidad and Tobago | 11 Jun 1992 | 24 Jun | 1994 |
| Tunisia | 13 Jun 1992 | 15 Jul | 1993 |
| Türkiye | | 24 Feb | 2004 a |
| Turkmenistan | | 5 Jun | 1995 a |
| Tuvalu | 8 Jun 1992 | 26 Oct | 1993 |
| Uganda | 13 Jun 1992 | 8 Sep | 1993 |
| Ukraine | 11 Jun 1992 | 13 May | 1997 |
| United Arab Emirates | | 29 Dec | 1995 a |
| United Kingdom of Great Britain and Northern Ireland[7,8] | 12 Jun 1992 | 8 Dec | 1993 |
| United Republic of Tanzania | 12 Jun 1992 | 17 Apr | 1996 |
| United States of America | 12 Jun 1992 | 15 Oct | 1992 |
| Uruguay | 4 Jun 1992 | 18 Aug | 1994 |
| Uzbekistan | | 20 Jun | 1993 a |
| Vanuatu | 9 Jun 1992 | 25 Mar | 1993 |

| Participant | Signature | | Approval(AA), Acceptance(A), Accession(a), Succession(d), Ratification | |
|---|---|---|---|---|
| Venezuela (Bolivarian Republic of) | 12 Jun | 1992 | 28 Dec | 1994 |
| Viet Nam | 11 Jun | 1992 | 16 Nov | 1994 |
| Yemen | 12 Jun | 1992 | 21 Feb | 1996 |
| Zambia | 11 Jun | 1992 | 28 May | 1993 |
| Zimbabwe | 12 Jun | 1992 | 3 Nov | 1992 |

## *Declarations*

***(Unless otherwise indicated, the declarations were made upon ratification, accession, acceptance, approval or succession.)***

### BULGARIA

"The Republic of Bulgaria declares that in accordance with article 4, paragraph 6, and with respect to paragraph 2 ( *b* ) of the said article, it accepts as a basis of the anthropogenic emissions in Bulgaria of carbon dioxide and other greenhouse gases not controlled by the Montreal Protocol, the 1988 levels of the said emissions in the country and not their 1990 levels, keeping records of and comparing the emission rates during the subsequent years."

### CROATIA

"The Republic of Croatia declares that it intends to be bound by the provisions of the Annex 1, as a country undergoing the process of transition to a market economy."

### CUBA

With reference to article 14 of the United Nations Framework Convention on Climate Change, the Government of the Republic of Cuba declares that, insofar as concerns the Republic of Cuba, any dispute that may arise between the Parties concerning the interpretation or application of the Convention shall be settled through negotiation through the diplomatic channel.

### EUROPEAN UNION

"The European Economic Community and its Member States declare, for the purposes of clarity, that the inclusion of the European Community as well as its Member States in the lists in the Annexes to the Convention is without prejudice to the division of competence and responsibilities between the Community and its Member States, which is to be declared in accordance with article 21 (3) of the Convention."

"The European Economic Community and its Member States declare that the commitment to limit anthropogenic CO 2 emissions set out in article 4(2) of the Convention will be fulfilled in the Community as a whole through action by the Community and its Member States, within the respective com- petence of each.

In this perspective, the Community and its Member States reaffirm the objectives set out in the Council conclusions of 29 October 1990, and in particular the objective of stabilization of CO 2 emission by 2000 and 1990 level in the Community as a whole.

The European Economic Community and its Member States are elaborating a coherent strategy in order to attain this objective."

### FIJI

"The Government of Fiji declares its understanding that signature of the Convention shall, in no way, constitute a renunciation of any rights under international law concerning state responsibility for the adverse effects of climate change, and that no provisions in the Convention can be interpreted as derogating from the principles of general international law."

### HOLY SEE

“By acceding to the United Nations Framework Convention on Climate Change in the name and on behalf of Vatican City State, the Holy See intends to contribute to the efforts of all States to work together in solidarity, in accordance with their common but differentiated responsibilities and respective capabilities, in an effective response to the challenges posed by climate change to humankind and to our common home.

In light of the territorial nature of the obligations set forth in the United Nations Framework Convention on Climate Change, the Holy See declares, for the avoidance of doubt, that in acceding to the Convention only in the name and on behalf of Vatican City State it commits itself to apply its provisions exclusively within the Territory of the Vatican City State, as circumscribed by the Leonine Walls.

The Holy See, in conformity with its particular mission, reiterates, on behalf of Vatican City State, its position regarding the term ‘gender’. The Holy See underlines that any reference to ‘gender’ and related terms in any document that has been or that will be adopted by the Conference of State Parties or by its subsidiary bodies is to be understood as grounded on the biological sexual identity that is male and female.

The Holy See upholds and promotes a holistic and integrated approach that is firmly centered on the human dignity and integral development of every person.”

### HUNGARY

"The Government of the Republic of Hungary attributes great significance to the United Nations Framework Convention on Climate Change and it reiterates its position in accordance with the provisions of article 4.6 of the Convention on certain degree of flexibility that the average level of anthropogenic carbon-dioxide emissions for the period of 1985-1987 will be considered as reference level in context of the commitments under article 4.2 of the Convention. This understanding is closely related to the `process of transition' as it is given in article 4.6 of the Convention. The Government of the Republic of Hungary declares that it will do all efforts to contribute to the objective of the Convention."

**KIRIBATI**

"The Government of the Republic of Kiribati declares its understanding that signature and /or ratification of the Convention shall in no way constitute a renunciation of any rights under international law concerning state responsibility for the adverse effects of climate change, and that no provisions in the Convention can be interpreted as derogating from the principles of general international law."

**MONACO**

In accordance with sub-paragraph g of article 4.2 of the Convention, the Principality of Monaco declares that it intends to be bound by the provisions of sub-paragraphs a and b of said article.

**NAURU**

"The Government of Nauru declares its understanding that signature of the Convention shall in no way constitute a renunciation of any rights under international law concerning state responsibility for the adverse effects of climate change, and that no provisions in the Convention can be interpreted as derogating from the principles of general international law."

**NETHERLANDS (KINGDOM OF THE)**

"The Kingdom of the Netherlands declares, in accordance with paragraph 2 of Article 14 of the United Nations Framework Convention on Climate Change, that it accepts both means of dispute settlement referred to in that paragraph as compulsory in relation to any Party accepting one or both means of dispute settlement."

**PAPUA NEW GUINEA**

"The Government of the Independent State of Papua New Guinea declares its understanding that ratification of the Con- vention shall in no way constitute a renunciation of any rights under International Law concerning State responsibility for the adverse effects of Climate Change as derogating from the prin- ciples of general International Law."

**SOLOMON ISLANDS**

"In pursuance of article 14 (2) of the said Convention [the Government of the Solomon Islands] shall recognise as com-pulsory, arbitration, in accordance with procedures to be adopted by the Conference of the Parties as soon as practicable, in an annex on arbitration."

**TUVALU**

"The Government of Tuvalu declares its understanding that signature of the Convention shall in no way constitute a renunciation of any rights under international law concerning state responsibility for the adverse effects of climate change, and that no provisions in the Convention can be interpreted as derogating from the principles of general international law."

### *Notifications made under article 4 (2) (g)[9]*

| *Participant* | *Date of receipt of the notification:* |
|---|---|
| Czech Republic | 27 Nov 1995 |
| Kazakhstan | 23 Mar 2000 |
| Monaco | 20 Nov 1992 |
| Slovakia | 23 Feb 1996 |
| Slovenia | 9 Jun 1998 |

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***Notes:***

[1] For the purpose of entry into force of the [Convention/Protocol] , any instrument of ratification, acceptance, approval or accession deposited by a regional economic integration organization shall not be counted as additional to those deposited by member States of that Organization.

[2] By a communication received on 8 April 2003, the Government of the Government of the People's Republic of China notified the Secretary-General of the following:

"In accordance with the provisions of Article 153 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China of 1990, the Government of the People's Republic of China decides that the United Nations Framework Convention on Climate Change and the Kyoto Protocol to the United Nations Framework Convention on Climate Change shall apply to the Hong Kong Special Administrative Region of the People's Republic of China.

The United Nations Framework Convention on Climate Change continues to be implemented in the Macao Special Administrative Region of the People's Republic of China. The Kyoto Protocol to the United Nations Framework Convention on Climate Change shall not apply to the Macao Special Administrative Region of the People's Republic of China until the Government of China notifies otherwise."

[3] On 28 June 1999, the Government of Portugal informed the Secretary-General the the Convention would also apply to Macao.

Subsequently, the Secretary-General received communications concerning the status of Macao from Portugal and China (see note 1 under "Portugal" and note 3 under "China" in the

“Historical Information” section in the front matter of this volume.) Upon resuming the exercise of sovereignty over Macao, China notified the Secretary-General that the Convention will also apply to the Macao Special Administrative Region.

[4] See note 1 under "Montenegro" in the "Historical Information" section in the front matter of this volume.

[5] For the Kingdom in Europe.

[6] Upon ratification, New Zealand had notified the Secretary-General of a territorial exclusion with respect to Tokealau. On 13 November 2017, New Zealand notified that it extends the application of the Convention to Tokelau. See C.N.704.2017.TREATIES-XXVII.7 of 13 November 2017.

[7] In respect of Great Britain and Northern Ireland, the Bailiwick of Jersey and the Isle of Man. On 4 April 2006: in respect of the Bailiwick of Guernsey. On 2 January 2007: in respect of Gibraltar. On 7 March 2007: in respect of Bermuda, Cayman Islands, Falkland Islands (Malvinas).

[8] By a communication received on 27 March 2007, the Government of Argentina notified the Secretary-General of the following:

The Argentine Republic objects to the extension of the territorial application to the United Nations Framework Convention on Climate Change of 9 May 1992 with respect to the Malvinas Islands, which was notified by the United Kingdom of Great Britain and Northern Ireland to the Depositary of the Convention on 7 March 2007.

The Argentine Republic reaffirms its sovereignty over the Malvinas Islands, the South Georgia and South Sandwich Islands and the surrounding maritime spaces, which are an integral part of its national territory, and recalls that the General Assembly of the United Nations adopted resolutions 2065 (XX), 3160 (XXVIII), 31/49, 37/9, 38/12, 39/6, 40/21, 41/40, 42/19 and 43/25, which recognize the existence of a dispute over sovereignty and request the Governments of the Argentine Republic and the United Kingdom of Great Britain and Northern Ireland to initiate negotiations with a view to finding the means to resolve peacefully and definitively the pending problems between both countries, including all aspects on the future of the Malvinas Islands, in accordance with the Charter of the United Nations.

[9] States having, in accordance with article 4 (2)(g), notified the Secretary-General of their intention to be bound by article 4 (2)(a) and (b) of the Convention.

# Annex 32

## 7. a) Kyoto Protocol to the United Nations Framework Convention on Climate Change

*Kyoto, 11 December 1997*

**ENTRY INTO FORCE:** 16 February 2005, in accordance with article 25(1) and article 25 (3) which read as follows: "1. This Protocol shall enter into force on the ninetieth day after the date on which not less than 55 Parties to the Convention, incorporating Parties included in Annex I which accounted in total for at least 55 per cent of the total carbon dioxide emissions for 1990 of the Parties included in Annex I, have deposited their instruments of ratification, acceptance, approval or accession." "3. For each State or regional economic integration organization that ratifies, accepts or approves this Protocol or accedes thereto after the conditions set out in paragraph 1 above for entry into force have been fulfilled, this Protocol shall enter into force on the ninetieth day following the date of deposit of its instrument of ratification acceptance, approval or accession".

**REGISTRATION:** 16 February 2005, No. 30822.

**STATUS:** Signatories: 83. Parties: 192.[1]

**TEXT:** United Nations, *Treaty Series* , vol. 2303, p. 162; depositary notifications C.N.101.2004.TREATIES-1 of 11 February 2004 [Proposed corrections to the original texts of the Protocol (Arabic and French versions)] and C.N.439.2004.TREATIES-4 of 12 May 2004 [Corrections to the original texts of the Protocol (Arabic and French versions)]; C.N.380.2007.TREATIES-5 of 17 April 2007 (Adoption of an amendment to Annex B of the Protocol).

***Note:*** The Protocol was adopted at the third session of the Conference of the Parties to the 1992 United Nations Framework Convention on Climate Change ("the Convention"), held at Kyoto (Japan) from 1 to 11 December 1997. The Protocol shall be open for signature by States and regional economic integration organizations which are Parties to the Convention at United Nations Headquarters in New York from 16 March 1998 to 15 March 1999 in accordance with its article 24 (1).

| *Participant* | *Signature* | *Ratification, Acceptance(A), Accession(a), Approval(AA)* |
|---|---|---|
| Afghanistan | | 25 Mar 2013 a |
| Albania | | 1 Apr 2005 a |
| Algeria | | 16 Feb 2005 a |
| Angola | | 8 May 2007 a |
| Antigua and Barbuda | 16 Mar 1998 | 3 Nov 1998 |
| Argentina | 16 Mar 1998 | 28 Sep 2001 |
| Armenia | | 25 Apr 2003 a |
| Australia | 29 Apr 1998 | 12 Dec 2007 |
| Austria | 29 Apr 1998 | 31 May 2002 |
| Azerbaijan | | 28 Sep 2000 a |
| Bahamas | | 9 Apr 1999 a |
| Bahrain | | 31 Jan 2006 a |
| Bangladesh | | 22 Oct 2001 a |
| Barbados | | 7 Aug 2000 a |
| Belarus | | 26 Aug 2005 a |
| Belgium | 29 Apr 1998 | 31 May 2002 |
| Belize | | 26 Sep 2003 a |
| Benin | | 25 Feb 2002 a |
| Bhutan | | 26 Aug 2002 a |
| Bolivia (Plurinational State of) | 9 Jul 1998 | 30 Nov 1999 |
| Bosnia and Herzegovina | | 16 Apr 2007 a |
| Botswana | | 8 Aug 2003 a |
| Brazil | 29 Apr 1998 | 23 Aug 2002 |
| Brunei Darussalam | | 20 Aug 2009 a |
| Bulgaria | 18 Sep 1998 | 15 Aug 2002 |
| Burkina Faso | | 31 Mar 2005 a |
| Burundi | | 18 Oct 2001 a |
| Cabo Verde | | 10 Feb 2006 a |
| Cambodia | | 22 Aug 2002 a |
| Cameroon | | 28 Aug 2002 a |
| Canada[2] | [29 Apr 1998 ] | [17 Dec 2002 ] |
| Central African Republic | | 18 Mar 2008 a |
| Chad | | 18 Aug 2009 a |
| Chile | 17 Jun 1998 | 26 Aug 2002 |
| China[3] | 29 May 1998 | 30 Aug 2002 AA |

| *Participant* | *Signature* | *Ratification, Acceptance(A), Accession(a), Approval(AA)* |
|---|---|---|
| Colombia | | 30 Nov 2001 a |
| Comoros | | 10 Apr 2008 a |
| Congo | | 12 Feb 2007 a |
| Cook Islands | 16 Sep 1998 | 27 Aug 2001 |
| Costa Rica | 27 Apr 1998 | 9 Aug 2002 |
| Côte d'Ivoire | | 23 Apr 2007 a |
| Croatia | 11 Mar 1999 | 30 May 2007 |
| Cuba | 15 Mar 1999 | 30 Apr 2002 |
| Cyprus | | 16 Jul 1999 a |
| Czech Republic | 23 Nov 1998 | 15 Nov 2001 AA |
| Democratic People's Republic of Korea | | 27 Apr 2005 a |
| Democratic Republic of the Congo | | 23 Mar 2005 a |
| Denmark[4] | 29 Apr 1998 | 31 May 2002 |
| Djibouti | | 12 Mar 2002 a |
| Dominica | | 25 Jan 2005 a |
| Dominican Republic | | 12 Feb 2002 a |
| Ecuador | 15 Jan 1999 | 13 Jan 2000 |
| Egypt | 15 Mar 1999 | 12 Jan 2005 |
| El Salvador | 8 Jun 1998 | 30 Nov 1998 |
| Equatorial Guinea | | 16 Aug 2000 a |
| Eritrea | | 28 Jul 2005 a |
| Estonia | 3 Dec 1998 | 14 Oct 2002 |
| Eswatini | | 13 Jan 2006 a |
| Ethiopia | | 14 Apr 2005 a |
| European Union | 29 Apr 1998 | 31 May 2002 AA |
| Fiji | 17 Sep 1998 | 17 Sep 1998 |
| Finland | 29 Apr 1998 | 31 May 2002 |
| France | 29 Apr 1998 | 31 May 2002 AA |
| Gabon | | 12 Dec 2006 a |
| Gambia | | 1 Jun 2001 a |
| Georgia | | 16 Jun 1999 a |
| Germany | 29 Apr 1998 | 31 May 2002 |
| Ghana | | 30 May 2003 a |
| Greece | 29 Apr 1998 | 31 May 2002 |
| Grenada | | 6 Aug 2002 a |
| Guatemala | 10 Jul 1998 | 5 Oct 1999 |
| Guinea | | 7 Sep 2000 a |
| Guinea-Bissau | | 18 Nov 2005 a |
| Guyana | | 5 Aug 2003 a |
| Haiti | | 6 Jul 2005 a |
| Honduras | 25 Feb 1999 | 19 Jul 2000 |
| Hungary | | 21 Aug 2002 a |
| Iceland | | 23 May 2002 a |
| India | | 26 Aug 2002 a |
| Indonesia | 13 Jul 1998 | 3 Dec 2004 |
| Iran (Islamic Republic of) | | 22 Aug 2005 a |
| Iraq | | 28 Jul 2009 a |
| Ireland | 29 Apr 1998 | 31 May 2002 |
| Israel | 16 Dec 1998 | 15 Mar 2004 |
| Italy | 29 Apr 1998 | 31 May 2002 |
| Jamaica | | 28 Jun 1999 a |
| Japan | 28 Apr 1998 | 4 Jun 2002 A |
| Jordan | | 17 Jan 2003 a |
| Kazakhstan | 12 Mar 1999 | 19 Jun 2009 |
| Kenya | | 25 Feb 2005 a |
| Kiribati | | 7 Sep 2000 a |
| Kuwait | | 11 Mar 2005 a |
| Kyrgyzstan | | 13 May 2003 a |
| Lao People's Democratic Republic | | 6 Feb 2003 a |
| Latvia | 14 Dec 1998 | 5 Jul 2002 |
| Lebanon | | 13 Nov 2006 a |
| Lesotho | | 6 Sep 2000 a |
| Liberia | | 5 Nov 2002 a |
| Libya | | 24 Aug 2006 a |
| Liechtenstein | 29 Jun 1998 | 3 Dec 2004 |
| Lithuania | 21 Sep 1998 | 3 Jan 2003 |
| Luxembourg | 29 Apr 1998 | 31 May 2002 |
| Madagascar | | 24 Sep 2003 a |
| Malawi | | 26 Oct 2001 a |
| Malaysia | 12 Mar 1999 | 4 Sep 2002 |
| Maldives | 16 Mar 1998 | 30 Dec 1998 |
| Mali | 27 Jan 1999 | 28 Mar 2002 |
| Malta | 17 Apr 1998 | 11 Nov 2001 |
| Marshall Islands | 17 Mar 1998 | 11 Aug 2003 |
| Mauritania | | 22 Jul 2005 a |
| Mauritius | | 9 May 2001 a |
| Mexico | 9 Jun 1998 | 7 Sep 2000 |
| Micronesia (Federated States of) | 17 Mar 1998 | 21 Jun 1999 |
| Monaco | 29 Apr 1998 | 27 Feb 2006 |
| Mongolia | | 15 Dec 1999 a |
| Montenegro | | 4 Jun 2007 a |
| Morocco | | 25 Jan 2002 a |

| *Participant* | *Signature* | *Ratification, Acceptance(A), Accession(a), Approval(AA)* |
|---|---|---|
| Mozambique | | 18 Jan 2005 a |
| Myanmar | | 13 Aug 2003 a |
| Namibia | | 4 Sep 2003 a |
| Nauru | | 16 Aug 2001 a |
| Nepal | | 16 Sep 2005 a |
| Netherlands (Kingdom of the)[5] | 29 Apr 1998 | 31 May 2002 A |
| New Zealand[6] | 22 May 1998 | 19 Dec 2002 |
| Nicaragua | 7 Jul 1998 | 18 Nov 1999 |
| Niger | 23 Oct 1998 | 30 Sep 2004 |
| Nigeria | | 10 Dec 2004 a |
| Niue | 8 Dec 1998 | 6 May 1999 |
| North Macedonia | | 18 Nov 2004 a |
| Norway | 29 Apr 1998 | 30 May 2002 |
| Oman | | 19 Jan 2005 a |
| Pakistan | | 11 Jan 2005 a |
| Palau | | 10 Dec 1999 a |
| Panama | 8 Jun 1998 | 5 Mar 1999 |
| Papua New Guinea | 2 Mar 1999 | 28 Mar 2002 |
| Paraguay | 25 Aug 1998 | 27 Aug 1999 |
| Peru | 13 Nov 1998 | 12 Sep 2002 |
| Philippines | 15 Apr 1998 | 20 Nov 2003 |
| Poland | 15 Jul 1998 | 13 Dec 2002 |
| Portugal | 29 Apr 1998 | 31 May 2002 AA |
| Qatar | | 11 Jan 2005 a |
| Republic of Korea | 25 Sep 1998 | 8 Nov 2002 |
| Republic of Moldova | | 22 Apr 2003 a |
| Romania | 5 Jan 1999 | 19 Mar 2001 |
| Russian Federation | 11 Mar 1999 | 18 Nov 2004 |
| Rwanda | | 22 Jul 2004 a |
| Samoa | 16 Mar 1998 | 27 Nov 2000 |
| San Marino | | 28 Apr 2010 a |
| Sao Tome and Principe | | 25 Apr 2008 a |
| Saudi Arabia | | 31 Jan 2005 a |
| Senegal | | 20 Jul 2001 a |
| Serbia | | 19 Oct 2007 a |
| Seychelles | 20 Mar 1998 | 22 Jul 2002 |
| Sierra Leone | | 10 Nov 2006 a |
| Singapore | | 12 Apr 2006 a |
| Slovakia | 26 Feb 1999 | 31 May 2002 |
| Slovenia | 21 Oct 1998 | 2 Aug 2002 |
| Solomon Islands | 29 Sep 1998 | 13 Mar 2003 |
| Somalia | | 26 Jul 2010 a |
| South Africa | | 31 Jul 2002 a |
| Spain | 29 Apr 1998 | 31 May 2002 |
| Sri Lanka | | 3 Sep 2002 a |
| St. Kitts and Nevis | | 8 Apr 2008 a |
| St. Lucia | 16 Mar 1998 | 20 Aug 2003 |
| St. Vincent and the Grenadines | 19 Mar 1998 | 31 Dec 2004 |
| Sudan | | 2 Nov 2004 a |
| Suriname | | 25 Sep 2006 a |
| Sweden | 29 Apr 1998 | 31 May 2002 |
| Switzerland | 16 Mar 1998 | 9 Jul 2003 |
| Syrian Arab Republic | | 27 Jan 2006 a |
| Tajikistan | | 29 Dec 2008 a |
| Thailand | 2 Feb 1999 | 28 Aug 2002 |
| Timor-Leste | | 14 Oct 2008 a |
| Togo | | 2 Jul 2004 a |
| Tonga | | 14 Jan 2008 a |
| Trinidad and Tobago | 7 Jan 1999 | 28 Jan 1999 |
| Tunisia | | 22 Jan 2003 a |
| Türkiye | | 28 May 2009 a |
| Turkmenistan | 28 Sep 1998 | 11 Jan 1999 |
| Tuvalu | 16 Nov 1998 | 16 Nov 1998 |
| Uganda | | 25 Mar 2002 a |
| Ukraine | 15 Mar 1999 | 12 Apr 2004 |
| United Arab Emirates | | 26 Jan 2005 a |
| United Kingdom of Great Britain and Northern Ireland[7,8] | 29 Apr 1998 | 31 May 2002 |
| United Republic of Tanzania | | 26 Aug 2002 a |
| United States of America | 12 Nov 1998 | |
| Uruguay | 29 Jul 1998 | 5 Feb 2001 |
| Uzbekistan | 20 Nov 1998 | 12 Oct 1999 |
| Vanuatu | | 17 Jul 2001 a |
| Venezuela (Bolivarian Republic of) | | 18 Feb 2005 a |
| Viet Nam | 3 Dec 1998 | 25 Sep 2002 |
| Yemen | | 15 Sep 2004 a |
| Zambia | 5 Aug 1998 | 7 Jul 2006 |
| Zimbabwe | | 30 Jun 2009 a |

## *Declarations and Reservations*
## *(Unless otherwise indicated, the declarations and reservations were made upon ratification, accession, acceptance or approval.)*

### AUSTRALIA

"The Government of Australia declares that it is eligible to apply the second sentence of Article 3.7 of the Protocol, using the Revised 1996 IPCC methodologies, as stipulated in Article 5.2 of the Protocol and paragraph 5 (b) of the Annex to Decision 13/CMP.1."

### COOK ISLANDS

The Government of the Cook Islands declares its understanding that signature and subsequent ratification of the Kyoto Protocol shall in no way constitute a renunciation of any rights under international law concerning State responsibility for the adverse effects of climate change and that no provision in the Protocol can be interpreted as derogating from principles of general international law.

In this regard, the Government of the Cook Islands further declares that, in light of the best available scientific information and assessment on climate change and its impacts, it considers the emissions reduction obligation in article 3 of the Kyoto Protocol to be inadequate to prevent dangerous anthropogenic interference with the climate system."

### EUROPEAN UNION

"The European Community and its Member States will fulfil their respective commitments under article 3, paragraph 1, of the Protocol jointly in accordance with the provisions of article 4."

Declaration by the European Community made in accordance with article 24 (3) of the Kyoto Protocol

"The following States are at present members of the European Community: the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the French Republic, Ireland, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Finland, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland.

The European Community declares that, in accordance with the Treaty establishing the European Community, and in particular article 175 (1) thereof, it is competent to enter into international agreements, and to implement the obligations resulting therefrom, which contribute to the pursuit of the following objectives:

- preserving, protecting and improving the quality of the environment;
- protecting human health;
- prudent and rational utilisation of natural resources;
- promoting measures at international level to deal with regional or world wide environmental problems.

The European Community declares that its quantified emission reduction commitment under the Protocol will be fulfilled through action by the Community and its Member States within the respective competence of each and that it has already adopted legal instruments, binding on its Member States, covering matters governed by the Protocol.

The European Community will on a regular basis provide information on relevant Community legal instruments within the framework of the supplementary information incorporated in its national communication submitted under art12 of the Convention for the purpose of demonstrating compliance with its commitments under the Protocol in accordance with article 7 (2) thereof and the guidelines thereunder."

### IRELAND

"The European Community and the Member States, including Ireland, will fulfil their respective commitments under article 3, paragraph 1, of the Protocol in accordance with the provisions of article 4."

### KIRIBATI

"The Government of the Republic of Kiribati declares its understanding that accession to the Kyoto Protocol shall in no way constitute a renunciation of any rights under international law concerning State responsibility for the adverse effects of the climate change and that no provision in the Protocol can be interpreted as derogating from principles of general international law."

### NAURU

"... The Government of the Republic of Nauru declares its understanding that the ratification of the Kyoto Protocol shall in no way constitute a renunciation of any rights under international law concerning State responsibility for the adverse effects of climate change; ...

... The Government of the Republic of Nauru further declares that, in the light of the best available scientific information and assessment of climate change and impacts, it considers the emissions of reduction obligations in Article 3 of the Kyoto Protocol to be inadequate to prevent the dangerous anthropogenic interference with the climate system;

... [The Government of the Republic of Nauru declares] that no provisions in the Protocol can be interpreted as derogating from the principles of general international law[.]

### NIUE

"The Government of Niue declares its understanding that ratification of the Kyoto Protocol shall in no way constitute a renunciation of any rights under international law concerning state responsibility for the adverse effects of climate change and that no provisions in the Protocol can be interpreted as derogating from the principles of general international law.

In this regard, the Government of Niue further declares that, in light of the best available scientific information and assessment of climate change and impacts, it considers the emissions reduction obligations in article 3 of the Kyoto Protocol to be inadequate to prevent dangerous anthropogenic interference with the climate system."

### RUSSIAN FEDERATION

The Russian Federation proceeds from the assumption that the commitments of the Russian Federation under the Protocol will have serious consequences for its social and economic development. Therefore, the decision on ratification was taken following a thorough analysis of all factors, inter alia, the importance of the Protocol for the promotion of international cooperation, and taking into account that the Protocol can enter into force only if the Russian Federation ratifies it.

The Protocol establishes for each of the Parties that have signed it quantified reductions of greenhouse gas emissions to atmosphere for the first commitment period from 2008 to 2012.

The commitments of the Parties to the Protocol on quantified reductions of greenhouse gas emissions to atmosphere for the second and subsequent commitment periods of the Protocol, that is after 2012, will be established through negotiations of the Parties to the Protocol scheduled to start in 2005. On the outcome of these negotiations the Russian Federation will take a decision on its participation in the Protocol in the second and subsequent commitment periods.

**SYRIAN ARAB REPUBLIC**

The accession of the Syrian Arab Republic to this Protocol shall in no way imply its recognition of Israel or entail its entry into any dealings with Israel in the matters governed by the provisions thereof.

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***Notes:***

[1] For the purpose of entry into force of the [Convention/Protocol] , any instrument of ratification, acceptance, approval or accession deposited by a regional economic integration organization shall not be counted as additional to those deposited by member States of that Organization.

[2] In accordance with article 27 (2) of the Kyoto Protocol to the United Nations Framework Convention on Climate Change, the Government of Canada notified the Secretary-General that it had decided to withdraw from the Kyoto Protocol as from the date indicated hereinafter:

| *Participant:* | *Date of notification:* | *Date of effect:* |
|---|---|---|
| Canada | 15 Dec 2011 | 15 Dec 2012 |

[3] In a communication received on 30 August 2002, the Government of the People's Republic of China informed the Secretary-General of the following:

In accordance with article 153 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China of 1990 and article 138 of the Basic Law of the Macao Special Administrative Region of the People's Republic of China of 1993, the Government of the People's Republic of China decides that the Kyoto Protocol to the United Nations Framework Convention on Climate Change shall provisionally not apply to the Hong Kong Special Administrative Region and the Macao Special Administrative Region of the People's Republic of China.

Further, in a communication received on 8 April 2003, the Government of the Government of the People's Republic of China notified the Secretary-General of the following:

"In accordance with the provisions of Article 153 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China of 1990, the Government of the People's Republic of China decides that the United Nations Framework Convention on Climate Change and the Kyoto Protocol to the United Nations Framework Convention on Climate Change shall apply to the Hong Kong Special Administrative Region of the People's Republic of China.

The United Nations Framework Convention on Climate Change continues to be implemented in the Macao Special Administrative Region of the People's Republic of China. The Kyoto Protocol to the United Nations Framework Convention on Climate Change shall not apply to the Macao Special Administrative Region of the People's Republic of China until the Government of China notifies otherwise."

In a communication received on 14 January 2008, the Government of the Government of the People's Republic of China notified the Secretary-General of the following:

In accordance with Article 138 of the Basic Law of the Macao Special Administrative Region of the People's Republic of China, the Government of the People's Republic of China decides that the Kyoto Protocol to the United Nations Framework Convention on Climate Change shall apply to the Macao Special Administrative Region of the People's Republic of China.

[4] With a territorial exclusion to the Faroe Islands.

[5] For the Kingdom in Europe.

[6] With the following declaration:

".....consistent with the constitutional status of Tokelau and taking into account the commitment of the Government of New Zealand to the development of self-government for Tokelau through an act of self-determination under the Charter of the United Nations, this ratification shall not extend to Tokelau unless and until a Declaration to this effect is lodged by the Government of New Zealand with the Depositary on the basis of appropriate consultation with that territory."

[7] By a communication received on 27 March 2007, the Government of Argentina notified the Secretary-General of the following:

The Argentine Republic objects to the extension of the territorial application to the Kyoto Protocol to the United Nations Framework Convention on Climate Change of 11 December 1997 with respect to the Malvinas Islands, which was notified by the United Kingdom of Great Britain and Northern Ireland to the Depositary of the Convention on 7 March 2007.

The Argentine Republic reaffirms its sovereignty over the Malvinas Islands, the South Georgia and South Sandwich Islands and the surrounding maritime spaces, which are an integral part of its national territory, and recalls that the General Assembly of the United Nations adopted resolutions 2065 (XX), 3160 (XXVIII), 31/49, 37/9, 38/12, 39/6, 40/21, 41/40, 42/19 and 43/25, which recognize the existence of a dispute over sovereignty and request the Governments of the Argentine Republic and the United Kingdom of Great Britain and Northern Ireland to initiate negotiations with a view to finding the means

to resolve peacefully and definitively the pending problems between both countries, including all aspects on the future of the Malvinas Islands, in accordance with the Charter of the United Nations.

[8] On 4 April 2006, the Government of the United Kingdom informed the Secretary-General that the Protocol shall apply to the Bailiwick of Guernsey and the Isle of Man. On 2 January 2007: in respect of Gibraltar. On 7 March 2007: in respect of Bermuda, Cayman Islands, Falkland Islands (Malvinas) and the Bailiwick of Jersey.

# Annex 33

Today is Tuesday, 19 March 2024 18:30:50

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| **Registration Number** | 54113 |
| **Title** | Paris Agreement |
| **Participant(s)** | |
| **Submitter** | ex officio |
| **Places/dates of conclusion** | **Place** Paris **Date** 12/12/2015 |
| **EIF information** | 4 November 2016 , in accordance with article 21(1) . The Agreement enters into force on the thirtieth day after the date on which at least 55 Parties to the Convention accounting in total for at least an estimated 55 per cent of the total global greenhouse gas emissions have deposited their instruments of ratification, acceptance, approval or accession |
| **Authentic texts** | Spanish<br>Russian<br>French<br>English<br>Chinese<br>Arabic |
| **Attachments** | |
| **ICJ information** | |
| **Depositary** | Secretary-General of the United Nations |
| **Registration Date** | ex officio 4 November 2016 |
| **Subject terms** | Environment |
| **Agreement type** | Multilateral |
| **UNTS Volume Number** | 3156 (p.79) |
| **Publication format** | Full |
| **Certificate Of Registration** | |
| **Text document(s)** | volume-3156-I-54113.pdf |
| **Volume In PDF** | v3156.pdf |
| **Map(s)** | |
| **Corrigendum/Addendum/Note** | |

| Participant | Action | Date of Notification/Deposit | Date of Effect |
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| United Kingdom of Great Britain and Northern Ireland | Territorial application | 23/03/2023 | |
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| Uruguay | Ratification | 19/10/2016 | 18/11/2016 |
| Uzbekistan | Signature | 19/04/2017 | |
| Uzbekistan | Ratification | 09/11/2018 | 09/12/2018 |
| Vanuatu | Signature | 22/04/2016 | |
| Vanuatu | Ratification | 21/09/2016 | 04/11/2016 |
| Venezuela (Bolivarian Republic of) | Signature | 22/04/2016 | |
| Venezuela (Bolivarian Republic of) | Ratification | 21/07/2017 | 20/08/2017 |
| Viet Nam | Signature | 22/04/2016 | |
| Viet Nam | Approval | 03/11/2016 | 03/12/2016 |
| Yemen | Signature | 23/09/2016 | |
| Zambia | Signature | 20/09/2016 | |

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| Zambia | Ratification | 09/12/2016 | 08/01/2017 |
| Zimbabwe | Signature | 22/04/2016 | |
| Zimbabwe | Ratification | 07/08/2017 | 06/09/2017 |

# Annex 34

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

# CASE CONCERNING EAST TIMOR

(PORTUGAL *v.* AUSTRALIA)

**JUDGMENT OF 30 JUNE 1995**

# 1995

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

# AFFAIRE RELATIVE AU TIMOR ORIENTAL

(PORTUGAL c. AUSTRALIE)

**ARRÊT DU 30 JUIN 1995**

Official citation:
*East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 90

Mode officiel de citation:
*Timor oriental (Portugal c. Australie), arrêt, C.I.J. Recueil 1995*, p. 90

ISSN 0074-4441
ISBN 92-1-070724-9

**Sales number**
**N° de vente: 661**

INTERNATIONAL COURT OF JUSTICE

1995
30 June
General List
No. 84

YEAR 1995

**30 June 1995**

# CASE CONCERNING EAST TIMOR

(PORTUGAL *v.* AUSTRALIA)

*Treaty of 1989 between Australia and Indonesia concerning the "Timor Gap".*

*Objection that there exists in reality no dispute between the Parties — Disagreement between the Parties on the law and on the facts — Existence of a legal dispute.*

*Objection that the Application would require the Court to determine the rights and obligations of a third State in the absence of the consent of that State — Case concerning* Monetary Gold Removed from Rome in 1943 *— Question whether the Respondent's objective conduct is separable from the conduct of a third State.*

*Right of peoples to self-determination as right* erga omnes *and essential principle of contemporary international law — Difference between* erga omnes *character of a norm and rule of consent to jurisdiction.*

*Question whether resolutions of the General Assembly and of the Security Council constitute "givens" on the content of which the Court would not have to decide* de novo.

*For the two Parties, the Territory of East Timor remains a non-self-governing territory and its people has the right to self-determination.*

*Rights and obligations of a third State constituting the very subject-matter of the decision requested — The Court cannot exercise the jurisdiction conferred upon it by the declarations made by the Parties under Article 36, paragraph 2, of its Statute to adjudicate on the dispute referred to it by the Application.*

## JUDGMENT

*Present:* *President* BEDJAOUI; *Vice-President* SCHWEBEL; *Judges* ODA, Sir Robert JENNINGS, GUILLAUME, SHAHABUDDEEN, AGUILAR-MAWDSLEY, WEERAMANTRY, RANJEVA, HERCZEGH, SHI, FLEISCHHAUER, KOROMA, VERESHCHETIN; *Judges* ad hoc Sir Ninian STEPHEN, SKUBISZEWSKI; *Registrar* VALENCIA-OSPINA.

In the case concerning East Timor,

*between*

the Portuguese Republic,

represented by

H.E. Mr. António Cascais, Ambassador of the Portuguese Republic to the Netherlands,

as Agent;

Mr. José Manuel Servulo Correia, Professor in the Faculty of Law of the University of Lisbon and Member of the Portuguese Bar,
Mr. Miguel Galvão Teles, Member of the Portuguese Bar,

as Co-Agents, Counsel and Advocates;

Mr. Pierre-Marie Dupuy, Professor at the University Panthéon-Assas (Paris II) and Director of the Institut des hautes études internationales of Paris,
Mrs. Rosalyn Higgins, Q.C., Professor of International Law in the University of London,

as Counsel and Advocates;

Mr. Rui Quartin Santos, Minister Plenipotentiary, Ministry of Foreign Affairs, Lisbon,
Mr. Francisco Ribeiro Telles, First Embassy Secretary, Ministry of Foreign Affairs, Lisbon,

as Advisers;

Mr. Richard Meese, Advocate, Partner in Frere Cholmeley, Paris,
Mr. Paulo Canelas de Castro, Assistant in the Faculty of Law of the University of Coïmbra,
Mrs. Luisa Duarte, Assistant in the Faculty of Law of the University of Lisbon,
Mr. Paulo Otero, Assistant in the Faculty of Law of the University of Lisbon,
Mr. Iain Scobbie, Lecturer in Law in the Faculty of Law of the University of Dundee, Scotland,
Miss Sasha Stepan, Squire, Sanders & Dempsey, Counsellors at Law, Prague,

as Counsel;

Mr. Fernando Figueirinhas, First Secretary, Portuguese Embassy in the Netherlands,

as Secretary,

*and*

the Commonwealth of Australia,

represented by

Mr. Gavan Griffith, Q.C., Solicitor-General of Australia,

as Agent and Counsel;

H.E. Mr. Michael Tate, Ambassador of Australia to the Netherlands, former Minister of Justice,
Mr. Henry Burmester, Principal International Law Counsel, Office of International Law, Attorney-General's Department,

as Co-Agents and Counsel;

Mr. Derek W. Bowett, Q.C., Whewell Professor emeritus, University of Cambridge,
Mr. James Crawford, Whewell Professor of International Law, University of Cambridge,
Mr. Alain Pellet, Professor of International Law, University of Paris X-Nanterre and Institute of Political Studies, Paris,
Mr. Christopher Staker, Counsel assisting the Solicitor-General of Australia,

as Counsel;

Mr. Christopher Lamb, Legal Adviser, Australian Department of Foreign Affairs and Trade,
Ms Cate Steains, Second Secretary, Australian Embassy in the Netherlands,
Mr. Jean-Marc Thouvenin, Head Lecturer, University of Maine and Institute of Political Studies, Paris,

as Advisers,

THE COURT,

composed as above,

after deliberation,

*delivers the following Judgment:*

1. On 22 February 1991, the Ambassador to the Netherlands of the Portuguese Republic (hereinafter referred to as "Portugal") filed in the Registry of the Court an Application instituting proceedings against the Commonwealth of Australia (hereinafter referred to as "Australia") concerning "certain activities of Australia with respect to East Timor". According to the Application Australia had, by its conduct, "failed to observe . . . the obligation to respect the duties and powers of [Portugal as] the administering Power [of East Timor] . . . and . . . the right of the people of East Timor to self-determination and the related rights". In consequence, according to the Application, Australia had "incurred international responsibility vis-à-vis both the people of East Timor and Portugal". As the basis for the jurisdiction of the Court, the Application refers to the declarations by which the two States have accepted the compulsory jurisdiction of the Court under Article 36, paragraph 2, of its Statute.

2. In accordance with Article 40, paragraph 2, of the Statute, the Application was communicated forthwith to the Australian Government by the Registrar; and, in accordance with paragraph 3 of the same Article, all the other States entitled to appear before the Court were notified by the Registrar of the Application.

3. By an Order dated 3 May 1991, the President of the Court fixed 18 November 1991 as the time-limit for filing the Memorial of Portugal and 1 June 1992 as the time-limit for filing the Counter-Memorial of Australia, and those pleadings were duly filed within the time-limits so fixed.

4. In its Counter-Memorial, Australia raised questions concerning the jurisdiction of the Court and the admissibility of the Application. In the course of a meeting held by the President of the Court on 1 June 1992 with the Agents of the Parties, pursuant to Article 31 of the Rules of Court, the Agents agreed that these questions were inextricably linked to the merits and that they should therefore be heard and determined within the framework of the merits.

5. By an Order dated 19 June 1992, the Court, taking into account the agreement of the Parties in this respect, authorized the filing of a Reply by Portugal and of a Rejoinder by Australia, and fixed 1 December 1992 and 1 June 1993 respectively as the time-limits for the filing of those pleadings. The Reply was duly filed within the time-limit so fixed. By an Order of 19 May 1993, the President of the Court, at the request of Australia, extended to 1 July 1993 the time-limit for the filing of the Rejoinder. This pleading was filed on 5 July 1993. Pursuant to Article 44, paragraph 3, of its Rules, having given the other Party an opportunity to state its views, the Court considered this filing as valid.

6. Since the Court included upon the Bench no judge of the nationality of either of the Parties, each Party proceeded to exercise the right conferred by Article 31, paragraph 3, of the Statute to choose a judge *ad hoc* to sit in the case; Portugal chose Mr. António de Arruda Ferrer-Correia and Australia Sir Ninian Martin Stephen. By a letter dated 30 June 1994, Mr. Ferrer-Correia informed the President of the Court that he was no longer able to sit, and, by a letter of 14 July 1994, the Agent of Portugal informed the Court that its Government had chosen Mr. Krzysztof Jan Skubiszewski to replace him.

7. In accordance with Article 53, paragraph 2, of its Rules, the Court, after ascertaining the views of the Parties, decided that the pleadings and annexed documents should be made accessible to the public from the date of the opening of the oral proceedings.

8. Between 30 January and 16 February 1995, public hearings were held in the course of which the Court heard oral arguments and replies by the following:

*For Portugal:* H.E. Mr. António Cascais,
Mr. José Manuel Servulo Correia,
Mr. Miguel Galvão Teles,
Mr. Pierre-Marie Dupuy,
Mrs. Rosalyn Higgins, Q.C.

*For Australia:* Mr. Gavan Griffith, Q.C.,
H.E. Mr. Michael Tate,
Mr. James Crawford,
Mr. Alain Pellet,
Mr. Henry Burmester,
Mr. Derek W. Bowett, Q.C.,
Mr. Christopher Staker.

9. During the oral proceedings, each of the Parties, referring to Article 56, paragraph 4, of the Rules of Court, presented documents not previously produced. Portugal objected to the presentation of one of these by Australia, on the ground that the document concerned was not "part of a publication readily available" within the meaning of that provision. Having ascertained Australia's views, the Court examined the question and informed the Parties that it had decided not to admit the document to the record in the case.

*

10. The Parties presented submissions in each of their written pleadings; in the course of the oral proceedings, the following final submissions were presented:

*On behalf of Portugal,*

at the hearing on 13 February 1995 (afternoon):

"Having regard to the facts and points of law set forth,

Portugal has the honour to

— Ask the Court to dismiss the objections raised by Australia and to adjudge and declare that it has jurisdiction to deal with the Application of Portugal and that that Application is admissible, and
— Request that it *may please the Court:*

(1) To adjudge and declare that, first, the rights of the people of East Timor to self-determination, to territorial integrity and unity and to permanent sovereignty over its wealth and natural resources and, secondly, the duties, powers and rights of Portugal as the administering Power of the Territory of East Timor are opposable to Australia, which is under an obligation not to disregard them, but to respect them.

(2) To adjudge and declare that Australia, inasmuch as in the first place it has negotiated, concluded and initiated performance of the Agreement of 11 December 1989, has taken internal legislative measures for the application thereof, and is continuing to negotiate, with the State party to that Agreement, the delimitation of the continental shelf in the area of the Timor Gap; and inasmuch as it has furthermore excluded any negotiation with the administering Power with respect to the exploration and exploitation of the continental shelf in that same area; and, finally, inasmuch as it contemplates exploring and exploiting the subsoil of the sea in the Timor Gap on the basis of a plurilateral title to which Portugal is not a party (each of these facts sufficing on its own):

*(a)* has infringed and is infringing the right of the people of East Timor to self-determination, to territorial integrity and unity and its permanent sovereignty over its natural wealth and resources, and is in breach of the obligation not to disregard but to respect that right, that integrity and that sovereignty;

*(b)* has infringed and is infringing the powers of Portugal as the administering Power of the Territory of East Timor, is impeding the fulfilment of its duties to the people of East Timor and to the international community, is infringing the right of Portugal to fulfil its responsibilities and is in breach of the obligation not to disregard but to respect those powers and duties and that right;

*(c)* is contravening Security Council resolutions 384 and 389 and is in breach of the obligation to accept and carry out Security Council resolutions laid down by the Charter of the United Nations, is disregarding the binding character of the resolutions of United Nations organs that relate to East Timor and, more generally, is in breach of the obligation incumbent on Member States to co-operate in good faith with the United Nations;

(3) To adjudge and declare that, inasmuch as it has excluded and is excluding any negotiation with Portugal as the administering Power of the Territory of East Timor, with respect to the exploration and exploitation of the continental shelf in the area of the Timor Gap, Australia has failed and is failing in its duty to negotiate in order to harmonize the respective rights in the event of a conflict of rights or of claims over maritime areas.

(4) To adjudge and declare that, by the breaches indicated in paragraphs 2 and 3 of the present submissions, Australia has incurred international responsibility and has caused damage, for which it owes reparation to the people of East Timor and to Portugal, in such form and manner as may be indicated by the Court, given the nature of the obligations breached.

(5) To adjudge and declare that Australia is bound, in relation to the people of East Timor, to Portugal and to the international community, to cease from all breaches of the rights and international norms referred to in paragraphs 1, 2 and 3 of the present submissions and in particular, until such time as the people of East Timor shall have exercised its right to self-determination, under the conditions laid down by the United Nations:

*(a)* to refrain from any negotiation, signature or ratification of any agreement with a State other than the administering Power concerning the delimitation, and the exploration and exploitation, of the continental shelf, or the exercise of jurisdiction over that shelf, in the area of the Timor Gap;

*(b)* to refrain from any act relating to the exploration and exploitation of the continental shelf in the area of the Timor Gap or to the exercise of jurisdiction over that shelf, on the basis of any plurilateral title to which Portugal, as the administering Power of the Territory of East Timor, is not a party";

*On behalf of Australia,*

at the hearing on 16 February 1995 (afternoon):

"The Government of Australia submits that, for all the reasons given by it in the written and oral pleadings, the Court should:

*(a)* adjudge and declare that the Court lacks jurisdiction to decide the Portuguese claims or that the Portuguese claims are inadmissible; or

*(b)* alternatively, adjudge and declare that the actions of Australia invoked by Portugal do not give rise to any breach by Australia of rights under international law asserted by Portugal."

* * *

11. The Territory of East Timor corresponds to the eastern part of the island of Timor; it includes the island of Atauro, 25 kilometres to the north, the islet of Jaco to the east, and the enclave of Oé-Cusse in the western part of the island of Timor. Its capital is Dili, situated on its north coast. The south coast of East Timor lies opposite the north coast of Australia, the distance between them being approximately 430 kilometres.

In the sixteenth century, East Timor became a colony of Portugal; Portugal remained there until 1975. The western part of the island came under Dutch rule and later became part of independent Indonesia.

12. In resolution 1542 (XV) of 15 December 1960 the United Nations General Assembly recalled "differences of views . . . concerning the status of certain territories under the administrations of Portugal and Spain and described by these two States as 'overseas provinces' of the metropolitan

State concerned"; and it also stated that it considered that the territories under the administration of Portugal, which were listed therein (including "Timor and dependencies") were non-self-governing territories within the meaning of Chapter XI of the Charter. Portugal, in the wake of its "Carnation Revolution", accepted this position in 1974.

13. Following internal disturbances in East Timor, on 27 August 1975 the Portuguese civil and military authorities withdrew from the mainland of East Timor to the island of Atauro. On 7 December 1975 the armed forces of Indonesia intervened in East Timor. On 8 December 1975 the Portuguese authorities departed from the island of Atauro, and thus left East Timor altogether. Since their departure, Indonesia has occupied the Territory, and the Parties acknowledge that the Territory has remained under the effective control of that State. Asserting that on 31 May 1976 the people of East Timor had requested Indonesia "to accept East Timor as an integral part of the Republic of Indonesia", on 17 July 1976 Indonesia enacted a law incorporating the Territory as part of its national territory.

14. Following the intervention of the armed forces of Indonesia in the Territory and the withdrawal of the Portuguese authorities, the question of East Timor became the subject of two resolutions of the Security Council and of eight resolutions of the General Assembly, namely, Security Council resolutions 384 (1975) of 22 December 1975 and 389 (1976) of 22 April 1976, and General Assembly resolutions 3485 (XXX) of 12 December 1975, 31/53 of 1 December 1976, 32/34 of 28 November 1977, 33/39 of 13 December 1978, 34/40 of 21 November 1979, 35/27 of 11 November 1980, 36/50 of 24 November 1981 and 37/30 of 23 November 1982.

15. Security Council resolution 384 (1975) of 22 December 1975 called upon "all States to respect the territorial integrity of East Timor as well as the inalienable right of its people to self-determination"; called upon "the Government of Indonesia to withdraw without delay all its forces from the Territory"; and further called upon

> "the Government of Portugal as administering Power to co-operate fully with the United Nations so as to enable the people of East Timor to exercise freely their right to self-determination".

Security Council resolution 389 (1976) of 22 April 1976 adopted the same terms with regard to the right of the people of East Timor to self-determination; called upon "the Government of Indonesia to withdraw without further delay all its forces from the Territory"; and further called upon "all States and other parties concerned to co-operate fully with the United Nations to achieve a peaceful solution to the existing situation . . .".

General Assembly resolution 3485 (XXX) of 12 December 1975 referred to Portugal "as the administering Power"; called upon it "to continue to make every effort to find a solution by peaceful means"; and "strongly deplore[d] the military intervention of the armed forces of Indonesia in

Portuguese Timor". In resolution 31/53 of 1 December 1976, and again in resolution 32/34 of 28 November 1977, the General Assembly rejected

> "the claim that East Timor has been incorporated into Indonesia, inasmuch as the people of the Territory have not been able to exercise freely their right to self-determination and independence".

Security Council resolution 389 (1976) of 22 April 1976 and General Assembly resolutions 31/53 of 1 December 1976, 32/34 of 28 November 1977 and 33/39 of 13 December 1978 made no reference to Portugal as the administering Power. Portugal is so described, however, in Security Council resolution 384 (1975) of 22 December 1975 and in the other resolutions of the General Assembly. Also, those resolutions which did not specifically refer to Portugal as the administering Power recalled another resolution or other resolutions which so referred to it.

16. No further resolutions on the question of East Timor have been passed by the Security Council since 1976 or by the General Assembly since 1982. However, the Assembly has maintained the item on its agenda since 1982, while deciding at each session, on the recommendation of its General Committee, to defer consideration of it until the following session. East Timor also continues to be included in the list of non-self-governing territories within the meaning of Chapter XI of the Charter; and the Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples remains seised of the question of East Timor. The Secretary-General of the United Nations is also engaged in a continuing effort, in consultation with all parties directly concerned, to achieve a comprehensive settlement of the problem.

17. The incorporation of East Timor as part of Indonesia was recognized by Australia *de facto* on 20 January 1978. On that date the Australian Minister for Foreign Affairs stated: "The Government has made clear publicly its opposition to the Indonesian intervention and has made this known to the Indonesian Government." He added: "[Indonesia's] control is effective and covers all major administrative centres of the territory." And further:

> "This is a reality with which we must come to terms. Accordingly, the Government has decided that although it remains critical of the means by which integration was brought about it would be unrealistic to continue to refuse to recognize *de facto* that East Timor is part of Indonesia."

On 23 February 1978 the Minister said: "we recognize the fact that East Timor is part of Indonesia, but not the means by which this was brought about".

On 15 December 1978 the Australian Minister for Foreign Affairs declared that negotiations which were about to begin between Australia and Indonesia for the delimitation of the continental shelf between Australia and East Timor, "when they start, will signify *de jure* recognition by Australia of the Indonesian incorporation of East Timor"; he added: "The acceptance of this situation does not alter the opposition which the Government has consistently expressed regarding the manner of incorporation." The negotiations in question began in February 1979.

18. Prior to this, Australia and Indonesia had, in 1971-1972, established a delimitation of the continental shelf between their respective coasts; the delimitation so effected stopped short on either side of the continental shelf between the south coast of East Timor and the north coast of Australia. This undelimited part of the continental shelf was called the "Timor Gap".

The delimitation negotiations which began in February 1979 between Australia and Indonesia related to the Timor Gap; they did not come to fruition. Australia and Indonesia then turned to the possibility of establishing a provisional arrangement for the joint exploration and exploitation of the resources of an area of the continental shelf. A Treaty to this effect was eventually concluded between them on 11 December 1989, whereby a "Zone of Cooperation" was created "in an area between the Indonesian Province of East Timor and Northern Australia". Australia enacted legislation in 1990 with a view to implementing the Treaty; this law came into force in 1991.

* * *

19. In these proceedings Portugal maintains that Australia, in negotiating and concluding the 1989 Treaty, in initiating performance of the Treaty, in taking internal legislative measures for its application, and in continuing to negotiate with Indonesia, has acted unlawfully, in that it has infringed the rights of the people of East Timor to self-determination and to permanent sovereignty over its natural resources, infringed the rights of Portugal as the administering Power, and contravened Security Council resolutions 384 and 389. Australia raised objections to the jurisdiction of the Court and to the admissibility of the Application. It took the position, however, that these objections were inextricably linked to the merits and should therefore be determined within the framework of the merits. The Court heard the Parties both on the objections and on the merits. While Australia concentrated its main arguments and submissions on the objections, it also submitted that Portugal's case on the merits should be dismissed, maintaining, in particular, that its actions did not in any way disregard the rights of Portugal.

* * *

20. According to one of the objections put forward by Australia, there exists in reality no dispute between itself and Portugal. In another objection, it argued that Portugal's Application would require the Court to rule on the rights and obligations of a State which is not a party to the proceedings, namely Indonesia. According to further objections of Australia, Portugal lacks standing to bring the case, the argument being that it does not have a sufficient interest of its own to institute the proceedings, notwithstanding the references to it in some of the resolutions of the Security Council and the General Assembly as the administering Power of East Timor, and that it cannot, furthermore, claim any right to represent the people of East Timor; its claims are remote from reality, and the judgment the Court is asked to give would be without useful effect; and finally, its claims concern matters which are essentially not legal in nature which should be resolved by negotiation within the framework of ongoing procedures before the political organs of the United Nations. Portugal requested the Court to dismiss all these objections.

* *

21. The Court will now consider Australia's objection that there is in reality no dispute between itself and Portugal. Australia contends that the case as presented by Portugal is artificially limited to the question of the lawfulness of Australia's conduct, and that the true respondent is Indonesia, not Australia. Australia maintains that it is being sued in place of Indonesia. In this connection, it points out that Portugal and Australia have accepted the compulsory jurisdiction of the Court under Article 36, paragraph 2, of its Statute, but that Indonesia has not.

In support of the objection, Australia contends that it recognizes, and has always recognized, the right of the people of East Timor to self-determination, the status of East Timor as a non-self-governing territory, and the fact that Portugal has been named by the United Nations as the administering Power of East Timor; that the arguments of Portugal, as well as its submissions, demonstrate that Portugal does not challenge the capacity of Australia to conclude the 1989 Treaty and that it does not contest the validity of the Treaty; and that consequently there is in reality no dispute between itself and Portugal.

Portugal, for its part, maintains that its Application defines the real and only dispute submitted to the Court.

22. The Court recalls that, in the sense accepted in its jurisprudence and that of its predecessor, a dispute is a disagreement on a point of law or fact, a conflict of legal views or interests between parties (see *Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 11; *Northern Cameroons, Judgment, I.C.J. Reports 1963*, p. 27; and *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory*

*Opinion, I.C.J. Reports 1988*, p. 27, para. 35). In order to establish the existence of a dispute, "It must be shown that the claim of one party is positively opposed by the other" (*South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 328); and further, "Whether there exists an international dispute is a matter for objective determination" (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 74).

For the purpose of verifying the existence of a legal dispute in the present case, it is not relevant whether the "real dispute" is between Portugal and Indonesia rather than Portugal and Australia. Portugal has, rightly or wrongly, formulated complaints of fact and law against Australia which the latter has denied. By virtue of this denial, there is a legal dispute.

On the record before the Court, it is clear that the Parties are in disagreement, both on the law and on the facts, on the question whether the conduct of Australia in negotiating, concluding and initiating performance of the 1989 Treaty was in breach of an obligation due by Australia to Portugal under international law.

Indeed, Portugal's Application limits the proceedings to these questions. There nonetheless exists a legal dispute between Portugal and Australia. This objection of Australia must therefore be dismissed.

* *

23. The Court will now consider Australia's principal objection, to the effect that Portugal's Application would require the Court to determine the rights and obligations of Indonesia. The declarations made by the Parties under Article 36, paragraph 2, of the Statute do not include any limitation which would exclude Portugal's claims from the jurisdiction thereby conferred upon the Court. Australia, however, contends that the jurisdiction so conferred would not enable the Court to act if, in order to do so, the Court were required to rule on the lawfulness of Indonesia's entry into and continuing presence in East Timor, on the validity of the 1989 Treaty between Australia and Indonesia, or on the rights and obligations of Indonesia under that Treaty, even if the Court did not have to determine its validity. Portugal agrees that if its Application required the Court to decide any of these questions, the Court could not entertain it. The Parties disagree, however, as to whether the Court is required to decide any of these questions in order to resolve the dispute referred to it.

24. Australia argues that the decision sought from the Court by Portugal would inevitably require the Court to rule on the lawfulness of the conduct of a third State, namely Indonesia, in the absence of that State's consent. In support of its argument, it cites the Judgment in the case concerning *Monetary Gold Removed from Rome in 1943*, in which the Court ruled that, in the absence of Albania's consent, it could not take any deci-

sion on the international responsibility of that State since "Albania's legal interests would not only be affected by a decision, but would form the very subject-matter of the decision" (*I.C.J. Reports 1954*, p. 32).

25. In reply, Portugal contends, first, that its Application is concerned exclusively with the objective conduct of Australia, which consists in having negotiated, concluded and initiated performance of the 1989 Treaty with Indonesia, and that this question is perfectly separable from any question relating to the lawfulness of the conduct of Indonesia. According to Portugal, such conduct of Australia in itself constitutes a breach of its obligation to treat East Timor as a non-self-governing territory and Portugal as its administering Power; and that breach could be passed upon by the Court by itself and without passing upon the rights of Indonesia. The objective conduct of Australia, considered as such, constitutes the only violation of international law of which Portugal complains.

26. The Court recalls in this respect that one of the fundamental principles of its Statute is that it cannot decide a dispute between States without the consent of those States to its jurisdiction. This principle was reaffirmed in the Judgment given by the Court in the case concerning *Monetary Gold Removed from Rome in 1943* and confirmed in several of its subsequent decisions (see *Continental Shelf (Libyan Arab Jamahiriya/Malta), Application for Permission to Intervene, Judgment, I.C.J. Reports 1984*, p. 25, para. 40; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 431, para. 88; *Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986*, p. 579, para. 49; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application to Intervene, Judgment, I.C.J. Reports 1990*, pp. 114-116, paras. 54-56, and p. 112, para. 73; and *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, pp. 259-262, paras. 50-55).

27. The Court notes that Portugal's claim that, in entering into the 1989 Treaty with Indonesia, Australia violated the obligation to respect Portugal's status as administering Power and that of East Timor as a non-self-governing territory, is based on the assertion that Portugal alone, in its capacity as administering Power, had the power to enter into the Treaty on behalf of East Timor; that Australia disregarded this exclusive power, and, in so doing, violated its obligations to respect the status of Portugal and that of East Timor.

The Court also observes that Australia, for its part, rejects Portugal's claim to the exclusive power to conclude treaties on behalf of East Timor, and the very fact that it entered into the 1989 Treaty with Indonesia shows that it considered that Indonesia had that power. Australia in substance argues that even if Portugal had retained that power, on whatever basis, after withdrawing from East Timor, the possibility existed that the power could later pass to another State under general international law,

and that it did so pass to Indonesia; Australia affirms moreover that, if the power in question did pass to Indonesia, it was acting in conformity with international law in entering into the 1989 Treaty with that State, and could not have violated any of the obligations Portugal attributes to it. Thus, for Australia, the fundamental question in the present case is ultimately whether, in 1989, the power to conclude a treaty on behalf of East Timor in relation to its continental shelf lay with Portugal or with Indonesia.

28. The Court has carefully considered the argument advanced by Portugal which seeks to separate Australia's behaviour from that of Indonesia. However, in the view of the Court, Australia's behaviour cannot be assessed without first entering into the question why it is that Indonesia could not lawfully have concluded the 1989 Treaty, while Portugal allegedly could have done so; the very subject-matter of the Court's decision would necessarily be a determination whether, having regard to the circumstances in which Indonesia entered and remained in East Timor, it could or could not have acquired the power to enter into treaties on behalf of East Timor relating to the resources of its continental shelf. The Court could not make such a determination in the absence of the consent of Indonesia.

29. However, Portugal puts forward an additional argument aiming to show that the principle formulated by the Court in the case concerning *Monetary Gold Removed from Rome in 1943* is not applicable in the present case. It maintains, in effect, that the rights which Australia allegedly breached were rights *erga omnes* and that accordingly Portugal could require it, individually, to respect them regardless of whether or not another State had conducted itself in a similarly unlawful manner.

In the Court's view, Portugal's assertion that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character, is irreproachable. The principle of self-determination of peoples has been recognized by the United Nations Charter and in the jurisprudence of the Court (see *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, pp. 31-32, paras. 52-53; *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, pp. 31-33, paras. 54-59); it is one of the essential principles of contemporary international law. However, the Court considers that the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things. Whatever the nature of the obligations invoked, the Court could not rule on the lawfulness of the conduct of a State when its judgment would imply an evaluation of the lawfulness of the conduct of another State which is not a party to the case. Where this is so, the Court cannot act, even if the right in question is a right *erga omnes*.

30. Portugal presents a final argument to challenge the applicability to the present case of the Court's jurisprudence in the case concerning *Monetary Gold Removed from Rome in 1943*. It argues that the principal matters on which its claims are based, namely the status of East Timor as a non-self-governing territory and its own capacity as the administering Power of the Territory, have already been decided by the General Assembly and the Security Council, acting within their proper spheres of competence; that in order to decide on Portugal's claims, the Court might well need to interpret those decisions but would not have to decide *de novo* on their content and must accordingly take them as "givens"; and that consequently the Court is not required in this case to pronounce on the question of the use of force by Indonesia in East Timor or upon the lawfulness of its presence in the Territory.

Australia objects that the United Nations resolutions regarding East Timor do not say what Portugal claims they say; that the last resolution of the Security Council on East Timor goes back to 1976 and the last resolution of the General Assembly to 1982, and that Portugal takes no account of the passage of time and the developments that have taken place since then; and that the Security Council resolutions are not resolutions which are binding under Chapter VII of the Charter or otherwise and, moreover, that they are not framed in mandatory terms.

31. The Court notes that the argument of Portugal under consideration rests on the premise that the United Nations resolutions, and in particular those of the Security Council, can be read as imposing an obligation on States not to recognize any authority on the part of Indonesia over the Territory and, where the latter is concerned, to deal only with Portugal. The Court is not persuaded, however, that the relevant resolutions went so far.

For the two Parties, the Territory of East Timor remains a non-self-governing territory and its people has the right to self-determination. Moreover, the General Assembly, which reserves to itself the right to determine the territories which have to be regarded as non-self-governing for the purposes of the application of Chapter XI of the Charter, has treated East Timor as such a territory. The competent subsidiary organs of the General Assembly have continued to treat East Timor as such to this day. Furthermore, the Security Council, in its resolutions 384 (1975) and 389 (1976) has expressly called for respect for "the territorial integrity of East Timor as well as the inalienable right of its people to self-determination in accordance with General Assembly resolution 1514 (XV)".

Nor is it at issue between the Parties that the General Assembly has expressly referred to Portugal as the "administering Power" of East Timor in a number of the resolutions it adopted on the subject of East Timor between 1975 and 1982, and that the Security Council has done so in its resolution 384 (1975). The Parties do not agree, however, on the

legal implications that flow from the reference to Portugal as the administering Power in those texts.

32. The Court finds that it cannot be inferred from the sole fact that the above-mentioned resolutions of the General Assembly and the Security Council refer to Portugal as the administering Power of East Timor that they intended to establish an obligation on third States to treat exclusively with Portugal as regards the continental shelf of East Timor. The Court notes, furthermore, that several States have concluded with Indonesia treaties capable of application to East Timor but which do not include any reservation in regard to that Territory. Finally, the Court observes that, by a letter of 15 December 1989, the Permanent Representative of Portugal to the United Nations transmitted to the Secretary-General the text of a note of protest addressed by the Portuguese Embassy in Canberra to the Australian Department of Foreign Affairs and Trade on the occasion of the conclusion of the Treaty on 11 December 1989; that the letter of the Permanent Representative was circulated, at his request, as an official document of the forty-fifth session of the General Assembly, under the item entitled "Question of East Timor", and of the Security Council; and that no responsive action was taken either by the General Assembly or the Security Council.

Without prejudice to the question whether the resolutions under discussion could be binding in nature, the Court considers as a result that they cannot be regarded as "givens" which constitute a sufficient basis for determining the dispute between the Parties.

33. It follows from this that the Court would necessarily have to rule upon the lawfulness of Indonesia's conduct as a prerequisite for deciding on Portugal's contention that Australia violated its obligation to respect Portugal's status as administering Power, East Timor's status as a non-self-governing territory and the right of the people of the Territory to self-determination and to permanent sovereignty over its wealth and natural resources.

*

34. The Court emphasizes that it is not necessarily prevented from adjudicating when the judgment it is asked to give might affect the legal interests of a State which is not a party to the case. Thus, in the case concerning *Certain Phosphate Lands in Nauru (Nauru* v. *Australia)*, it stated, *inter alia*, as follows:

> "In the present case, the interests of New Zealand and the United Kingdom do not constitute the very subject-matter of the judgment to be rendered on the merits of Nauru's Application . . . In the present case, the determination of the responsibility of New Zealand or the United Kingdom is not a prerequisite for the determination of the responsibility of Australia, the only object of Nauru's claim . . . In the present case, a finding by the Court regarding the existence or the content of the responsibility attributed to Australia by Nauru

might well have implications for the legal situation of the two other States concerned, but no finding in respect of that legal situation will be needed as a basis for the Court's decision on Nauru's claims against Australia. Accordingly, the Court cannot decline to exercise its jurisdiction." (*I.C.J. Reports 1992*, pp. 261-262, para. 55.)

However, in this case, the effects of the judgment requested by Portugal would amount to a determination that Indonesia's entry into and continued presence in East Timor are unlawful and that, as a consequence, it does not have the treaty-making power in matters relating to the continental shelf resources of East Timor. Indonesia's rights and obligations would thus constitute the very subject-matter of such a judgment made in the absence of that State's consent. Such a judgment would run directly counter to the "well-established principle of international law embodied in the Court's Statute, namely, that the Court can only exercise jurisdiction over a State with its consent" (*Monetary Gold Removed from Rome in 1943, Judgment, I.C.J. Reports 1954*, p. 32).

*

35. The Court concludes that it cannot, in this case, exercise the jurisdiction it has by virtue of the declarations made by the Parties under Article 36, paragraph 2, of its Statute because, in order to decide the claims of Portugal, it would have to rule, as a prerequisite, on the lawfulness of Indonesia's conduct in the absence of that State's consent. This conclusion applies to all the claims of Portugal, for all of them raise a common question: whether the power to make treaties concerning the continental shelf resources of East Timor belongs to Portugal or Indonesia, and, therefore, whether Indonesia's entry into and continued presence in the Territory are lawful. In these circumstances, the Court does not deem it necessary to examine the other arguments derived by Australia from the non-participation of Indonesia in the case, namely the Court's lack of jurisdiction to decide on the validity of the 1989 Treaty and the effects on Indonesia's rights under that treaty which would result from a judgment in favour of Portugal.

* *

36. Having dismissed the first of the two objections of Australia which it has examined, but upheld its second, the Court finds that it is not required to consider Australia's other objections and that it cannot rule on Portugal's claims on the merits, whatever the importance of the questions raised by those claims and of the rules of international law which they bring into play.

37. The Court recalls in any event that it has taken note in the present Judgment (paragraph 31) that, for the two Parties, the Territory of East

Timor remains a non-self-governing territory and its people has the right to self-determination.

* * *

38. For these reasons,

THE COURT,

By fourteen votes to two,

*Finds* that it cannot in the present case exercise the jurisdiction conferred upon it by the declarations made by the Parties under Article 36, paragraph 2, of its Statute to adjudicate upon the dispute referred to it by the Application of the Portuguese Republic.

IN FAVOUR: *President* Bedjaoui; *Vice-President* Schwebel; *Judges* Oda, Sir Robert Jennings, Guillaume, Shahabuddeen, Aguilar-Mawdsley, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma, Vereshchetin; *Judge* ad hoc Sir Ninian Stephen;

AGAINST: *Judge* Weeramantry; *Judge* ad hoc Skubiszewski.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this thirtieth day of June, one thousand nine hundred and ninety-five, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Portuguese Republic and the Government of the Commonwealth of Australia, respectively.

*(Signed)* Mohammed BEDJAOUI,
President.

*(Signed)* Eduardo VALENCIA-OSPINA,
Registrar.

Judges ODA, SHAHABUDDEEN, RANJEVA and VERESHCHETIN append separate opinions to the Judgment of the Court.

Judge WEERAMANTRY and Judge *ad hoc* SKUBISZEWSKI append dissenting opinions to the Judgment of the Court.

*(Initialled)* M.B.
*(Initialled)* E.V.O.

# Annex 35

# CHAPTER I

# CHARTER OF THE UNITED NATIONS AND STATUTE OF THE INTERNATIONAL COURT OF JUSTICE

## 1. CHARTER OF THE UNITED NATIONS

***San Francisco, 26 June 1945***

**ENTRY INTO FORCE:** 24 October 1945, in accordance with article 110.[1,2,3,4,5,6]

**STATUS:** Parties: 49.

**TEXT:** In Arabic, In Chinese, in English, in French, In Russian, In Spanish

***Note:*** 193 Members [49[1,6] original Members and 144 Members having been admitted in accordance with Article 4 (see list under chapter I.2. hereinafter.)].

| *Participant* | *Ratification* |
|---|---|
| Argentina | 24 Sep 1945 |
| Australia | 1 Nov 1945 |
| Belarus[3] | 24 Oct 1945 |
| Belgium | 27 Dec 1945 |
| Bolivia (Plurinational State of) | 14 Nov 1945 |
| Brazil | 21 Sep 1945 |
| Canada | 9 Nov 1945 |
| Chile | 11 Oct 1945 |
| China[4,7,8] | 28 Sep 1945 |
| Colombia | 5 Nov 1945 |
| Costa Rica | 2 Nov 1945 |
| Cuba | 15 Oct 1945 |
| Denmark | 9 Oct 1945 |
| Dominican Republic | 4 Sep 1945 |
| Ecuador | 21 Dec 1945 |
| Egypt[5] | 22 Oct 1945 |
| El Salvador | 26 Sep 1945 |
| Ethiopia | 13 Nov 1945 |
| France | 31 Aug 1945 |
| Greece[9] | 25 Oct 1945 |
| Guatemala | 21 Nov 1945 |
| Haiti | 27 Sep 1945 |
| Honduras | 17 Dec 1945 |
| India | 30 Oct 1945 |
| Iran (Islamic Republic of)[10] | 16 Oct 1945 |
| Iraq | 21 Dec 1945 |
| Lebanon | 15 Oct 1945 |
| Liberia | 2 Nov 1945 |
| Luxembourg | 17 Oct 1945 |
| Mexico | 7 Nov 1945 |
| Netherlands (Kingdom of the)[11] | 10 Dec 1945 |
| New Zealand[12] | 19 Sep 1945 |
| Nicaragua | 6 Sep 1945 |
| Norway | 27 Nov 1945 |
| Panama | 13 Nov 1945 |
| Paraguay | 12 Oct 1945 |
| Peru | 31 Oct 1945 |
| Philippines | 11 Oct 1945 |
| Poland | 24 Oct 1945 |
| Russian Federation[13] | 24 Oct 1945 |
| Saudi Arabia | 18 Oct 1945 |
| South Africa[14] | 7 Nov 1945 |
| Syrian Arab Republic[5] | 19 Oct 1945 |
| Türkiye | 28 Sep 1945 |
| Ukraine[15] | 24 Oct 1945 |
| United Kingdom of Great Britain and Northern Ireland[7] | 20 Oct 1945 |
| United States of America | 8 Aug 1945 |
| Uruguay | 18 Dec 1945 |
| Venezuela (Bolivarian Republic of)[16] | 15 Nov 1945 |

***Notes:***

[1] The former Yugoslavia was an original Member of the United Nations, the Charter having been signed and ratified on its behalf on 26 June 1945 and 19 October 1945, respectively, until its dissolution. Treaty actions undertaken by the former Yugoslavia appear in footnotes against the designation “former Yugoslavia”. See note 1 under Bosnia and Herzegovina" ,

"Croatia", "former Yugoslavia", "Serbia and Montenegro" , "Slovenia" , "The Former Yugoslav Republic of Macedonia" and "Yugoslavia" in the "Historical Information" section.

[2] All States listed herein signed the Charter on 26 June 1945, with the exception of Poland on behalf of which it was signed on 15 October 1945.

[3] See note 1 under "Belarus" in the "Historical Information" section.

[4] See note 1 under "China" in the "Historical Information" section.

[5] See note 1 under "United Arab Republic" in the "Historical Information" section.

[6] Czechoslovakia was an original Member of the United Nations, the Charter having been signed and ratified on its behalf on 26 June 1945 and 19 October 1945, respectively, until its dissolution on 31 December 1992. See also note 1 under "Czech Republic" and note 1 under Slovakia" in the Historical Information section.

[7] See note 2 under "China" and note 2 under "United Kingdom of Great Britain and Northern Ireland"regarding Hong Kong in the Historical Information section.

[8] See note 3 under "China" and note 1 under "Portugal" regarding Macao in the "Historical Information" section.

[9] See note 1 under "Greece" in the "Historical Information" section.

[10] See note 1 under "Iran, Islamic Republic" of in the "Historical Information" section.

[11] See note 1 under "Netherlands" regarding Aruba/Netherlands Antilles in the "Historical Information" section.

[12] See note 1 under "New Zealand"regarding Tokelau in the "Historical Information" section.

[13] See note 1 under "Russian Federation" in the "Historical Information" section.

[14] See note 1 under "South Africa" in the "Historical Information" section.

[15] See note 1 under "Ukraine"section.

[16] See note 1 under "Venezuela" in the "Historical Information" section.

# Annex 36

# CCPR General Comment No. 12: Article 1 (Right to Self-determination) The Right to Self-determination of Peoples

*Adopted at the Twenty-first Session of the Human Rights Committee, on 13 March 1984*

1. In accordance with the purposes and principles of the Charter of the United Nations, article 1 of the International Covenant on Civil and Political Rights recognizes that all peoples have the right of self-determination. The right of self-determination is of particular importance because its realization is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights. It is for that reason that States set forth the right of self-determination in a provision of positive law in both Covenants and placed this provision as article 1 apart from and before all of the other rights in the two Covenants.

2. Article 1 enshrines an inalienable right of all peoples as described in its paragraphs 1 and 2. By virtue of that right they freely "determine their political status and freely pursue their economic, social and cultural development". The article imposes on all States parties corresponding obligations. This right and the corresponding obligations concerning its implementation are interrelated with other provisions of the Covenant and rules of international law.

3. Although the reporting obligations of all States parties include article 1, only some reports give detailed explanations regarding each of its paragraphs. The Committee has noted that many of them completely ignore article 1, provide inadequate information in regard to it or confine themselves to a reference to election laws. The Committee considers it highly desirable that States parties' reports should contain information on each paragraph of article 1.

4. With regard to paragraph 1 of article 1, States parties should describe the constitutional and political processes which in practice allow the exercise of this right.

5. Paragraph 2 affirms a particular aspect of the economic content of the right of self-determination, namely the right of peoples, for their own ends, freely to "dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence". This right entails corresponding duties for all States and the international community. States should indicate any factors or difficulties which prevent the free disposal of their natural wealth and resources contrary to the provisions of this paragraph and to what extent that affects the enjoyment of other rights set forth in the Covenant.

6. Paragraph 3, in the Committee's opinion, is particularly important in that it imposes specific obligations on States parties, not only in relation to their own peoples but vis-à-vis all peoples which have not been able to exercise or have been

deprived of the possibility of exercising their right to self-determination. The general nature of this paragraph is confirmed by its drafting history. It stipulates that "The States parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations". The obligations exist irrespective of whether a people entitled to self-determination depends on a State party to the Covenant or not. It follows that all States parties to the Covenant should take positive action to facilitate realization of and respect for the right of peoples to self-determination. Such positive action must be consistent with the States' obligations under the Charter of the United Nations and under international law: in particular, States must refrain from interfering in the internal affairs of other States and thereby adversely affecting the exercise of the right to self-determination. The reports should contain information on the performance of these obligations and the measures taken to that end.

7. In connection with article 1 of the Covenant, the Committee refers to other international instruments concerning the right of all peoples to self-determination, in particular the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, adopted by the General Assembly on 24 October 1970 (General Assembly resolution 2625 (XXV)).

8. The Committee considers that history has proved that the realization of and respect for the right of self-determination of peoples contributes to the establishment of friendly relations and cooperation between States and to strengthening international peace and understanding.

# Annex 37

# Draft articles on
# Responsibility of States for Internationally Wrongful Acts, with commentaries

**2001**

Text adopted by the International Law Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/56/10). The report, which also contains commentaries on the draft articles, appears in the *Yearbook of the International Law Commission, 2001*, vol. II, Part Two, as corrected.

## RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS

*General commentary*

(1) These articles seek to formulate, by way of codification and progressive development, the basic rules of international law concerning the responsibility of States for their internationally wrongful acts. The emphasis is on the secondary rules of State responsibility: that is to say, the general conditions under international law for the State to be considered responsible for wrongful actions or omissions, and the legal consequences which flow therefrom. The articles do not attempt to define the content of the international obligations, the breach of which gives rise to responsibility. This is the function of the primary rules, whose codification would involve restating most of substantive customary and conventional international law.

(2) Roberto Ago, who was responsible for establishing the basic structure and orientation of the project, saw the articles as specifying:

> the principles which govern the responsibility of States for internationally wrongful acts, maintaining a strict distinction between this task and the task of defining the rules that place obligations on States, the violation of which may generate responsibility … [I]t is one thing to define a rule and the content of the obligation it imposes, and another to determine whether that obligation has been violated and what should be the consequences of the violation.[32]

(3) Given the existence of a primary rule establishing an obligation under international law for a State, and assuming that a question has arisen as to whether that State has complied with the obligation, a number of further issues of a general character arise. These include:

(*a*) The role of international law as distinct from the internal law of the State concerned in characterizing conduct as unlawful;

(*b*) Determining in what circumstances conduct is to be attributed to the State as a subject of international law;

(*c*) Specifying when and for what period of time there is or has been a breach of an international obligation by a State;

(*d*) Determining in what circumstances a State may be responsible for the conduct of another State which is incompatible with an international obligation of the latter;

(*e*) Defining the circumstances in which the wrongfulness of conduct under international law may be precluded;

(*f*) Specifying the content of State responsibility, i.e. the new legal relations that arise from the commission by a State of an internationally wrongful act, in terms of cessation of the wrongful act, and reparation for any injury done;

(*g*) Determining any procedural or substantive preconditions for one State to invoke the responsibility of another State, and the circumstances in which the right to invoke responsibility may be lost;

(*h*) Laying down the conditions under which a State may be entitled to respond to a breach of an international obligation by taking countermeasures designed to ensure the fulfilment of the obligations of the responsible State under these articles.

This is the province of the secondary rules of State responsibility.

(4) A number of matters do not fall within the scope of State responsibility as dealt with in the present articles:

(*a*) As already noted, it is not the function of the articles to specify the content of the obligations laid down by particular primary rules, or their interpretation. Nor do the articles deal with the question whether and for how long particular primary obligations are in force for a State. It is a matter for the law of treaties to determine whether a State is a party to a valid treaty, whether the treaty is in force for that State and with respect to which provisions, and how the treaty is to be interpreted. The same is true, *mutatis mutandis*, for other "sources" of international obligations, such as customary international law. The articles take the existence and content of the primary rules of international law as they are at the relevant time; they provide the framework for determining whether the consequent obligations of each State have been breached, and with what legal consequences for other States.

(*b*) The consequences dealt with in the articles are those which flow from the commission of an internationally wrongful act as such.[33] No attempt is made to deal with the consequences of a breach for the continued validity or binding effect of the primary rule (e.g. the right of an injured State to terminate or suspend a treaty for material breach, as reflected in article 60 of the 1969 Vienna Convention). Nor do the articles cover such indirect or additional consequences as may flow from the responses of international organizations to wrongful conduct. In carrying out their functions it may be necessary for international organizations to take a position on whether a State has breached an international obligation. But even where this is so, the consequences will be those determined by or within the framework of the constituent instrument of the organization, and these fall outside the scope of the articles. This is particularly the case with action of the United Nations under the Charter, which is specifically reserved by article 59.

(*c*) The articles deal only with the responsibility for conduct which is internationally wrongful. There may be cases where States incur obligations to compensate for the injurious consequences of conduct which is not prohibited, and may even be expressly permitted, by international law (e.g. compensation for property duly taken for a public purpose). There may also be cases where a State is obliged to restore the *status quo ante* after some lawful activity has been completed. These requirements of compensation or restoration would involve primary obligations; it would be the failure to pay compensation, or to restore the *status*

[32] *Yearbook ... 1970*, vol. II, p. 306, document A/8010/Rev.l, para. 66 (*c*).

[33] For the purposes of the articles, the term "internationally wrongful act" includes an omission and extends to conduct consisting of several actions or omissions which together amount to an internationally wrongful act. See paragraph (1) of the commentary to article 1.

*quo* which would engage the international responsibility of the State concerned. Thus for the purposes of these articles, international responsibility results exclusively from a wrongful act contrary to international law. This is reflected in the title of the articles.

(*d*) The articles are concerned only with the responsibility of States for internationally wrongful conduct, leaving to one side issues of the responsibility of international organizations or of other non-State entities (see articles 57 and 58).

(5) On the other hand, the present articles are concerned with the whole field of State responsibility. Thus they are not limited to breaches of obligations of a bilateral character, e.g. under a bilateral treaty with another State. They apply to the whole field of the international obligations of States, whether the obligation is owed to one or several States, to an individual or group, or to the international community as a whole. Being general in character, they are also for the most part residual. In principle, States are free, when establishing or agreeing to be bound by a rule, to specify that its breach shall entail only particular consequences and thereby to exclude the ordinary rules of responsibility. This is made clear by article 55.

(6) The present articles are divided into four parts. Part One is entitled "The internationally wrongful act of a State". It deals with the requirements for the international responsibility of a State to arise. Part Two, "Content of the international responsibility of a State", deals with the legal consequences for the responsible State of its internationally wrongful act, in particular as they concern cessation and reparation. Part Three is entitled "The implementation of the international responsibility of a State". It identifies the State or States which may react to an internationally wrongful act and specifies the modalities by which this may be done, including, in certain circumstances, by the taking of countermeasures as necessary to ensure cessation of the wrongful act and reparation for its consequences. Part Four contains certain general provisions applicable to the articles as a whole.

## Part One

## THE INTERNATIONALLY WRONGFUL ACT OF A STATE

Part One defines the general conditions necessary for State responsibility to arise. Chapter I lays down three basic principles for responsibility from which the articles as a whole proceed. Chapter II defines the conditions under which conduct is attributable to the State. Chapter III spells out in general terms the conditions under which such conduct amounts to a breach of an international obligation of the State concerned. Chapter IV deals with certain exceptional cases where one State may be responsible for the conduct of another State not in conformity with an international obligation of the latter. Chapter V defines the circumstances precluding the wrongfulness for conduct not in conformity with the international obligations of a State.

### Chapter I

### GENERAL PRINCIPLES

#### *Article 1. Responsibility of a State for its internationally wrongful acts*

**Every internationally wrongful act of a State entails the international responsibility of that State.**

*Commentary*

(1) Article 1 states the basic principle underlying the articles as a whole, which is that a breach of international law by a State entails its international responsibility. An internationally wrongful act of a State may consist in one or more actions or omissions or a combination of both. Whether there has been an internationally wrongful act depends, first, on the requirements of the obligation which is said to have been breached and, secondly, on the framework conditions for such an act, which are set out in Part One. The term "international responsibility" covers the new legal relations which arise under international law by reason of the internationally wrongful act of a State. The content of these new legal relations is specified in Part Two.

(2) PCIJ applied the principle set out in article 1 in a number of cases. For example, in the *Phosphates in Morocco* case, PCIJ affirmed that when a State commits an internationally wrongful act against another State international responsibility is established "immediately as between the two States".[34] ICJ has applied the principle on several occasions, for example in the *Corfu Channel* case,[35] in the *Military and Paramilitary Activities in and against Nicaragua* case,[36] and in the *Gabčíkovo-Nagymaros Project* case.[37] The Court also referred to the principle in its advisory opinions on *Reparation for Injuries*,[38] and on the *Interpretation of Peace Treaties (Second Phase)*,[39] in which it stated that "refusal to fulfil a treaty obligation involves international responsibility".[40] Arbitral tribunals have repeatedly affirmed the principle, for example in the *Claims of Italian Nationals Resident in Peru* cases,[41] in

[34] *Phosphates in Morocco, Judgment, 1938, P.C.I.J., Series A/B, No. 74*, p. 10, at p. 28. See also *S.S. "Wimbledon", 1923, P.C.I.J., Series A, No. 1*, p. 15, at p. 30; *Factory at Chorzów, Jurisdiction*, *Judgment No. 8, 1927, P.C.I.J., Series A, No. 9*, p. 21; and *ibid., Merits*, *Judgment No. 13, 1928, P.C.I.J., Series A, No. 17*, p. 29.

[35] *Corfu Channel, Merits, Judgment, I.C.J. Reports 1949*, p. 4, at p. 23.

[36] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14, at p. 142, para. 283, and p. 149, para. 292.

[37] *Gabčíkovo-Nagymaros Project* (see footnote 27 above), at p. 38, para. 47.

[38] *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949*, p. 174, at p. 184.

[39] *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Second Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 221.

[40] *Ibid.*, p. 228.

[41] Seven of these awards rendered in 1901 reiterated that "a universally recognized principle of international law states that the State is responsible for the violations of the law of nations committed by its agents" (UNRIAA, vol. XV (Sales No. 66.V.3), pp. 399 (Chiessa claim), 401 (Sessarego claim), 404 (Sanguinetti claim), 407 (Vercelli claim), 408 (Queirolo claim), 409 (Roggero claim), and 411 (Miglia claim)).

the *Dickson Car Wheel Company* case,[42] in the *International Fisheries Company* case,[43] in the *British Claims in the Spanish Zone of Morocco* case[44] and in the *Armstrong Cork Company* case.[45] In the *"Rainbow Warrior"* case,[46] the arbitral tribunal stressed that "any violation by a State of any obligation, of whatever origin, gives rise to State responsibility".[47]

(3) That every internationally wrongful act of a State entails the international responsibility of that State, and thus gives rise to new international legal relations additional to those which existed before the act took place, has been widely recognized, both before[48] and since[49] article 1 was first formulated by the Commission. It is true that there were early differences of opinion over the definition of the legal relationships arising from an internationally wrongful act. One approach, associated with Anzilotti, described the legal consequences deriving from an internationally wrongful act exclusively in terms of a binding bilateral relationship thereby established between the wrongdoing State and the injured State, in which the obligation of the former State to make reparation is set against the "subjective" right of the latter State to require reparation. Another view, associated with Kelsen, started from the idea that the legal order is a coercive order and saw the authorization accorded to the injured State to apply a coercive sanction against the responsible State as the primary legal consequence flowing directly from the wrongful act.[50] According to this view, general international law empowered the injured State to react to a wrong; the obligation to make reparation was treated as subsidiary, a way by which the responsible State could avoid the application of coercion. A third view, which came to prevail, held that the consequences of an internationally wrongful act cannot be limited either to reparation or to a "sanction".[51] In international law, as in any system of law, the wrongful act may give rise to various types of legal relations, depending on the circumstances.

(4) Opinions have also differed on the question whether the legal relations arising from the occurrence of an internationally wrongful act were essentially bilateral, i.e. concerned only the relations of the responsible State and the injured State *inter se*. Increasingly it has been recognized that some wrongful acts engage the responsibility of the State concerned towards several or many States or even towards the international community as a whole. A significant step in this direction was taken by ICJ in the *Barcelona Traction* case when it noted that:

> an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.[52]

Every State, by virtue of its membership in the international community, has a legal interest in the protection of certain basic rights and the fulfilment of certain essential obligations. Among these the Court instanced "the outlawing of acts of aggression, and of genocide, as also … the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination".[53] In later cases the Court has reaffirmed this idea.[54] The consequences of a broader conception of international responsibility must necessarily be reflected in the articles which, although they include standard bilateral situations of responsibility, are not limited to them.

(5) Thus the term "international responsibility" in article 1 covers the relations which arise under international law from the internationally wrongful act of a State, whether such relations are limited to the wrongdoing State and one injured State or whether they extend also to other States or indeed to other subjects of international law, and whether they are centred on obligations of restitution or compensation or also give the injured State the possibility of responding by way of countermeasures.

(6) The fact that under article 1 every internationally wrongful act of a State entails the international responsibility of that State does not mean that other States may not also be held responsible for the conduct in question, or for injury caused as a result. Under chapter II the same

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[42] *Dickson Car Wheel Company (U.S.A.)* v. *United Mexican States*, UNRIAA, vol. IV (Sales No. 1951.V.1), p. 669, at p. 678 (1931).

[43] *International Fisheries Company (U.S.A.)* v. *United Mexican States*, *ibid.*, p. 691, at p. 701 (1931).

[44] According to the arbitrator, Max Huber, it is an indisputable principle that "responsibility is the necessary corollary of rights. All international rights entail international responsibility", UNRIAA, vol. II (Sales No. 1949.V.1), p. 615, at p. 641 (1925).

[45] According to the Italian-United States Conciliation Commission, no State may "escape the responsibility arising out of the exercise of an illicit action from the viewpoint of the general principles of international law", UNRIAA, vol. XIV (Sales No. 65.V.4), p. 159, at p. 163 (1953).

[46] Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements concluded on 9 July 1986 between the two States and which related to the problems arising from the *Rainbow Warrior* affair, UNRIAA, vol. XX (Sales No. E/F.93.V.3), p. 215 (1990).

[47] *Ibid.*, p. 251, para. 75.

[48] See, e.g., D. Anzilotti, *Corso di diritto internazionale*, 4th ed. (Padua, CEDAM, 1955) vol. I, p. 385; W. Wengler, *Völkerrecht* (Berlin, Springer, 1964), vol. I, p. 499; G. I. Tunkin, *Teoria mezhdunarodnogo prava* (Moscow, Mezhdunarodnye otnoshenia, 1970), p. 470, trans. W. E. Butler, *Theory of International Law* (London, George Allen and Unwin, 1974), p. 415; and E. Jiménez de Aréchaga, "International responsibility", *Manual of Public International Law*, M. Sørensen, ed. (London, Macmillan, 1968), p. 533.

[49] See, e.g., I. Brownlie, *Principles of Public International Law*, 5th ed. (Oxford University Press, 1998), p. 435; B. Conforti, *Diritto internazionale*, 4th ed. (Milan, Editoriale Scientifica, 1995), p. 332; P. Daillier and A. Pellet, *Droit international public (Nguyen Quoc Dinh)*, 6th ed. (Paris, Librairie générale de droit et de jurisprudence, 1999), p. 742; P.-M. Dupuy, *Droit international public*, 4th ed. (Paris, Dalloz, 1998), p. 414; and R. Wolfrum, "Internationally wrongful acts", *Encyclopedia of Public International Law*, R. Bernhardt, ed. (Amsterdam, North-Holland, 1995), vol. II, p. 1398.

[50] See H. Kelsen, *Principles of International Law*, 2nd ed., R. W. Tucker, ed. (New York, Holt, Rinehart and Winston, 1966), p. 22.

[51] See, e.g., R. Ago, "Le délit international", *Recueil des cours..., 1939–II* (Paris, Sirey, 1947), vol. 68, p. 415, at pp. 430–440; and L. Oppenheim, *International Law: A Treatise*, vol. I, *Peace*, 8th ed., H. Lauterpacht, ed. (London, Longmans, Green and Co., 1955), pp. 352–354.

[52] *Barcelona Traction* (see footnote 25 above), p. 32, para. 33.

[53] *Ibid.*, para. 34.

[54] See *East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 90, at p. 102, para. 29; *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at p. 258, para. 83; and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, Judgment, I.C.J. Reports 1996*, p. 595, at pp. 615–616, paras. 31–32.

conduct may be attributable to several States at the same time. Under chapter IV, one State may be responsible for the internationally wrongful act of another, for example if the act was carried out under its direction and control. Nonetheless the basic principle of international law is that each State is responsible for its own conduct in respect of its own international obligations.

(7) The articles deal only with the responsibility of States. Of course, as ICJ affirmed in the *Reparation for Injuries* case, the United Nations "is a subject of international law and capable of possessing international rights and duties … it has capacity to maintain its rights by bringing international claims".[55] The Court has also drawn attention to the responsibility of the United Nations for the conduct of its organs or agents.[56] It may be that the notion of responsibility for wrongful conduct is a basic element in the possession of international legal personality. Nonetheless, special considerations apply to the responsibility of other international legal persons, and these are not covered in the articles.[57]

(8) As to terminology, the French term *fait internationalement illicite* is preferable to *délit* or other similar expressions which may have a special meaning in internal law. For the same reason, it is best to avoid, in English, such terms as "tort", "delict" or "delinquency", or in Spanish the term *delito*. The French term *fait internationalement illicite* is better than *acte internationalement illicite*, since wrongfulness often results from omissions which are hardly indicated by the term *acte*. Moreover, the latter term appears to imply that the legal consequences are intended by its author. For the same reasons, the term *hecho internacionalmente ilícito* is adopted in the Spanish text. In the English text, it is necessary to maintain the expression "internationally wrongful act", since the French *fait* has no exact equivalent; nonetheless, the term "act" is intended to encompass omissions, and this is made clear in article 2.

### *Article 2. Elements of an internationally wrongful act of a State*

**There is an internationally wrongful act of a State when conduct consisting of an action or omission:**

**(*a*) is attributable to the State under international law; and**

**(*b*) constitutes a breach of an international obligation of the State.**

*Commentary*

(1) Article 1 states the basic principle that every internationally wrongful act of a State entails its international responsibility. Article 2 specifies the conditions required to establish the existence of an internationally wrongful act of the State, i.e. the constituent elements of such an act. Two elements are identified. First, the conduct in question must be attributable to the State under international law. Secondly, for responsibility to attach to the act of the State, the conduct must constitute a breach of an international legal obligation in force for that State at that time.

(2) These two elements were specified, for example, by PCIJ in the *Phosphates in Morocco* case. The Court explicitly linked the creation of international responsibility with the existence of an "act being attributable to the State and described as contrary to the treaty right[s] of another State".[58] ICJ has also referred to the two elements on several occasions. In the *United States Diplomatic and Consular Staff in Tehran* case, it pointed out that, in order to establish the responsibility of the Islamic Republic of Iran:

> [f]irst, it must determine how far, legally, the acts in question may be regarded as imputable to the Iranian State. Secondly, it must consider their compatibility or incompatibility with the obligations of Iran under treaties in force or under any other rules of international law that may be applicable.[59]

Similarly in the *Dickson Car Wheel Company* case, the Mexico-United States General Claims Commission noted that the condition required for a State to incur international responsibility is "that an unlawful international act be imputed to it, that is, that there exist a violation of a duty imposed by an international juridical standard".[60]

(3) The element of attribution has sometimes been described as "subjective" and the element of breach as "objective", but the articles avoid such terminology.[61] Whether there has been a breach of a rule may depend on the intention or knowledge of relevant State organs or agents and in that sense may be "subjective". For example, article II of the Convention on the Prevention and Punishment of the Crime of Genocide states that: "In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such …" In other cases, the standard for breach of an obligation may be "objective", in the sense that the advertence or otherwise of relevant State organs or agents may be irrelevant. Whether responsibility is "objective" or "subjective" in this sense depends on the circumstances, including the content of the primary obligation in question. The articles lay down no general rule in that regard. The same is true of other standards, whether they involve some degree of fault, culpability, negligence or want of due diligence. Such standards vary from one context to another for reasons which essentially relate to the object and purpose of the treaty provision or other rule giving rise to the primary obligation. Nor do the articles lay down any presumption in this regard as between the different

[55] *Reparation for Injuries* (see footnote 38 above), p. 179.

[56] *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I.C.J. Reports 1999*, p. 62, at pp. 88–89, para. 66.

[57] For the position of international organizations, see article 57 and commentary.

[58] See footnote 34 above.

[59] *United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980*, p. 3, at p. 29, para. 56. Cf. page 41, para. 90. See also *Military and Paramilitary Activities in and against Nicaragua* (footnote 36 above), pp. 117–118, para. 226; and *Gabčíkovo-Nagymaros Project* (footnote 27 above), p. 54, para. 78.

[60] See footnote 42 above.

[61] Cf. *Yearbook ... 1973*, vol. II, p. 179, document A/9010/Rev.1, paragraph (1) of the commentary to article 3.

possible standards. Establishing these is a matter for the interpretation and application of the primary rules engaged in the given case.

(4) Conduct attributable to the State can consist of actions or omissions. Cases in which the international responsibility of a State has been invoked on the basis of an omission are at least as numerous as those based on positive acts, and no difference in principle exists between the two. Moreover, it may be difficult to isolate an "omission" from the surrounding circumstances which are relevant to the determination of responsibility. For example, in the *Corfu Channel* case, ICJ held that it was a sufficient basis for Albanian responsibility that it knew, or must have known, of the presence of the mines in its territorial waters and did nothing to warn third States of their presence.[62] In the *United States Diplomatic and Consular Staff in Tehran* case, the Court concluded that the responsibility of the Islamic Republic of Iran was entailed by the "inaction" of its authorities which "failed to take appropriate steps", in circumstances where such steps were evidently called for.[63] In other cases it may be the combination of an action and an omission which is the basis for responsibility.[64]

(5) For particular conduct to be characterized as an internationally wrongful act, it must first be attributable to the State. The State is a real organized entity, a legal person with full authority to act under international law. But to recognize this is not to deny the elementary fact that the State cannot act of itself. An "act of the State" must involve some action or omission by a human being or group: "States can act only by and through their agents and representatives."[65] The question is which persons should be considered as acting on behalf of the State, i.e. what constitutes an "act of the State" for the purposes of State responsibility.

(6) In speaking of attribution to the State what is meant is the State as a subject of international law. Under many legal systems, the State organs consist of different legal persons (ministries or other legal entities), which are regarded as having distinct rights and obligations for which they alone can be sued and are responsible. For the purposes of the international law of State responsibility the position is different. The State is treated as a unity, consistent with its recognition as a single legal person in international law. In this as in other respects the attribution of conduct to the State is necessarily a normative operation. What is crucial is that a given event is sufficiently connected to conduct (whether an act or omission) which is attributable to the State under one or other of the rules set out in chapter II.

(7) The second condition for the existence of an internationally wrongful act of the State is that the conduct attributable to the State should constitute a breach of an international obligation of that State. The terminology of breach of an international obligation of the State is long established and is used to cover both treaty and non-treaty obligations. In its judgment on jurisdiction in the *Factory at Chorzów* case, PCIJ used the words "breach of an engagement".[66] It employed the same expression in its subsequent judgment on the merits.[67] ICJ referred explicitly to these words in the *Reparation for Injuries* case.[68] The arbitral tribunal in the *"Rainbow Warrior"* affair referred to "any violation by a State of any obligation".[69] In practice, terms such as "non-execution of international obligations", "acts incompatible with international obligations", "violation of an international obligation" or "breach of an engagement" are also used.[70] All these formulations have essentially the same meaning. The phrase preferred in the articles is "breach of an international obligation" corresponding as it does to the language of Article 36, paragraph 2 (*c*), of the ICJ Statute.

(8) In international law the idea of breach of an obligation has often been equated with conduct contrary to the rights of others. PCIJ spoke of an act "contrary to the treaty right[s] of another State" in its judgment in the *Phosphates in Morocco* case.[71] That case concerned a limited multilateral treaty which dealt with the mutual rights and duties of the parties, but some have considered the correlation of obligations and rights as a general feature of international law: there are no international obligations of a subject of international law which are not matched by an international right of another subject or subjects, or even of the totality of the other subjects (the international community as a whole). But different incidents may attach to a right which is held in common by all other subjects of international law, as compared with a specific right of a given State or States. Different States may be beneficiaries of an obligation in different ways, or may have different interests in respect of its performance. Multilateral obligations may thus differ from bilateral ones, in view of the diversity of legal rules and institutions and the wide variety of interests sought to be protected by them. But whether any obligation has been breached still raises the two basic questions identified in article 2, and this is so whatever the character or provenance of the obligation breached. It is a separate question who may invoke the responsibility arising from the breach of an obligation: this question is dealt with in Part Three.[72]

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[62] *Corfu Channel, Merits* (see footnote 35 above), pp. 22–23.

[63] *United States Diplomatic and Consular Staff in Tehran* (see footnote 59 above), pp. 31–32, paras. 63 and 67. See also *Velásquez Rodríguez* v. *Honduras* case, Inter-American Court of Human Rights, Series C, No. 4, para. 170 (1988): "under international law a State is responsible for the acts of its agents undertaken in their official capacity and for their omissions"; and *Affaire relative à l'acquisition de la nationalité polonaise*, UNRIAA, vol. I (Sales No. 1948.V.2), p. 401, at p. 425 (1924).

[64] For example, under article 4 of the Convention relative to the Laying of Automatic Submarine Contact Mines (Hague Convention VIII of 18 October 1907), a neutral Power which lays mines off its coasts but omits to give the required notice to other States parties would be responsible accordingly.

[65] *German Settlers in Poland, Advisory Opinion, 1923, P.C.I.J., Series B, No. 6*, p. 22.

[66] *Factory at Chorzów, Jurisdiction* (see footnote 34 above).

[67] *Factory at Chorzów, Merits* (*ibid.*).

[68] *Reparation for Injuries* (see footnote 38 above), p. 184.

[69] *"Rainbow Warrior"* (see footnote 46 above), p. 251, para. 75.

[70] At the Conference for the Codification of International Law, held at The Hague in 1930, the term "any failure ... to carry out the international obligations of the State" was adopted (see *Yearbook ... 1956*, vol. II, p. 225, document A/CN.4/96, annex 3, article 1).

[71] See footnote 34 above.

[72] See also article 33, paragraph 2, and commentary.

(9) Thus there is no exception to the principle stated in article 2 that there are two necessary conditions for an internationally wrongful act—conduct attributable to the State under international law and the breach by that conduct of an international obligation of the State. The question is whether those two necessary conditions are also sufficient. It is sometimes said that international responsibility is not engaged by conduct of a State in disregard of its obligations unless some further element exists, in particular, "damage" to another State. But whether such elements are required depends on the content of the primary obligation, and there is no general rule in this respect. For example, the obligation under a treaty to enact a uniform law is breached by the failure to enact the law, and it is not necessary for another State party to point to any specific damage it has suffered by reason of that failure. Whether a particular obligation is breached forthwith upon a failure to act on the part of the responsible State, or whether some further event must occur, depends on the content and interpretation of the primary obligation and cannot be determined in the abstract.[73]

(10) A related question is whether fault constitutes a necessary element of the internationally wrongful act of a State. This is certainly not the case if by "fault" one understands the existence, for example, of an intention to harm. In the absence of any specific requirement of a mental element in terms of the primary obligation, it is only the act of a State that matters, independently of any intention.

(11) Article 2 introduces and places in the necessary legal context the questions dealt with in subsequent chapters of Part One. Subparagraph (*a*)—which states that conduct attributable to the State under international law is necessary for there to be an internationally wrongful act—corresponds to chapter II, while chapter IV deals with the specific cases where one State is responsible for the internationally wrongful act of another State. Subparagraph (*b*)—which states that such conduct must constitute a breach of an international obligation—corresponds to the general principles stated in chapter III, while chapter V deals with cases where the wrongfulness of conduct, which would otherwise be a breach of an obligation, is precluded.

(12) In subparagraph (*a*), the term "attribution" is used to denote the operation of attaching a given action or omission to a State. In international practice and judicial decisions, the term "imputation" is also used.[74] But the term "attribution" avoids any suggestion that the legal process of connecting conduct to the State is a fiction, or that the conduct in question is "really" that of someone else.

(13) In subparagraph (*b*), reference is made to the breach of an international obligation rather than a rule or a norm of international law. What matters for these purposes is not simply the existence of a rule but its application in the specific case to the responsible State. The term "obligation" is commonly used in international judicial decisions and practice and in the literature to cover all the possibilities. The reference to an "obligation" is limited to an obligation under international law, a matter further clarified in article 3.

### *Article 3. Characterization of an act of a State as internationally wrongful*

**The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.**

*Commentary*

(1) Article 3 makes explicit a principle already implicit in article 2, namely that the characterization of a given act as internationally wrongful is independent of its characterization as lawful under the internal law of the State concerned. There are two elements to this. First, an act of a State cannot be characterized as internationally wrongful unless it constitutes a breach of an international obligation, even if it violates a provision of the State's own law. Secondly and most importantly, a State cannot, by pleading that its conduct conforms to the provisions of its internal law, escape the characterization of that conduct as wrongful by international law. An act of a State must be characterized as internationally wrongful if it constitutes a breach of an international obligation, even if the act does not contravene the State's internal law—even if, under that law, the State was actually bound to act in that way.

(2) As to the first of these elements, perhaps the clearest judicial decision is that of PCIJ in the *Treatment of Polish Nationals* case.[75] The Court denied the Polish Government the right to submit to organs of the League of Nations questions concerning the application to Polish nationals of certain provisions of the Constitution of the Free City of Danzig, on the ground that:

> according to generally accepted principles, a State cannot rely, as against another State, on the provisions of the latter's Constitution, but only on international law and international obligations duly accepted ... [C]onversely, a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force ... The application of the Danzig Constitution may ... result in the violation of an international obligation incumbent on Danzig towards Poland, whether under treaty stipulations or under general international law ... However, in cases of such a nature, it is not the Constitution and other laws, as such, but the international obligation that gives rise to the responsibility of the Free City.[76]

(3) That conformity with the provisions of internal law in no way precludes conduct being characterized as internationally wrongful is equally well settled. Interna-

[73] For examples of analysis of different obligations, see *United States Diplomatic and Consular Staff in Tehran* (footnote 59 above), pp. 30–33, paras. 62–68; *"Rainbow Warrior"* (footnote 46 above), pp. 266–267, paras. 107–110; and WTO, Report of the Panel, United States–Sections 301–310 of the Trade Act of 1974 (WT/DS152/R), 22 December 1999, paras. 7.41 et seq.

[74] See, e.g., *United States Diplomatic and Consular Staff in Tehran* (footnote 59 above), p. 29, paras. 56 and 58; and *Military and Paramilitary Activities in and against Nicaragua* (footnote 36 above), p. 51, para. 86.

[75] *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory, Advisory Opinion, 1932, P.C.I.J., Series A/B, No. 44*, p. 4.

[76] *Ibid.*, pp. 24–25. See also *"Lotus", Judgment No. 9, 1927, P.C.I.J., Series A, No. 10*, p. 24.

tional judicial decisions leave no doubt on that subject. In particular, PCIJ expressly recognized the principle in its first judgment, in the *S.S. "Wimbledon"* case. The Court rejected the argument of the German Government that the passage of the ship through the Kiel Canal would have constituted a violation of the German neutrality orders, observing that:

a neutrality order, issued by an individual State, could not prevail over the provisions of the Treaty of Peace. ... under Article 380 of the Treaty of Versailles, it was [Germany's] definite duty to allow [the passage of the *Wimbledon* through the Kiel Canal]. She could not advance her neutrality orders against the obligations which she had accepted under this Article.[77]

The principle was reaffirmed many times:

it is a generally accepted principle of international law that in the relations between Powers who are contracting Parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty;[78]

... it is certain that France cannot rely on her own legislation to limit the scope of her international obligations;[79]

... a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force.[80]

A different facet of the same principle was also affirmed in the advisory opinions on *Exchange of Greek and Turkish Populations*[81] and *Jurisdiction of the Courts of Danzig*.[82]

(4) ICJ has often referred to and applied the principle.[83] For example, in the *Reparation for Injuries* case, it noted that "[a]s the claim is based on the breach of an international obligation on the part of the Member held responsible … the Member cannot contend that this obligation is governed by municipal law".[84] In the *ELSI* case, a Chamber of the Court emphasized this rule, stating that:

Compliance with municipal law and compliance with the provisions of a treaty are different questions. What is a breach of treaty may be lawful in the municipal law and what is unlawful in the municipal law may be wholly innocent of violation of a treaty provision. Even had the Prefect held the requisition to be entirely justified in Italian law, this would not exclude the possibility that it was a violation of the FCN Treaty.[85]

Conversely, as the Chamber explained:

the fact that an act of a public authority may have been unlawful in municipal law does not necessarily mean that that act was unlawful in international law, as a breach of treaty or otherwise. A finding of the local courts that an act was unlawful may well be relevant to an argument that it was also arbitrary; but by itself, and without more, unlawfulness cannot be said to amount to arbitrariness … Nor does it follow from a finding by a municipal court that an act was unjustified, or unreasonable, or arbitrary, that that act is necessarily to be classed as arbitrary in international law, though the qualification given to the impugned act by a municipal authority may be a valuable indication.[86]

The principle has also been applied by numerous arbitral tribunals.[87]

(5) The principle was expressly endorsed in the work undertaken under the auspices of the League of Nations on the codification of State responsibility,[88] as well as in the work undertaken under the auspices of the United Nations on the codification of the rights and duties of States and the law of treaties. The Commission's draft Declaration on Rights and Duties of States, article 13, provided that:

Every State has the duty to carry out in good faith its obligations arising from treaties and other sources of international law, and it may not invoke provisions in its constitution or its laws as an excuse for failure to perform this duty.[89]

(6) Similarly this principle was endorsed in the 1969 Vienna Convention, article 27 of which provides that:

A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.[90]

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[77] *S.S. "Wimbledon"* (see footnote 34 above), pp. 29–30.

[78] *Greco-Bulgarian "Communities"*, *Advisory Opinion, 1930, P.C.I.J., Series B, No. 17*, p. 32.

[79] *Free Zones of Upper Savoy and the District of Gex, Order of 6 December 1930, P.C.I.J., Series A, No. 24*, p. 12; and *ibid., Judgment, 1932, P.C.I.J., Series A/B, No. 46*, p. 96, at p. 167.

[80] *Treatment of Polish Nationals* (see footnote 75 above), p. 24.

[81] *Exchange of Greek and Turkish Populations, Advisory Opinion, 1925, P.C.I.J., Series B, No. 10*, p. 20.

[82] *Jurisdiction of the Courts of Danzig, Advisory Opinion, 1928, P.C.I.J., Series B, No. 15*, pp. 26–27. See also the observations of Lord Finlay in *Acquisition of Polish Nationality, Advisory Opinion, 1923, P.C.I.J., Series B, No. 7*, p. 26.

[83] See *Fisheries, Judgment, I.C.J. Reports 1951*, p. 116, at p. 132; *Nottebohm, Preliminary Objection, Judgment, I.C.J. Reports 1953*, p. 111, at p. 123; *Application of the Convention of 1902 Governing the Guardianship of Infants, Judgment, I.C.J. Reports 1958*, p. 55, at p. 67; and *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory Opinion, I.C.J. Reports 1988*, p. 12, at pp. 34–35, para. 57.

[84] *Reparation for Injuries* (see footnote 38 above), at p. 180.

[85] *Elettronica Sicula S.p.A. (ELSI), Judgment, I.C.J. Reports 1989*, p. 15, at p. 51, para. 73.

[86] *Ibid.*, p. 74, para. 124.

[87] See, e.g., the Geneva Arbitration (the *"Alabama"* case), in Moore, *History and Digest*, vol. IV, p. 4144, at pp. 4156 and 4157 (1872); *Norwegian Shipowners' Claims (Norway* v. *United States of America)*, UNRIAA, vol. I (Sales No. 1948.V.2), p. 307, at p. 331 (1922); *Aguilar-Amory and Royal Bank of Canada Claims* (*Tinoco* case) *(Great Britain* v. *Costa Rica), ibid.*, p. 369, at p. 386 (1923); *Shufeldt Claim*, *ibid.*, vol. II (Sales No. 1949.V.1), p. 1079, at p. 1098 ("it is a settled principle of international law that a sovereign can not be permitted to set up one of his own municipal laws as a bar to a claim by a sovereign for a wrong done to the latter's subject") (1930); *Wollemborg Case*, *ibid.*, vol. XIV (Sales No. 65.V.4), p. 283, at p. 289 (1956); and *Flegenheimer*, *ibid.*, p. 327, at p. 360 (1958).

[88] In point I of the request for information on State responsibility sent to States by the Preparatory Committee for the 1930 Hague Conference it was stated:

"In particular, a State cannot escape its responsibility under international law, if such responsibility exists, by appealing to the provisions of its municipal law."

In their replies, States agreed expressly or implicitly with this principle (see League of Nations, Conference for the Codification of International Law, *Bases of Discussion for the Conference drawn up by the Preparatory Committee*, vol. III: *Responsibility of States for Damage caused in their Territory to the Person or Property of Foreigners* (document C.75.M.69.1929.V), p. 16). During the debate at the 1930 Hague Conference, States expressed general approval of the idea embodied in point I and the Third Committee of the Conference adopted article 5 to the effect that "A State cannot avoid international responsibility by invoking the state of its municipal law" (document C.351(c) M.145(c).1930.V; reproduced in *Yearbook ... 1956*, vol. II, p. 225, document A/CN.4/96, annex 3).

[89] See General Assembly resolution 375 (IV) of 6 December 1949, annex. For the debate in the Commission, see *Yearbook ... 1949*, pp. 105–106, 150 and 171. For the debate in the Assembly, see *Official Records of the General Assembly, Fourth Session, Sixth Committee*, 168th–173rd meetings, 18–25 October 1949; 175th–183rd meetings, 27 October–3 November 1949; and *ibid.*, *Fourth Session, Plenary Meetings*, 270th meeting, 6 December 1949.

[90] Article 46 of the Convention provides for the invocation of provisions of internal law regarding competence to conclude treaties in limited circumstances, viz., where the violation of such provisions "was manifest and concerned a rule of … internal law of fundamental importance".

(7) The rule that the characterization of conduct as unlawful in international law cannot be affected by the characterization of the same act as lawful in internal law makes no exception for cases where rules of international law require a State to conform to the provisions of its internal law, for instance by applying to aliens the same legal treatment as to nationals. It is true that in such a case, compliance with internal law is relevant to the question of international responsibility. But this is because the rule of international law makes it relevant, e.g. by incorporating the standard of compliance with internal law as the applicable international standard or as an aspect of it. Especially in the fields of injury to aliens and their property and of human rights, the content and application of internal law will often be relevant to the question of international responsibility. In every case it will be seen on analysis that either the provisions of internal law are relevant as facts in applying the applicable international standard, or else that they are actually incorporated in some form, conditionally or unconditionally, into that standard.

(8) As regards the wording of the rule, the formulation "The municipal law of a State cannot be invoked to prevent an act of that State from being characterized as wrongful in international law", which is similar to article 5 of the draft adopted on first reading at the 1930 Hague Conference and also to article 27 of the 1969 Vienna Convention, has the merit of making it clear that States cannot use their internal law as a means of escaping international responsibility. On the other hand, such a formulation sounds like a rule of procedure and is inappropriate for a statement of principle. Issues of the invocation of responsibility belong to Part Three, whereas this principle addresses the underlying question of the origin of responsibility. In addition, there are many cases where issues of internal law are relevant to the existence or otherwise of responsibility. As already noted, in such cases it is international law which determines the scope and limits of any reference to internal law. This element is best reflected by saying, first, that the characterization of State conduct as internationally wrongful is governed by international law, and secondly by affirming that conduct which is characterized as wrongful under international law cannot be excused by reference to the legality of that conduct under internal law.

(9) As to terminology, in the English version the term "internal law" is preferred to "municipal law", because the latter is sometimes used in a narrower sense, and because the 1969 Vienna Convention speaks of "internal law". Still less would it be appropriate to use the term "national law", which in some legal systems refers only to the laws emanating from the central legislature, as distinct from provincial, cantonal or local authorities. The principle in article 3 applies to all laws and regulations adopted within the framework of the State, by whatever authority and at whatever level.[91] In the French version the expression *droit interne* is preferred to *législation interne* and *loi interne*, because it covers all provisions of the internal legal order, whether written or unwritten and whether they take the form of constitutional or legislative rules, administrative decrees or judicial decisions.

[91] Cf. *LaGrand (Germany* v. *United States of America), Provisional Measures, Order of 3 March 1999, I.C.J. Reports 1999*, p. 9, at p. 16, para. 28.

## Chapter II

## ATTRIBUTION OF CONDUCT TO A STATE

### *Commentary*

(1) In accordance with article 2, one of the essential conditions for the international responsibility of a State is that the conduct in question is attributable to the State under international law. Chapter II defines the circumstances in which such attribution is justified, i.e. when conduct consisting of an act or omission or a series of acts or omissions is to be considered as the conduct of the State.

(2) In theory, the conduct of all human beings, corporations or collectivities linked to the State by nationality, habitual residence or incorporation might be attributed to the State, whether or not they have any connection to the Government. In international law, such an approach is avoided, both with a view to limiting responsibility to conduct which engages the State as an organization, and also so as to recognize the autonomy of persons acting on their own account and not at the instigation of a public authority. Thus, the general rule is that the only conduct attributed to the State at the international level is that of its organs of government, or of others who have acted under the direction, instigation or control of those organs, i.e. as agents of the State.[92]

(3) As a corollary, the conduct of private persons is not as such attributable to the State. This was established, for example, in the *Tellini* case of 1923. The Council of the League of Nations referred to a Special Commission of Jurists certain questions arising from an incident between Italy and Greece.[93] This involved the assassination on Greek territory of the Chairman and several members of an international commission entrusted with the task of delimiting the Greek-Albanian border. In reply to question five, the Commission stated that:

> The responsibility of a State is only involved by the commission in its territory of a political crime against the persons of foreigners if the State has neglected to take all reasonable measures for the prevention of the crime and the pursuit, arrest and bringing to justice of the criminal.[94]

(4) The attribution of conduct to the State as a subject of international law is based on criteria determined by international law and not on the mere recognition of a link

[92] See, e.g., I. Brownlie, *System of the Law of Nations: State Responsibility*, Part I (Oxford, Clarendon Press, 1983), pp. 132–166; D. D. Caron, "The basis of responsibility: attribution and other trans-substantive rules", *The Iran-United States Claims Tribunal: Its Contribution to the Law of State Responsibility*, R. B. Lillich and D. B. Magraw, eds. (Irvington-on-Hudson, N.Y., Transnational, 1998), p. 109; L. Condorelli, "L'imputation à l'État d'un fait internationalement illicite : solutions classiques et nouvelles tendances", *Recueil des cours…, 1984–VI* (Dordrecht, Martinus Nijhoff, 1988), vol. 189, p. 9; H. Dipla, *La responsabilité de l'État pour violation des droits de l'homme: problèmes d'imputation* (Paris, Pedone, 1994); A. V. Freeman, "Responsibility of States for unlawful acts of their armed forces", *Recueil des cours…, 1955–II* (Leiden, Sijthoff, 1956), vol. 88, p. 261; and F. Przetacznik, "The international responsibility of States for the unauthorized acts of their organs", *Sri Lanka Journal of International Law*, vol. 1 (June 1989), p. 151.

[93] League of Nations, *Official Journal*, 4th Year, No. 11 (November 1923), p. 1349.

[94] *Ibid.*, 5th Year, No. 4 (April 1924), p. 524. See also the *Janes* case, UNRIAA, vol. IV (Sales No. 1951.V.1), p. 82 (1925).

of factual causality. As a normative operation, attribution must be clearly distinguished from the characterization of conduct as internationally wrongful. Its concern is to establish that there is an act of the State for the purposes of responsibility. To show that conduct is attributable to the State says nothing, as such, about the legality or otherwise of that conduct, and rules of attribution should not be formulated in terms which imply otherwise. But the different rules of attribution stated in chapter II have a cumulative effect, such that a State may be responsible for the effects of the conduct of private parties, if it failed to take necessary measures to prevent those effects. For example, a receiving State is not responsible, as such, for the acts of private individuals in seizing an embassy, but it will be responsible if it fails to take all necessary steps to protect the embassy from seizure, or to regain control over it.[95] In this respect there is often a close link between the basis of attribution and the particular obligation said to have been breached, even though the two elements are analytically distinct.

(5) The question of attribution of conduct to the State for the purposes of responsibility is to be distinguished from other international law processes by which particular organs are authorized to enter into commitments on behalf of the State. Thus the Head of State or Government or the minister of foreign affairs is regarded as having authority to represent the State without any need to produce full powers.[96] Such rules have nothing to do with attribution for the purposes of State responsibility. In principle, the State's responsibility is engaged by conduct incompatible with its international obligations, irrespective of the level of administration or government at which the conduct occurs.[97] Thus, the rules concerning attribution set out in this chapter are formulated for this particular purpose, and not for other purposes for which it may be necessary to define the State or its Government.

(6) In determining what constitutes an organ of a State for the purposes of responsibility, the internal law and practice of each State are of prime importance. The structure of the State and the functions of its organs are not, in general, governed by international law. It is a matter for each State to decide how its administration is to be structured and which functions are to be assumed by government. But while the State remains free to determine its internal structure and functions through its own law and practice, international law has a distinct role. For example, the conduct of certain institutions performing public functions and exercising public powers (e.g. the police) is attributed to the State even if those institutions are regarded in internal law as autonomous and independent of the executive government.[98] Conduct engaged in by organs of the State in excess of their competence may also be attributed to the State under international law, whatever the position may be under internal law.[99]

(7) The purpose of this chapter is to specify the conditions under which conduct is attributed to the State as a subject of international law for the purposes of determining its international responsibility. Conduct is thereby attributed to the State as a subject of international law and not as a subject of internal law. In internal law, it is common for the "State" to be subdivided into a series of distinct legal entities. For example, ministries, departments, component units of all kinds, State commissions or corporations may have separate legal personality under internal law, with separate accounts and separate liabilities. But international law does not permit a State to escape its international responsibilities by a mere process of internal subdivision. The State as a subject of international law is held responsible for the conduct of all the organs, instrumentalities and officials which form part of its organization and act in that capacity, whether or not they have separate legal personality under its internal law.

(8) Chapter II consists of eight articles. Article 4 states the basic rule attributing to the State the conduct of its organs. Article 5 deals with conduct of entities empowered to exercise the governmental authority of a State, and article 6 deals with the special case where an organ of one State is placed at the disposal of another State and empowered to exercise the governmental authority of that State. Article 7 makes it clear that the conduct of organs or entities empowered to exercise governmental authority is attributable to the State even if it was carried out outside the authority of the organ or person concerned or contrary to instructions. Articles 8 to 11 then deal with certain additional cases where conduct, not that of a State organ or entity, is nonetheless attributed to the State in international law. Article 8 deals with conduct carried out on the instructions of a State organ or under its direction or control. Article 9 deals with certain conduct involving elements of governmental authority, carried out in the absence of the official authorities. Article 10 concerns the special case of responsibility in defined circumstances for the conduct of insurrectional movements. Article 11 deals with conduct not attributable to the State under one of the earlier articles which is nonetheless adopted by the State, expressly or by conduct, as its own.

(9) These rules are cumulative but they are also limitative. In the absence of a specific undertaking or guarantee (which would be a *lex specialis*[100]), a State is not responsible for the conduct of persons or entities in circumstances not covered by this chapter. As the Iran-United States Claims Tribunal has affirmed, "in order to attribute an act to the State, it is necessary to identify with reasonable certainty the actors and their association with the State".[101] This follows already from the provisions of article 2.

[95] See *United States Diplomatic and Consular Staff in Tehran* (footnote 59 above).

[96] See articles 7, 8, 46 and 47 of the 1969 Vienna Convention.

[97] The point was emphasized, in the context of federal States, in *LaGrand* (see footnote 91 above). It is not of course limited to federal States. See further article 5 and commentary.

[98] See paragraph (11) of the commentary to article 4; see also article 5 and commentary.

[99] See article 7 and commentary.

[100] See article 55 and commentary.

[101] *Kenneth P. Yeager* v. *The Islamic Republic of Iran*, Iran-U.S. C.T.R., vol. 17 , p. 92, at pp. 101–102 (1987).

### *Article 4. Conduct of organs of a State*

**1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.**

**2. An organ includes any person or entity which has that status in accordance with the internal law of the State.**

*Commentary*

(1) *Paragraph 1* of article 4 states the first principle of attribution for the purposes of State responsibility in international law—that the conduct of an organ of the State is attributable to that State. The reference to a "State organ" covers all the individual or collective entities which make up the organization of the State and act on its behalf. It includes an organ of any territorial governmental entity within the State on the same basis as the central governmental organs of that State: this is made clear by the final phrase.

(2) Certain acts of individuals or entities which do not have the status of organs of the State may be attributed to the State in international law, and these cases are dealt with in later articles of this chapter. But the rule is nonetheless a point of departure. It defines the core cases of attribution, and it is a starting point for other cases. For example, under article 8 conduct which is authorized by the State, so as to be attributable to it, must have been authorized by an organ of the State, either directly or indirectly.

(3) That the State is responsible for the conduct of its own organs, acting in that capacity, has long been recognized in international judicial decisions. In the *Moses* case, for example, a decision of a Mexico-United States Mixed Claims Commission, Umpire Lieber said: "An officer or person in authority represents *pro tanto* his government, which in an international sense is the aggregate of all officers and men in authority."[102] There have been many statements of the principle since then.[103]

(4) The replies by Governments to the Preparatory Committee for the 1930 Hague Conference[104] were unanimously of the view that the actions or omissions of organs of the State must be attributed to it. The Third Committee of the Conference adopted unanimously on first reading an article 1, which provided that international responsibility shall be incurred by a State as a consequence of "any failure on the part of its organs to carry out the international obligations of the State".[105]

(5) The principle of the unity of the State entails that the acts or omissions of all its organs should be regarded as acts or omissions of the State for the purposes of international responsibility. It goes without saying that there is no category of organs specially designated for the commission of internationally wrongful acts, and virtually any State organ may be the author of such an act. The diversity of international obligations does not permit any general distinction between organs which can commit internationally wrongful acts and those which cannot. This is reflected in the closing words of paragraph 1, which clearly reflect the rule of international law in the matter.

(6) Thus, the reference to a State organ in article 4 is intended in the most general sense. It is not limited to the organs of the central government, to officials at a high level or to persons with responsibility for the external relations of the State. It extends to organs of government of whatever kind or classification, exercising whatever functions, and at whatever level in the hierarchy, including those at provincial or even local level. No distinction is made for this purpose between legislative, executive or judicial organs. Thus, in the *Salvador Commercial Company* case, the tribunal said that:

> a State is responsible for the acts of its rulers, whether they belong to the legislative, executive, or judicial department of the Government, so far as the acts are done in their official capacity.[106]

ICJ has also confirmed the rule in categorical terms. In *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, it said:

> According to a well-established rule of international law, the conduct of any organ of a State must be regarded as an act of that State. This rule … is of a customary character.[107]

In that case the Court was principally concerned with decisions of State courts, but the same principle applies to legislative and executive acts.[108] As PCIJ said in *Certain German Interests in Polish Upper Silesia (Merits)*:

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[102] Moore, *History and Digest*, vol. III, p. 3127, at p. 3129 (1871).

[103] See, e.g., *Claims of Italian Nationals* (footnote 41 above); *Salvador Commercial Company*, UNRIAA, vol. XV (Sales No. 66.V.3), p. 455, at p. 477 (1902); and *Finnish Shipowners (Great Britain/Finland)*, *ibid.*, vol. III (Sales No. 1949.V.2), p. 1479, at p. 1501 (1934).

[104] League of Nations, Conference for the Codification of International Law, *Bases of Discussion …* (see footnote 88 above), pp. 25, 41 and 52; *Supplement to Volume III: Replies made by the Governments to the Schedule of Points; Replies of Canada and the United States of America* (document C.75(a)M.69(a).1929.V), pp. 2–3 and 6.

[105] Reproduced in *Yearbook ... 1956*, vol. II, p. 225, document A/CN.4/96, annex 3.

[106] See *Salvador Commercial Company* (footnote 103 above). See also *Chattin* case, UNRIAA, vol. IV (Sales No. 1951.V.1), p. 282, at pp. 285–286 (1927); and *Dispute concerning the interpretation of article 79 of the Treaty of Peace*, *ibid.*, vol. XIII (Sales No. 64.V.3), p. 389, at p. 438 (1955).

[107] *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* (see footnote 56 above), p. 87, para. 62, referring to the draft articles on State responsibility, article 6, now embodied in article 4.

[108] As to legislative acts, see, e.g., *German Settlers in Poland* (footnote 65 above), at pp. 35–36; *Treatment of Polish Nationals* (footnote 75 above), at pp. 24–25; *Phosphates in Morocco* (footnote 34 above), at pp. 25–26; and *Rights of Nationals of the United States of America in Morocco, Judgment, I.C.J. Reports 1952*, p. 176, at pp. 193–194. As to executive acts, see, e.g., *Military and Paramilitary Activities in and against Nicaragua* (footnote 36 above); and *ELSI* (footnote 85 above). As to judicial acts, see, e.g., *"Lotus"* (footnote 76 above); *Jurisdiction of the Courts of Danzig* (footnote 82 above); and *Ambatielos, Merits, Judgment, I.C.J. Reports 1953*, p. 10, at pp. 21–22. In some cases, the conduct in question may involve both executive and judicial acts; see, e.g., *Application of the Convention of 1902* (footnote 83 above) at p. 65.

From the standpoint of International Law and of the Court which is its organ, municipal laws ... express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures.[109]

Thus, article 4 covers organs, whether they exercise "legislative, executive, judicial or any other functions". This language allows for the fact that the principle of the separation of powers is not followed in any uniform way, and that many organs exercise some combination of public powers of a legislative, executive or judicial character. Moreover, the term is one of extension, not limitation, as is made clear by the words "or any other functions".[110] It is irrelevant for the purposes of attribution that the conduct of a State organ may be classified as "commercial" or as *acta iure gestionis*. Of course, the breach by a State of a contract does not as such entail a breach of international law.[111] Something further is required before international law becomes relevant, such as a denial of justice by the courts of the State in proceedings brought by the other contracting party. But the entry into or breach of a contract by a State organ is nonetheless an act of the State for the purposes of article 4,[112] and it might in certain circumstances amount to an internationally wrongful act.[113]

(7) Nor is any distinction made at the level of principle between the acts of "superior" and "subordinate" officials, provided they are acting in their official capacity. This is expressed in the phrase "whatever position it holds in the organization of the State" in article 4. No doubt lower-level officials may have a more restricted scope of activity and they may not be able to make final decisions. But conduct carried out by them in their official capacity is nonetheless attributable to the State for the purposes of article 4. Mixed commissions after the Second World War often had to consider the conduct of minor organs of the State, such as administrators of enemy property, mayors and police officers, and consistently treated the acts of such persons as attributable to the State.[114]

(8) Likewise, the principle in article 4 applies equally to organs of the central government and to those of regional or local units. This principle has long been recognized. For example, the Franco-Italian Conciliation Commission in the *Heirs of the Duc de Guise* case said:

For the purposes of reaching a decision in the present case it matters little that the decree of 29 August 1947 was not enacted by the Italian State but by the region of Sicily. For the Italian State is responsible for implementing the Peace Treaty, even for Sicily, notwithstanding the autonomy granted to Sicily in internal relations under the public law of the Italian Republic.[115]

This principle was strongly supported during the preparatory work for the 1930 Hague Conference. Governments were expressly asked whether the State became responsible as a result of "[a]cts or omissions of bodies exercising public functions of a legislative or executive character (communes, provinces, etc.)". All answered in the affirmative.[116]

(9) It does not matter for this purpose whether the territorial unit in question is a component unit of a federal State or a specific autonomous area, and it is equally irrelevant whether the internal law of the State in question gives the federal parliament power to compel the component unit to abide by the State's international obligations. The award in the *"Montijo"* case is the starting point for a consistent series of decisions to this effect.[117] The French-Mexican Claims Commission in the *Pellat* case reaffirmed "the principle of the international responsibility ... of a federal State for all the acts of its separate States which give rise to claims by foreign States" and noted specially that such responsibility "... cannot be denied, not even in cases where the federal Constitution denies the central Government the right of control over the separate States or the right to require them to comply, in their conduct, with the rules of international law".[118] That rule has since been consistently applied. Thus, for example, in the *LaGrand* case, ICJ said:

Whereas the international responsibility of a State is engaged by the action of the competent organs and authorities acting in that State, whatever they may be; whereas the United States should take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings; whereas, according to the information available to the Court, implementation of the measures indicated in the present Order falls within the jurisdiction of the Governor of Arizona; whereas the Government of the United States is consequently under the obligation to transmit the present Order to the said Governor; whereas the Governor of Arizona is under the obligation to act in conformity with the international undertakings of the United States.[119]

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[109] *Certain German Interests in Polish Upper Silesia, Merits, Judgment No. 7, 1926, P.C.I.J., Series A, No. 7*, at p. 19.

[110] These functions might involve, e.g. the giving of administrative guidance to the private sector. Whether such guidance involves a breach of an international obligation may be an issue, but as "guidance" it is clearly attributable to the State. See, e.g., GATT, Report of the Panel, Japan–Trade in Semi-conductors, 24 March 1988, paras. 110–111; and WTO, Report of the Panel, Japan–Measures affecting Consumer Photographic Film and Paper (WT/DS44/R), paras. 10.12–10.16.

[111] See article 3 and commentary.

[112] See, e.g., the decisions of the European Court of Human Rights in *Swedish Engine Drivers' Union* v. *Sweden, Eur. Court H.R., Series A, No. 20* (1976), at p. 14; and *Schmidt and Dahlström* v. *Sweden, ibid., Series A, No. 21* (1976), at p. 15.

[113] The irrelevance of the classification of the acts of State organs as *iure imperii* or *iure gestionis* was affirmed by all those members of the Sixth Committee who responded to a specific question on this issue from the Commission (see *Yearbook ... 1998*, vol. II (Part Two), p. 17, para. 35).

[114] See, e.g., the *Currie* case, UNRIAA, vol. XIV (Sales No. 65.V.4), p. 21, at p. 24 (1954); *Dispute concerning the interpretation of article 79* (footnote 106 above), at pp. 431–432; and *Mossé* case, UNRIAA, vol. XIII (Sales No. 64.V.3), p. 486, at pp. 492–493 (1953). For earlier decisions, see the *Roper* case, *ibid.*, vol. IV (Sales No. 1951.V.1), p. 145 (1927); *Massey, ibid.*, p. 155 (1927); *Way, ibid.*, p. 391, at p. 400 (1928); and *Baldwin, ibid.*, vol. VI (Sales No. 1955.V.3), p. 328 (1933). Cf. the consideration of the requisition of a plant by the Mayor of Palermo in *ELSI* (see footnote 85 above), e.g. at p. 50, para. 70.

[115] UNRIAA, vol. XIII (Sales No. 64.V.3), p. 150, at p. 161 (1951). For earlier decisions, see, e.g., the *Pieri Dominique and Co.* case, *ibid.*, vol. X (Sales No. 60.V.4), p. 139, at p. 156 (1905).

[116] League of Nations, Conference for the Codification of International Law, *Bases of Discussion …* (see footnote 104 above), p. 90; *Supplement to Vol. III …* (*ibid.*), pp. 3 and 18.

[117] See Moore, *History and Digest*, vol. II, p. 1440, at p. 1440 (1874). See also *De Brissot and others*, Moore, *History and Digest*, vol. III, p. 2967, at pp. 2970–2971 (1855); *Pieri Dominique and Co.* (footnote 115 above), at pp. 156–157; *Davy* case, UNRIAA, vol. IX (Sales No. 59.V.5), p. 467, at p. 468 (1903); *Janes* case (footnote 94 above); *Swinney*, UNRIAA, vol. IV (Sales No. 1951.V.1), p. 101 (1925); *Quintanilla*, *ibid.*, p. 101, at p. 103 (1925); *Youmans*, *ibid.*, p. 110, at p. 116 (1925); *Mallén*, *ibid.*, p. 173, at p. 177 (1927); *Venable*, *ibid.*, p. 218, at p. 230 (1925); and *Tribolet*, *ibid.*, p. 598, at p. 601 (1925).

[118] UNRIAA, vol. V (Sales No. 1952.V.3), p. 534, at p. 536 (1929).

[119] *LaGrand, Provisional Measures* (see footnote 91 above). See also *LaGrand (Germany* v. *United States of America), Judgment, I.C.J.Reports 2001*, p. 466, at p. 495, para. 81.

(10) The reasons for this position are reinforced by the fact that federal States vary widely in their structure and distribution of powers, and that in most cases the constituent units have no separate international legal personality of their own (however limited), nor any treaty-making power. In those cases where the constituent unit of a federation is able to enter into international agreements on its own account,[120] the other party may well have agreed to limit itself to recourse against the constituent unit in the event of a breach. In that case the matter will not involve the responsibility of the federal State and will fall outside the scope of the present articles. Another possibility is that the responsibility of the federal State under a treaty may be limited by the terms of a federal clause in the treaty.[121] This is clearly an exception to the general rule, applicable solely in relations between the States parties to the treaty and in the matters which the treaty covers. It has effect by virtue of the *lex specialis* principle, dealt with in article 55.

(11) *Paragraph 2* explains the relevance of internal law in determining the status of a State organ. Where the law of a State characterizes an entity as an organ, no difficulty will arise. On the other hand, it is not sufficient to refer to internal law for the status of State organs. In some systems the status and functions of various entities are determined not only by law but also by practice, and reference exclusively to internal law would be misleading. The internal law of a State may not classify, exhaustively or at all, which entities have the status of "organs". In such cases, while the powers of an entity and its relation to other bodies under internal law will be relevant to its classification as an "organ", internal law will not itself perform the task of classification. Even if it does so, the term "organ" used in internal law may have a special meaning, and not the very broad meaning it has under article 4. For example, under some legal systems the term "government" refers only to bodies at the highest level such as the Head of State and the cabinet of ministers. In others, the police have a special status, independent of the executive; this cannot mean that for international law purposes they are not organs of the State.[122] Accordingly, a State cannot avoid responsibility for the conduct of a body which does in truth act as one of its organs merely by denying it that status under its own law. This result is achieved by the use of the word "includes" in paragraph 2.

(12) The term "person or entity" is used in article 4, paragraph 2, as well as in articles 5 and 7. It is used in a broad sense to include any natural or legal person, including an individual office holder, a department, commission or other body exercising public authority, etc. The term "entity" is used in a similar sense[123] in the draft articles on jurisdictional immunities of States and their property, adopted in 1991.

(13) Although the principle stated in article 4 is clear and undoubted, difficulties can arise in its application. A particular problem is to determine whether a person who is a State organ acts in that capacity. It is irrelevant for this purpose that the person concerned may have had ulterior or improper motives or may be abusing public power. Where such a person acts in an apparently official capacity, or under colour of authority, the actions in question will be attributable to the State. The distinction between unauthorized conduct of a State organ and purely private conduct has been clearly drawn in international arbitral decisions. For example, the award of the Mexico-United States General Claims Commission in the *Mallén* case involved, first, the act of an official acting in a private capacity and, secondly, another act committed by the same official in his official capacity, although in an abusive way.[124] The latter action was, and the former was not, held attributable to the State. The French-Mexican Claims Commission in the *Caire* case excluded responsibility only in cases where "the act had no connexion with the official function and was, in fact, merely the act of a private individual".[125] The case of purely private conduct should not be confused with that of an organ functioning as such but acting *ultra vires* or in breach of the rules governing its operation. In this latter case, the organ is nevertheless acting in the name of the State: this principle is affirmed in article 7.[126] In applying this test, of course, each case will have to be dealt with on the basis of its own facts and circumstances.

### *Article 5. Conduct of persons or entities exercising elements of governmental authority*

**The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.**

*Commentary*

(1) Article 5 deals with the attribution to the State of conduct of bodies which are not State organs in the sense of article 4, but which are nonetheless authorized to exercise governmental authority. The article is intended to take account of the increasingly common phenomenon of parastatal entities, which exercise elements of governmental authority in place of State organs, as well as situations where former State corporations have been privatized but retain certain public or regulatory functions.

[120] See, e.g., articles 56, paragraph 3, and 172, paragraph 3, of the Constitution of the Swiss Confederation of 18 April 1999.

[121] See, e.g., article 34 of the Convention for the Protection of the World Cultural and Natural Heritage.

[122] See, e.g., the *Church of Scientology* case, Germany, Federal Supreme Court, Judgment of 26 September 1978, case No. *VI ZR* 267/76, *Neue Juristische Wochenschrift*, No. 21 (May 1979), p. 1101; ILR, vol. 65, p. 193; and *Propend Finance Pty Ltd.* v. *Sing*, England, Court of Appeal, ILR, vol. 111, p. 611 (1997). These were State immunity cases, but the same principle applies in the field of State responsibility.

[123] See *Yearbook … 1991*, vol. II (Part Two), pp. 14–18.

[124] *Mallén* (see footnote 117 above), at p. 175.

[125] UNRIAA, vol. V (Sales No. 1952.V.3), p. 516, at p. 531 (1929). See also the *Bensley* case in Moore, *History and Digest*, vol. III, p. 3018 (1850) ("a wanton trespass … under no color of official proceedings, and without any connection with his official duties"); and the *Castelain* case *ibid.*, p. 2999 (1880). See further article 7 and commentary.

[126] See paragraph (7) of the commentary to article 7.

(2) The generic term "entity" reflects the wide variety of bodies which, though not organs, may be empowered by the law of a State to exercise elements of governmental authority. They may include public corporations, semi-public entities, public agencies of various kinds and even, in special cases, private companies, provided that in each case the entity is empowered by the law of the State to exercise functions of a public character normally exercised by State organs, and the conduct of the entity relates to the exercise of the governmental authority concerned. For example, in some countries private security firms may be contracted to act as prison guards and in that capacity may exercise public powers such as powers of detention and discipline pursuant to a judicial sentence or to prison regulations. Private or State-owned airlines may have delegated to them certain powers in relation to immigration control or quarantine. In one case before the Iran-United States Claims Tribunal, an autonomous foundation established by the State held property for charitable purposes under close governmental control; its powers included the identification of property for seizure. It was held that it was a public and not a private entity, and therefore within the tribunal's jurisdiction; with respect to its administration of allegedly expropriated property, it would in any event have been covered by article 5.[127]

(3) The fact that an entity can be classified as public or private according to the criteria of a given legal system, the existence of a greater or lesser State participation in its capital, or, more generally, in the ownership of its assets, the fact that it is not subject to executive control—these are not decisive criteria for the purpose of attribution of the entity's conduct to the State. Instead, article 5 refers to the true common feature, namely that these entities are empowered, if only to a limited extent or in a specific context, to exercise specified elements of governmental authority.

(4) Parastatal entities may be considered a relatively modern phenomenon, but the principle embodied in article 5 has been recognized for some time. For example, the replies to the request for information made by the Preparatory Committee for the 1930 Hague Conference indicated strong support from some Governments for the attribution to the State of the conduct of autonomous bodies exercising public functions of an administrative or legislative character. The German Government, for example, asserted that:

> when, by delegation of powers, bodies act in a public capacity, *e.g.*, police an area … the principles governing the responsibility of the State for its organs apply with equal force. From the point of view of international law, it does not matter whether a State polices a given area with its own police or entrusts this duty, to a greater or less extent, to autonomous bodies.[128]

The Preparatory Committee accordingly prepared the following basis of discussion, though the Third Committee of the Conference was unable in the time available to examine it:

> A State is responsible for damage suffered by a foreigner as the result of acts or omissions of such … autonomous institutions as exercise public functions of a legislative or administrative character, if such acts or omissions contravene the international obligations of the State.[129]

(5) The justification for attributing to the State under international law the conduct of "parastatal" entities lies in the fact that the internal law of the State has conferred on the entity in question the exercise of certain elements of the governmental authority. If it is to be regarded as an act of the State for purposes of international responsibility, the conduct of an entity must accordingly concern governmental activity and not other private or commercial activity in which the entity may engage. Thus, for example, the conduct of a railway company to which certain police powers have been granted will be regarded as an act of the State under international law if it concerns the exercise of those powers, but not if it concerns other activities (e.g. the sale of tickets or the purchase of rolling stock).

(6) Article 5 does not attempt to identify precisely the scope of "governmental authority" for the purpose of attribution of the conduct of an entity to the State. Beyond a certain limit, what is regarded as "governmental" depends on the particular society, its history and traditions. Of particular importance will be not just the content of the powers, but the way they are conferred on an entity, the purposes for which they are to be exercised and the extent to which the entity is accountable to government for their exercise. These are essentially questions of the application of a general standard to varied circumstances.

(7) The formulation of article 5 clearly limits it to entities which are empowered by internal law to exercise governmental authority. This is to be distinguished from situations where an entity acts under the direction or control of the State, which are covered by article 8, and those where an entity or group seizes power in the absence of State organs but in situations where the exercise of governmental authority is called for: these are dealt with in article 9. For the purposes of article 5, an entity is covered even if its exercise of authority involves an independent discretion or power to act; there is no need to show that the conduct was in fact carried out under the control of the State. On the other hand, article 5 does not extend to cover, for example, situations where internal law authorizes or justifies certain conduct by way of self-help or self-defence; i.e. where it confers powers upon or authorizes conduct by citizens or residents generally. The internal law in question must specifically authorize the conduct as involving the exercise of public authority; it is not enough that it permits activity as part of the general regulation of the affairs of the community. It is accordingly a narrow category.

### *Article 6. Conduct of organs placed at the disposal of a State by another State*

**The conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ is**

[127] *Hyatt International Corporation* v. *The Government of the Islamic Republic of Iran*, Iran-U.S. C.T.R., vol. 9, p. 72, at pp. 88–94 (1985).

[128] League of Nations, Conference for the Codification of International Law, *Bases of Discussion …* (see footnote 88 above), p. 90. The German Government noted that these remarks would extend to the situation where "the State, as an exceptional measure, invests private organisations with public powers and duties or authorities [*sic*] them to exercise sovereign rights, as in the case of private railway companies permitted to maintain a police force", *ibid.*

[129] *Ibid.*, p. 92.

**acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed.**

*Commentary*

(1) Article 6 deals with the limited and precise situation in which an organ of a State is effectively put at the disposal of another State so that the organ may temporarily act for its benefit and under its authority. In such a case, the organ, originally that of one State, acts exclusively for the purposes of and on behalf of another State and its conduct is attributed to the latter State alone.

(2) The words "placed at the disposal of" in article 6 express the essential condition that must be met in order for the conduct of the organ to be regarded under international law as an act of the receiving and not of the sending State. The notion of an organ "placed at the disposal of" the receiving State is a specialized one, implying that the organ is acting with the consent, under the authority of and for the purposes of the receiving State. Not only must the organ be appointed to perform functions appertaining to the State at whose disposal it is placed, but in performing the functions entrusted to it by the beneficiary State, the organ must also act in conjunction with the machinery of that State and under its exclusive direction and control, rather than on instructions from the sending State. Thus article 6 is not concerned with ordinary situations of inter-State cooperation or collaboration, pursuant to treaty or otherwise.[130]

(3) Examples of situations that could come within this limited notion of a State organ "placed at the disposal" of another State might include a section of the health service or some other unit placed under the orders of another country to assist in overcoming an epidemic or natural disaster, or judges appointed in particular cases to act as judicial organs of another State. On the other hand, mere aid or assistance offered by organs of one State to another on the territory of the latter is not covered by article 6. For example, armed forces may be sent to assist another State in the exercise of the right of collective self-defence or for other purposes. Where the forces in question remain under the authority of the sending State, they exercise elements of the governmental authority of that State and not of the receiving State. Situations can also arise where the organ of one State acts on the joint instructions of its own and another State, or there may be a single entity which is a joint organ of several States. In these cases, the conduct in question is attributable to both States under other articles of this chapter.[131]

(4) Thus, what is crucial for the purposes of article 6 is the establishment of a functional link between the organ in question and the structure or authority of the receiving State. The notion of an organ "placed at the disposal" of another State excludes the case of State organs, sent to another State for the purposes of the former State or even for shared purposes, which retain their own autonomy and status: for example, cultural missions, diplomatic or consular missions, foreign relief or aid organizations. Also excluded from the ambit of article 6 are situations in which functions of the "beneficiary" State are performed without its consent, as when a State placed in a position of dependence, territorial occupation or the like is compelled to allow the acts of its own organs to be set aside and replaced to a greater or lesser extent by those of the other State.[132]

(5) There are two further criteria that must be met for article 6 to apply. First, the organ in question must possess the status of an organ of the sending State; and secondly its conduct must involve the exercise of elements of the governmental authority of the receiving State. The first of these conditions excludes from the ambit of article 6 the conduct of private entities or individuals which have never had the status of an organ of the sending State. For example, experts or advisers placed at the disposal of a State under technical assistance programmes do not usually have the status of organs of the sending State. The second condition is that the organ placed at the disposal of a State by another State must be "acting in the exercise of elements of the governmental authority" of the receiving State. There will only be an act attributable to the receiving State where the conduct of the loaned organ involves the exercise of the governmental authority of that State. By comparison with the number of cases of cooperative action by States in fields such as mutual defence, aid and development, article 6 covers only a specific and limited notion of "transferred responsibility". Yet, in State practice the situation is not unknown.

(6) In the *Chevreau* case, a British consul in Persia, temporarily placed in charge of the French consulate, lost some papers entrusted to him. On a claim being brought by France, Arbitrator Beichmann held that: "the British Government cannot be held responsible for negligence by its Consul in his capacity as the person in charge of the Consulate of another Power."[133] It is implicit in the Arbitrator's finding that the agreed terms on which the British Consul was acting contained no provision allocating responsibility for the Consul's acts. If a third State had brought a claim, the proper respondent in accordance with article 6 would have been the State on whose behalf the conduct in question was carried out.

(7) Similar issues were considered by the European Commission of Human Rights in two cases relating to the exercise by Swiss police in Liechtenstein of "delegated" powers.[134] At the relevant time Liechtenstein was not

[130] Thus, the conduct of Italy in policing illegal immigration at sea pursuant to an agreement with Albania was not attributable to Albania: *Xhavara and Others* v. *Italy and Albania*, application No. 39473/98, *Eur. Court H.R.*, decision of 11 January 2001. Conversely, the conduct of Turkey taken in the context of the Turkey-European Communities customs union was still attributable to Turkey: see WTO, Report of the Panel, Turkey: Restrictions on Imports of Textile and Clothing Products (WT/DS34/R), 31 May 1999, paras. 9.33–9.44.

[131] See also article 47 and commentary.

[132] For the responsibility of a State for directing, controlling or coercing the internationally wrongful act of another, see articles 17 and 18 and commentaries.

[133] UNRIAA, vol. II (Sales No. 1949.V.1), p. 1113, at p. 1141 (1931).

[134] *X and Y* v. *Switzerland*, application Nos. 7289/75 and 7349/76, decision of 14 July 1977; Council of Europe, European Commission of Human Rights, *Decisions and Reports*, vol. 9, p. 57; and *Yearbook of the European Convention on Human Rights, 1977*, vol. 20 (1978), p. 372, at pp. 402–406.

a party to the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), so that if the conduct was attributable only to Liechtenstein no breach of the Convention could have occurred. The Commission held the case admissible, on the basis that under the treaty governing the relations between Switzerland and Liechtenstein of 1923, Switzerland exercised its own customs and immigration jurisdiction in Liechtenstein, albeit with the latter's consent and in their mutual interest. The officers in question were governed exclusively by Swiss law and were considered to be exercising the public authority of Switzerland. In that sense, they were not "placed at the disposal" of the receiving State.[135]

(8) A further, long-standing example of a situation to which article 6 applies is the Judicial Committee of the Privy Council, which has acted as the final court of appeal for a number of independent States within the Commonwealth. Decisions of the Privy Council on appeal from an independent Commonwealth State will be attributable to that State and not to the United Kingdom. The Privy Council's role is paralleled by certain final courts of appeal acting pursuant to treaty arrangements.[136] There are many examples of judges seconded by one State to another for a time: in their capacity as judges of the receiving State, their decisions are not attributable to the sending State, even if it continues to pay their salaries.

(9) Similar questions could also arise in the case of organs of international organizations placed at the disposal of a State and exercising elements of that State's governmental authority. This is even more exceptional than the inter-State cases to which article 6 is limited. It also raises difficult questions of the relations between States and international organizations, questions which fall outside the scope of these articles. Article 57 accordingly excludes from the ambit of the articles all questions of the responsibility of international organizations or of a State for the acts of an international organization. By the same token, article 6 does not concern those cases where, for example, accused persons are transferred by a State to an international institution pursuant to treaty.[137] In cooperating with international institutions in such a case, the State concerned does not assume responsibility for their subsequent conduct.

### *Article 7. Excess of authority or contravention of instructions*

**The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.**

*Commentary*

(1) Article 7 deals with the important question of unauthorized or *ultra vires* acts of State organs or entities. It makes it clear that the conduct of a State organ or an entity empowered to exercise elements of the governmental authority, acting in its official capacity, is attributable to the State even if the organ or entity acted in excess of authority or contrary to instructions.

(2) The State cannot take refuge behind the notion that, according to the provisions of its internal law or to instructions which may have been given to its organs or agents, their actions or omissions ought not to have occurred or ought to have taken a different form. This is so even where the organ or entity in question has overtly committed unlawful acts under the cover of its official status or has manifestly exceeded its competence. It is so even if other organs of the State have disowned the conduct in question.[138] Any other rule would contradict the basic principle stated in article 3, since otherwise a State could rely on its internal law in order to argue that conduct, in fact carried out by its organs, was not attributable to it.

(3) The rule evolved in response to the need for clarity and security in international relations. Despite early equivocal statements in diplomatic practice and by arbitral tribunals,[139] State practice came to support the proposition, articulated by the British Government in response to an Italian request, that "all Governments should always be held responsible for all acts committed by their agents by virtue of their official capacity".[140] As the Spanish Government pointed out: "If this were not the case, one would end by authorizing abuse, for in most cases there would be no practical way of proving that the agent had or had not acted on orders received."[141] At this time the United States supported "a rule of international law that sovereigns are not liable, in diplomatic procedure, for damages to a foreigner when arising from the misconduct of agents acting out of the range not only of their real but

[135] See also *Drozd and Janousek* v. *France and Spain, Eur. Court H.R., Series A, No. 240* (1992), paras. 96 and 110. See also *Controller and Auditor-General* v. *Davison* (New Zealand, Court of Appeal), ILR, vol. 104 (1996), p. 526, at pp. 536–537 (Cooke, P.) and pp. 574–576 (Richardson, J.). An appeal to the Privy Council on other grounds was dismissed, *Brannigan* v. *Davison*, *ibid.*, vol. 108, p. 622.

[136] For example, Agreement relating to Appeals to the High Court of Australia from the Supreme Court of Nauru (Nauru, 6 September 1976) (United Nations, *Treaty Series*, vol. 1216, No. 19617, p. 151).

[137] See, e.g., article 89 of the Rome Statute of the International Criminal Court.

[138] See, e.g., the "Star and Herald" controversy, Moore, *Digest*, vol. VI, p. 775.

[139] In a number of early cases, international responsibility was attributed to the State for the conduct of officials without making it clear whether the officials had exceeded their authority: see, e.g., the following cases: *"Only Son"*, Moore, *History and Digest*, vol. IV, pp. 3404–3405; *"William Lee"*, *ibid.*, p. 3405; and *Donoughho's*, *ibid.*, vol. III, p. 3012. Where the question was expressly examined, tribunals did not consistently apply any single principle: see, e.g., the *Lewis's* case, *ibid.*, p. 3019; the *Gadino* case, UNRIAA, vol. XV (Sales No. 66.V.3), p. 414 (1901); the *Lacaze* case, Lapradelle-Politis, vol. II, p. 290, at pp. 297–298; and the *"William Yeaton"* case, Moore, *History and Digest*, vol. III, p. 2944, at p. 2946.

[140] For the opinions of the British and Spanish Governments given in 1898 at the request of Italy in respect of a dispute with Peru, see *Archivio del Ministero degli Affari esteri italiano*, serie politica P, No. 43.

[141] Note verbale by Duke Almodóvar del Río, 4 July 1898, *ibid.*

of their apparent authority".[142] It is probable that the different formulations had essentially the same effect, since acts falling outside the scope of both real and apparent authority would not be performed "by virtue of … official capacity". In any event, by the time of the 1930 Hague Conference, a majority of States responding to the Preparatory Committee's request for information were clearly in favour of the broadest formulation of the rule, providing for attribution to the State in the case of "[a]cts of officials in the national territory in their public capacity (*actes de fonction*) but exceeding their authority".[143] The Basis of Discussion prepared by the Committee reflected this view. The Third Committee of the Conference adopted an article on first reading in the following terms:

> International responsibility is … incurred by a State if damage is sustained by a foreigner as a result of unauthorised acts of its officials performed under cover of their official character, if the acts contravene the international obligations of the State.[144]

(4) The modern rule is now firmly established in this sense by international jurisprudence, State practice and the writings of jurists.[145] It is confirmed, for example, in article 91 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), which provides that: "A Party to the conflict … shall be responsible for all acts committed by persons forming part of its armed forces": this clearly covers acts committed contrary to orders or instructions. The commentary notes that article 91 was adopted by consensus and "correspond[s] to the general principles of law on international responsibility".[146]

(5) A definitive formulation of the modern rule is found in the *Caire* case. The case concerned the murder of a French national by two Mexican officers who, after failing to extort money, took Caire to the local barracks and shot him. The Commission held:

> that the two officers, even if they are deemed to have acted outside their competence … and even if their superiors countermanded an order, have involved the responsibility of the State, since they acted under cover of their status as officers and used means placed at their disposal on account of that status.[147]

(6) International human rights courts and tribunals have applied the same rule. For example, the Inter-American Court of Human Rights in the *Velásquez Rodríguez* case said:

> This conclusion [of a breach of the Convention] is independent of whether the organ or official has contravened provisions of internal law or overstepped the limits of his authority: under international law a State is responsible for the acts of its agents undertaken in their official capacity and for their omissions, even when those agents act outside the sphere of their authority or violate internal law.[148]

(7) The central issue to be addressed in determining the applicability of article 7 to unauthorized conduct of official bodies is whether the conduct was performed by the body in an official capacity or not. Cases where officials acted in their capacity as such, albeit unlawfully or contrary to instructions, must be distinguished from cases where the conduct is so removed from the scope of their official functions that it should be assimilated to that of private individuals, not attributable to the State. In the words of the Iran-United States Claims Tribunal, the question is whether the conduct has been "carried out by persons cloaked with governmental authority".[149]

(8) The problem of drawing the line between unauthorized but still "official" conduct, on the one hand, and "private" conduct on the other, may be avoided if the conduct complained of is systematic or recurrent, such that the State knew or ought to have known of it and should have taken steps to prevent it. However, the distinction between the two situations still needs to be made in some cases, for example when considering isolated instances of outrageous conduct on the part of persons who are officials. That distinction is reflected in the expression "if the organ, person or entity acts in that capacity" in article 7. This indicates that the conduct referred to comprises only the actions and omissions of organs purportedly or apparently carrying out their official functions, and not the private actions or omissions of individuals who happen to be organs or agents of the State.[150] In short, the question is whether they were acting with apparent authority.

(9) As formulated, article 7 only applies to the conduct of an organ of a State or of an entity empowered to exercise elements of the governmental authority, i.e.

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[142] "American Bible Society" incident, statement of United States Secretary of State, 17 August 1885, Moore, *Digest*, vol. VI, p. 743; "Shine and Milligen", G. H. Hackworth, *Digest of International Law* (Washington, D.C., United States Government Printing Office, 1943), vol. V, p. 575; and "Miller", *ibid.*, pp. 570–571.

[143] League of Nations, Conference for the Codification of International Law, *Bases of Discussion …* (see footnote 88 above), point V, No. 2 (*b*), p. 74, and *Supplement to Vol. III …* (see footnote 104 above), pp. 3 and 17.

[144] League of Nations, Conference for the Codification of International Law, *Bases of Discussion* ..., document C.351(c)M.145(c).1930. V (see footnote 88 above), p. 237. For a more detailed account of the evolution of the modern rule, see *Yearbook … 1975*, vol. II, pp. 61–70.

[145] For example, the 1961 revised draft by the Special Rapporteur, Mr. García Amador, provided that "an act or omission shall likewise be imputable to the State if the organs or officials concerned exceeded their competence but purported to be acting in their official capacity" (*Yearbook ... 1961*, vol. II, p. 53).

[146] ICRC, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva, Martinus Nijhoff, 1987), pp. 1053–1054.

[147] *Caire* (see footnote 125 above). For other statements of the rule, see *Maal*, UNRIAA, vol. X (Sales No. 60.V.4), pp. 732–733 (1903); *La Masica, ibid.*, vol. XI (Sales No. 61.V.4), p. 560 (1916); *Youmans* (footnote 117 above); *Mallén*, *ibid.*; *Stephens*, UNRIAA, vol. IV (Sales No. 1951.V.1), pp. 267–268 (1927); and *Way* (footnote 114 above), pp. 400–401. The decision of the United States Court of Claims in *Royal Holland Lloyd* v. *United States*, 73 Ct. Cl. 722 (1931) (*Annual Digest of Public International Law Cases* (London, Butterworth, 1938), vol. 6, p. 442) is also often cited.

[148] *Velásquez Rodríguez* (see footnote 63 above); see also ILR, vol. 95, p. 232, at p. 296.

[149] *Petrolane, Inc.* v. *The Government of the Islamic Republic of Iran*, Iran-U.S. C.T.R., vol. 27, p. 64, at p. 92 (1991). See also paragraph (13) of the commentary to article 4.

[150] One form of *ultra vires* conduct covered by article 7 would be for a State official to accept a bribe to perform some act or conclude some transaction. The articles are not concerned with questions that would then arise as to the validity of the transaction (cf. the 1969 Vienna Convention, art. 50). So far as responsibility for the corrupt conduct is concerned, various situations could arise which it is not necessary to deal with expressly in the present articles. Where one State bribes an organ of another to perform some official act, the corrupting State would be responsible either under article 8 or article 17. The question of the responsibility of the State whose official had been bribed towards the corrupting State in such a case could hardly arise, but there could be issues of its responsibility towards a third party, which would be properly resolved under article 7.

only to those cases of attribution covered by articles 4, 5 and 6. Problems of unauthorized conduct by other persons, groups or entities give rise to distinct problems, which are dealt with separately under articles 8, 9 and 10.

(10) As a rule of attribution, article 7 is not concerned with the question whether the conduct amounted to a breach of an international obligation. The fact that instructions given to an organ or entity were ignored, or that its actions were *ultra vires*, may be relevant in determining whether or not the obligation has been breached, but that is a separate issue.[151] Equally, article 7 is not concerned with the admissibility of claims arising from internationally wrongful acts committed by organs or agents acting *ultra vires* or contrary to their instructions. Where there has been an unauthorized or invalid act under local law and as a result a local remedy is available, this will have to be resorted to, in accordance with the principle of exhaustion of local remedies, before bringing an international claim.[152]

### *Article 8. Conduct directed or controlled by a State*

**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.**

*Commentary*

(1) As a general principle, the conduct of private persons or entities is not attributable to the State under international law. Circumstances may arise, however, where such conduct is nevertheless attributable to the State because there exists a specific factual relationship between the person or entity engaging in the conduct and the State. Article 8 deals with two such circumstances. The first involves private persons acting on the instructions of the State in carrying out the wrongful conduct. The second deals with a more general situation where private persons act under the State's direction or control.[153] Bearing in mind the important role played by the principle of effectiveness in international law, it is necessary to take into account in both cases the existence of a real link between the person or group performing the act and the State machinery.

(2) The attribution to the State of conduct in fact authorized by it is widely accepted in international jurisprudence.[154] In such cases it does not matter that the person or persons involved are private individuals nor whether their conduct involves "governmental activity". Most commonly, cases of this kind will arise where State organs supplement their own action by recruiting or instigating private persons or groups who act as "auxiliaries" while remaining outside the official structure of the State. These include, for example, individuals or groups of private individuals who, though not specifically commissioned by the State and not forming part of its police or armed forces, are employed as auxiliaries or are sent as "volunteers" to neighbouring countries, or who are instructed to carry out particular missions abroad.

(3) More complex issues arise in determining whether conduct was carried out "under the direction or control" of a State. Such conduct will be attributable to the State only if it directed or controlled the specific operation and the conduct complained of was an integral part of that operation. The principle does not extend to conduct which was only incidentally or peripherally associated with an operation and which escaped from the State's direction or control.

(4) The degree of control which must be exercised by the State in order for the conduct to be attributable to it was a key issue in the *Military and Paramilitary Activities in and against Nicaragua* case. The question was whether the conduct of the contras was attributable to the United States so as to hold the latter generally responsible for breaches of international humanitarian law committed by the contras. This was analysed by ICJ in terms of the notion of "control". On the one hand, it held that the United States was responsible for the "planning, direction and support" given by the United States to Nicaraguan operatives.[155] But it rejected the broader claim of Nicaragua that all the conduct of the contras was attributable to the United States by reason of its control over them. It concluded that:

> [D]espite the heavy subsidies and other support provided to them by the United States, there is no clear evidence of the United States having actually exercised such a degree of control in all fields as to justify treating the *contras* as acting on its behalf.
>
> …
>
> All the forms of United States participation mentioned above, and even the general control by the respondent State over a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State. Such acts could well be committed by members of the *contras* without the control of the United States. For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.[156]

Thus while the United States was held responsible for its own support for the contras, only in certain individual instances were the acts of the contras themselves held attributable to it, based upon actual participation of and directions given by that State. The Court confirmed that a general situation of dependence and support would be

[151] See *ELSI* (footnote 85 above), especially at pp. 52, 62 and 74.

[152] See further article 44, subparagraph (*b*), and commentary.

[153] Separate issues are raised where one State engages in internationally wrongful conduct at the direction or under the control of another State: see article 17 and commentary, and especially paragraph (7) for the meaning of the words "direction" and "control" in various languages.

[154] See, e.g., the *Zafiro* case, UNRIAA, vol. VI (Sales No. 1955.V.3), p. 160 (1925); the *Stephens* case (footnote 147 above), p. 267; and *Lehigh Valley Railroad Company and Others (U.S.A.)* v. *Germany (Sabotage* cases*)*: "*Black Tom"* and *"Kingsland"* incidents, *ibid*., vol. VIII (Sales No. 58.V.2), p. 84 (1930) and p. 458 (1939).

[155] *Military and Paramilitary Activities in and against Nicaragua* (see footnote 36 above), p. 51, para. 86.

[156] *Ibid.*, pp. 62 and 64–65, paras. 109 and 115. See also the concurring opinion of Judge Ago, *ibid.*, p. 189, para. 17.

insufficient to justify attribution of the conduct to the State.

(5) The Appeals Chamber of the International Tribunal for the Former Yugoslavia has also addressed these issues. In the *Tadić*, case, the Chamber stressed that:

> The requirement of international law for the attribution to States of acts performed by private individuals is that the State exercises control over the individuals. The *degree of control* may, however, vary according to the factual circumstances of each case. The Appeals Chamber fails to see why in each and every circumstance international law should require a high threshold for the test of control.[157]

The Appeals Chamber held that the requisite degree of control by the Yugoslavian "authorities over these armed forces required by international law for considering the armed conflict to be international was *overall control* going beyond the mere financing and equipping of such forces and involving also participation in the planning and supervision of military operations".[158] In the course of their reasoning, the majority considered it necessary to disapprove the ICJ approach in the *Military and Paramilitary Activities in and against Nicaragua* case. But the legal issues and the factual situation in the *Tadić* case were different from those facing the Court in that case. The tribunal's mandate is directed to issues of individual criminal responsibility, not State responsibility, and the question in that case concerned not responsibility but the applicable rules of international humanitarian law.[159] In any event it is a matter for appreciation in each case whether particular conduct was or was not carried out under the control of a State, to such an extent that the conduct controlled should be attributed to it.[160]

(6) Questions arise with respect to the conduct of companies or enterprises which are State-owned and controlled. If such corporations act inconsistently with the international obligations of the State concerned the question arises whether such conduct is attributable to the State. In discussing this issue it is necessary to recall that international law acknowledges the general separateness of corporate entities at the national level, except in those cases where the "corporate veil" is a mere device or a vehicle for fraud or evasion.[161] The fact that the State initially establishes a corporate entity, whether by a special law or otherwise, is not a sufficient basis for the attribution to the State of the subsequent conduct of that entity.[162] Since corporate entities, although owned by and in that sense subject to the control of the State, are considered to be separate, *prima facie* their conduct in carrying out their activities is not attributable to the State unless they are exercising elements of governmental authority within the meaning of article 5. This was the position taken, for example, in relation to the *de facto* seizure of property by a State-owned oil company, in a case where there was no proof that the State used its ownership interest as a vehicle for directing the company to seize the property.[163] On the other hand, where there was evidence that the corporation was exercising public powers,[164] or that the State was using its ownership interest in or control of a corporation specifically in order to achieve a particular result,[165] the conduct in question has been attributed to the State.[166]

(7) It is clear then that a State may, either by specific directions or by exercising control over a group, in effect assume responsibility for their conduct. Each case will depend on its own facts, in particular those concerning the relationship between the instructions given or the direction or control exercised and the specific conduct complained of. In the text of article 8, the three terms "instructions", "direction" and "control" are disjunctive; it is sufficient to establish any one of them. At the same time it is made clear that the instructions, direction or control must relate to the conduct which is said to have amounted to an internationally wrongful act.

(8) Where a State has authorized an act, or has exercised direction or control over it, questions can arise as to the State's responsibility for actions going beyond the scope of the authorization. For example, questions might arise if the agent, while carrying out lawful instructions or directions, engages in some activity which contravenes both the instructions or directions given and the international obligations of the instructing State. Such cases can be resolved by asking whether the unlawful or unauthorized conduct was really incidental to the mission or clearly went beyond it. In general a State, in giving lawful instructions to persons who are not its organs, does not assume the risk that the instructions will be carried out in an internationally unlawful way. On the other hand, where persons or groups have committed acts under the effective control of a State, the condition for attribution will still be met even if particular instructions may have been ignored.

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[157] *Prosecutor* v. *Duško Tadić*, International Tribunal for the Former Yugoslavia, Case IT-94-1-A (1999), ILM, vol. 38, No. 6 (November 1999), p. 1518, at p. 1541, para. 117. For the judgment of the Trial Chamber (Case IT-94-1-T (1997)), see ILR, vol. 112, p. 1.

[158] ILM, vol. 38, No. 6 (November 1999), p. 1546, para. 145.

[159] See the explanation given by Judge Shahabuddeen, *ibid.*, pp. 1614–1615.

[160] The problem of the degree of State control necessary for the purposes of attribution of conduct to the State has also been dealt with, for example, by the Iran-United States Claims Tribunal and the European Court of Human Rights: *Yeager* (see footnote 101 above), p. 103. See also *Starrett Housing Corporation* v. *Government of the Islamic Republic of Iran*, Iran-U.S. C.T.R., vol. 4, p. 122, at p. 143 (1983); *Loizidou* v. *Turkey, Merits, Eur. Court H.R., Reports*, 1996–VI, p. 2216, at pp. 2235–2236, para. 56, also p. 2234, para. 52; and *ibid., Preliminary Objections, Eur. Court H.R., Series A, No. 310*, p. 23, para. 62 (1995).

[161] *Barcelona Traction* (see footnote 25 above), p. 39, paras. 56–58.

[162] For example, the Workers' Councils considered in *Schering Corporation* v. *The Islamic Republic of Iran*, Iran-U.S. C.T.R., vol. 5, p. 361 (1984); *Otis Elevator Company* v. *The Islamic Republic of Iran, ibid.*, vol. 14, p. 283 (1987); and *Eastman Kodak Company* v. *The Government of Iran, ibid.*, vol. 17, p. 153 (1987).

[163] *SEDCO, Inc.* v. *National Iranian Oil Company*, *ibid*., vol. 15, p. 23 (1987). See also *International Technical Products Corporation* v. *The Government of the Islamic Republic of Iran*, *ibid.*, vol. 9, p. 206 (1985); and *Flexi-Van Leasing, Inc.* v. *The Government of the Islamic Republic of Iran*, *ibid.*, vol. 12, p. 335, at p. 349 (1986).

[164] *Phillips Petroleum Company Iran* v. *The Islamic Republic of Iran*, *ibid.*, vol. 21, p. 79 (1989); and *Petrolane* (see footnote 149 above).

[165] *Foremost Tehran, Inc.* v. *The Government of the Islamic Republic of Iran*, Iran-U.S. *ibid.*, vol. 10, p. 228 (1986); and *American Bell International Inc.* v. *The Islamic Republic of Iran*, *ibid.*, vol. 12, p. 170 (1986).

[166] See *Hertzberg et al.* v. *Finland* (*Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 40* (A/37/40), annex XIV, communication No. R.14/61, p. 161, at p. 164, para. 9.1) (1982). See also *X* v. *Ireland*, application No. 4125/69, *Yearbook of the European Convention on Human Rights, 1971*, vol. 14 (1973), p. 199; and *Young, James and Webster* v. *the United Kingdom, Eur. Court H.R., Series A, No. 44* (1981).

The conduct will have been committed under the control of the State and it will be attributable to the State in accordance with article 8.

(9) Article 8 uses the words "person or group of persons", reflecting the fact that conduct covered by the article may be that of a group lacking separate legal personality but acting on a *de facto* basis. Thus, while a State may authorize conduct by a legal entity such as a corporation, it may also deal with aggregates of individuals or groups that do not have legal personality but are nonetheless acting as a collective.

### *Article 9. Conduct carried out in the absence or default of the official authorities*

**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 exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.**

*Commentary*

(1) Article 9 deals with the exceptional case of conduct in the exercise of elements of the governmental authority by a person or group of persons acting in the absence of the official authorities and without any actual authority to do so. The exceptional nature of the circumstances envisaged in the article is indicated by the phrase "in circumstances such as to call for". Such cases occur only rarely, such as during revolution, armed conflict or foreign occupation, where the regular authorities dissolve, are disintegrating, have been suppressed or are for the time being inoperative. They may also cover cases where lawful authority is being gradually restored, e.g. after foreign occupation.

(2) The principle underlying article 9 owes something to the old idea of the *levée en masse*, the self-defence of the citizenry in the absence of regular forces:[167] in effect it is a form of agency of necessity. Instances continue to occur from time to time in the field of State responsibility. Thus, the position of the Revolutionary Guards or "Komitehs" immediately after the revolution in the Islamic Republic of Iran was treated by the Iran-United States Claims Tribunal as covered by the principle expressed in article 9. *Yeager* concerned, *inter alia*, the action of performing immigration, customs and similar functions at Tehran airport in the immediate aftermath of the revolution. The tribunal held the conduct attributable to the Islamic Republic of Iran, on the basis that, if it was not actually authorized by the Government, then the Guards:

at least exercised elements of governmental authority in the absence of official authorities, in operations of which the new Government must have had knowledge and to which it did not specifically object.[168]

(3) Article 9 establishes three conditions which must be met in order for conduct to be attributable to the State: first, the conduct must effectively relate to the exercise of elements of the governmental authority, secondly, the conduct must have been carried out in the absence or default of the official authorities, and thirdly, the circumstances must have been such as to call for the exercise of those elements of authority.

(4) As regards the first condition, the person or group acting must be performing governmental functions, though they are doing so on their own initiative. In this respect, the nature of the activity performed is given more weight than the existence of a formal link between the actors and the organization of the State. It must be stressed that the private persons covered by article 9 are not equivalent to a general *de facto* Government. The cases envisaged by article 9 presuppose the existence of a Government in office and of State machinery whose place is taken by irregulars or whose action is supplemented in certain cases. This may happen on part of the territory of a State which is for the time being out of control, or in other specific circumstances. A general *de facto* Government, on the other hand, is itself an apparatus of the State, replacing that which existed previously. The conduct of the organs of such a Government is covered by article 4 rather than article 9.[169]

(5) In respect of the second condition, the phrase "in the absence or default of" is intended to cover both the situation of a total collapse of the State apparatus as well as cases where the official authorities are not exercising their functions in some specific respect, for instance, in the case of a partial collapse of the State or its loss of control over a certain locality. The phrase "absence or default" seeks to capture both situations.

(6) The third condition for attribution under article 9 requires that the circumstances must have been such as to call for the exercise of elements of the governmental authority by private persons. The term "call for" conveys the idea that some exercise of governmental functions was called for, though not necessarily the conduct in question. In other words, the circumstances surrounding the exercise of elements of the governmental authority by private persons must have justified the attempt to exercise police or other functions in the absence of any constituted authority. There is thus a normative element in the form of agency entailed by article 9, and this distinguishes these situations from the normal principle that conduct of private parties, including insurrectionary forces, is not attributable to the State.[170]

[167] This principle is recognized as legitimate by article 2 of the Regulations respecting the Laws and Customs of War on Land (annexed to the Hague Conventions II of 1899 and IV of 1907 respecting the Laws and Customs of War on Land); and by article 4, paragraph A (6), of the Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949.

[168] *Yeager* (see footnote 101 above), p. 104, para. 43.

[169] See, e.g., the award of 18 October 1923 by Arbitrator Taft in the *Tinoco* case (footnote 87 above), pp. 381–382. On the responsibility of the State for the conduct of *de facto* Governments, see also J. A. Frowein, *Das de facto-Regime im Völkerrecht* (Cologne, Heymanns, 1968), pp. 70–71. Conduct of a Government in exile might be covered by article 9, depending on the circumstances.

[170] See, e.g., the *Sambiaggio* case, UNRIAA, vol. X (Sales No. 60.V.4), p. 499, at p. 512 (1904); see also article 10 and commentary.

### *Article 10. Conduct of an insurrectional or other movement*

**1. The conduct of an insurrectional movement which becomes the new Government of a State shall be considered an act of that State under international law.**

**2. The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered an act of the new State under international law.**

**3. This article is without prejudice to the attribution to a State of any conduct, however related to that of the movement concerned, which is to be considered an act of that State by virtue of articles 4 to 9.**

*Commentary*

(1) Article 10 deals with the special case of attribution to a State of conduct of an insurrectional or other movement which subsequently becomes the new Government of the State or succeeds in establishing a new State.

(2) At the outset, the conduct of the members of the movement presents itself purely as the conduct of private individuals. It can be placed on the same footing as that of persons or groups who participate in a riot or mass demonstration and it is likewise not attributable to the State. Once an organized movement comes into existence as a matter of fact, it will be even less possible to attribute its conduct to the State, which will not be in a position to exert effective control over its activities. The general principle in respect of the conduct of such movements, committed during the continuing struggle with the constituted authority, is that it is not attributable to the State under international law. In other words, the acts of unsuccessful insurrectional movements are not attributable to the State, unless under some other article of chapter II, for example in the special circumstances envisaged by article 9.

(3) Ample support for this general principle is found in arbitral jurisprudence. International arbitral bodies, including mixed claims commissions[171] and arbitral tribunals[172] have uniformly affirmed what Commissioner Nielsen in the *Solis* case described as a "well-established principle of international law", that no Government can be held responsible for the conduct of rebellious groups committed in violation of its authority, where it is itself guilty of no breach of good faith, or of no negligence in suppressing insurrection.[173] Diplomatic practice is remarkably consistent in recognizing that the conduct of an insurrectional movement cannot be attributed to the State. This can be seen, for example, from the preparatory work for the 1930 Hague Conference. Replies of Governments to point IX of the request for information addressed to them by the Preparatory Committee indicated substantial agreement that: (*a*) the conduct of organs of an insurrectional movement could not be attributed as such to the State or entail its international responsibility; and (*b*) only conduct engaged in by organs of the State in connection with the injurious acts of the insurgents could be attributed to the State and entail its international responsibility, and then only if such conduct constituted a breach of an international obligation of that State.[174]

(4) The general principle that the conduct of an insurrectional or other movement is not attributable to the State is premised on the assumption that the structures and organization of the movement are and remain independent of those of the State. This will be the case where the State successfully puts down the revolt. In contrast, where the movement achieves its aims and either installs itself as the new Government of the State or forms a new State in part of the territory of the pre-existing State or in a territory under its administration, it would be anomalous if the new regime or new State could avoid responsibility for conduct earlier committed by it. In these exceptional circumstances, article 10 provides for the attribution of the conduct of the successful insurrectional or other movement to the State. The basis for the attribution of conduct of a successful insurrectional or other movement to the State under international law lies in the continuity between the movement and the eventual Government. Thus the term "conduct" only concerns the conduct of the movement as such and not the individual acts of members of the movement, acting in their own capacity.

(5) Where the insurrectional movement, as a new Government, replaces the previous Government of the State, the ruling organization of the insurrectional movement becomes the ruling organization of that State. The continuity which thus exists between the new organization of the State and that of the insurrectional movement leads naturally to the attribution to the State of conduct which the insurrectional movement may have committed during the struggle. In such a case, the State does not cease to exist as a subject of international law. It remains the same State, despite the changes, reorganizations and adaptations which occur in its institutions. Moreover, it is the only subject of international law to which responsibility can be attributed. The situation requires that acts committed during the struggle for power by the apparatus of the insurrectional movement should be attributable to the State, alongside acts of the then established Government.

(6) Where the insurrectional or other movement succeeds in establishing a new State, either in part of the territory of the pre-existing State or in a territory which was previously under its administration, the attribution to the new State of the conduct of the insurrectional or other movement is again justified by virtue of the continuity be-

[171] See the decisions of the various mixed commissions: *Zuloaga and Miramon Governments*, Moore, *History and Digest*, vol. III, p. 2873; *McKenny* case, *ibid.*, p. 2881; *Confederate States*, *ibid.*, p. 2886; *Confederate Debt*, *ibid.*, p. 2900; and *Maximilian Government*, *ibid.*, p. 2902, at pp. 2928–2929.

[172] See, e.g., *British Claims in the Spanish Zone of Morocco* (footnote 44 above), p. 642; and the *Iloilo Claims*, UNRIAA, vol. VI (Sales No. 1955.V.3), p. 158, at pp. 159–160 (1925).

[173] UNRIAA, vol. IV (Sales No. 1951.V.1), p. 358, at p. 361 (1928) (referring to *Home Frontier and Foreign Missionary Society*, *ibid.*, vol. VI (Sales No. 1955.V.3), p. 42 (1920)); cf. the *Sambiaggio* case (footnote 170 above), p. 524.

[174] League of Nations, Conference for the Codification of International Law, *Bases of Discussion* … (see footnote 88 above), p. 108; and *Supplement to Volume III* … (see footnote 104 above), pp. 3 and 20.

tween the organization of the movement and the organization of the State to which it has given rise. Effectively the same entity which previously had the characteristics of an insurrectional or other movement has become the Government of the State it was struggling to establish. The predecessor State will not be responsible for those acts. The only possibility is that the new State be required to assume responsibility for conduct committed with a view to its own establishment, and this represents the accepted rule.

(7) *Paragraph 1* of article 10 covers the scenario in which the insurrectional movement, having triumphed, has substituted its structures for those of the previous Government of the State in question. The phrase "which becomes the new Government" is used to describe this consequence. However, the rule in paragraph 1 should not be pressed too far in the case of Governments of national reconciliation, formed following an agreement between the existing authorities and the leaders of an insurrectional movement. The State should not be made responsible for the conduct of a violent opposition movement merely because, in the interests of an overall peace settlement, elements of the opposition are drawn into a reconstructed Government. Thus, the criterion of application of paragraph 1 is that of a real and substantial continuity between the former insurrectional movement and the new Government it has succeeded in forming.

(8) *Paragraph 2* of article 10 addresses the second scenario, where the structures of the insurrectional or other revolutionary movement become those of a new State, constituted by secession or decolonization in part of the territory which was previously subject to the sovereignty or administration of the predecessor State. The expression "or in a territory under its administration" is included in order to take account of the differing legal status of different dependent territories.

(9) A comprehensive definition of the types of groups encompassed by the term "insurrectional movement" as used in article 10 is made difficult by the wide variety of forms which insurrectional movements may take in practice, according to whether there is relatively limited internal unrest, a genuine civil war situation, an anti-colonial struggle, the action of a national liberation front, revolutionary or counter-revolutionary movements and so on. Insurrectional movements may be based in the territory of the State against which the movement's actions are directed, or on the territory of a third State. Despite this diversity, the threshold for the application of the laws of armed conflict contained in the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II) may be taken as a guide. Article 1, paragraph 1, refers to "dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of [the relevant State's] territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol", and it contrasts such groups with "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature" (art. 1, para. 2). This definition of "dissident armed forces" reflects, in the context of the Protocols, the essential idea of an "insurrectional movement".

(10) As compared with paragraph 1, the scope of the attribution rule articulated by paragraph 2 is broadened to include "insurrectional or other" movements. This terminology reflects the existence of a greater variety of movements whose actions may result in the formation of a new State. The words do not, however, extend to encompass the actions of a group of citizens advocating separation or revolution where these are carried out within the framework of the predecessor State. Nor does it cover the situation where an insurrectional movement within a territory succeeds in its agitation for union with another State. This is essentially a case of succession, and outside the scope of the articles, whereas article 10 focuses on the continuity of the movement concerned and the eventual new Government or State, as the case may be.

(11) No distinction should be made for the purposes of article 10 between different categories of movements on the basis of any international "legitimacy" or of any illegality in respect of their establishment as a Government, despite the potential importance of such distinctions in other contexts.[175] From the standpoint of the formulation of rules of law governing State responsibility, it is unnecessary and undesirable to exonerate a new Government or a new State from responsibility for the conduct of its personnel by reference to considerations of legitimacy or illegitimacy of its origin.[176] Rather, the focus must be on the particular conduct in question, and on its lawfulness or otherwise under the applicable rules of international law.

(12) Arbitral decisions, together with State practice and the literature, indicate a general acceptance of the two positive attribution rules in article 10. The international arbitral decisions, e.g. those of the mixed commissions established in respect of Venezuela (1903) and Mexico (1920–1930), support the attribution of conduct by insurgents where the movement is successful in achieving its revolutionary aims. For example, in the *Bolívar Railway Company* claim, the principle is stated in the following terms:

> The nation is responsible for the obligations of a successful revolution from its beginning, because in theory, it represented ab initio a changing national will, crystallizing in the finally successful result.[177]

The French-Venezuelan Mixed Claims Commission in its decision concerning the *French Company of Venezuelan Railroads* case emphasized that the State cannot be held responsible for the acts of revolutionaries "unless the revolution was successful", since such acts then involve the responsibility of the State "under the well-recognized rules of public law".[178] In the *Pinson* case, the French-Mexican Claims Commission ruled that:

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[175] See H. Atlam, "National liberation movements and international responsibility", *United Nations Codification of State Responsibility*, B. Simma and M. Spinedi, eds. (New York, Oceana, 1987), p. 35.

[176] As ICJ said, "[p]hysical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States", *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion I.C.J. Reports 1971*, p. 16, at p. 54, para. 118.

[177] UNRIAA, vol. IX (Sales No. 59.V.5), p. 445, at p. 453 (1903). See also *Puerto Cabello and Valencia Railway Company*, *ibid.*, p. 510, at p. 513 (1903).

[178] *Ibid.*, vol. X (Sales No. 60.V.4), p. 285, at p. 354 (1902). See also the *Dix* case, *ibid.*, vol. IX (Sales No. 59.V.5), p. 119 (1902).

if the injuries originated, for example, in requisitions or forced contributions demanded ... by revolutionaries before their final success, or if they were caused ... by offences committed by successful revolutionary forces, the responsibility of the State ... cannot be denied.[179]

(13) The possibility of holding the State responsible for the conduct of a successful insurrectional movement was brought out in the request for information addressed to Governments by the Preparatory Committee for the 1930 Hague Conference. On the basis of replies received from a number of Governments, the Preparatory Committee drew up the following Basis of Discussion: "A State is responsible for damage caused to foreigners by an insurrectionist party which has been successful and has become the Government to the same degree as it is responsible for damage caused by acts of the Government *de jure* or its officials or troops." [180] Although the proposition was never discussed, it may be considered to reflect the rule of attribution now contained in paragraph 2.

(14) More recent decisions and practice do not, on the whole, give any reason to doubt the propositions contained in article 10. In one case, the Supreme Court of Namibia went even further in accepting responsibility for "anything done" by the predecessor administration of South Africa.[181]

(15) Exceptional cases may occur where the State was in a position to adopt measures of vigilance, prevention or punishment in respect of the movement's conduct but improperly failed to do so. This possibility is preserved by paragraph 3 of article 10, which provides that the attribution rules of paragraphs 1 and 2 are without prejudice to the attribution to a State of any conduct, however related to that of the movement concerned, which is to be considered an act of that State by virtue of other provisions in chapter II. The term "however related to that of the movement concerned" is intended to have a broad meaning. Thus, the failure by a State to take available steps to protect the premises of diplomatic missions, threatened from attack by an insurrectional movement, is clearly conduct attributable to the State and is preserved by paragraph 3.

(16) A further possibility is that the insurrectional movement may itself be held responsible for its own conduct under international law, for example for a breach of international humanitarian law committed by its forces. The topic of the international responsibility of unsuccessful insurrectional or other movements, however, falls outside the scope of the present articles, which are concerned only with the responsibility of States.

[179] *Ibid.*, vol. V (Sales No. 1952.V.3), p. 327, at p. 353 (1928).

[180] League of Nations, Conference for the Codification of International Law, *Bases of Discussion* … (see footnote 88 above), pp. 108 and 116; and Basis of discussion No. 22 (*c*), *ibid.*, p. 118; reproduced in *Yearbook ... 1956*, vol. II, p. 223, at p. 224, document A/CN.4/96.

[181] Guided in particular by a constitutional provision, the Supreme Court of Namibia held that "the new government inherits responsibility for the acts committed by the previous organs of the State", *Minister of Defence, Namibia* v. *Mwandinghi, South African Law Reports*, 1992 (2), p. 355, at p. 360; and ILR, vol. 91, p. 341, at p. 361. See, on the other hand, *44123 Ontario Ltd.* v. *Crispus Kiyonga and Others*, 11 *Kampala Law Reports* 14, pp. 20–21 (1992); and ILR, vol. 103, p. 259, at p. 266 (High Court, Uganda).

### *Article 11. Conduct acknowledged and adopted by a State as its own*

**Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own.**

*Commentary*

(1) All the bases for attribution covered in chapter II, with the exception of the conduct of insurrectional or other movements under article 10, assume that the status of the person or body as a State organ, or its mandate to act on behalf of the State, are established at the time of the alleged wrongful act. Article 11, by contrast, provides for the attribution to a State of conduct that was not or may not have been attributable to it at the time of commission, but which is subsequently acknowledged and adopted by the State as its own.

(2) In many cases, the conduct which is acknowledged and adopted by a State will be that of private persons or entities. The general principle, drawn from State practice and international judicial decisions, is that the conduct of a person or group of persons not acting on behalf of the State is not considered as an act of the State under international law. This conclusion holds irrespective of the circumstances in which the private person acts and of the interests affected by the person's conduct.

(3) Thus, like article 10, article 11 is based on the principle that purely private conduct cannot as such be attributed to a State. But it recognizes "nevertheless" that conduct is to be considered as an act of a State "if and to the extent that the State acknowledges and adopts the conduct in question as its own". Instances of the application of the principle can be found in judicial decisions and State practice. For example, in the *Lighthouses* arbitration, a tribunal held Greece liable for the breach of a concession agreement initiated by Crete at a period when the latter was an autonomous territory of the Ottoman Empire, partly on the basis that the breach had been "endorsed by [Greece] as if it had been a regular transaction … and eventually continued by her, even after the acquisition of territorial sovereignty over the island".[182] In the context of State succession, it is unclear whether a new State succeeds to any State responsibility of the predecessor State with respect to its territory.[183] However, if the successor State, faced with a continuing wrongful act on its territory, endorses and continues that situation, the inference may readily be drawn that it has assumed responsibility for it.

(4) Outside the context of State succession, the *United States Diplomatic and Consular Staff in Tehran* case provides a further example of subsequent adoption by a

[182] *Affaire relative à la concession des phares de l'Empire ottoman*, UNRIAA, vol. XII (Sales No. 63.V.3), p. 155, at p. 198 (1956).

[183] The matter is reserved by article 39 of the Vienna Convention on Succession of States in respect of Treaties (hereinafter "the 1978 Vienna Convention").

State of particular conduct. There ICJ drew a clear distinction between the legal situation immediately following the seizure of the United States embassy and its personnel by the militants, and that created by a decree of the Iranian State which expressly approved and maintained the situation. In the words of the Court:

> The policy thus announced by the Ayatollah Khomeini, of maintaining the occupation of the Embassy and the detention of its inmates as hostages for the purpose of exerting pressure on the United States Government was complied with by other Iranian authorities and endorsed by them repeatedly in statements made in various contexts. The result of that policy was fundamentally to transform the legal nature of the situation created by the occupation of the Embassy and the detention of its diplomatic and consular staff as hostages. The approval given to these facts by the Ayatollah Khomeini and other organs of the Iranian State, and the decision to perpetuate them, translated continuing occupation of the Embassy and detention of the hostages into acts of that State.[184]

In that case it made no difference whether the effect of the "approval" of the conduct of the militants was merely prospective, or whether it made the Islamic Republic of Iran responsible for the whole process of seizure of the embassy and detention of its personnel *ab initio*. The Islamic Republic of Iran had already been held responsible in relation to the earlier period on a different legal basis, viz. its failure to take sufficient action to prevent the seizure or to bring it to an immediate end.[185] In other cases no such prior responsibility will exist. Where the acknowledgement and adoption is unequivocal and unqualified there is good reason to give it retroactive effect, which is what the tribunal did in the *Lighthouses* arbitration.[186] This is consistent with the position established by article 10 for insurrectional movements and avoids gaps in the extent of responsibility for what is, in effect, the same continuing act.

(5) As regards State practice, the capture and subsequent trial in Israel of Adolf Eichmann may provide an example of the subsequent adoption of private conduct by a State. On 10 May 1960, Eichmann was captured by a group of Israelis in Buenos Aires. He was held in captivity in Buenos Aires in a private home for some weeks before being taken by air to Israel. Argentina later charged the Israeli Government with complicity in Eichmann's capture, a charge neither admitted nor denied by Israeli Foreign Minister Golda Meir, during the discussion in the Security Council of the complaint. She referred to Eichmann's captors as a "volunteer group".[187] Security Council resolution 138 (1960) of 23 June 1960 implied a finding that the Israeli Government was at least aware of, and consented to, the successful plan to capture Eichmann in Argentina. It may be that Eichmann's captors were "in fact acting on the instructions of, or under the direction or control of" Israel, in which case their conduct was more properly attributed to the State under article 8. But where there are doubts about whether certain conduct falls within article 8, these may be resolved by the subsequent adoption of the conduct in question by the State.

(6) The phrase "acknowledges and adopts the conduct in question as its own" is intended to distinguish cases of acknowledgement and adoption from cases of mere support or endorsement.[188] ICJ in the *United States Diplomatic and Consular Staff in Tehran* case used phrases such as "approval", "endorsement", "the seal of official governmental approval" and "the decision to perpetuate [the situation]".[189] These were sufficient in the context of that case, but as a general matter, conduct will not be attributable to a State under article 11 where a State merely acknowledges the factual existence of conduct or expresses its verbal approval of it. In international controversies, States often take positions which amount to "approval" or "endorsement" of conduct in some general sense but do not involve any assumption of responsibility. The language of "adoption", on the other hand, carries with it the idea that the conduct is acknowledged by the State as, in effect, its own conduct. Indeed, provided the State's intention to accept responsibility for otherwise non-attributable conduct is clearly indicated, article 11 may cover cases where a State has accepted responsibility for conduct of which it did not approve, which it had sought to prevent and which it deeply regretted. However such acceptance may be phrased in the particular case, the term "acknowledges and adopts" in article 11 makes it clear that what is required is something more than a general acknowledgement of a factual situation, but rather that the State identifies the conduct in question and makes it its own.

(7) The principle established by article 11 governs the question of attribution only. Where conduct has been acknowledged and adopted by a State, it will still be necessary to consider whether the conduct was internationally wrongful. For the purposes of article 11, the international obligations of the adopting State are the criterion for wrongfulness. The conduct may have been lawful so far as the original actor was concerned, or the actor may have been a private party whose conduct in the relevant respect was not regulated by international law. By the same token, a State adopting or acknowledging conduct which is lawful in terms of its own international obligations does not thereby assume responsibility for the unlawful acts of any other person or entity. Such an assumption of responsibility would have to go further and amount to an agreement to indemnify for the wrongful act of another.

(8) The phrase "if and to the extent that" is intended to convey a number of ideas. First, the conduct of, in particular, private persons, groups or entities is not attributable to the State unless under some other article of chapter II or unless it has been acknowledged and adopted by the State. Secondly, a State might acknowledge and adopt conduct only to a certain extent. In other words, a State may elect to acknowledge and adopt only some of the conduct in question. Thirdly, the act of acknowledgment and adoption, whether it takes the form of words or conduct, must be clear and unequivocal.

(9) The conditions of acknowledgement and adoption are cumulative, as indicated by the word "and". The order of the two conditions indicates the normal sequence of

[184] *United States Diplomatic and Consular Staff in Tehran* (see footnote 59 above), p. 35, para. 74.

[185] *Ibid.*, pp. 31–33, paras. 63–68.

[186] *Lighthouses* arbitration (see footnote 182 above), pp. 197–198.

[187] *Official Records of the Security Council, Fifteenth Year*, 866th meeting, 22 June 1960, para. 18.

[188] The separate question of aid or assistance by a State to internationally wrongful conduct of another State is dealt with in article 16.

[189] See footnote 59 above.

events in cases in which article 11 is relied on. Acknowledgement and adoption of conduct by a State might be express (as for example in the *United States Diplomatic and Consular Staff in Tehran* case), or it might be inferred from the conduct of the State in question.

## CHAPTER III

## BREACH OF AN INTERNATIONAL OBLIGATION

*Commentary*

(1) There is a breach of an international obligation when conduct attributed to a State as a subject of international law amounts to a failure by that State to comply with an international obligation incumbent upon it or, to use the language of article 2, subparagraph (*b*), when such conduct constitutes "a breach of an international obligation of the State". This chapter develops the notion of a breach of an international obligation, to the extent that this is possible in general terms.

(2) It must be stressed again that the articles do not purport to specify the content of the primary rules of international law, or of the obligations thereby created for particular States.[190] In determining whether given conduct attributable to a State constitutes a breach of its international obligations, the principal focus will be on the primary obligation concerned. It is this which has to be interpreted and applied to the situation, determining thereby the substance of the conduct required, the standard to be observed, the result to be achieved, etc. There is no such thing as a breach of an international obligation in the abstract, and chapter III can only play an ancillary role in determining whether there has been such a breach, or the time at which it occurred, or its duration. Nonetheless, a number of basic principles can be stated.

(3) The essence of an internationally wrongful act lies in the non-conformity of the State's actual conduct with the conduct it ought to have adopted in order to comply with a particular international obligation. Such conduct gives rise to the new legal relations which are grouped under the common denomination of international responsibility. Chapter III, therefore, begins with a provision specifying in general terms when it may be considered that there is a breach of an international obligation (art. 12). The basic concept having been defined, the other provisions of the chapter are devoted to specifying how this concept applies to various situations. In particular, the chapter deals with the question of the intertemporal law as it applies to State responsibility, i.e. the principle that a State is only responsible for a breach of an international obligation if the obligation is in force for the State at the time of the breach (art. 13), with the equally important question of continuing breaches (art. 14), and with the special problem of determining whether and when there has been a breach of an obligation which is directed not at single but at composite acts, i.e. where the essence of the breach lies in a series of acts defined in aggregate as wrongful (art. 15).

[190] See paragraphs (2) to (4) of the general commentary.

(4) For the reason given in paragraph (2) above, it is neither possible nor desirable to deal in the framework of this Part with all the issues that can arise in determining whether there has been a breach of an international obligation. Questions of evidence and proof of such a breach fall entirely outside the scope of the articles. Other questions concern rather the classification or typology of international obligations. These have only been included in the text where they can be seen to have distinct consequences within the framework of the secondary rules of State responsibility.[191]

### *Article 12. Existence of a breach of an international obligation*

**There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character.**

*Commentary*

(1) As stated in article 2, a breach by a State of an international obligation incumbent upon it gives rise to its international responsibility. It is first necessary to specify what is meant by a breach of an international obligation. This is the purpose of article 12, which defines in the most general terms what constitutes a breach of an international obligation by a State. In order to conclude that there is a breach of an international obligation in any specific case, it will be necessary to take account of the other provisions of chapter III which specify further conditions relating to the existence of a breach of an international obligation, as well as the provisions of chapter V dealing with circumstances which may preclude the wrongfulness of an act of a State. But in the final analysis, whether and when there has been a breach of an obligation depends on the precise terms of the obligation, its interpretation and application, taking into account its object and purpose and the facts of the case.

(2) In introducing the notion of a breach of an international obligation, it is necessary again to emphasize the autonomy of international law in accordance with the principle stated in article 3. In the terms of article 12, the breach of an international obligation consists in the disconformity between the conduct required of the State by that obligation and the conduct actually adopted by the State—i.e. between the requirements of international law and the facts of the matter. This can be expressed in different ways. For example, ICJ has used such expressions as "incompatibility with the obligations" of a State,[192] acts "contrary to" or "inconsistent with" a given rule,[193] and

[191] See, e.g., the classification of obligations of conduct and results, paragraphs (11) to (12) of the commentary to article 12.

[192] *United States Diplomatic and Consular Staff in Tehran* (see footnote 59 above), p. 29, para. 56.

[193] *Military and Paramilitary Activities in and against Nicaragua* (see footnote 36 above), p. 64, para. 115, and p. 98, para. 186, respectively.

"failure to comply with its treaty obligations".[194] In the *ELSI* case, a Chamber of the Court asked the "question whether the requisition was in conformity with the requirements … of the FCN Treaty".[195] The expression "not in conformity with what is required of it by that obligation" is the most appropriate to indicate what constitutes the essence of a breach of an international obligation by a State. It allows for the possibility that a breach may exist even if the act of the State is only partly contrary to an international obligation incumbent upon it. In some cases precisely defined conduct is expected from the State concerned; in others the obligation only sets a minimum standard above which the State is free to act. Conduct proscribed by an international obligation may involve an act or an omission or a combination of acts and omissions; it may involve the passage of legislation, or specific administrative or other action in a given case, or even a threat of such action, whether or not the threat is carried out, or a final judicial decision. It may require the provision of facilities, or the taking of precautions or the enforcement of a prohibition. In every case, it is by comparing the conduct in fact engaged in by the State with the conduct legally prescribed by the international obligation that one can determine whether or not there is a breach of that obligation. The phrase "is not in conformity with" is flexible enough to cover the many different ways in which an obligation can be expressed, as well as the various forms which a breach may take.

(3) Article 12 states that there is a breach of an international obligation when the act in question is not in conformity with what is required by that obligation "regardless of its origin". As this phrase indicates, the articles are of general application. They apply to all international obligations of States, whatever their origin may be. International obligations may be established by a customary rule of international law, by a treaty or by a general principle applicable within the international legal order. States may assume international obligations by a unilateral act.[196] An international obligation may arise from provisions stipulated in a treaty (a decision of an organ of an international organization competent in the matter, a judgment given between two States by ICJ or another tribunal, etc.). It is unnecessary to spell out these possibilities in article 12, since the responsibility of a State is engaged by the breach of an international obligation whatever the particular origin of the obligation concerned. The formula "regardless of its origin" refers to all possible sources of international obligations, that is to say, to all processes for creating legal obligations recognized by international law. The word "source" is sometimes used in this context, as in the preamble to the Charter of the United Nations which stresses the need to respect "the obligations arising from treaties and other sources of international law". The word "origin", which has the same meaning, is not attended by the doubts and doctrinal debates the term "source" has provoked.

(4) According to article 12, the origin or provenance of an obligation does not, as such, alter the conclusion that responsibility will be entailed if it is breached by a State, nor does it, as such, affect the regime of State responsibility thereby arising. Obligations may arise for a State by a treaty and by a rule of customary international law or by a treaty and a unilateral act.[197] Moreover, these various grounds of obligation interact with each other, as practice clearly shows. Treaties, especially multilateral treaties, can contribute to the formation of general international law; customary law may assist in the interpretation of treaties; an obligation contained in a treaty may be applicable to a State by reason of its unilateral act, and so on. Thus, international courts and tribunals have treated responsibility as arising for a State by reason of any "violation of a duty imposed by an international juridical standard".[198] In the *"Rainbow Warrior"* arbitration, the tribunal said that "any violation by a State of any obligation, of whatever origin, gives rise to State responsibility and consequently, to the duty of reparation".[199] In the *Gabčíkovo-Nagymaros Project* case, ICJ referred to the relevant draft article provisionally adopted by the Commission in 1976 in support of the proposition that it is "well established that, when a State has committed an internationally wrongful act, its international responsibility is likely to be involved whatever the nature of the obligation it has failed to respect".[200]

(5) Thus, there is no room in international law for a distinction, such as is drawn by some legal systems, between the regime of responsibility for breach of a treaty and for breach of some other rule, i.e. for responsibility arising *ex contractu* or *ex delicto*. In the *"Rainbow Warrior"* arbitration, the tribunal affirmed that "in the field of international law there is no distinction between contractual and tortious responsibility".[201] As far as the origin of the obligation breached is concerned, there is a single general regime of State responsibility. Nor does any distinction exist between the "civil" and "criminal" responsibility as is the case in internal legal systems.

(6) State responsibility can arise from breaches of bilateral obligations or of obligations owed to some States

[194] *Gabčíkovo-Nagymaros Project* (see footnote 27 above), p. 46, para. 57.

[195] *ELSI* (see footnote 85 above), p. 50, para. 70.

[196] Thus, France undertook by a unilateral act not to engage in further atmospheric nuclear testing: *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 253; *Nuclear Tests (New Zealand* v. *France)*, *ibid.*, p. 457. The extent of the obligation thereby undertaken was clarified in *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand* v. *France) Case, Order of 22 September 1995, I.C.J. Reports 1995*, p. 288.

[197] ICJ has recognized "[t]he existence of identical rules in international treaty law and customary law" on a number of occasions, *Military and Paramilitary Activities in and against Nicaragua* (see footnote 36 above), p. 95, para. 177; see also *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at pp. 38–39, para. 63.

[198] *Dickson Car Wheel Company* (see footnote 42 above); cf. the *Goldenberg* case, UNRIAA, vol. II (Sales No. 1949.V.1), p. 901, at pp. 908–909 (1928); *International Fisheries Company* (footnote 43 above), p. 701 ("some principle of international law"); and *Armstrong Cork Company* (footnote 45 above), p. 163 ("any rule whatsoever of international law").

[199] *"Rainbow Warrior"* (see footnote 46 above), p. 251, para. 75. See also *Barcelona Traction* (footnote 25 above), p. 46, para. 86 ("breach of an international obligation arising out of a treaty or a general rule of law").

[200] *Gabčíkovo-Nagymaros Project* (see footnote 27 above), p. 38, para. 47. The qualification "likely to be involved" may have been inserted because of possible circumstances precluding wrongfulness in that case.

[201] *"Rainbow Warrior"* (see footnote 46 above), p. 251, para. 75.

or to the international community as a whole. It can involve relatively minor infringements as well as the most serious breaches of obligations under peremptory norms of general international law. Questions of the gravity of the breach and the peremptory character of the obligation breached can affect the consequences which arise for the responsible State and, in certain cases, for other States also. Certain distinctions between the consequences of certain breaches are accordingly drawn in Parts Two and Three of these articles.[202] But the regime of State responsibility for breach of an international obligation under Part One is comprehensive in scope, general in character and flexible in its application: Part One is thus able to cover the spectrum of possible situations without any need for further distinctions between categories of obligation concerned or the category of the breach.

(7) Even fundamental principles of the international legal order are not based on any special source of law or specific law-making procedure, in contrast with rules of constitutional character in internal legal systems. In accordance with article 53 of the 1969 Vienna Convention, a peremptory norm of general international law is one which is "accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character". Article 53 recognizes both that norms of a peremptory character can be created and that the States have a special role in this regard as par excellence the holders of normative authority on behalf of the international community. Moreover, obligations imposed on States by peremptory norms necessarily affect the vital interests of the international community as a whole and may entail a stricter regime of responsibility than that applied to other internationally wrongful acts. But this is an issue belonging to the content of State responsibility.[203] So far at least as Part One of the articles is concerned, there is a unitary regime of State responsibility which is general in character.

(8) Rather similar considerations apply with respect to obligations arising under the Charter of the United Nations. Since the Charter is a treaty, the obligations it contains are, from the point of view of their origin, treaty obligations. The special importance of the Charter, as reflected in its Article 103,[204] derives from its express provisions as well as from the virtually universal membership of States in the United Nations.

(9) The general scope of the articles extends not only to the conventional or other origin of the obligation breached but also to its subject matter. International awards and decisions specifying the conditions for the existence of an internationally wrongful act speak of the breach of an international obligation without placing any restriction on the subject matter of the obligation breached.[205] Courts and tribunals have consistently affirmed the principle that there is no *a priori* limit to the subject matters on which States may assume international obligations. Thus, PCIJ stated in its first judgment, in the *S.S. "Wimbledon"* case, that "the right of entering into international engagements is an attribute of State sovereignty".[206] That proposition has often been endorsed.[207]

(10) In a similar perspective, it has sometimes been argued that an obligation dealing with a certain subject matter could only have been breached by conduct of the same description. That proposition formed the basis of an objection to the jurisdiction of ICJ in the *Oil Platforms* case. It was argued that a treaty of friendship, commerce and navigation could not in principle have been breached by conduct involving the use of armed force. The Court responded in the following terms:

> The Treaty of 1955 imposes on each of the Parties various obligations on a variety of matters. Any action by one of the Parties that is incompatible with those obligations is unlawful, regardless of the means by which it is brought about. A violation of the rights of one party under the Treaty by means of the use of force is as unlawful as would be a violation by administrative decision or by any other means. Matters relating to the use of force are therefore not *per se* excluded from the reach of the Treaty of 1955.[208]

Thus, the breach by a State of an international obligation constitutes an internationally wrongful act, whatever the subject matter or content of the obligation breached, and whatever description may be given to the non-conforming conduct.

(11) Article 12 also states that there is a breach of an international obligation when the act in question is not in conformity with what is required by that obligation, "regardless of its … character". In practice, various classifications of international obligations have been adopted. For example, a distinction is commonly drawn between obligations of conduct and obligations of result. That distinction may assist in ascertaining when a breach has occurred. But it is not exclusive,[209] and it does not seem to bear specific or direct consequences as far as the present articles are concerned. In the *Colozza* case, for example, the European Court of Human Rights was concerned with the trial in absentia of a person who, without actual notice of his trial, was sentenced to six years' imprisonment and was not allowed subsequently to contest his conviction.

[202] See Part Three, chapter II and commentary; see also article 48 and commentary.

[203] See articles 40 and 41 and commentaries.

[204] According to which "[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail".

[205] See, e.g., *Factory at Chorzów, Jurisdiction* (footnote 34 above); *Factory at Chorzów, Merits* (*ibid.*); and *Reparation for Injuries* (footnote 38 above). In these decisions it is stated that "any breach of an international engagement" entails international responsibility. See also *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* (footnote 39 above), p. 228.

[206] *S.S. "Wimbledon"* (see footnote 34 above), p. 25.

[207] See, e.g., *Nottebohm, Second Phase*, *Judgment, I.C.J. Reports 1955*, p. 4, at pp. 20–21; *Right of Passage over Indian Territory, Merits, Judgment, I.C.J. Reports 1960*, p. 6, at p. 33; and *Military and Paramilitary Activities in and against Nicaragua* (footnote 36 above), p. 131, para. 259.

[208] *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, p. 803, at pp. 811–812, para. 21.

[209] Cf. *Gabčíkovo-Nagymaros Project* (footnote 27 above), p. 77, para. 135, where the Court referred to the parties having accepted "obligations of conduct, obligations of performance, and obligations of result".

He claimed that he had not had a fair hearing, contrary to article 6, paragraph 1, of the European Convention on Human Rights. The Court noted that:

> The Contracting States enjoy a wide discretion as regards the choice of the means calculated to ensure that their legal systems are in compliance with the requirements of article 6 § 1 in this field. The Court's task is not to indicate those means to the States, but to determine whether the result called for by the Convention has been achieved ... For this to be so, the resources available under domestic law must be shown to be effective and a person "charged with a criminal offence" ... must not be left with the burden of proving that he was not seeking to evade justice or that his absence was due to *force majeure*.[210]

The Court thus considered that article 6, paragraph 1, imposed an obligation of result.[211] But, in order to decide whether there had been a breach of the Convention in the circumstances of the case, it did not simply compare the result required (the opportunity for a trial in the accused's presence) with the result practically achieved (the lack of that opportunity in the particular case). Rather, it examined what more Italy could have done to make the applicant's right "effective".[212] The distinction between obligations of conduct and result was not determinative of the actual decision that there had been a breach of article 6, paragraph 1.[213]

(12) The question often arises whether an obligation is breached by the enactment of legislation by a State, in cases where the content of the legislation *prima facie* conflicts with what is required by the international obligation, or whether the legislation has to be implemented in the given case before the breach can be said to have occurred. Again, no general rule can be laid down that is applicable to all cases.[214] Certain obligations may be breached by the mere passage of incompatible legislation.[215] Where this is so, the passage of the legislation without more entails the international responsibility of the enacting State, the legislature itself being an organ of the State for the purposes of the attribution of responsibility.[216] In other circumstances, the enactment of legislation may not in and of itself amount to a breach,[217] especially if it is open to the State concerned to give effect to the legislation in a way which would not violate the international obligation in question. In such cases, whether there is a breach will depend on whether and how the legislation is given effect.[218]

### *Article 13. International obligation in force for a State*

**An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs.**

*Commentary*

(1) Article 13 states the basic principle that, for responsibility to exist, the breach must occur at a time when the State is bound by the obligation. This is but the application in the field of State responsibility of the general principle of intertemporal law, as stated by Judge Huber in another context in the *Island of Palmas* case:

> [A] juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled.[219]

Article 13 provides an important guarantee for States in terms of claims of responsibility. Its formulation ("does not constitute … unless …") is in keeping with the idea of a guarantee against the retrospective application of international law in matters of State responsibility.

(2) International tribunals have applied the principle stated in article 13 in many cases. An instructive example is provided by the decision of Umpire Bates of the United States-Great Britain Mixed Commission concerning the

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[210] *Colozza* v. *Italy, Eur. Court H.R., Series A, No. 89* (1985), pp. 15–16, para. 30, citing *De Cubber* v. *Belgium, ibid., No. 86* (1984), p. 20, para. 35.

[211] Cf. *Plattform "Ärzte für das Leben"* v. *Austria*, in which the Court gave the following interpretation of article 11:

> "While it is the duty of Contracting States to take reasonable and appropriate measures to enable lawful demonstrations to proceed peacefully, they cannot guarantee this absolutely and they have a wide discretion in the choice of the means to be used … In this area the obligation they enter into under article 11 of the Convention is an obligation as to measures to be taken and not as to results to be achieved" (*Eur. Court H.R., Series A, No. 139*, p. 12, para. 34 (1988)).

In the *Colozza* case (see footnote 210 above), the Court used similar language but concluded that the obligation was an obligation of result. Cf. C. Tomuschat, "What is a 'breach' of the European Convention on Human Rights?", *The Dynamics of the Protection of Human Rights in Europe: Essays in Honour of Henry G. Schermers*, Lawson and de Blois, eds. (Dordrecht, Martinus Nijhoff, 1994), vol. 3, p. 315, at p. 328.

[212] *Colozza* case (see footnote 210 above), para. 28.

[213] See also *The Islamic Republic of Iran* v. *The United States of America*, cases A15 (IV) and A24, Iran-U.S. C.T.R., vol. 32, p. 115 (1996).

[214] Cf. *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947* (footnote 83 above), p. 30, para. 42.

[215] A uniform law treaty will generally be construed as requiring immediate implementation, i.e. as embodying an obligation to make the provisions of the uniform law a part of the law of each State party: see, e.g., B. Conforti, "Obblighi di mezzi e obblighi di risultato nelle convenzioni di diritto uniforme", *Rivista di diritto internazionale privato e processuale*, vol. 24 (1988), p. 233.

[216] See article 4 and commentary. For illustrations, see, e.g., the findings of the European Court of Human Rights in *Norris* v. *Ireland*, *Eur. Court H.R., Series A, No. 142*, para. 31 (1988), citing *Klass and Others* v. *Germany, ibid., No. 28*, para. 33 (1978); *Marckx* v. *Belgium, ibid., No. 31*, para. 27 (1979); *Johnston and Others* v. *Ireland, ibid., No. 112*, para. 42 (1986); *Dudgeon* v. *the United Kingdom, ibid., No. 45*, para. 41 (1981); and *Modinos* v. *Cyprus, ibid., No. 259*, para. 24 (1993). See also *International responsibility for the promulgation and enforcement of laws in violation of the Convention (arts. 1 and 2 American Convention on Human Rights)*, Advisory Opinion OC–14/94, Inter-American Court of Human Rights, Series A, No. 14 (1994). The Inter-American Court also considered it possible to determine whether draft legislation was compatible with the provisions of human rights treaties: *Restrictions to the Death Penalty (arts. 4(2) and 4(4) American Convention on Human Rights)*, Advisory Opinion OC–3/83, Series A, No. 3 (1983).

[217] As ICJ held in *LaGrand*, *Judgment* (see footnote 119 above), p. 497, paras. 90–91.

[218] See, e.g., WTO, Report of the Panel (footnote 73 above), paras. 7.34–7.57.

[219] *Island of Palmas* (Netherlands/United States of America), UNRIAA, vol. II (Sales No. 1949.V.1), p. 829, at p. 845 (1928). Generally on intertemporal law, see resolution I adopted in 1975 by the Institute of International Law at its Wiesbaden session, *Annuaire de l'Institut de droit international*, vol. 56 (1975), pp. 536–540; for the debate, *ibid.*, pp. 339–374; for M. Sørensen's reports, *ibid.*, vol. 55 (1973), pp. 1–116. See further W. Karl, "The time factor in the law of State responsibility", Spinedi and Simma, eds., *op. cit*. (footnote 175 above), p. 95.

conduct of British authorities who had seized United States vessels engaged in the slave trade and freed slaves belonging to United States nationals. The incidents referred to the Commission had taken place at different times and the umpire had to determine whether, at the time each incident took place, slavery was "contrary to the law of nations". Earlier incidents, dating back to a time when the slave trade was considered lawful, amounted to a breach on the part of the British authorities of the international obligation to respect and protect the property of foreign nationals.[220] The later incidents occurred when the slave trade had been "prohibited by all civilized nations" and did not involve the responsibility of Great Britain.[221]

(3) Similar principles were applied by Arbitrator Asser in deciding whether the seizure and confiscation by Russian authorities of United States vessels engaged in seal hunting outside Russia's territorial waters should be considered internationally wrongful. In his award in the *"James Hamilton Lewis"* case, he observed that the question had to be settled "according to the general principles of the law of nations and the spirit of the international agreements in force and binding upon the two High Parties at the time of the seizure of the vessel".[222] Since, under the principles in force at the time, Russia had no right to seize the United States vessel, the seizure and confiscation of the vessel were unlawful acts for which Russia was required to pay compensation.[223] The same principle has consistently been applied by the European Commission and the European Court of Human Rights to deny claims relating to periods during which the European Convention on Human Rights was not in force for the State concerned.[224]

(4) State practice also supports the principle. A requirement that arbitrators apply the rules of international law in force at the time when the alleged wrongful acts took place is a common stipulation in arbitration agreements,[225] and undoubtedly is made by way of explicit confirmation of a generally recognized principle. International law writers who have dealt with the question recognize that the wrongfulness of an act must be established on the basis of the obligations in force at the time when the act was performed.[226]

(5) State responsibility can extend to acts of the utmost seriousness, and the regime of responsibility in such cases will be correspondingly stringent. But even when a new peremptory norm of general international law comes into existence, as contemplated by article 64 of the 1969 Vienna Convention, this does not entail any retrospective assumption of responsibility. Article 71, paragraph 2 (*b*), provides that such a new peremptory norm "does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination, provided that those rights, obligations or situations may thereafter be maintained only to the extent that their maintenance is not in itself in conflict with the new peremptory norm".

(6) Accordingly, it is appropriate to apply the intertemporal principle to all international obligations, and article 13 is general in its application. It is, however, without prejudice to the possibility that a State may agree to compensate for damage caused as a result of conduct which was not at the time a breach of any international obligation in force for that State. In fact, cases of the retrospective assumption of responsibility are rare. The *lex specialis* principle (art. 55) is sufficient to deal with any such cases where it may be agreed or decided that responsibility will be assumed retrospectively for conduct which was not a breach of an international obligation at the time it was committed.[227]

(7) In international law, the principle stated in article 13 is not only a necessary but also a sufficient basis for responsibility. In other words, once responsibility has accrued as a result of an internationally wrongful act, it is not affected by the subsequent termination of the obligation, whether as a result of the termination of the treaty which has been breached or of a change in international law. Thus, as ICJ said in the *Northern Cameroons* case:

> [I]f during the life of the Trusteeship the Trustee was responsible for some act in violation of the terms of the Trusteeship Agreement which resulted in damage to another Member of the United Nations or to one of its nationals, a claim for reparation would not be liquidated by the termination of the Trust.[228]

Similarly, in the *"Rainbow Warrior"* arbitration, the arbitral tribunal held that, although the relevant treaty obli-

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[220] See the *"Enterprize"* case, Lapradelle-Politis (footnote 139 above), vol. I, p. 703 (1855); and Moore, *History and Digest*, vol. IV, p. 4349, at p. 4373. See also the *"Hermosa"* and *"Créole"* cases, Lapradelle-Politis, *op. cit*., p. 704 (1855); and Moore, *History and Digest*, vol. IV, pp. 4374–4375.

[221] See the *"Lawrence"* case, Lapradelle-Politis, *op. cit*., p. 741; and Moore, *History and Digest*, vol. III, p. 2824. See also the *"Volusia"* case, Lapradelle-Politis, *op. cit*., p. 741.

[222] *Affaire des navires Cape Horn Pigeon, James Hamilton Lewis, C. H. White et Kate and Anna*, UNRIAA, vol. IX (Sales No. 59.V.5), p. 66, at p. 69 (1902).

[223] See also the *"C. H. White"* case, *ibid.*, p. 74. In these cases the arbitrator was required by the arbitration agreement itself to apply the law in force at the time the acts were performed. Nevertheless, the intention of the parties was clearly to confirm the application of the general principle in the context of the arbitration agreement, not to establish an exception. See further the *S.S. "Lisman"* case, *ibid.*, vol. III (Sales No. 1949.V.2), p. 1767, at p. 1771 (1937).

[224] See, e.g., *X* v. *Germany*, application No. 1151/61, Council of Europe, European Commission of Human Rights, *Recueil des décisions*, No. 7 (March 1962), p. 119 (1961) and many later decisions.

[225] See, e.g., Declarations exchanged between the Government of the United States of America and the Imperial Government of Russia, for the submission to arbitration of certain disputes concerning the international responsibility of Russia for the seizure of American ships, UNRIAA, vol. IX (Sales No. 59.V.5), p. 57 (1900).

[226] See, e.g., P. Tavernier, *Recherches sur l'application dans le temps des actes et des règles en droit international public: problèmes de droit intertemporel ou de droit transitoire* (Paris, Librairie générale de droit et de jurisprudence, 1970), pp. 119, 135 and 292; D. Bindschedler-Robert, "De la rétroactivité en droit international public", *Recueil d'études de droit international en hommage à Paul Guggenheim* (University of Geneva Law Faculty/Graduate Institute of International Studies, 1968), p. 184; M. Sørensen, "Le problème intertemporel dans l'application de la Convention européenne des droits de l'homme", *Mélanges offerts à Polys Modinos* (Paris, Pedone, 1968), p. 304; T. O. Elias, "The doctrine of intertemporal law", AJIL, vol. 74, No. 2 (April 1980), p. 285; and R. Higgins, "Time and the law: international perspectives on an old problem", *International and Comparative Law Quarterly*, vol. 46 (July 1997), p. 501.

[227] As to the retroactive effect of the acknowledgement and adoption of conduct by a State, see article 11 and commentary, especially paragraph (4). Such acknowledgement and adoption would not, without more, give retroactive effect to the obligations of the adopting State.

[228] *Northern Cameroons, Preliminary Objections, Judgment, I.C.J. Reports 1963*, p. 15, at p. 35.

gation had terminated with the passage of time, France's responsibility for its earlier breach remained.[229]

(8) Both aspects of the principle are implicit in the ICJ decision in the *Certain Phosphate Lands in Nauru* case. Australia argued there that a State responsibility claim relating to the period of its joint administration of the Trust Territory for Nauru (1947–1968) could not be brought decades later, even if the claim had not been formally waived. The Court rejected the argument, applying a liberal standard of laches or unreasonable delay.[230] But it went on to say that:

> [I]t will be for the Court, in due time, to ensure that Nauru's delay in seising [*sic*] it will in no way cause prejudice to Australia with regard to both the establishment of the facts and the determination of the content of the applicable law.[231]

Evidently, the Court intended to apply the law in force at the time the claim arose. Indeed that position was necessarily taken by Nauru itself, since its claim was based on a breach of the Trusteeship Agreement, which terminated at the date of its accession to independence in 1968. Its claim was that the responsibility of Australia, once engaged under the law in force at a given time, continued to exist even if the primary obligation had subsequently terminated.[232]

(9) The basic principle stated in article 13 is thus well established. One possible qualification concerns the progressive interpretation of obligations, by a majority of the Court in the *Namibia* case.[233] But the intertemporal principle does not entail that treaty provisions are to be interpreted as if frozen in time. The evolutionary interpretation of treaty provisions is permissible in certain cases,[234] but this has nothing to do with the principle that a State can only be held responsible for breach of an obligation which was in force for that State at the time of its conduct. Nor does the principle of the intertemporal law mean that facts occurring prior to the entry into force of a particular obligation may not be taken into account where these are otherwise relevant. For example, in dealing with the obligation to ensure that persons accused are tried without undue delay, periods of detention prior to the entry into force of that obligation may be relevant as facts, even though no compensation could be awarded in respect of the period prior to the entry into force of the obligation.[235]

[229] *"Rainbow Warrior"* (see footnote 46 above), pp. 265–266.

[230] *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 240, at pp. 253–255, paras. 31–36. See article 45, subparagraph (*b*), and commentary.

[231] *Certain Phosphate Lands in Nauru*, *ibid.*, p. 255, para. 36.

[232] The case was settled before the Court had the opportunity to consider the merits: *Certain Phosphate Lands in Nauru, Order of 13 September 1993, I.C.J. Reports 1993*, p. 322; for the settlement agreement, see Agreement between Australia and the Republic of Nauru for the Settlement of the Case in the International Court of Justice concerning Certain Phosphate Lands in Nauru (Nauru, 10 August 1993) (United Nations, *Treaty Series*, vol. 1770, No. 30807, p. 379).

[233] *Namibia* case (see footnote 176 above), pp. 31–32, para. 53.

[234] See, e.g., *Tyrer* v. *the United Kingdom, Eur. Court H.R., Series A, No. 26*, pp. 15–16 (1978).

[235] See, e.g., *Zana* v. *Turkey*, *Eur. Court H.R., Reports*, 1997–VII, p. 2533 (1997); and J. Pauwelyn, "The concept of a 'continuing violation' of an international obligation: selected problems", BYBIL, *1995*, vol. 66, p. 415, at pp. 443–445.

### *Article 14. Extension in time of the breach of an international obligation*

**1. The breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the act is performed, even if its effects continue.**

**2. The breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation.**

**3. The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation.**

*Commentary*

(1) The problem of identifying when a wrongful act begins and how long it continues is one which arises frequently[236] and has consequences in the field of State responsibility, including the important question of cessation of continuing wrongful acts dealt with in article 30. Although the existence and duration of a breach of an international obligation depends for the most part on the existence and content of the obligation and on the facts of the particular breach, certain basic concepts are established. These are introduced in article 14. Without seeking to be comprehensive in its treatment of the problem, article 14 deals with several related questions. In particular, it develops the distinction between breaches not extending in time and continuing wrongful acts (see paragraphs (1) and (2) respectively), and it also deals with the application of that distinction to the important case of obligations of prevention. In each of these cases it takes into account the question of the continuance in force of the obligation breached.

(2) Internationally wrongful acts usually take some time to happen. The critical distinction for the purpose of article 14 is between a breach which is continuing and one which has already been completed. In accordance with *paragraph 1*, a completed act occurs "at the moment when the act is performed", even though its effects or consequences may continue. The words "at the moment" are intended to provide a more precise description of the time frame when a completed wrongful act is performed,

[236] See, e.g., *Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 35; *Phosphates in Morocco* (footnote 34 above), pp. 23–29; *Electricity Company of Sofia and Bulgaria, Judgment, 1939*, *P.C.I.J., Series A/B, No. 77*, p. 64, at pp. 80–82; and *Right of Passage over Indian Territory* (footnote 207 above), pp. 33–36. The issue has often been raised before the organs of the European Convention on Human Rights. See, e. g., the decision of the European Commission of Human Rights in the *De Becker* v. *Belgium* case, application No. 214/56, *Yearbook of the European Convention on Human Rights, 1958–1959*, p. 214, at pp. 234 and 244; and the Court's judgments in *Ireland* v. *the United Kingdom, Eur. Court H.R., Series A, No. 25*, p. 64 (1978); *Papamichalopoulos and Others* v. *Greece, ibid., No. 260–B*, para. 40 (1993); and *Agrotexim and Others* v. *Greece, ibid., No. 330–A*, p. 22, para. 58 (1995). See also E. Wyler, "Quelques réflexions sur la réalisation dans le temps du fait internationalement illicite", RGDIP, vol. 95, p. 881 (1991).

without requiring that the act necessarily be completed in a single instant.

(3) In accordance with *paragraph 2*, a continuing wrongful act, on the other hand, occupies the entire period during which the act continues and remains not in conformity with the international obligation, provided that the State is bound by the international obligation during that period.[237] Examples of continuing wrongful acts include the maintenance in effect of legislative provisions incompatible with treaty obligations of the enacting State, unlawful detention of a foreign official or unlawful occupation of embassy premises, maintenance by force of colonial domination, unlawful occupation of part of the territory of another State or stationing armed forces in another State without its consent.

(4) Whether a wrongful act is completed or has a continuing character will depend both on the primary obligation and the circumstances of the given case. For example, the Inter-American Court of Human Rights has interpreted forced or involuntary disappearance as a continuing wrongful act, one which continues for as long as the person concerned is unaccounted for.[238] The question whether a wrongful taking of property is a completed or continuing act likewise depends to some extent on the content of the primary rule said to have been violated. Where an expropriation is carried out by legal process, with the consequence that title to the property concerned is transferred, the expropriation itself will then be a completed act. The position with a *de facto*, "creeping" or disguised occupation, however, may well be different.[239] Exceptionally, a tribunal may be justified in refusing to recognize a law or decree at all, with the consequence that the resulting denial of status, ownership or possession may give rise to a continuing wrongful act.[240]

(5) Moreover, the distinction between completed and continuing acts is a relative one. A continuing wrongful act itself can cease: thus a hostage can be released, or the body of a disappeared person returned to the next of kin. In essence, a continuing wrongful act is one which has been commenced but has not been completed at the relevant time. Where a continuing wrongful act has ceased, for example by the release of hostages or the withdrawal of forces from territory unlawfully occupied, the act is considered for the future as no longer having a continuing character, even though certain effects of the act may continue. In this respect, it is covered by paragraph 1 of article 14.

(6) An act does not have a continuing character merely because its effects or consequences extend in time. It must be the wrongful act as such which continues. In many cases of internationally wrongful acts, their consequences may be prolonged. The pain and suffering caused by earlier acts of torture or the economic effects of the expropriation of property continue even though the torture has ceased or title to the property has passed. Such consequences are the subject of the secondary obligations of reparation, including restitution, as required by Part Two of the articles. The prolongation of such effects will be relevant, for example, in determining the amount of compensation payable. They do not, however, entail that the breach itself is a continuing one.

(7) The notion of continuing wrongful acts is common to many national legal systems and owes its origins in international law to Triepel.[241] It has been repeatedly referred to by ICJ and by other international tribunals. For example, in the *United States Diplomatic and Consular Staff in Tehran* case, the Court referred to "successive and still continuing breaches by Iran of its obligations to the United States under the Vienna Conventions of 1961 and 1963".[242]

(8) The consequences of a continuing wrongful act will depend on the context, as well as on the duration of the obligation breached. For example, the *"Rainbow Warrior"* arbitration involved the failure of France to detain two agents on the French Pacific island of Hao for a period of three years, as required by an agreement between France and New Zealand. The arbitral tribunal referred with approval to the Commission's draft articles (now amalgamated in article 14) and to the distinction between instantaneous and continuing wrongful acts, and said:

> Applying this classification to the present case, it is clear that the breach consisting in the failure of returning to Hao the two agents has been not only a material but also a continuous breach. And this classification is not purely theoretical, but, on the contrary, it has practical consequences, since the seriousness of the breach and its prolongation in time cannot fail to have considerable bearing on the establishment of the reparation which is adequate for a violation presenting these two features.[243]

The tribunal went on to draw further legal consequences from the distinction in terms of the duration of French obligations under the agreement.[244]

(9) The notion of continuing wrongful acts has also been applied by the European Court of Human Rights to establish its jurisdiction *ratione temporis* in a series of cases. The issue arises because the Court's jurisdiction may be limited to events occurring after the respondent State became a party to the Convention or the relevant Protocol and accepted the right of individual petition. Thus, in the *Papamichalopoulos* case, a seizure of property not involving formal expropriation occurred some eight years before Greece recognized the Court's competence. The Court held that there was a continuing breach of the right to peaceful enjoyment of property under article 1 of the Protocol to the European Convention on Human Rights,

[237] See article 13 and commentary, especially para. (2).

[238] *Blake*, Inter-American Court of Human Rights, Series C, No. 36, para. 67 (1998).

[239] *Papamichalopoulos* (see footnote 236 above).

[240] *Loizidou*, *Merits* (see footnote 160 above), p. 2216.

[241] H. Triepel, *Völkerrecht und Landesrecht* (Leipzig, Hirschfeld, 1899), p. 289. The concept was subsequently taken up in various general studies on State responsibility as well as in works on the interpretation of the formula "situations or facts prior to a given date" used in some declarations of acceptance of the compulsory jurisdiction of ICJ.

[242] *United States Diplomatic and Consular Staff in Tehran* (see footnote 59 above), p. 37, para. 80. See also pages 36–37, paras. 78–79.

[243] *"Rainbow Warrior"* (see footnote 46 above), p. 264, para. 101.

[244] *Ibid*., pp. 265–266, paras. 105–106. But see the separate opinion of Sir Kenneth Keith, *ibid*., pp. 279–284.

which continued after the Protocol had come into force; it accordingly upheld its jurisdiction over the claim.[245]

(10) In the *Loizidou* case,[246] similar reasoning was applied by the Court to the consequences of the Turkish invasion of Cyprus in 1974, as a result of which the applicant was denied access to her property in northern Cyprus. Turkey argued that under article 159 of the Constitution of the Turkish Republic of Northern Cyprus of 1985, the property in question had been expropriated, and this had occurred prior to Turkey's acceptance of the Court's jurisdiction in 1990. The Court held that, in accordance with international law and having regard to the relevant Security Council resolutions, it could not attribute legal effect to the 1985 Constitution so that the expropriation was not completed at that time and the property continued to belong to the applicant. The conduct of the Turkish Republic and of Turkish troops in denying the applicant access to her property continued after Turkey's acceptance of the Court's jurisdiction, and constituted a breach of article 1 of the Protocol to the European Convention on Human Rights after that time.[247]

(11) The Human Rights Committee has likewise endorsed the idea of continuing wrongful acts. For example, in *Lovelace*, it held it had jurisdiction to examine the continuing effects for the applicant of the loss of her status as a registered member of an Indian group, although the loss had occurred at the time of her marriage in 1970 and Canada only accepted the Committee's jurisdiction in 1976. The Committee noted that it was:

> not competent, as a rule, to examine allegations relating to events having taken place before the entry into force of the Covenant and the Optional Protocol … In the case of Sandra Lovelace it follows that the Committee is not competent to express any view on the original cause of her loss of Indian status … at the time of her marriage in 1970 …
>
> The Committee recognizes, however, that the situation may be different if the alleged violations, although relating to events occurring before 19 August 1976, continue, or have effects which themselves constitute violations, after that date.[248]

It found that the continuing impact of Canadian legislation, in preventing Lovelace from exercising her rights as a member of a minority, was sufficient to constitute a breach of article 27 of the International Covenant on Civil and Political Rights after that date. Here the notion of a continuing breach was relevant not only to the Committee's jurisdiction but also to the application of article 27 as the most directly relevant provision of the Covenant to the facts in hand.

(12) Thus, conduct which has commenced some time in the past, and which constituted (or, if the relevant primary rule had been in force for the State at the time, would have constituted) a breach at that time, can continue and give rise to a continuing wrongful act in the present. Moreover, this continuing character can have legal significance for various purposes, including State responsibility. For example, the obligation of cessation contained in article 30 applies to continuing wrongful acts.

(13) A question common to wrongful acts whether completed or continuing is when a breach of international law occurs, as distinct from being merely apprehended or imminent. As noted in the context of article 12, that question can only be answered by reference to the particular primary rule. Some rules specifically prohibit threats of conduct,[249] incitement or attempt,[250] in which case the threat, incitement or attempt is itself a wrongful act. On the other hand, where the internationally wrongful act is the occurrence of some event—e.g. the diversion of an international river—mere preparatory conduct is not necessarily wrongful.[251] In the *Gabčíkovo-Nagymaros Project* case, the question was when the diversion scheme ("Variant C") was put into effect. ICJ held that the breach did not occur until the actual diversion of the Danube. It noted:

> that between November 1991 and October 1992, Czechoslovakia confined itself to the execution, on its own territory, of the works which were necessary for the implementation of Variant C, but which could have been abandoned if an agreement had been reached between the parties and did not therefore predetermine the final decision to be taken. For as long as the Danube had not been unilaterally dammed, Variant C had not in fact been applied.
>
> Such a situation is not unusual in international law or, for that matter, in domestic law. A wrongful act or offence is frequently preceded by preparatory actions which are not to be confused with the act or offence itself. It is as well to distinguish between the actual commission of a wrongful act (whether instantaneous or continuous) and the conduct prior to that act which is of a preparatory character and which "does not qualify as a wrongful act". [252]

Thus, the Court distinguished between the actual commission of a wrongful act and conduct of a preparatory character. Preparatory conduct does not itself amount to a

[245] See footnote 236 above.

[246] *Loizidou, Merits* (see footnote 160 above), p. 2216.

[247] *Ibid*., pp. 2230–2232 and 2237–2238, paras. 41–47 and 63–64. See, however, the dissenting opinion of Judge Bernhardt, p. 2242, para. 2 (with whom Judges Lopes Rocha, Jambrek, Pettiti, Baka and Gölcüklü in substance agreed). See also *Loizidou, Preliminary Objections* (footnote 160 above), pp. 33–34, paras. 102–105; and *Cyprus* v. *Turkey*, application No. 25781/94, judgement of 10 May 2001, *Eur. Court H.R., Reports*, 2001–IV.

[248] *Lovelace* v. *Canada*, *Official Records of the General Assembly, Thirty-sixth Session, Supplement No. 40* (A/36/40), annex XVIII, communication No. R.6/24, p. 172, paras. 10–11 (1981).

[249] Notably, Article 2, paragraph 4, of the Charter of the United Nations prohibits "the threat or use of force against the territorial integrity or political independence of any state". For the question of what constitutes a threat of force, see *Legality of the Threat or Use of Nuclear Weapons* (footnote 54 above), pp. 246–247, paras. 47–48; see also R. Sadurska, "Threats of force", AJIL, vol. 82, No. 2 (April 1988), p. 239.

[250] A particularly comprehensive formulation is that of article III of the Convention on the Prevention and Punishment of the Crime of Genocide which prohibits conspiracy, direct and public incitement, attempt and complicity in relation to genocide. See also article 2 of the International Convention for the Suppression of Terrorist Bombings and article 2 of the International Convention for the Suppression of the Financing of Terrorism.

[251] In some legal systems, the notion of "anticipatory breach" is used to deal with the definitive refusal by a party to perform a contractual obligation, in advance of the time laid down for its performance. Confronted with an anticipatory breach, the party concerned is entitled to terminate the contract and sue for damages. See K. Zweigert and H. Kötz, *Introduction to Comparative Law*, 3rd rev. ed., trans. T. Weir (Oxford, Clarendon Press, 1998), p. 508. Other systems achieve similar results without using this concept, e.g. by construing a refusal to perform in advance of the time for performance as a "positive breach of contract", *ibid*., p. 494 (German law). There appears to be no equivalent in international law, but article 60, paragraph 3 (*a*), of the 1969 Vienna Convention defines a material breach as including "a repudiation … not sanctioned by the present Convention". Such a repudiation could occur in advance of the time for performance.

[252] *Gabčíkovo-Nagymaros Project* (see footnote 27 above), p. 54, para. 79, citing the draft commentary to what is now article 30.

breach if it does not "predetermine the final decision to be taken". Whether that is so in any given case will depend on the facts and on the content of the primary obligation. There will be questions of judgement and degree, which it is not possible to determine in advance by the use of any particular formula. The various possibilities are intended to be covered by the use of the term "occurs" in paragraphs 1 and 3 of article 14.

(14) *Paragraph 3* of article 14 deals with the temporal dimensions of a particular category of breaches of international obligations, namely the breach of obligations to prevent the occurrence of a given event. Obligations of prevention are usually construed as best efforts obligations, requiring States to take all reasonable or necessary measures to prevent a given event from occurring, but without warranting that the event will not occur. The breach of an obligation of prevention may well be a continuing wrongful act, although, as for other continuing wrongful acts, the effect of article 13 is that the breach only continues if the State is bound by the obligation for the period during which the event continues and remains not in conformity with what is required by the obligation. For example, the obligation to prevent transboundary damage by air pollution, dealt with in the *Trail Smelter* arbitration,[253] was breached for as long as the pollution continued to be emitted. Indeed, in such cases the breach may be progressively aggravated by the failure to suppress it. However, not all obligations directed to preventing an act from occurring will be of this kind. If the obligation in question was only concerned to prevent the happening of the event in the first place (as distinct from its continuation), there will be no continuing wrongful act.[254] If the obligation in question has ceased, any continuing conduct by definition ceases to be wrongful at that time.[255] Both qualifications are intended to be covered by the phrase in paragraph 3, "and remains not in conformity with that obligation".

### *Article 15. Breach consisting of a composite act*

**1. The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.**

**2. In such a case, the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation.**

*Commentary*

(1) Within the basic framework established by the distinction between completed and continuing acts in article 14, article 15 deals with a further refinement, viz. the notion of a composite wrongful act. Composite acts give rise to continuing breaches, which extend in time from the first of the actions or omissions in the series of acts making up the wrongful conduct.

(2) Composite acts covered by article 15 are limited to breaches of obligations which concern some aggregate of conduct and not individual acts as such. In other words, their focus is "a series of acts or omissions defined in aggregate as wrongful". Examples include the obligations concerning genocide, apartheid or crimes against humanity, systematic acts of racial discrimination, systematic acts of discrimination prohibited by a trade agreement, etc. Some of the most serious wrongful acts in international law are defined in terms of their composite character. The importance of these obligations in international law justifies special treatment in article 15.[256]

(3) Even though it has special features, the prohibition of genocide, formulated in identical terms in the Convention on the Prevention and Punishment of the Crime of Genocide and in later instruments,[257] may be taken as an illustration of a "composite" obligation. It implies that the responsible entity (including a State) will have adopted a systematic policy or practice. According to article II, subparagraph (*a*), of the Convention, the prime case of genocide is "[k]illing members of the [national, ethnical, racial or religious] group" with the intent to destroy that group as such, in whole or in part. Both limbs of the definition contain systematic elements. Genocide has also to be carried out with the relevant intention, aimed at physically eliminating the group "as such". Genocide is not committed until there has been an accumulation of acts of killing, causing harm, etc., committed with the relevant intent, so as to satisfy the definition in article II. Once that threshold is crossed, the time of commission extends over the whole period during which any of the acts was committed, and any individual responsible for any of them with the relevant intent will have committed genocide.[258]

(4) It is necessary to distinguish composite obligations from simple obligations breached by a "composite" act. Composite acts may be more likely to give rise to

[253] *Trail Smelter*, UNRIAA, vol. III (Sales No. 1949.V.2), p. 1905 (1938, 1941).

[254] An example might be an obligation by State A to prevent certain information from being published. The breach of such an obligation will not necessarily be of a continuing character, since it may be that once the information is published, the whole point of the obligation is defeated.

[255] See the *"Rainbow Warrior"* case (footnote 46 above), p. 266.

[256] See further J. J. A. Salmon, "Le fait étatique complexe: une notion contestable", *Annuaire français de droit international*, vol. 28 (1982), p. 709.

[257] See, e.g., article 4 of the statute of the International Tribunal for the Former Yugoslavia, originally published as an annex to document S/25704 and Add.1, approved by the Security Council in its resolution 827 (1993) of 25 May 1993, and amended on 13 May 1998 by resolution 1166 (1998) and on 30 November 2000 by resolution 1329 (2000); article 2 of the statute of the International Tribunal for Rwanda, approved by the Security Council in its resolution 955 (1994) of 8 November 1994; and article 6 of the Rome Statute of the International Criminal Court.

[258] The intertemporal principle does not apply to the Convention, which according to its article I is declaratory. Thus, the obligation to prosecute relates to genocide whenever committed. See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections* (footnote 54 above), p. 617, para. 34.

continuing breaches, but simple acts can cause continuing breaches as well. The position is different, however, where the obligation itself is defined in terms of the cumulative character of the conduct, i.e. where the cumulative conduct constitutes the essence of the wrongful act. Thus, apartheid is different in kind from individual acts of racial discrimination, and genocide is different in kind from individual acts even of ethnically or racially motivated killing.

(5) In *Ireland* v. *the United Kingdom*, Ireland complained of a practice of unlawful treatment of detainees in Northern Ireland which was said to amount to torture or inhuman or degrading treatment, and the case was held to be admissible on that basis. This had various procedural and remedial consequences. In particular, the exhaustion of local remedies rule did not have to be complied with in relation to each of the incidents cited as part of the practice. But the Court denied that there was any separate wrongful act of a systematic kind involved. It was simply that Ireland was entitled to complain of a practice made up by a series of breaches of article VII of the Convention on the Prevention and Punishment of the Crime of Genocide, and to call for its cessation. As the Court said:

> A practice incompatible with the Convention consists of an accumulation of identical or analogous breaches which are sufficiently numerous and inter-connected to amount not merely to isolated incidents or exceptions but to a pattern or system; *a practice does not of itself constitute a violation separate from such breaches* ...*
>
> The concept of practice is of particular importance for the operation of the rule of exhaustion of domestic remedies. This rule, as embodied in Article 26 of the Convention, applies to State applications ... in the same way as it does to "individual" applications ... On the other hand and in principle, the rule does not apply where the applicant State complains of a practice as such, with the aim of preventing its continuation or recurrence, but does not ask the Commission or the Court to give a decision on each of the cases put forward as proof or illustrations of that practice.[259]

In the case of crimes against humanity, the composite act is a violation separate from the individual violations of human rights of which it is composed.

(6) A further distinction must be drawn between the necessary elements of a wrongful act and what might be required by way of evidence or proof that such an act has occurred. For example, an individual act of racial discrimination by a State is internationally wrongful,[260] even though it may be necessary to adduce evidence of a series of acts by State officials (involving the same person or other persons similarly situated) in order to show that any one of those acts was discriminatory rather than actuated by legitimate grounds. In its essence such discrimination is not a composite act, but it may be necessary for the purposes of proving it to produce evidence of a practice amounting to such an act.

(7) A consequence of the character of a composite act is that the time when the act is accomplished cannot be the time when the first action or omission of the series takes place. It is only subsequently that the first action or omission will appear as having, as it were, inaugurated the series. Only after a series of actions or omissions takes place will the composite act be revealed, not merely as a succession of isolated acts, but as a composite act, i.e. an act defined in aggregate as wrongful.

(8) *Paragraph 1* of article 15 defines the time at which a composite act "occurs" as the time at which the last action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act, without it necessarily having to be the last in the series. Similar considerations apply as for completed and continuing wrongful acts in determining when a breach of international law exists; the matter is dependent upon the precise facts and the content of the primary obligation. The number of actions or omissions which must occur to constitute a breach of the obligation is also determined by the formulation and purpose of the primary rule. The actions or omissions must be part of a series but the article does not require that the whole series of wrongful acts has to be committed in order to fall into the category of a composite wrongful act, provided a sufficient number of acts has occurred to constitute a breach. At the time when the act occurs which is sufficient to constitute the breach it may not be clear that further acts are to follow and that the series is not complete. Further, the fact that the series of actions or omissions was interrupted so that it was never completed will not necessarily prevent those actions or omissions which have occurred being classified as a composite wrongful act if, taken together, they are sufficient to constitute the breach.

(9) While composite acts are made up of a series of actions or omissions defined in aggregate as wrongful, this does not exclude the possibility that every single act in the series could be wrongful in accordance with another obligation. For example, the wrongful act of genocide is generally made up of a series of acts which are themselves internationally wrongful. Nor does it affect the temporal element in the commission of the acts: a series of acts or omissions may occur at the same time or sequentially, at different times.

(10) *Paragraph 2* of article 15 deals with the extension in time of a composite act. Once a sufficient number of actions or omissions has occurred, producing the result of the composite act as such, the breach is dated to the first of the acts in the series. The status of the first action or omission is equivocal until enough of the series has occurred to constitute the wrongful act; but at that point the act should be regarded as having occurred over the whole period from the commission of the first action or omission. If this were not so, the effectiveness of the prohibition would thereby be undermined.

(11) The word "remain" in paragraph 2 is inserted to deal with the intertemporal principle set out in article 13. In accordance with that principle, the State must be bound by the international obligation for the period during which the series of acts making up the breach is committed. In

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[259] *Ireland* v. *the United Kingdom* (see footnote 236 above), p. 64, para. 159; see also page 63, para. 157. See further the United States counterclaim in *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Counter-Claim, Order of 10 March 1998, I.C.J. Reports 1998*, p. 190, which likewise focuses on a general situation rather than specific instances.

[260] See, e.g., article 2 of the International Convention on the Elimination of All Forms of Racial Discrimination; and article 26 of the International Covenant on Civil and Political Rights.

cases where the relevant obligation did not exist at the beginning of the course of conduct but came into being thereafter, the "first" of the actions or omissions of the series for the purposes of State responsibility will be the first occurring after the obligation came into existence. This need not prevent a court taking into account earlier actions or omissions for other purposes (e.g. in order to establish a factual basis for the later breaches or to provide evidence of intent).

## Chapter IV

## RESPONSIBILITY OF A STATE IN CONNECTION WITH THE ACT OF ANOTHER STATE

### *Commentary*

(1) In accordance with the basic principles laid down in chapter I, each State is responsible for its own internationally wrongful conduct, i.e. for conduct attributable to it under chapter II which is in breach of an international obligation of that State in accordance with chapter III.[261] The principle that State responsibility is specific to the State concerned underlies the present articles as a whole. It will be referred to as the principle of independent responsibility. It is appropriate since each State has its own range of international obligations and its own correlative responsibilities.

(2) However, internationally wrongful conduct often results from the collaboration of several States rather than of one State acting alone.[262] This may involve independent conduct by several States, each playing its own role in carrying out an internationally wrongful act. Or it may be that a number of States act through a common organ to commit a wrongful act.[263] Internationally wrongful conduct can also arise out of situations where a State acts on behalf of another State in carrying out the conduct in question.

(3) Various forms of collaborative conduct can coexist in the same case. For example, three States, Australia, New Zealand and the United Kingdom, together constituted the Administering Authority for the Trust Territory of Nauru. In the *Certain Phosphate Lands in Nauru* case, proceedings were commenced against Australia alone in respect of acts performed on the "joint behalf" of the three States.[264] The acts performed by Australia involved both "joint" conduct of several States and day-to-day administration of a territory by one State acting on behalf of other States as well as on its own behalf. By contrast, if the relevant organ of the acting State is merely "placed at the disposal" of the requesting State, in the sense provided for in article 6, only the requesting State is responsible for the act in question.

(4) In certain circumstances the wrongfulness of a State's conduct may depend on the independent action of another State. A State may engage in conduct in a situation where another State is involved and the conduct of the other State may be relevant or even decisive in assessing whether the first State has breached its own international obligations. For example, in the *Soering* case the European Court of Human Rights held that the proposed extradition of a person to a State not party to the European Convention on Human Rights where he was likely to suffer inhuman or degrading treatment or punishment involved a breach of article 3 of the Convention by the extraditing State.[265] Alternatively, a State may be required by its own international obligations to prevent certain conduct by another State, or at least to prevent the harm that would flow from such conduct. Thus, the basis of responsibility in the *Corfu Channel* case[266] was Albania's failure to warn the United Kingdom of the presence of mines in Albanian waters which had been laid by a third State. Albania's responsibility in the circumstances was original and not derived from the wrongfulness of the conduct of any other State.

(5) In most cases of collaborative conduct by States, responsibility for the wrongful act will be determined according to the principle of independent responsibility referred to in paragraph (1) above. But there may be cases where conduct of the organ of one State, not acting as an organ or agent of another State, is nonetheless chargeable to the latter State, and this may be so even though the wrongfulness of the conduct lies, or at any rate primarily lies, in a breach of the international obligations of the former. Chapter IV of Part One defines these exceptional cases where it is appropriate that one State should assume responsibility for the internationally wrongful act of another.

(6) Three situations are covered in chapter IV. Article 16 deals with cases where one State provides aid or assistance to another State with a view to assisting in the commission of a wrongful act by the latter. Article 17 deals with cases where one State is responsible for the internationally wrongful act of another State because it has exercised powers of direction and control over the commission of an internationally wrongful act by the latter. Article 18 deals with the extreme case where one State deliberately coerces another into committing an act which is, or but for

[261] See, in particular, article 2 and commentary.

[262] See M. L. Padelletti, *Pluralità di Stati nel Fatto Illecito Internazionale* (Milan, Giuffrè, 1990); Brownlie, *System of the Law of Nations …* (footnote 92 above), pp. 189–192; J. Quigley, "Complicity in international law: a new direction in the law of State responsibility", BYBIL, *1986*, vol. 57, p. 77; J. E. Noyes and B. D. Smith, "State responsibility and the principle of joint and several liability", *Yale Journal of International Law*, vol. 13 (1988), p. 225; and B. Graefrath, "Complicity in the law of international responsibility", *Revue belge de droit international*, vol. 29 (1996), p. 370.

[263] In some cases, the act in question may be committed by the organs of an international organization. This raises issues of the international responsibility of international organizations which fall outside the scope of the present articles. See article 57 and commentary.

[264] *Certain Phosphate Lands in Nauru, Preliminary Objections* (see footnote 230 above), p. 258, para. 47; see also the separate opinion of Judge Shahabuddeen, *ibid*., p. 284.

[265] *Soering* v. *the United Kingdom*, *Eur. Court H.R., Series A, No. 161*, pp. 33–36, paras. 85–91 (1989). See also *Cruz Varas and Others* v. *Sweden*, *ibid.*, *No. 201*, p. 28, paras. 69–70 (1991); and *Vilvarajah and Others* v. *the United Kingdom, ibid.*, *No. 215*, p. 37, paras. 115–116 (1991).

[266] *Corfu Channel, Merits* (see footnote 35 above), p. 22.

the coercion would be,[267] an internationally wrongful act on the part of the coerced State. In all three cases, the act in question is still committed, voluntarily or otherwise, by organs or agents of the acting State, and is, or but for the coercion would be, a breach of that State's international obligations. The implication of the second State in that breach arises from the special circumstance of its willing assistance in, its direction and control over or its coercion of the acting State. But there are important differences between the three cases. Under article 16, the State primarily responsible is the acting State and the assisting State has a mere supporting role. Similarly under article 17, the acting State commits the internationally wrongful act, albeit under the direction and control of another State. By contrast, in the case of coercion under article 18, the coercing State is the prime mover in respect of the conduct and the coerced State is merely its instrument.

(7) A feature of this chapter is that it specifies certain conduct as internationally wrongful. This may seem to blur the distinction maintained in the articles between the primary or substantive obligations of the State and its secondary obligations of responsibility.[268] It is justified on the basis that responsibility under chapter IV is in a sense derivative.[269] In national legal systems, rules dealing, for example, with conspiracy, complicity and inducing breach of contract may be classified as falling within the "general part" of the law of obligations. Moreover, the idea of the implication of one State in the conduct of another is analogous to problems of attribution, dealt with in chapter II.

(8) On the other hand, the situations covered in chapter IV have a special character. They are exceptions to the principle of independent responsibility and they only cover certain cases. In formulating these exceptional cases where one State is responsible for the internationally wrongful acts of another, it is necessary to bear in mind certain features of the international system. First, there is the possibility that the same conduct may be internationally wrongful so far as one State is concerned but not for another State having regard to its own international obligations. Rules of derived responsibility cannot be allowed to undermine the principle, stated in article 34 of the 1969 Vienna Convention, that a "treaty does not create either obligations or rights for a third State without its consent"; similar issues arise with respect to unilateral obligations and even, in certain cases, rules of general international law. Hence it is only in the extreme case of coercion that a State may become responsible under this chapter for conduct which would not have been internationally wrongful if performed by that State. Secondly, States engage in a wide variety of activities through a multiplicity of organs and agencies. For example, a State providing financial or other aid to another State should not be required to assume the risk that the latter will divert the aid for purposes which may be internationally unlawful. Thus, it is necessary to establish a close connection between the action of the assisting, directing or coercing State on the one hand and that of the State committing the internationally wrongful act on the other. Thus, the articles in this chapter require that the former State should be aware of the circumstances of the internationally wrongful act in question, and establish a specific causal link between that act and the conduct of the assisting, directing or coercing State. This is done without prejudice to the general question of "wrongful intent" in matters of State responsibility, on which the articles are neutral.[270]

(9) Similar considerations dictate the exclusion of certain situations of "derived responsibility" from chapter IV. One of these is incitement. The incitement of wrongful conduct is generally not regarded as sufficient to give rise to responsibility on the part of the inciting State, if it is not accompanied by concrete support or does not involve direction and control on the part of the inciting State.[271] However, there can be specific treaty obligations prohibiting incitement under certain circumstances.[272] Another concerns the issue which is described in some systems of internal law as being an "accessory after the fact". It seems that there is no general obligation on the part of third States to cooperate in suppressing internationally wrongful conduct of another State which may already have occurred. Again it is a matter for specific treaty obligations to establish any such obligation of suppression after the event. There are, however, two important qualifications here. First, in some circumstances assistance given by one State to another after the latter has committed an internationally wrongful act may amount to the adoption of that act by the former State. In such cases responsibility for that act potentially arises pursuant to article 11. Secondly, special obligations of cooperation in putting an end to an unlawful situation arise in the case of serious breaches of obligations under peremptory norms of general international law. By definition, in such cases States will have agreed that no derogation from such obligations is to be permitted and, faced with a serious breach of such an obligation, certain obligations of cooperation arise. These are dealt with in article 41.

### *Article 16. Aid or assistance in the commission of an internationally wrongful act*

**A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:**

**(*a*) that State does so with knowledge of the circumstances of the internationally wrongful act; and**

**(*b*) the act would be internationally wrongful if committed by that State.**

[267] If a State has been coerced, the wrongfulness of its act may be precluded by *force majeure*: see article 23 and commentary.

[268] See paras. (1)–(2) and (4) of the general commentary for an explanation of the distinction.

[269] Cf. the term *responsabilité dérivée* used by Arbitrator Huber in *British Claims in the Spanish Zone of Morocco* (footnote 44 above), p. 648.

[270] See above, the commentary to paragraphs (3) and (10) of article 2.

[271] See the statement of the United States-French Commissioners relating to the *French Indemnity of 1831* case in Moore, *History and Digest*, vol. V, p. 4447, at pp. 4473–4476. See also *Military and Paramilitary Activities in and against Nicaragua* (footnote 36 above), p. 129, para. 255, and the dissenting opinion of Judge Schwebel, p. 389, para. 259.

[272] See, e.g., article III (*c*) of the Convention on the Prevention and Punishment of the Crime of Genocide; and article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination.

*Commentary*

(1) Article 16 deals with the situation where one State provides aid or assistance to another with a view to facilitating the commission of an internationally wrongful act by the latter. Such situations arise where a State voluntarily assists or aids another State in carrying out conduct which violates the international obligations of the latter, for example, by knowingly providing an essential facility or financing the activity in question. Other examples include providing means for the closing of an international waterway, facilitating the abduction of persons on foreign soil, or assisting in the destruction of property belonging to nationals of a third country. The State primarily responsible in each case is the acting State, and the assisting State has only a supporting role. Hence the use of the term "by the latter" in the *chapeau* to article 16, which distinguishes the situation of aid or assistance from that of co-perpetrators or co-participants in an internationally wrongful act. Under article 16, aid or assistance by the assisting State is not to be confused with the responsibility of the acting State. In such a case, the assisting State will only be responsible to the extent that its own conduct has caused or contributed to the internationally wrongful act. Thus, in cases where that internationally wrongful act would clearly have occurred in any event, the responsibility of the assisting State will not extend to compensating for the act itself.

(2) Various specific substantive rules exist, prohibiting one State from providing assistance in the commission of certain wrongful acts by other States or even requiring third States to prevent or repress such acts.[273] Such provisions do not rely on any general principle of derived responsibility, nor do they deny the existence of such a principle, and it would be wrong to infer from them the non-existence of any general rule. As to treaty provisions such as Article 2, paragraph 5, of the Charter of the United Nations, again these have a specific rationale which goes well beyond the scope and purpose of article 16.

(3) Article 16 limits the scope of responsibility for aid or assistance in three ways. First, the relevant State organ or agency providing aid or assistance must be aware of the circumstances making the conduct of the assisted State internationally wrongful; secondly, the aid or assistance must be given with a view to facilitating the commission of that act, and must actually do so; and thirdly, the completed act must be such that it would have been wrongful had it been committed by the assisting State itself.

(4) The requirement that the assisting State be aware of the circumstances making the conduct of the assisted State internationally wrongful is reflected by the phrase "knowledge of the circumstances of the internationally wrongful act". A State providing material or financial assistance or aid to another State does not normally assume the risk that its assistance or aid may be used to carry out an internationally wrongful act. If the assisting or aiding State is unaware of the circumstances in which its aid or assistance is intended to be used by the other State, it bears no international responsibility.

(5) The second requirement is that the aid or assistance must be given with a view to facilitating the commission of the wrongful act, and must actually do so. This limits the application of article 16 to those cases where the aid or assistance given is clearly linked to the subsequent wrongful conduct. A State is not responsible for aid or assistance under article 16 unless the relevant State organ intended, by the aid or assistance given, to facilitate the occurrence of the wrongful conduct and the internationally wrongful conduct is actually committed by the aided or assisted State. There is no requirement that the aid or assistance should have been essential to the performance of the internationally wrongful act; it is sufficient if it contributed significantly to that act.

(6) The third condition limits article 16 to aid or assistance in the breach of obligations by which the aiding or assisting State is itself bound. An aiding or assisting State may not deliberately procure the breach by another State of an obligation by which both States are bound; a State cannot do by another what it cannot do by itself. On the other hand, a State is not bound by obligations of another State *vis-à-vis* third States. This basic principle is also embodied in articles 34 and 35 of the 1969 Vienna Convention. Correspondingly, a State is free to act for itself in a way which is inconsistent with the obligations of another State *vis-à-vis* third States. Any question of responsibility in such cases will be a matter for the State to whom assistance is provided *vis-à-vis* the injured State. Thus, it is a necessary requirement for the responsibility of an assisting State that the conduct in question, if attributable to the assisting State, would have constituted a breach of its own international obligations.

(7) State practice supports assigning international responsibility to a State which deliberately participates in the internationally wrongful conduct of another through the provision of aid or assistance, in circumstances where the obligation breached is equally opposable to the assisting State. For example, in 1984 the Islamic Republic of Iran protested against the supply of financial and military aid to Iraq by the United Kingdom, which allegedly included chemical weapons used in attacks against Iranian troops, on the ground that the assistance was facilitating acts of aggression by Iraq.[274] The Government of the United Kingdom denied both the allegation that it had chemical weapons and that it had supplied them to Iraq.[275] In 1998, a similar allegation surfaced that the Sudan had assisted Iraq to manufacture chemical weapons by allowing Sudanese installations to be used by Iraqi technicians for steps in the production of nerve gas. The allegation was denied by Iraq's representative to the United Nations.[276]

(8) The obligation not to use force may also be breached by an assisting State through permitting the use of its territory by another State to carry out an armed attack against a third State. An example is provided by a statement made by the Government of the Federal Republic of Germany

[273] See, e.g., the first principle of the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV) of 24 October 1970, annex); and article 3 (*f*) of the Definition of Aggression (General Assembly resolution 3314 (XXIX) of 14 December 1974, annex).

[274] *The New York Times*, 6 March 1984, p. A1.

[275] *Ibid*., 5 March 1984, p. A3.

[276] *Ibid*., 26 August 1998, p. A8.

in response to an allegation that Germany had participated in an armed attack by allowing United States military aircraft to use airfields in its territory in connection with the United States intervention in Lebanon. While denying that the measures taken by the United States and the United Kingdom in the Near East constituted intervention, the Federal Republic of Germany nevertheless seems to have accepted that the act of a State in placing its own territory at the disposal of another State in order to facilitate the commission of an unlawful use of force by that other State was itself an internationally wrongful act.[277] Another example arises from the Tripoli bombing incident in April 1986. The Libyan Arab Jamahiriya charged the United Kingdom with responsibility for the event, based on the fact that the United Kingdom had allowed several of its air bases to be used for the launching of United States fighter planes to attack Libyan targets.[278] The Libyan Arab Jamahiriya asserted that the United Kingdom "would be held partly responsible" for having "supported and contributed in a direct way" to the raid.[279] The United Kingdom denied responsibility on the basis that the raid by the United States was lawful as an act of self-defence against Libyan terrorist attacks on United States targets.[280] A proposed Security Council resolution concerning the attack was vetoed, but the General Assembly issued a resolution condemning the "military attack" as "a violation of the Charter of the United Nations and of international law", and calling upon all States "to refrain from extending any assistance or facilities for perpetrating acts of aggression against the Libyan Arab Jamahiriya".[281]

(9) The obligation not to provide aid or assistance to facilitate the commission of an internationally wrongful act by another State is not limited to the prohibition on the use of force. For instance, a State may incur responsibility if it assists another State to circumvent sanctions imposed by the Security Council[282] or provides material aid to a State that uses the aid to commit human rights violations. In this respect, the General Assembly has called on Member States in a number of cases to refrain from supplying arms and other military assistance to countries found to be committing serious human rights violations.[283] Where the allegation is that the assistance of a State has facilitated human rights abuses by another State, the particular circumstances of each case must be carefully examined to determine whether the aiding State by its aid was aware of and intended to facilitate the commission of the internationally wrongful conduct.

[277] For the text of the note from the Federal Government, see *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, vol. 20 (August 1960), pp. 663–664.

[278] See United States of America, *Department of State Bulletin*, No. 2111 (June 1986), p. 8.

[279] See the statement of Ambassador Hamed Houdeiry, Libyan People's Bureau, Paris, *The Times*, 16 April 1986, p. 6.

[280] Statement of Mrs. Margaret Thatcher, Prime Minister, *House of Commons Debates*, 6th series, vol. 95, col. 737 (15 April 1986), reprinted in BYBIL, *1986*, vol. 57, pp. 637–638.

[281] General Assembly resolution 41/38 of 20 November 1986, paras. 1 and 3.

[282] See, e.g., Report by President Clinton, AJIL, vol. 91, No. 4 (October 1997), p. 709.

[283] Report of the Economic and Social Council, Report of the Third Committee of the General Assembly, draft resolution XVII (A/37/745), p. 50.

(10) In accordance with article 16, the assisting State is responsible for its own act in deliberately assisting another State to breach an international obligation by which they are both bound. It is not responsible, as such, for the act of the assisted State. In some cases this may be a distinction without a difference: where the assistance is a necessary element in the wrongful act in absence of which it could not have occurred, the injury suffered can be concurrently attributed to the assisting and the acting State.[284] In other cases, however, the difference may be very material: the assistance may have been only an incidental factor in the commission of the primary act, and may have contributed only to a minor degree, if at all, to the injury suffered. By assisting another State to commit an internationally wrongful act, a State should not necessarily be held to indemnify the victim for all the consequences of the act, but only for those which, in accordance with the principles stated in Part Two of the articles, flow from its own conduct.

(11) Article 16 does not address the question of the admissibility of judicial proceedings to establish the responsibility of the aiding or assisting State in the absence of or without the consent of the aided or assisted State. ICJ has repeatedly affirmed that it cannot decide on the international responsibility of a State if, in order to do so, "it would have to rule, as a prerequisite, on the lawfulness"[285] of the conduct of another State, in the latter's absence and without its consent. This is the so-called *Monetary Gold* principle.[286] That principle may well apply to cases under article 16, since it is of the essence of the responsibility of the aiding or assisting State that the aided or assisted State itself committed an internationally wrongful act. The wrongfulness of the aid or assistance given by the former is dependent, *inter alia*, on the wrongfulness of the conduct of the latter. This may present practical difficulties in some cases in establishing the responsibility of the aiding or assisting State, but it does not vitiate the purpose of article 16. The *Monetary Gold* principle is concerned with the admissibility of claims in international judicial proceedings, not with questions of responsibility as such. Moreover, that principle is not all-embracing, and the *Monetary Gold* principle may not be a barrier to judicial proceedings in every case. In any event, wrongful assistance given to another State has frequently led to diplomatic protests. States are entitled to assert complicity in the wrongful conduct of another State even though no international court may have jurisdiction to rule on the charge, at all or in the absence of the other State.

### *Article 17. Direction and control exercised over the commission of an internationally wrongful act*

**A State which directs and controls another State in the commission of an internationally wrongful act by the latter is internationally responsible for that act if:**

**(*a*) that State does so with knowledge of the circumstances of the internationally wrongful act; and**

[284] For the question of concurrent responsibility of several States for the same injury, see article 47 and commentary.

[285] *East Timor* (see footnote 54 above), p. 105, para. 35.

[286] *Monetary Gold Removed from Rome in 1943, Judgment, I.C.J. Reports 1954*, p. 19, at p. 32; *Certain Phosphate Lands in Nauru, Preliminary Objections* (see footnote 230 above), p. 261, para. 55.

**(*b*) the act would be internationally wrongful if committed by that State.**

*Commentary*

(1) Article 17 deals with a second case of derived responsibility, the exercise of direction and control by one State over the commission of an internationally wrongful act by another. Under article 16, a State providing aid or assistance with a view to the commission of an internationally wrongful act incurs international responsibility only to the extent of the aid or assistance given. By contrast, a State which directs and controls another in the commission of an internationally wrongful act is responsible for the act itself, since it controlled and directed the act in its entirety.

(2) Some examples of international responsibility flowing from the exercise of direction and control over the commission of a wrongful act by another State are now largely of historical significance. International dependency relationships such as "suzerainty" or "protectorate" warranted treating the dominant State as internationally responsible for conduct formally attributable to the dependent State. For example, in *Rights of Nationals of the United States of America in Morocco*,[287] France commenced proceedings under the Optional Clause in respect of a dispute concerning the rights of United States nationals in Morocco under French protectorate. The United States objected that any eventual judgment might not be considered as binding upon Morocco, which was not a party to the proceedings. France confirmed that it was acting both in its own name and as the protecting power over Morocco, with the result that the Court's judgment would be binding both on France and on Morocco,[288] and the case proceeded on that basis.[289] The Court's judgment concerned questions of the responsibility of France in respect of the conduct of Morocco which were raised both by the application and by the United States counterclaim.

(3) With the developments in international relations since 1945, and in particular the process of decolonization, older dependency relationships have been terminated. Such links do not involve any legal right to direction or control on the part of the representing State. In cases of representation, the represented entity remains responsible for its own international obligations, even though diplomatic communications may be channelled through another State. The representing State in such cases does not, merely because it is the channel through which communications pass, assume any responsibility for their content. This is not in contradiction to the *British Claims in the Spanish Zone of Morocco* arbitration, which affirmed that "the responsibility of the protecting State … proceeds … from the fact that the protecting State alone represents the protected territory in its international relations",[290] and that the protecting State is answerable "in place of the protected State".[291] The principal concern in the arbitration was to ensure that, in the case of a protectorate which put an end to direct international relations by the protected State, international responsibility for wrongful acts committed by the protected State was not erased to the detriment of third States injured by the wrongful conduct. The acceptance by the protecting State of the obligation to answer in place of the protected State was viewed as an appropriate means of avoiding that danger.[292] The justification for such an acceptance was not based on the relationship of "representation" as such but on the fact that the protecting State was in virtually total control over the protected State. It was not merely acting as a channel of communication.

(4) Other relationships of dependency, such as dependent territories, fall entirely outside the scope of article 17, which is concerned only with the responsibility of one State for the conduct of another State. In most relationships of dependency between one territory and another, the dependent territory, even if it may possess some international personality, is not a State. Even in cases where a component unit of a federal State enters into treaties or other international legal relations in its own right, and not by delegation from the federal State, the component unit is not itself a State in international law. So far as State responsibility is concerned, the position of federal States is no different from that of any other State: the normal principles specified in articles 4 to 9 of the draft articles apply, and the federal State is internationally responsible for the conduct of its component units even though that conduct falls within their own local control under the federal constitution.[293]

(5) Nonetheless, instances exist or can be envisaged where one State exercises the power to direct and control the activities of another State, whether by treaty or as a result of a military occupation or for some other reason. For example, during the belligerent occupation of Italy by Germany in the Second World War, it was generally acknowledged that the Italian police in Rome operated under the control of the occupying Power. Thus, the protest by the Holy See in respect of wrongful acts committed by Italian police who forcibly entered the Basilica of St. Paul in Rome in February 1944 asserted the responsibility of the German authorities.[294] In such cases the occupying State is responsible for acts of the occupied State which it directs and controls.

(6) Article 17 is limited to cases where a dominant State actually directs and controls conduct which is a breach of an international obligation of the dependent State. International tribunals have consistently refused to infer responsibility on the part of a dominant State merely because

[287] *Rights of Nationals of the United States of America in Morocco* (see footnote 108 above), p. 176.

[288] *Ibid., I.C.J. Pleadings*, vol. I, p. 235; and vol. II, pp. 431–433; the United States thereupon withdrew its preliminary objection: *ibid*., p. 434.

[289] See *Rights of Nationals of the United States of America in Morocco* (footnote 108 above), p. 179.

[290] *British Claims in the Spanish Zone of Morocco* (see footnote 44 above), p. 649.

[291] *Ibid*., p. 648.

[292] *Ibid*.

[293] See, e.g., *LaGrand, Provisional Measures* (footnote 91 above).

[294] See R. Ago, "L'occupazione bellica di Roma e il Trattato lateranense", *Comunicazioni e Studi* (Milan, Giuffrè, 1945), vol. II, pp. 167–168.

the latter may have the power to interfere in matters of administration internal to a dependent State, if that power is not exercised in the particular case. In the *Brown* case, for example, the arbitral tribunal held that the authority of Great Britain, as suzerain over the South African Republic prior to the Boer War, "fell far short of what would be required to make her responsible for the wrong inflicted upon Brown".[295] It went on to deny that Great Britain possessed power to interfere in matters of internal administration and continued that there was no evidence "that Great Britain ever did undertake to interfere in this way".[296] Accordingly, the relation of suzerainty "did not operate to render Great Britain liable for the acts complained of".[297] In the *Heirs of the Duc de Guise* case, the Franco-Italian Conciliation Commission held that Italy was responsible for a requisition carried out by Italy in Sicily at a time when it was under Allied occupation. Its decision was not based on the absence of Allied power to requisition the property, or to stop Italy from doing so. Rather, the majority pointed to the absence in fact of any "intermeddling on the part of the Commander of the Occupation forces or any Allied authority calling for the requisition decrees".[298] The mere fact that a State may have power to exercise direction and control over another State in some field is not a sufficient basis for attributing to it any wrongful acts of the latter State in that field.[299]

(7) In the formulation of article 17, the term "controls" refers to cases of domination over the commission of wrongful conduct and not simply the exercise of oversight, still less mere influence or concern. Similarly, the word "directs" does not encompass mere incitement or suggestion but rather connotes actual direction of an operative kind. Both direction and control must be exercised over the wrongful conduct in order for a dominant State to incur responsibility. The choice of the expression, common in English, "*direction and control*", raised some problems in other languages, owing in particular to the ambiguity of the term "*direction*" which may imply, as is the case in French, complete power, whereas it does not have this implication in English.

(8) Two further conditions attach to responsibility under article 17. First, the dominant State is only responsible if it has knowledge of the circumstances making the conduct of the dependent State wrongful. Secondly, it has to be shown that the completed act would have been wrongful had it been committed by the directing and controlling State itself. This condition is significant in the context of bilateral obligations, which are not opposable to the directing State. In cases of multilateral obligations and especially of obligations to the international community, it is of much less significance. The essential principle is that a State should not be able to do through another what it could not do itself.

(9) As to the responsibility of the directed and controlled State, the mere fact that it was directed to carry out an internationally wrongful act does not constitute an excuse under chapter V of Part One. If the conduct in question would involve a breach of its international obligations, it is incumbent upon it to decline to comply with the direction. The defence of "superior orders" does not exist for States in international law. This is not to say that the wrongfulness of the directed and controlled State's conduct may not be precluded under chapter V, but this will only be so if it can show the existence of a circumstance precluding wrongfulness, e.g. *force majeure*. In such a case it is to the directing State alone that the injured State must look. But as between States, genuine cases of *force majeure* or coercion are exceptional. Conversely, it is no excuse for the directing State to show that the directed State was a willing or even enthusiastic participant in the internationally wrongful conduct, if in truth the conditions laid down in article 17 are met.

### *Article 18. Coercion of another State*

**A State which coerces another State to commit an act is internationally responsible for that act if:**

**(*a*) the act would, but for the coercion, be an internationally wrongful act of the coerced State; and**

**(*b*) the coercing State does so with knowledge of the circumstances of the act.**

*Commentary*

(1) The third case of derived responsibility dealt with by chapter IV is that of coercion of one State by another. Article 18 is concerned with the specific problem of coercion deliberately exercised in order to procure the breach of one State's obligation to a third State. In such cases the responsibility of the coercing State with respect to the third State derives not from its act of coercion, but rather from the wrongful conduct resulting from the action of the coerced State. Responsibility for the coercion itself is that of the coercing State *vis-à-vis* the coerced State, whereas responsibility under article 18 is the responsibility of the coercing State *vis-à-vis* a victim of the coerced act, in particular a third State which is injured as a result.

(2) Coercion for the purpose of article 18 has the same essential character as *force majeure* under article 23. Nothing less than conduct which forces the will of the coerced State will suffice, giving it no effective choice but to comply with the wishes of the coercing State. It is not sufficient that compliance with the obligation is made more difficult or onerous, or that the acting State is assisted or directed in its conduct: such questions are covered by the preceding articles. Moreover, the coercing State must coerce the very act which is internationally wrongful. It is not enough that the consequences of the

[295] *Robert E. Brown (United States)* v. *Great Britain*, UNRIAA, vol. VI (Sales No. 1955.V.3), p. 120, at p. 130 (1923).

[296] *Ibid*., p. 131.

[297] *Ibid*.

[298] *Heirs of the Duc de Guise* (see footnote 115 above). See also, in another context, *Drozd and Janousek* v. *France and Spain* (footnote 135 above); see also *Iribarne Pérez* v. *France*, *Eur. Court H.R., Series A, No. 325–C*, pp. 62–63, paras. 29–31 (1995).

[299] It may be that the fact of the dependence of one State upon another is relevant in terms of the burden of proof, since the mere existence of a formal State apparatus does not exclude the possibility that control was exercised in fact by an occupying Power. Cf. *Restitution of Household Effects Belonging to Jews Deported from Hungary (Germany)*, Kammergericht of Berlin, ILR, vol. 44, p. 301, at pp. 340–342 (1965).

coerced act merely make it more difficult for the coerced State to comply with the obligation.

(3) Though coercion for the purpose of article 18 is narrowly defined, it is not limited to unlawful coercion.[300] As a practical matter, most cases of coercion meeting the requirements of the article will be unlawful, e.g. because they involve a threat or use of force contrary to the Charter of the United Nations, or because they involve intervention, i.e. coercive interference, in the affairs of another State. Such is also the case with countermeasures. They may have a coercive character, but as is made clear in article 49, their function is to induce a wrongdoing State to comply with obligations of cessation and reparation towards the State taking the countermeasures, not to coerce that State to violate obligations to third States.[301] However, coercion could possibly take other forms, e.g. serious economic pressure, provided that it is such as to deprive the coerced State of any possibility of conforming with the obligation breached.

(4) The equation of coercion with *force majeure* means that in most cases where article 18 is applicable, the responsibility of the coerced State will be precluded *vis-à-vis* the injured third State. This is reflected in the phrase "but for the coercion" in subparagraph (*a*) of article 18. Coercion amounting to *force majeure* may be the reason why the wrongfulness of an act is precluded *vis-à-vis* the coerced State. Therefore, the act is not described as an internationally wrongful act in the opening clause of the article, as is done in articles 16 and 17, where no comparable circumstance would preclude the wrongfulness of the act of the assisted or controlled State. But there is no reason why the wrongfulness of that act should be precluded *vis-à-vis* the coercing State. On the contrary, if the coercing State cannot be held responsible for the act in question, the injured State may have no redress at all.

(5) It is a further requirement for responsibility under article 18 that the coercing State must be aware of the circumstances which would, but for the coercion, have entailed the wrongfulness of the coerced State's conduct. The reference to "circumstances" in subparagraph (*b*) is understood as reference to the factual situation rather than to the coercing State's judgement of the legality of the act. This point is clarified by the phrase "circumstances of the act". Hence, while ignorance of the law is no excuse, ignorance of the facts is material in determining the responsibility of the coercing State.

(6) A State which sets out to procure by coercion a breach of another State's obligations to a third State will be held responsible to the third State for the consequences, regardless of whether the coercing State is also bound by the obligation in question. Otherwise, the injured State would potentially be deprived of any redress, because the acting State may be able to rely on *force majeure* as a circumstance precluding wrongfulness. Article 18 thus differs from articles 16 and 17 in that it does not allow for an exemption from responsibility for the act of the coerced State in circumstances where the coercing State is not itself bound by the obligation in question.

(7) State practice lends support to the principle that a State bears responsibility for the internationally wrongful conduct of another State which it coerces. In the *Romano-Americana* case, the claim of the United States Government in respect of the destruction of certain oil storage and other facilities owned by a United States company on the orders of the Government of Romania during the First World War was originally addressed to the British Government. At the time the facilities were destroyed, Romania was at war with Germany, which was preparing to invade the country, and the United States claimed that the Romanian authorities had been "compelled" by Great Britain to take the measures in question. In support of its claim, the United States Government argued that the circumstances of the case revealed "a situation where a strong belligerent for a purpose primarily its own arising from its defensive requirements at sea, compelled a weaker Ally to acquiesce in an operation which it carried out on the territory of that Ally".[302] The British Government denied responsibility, asserting that its influence over the conduct of the Romanian authorities "did not in any way go beyond the limits of persuasion and good counsel as between governments associated in a common cause".[303] The point of disagreement between the Governments of the United States and of Great Britain was not as to the responsibility of a State for the conduct of another State which it has coerced, but rather the existence of "compulsion" in the particular circumstances of the case.[304]

### *Article 19. Effect of this chapter*

**This chapter is without prejudice to the international responsibility, under other provisions of these articles, of the State which commits the act in question, or of any other State.**

*Commentary*

(1) Article 19 serves three purposes. First, it preserves the responsibility of the State which has committed the internationally wrongful act, albeit with the aid or assistance, under the direction and control or subject to the coercion of another State. It recognizes that the attribution of international responsibility to an assisting, directing or coercing State does not preclude the responsibility of the assisted, directed or coerced State.

(2) Secondly, the article makes clear that the provisions of chapter IV are without prejudice to any other basis for establishing the responsibility of the assisting, directing or coercing State under any rule of international law defining particular conduct as wrongful. The phrase "under

[300] P. Reuter, *Introduction to the Law of Treaties*, 2nd rev. ed. (London, Kegan Paul International, 1995), paras. 271–274.

[301] See article 49, para. 2, and commentary.

[302] Note from the United States Embassy in London, dated 16 February 1925, in Hackworth, *op. cit.* (footnote 142 above), p. 702.

[303] Note from the British Foreign Office dated 5 July 1928, *ibid.*, p. 704.

[304] For a different example involving the coercion of a breach of contract in circumstances amounting to a denial of justice, see C. L. Bouvé, "Russia's liability in tort for Persia's breach of contract", AJIL, vol. 6, No. 2 (April 1912), p. 389.

other provisions of these articles" is a reference, *inter alia*, to article 23 (*Force majeure*), which might affect the question of responsibility. The phrase also draws attention to the fact that other provisions of the draft articles may be relevant to the State committing the act in question, and that chapter IV in no way precludes the issue of its responsibility in that regard.

(3) Thirdly, article 19 preserves the responsibility "of any other State" to whom the internationally wrongful conduct might also be attributable under other provisions of the articles.

(4) Thus, article 19 is intended to avoid any contrary inference in respect of responsibility which may arise from primary rules, precluding certain forms of assistance, or from acts otherwise attributable to any State under chapter II. The article covers both the implicated and the acting State. It makes it clear that chapter IV is concerned only with situations in which the act which lies at the origin of the wrong is an act committed by one State and not by the other. If both States commit the act, then that situation would fall within the realm of co-perpetrators, dealt with in chapter II.

## CHAPTER V

## CIRCUMSTANCES PRECLUDING WRONGFULNESS

### *Commentary*

(1) Chapter V sets out six circumstances precluding the wrongfulness of conduct that would otherwise not be in conformity with the international obligations of the State concerned. The existence in a given case of a circumstance precluding wrongfulness in accordance with this chapter provides a shield against an otherwise well-founded claim for the breach of an international obligation. The six circumstances are: consent (art. 20), self-defence (art. 21), countermeasures (art. 22), *force majeure* (art. 23), distress (art. 24) and necessity (art. 25). Article 26 makes it clear that none of these circumstances can be relied on if to do so would conflict with a peremptory norm of general international law. Article 27 deals with certain consequences of the invocation of one of these circumstances.

(2) Consistent with the approach of the present articles, the circumstances precluding wrongfulness set out in chapter V are of general application. Unless otherwise provided,[305] they apply to any internationally wrongful act whether it involves the breach by a State of an obligation arising under a rule of general international law, a treaty, a unilateral act or from any other source. They do not annul or terminate the obligation; rather they provide a justification or excuse for non-performance while the circumstance in question subsists. This was emphasized by ICJ in the *Gabčíkovo-Nagymaros Project* case. Hungary sought to argue that the wrongfulness of its conduct in discontinuing work on the Project in breach of its obligations under the Treaty on the Construction and Operation of the Gabčíkovo-Nagymaros Barrage System was precluded by necessity. In dealing with the Hungarian plea, the Court said:

> The state of necessity claimed by Hungary—supposing it to have been established—thus could not permit of the conclusion that ... it had acted in accordance with its obligations under the 1977 Treaty or that those obligations had ceased to be binding upon it. It would only permit the affirmation that, under the circumstances, Hungary would not incur international responsibility by acting as it did.[306]

Thus a distinction must be drawn between the effect of circumstances precluding wrongfulness and the termination of the obligation itself. The circumstances in chapter V operate as a shield rather than a sword. As Fitzmaurice noted, where one of the circumstances precluding wrongfulness applies, "the non-performance is not only justified, but 'looks towards' a resumption of performance so soon as the factors causing and justifying the non-performance are no longer present".[307]

(3) This distinction emerges clearly from the decisions of international tribunals. In the *"Rainbow Warrior"* arbitration, the tribunal held that both the law of treaties and the law of State responsibility had to be applied, the former to determine whether the treaty was still in force, the latter to determine what the consequences were of any breach of the treaty while it was in force, including the question whether the wrongfulness of the conduct in question was precluded.[308] In the *Gabčíkovo-Nagymaros Project* case, the Court noted that:

> [E]ven if a state of necessity is found to exist, it is not a ground for the termination of a treaty. It may only be invoked to exonerate from its responsibility a State which has failed to implement a treaty. Even if found justified, it does not terminate a Treaty; the Treaty may be ineffective as long as the condition of necessity continues to exist; it may in fact be dormant, but—unless the parties by mutual agreement terminate the treaty—it continues to exist. As soon as the state of necessity ceases to exist, the duty to comply with treaty obligations revives.[309]

(4) While the same facts may amount, for example, to *force majeure* under article 23 and to a supervening impossibility of performance under article 61 of the 1969 Vienna Convention, the two are distinct. *Force majeure* justifies non-performance of the obligation for so long as the circumstance exists; supervening impossibility justifies the termination of the treaty or its suspension in accordance with the conditions laid down in article 61. The former operates in respect of the particular obligation, the latter with respect to the treaty which is the source of that obligation. Just as the scope of application of the two doctrines is different, so is their mode of application. *Force majeure* excuses non-performance for the time being, but a treaty is not automatically terminated by supervening impossibility: at least one of the parties must decide to terminate it.

(5) The concept of circumstances precluding wrongfulness may be traced to the work of the Preparatory

[305] For example, by a treaty to the contrary, which would constitute a *lex specialis* under article 55.

[306] *Gabčíkovo-Nagymaros Project* (see footnote 27 above), p. 39, para. 48.

[307] *Yearbook … 1959*, vol. II, p. 41, document A/CN.4/120.

[308] *"Rainbow Warrior"* (see footnote 46 above), pp. 251–252, para. 75.

[309] *Gabčíkovo-Nagymaros Project* (see footnote 27 above), p. 63, para. 101; see also page 38, para. 47.

Committee of the 1930 Hague Conference. Among its Bases of discussion,[310] it listed two "[c]ircumstances under which States can decline their responsibility", self-defence and reprisals.[311] It considered that the extent of a State's responsibility in the context of diplomatic protection could also be affected by the "provocative attitude" adopted by the injured person (Basis of discussion No. 19) and that a State could not be held responsible for damage caused by its armed forces "in the suppression of an insurrection, riot or other disturbance" (Basis of discussion No. 21). However, these issues were not taken to any conclusion.

(6) The category of circumstances precluding wrongfulness was developed by ILC in its work on international responsibility for injuries to aliens[312] and the performance of treaties.[313] In the event, the subject of excuses for the non-performance of treaties was not included within the scope of the 1969 Vienna Convention.[314] It is a matter for the law on State responsibility.

(7) Circumstances precluding wrongfulness are to be distinguished from other arguments which may have the effect of allowing a State to avoid responsibility. They have nothing to do with questions of the jurisdiction of a court or tribunal over a dispute or the admissibility of a claim. They are to be distinguished from the constituent requirements of the obligation, i.e. those elements which have to exist for the issue of wrongfulness to arise in the first place and which are in principle specified by the obligation itself. In this sense the circumstances precluding wrongfulness operate like defences or excuses in internal legal systems, and the circumstances identified in chapter V are recognized by many legal systems, often under the same designation.[315] On the other hand, there is no common approach to these circumstances in internal law, and the conditions and limitations in chapter V have been developed independently.

(8) Just as the articles do not deal with questions of the jurisdiction of courts or tribunals, so they do not deal with issues of evidence or the burden of proof. In a bilateral dispute over State responsibility, the onus of establishing responsibility lies in principle on the claimant State. Where conduct in conflict with an international obligation is attributable to a State and that State seeks to avoid its responsibility by relying on a circumstance under chapter V, however, the position changes and the onus lies on that State to justify or excuse its conduct. Indeed, it is often the case that only that State is fully aware of the facts which might excuse its non-performance.

(9) Chapter V sets out the circumstances precluding wrongfulness presently recognized under general international law.[316] Certain other candidates have been excluded. For example, the exception of non-performance (*exceptio inadimpleti contractus*) is best seen as a specific feature of certain mutual or synallagmatic obligations and not a circumstance precluding wrongfulness.[317] The principle that a State may not benefit from its own wrongful act is capable of generating consequences in the field of State responsibility but it is rather a general principle than a specific circumstance precluding wrongfulness.[318] The so-called "clean hands" doctrine has been invoked principally in the context of the admissibility of claims before international courts and tribunals, though rarely applied. It also does not need to be included here.[319]

### *Article 20. Consent*

**Valid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent.**

*Commentary*

(1) Article 20 reflects the basic international law principle of consent in the particular context of Part One. In accordance with this principle, consent by a State to particular conduct by another State precludes the wrongfulness of that act in relation to the consenting State, provided the consent is valid and to the extent that the conduct remains within the limits of the consent given.

(2) It is a daily occurrence that States consent to conduct of other States which, without such consent, would constitute a breach of an international obligation. Simple examples include transit through the airspace or internal waters of a State, the location of facilities on its territory or the conduct of official investigations or inquiries there. But a distinction must be drawn between consent in relation to a particular situation or a particular course of

[310] *Yearbook ... 1956*, vol. II, pp. 219–225, document A/CN.4/96.

[311] *Ibid*., pp. 224–225. Issues raised by the Calvo clause and the exhaustion of local remedies were dealt with under the same heading.

[312] *Yearbook ... 1958*, vol. II, p. 72. For the discussion of the circumstances by Special Rapporteur García Amador, see his first report on State responsibility, *Yearbook ... 1956*, vol. II, pp. 203–209, document A/CN.4/96, and his third report on State responsibility, *Yearbook ... 1958*, vol. II, pp. 50–55, document A/CN.4/111.

[313] See the fourth report on the law of treaties of Special Rapporteur Fitzmaurice (footnote 307 above), pp. 44–47, and his comments, *ibid*., pp. 63–74.

[314] See article 73 of the Convention.

[315] See the comparative review by C. von Bar, *The Common European Law of Torts* (Oxford University Press, 2000), vol. 2, pp. 499–592.

[316] For the effect of contribution to the injury by the injured State or other person or entity, see article 39 and commentary. This does not preclude wrongfulness but is relevant in determining the extent and form of reparation.

[317] Cf. *Diversion of Water from the Meuse, Judgment, 1937, P.C.I.J., Series A/B, No. 70*, p. 4, especially at pp. 50 and 77. See also the fourth report on the law of treaties of Special Rapporteur Fitzmaurice (footnote 307 above), pp. 43–47; D. W. Greig, "Reciprocity, proportionality and the law of treaties", *Virginia Journal of International Law*, vol. 34 (1994), p. 295; and for a comparative review, G. H. Treitel, *Remedies for Breach of Contract: A Comparative Account* (Oxford, Clarendon Press, 1988), pp. 245–317. For the relationship between the exception of non-performance and countermeasures, see below, paragraph (5) of commentary to Part Three, chap. II.

[318] See, e.g., *Factory at Chorzów, Jurisdiction* (footnote 34 above), p. 31; cf. *Gabčíkovo-Nagymaros Project* (footnote 27 above), p. 67, para. 110.

[319] See J. J. A. Salmon, "Des 'mains propres' comme condition de recevabilité des réclamations internationales", *Annuaire français de droit international*, vol. 10 (1964), p. 225; A. Miaja de la Muela, "Le rôle de la condition des mains propres de la personne lésée dans les réclamations devant les tribunaux internationaux", *Mélanges offerts à Juraj Andrassy* (The Hague, Martinus Nijhoff, 1968), p. 189, and the dissenting opinion of Judge Schwebel in *Military and Paramilitary Activities in and against Nicaragua* (footnote 36 above), pp. 392–394.

conduct, and consent in relation to the underlying obligation itself. In the case of a bilateral treaty, the States parties can at any time agree to terminate or suspend the treaty, in which case obligations arising from the treaty will be terminated or suspended accordingly.[320] But quite apart from that possibility, States have the right to dispense with the performance of an obligation owed to them individually, or generally to permit conduct to occur which (absent such permission) would be unlawful so far as they are concerned. In such cases, the primary obligation continues to govern the relations between the two States, but it is displaced on the particular occasion or for the purposes of the particular conduct by reason of the consent given.

(3) Consent to the commission of otherwise wrongful conduct may be given by a State in advance or even at the time it is occurring. By contrast, cases of consent given after the conduct has occurred are a form of waiver or acquiescence, leading to loss of the right to invoke responsibility. This is dealt with in article 45.

(4) In order to preclude wrongfulness, consent dispensing with the performance of an obligation in a particular case must be "valid". Whether consent has been validly given is a matter addressed by international law rules outside the framework of State responsibility. Issues include whether the agent or person who gave the consent was authorized to do so on behalf of the State (and if not, whether the lack of that authority was known or ought to have been known to the acting State), or whether the consent was vitiated by coercion or some other factor.[321] Indeed there may be a question whether the State could validly consent at all. The reference to a "valid consent" in article 20 highlights the need to consider these issues in certain cases.

(5) Whether a particular person or entity had the authority to grant consent in a given case is a separate question from whether the conduct of that person or entity was attributable to the State for the purposes of chapter II. For example, the issue has arisen whether consent expressed by a regional authority could legitimize the sending of foreign troops into the territory of a State, or whether such consent could only be given by the central Government, and such questions are not resolved by saying that the acts of the regional authority are attributable to the State under article 4.[322] In other cases, the "legitimacy" of the Government which has given the consent has been questioned. Sometimes the validity of consent has been questioned because the consent was expressed in violation of relevant provisions of the State's internal law. These questions depend on the rules of international law relating to the expression of the will of the State, as well as rules of internal law to which, in certain cases, international law refers.

(6) Who has authority to consent to a departure from a particular rule may depend on the rule. It is one thing to consent to a search of embassy premises, another to the establishment of a military base on the territory of a State. Different officials or agencies may have authority in different contexts, in accordance with the arrangements made by each State and general principles of actual and ostensible authority. But in any case, certain modalities need to be observed for consent to be considered valid. Consent must be freely given and clearly established. It must be actually expressed by the State rather than merely presumed on the basis that the State would have consented if it had been asked. Consent may be vitiated by error, fraud, corruption or coercion. In this respect, the principles concerning the validity of consent to treaties provide relevant guidance.

(7) Apart from drawing attention to prerequisites to a valid consent, including issues of the authority to consent, the requirement for consent to be valid serves a further function. It points to the existence of cases in which consent may not be validly given at all. This question is discussed in relation to article 26 (compliance with peremptory norms), which applies to chapter V as a whole.[323]

(8) Examples of consent given by a State which has the effect of rendering certain conduct lawful include commissions of inquiry sitting on the territory of another State, the exercise of jurisdiction over visiting forces, humanitarian relief and rescue operations and the arrest or detention of persons on foreign territory. In the *Savarkar* case, the arbitral tribunal considered that the arrest of Savarkar was not a violation of French sovereignty as France had implicitly consented to the arrest through the conduct of its gendarme, who aided the British authorities in the arrest.[324] In considering the application of article 20 to such cases it may be necessary to have regard to the relevant primary rule. For example, only the head of a diplomatic mission can consent to the receiving State's entering the premises of the mission.[325]

(9) Article 20 is concerned with the relations between the two States in question. In circumstances where the consent of a number of States is required, the consent of one State will not preclude wrongfulness in relation to another.[326] Furthermore, where consent is relied on to

[320] 1969 Vienna Convention, art. 54 (*b*).

[321] See, e.g., the issue of Austrian consent to the *Anschluss* of 1938, dealt with by the Nuremberg Tribunal. The tribunal denied that Austrian consent had been given; even if it had, it would have been coerced and did not excuse the annexation. See "International Military Tribunal (Nuremberg), judgment and sentences October 1, 1946: judgment", reprinted in AJIL, vol. 41, No. 1 (January 1947) p. 172, at pp. 192–194.

[322] This issue arose with respect to the dispatch of Belgian troops to the Republic of the Congo in 1960. See *Official Records of the Security Council, Fifteenth Year*, 873rd meeting, 13–14 July 1960, particularly the statement of the representative of Belgium, paras. 186–188 and 209.

[323] See paragraph (6) of the commentary to article 26.

[324] UNRIAA, vol. XI (Sales No. 61.V.4), p. 243, at pp. 252–255 (1911).

[325] Vienna Convention on Diplomatic Relations, art. 22, para. 1.

[326] Austrian consent to the proposed customs union of 1931 would not have precluded its wrongfulness in regard of the obligation to respect Austrian independence owed by Germany to all the parties to the Treaty of Peace between the Allied and Associated Powers and Germany (Treaty of Versailles). Likewise, Germany's consent would not have precluded the wrongfulness of the customs union in respect of the obligation of the maintenance of its complete independence imposed on Austria by the Treaty of Peace between the Allied and Associated Powers and Austria (Peace Treaty of Saint-Germain-en-Laye). See *Customs Régime between Germany and Austria, Advisory Opinion, 1931, P.C.I.J., Series A/B, No. 41*, p. 37, at pp. 46 and 49.

preclude wrongfulness, it will be necessary to show that the conduct fell within the limits of the consent. Consent to overflight by commercial aircraft of another State would not preclude the wrongfulness of overflight by aircraft transporting troops and military equipment. Consent to the stationing of foreign troops for a specific period would not preclude the wrongfulness of the stationing of such troops beyond that period.[327] These limitations are indicated by the words "given act" in article 20 as well as by the phrase "within the limits of that consent".

(10) Article 20 envisages only the consent of States to conduct otherwise in breach of an international obligation. International law may also take into account the consent of non-State entities such as corporations or private persons. The extent to which investors can waive the rules of diplomatic protection by agreement in advance has long been controversial, but under the Convention on the Settlement of Investment Disputes between States and Nationals of other States (art. 27, para. 1), consent by an investor to arbitration under the Convention has the effect of suspending the right of diplomatic protection by the investor's national State. The rights conferred by international human rights treaties cannot be waived by their beneficiaries, but the individual's free consent may be relevant to their application.[328] In these cases the particular rule of international law itself allows for the consent in question and deals with its effect. By contrast, article 20 states a general principle so far as enjoyment of the rights and performance of the obligations of States are concerned.

### *Article 21. Self-defence*

**The wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations.**

*Commentary*

(1) The existence of a general principle admitting self-defence as an exception to the prohibition against the use of force in international relations is undisputed. Article 51 of the Charter of the United Nations preserves a State's "inherent right" of self-defence in the face of an armed attack and forms part of the definition of the obligation to refrain from the threat or use of force laid down in Article 2, paragraph 4. Thus, a State exercising its inherent right of self-defence as referred to in Article 51 of the Charter is not, even potentially, in breach of Article 2, paragraph 4.[329]

(2) Self-defence may justify non-performance of certain obligations other than that under Article 2, paragraph 4, of the Charter of the United Nations, provided that such non-performance is related to the breach of that provision. Traditional international law dealt with these problems by instituting a separate legal regime of war, defining the scope of belligerent rights and suspending most treaties in force between the belligerents on the outbreak of war.[330] In the Charter period, declarations of war are exceptional and military actions proclaimed as self-defence by one or both parties occur between States formally at "peace" with each other.[331] The 1969 Vienna Convention leaves such issues to one side by providing in article 73 that the Convention does not prejudice "any question that may arise in regard to a treaty ... from the outbreak of hostilities between States".

(3) This is not to say that self-defence precludes the wrongfulness of conduct in all cases or with respect to all obligations. Examples relate to international humanitarian law and human rights obligations. The Geneva Conventions for the protection of war victims of 12 August 1949 and the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) apply equally to all the parties in an international armed conflict, and the same is true of customary international humanitarian law.[332] Human rights treaties contain derogation provisions for times of public emergency, including actions taken in self-defence. As to obligations under international humanitarian law and in relation to non-derogable human rights provisions, self-defence does not preclude the wrongfulness of conduct.

(4) ICJ in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapon*s provided some guidance on this question. One issue before the Court was whether a use of nuclear weapons would necessarily be a breach of environmental obligations because of the massive and long-term damage such weapons can cause. The Court said:

> [T]he issue is not whether the treaties relating to the protection of the environment are or are not applicable during an armed conflict, but rather whether the obligations stemming from these treaties were intended to be obligations of total restraint during military conflict.
>
> The Court does not consider that the treaties in question could have intended to deprive a State of the exercise of its right of self-defence under international law because of its obligations to protect the environment. Nonetheless, States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives. Respect for the environment

[327] The non-observance of a condition placed on the consent will not necessarily take conduct outside of the limits of the consent. For example, consent to a visiting force on the territory of a State may be subject to a requirement to pay rent for the use of facilities. While the non-payment of the rent would no doubt be a wrongful act, it would not transform the visiting force into an army of occupation.

[328] See, e.g., International Covenant on Civil and Political Rights, arts. 7; 8, para. 3; 14, para. 3 (*g*); and 23, para. 3.

[329] Cf. *Legality of the Threat or Use of Nuclear Weapons* (footnote 54 above), p. 244, para. 38, and p. 263, para. 96, emphasizing the lawfulness of the use of force in self-defence.

[330] See further Lord McNair and A. D. Watts, *The Legal Effects of War*, 4th ed. (Cambridge University Press, 1966).

[331] In *Oil Platforms, Preliminary Objection* (see footnote 208 above), it was not denied that the 1955 Treaty of Amity, Economic Relations and Consular Rights remained in force, despite many actions by United States naval forces against the Islamic Republic of Iran. In that case both parties agreed that to the extent that any such actions were justified by self-defence they would be lawful.

[332] As the Court said of the rules of international humanitarian law in the advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons* (see footnote 54 above), p. 257, para. 79, "they constitute intransgressible principles of international customary law". On the relationship between human rights and humanitarian law in time of armed conflict, see page 240, para. 25.

is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality.[333]

A State acting in self-defence is "totally restrained" by an international obligation if that obligation is expressed or intended to apply as a definitive constraint even to States in armed conflict.[334]

(5) The essential effect of article 21 is to preclude the wrongfulness of conduct of a State acting in self-defence *vis-à-vis* an attacking State. But there may be effects *vis-à-vis* third States in certain circumstances. In its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the Court observed that:

> [A]s in the case of the principles of humanitarian law applicable in armed conflict, international law leaves no doubt that the principle of neutrality, whatever its content, which is of a fundamental character similar to that of the humanitarian principles and rules, is applicable (subject to the relevant provisions of the United Nations Charter), to all international armed conflict, whatever type of weapons might be used.[335]

The law of neutrality distinguishes between conduct as against a belligerent and conduct as against a neutral. But neutral States are not unaffected by the existence of a state of war. Article 21 leaves open all issues of the effect of action in self-defence *vis-à-vis* third States.

(6) Thus, article 21 reflects the generally accepted position that self-defence precludes the wrongfulness of the conduct taken within the limits laid down by international law. The reference is to action "taken in conformity with the Charter of the United Nations". In addition, the term "lawful" implies that the action taken respects those obligations of total restraint applicable in international armed conflict, as well as compliance with the requirements of proportionality and of necessity inherent in the notion of self-defence. Article 21 simply reflects the basic principle for the purposes of chapter V, leaving questions of the extent and application of self-defence to the applicable primary rules referred to in the Charter.

### *Article 22. Countermeasures in respect of an internationally wrongful act*

**The wrongfulness of an act of a State not in conformity with an international obligation towards another State is precluded if and to the extent that the act constitutes a countermeasure taken against the latter State in accordance with chapter II of Part Three.**

*Commentary*

(1) In certain circumstances, the commission by one State of an internationally wrongful act may justify another State injured by that act in taking non-forcible countermeasures in order to procure its cessation and to achieve reparation for the injury. Article 22 deals with this situation from the perspective of circumstances precluding wrongfulness. Chapter II of Part Three regulates countermeasures in further detail.

(2) Judicial decisions, State practice and doctrine confirm the proposition that countermeasures meeting certain substantive and procedural conditions may be legitimate. In the *Gabčíkovo-Nagymaros Project* case, ICJ clearly accepted that countermeasures might justify otherwise unlawful conduct "taken in response to a previous international wrongful act of another State and … directed against that State",[336] provided certain conditions are met. Similar recognition of the legitimacy of measures of this kind in certain cases can be found in arbitral decisions, in particular the *"Naulilaa"*,[337] *"Cysne"*,[338] and *Air Service Agreement*[339] awards.

(3) In the literature concerning countermeasures, reference is sometimes made to the application of a "sanction", or to a "reaction" to a prior internationally wrongful act; historically the more usual terminology was that of "legitimate reprisals" or, more generally, measures of "self-protection" or "self-help". The term "sanctions" has been used for measures taken in accordance with the constituent instrument of some international organization, in particular under Chapter VII of the Charter of the United Nations—despite the fact that the Charter uses the term "measures", not "sanctions". The term "reprisals" is now no longer widely used in the present context, because of its association with the law of belligerent reprisals involving the use of force. At least since the *Air Service Agreement* arbitration,[340] the term "countermeasures" has been preferred, and it has been adopted for the purposes of the present articles.

(4) Where countermeasures are taken in accordance with article 22, the underlying obligation is not suspended, still less terminated; the wrongfulness of the conduct in question is precluded for the time being by reason of its character as a countermeasure, but only provided that and for so long as the necessary conditions for taking countermeasures are satisfied. These conditions are set out in Part Three, chapter II, to which article 22 refers. As a response to internationally wrongful conduct of another State, countermeasures may be justified only in relation to that State. This is emphasized by the phrases "if and to the extent" and "countermeasures taken against" the responsible State. An act directed against a third State would not fit this definition and could not be justified as a countermeasure. On the other hand, indirect or consequential effects of countermeasures on third parties, which do not involve an independent breach of any obligation to those third parties, will not take a countermeasure outside the scope of article 22.

(5) Countermeasures may only preclude wrongfulness in the relations between an injured State and the State which has committed the internationally wrongful act.

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[333] *Ibid.*, p. 242, para. 30.

[334] See, e.g., the Convention on the Prohibition of Military or any Other Hostile Use of Environmental Modification Techniques.

[335] *I.C.J. Reports 1996* (see footnote 54 above), p. 261, para. 89.

[336] *Gabčíkovo-Nagymaros Project* (see footnote 27 above), p. 55, para. 83.

[337] *Portuguese Colonies* case (Naulilaa incident), UNRIAA, vol. II (Sales No. 1949.V.1), p. 1011, at pp. 1025–1026 (1928).

[338] *Ibid.*, p. 1035, at p. 1052 (1930).

[339] *Air Service Agreement* (see footnote 28 above).

[340] *Ibid.*, especially pp. 443–446, paras. 80–98.

The principle is clearly expressed in the *"Cysne"* case, where the tribunal stressed that:

> reprisals, which constitute an act in principle contrary to the law of nations, are defensible only insofar as they were *provoked* by some other act likewise contrary to that law. *Only reprisals taken against the provoking State are permissible.* Admittedly, it can happen that legitimate reprisals taken against an offending State may affect the nationals of an innocent State. But that would be an indirect and unintentional consequence which, in practice, the injured State will always endeavour to avoid or to limit as far as possible.[341]

Accordingly, the wrongfulness of Germany's conduct *vis-à-vis* Portugal was not precluded. Since it involved the use of armed force, this decision concerned belligerent reprisals rather than countermeasures in the sense of article 22. But the same principle applies to countermeasures, as the Court confirmed in the *Gabčíkovo-Nagymaros Project* case when it stressed that the measure in question must be "directed against" the responsible State.[342]

(6) If article 22 had stood alone, it would have been necessary to spell out other conditions for the legitimacy of countermeasures, including in particular the requirement of proportionality, the temporary or reversible character of countermeasures and the status of certain fundamental obligations which may not be subject to countermeasures. Since these conditions are dealt with in Part Three, chapter II, it is sufficient to make a cross reference to them here. Article 22 covers any action which qualifies as a countermeasure in accordance with those conditions. One issue is whether countermeasures may be taken by third States which are not themselves individually injured by the internationally wrongful act in question, although they are owed the obligation which has been breached.[343] For example, in the case of an obligation owed to the international community as a whole ICJ has affirmed that all States have a legal interest in compliance.[344] Article 54 leaves open the question whether any State may take measures to ensure compliance with certain international obligations in the general interest as distinct from its own individual interest as an injured State. While article 22 does not cover measures taken in such a case to the extent that these do not qualify as countermeasures, neither does it exclude that possibility.

### *Article 23.* Force majeure

**1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act is due to *force majeure*, that is the occurrence of an irresistible force or of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation.**

**2. Paragraph 1 does not apply if:**

**(*a*) the situation of *force majeure* is due, either alone or in combination with other factors, to the conduct of the State invoking it; or**

**(*b*) the State has assumed the risk of that situation occurring.**

*Commentary*

(1) *Force majeure* is quite often invoked as a ground for precluding the wrongfulness of an act of a State.[345] It involves a situation where the State in question is in effect compelled to act in a manner not in conformity with the requirements of an international obligation incumbent upon it. *Force majeure* differs from a situation of distress (art. 24) or necessity (art. 25) because the conduct of the State which would otherwise be internationally wrongful is involuntary or at least involves no element of free choice.

(2) A situation of *force majeure* precluding wrongfulness only arises where three elements are met: (*a*) the act in question must be brought about by an irresistible force or an unforeseen event; (*b*) which is beyond the control of the State concerned; and (*c*) which makes it materially impossible in the circumstances to perform the obligation. The adjective "irresistible" qualifying the word "force" emphasizes that there must be a constraint which the State was unable to avoid or oppose by its own means. To have been "unforeseen" the event must have been neither foreseen nor of an easily foreseeable kind. Further the "irresistible force" or "unforeseen event" must be causally linked to the situation of material impossibility, as indicated by the words "due to *force majeure* … making it materially impossible". Subject to paragraph 2, where these elements are met, the wrongfulness of the State's conduct is precluded for so long as the situation of *force majeure* subsists.

(3) Material impossibility of performance giving rise to *force majeure* may be due to a natural or physical event (e.g. stress of weather which may divert State aircraft into the territory of another State, earthquakes, floods or drought) or to human intervention (e.g. loss of control over a portion of the State's territory as a result of an insurrection or devastation of an area by military operations carried out by a third State), or some combination of the two. Certain situations of duress or coercion involving force imposed on the State may also amount to *force majeure* if they meet the various requirements of article 23. In particular, the situation must be irresistible, so that the State concerned has no real possibility of escaping its effects. *Force majeure* does not include circumstances in which performance of an obligation has become more difficult, for example due to some political or economic crisis. Nor does it cover situations brought about by the neglect or

[341] *"Cysne"* (see footnote 338 above), pp. 1056–1057.

[342] *Gabčíkovo-Nagymaros Project* (see footnote 27 above), p. 55, para. 83.

[343] For the distinction between injured States and other States entitled to invoke State responsibility, see articles 42 and 48 and commentaries.

[344] *Barcelona Traction* (see footnote 25 above), p. 32, para. 33.

[345] "'*Force majeure*' and 'fortuitous event' as circumstances precluding wrongfulness: survey of State practice, international judicial decisions and doctrine", study prepared by the Secretariat (*Yearbook … 1978*, vol. II (Part One), p. 61, document A/CN.4/315).

default of the State concerned,[346] even if the resulting injury itself was accidental and unintended.[347]

(4) In drafting what became article 61 of the 1969 Vienna Convention, ILC took the view that *force majeure* was a circumstance precluding wrongfulness in relation to treaty performance, just as supervening impossibility of performance was a ground for termination of a treaty.[348] The same view was taken at the United Nations Conference on the Law of Treaties.[349] But in the interests of the stability of treaties, the Conference insisted on a narrow formulation of article 61 so far as treaty termination is concerned. The degree of difficulty associated with *force majeure* as a circumstance precluding wrongfulness, though considerable, is less than is required by article 61 for termination of a treaty on grounds of supervening impossibility, as ICJ pointed out in the *Gabčíkovo-Nagymaros Project* case:

> Article 61, paragraph 1, requires the "permanent disappearance or destruction of an object indispensable for the execution" of the treaty to justify the termination of a treaty on grounds of impossibility of performance. During the conference, a proposal was made to extend the scope of the article by including in it cases such as the impossibility to make certain payments because of serious financial difficulties ... Although it was recognized that such situations could lead to a preclusion of the wrongfulness of non-performance by a party of its treaty obligations, the participating States were not prepared to consider such situations to be a ground for terminating or suspending a treaty, and preferred to limit themselves to a narrower concept.[350]

(5) In practice, many of the cases where "impossibility" has been relied upon have not involved actual impossibility as distinct from increased difficulty of performance and the plea of *force majeure* has accordingly failed. But cases of material impossibility have occurred, e.g. where a State aircraft is forced, due to damage or loss of control of the aircraft owing to weather, into the airspace of another State without the latter's authorization. In such cases the principle that wrongfulness is precluded has been accepted.[351]

(6) Apart from aerial incidents, the principle in article 23 is also recognized in relation to ships in innocent passage by article 14, paragraph 3, of the Convention on the Territorial Sea and the Contiguous Zone (the United Nations Convention on the Law of the Sea, art. 18, para. 2), as well as in article 7, paragraph 1, of the Convention on Transit Trade of Land-locked States. In these provisions, *force majeure* is incorporated as a constituent element of the relevant primary rule; nonetheless, its acceptance in these cases helps to confirm the existence of a general principle of international law to similar effect.

(7) The principle has also been accepted by international tribunals. Mixed claims commissions have frequently cited the unforeseeability of attacks by rebels in denying the responsibility of the territorial State for resulting damage suffered by foreigners.[352] In the *Lighthouses* arbitration, a lighthouse owned by a French company had been requisitioned by the Government of Greece in 1915 and was subsequently destroyed by enemy action. The arbitral tribunal denied the French claim for restoration of the lighthouse on grounds of *force majeur*e.[353] In the *Russian Indemnity* case, the principle was accepted but the plea of *force majeure* failed because the payment of the debt was not materially impossible.[354] *Force majeure* was acknowledged as a general principle of law (though again the plea was rejected on the facts of the case) by PCIJ in the *Serbian Loans* and *Brazilian Loans* cases.[355] More recently, in the *"Rainbow Warrior"* arbitration, France relied on *force majeure* as a circumstance precluding the wrongfulness of its conduct in removing the officers from Hao and not returning them following medical treatment. The tribunal dealt with the point briefly:

> New Zealand is right in asserting that the excuse of *force majeure* is not of relevance in this case because the test of its applicability is of

[346] For example, in relation to occurrences such as the bombing of La Chaux-de-Fonds by German airmen on 17 October 1915, and of Porrentruy by a French airman on 26 April 1917, ascribed to negligence on the part of the airmen, the belligerent undertook to punish the offenders and make reparation for the damage suffered (study prepared by the Secretariat, *ibid*., paras. 255–256).

[347] For example, in 1906 an American officer on the USS *Chattanooga* was mortally wounded by a bullet from a French warship as his ship entered the Chinese harbour of Chefoo. The United States Government obtained reparation, having maintained that:

> "While the killing of Lieutenant England can only be viewed as an accident, it cannot be regarded as belonging to the unavoidable class whereby no responsibility is entailed. Indeed, it is not conceivable how it could have occurred without the contributory element of lack of proper precaution on the part of those officers of the *Dupetit Thouars* who were in responsible charge of the rifle firing practice and who failed to stop firing when the *Chattanooga*, in the course of her regular passage through the public channel, came into the line of fire."

M. M. Whiteman, *Damages in International Law* (Washington, D.C., United States Government Printing Office, 1937), vol. I, p. 221. See also the study prepared by the Secretariat (footnote 345 above), para. 130.

[348] *Yearbook … 1966*, vol. II, p. 255.

[349] See, e.g., the proposal of the representative of Mexico, *United Nations Conference on the Law of Treaties, First and second sessions, Vienna, 26 March–24 May 1968 and 9 April–22 May 1969, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), Report of the Committee of the Whole on its work at the first session of the Conference, document A/CONF.39/14, p. 182, para. 531 (*a*).

[350] *Gabčíkovo-Nagymaros Project* (see footnote 27 above), p. 63, para. 102.

[351] See, e.g., the cases of accidental intrusion into airspace attributable to weather, and the cases of accidental bombing of neutral territory attributable to navigational errors during the First World War discussed in the study prepared by the Secretariat (footnote 345 above), paras. 250–256. See also the exchanges of correspondence between the States concerned in the incidents involving United States military aircraft entering the airspace of Yugoslavia in 1946, United States of America, *Department of State Bulletin* (Washington, D.C.), vol. XV, No. 376 (15 September 1946), p. 502, reproduced in the study prepared by the Secretariat, para. 144, and the incident provoking the application to ICJ in 1954, *I.C.J. Pleadings, Treatment in Hungary of Aircraft and Crew of the United States of America*, p. 14 (note to the Hungarian Government of 17 March 1953). It is not always clear whether these cases are based on distress or *force majeure*.

[352] See, e.g., the decision of the American-British Claims Commission in the *Saint Albans Raid* case, Moore, *History and Digest*, vol. IV, p. 4042 (1873), and the study prepared by the Secretariat (footnote 345 above), para. 339; the decisions of the United States-Venezuela Claims Commission in the *Wipperman* case, Moore, *History and Digest*, vol. III, p. 3039, and the study prepared by the Secretariat, paras. 349–350; *De Brissot and others* case (footnote 117 above), and the study prepared by the Secretariat, para. 352; and the decision of the British-Mexican Claims Commission in the *Gill* case, UNRIAA, vol. V (Sales No. 1952.V.3), p. 157 (1931), and the study prepared by the Secretariat, para. 463.

[353] *Lighthouses* arbitration (see footnote 182 above), pp. 219–220.

[354] UNRIAA, vol. XI (Sales No. 61.V.4), p. 421, at p. 443 (1912).

[355] *Serbian Loans, Judgment No. 14, 1929, P.C.I.J., Series A, No. 20*, pp. 39–40; *Brazilian Loans, Judgment No. 15, ibid., No. 21*, p. 120.

absolute and material impossibility, and because a circumstance rendering performance more difficult or burdensome does not constitute a case of *force majeure*.[356]

(8) In addition to its application in inter-State cases as a matter of public international law, *force majeure* has substantial currency in the field of international commercial arbitration, and may qualify as a general principle of law.[357]

(9) A State may not invoke *force majeure* if it has caused or induced the situation in question. In *Libyan Arab Foreign Investment Company and The Republic of Burundi*, the arbitral tribunal rejected a plea of *force majeure* because "the alleged impossibility [was] not the result of an irresistible force or an unforeseen external event beyond the control of Burundi. In fact, the impossibility is the result of a unilateral decision of that State ..."[358] Under the equivalent ground for termination of a treaty in article 61 of the 1969 Vienna Convention, material impossibility cannot be invoked "if the impossibility is the result of a breach by that party either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty". By analogy with this provision, *paragraph 2* (a) excludes the plea in circumstances where *force majeure* is due, either alone or in combination with other factors, to the conduct of the State invoking it. For paragraph 2 (*a*) to apply it is not enough that the State invoking *force majeure* has contributed to the situation of material impossibility; the situation of *force majeure* must be "due" to the conduct of the State invoking it. This allows for *force majeure* to be invoked in situations in which a State may have unwittingly contributed to the occurrence of material impossibility by something which, in hindsight, might have been done differently but which was done in good faith and did not itself make the event any less unforeseen. Paragraph 2 (*a*) requires that the State's role in the occurrence of *force majeure* must be substantial.

(10) *Paragraph 2* (b) deals with situations in which the State has already accepted the risk of the occurrence of *force majeure*, whether it has done so in terms of the obligation itself or by its conduct or by virtue of some unilateral act. This reflects the principle that *force majeure* should not excuse performance if the State has undertaken to prevent the particular situation arising or has otherwise assumed that risk.[359] Once a State accepts the responsibility for a particular risk it cannot then claim *force majeure* to avoid responsibility. But the assumption of risk must be unequivocal and directed towards those to whom the obligation is owed.

### *Article 24. Distress*

**1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the author of the act in question has no other reasonable way, in a situation of distress, of saving the author's life or the lives of other persons entrusted to the author's care.**

**2. Paragraph 1 does not apply if:**

**(*a*) the situation of distress is due, either alone or in combination with other factors, to the conduct of the State invoking it; or**

**(*b*) the act in question is likely to create a comparable or greater peril.**

*Commentary*

(1) Article 24 deals with the specific case where an individual whose acts are attributable to the State is in a situation of peril, either personally or in relation to persons under his or her care. The article precludes the wrongfulness of conduct adopted by the State agent in circumstances where the agent had no other reasonable way of saving life. Unlike situations of *force majeure* dealt with in article 23, a person acting under distress is not acting involuntarily, even though the choice is effectively nullified by the situation of peril.[360] Nor is it a case of choosing between compliance with international law and other legitimate interests of the State, such as characterize situations of necessity under article 25. The interest concerned is the immediate one of saving people's lives, irrespective of their nationality.

(2) In practice, cases of distress have mostly involved aircraft or ships entering State territory under stress of weather or following mechanical or navigational failure.[361] An example is the entry of United States military aircraft into Yugoslavia's airspace in 1946. On two occasions, United States military aircraft entered Yugoslav airspace without authorization and were attacked by Yugoslav air defences. The United States Government protested the Yugoslav action on the basis that the aircraft had entered Yugoslav airspace solely in order to escape extreme danger. The Yugoslav Government responded by denouncing the systematic violation of its airspace, which it claimed could only be intentional in view of its frequency. A later note from the Yugoslav chargé d'affaires informed the United States Department of State that Marshal Tito had

[356] *"Rainbow Warrior"* (see footnote 46 above), p. 253.

[357] On *force majeure* in the case law of the Iran-United States Claims Tribunal, see G. H. Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal* (Oxford, Clarendon Press, 1996), pp. 306–320. *Force majeure* has also been recognized as a general principle of law by the European Court of Justice: see, e.g., case 145/85, *Denkavit* v. *Belgium*, *Eur. Court H.R., Reports* 1987–2, p. 565; case 101/84, *Commission of the European Communities* v. *Italian Republic*, *ibid*., *Reports* 1985–6, p. 2629. See also article 79 of the United Nations Convention on Contracts for the International Sale of Goods; P. Schlechtriem, ed., *Commentary on the UN Convention on the International Sale of Goods*, 2nd ed. (trans. G. Thomas) (Oxford, Clarendon Press, 1998), pp. 600–626; and article 7.1.7 of the UNIDROIT Principles, *Principles of International Commercial Contracts* (Rome, Unidroit, 1994), pp. 169–171.

[358] ILR, vol. 96 (1994), p. 318, para. 55.

[359] As the study prepared by the Secretariat (footnote 345 above), para. 31, points out, States may renounce the right to rely on *force majeure* by agreement. The most common way of doing so would be by an agreement or obligation assuming in advance the risk of the particular *force majeure* event.

[360] For this reason, writers who have considered this situation have often defined it as one of "relative impossibility" of complying with the international obligation. See, e.g., O. J. Lissitzyn, "The treatment of aerial intruders in recent practice and international law", AJIL, vol. 47, No. 4 (October 1953), p. 588.

[361] See the study prepared by the Secretariat (footnote 345 above), paras. 141–142 and 252.

forbidden any firing on aircraft which flew over Yugoslav territory without authorization, presuming that, for its part, the United States Government "would undertake the steps necessary to prevent these flights, except in the case of emergency or bad weather, for which arrangements could be made by agreement between American and Yugoslav authorities".[362] The reply of the United States Acting Secretary of State reiterated the assertion that no United States planes had flown over Yugoslavia intentionally without prior authorization from Yugoslav authorities "unless forced to do so in an emergency". However, the Acting Secretary of State added:

> I presume that the Government of Yugoslavia recognizes that *in case a plane and its occupants are jeopardized, the aircraft may change its course so as to seek safety, even though such action may result in flying over Yugoslav territory without prior clearance*.[363]

(3) Claims of distress have also been made in cases of violation of maritime boundaries. For example, in December 1975, after British naval vessels entered Icelandic territorial waters, the British Government claimed that the vessels in question had done so in search of "shelter from severe weather, as they have the right to do under customary international law".[364] Iceland maintained that British vessels were in its waters for the sole purpose of provoking an incident, but did not contest the point that if the British vessels had been in a situation of distress, they could enter Icelandic territorial waters.

(4) Although historically practice has focused on cases involving ships and aircraft, article 24 is not limited to such cases.[365] The *"Rainbow Warrior"* arbitration involved a plea of distress as a circumstance precluding wrongfulness outside the context of ships or aircraft. France sought to justify its conduct in removing the two officers from the island of Hao on the ground of "circumstances of distress in a case of extreme urgency involving elementary humanitarian considerations affecting the acting organs of the State".[366] The tribunal unanimously accepted that this plea was admissible in principle, and by majority that it was applicable to the facts of one of the two cases. As to the principle, the tribunal required France to show three things:

> (1) The existence of very exceptional circumstances of extreme urgency involving medical or other considerations of an elementary nature, provided always that a prompt recognition of the existence of those exceptional circumstances is subsequently obtained from the other interested party or is clearly demonstrated.
>
> (2) The reestablishment of the original situation of compliance with the assignment in Hao as soon as the reasons of emergency invoked to justify the repatriation had disappeared.
>
> (3) The existence of a good faith effort to try to obtain the consent of New Zealand in terms of the 1986 Agreement.[367]

In fact, the danger to one of the officers, though perhaps not life-threatening, was real and might have been imminent, and it was not denied by the New Zealand physician who subsequently examined him. By contrast, in the case of the second officer, the justifications given (the need for medical examination on grounds of pregnancy and the desire to see a dying father) did not justify emergency action. The lives of the agent and the child were at no stage threatened and there were excellent medical facilities nearby. The tribunal held that:

> [C]learly these circumstances entirely fail to justify France's responsibility for the removal of Captain Prieur and from the breach of its obligations resulting from the failure to return the two officers to Hao (in the case of Major Mafart once the reasons for their removal had disappeared). There was here a clear breach of its obligations.[368]

(5) The plea of distress is also accepted in many treaties as a circumstance justifying conduct which would otherwise be wrongful. Article 14, paragraph 3, of the Convention on the Territorial Sea and the Contiguous Zone permits stopping and anchoring by ships during their passage through foreign territorial seas insofar as this conduct is rendered necessary by distress. This provision is repeated in much the same terms in article 18, paragraph 2, of the United Nations Convention on the Law of the Sea.[369] Similar provisions appear in the international conventions on the prevention of pollution at sea.[370]

(6) Article 24 is limited to cases where human life is at stake. The tribunal in the *"Rainbow Warrior"* arbitration appeared to take a broader view of the circumstances justifying a plea of distress, apparently accepting that a serious health risk would suffice. The problem with extending article 24 to less than life-threatening situations is where to place any lower limit. In situations of distress involving aircraft there will usually be no difficulty in establishing that there is a threat to life, but other cases present a wide range of possibilities. Given the context of chapter V and the likelihood that there will be other solutions available for cases which are not apparently life-threatening, it does

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[362] United States of America, *Department of State Bulletin* (see footnote 351 above), reproduced in the study prepared by the Secretariat (see footnote 345 above), para. 144.

[363] Study prepared by the Secretariat (see footnote 345 above), para. 145. The same argument is found in the Memorial of 2 December 1958 submitted by the United States Government to ICJ in relation to another aerial incident (*I.C.J. Pleadings, Aerial Incident of 27 July 1955*, pp. 358–359).

[364] *Official Records of the Security Council, Thirtieth Year*, 1866th meeting, 16 December 1975, para. 24; see the study prepared by the Secretariat (footnote 345 above), para. 136.

[365] There have also been cases involving the violation of a land frontier in order to save the life of a person in danger. See, e.g., the case of violation of the Austrian border by Italian soldiers in 1862, study prepared by the Secretariat (footnote 345 above), para. 121.

[366] *"Rainbow Warrior"* (see footnote 46 above), pp. 254–255, para. 78.

[367] *Ibid*., p. 255, para. 79.

[368] *Ibid*., p. 263, para. 99.

[369] See also articles 39, paragraph 1 (*c*), 98 and 109, of the Convention.

[370] See, e.g., the International Convention for the Prevention of Pollution of the Sea by Oil, article IV, paragraph 1 (*a*) of which provides that the prohibition on the discharge of oil into the sea does not apply if the discharge takes place "for the purpose of securing the safety of the ship, preventing damage to the ship or cargo, or saving life at sea". See also the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, article V, paragraph 1 of which provides that the prohibition on dumping of wastes does not apply when it is "necessary to secure the safety of human life or of vessels, aircraft, platforms or other man-made structures at sea … in any case which constitutes a danger to human life or a real threat to vessels, aircraft, platforms or other man-made structures at sea, if dumping appears to be the only way of averting the threat". See also the Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft (art. 8, para. 1); and the International Convention for the Prevention of Pollution from Ships, 1973 (MARPOL Convention), annex I, regulation 11 (*a*).

not seem necessary to extend the scope of distress beyond threats to life itself. In situations in which a State agent is in distress and has to act to save lives, there should however be a certain degree of flexibility in the assessment of the conditions of distress. The "no other reasonable way" criterion in article 24 seeks to strike a balance between the desire to provide some flexibility regarding the choices of action by the agent in saving lives and the need to confine the scope of the plea having regard to its exceptional character.

(7) Distress may only be invoked as a circumstance precluding wrongfulness in cases where a State agent has acted to save his or her own life or where there exists a special relationship between the State organ or agent and the persons in danger. It does not extend to more general cases of emergencies, which are more a matter of necessity than distress.

(8) Article 24 only precludes the wrongfulness of conduct so far as it is necessary to avoid the life-threatening situation. Thus, it does not exempt the State or its agent from complying with other requirements (national or international), e.g. the requirement to notify arrival to the relevant authorities, or to give relevant information about the voyage, the passengers or the cargo.[371]

(9) As in the case of *force majeure*, a situation which has been caused or induced by the invoking State is not one of distress. In many cases the State invoking distress may well have contributed, even if indirectly, to the situation. Priority should be given to necessary life-saving measures, however, and under *paragraph 2* (a), distress is only excluded if the situation of distress is due, either alone or in combination with other factors, to the conduct of the State invoking it. This is the same formula as that adopted in respect of article 23, paragraph 2 (*a*).[372]

(10) Distress can only preclude wrongfulness where the interests sought to be protected (e.g. the lives of passengers or crew) clearly outweigh the other interests at stake in the circumstances. If the conduct sought to be excused endangers more lives than it may save or is otherwise likely to create a greater peril it will not be covered by the plea of distress. For instance, a military aircraft carrying explosives might cause a disaster by making an emergency landing, or a nuclear submarine with a serious breakdown might cause radioactive contamination to a port in which it sought refuge. *Paragraph 2* (b) stipulates that distress does not apply if the act in question is likely to create a comparable or greater peril. This is consistent with paragraph 1, which in asking whether the agent had "no other reasonable way" to save life establishes an objective test. The words "comparable or greater peril" must be assessed in the context of the overall purpose of saving lives.

[371] See *Cashin and Lewis* v. *The King, Canada Law Reports* (1935), p. 103 (even if a vessel enters a port in distress, it is not exempted from the requirement to report on its voyage). See also the *"Rebecca"*, Mexico-United States General Claims Commission, AJIL, vol. 23, No. 4 (October 1929), p. 860 (vessel entered port in distress; merchandise seized for customs offence: held, entry reasonably necessary in the circumstances and not a mere matter of convenience; seizure therefore unlawful); the *"May"* v. *The King, Canada Law Reports* (1931), p. 374; the *"Queen City"* v. *The King, ibid*., p. 387; and *Rex* v. *Flahaut*, *Dominion Law Reports* (1935), p. 685 (test of "real and irresistible distress" applied).

[372] See paragraph (9) of the commentary to article 23.

### *Article 25. Necessity*

**1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:**

**(*a*) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and**

**(*b*) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.**

**2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:**

**(*a*) the international obligation in question excludes the possibility of invoking necessity; or**

**(*b*) the State has contributed to the situation of necessity.**

*Commentary*

(1) The term "necessity" (*état de nécessité*) is used to denote those exceptional cases where the only way a State can safeguard an essential interest threatened by a grave and imminent peril is, for the time being, not to perform some other international obligation of lesser weight or urgency. Under conditions narrowly defined in article 25, such a plea is recognized as a circumstance precluding wrongfulness.

(2) The plea of necessity is exceptional in a number of respects. Unlike consent (art. 20), self-defence (art. 21) or countermeasures (art. 22), it is not dependent on the prior conduct of the injured State. Unlike *force majeure* (art. 23), it does not involve conduct which is involuntary or coerced. Unlike distress (art. 24), necessity consists not in danger to the lives of individuals in the charge of a State official but in a grave danger either to the essential interests of the State or of the international community as a whole. It arises where there is an irreconcilable conflict between an essential interest on the one hand and an obligation of the State invoking necessity on the other. These special features mean that necessity will only rarely be available to excuse non-performance of an obligation and that it is subject to strict limitations to safeguard against possible abuse.[373]

(3) There is substantial authority in support of the existence of necessity as a circumstance precluding wrongful-

[373] Perhaps the classic case of such an abuse was the occupation of Luxembourg and Belgium by Germany in 1914, which Germany sought to justify on the ground of necessity. See, in particular, the note presented on 2 August 1914 by the German Minister in Brussels to the Belgian Minister for Foreign Affairs, in J. B. Scott, ed., *Diplomatic Documents relating to the Outbreak of the European War* (New York, Oxford University Press, 1916), part I, pp. 749–750, and the speech in the Reichstag by the German Chancellor von Bethmann-Hollweg, on 4 August 1914, containing the well-known words: *wir sind jetzt in der Notwehr; und Not kennt kein Gebot!* (we are in a state of self-defence and necessity knows no law), *Jahrbuch des Völkerrechts*, vol. III (1916), p. 728.

ness. It has been invoked by States and has been dealt with by a number of international tribunals. In these cases the plea of necessity has been accepted in principle, or at least not rejected.

(4) In an Anglo-Portuguese dispute of 1832, the Portuguese Government argued that the pressing necessity of providing for the subsistence of certain contingents of troops engaged in quelling internal disturbances had justified its appropriation of property owned by British subjects, notwithstanding a treaty stipulation. The British Government was advised that:

> the Treaties between this Country and Portugal are [not] of so stubborn and unbending a nature, as to be incapable of modification under any circumstances whatever, or that their stipulations ought to be so strictly adhered to, as to deprive the Government of Portugal of the right of using those means, which may be absolutely and indispensably necessary to the safety, and even to the very existence of the State.
>
> The extent of the necessity, which will justify such an appropriation of the Property of British Subjects, must depend upon the circumstances of the particular case, but it must be imminent and urgent.[374]

(5) The *"Caroline"* incident of 1837, though frequently referred to as an instance of self-defence, really involved the plea of necessity at a time when the law concerning the use of force had a quite different basis than it has at present. In that case, British armed forces entered United States territory and attacked and destroyed a vessel owned by United States citizens which was carrying recruits and military and other material to Canadian insurgents. In response to the protests by the United States, the British Minister in Washington, Fox, referred to the "necessity of self-defence and self-preservation"; the same point was made by counsel consulted by the British Government, who stated that "the conduct of the British Authorities" was justified because it was "absolutely necessary as a measure of precaution".[375] Secretary of State Webster replied to Minister Fox that "nothing less than a clear and absolute necessity can afford ground of justification" for the commission "of hostile acts within the territory of a Power at Peace", and observed that the British Government must prove that the action of its forces had really been caused by "a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation".[376] In his message to Congress of 7 December 1841, President Tyler reiterated that:

> This Government can never concede to any foreign Government the power, except in a case of the most urgent and extreme necessity, of invading its territory, either to arrest the persons or destroy the property of those who may have violated the municipal laws of such foreign Government."[377]

The incident was not closed until 1842, with an exchange of letters in which the two Governments agreed that "a strong overpowering necessity may arise when this great principle may and must be suspended". "It must be so", added Lord Ashburton, the British Government's *ad hoc* envoy to Washington, "for the shortest possible period during the continuance of an admitted overruling necessity, and strictly confined within the narrowest limits imposed by that necessity".[378]

(6) In the *Russian Fur Seals* controversy of 1893, the "essential interest" to be safeguarded against a "grave and imminent peril" was the natural environment in an area not subject to the jurisdiction of any State or to any international regulation. Facing the danger of extermination of a fur seal population by unrestricted hunting, the Russian Government issued a decree prohibiting sealing in an area of the high seas. In a letter to the British Ambassador dated 12 February (24 February) 1893, the Russian Minister for Foreign Affairs explained that the action had been taken because of the "absolute necessity of immediate provisional measures" in view of the imminence of the hunting season. He "emphasize[d] the essentially precautionary character of the above-mentioned measures, which were taken under the pressure of exceptional circumstances"[379] and declared his willingness to conclude an agreement with the British Government with a view to a longer-term settlement of the question of sealing in the area.

(7) In the *Russian Indemnity* case, the Government of the Ottoman Empire, to justify its delay in paying its debt to the Russian Government, invoked among other reasons the fact that it had been in an extremely difficult financial situation, which it described as *"force majeure"* but which was more like a state of necessity. The arbitral tribunal accepted the plea in principle:

> *The exception of force majeure*, invoked in the first place, is arguable in international public law, as well as in private law; international law must adapt itself to political exigencies. The Imperial Russian Government expressly admits ... that the obligation for a State to execute treaties may be weakened "if the very existence of the State is endangered, if observation of the international duty is ... *self-destructive*".[380]

It considered, however, that:

> It would be a manifest exaggeration to admit that the payment (or the contracting of a loan for the payment) of the relatively small sum of 6 million francs due to the Russian claimants would have imperilled the existence of the Ottoman Empire or seriously endangered its internal or external situation.[381]

In its view, compliance with an international obligation must be "self-destructive" for the wrongfulness of the conduct not in conformity with the obligation to be precluded.[382]

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[374] Lord McNair, ed., *International Law Opinions* (Cambridge University Press, 1956), vol. II, Peace, p. 232.

[375] See respectively W. R. Manning, ed., *Diplomatic Correspondence of the United States: Canadian Relations 1784–1860* (Washington, D.C., Carnegie Endowment for International Peace, 1943), vol. III, p. 422; and Lord McNair, ed., *International Law Opinions* (footnote 374 above), p. 221, at p. 228.

[376] *British and Foreign State Papers, 1840–1841* (London, Ridgway, 1857), vol. 29, p. 1129.

[377] *Ibid.*, 1841–1842, vol. 30, p. 194.

[378] *Ibid.*, p. 195. See Secretary of State Webster's reply on page 201.

[379] *Ibid.*, *1893–1894* (London, HM Stationery Office, 1899), vol. 86, p. 220; and the study prepared by the Secretariat (see footnote 345 above), para. 155.

[380] See footnote 354 above; see also the study prepared by the Secretariat (footnote 345 above), para. 394.

[381] *Ibid.*

[382] A case in which the parties to the dispute agreed that very serious financial difficulties could justify a different mode of discharging the obligation other than that originally provided for arose in connection with the enforcement of the arbitral award in *Forests of Central Rhodopia*, UNRIAA, vol. III (Sales No. 1949.V.2), p. 1405 (1933); see League of Nations, *Official Journal*, 15th Year, No. 11 (part I) (November 1934), p. 1432.

(8) In *Société commerciale de Belgique*,[383] the Greek Government owed money to a Belgian company under two arbitral awards. Belgium applied to PCIJ for a declaration that the Greek Government, in refusing to carry out the awards, was in breach of its international obligations. The Greek Government pleaded the country's serious budgetary and monetary situation.[384] The Court noted that it was not within its mandate to declare whether the Greek Government was justified in not executing the arbitral awards. However, the Court implicitly accepted the basic principle, on which the two parties were in agreement.[385]

(9) In March 1967 the Liberian oil tanker *Torrey Canyon* went aground on submerged rocks off the coast of Cornwall outside British territorial waters, spilling large amounts of oil which threatened the English coastline. After various remedial attempts had failed, the British Government decided to bomb the ship to burn the remaining oil. This operation was carried out successfully. The British Government did not advance any legal justification for its conduct, but stressed the existence of a situation of extreme danger and claimed that the decision to bomb the ship had been taken only after all other means had failed.[386] No international protest resulted. A convention was subsequently concluded to cover future cases where intervention might prove necessary to avert serious oil pollution.[387]

(10) In the *"Rainbow Warrior"* arbitration, the arbitral tribunal expressed doubt as to the existence of the excuse of necessity. It noted that the Commission's draft article "allegedly authorizes a State to take unlawful action invoking a state of necessity" and described the Commission's proposal as "controversial".[388]

(11) By contrast, in the *Gabčíkovo-Nagymaros Project* case, ICJ carefully considered an argument based on the Commission's draft article (now article 25), expressly accepting the principle while at the same time rejecting its invocation in the circumstances of that case. As to the principle itself, the Court noted that the parties had both relied on the Commission's draft article as an appropriate formulation, and continued:

> The Court considers ... that the state of necessity is a ground recognized by customary international law for precluding the wrongfulness of an act not in conformity with an international obligation. It observes moreover that such ground for precluding wrongfulness can only be accepted on an exceptional basis. The International Law Commission was of the same opinion when it explained that it had opted for a negative form of words ...
>
> Thus, according to the Commission, the state of necessity can only be invoked under certain strictly defined conditions which must be cumulatively satisfied; and the State concerned is not the sole judge of whether those conditions have been met.
>
> ... In the present case, the following basic conditions ... are relevant: it must have been occasioned by an "essential interest" of the State which is the author of the act conflicting with one of its international obligations; that interest must have been threatened by a "grave and imminent peril"; the act being challenged must have been the "only means" of safeguarding that interest; that act must not have "seriously impair[ed] an essential interest" of the State towards which the obligation existed; and the State which is the author of that act must not have "contributed to the occurrence of the state of necessity". Those conditions reflect customary international law. [389]

(12) The plea of necessity was apparently an issue in the *Fisheries Jurisdiction* case.[390] Regulatory measures taken to conserve straddling stocks had been taken by the Northwest Atlantic Fisheries Organization (NAFO) but had, in Canada's opinion, proved ineffective for various reasons. By the Coastal Fisheries Protection Act 1994, Canada declared that the straddling stocks of the Grand Banks were "threatened with extinction", and asserted that the purpose of the Act and regulations was "to enable Canada to take urgent action necessary to prevent further destruction of those stocks and to permit their rebuilding". Canadian officials subsequently boarded and seized a Spanish fishing ship, the *Estai*, on the high seas, leading to a conflict with the European Union and with Spain. The Spanish Government denied that the arrest could be justified by concerns as to conservation "since it violates the established provisions of the NAFO Convention [Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries] to which Canada is a party".[391] Canada disagreed, asserting that "the arrest of the *Estai* was necessary in order to put a stop to the overfishing of Greenland halibut by Spanish fishermen".[392] The Court held that it had no jurisdiction over the case.[393]

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[383] *Société commerciale de Belgique, Judgment, 1939, P.C.I.J., Series A/B, No. 78*, p. 160.

[384] *P.C.I.J., Series C, No. 87*, pp. 141 and 190; study prepared by the Secretariat (footnote 345 above), para. 278. See generally paragraphs 276–287 for the Greek arguments relative to the state of necessity.

[385] See footnote 383 above; and the study prepared by the Secretariat (footnote 345 above), para. 288. See also the *Serbian Loans* case, where the positions of the parties and the Court on the point were very similar (footnote 355 above); the *French Company of Venezuelan Railroads* case (footnote 178 above) p. 353; and the study prepared by the Secretariat (footnote 345 above), paras. 263–268 and 385–386. In his separate opinion in the *Oscar Chinn* case, Judge Anzilotti accepted the principle that "necessity may excuse the non-observance of international obligations", but denied its applicability on the facts (*Judgment, 1934, P.C.I.J., Series A/B, No. 63*, p. 65, at pp. 112–114).

[386] *The "Torrey Canyon"*, Cmnd. 3246 (London, HM Stationery Office, 1967).

[387] International Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties.

[388] *"Rainbow Warrior"* (see footnote 46 above), p. 254. In *Libyan Arab Foreign Investment Company and The Republic of Burundi* (see footnote 358 above), p. 319, the tribunal declined to comment on the appropriateness of codifying the doctrine of necessity, noting that the measures taken by Burundi did not appear to have been the only means of safeguarding an essential interest "against a grave and imminent peril".

[389] *Gabčíkovo-Nagymaros Project* (see footnote 27 above), pp. 40–41, paras. 51–52.

[390] *Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 432.

[391] *Ibid*., p. 443, para. 20. For the European Community protest of 10 March 1995, asserting that the arrest "cannot be justified by any means", see Memorial of Spain (Jurisdiction of the Court), *I.C.J. Pleadings, Fisheries Jurisdiction (Spain* v. *Canada)*, p. 17, at p. 38, para. 15.

[392] *Fisheries Jurisdiction* (see footnote 390 above), p. 443, para. 20. See also the Canadian Counter-Memorial (29 February 1996), *I.C.J. Pleadings* (footnote 391 above), paras. 17–45.

[393] By an Agreed Minute between Canada and the European Community, Canada undertook to repeal the regulations applying the 1994 Act to Spanish and Portuguese vessels in the NAFO area and to release the *Estai*. The parties expressly maintained "their respective positions on the conformity of the amendment of 25 May 1994 to Canada's Coastal Fisheries Protection Act, and subsequent regulations, with customary international law and the NAFO Convention" and reserved "their ability to preserve and defend their rights in conformity with international law". See Canada-European Community: Agreed Minute on the Con-

(13) The existence and limits of a plea of necessity have given rise to a long-standing controversy among writers. It was for the most part explicitly accepted by the early writers, subject to strict conditions.[394] In the nineteenth century, abuses of necessity associated with the idea of "fundamental rights of States" led to a reaction against the doctrine. During the twentieth century, the number of writers opposed to the concept of state of necessity in international law increased, but the balance of doctrine has continued to favour the existence of the plea.[395]

(14) On balance, State practice and judicial decisions support the view that necessity may constitute a circumstance precluding wrongfulness under certain very limited conditions, and this view is embodied in article 25. The cases show that necessity has been invoked to preclude the wrongfulness of acts contrary to a broad range of obligations, whether customary or conventional in origin.[396] It has been invoked to protect a wide variety of interests, including safeguarding the environment, preserving the very existence of the State and its people in time of public emergency, or ensuring the safety of a civilian population. But stringent conditions are imposed before any such plea is allowed. This is reflected in article 25. In particular, to emphasize the exceptional nature of necessity and concerns about its possible abuse, article 25 is cast in negative language ("Necessity may not be invoked … unless").[397] In this respect it mirrors the language of article 62 of the 1969 Vienna Convention dealing with fundamental change of circumstances. It also mirrors that language in establishing, in paragraph 1, two conditions without which necessity may not be invoked and excluding, in paragraph 2, two situations entirely from the scope of the excuse of necessity.[398]

servation and Management of Fish Stocks (Brussels, 20 April 1995), ILM, vol. 34, No. 5 (September 1995), p. 1260. See also the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks.

[394] See B. Ayala, *De jure et officiis bellicis et disciplina militari, libri tres* (1582) (Washington, D.C., Carnegie Institution, 1912), vol. II, p. 135; A. Gentili, *De iure belli, libri tres* (1612) (Oxford, Clarendon Press, 1933), vol. II, p. 351; H. Grotius, *De jure belli ac pacis, libri tres* (1646) (Oxford, Clarendon Press, 1925), vol. II, pp. 193 et seq.; S. Pufendorf, *De jure naturae et gentium, libri octo* (1688) (Oxford, Clarendon Press, 1934), vol. II, pp. 295–296; C. Wolff, *Jus gentium methodo scientifica pertractatum* (1764) (Oxford, Clarendon Press, 1934), pp. 173–174; and E. de Vattel, *The Law of Nations or the Principles of Natural Law* (1758) (Washington, D.C., Carnegie Institution, 1916), vol. III, p. 149.

[395] For a review of the earlier doctrine, see *Yearbook … 1980*, vol. II (Part Two), pp. 47–49; see also P. A. Pillitu, *Lo stato di necessità nel diritto internazionale* (University of Perugia/Editrice Licosa, 1981); J. Barboza, "Necessity (revisited) in international law", *Essays in International Law in Honour of Judge Manfred Lachs*, J. Makarczyk, ed. (The Hague, Martinus Nijhoff, 1984), p. 27; and R. Boed, "State of necessity as a justification for internationally wrongful conduct", *Yale Human Rights and Development Law Journal*, vol. 3 (2000), p. 1.

[396] Generally on the irrelevance of the source of the obligation breached, see article 12 and commentary.

[397] This negative formulation was referred to by ICJ in the *Gabčíkovo-Nagymaros Project* case (see footnote 27 above), p. 40, para. 51.

[398] A further exclusion, common to all the circumstances precluding wrongfulness, concerns peremptory norms (see article 26 and commentary).

(15) The first condition, set out in *paragraph 1* (a), is that necessity may only be invoked to safeguard an essential interest from a grave and imminent peril. The extent to which a given interest is "essential" depends on all the circumstances, and cannot be prejudged. It extends to particular interests of the State and its people, as well as of the international community as a whole. Whatever the interest may be, however, it is only when it is threatened by a grave and imminent peril that this condition is satisfied. The peril has to be objectively established and not merely apprehended as possible. In addition to being grave, the peril has to be imminent in the sense of proximate. However, as the Court in the *Gabčíkovo-Nagymaros Project* case said:

> That does not exclude ... that a "peril" appearing in the long term might be held to be "imminent" as soon as it is established, at the relevant point in time, that the realization of that peril, however far off it might be, is not thereby any less certain and inevitable.[399]

Moreover, the course of action taken must be the "only way" available to safeguard that interest. The plea is excluded if there are other (otherwise lawful) means available, even if they may be more costly or less convenient. Thus, in the *Gabčíkovo-Nagymaros Project* case, the Court was not convinced that the unilateral suspension and abandonment of the Project was the only course open in the circumstances, having regard in particular to the amount of work already done and the money expended on it, and the possibility of remedying any problems by other means.[400] The word "way" in paragraph 1 (*a*) is not limited to unilateral action but may also comprise other forms of conduct available through cooperative action with other States or through international organizations (for example, conservation measures for a fishery taken through the competent regional fisheries agency). Moreover, the requirement of necessity is inherent in the plea: any conduct going beyond what is strictly necessary for the purpose will not be covered.

(16) It is not sufficient for the purposes of paragraph 1 (*a*) that the peril is merely apprehended or contingent. It is true that in questions relating, for example, to conservation and the environment or to the safety of large structures, there will often be issues of scientific uncertainty and different views may be taken by informed experts on whether there is a peril, how grave or imminent it is and whether the means proposed are the only ones available in the circumstances. By definition, in cases of necessity the peril will not yet have occurred. In the *Gabčíkovo-Nagymaros Project* case the Court noted that the invoking State could not be the sole judge of the necessity,[401] but a measure of uncertainty about the future does not necessarily disqualify a State from invoking necessity, if the peril is clearly established on the basis of the evidence reasonably available at the time.

(17) The second condition for invoking necessity, set out in *paragraph 1* (b), is that the conduct in question must not seriously impair an essential interest of the other State or States concerned, or of the international community as

[399] *Gabčíkovo-Nagymaros Project* (see footnote 27 above), p. 42, para. 54.

[400] *Ibid*., pp. 42–43, para. 55.

[401] *Ibid*., p. 40, para. 51.

a whole (see paragraph (18) below). In other words, the interest relied on must outweigh all other considerations, not merely from the point of view of the acting State but on a reasonable assessment of the competing interests, whether these are individual or collective.[402]

(18) As a matter of terminology, it is sufficient to use the phrase "international community as a whole" rather than "international community of States as a whole", which is used in the specific context of article 53 of the 1969 Vienna Convention. The insertion of the words "of States" in article 53 of the Convention was intended to stress the paramountcy that States have over the making of international law, including especially the establishment of norms of a peremptory character. On the other hand, ICJ used the phrase "international community as a whole" in the *Barcelona Traction* case,[403] and it is frequently used in treaties and other international instruments in the same sense as in paragraph 1(*b*).[404]

(19) Over and above the conditions in paragraph 1, *paragraph 2* lays down two general limits to any invocation of necessity. This is made clear by the use of the words "in any case". *Paragraph 2* (a) concerns cases where the international obligation in question explicitly or implicitly excludes reliance on necessity. Thus, certain humanitarian conventions applicable to armed conflict expressly exclude reliance on military necessity. Others while not explicitly excluding necessity are intended to apply in abnormal situations of peril for the responsible State and plainly engage its essential interests. In such a case the non-availability of the plea of necessity emerges clearly from the object and the purpose of the rule.

(20) According to *paragraph 2* (b), necessity may not be relied on if the responsible State has contributed to the situation of necessity. Thus, in the *Gabčíkovo-Nagymaros Project* case, ICJ considered that because Hungary had "helped, by act or omission to bring about" the situation of alleged necessity, it could not then rely on that situation as a circumstance precluding wrongfulness.[405] For a plea of necessity to be precluded under paragraph 2 (*b*), the contribution to the situation of necessity must be sufficiently substantial and not merely incidental or peripheral. Paragraph 2 (*b*) is phrased in more categorical terms than articles 23, paragraph 2 (*a*), and 24, paragraph 2 (*a*), because necessity needs to be more narrowly confined.

(21) As embodied in article 25, the plea of necessity is not intended to cover conduct which is in principle regulated by the primary obligations. This has a particular importance in relation to the rules relating to the use of force in international relations and to the question of "military necessity". It is true that in a few cases, the plea of necessity has been invoked to excuse military action abroad, in particular in the context of claims to humanitarian intervention.[406] The question whether measures of forcible humanitarian intervention, not sanctioned pursuant to Chapters VII or VIII of the Charter of the United Nations, may be lawful under modern international law is not covered by article 25.[407] The same thing is true of the doctrine of "military necessity" which is, in the first place, the underlying criterion for a series of substantive rules of the law of war and neutrality, as well as being included in terms in a number of treaty provisions in the field of international humanitarian law.[408] In both respects, while considerations akin to those underlying article 25 may have a role, they are taken into account in the context of the formulation and interpretation of the primary obligations.[409]

### *Article 26. Compliance with peremptory norms*

**Nothing in this chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law.**

*Commentary*

(1) In accordance with article 53 of the 1969 Vienna Convention, a treaty which conflicts with a peremptory norm of general international law is void. Under article 64, an earlier treaty which conflicts with a new peremp-

[402] In the *Gabčíkovo-Nagymaros Project* case ICJ affirmed the need to take into account any countervailing interest of the other State concerned (see footnote 27 above), p. 46, para. 58.

[403] *Barcelona Traction* (see footnote 25 above), p. 32, para. 33.

[404] See, e.g., third preambular paragraph of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents; fourth preambular paragraph of the International Convention Against the Taking of Hostages; fifth preambular paragraph of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation; third preambular paragraph of the Convention on the Safety of United Nations and Associated Personnel; tenth preambular paragraph of the International Convention for the Suppression of Terrorist Bombings; ninth preambular paragraph of the Rome Statute of the International Criminal Court; and ninth preambular paragraph of the International Convention for the Suppression of the Financing of Terrorism.

[405] *Gabčíkovo-Nagymaros Project* (see footnote 27 above), p. 46, para. 57.

[406] For example, in 1960 Belgium invoked necessity to justify its military intervention in the Congo. The matter was discussed in the Security Council but not in terms of the plea of necessity as such. See *Official Records of the Security Council, Fifteenth Year*, 873rd meeting, 13–14 July 1960, paras. 144, 182 and 192; 877th meeting, 20–21 July 1960, paras. 31 et seq. and para. 142; 878th meeting, 21 July 1960, paras. 23 and 65; and 879th meeting, 21–22 July 1960, paras. 80 et seq. and paras. 118 and 151. For the *"Caroline"* incident, see above, paragraph (5).

[407] See also article 26 and commentary for the general exclusion of the scope of circumstances precluding wrongfulness of conduct in breach of a peremptory norm.

[408] See, e.g., article 23 (*g*) of the Regulations respecting the Laws and Customs of War on Land (annexed to the Hague Conventions II of 1899 and IV of 1907), which prohibits the destruction of enemy property "unless such destruction or seizure be imperatively demanded by the necessities of war". Similarly, article 54, paragraph 5, of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), appears to permit attacks on objects indispensable to the survival of the civilian population if "imperative military necessity" so requires.

[409] See, e.g., M. Huber, "Die Kriegsrechtlichen Verträge und die Kriegsraison", *Zeitschrift für Völkerrecht*, vol. VII (1913), p. 351; D. Anzilotti, *Corso di diritto internazionale* (Rome, Athenaeum, 1915), vol. III, p. 207; C. De Visscher, "Les lois de la guerre et la théorie de la nécessité", RGDIP, vol. 24 (1917), p. 74; N. C. H. Dunbar, "Military necessity in war crimes trials", BYBIL, *1952*, vol. 29, p. 442; C. Greenwood, "Historical development and legal basis", *The Handbook of Humanitarian Law in Armed Conflicts*, D. Fleck, ed. (Oxford University Press, 1995), p. 1, at pp. 30–33; and Y. Dinstein, "Military necessity", *Encyclopedia of Public International Law*, R. Bernhardt, ed. (Amsterdam, Elsevier, 1997), vol. 3, pp. 395–397.

tory norm becomes void and terminates.[410] The question is what implications these provisions may have for the matters dealt with in chapter V.

(2) Sir Gerald Fitzmaurice as Special Rapporteur on the Law of Treaties treated this question on the basis of an implied condition of "continued compatibility with international law", noting that:

> A treaty obligation the observance of which is incompatible a new rule or prohibition of international law in the nature of *jus cogens* will justify (and require) non-observance of any treaty obligation involving such incompatibility …
>
> The same principle is applicable where circumstances arise subsequent to the conclusion of a treaty, bringing into play an existing rule of international law which was not relevant to the situation as it existed at the time of the conclusion of the treaty.[411]

The Commission did not, however, propose with any specific articles on this question, apart from articles 53 and 64 themselves.

(3) Where there is an apparent conflict between primary obligations, one of which arises for a State directly under a peremptory norm of general international law, it is evident that such an obligation must prevail. The processes of interpretation and application should resolve such questions without any need to resort to the secondary rules of State responsibility. In theory, one might envisage a conflict arising on a subsequent occasion between a treaty obligation, apparently lawful on its face and innocent in its purpose, and a peremptory norm. If such a case were to arise it would be too much to invalidate the treaty as a whole merely because its application in the given case was not foreseen. But in practice such situations seem not to have occurred.[412] Even if they were to arise, peremptory norms of general international law generate strong interpretative principles which will resolve all or most apparent conflicts.

(4) It is, however, desirable to make it clear that the circumstances precluding wrongfulness in chapter V of Part One do not authorize or excuse any derogation from a peremptory norm of general international law. For example, a State taking countermeasures may not derogate from such a norm: for example, a genocide cannot justify a counter-genocide.[413] The plea of necessity likewise cannot excuse the breach of a peremptory norm. It would be possible to incorporate this principle expressly in each of the articles of chapter V, but it is both more economical and more in keeping with the overriding character of this class of norms to deal with the basic principle separately. Hence, article 26 provides that nothing in chapter V can preclude the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law.[414]

(5) The criteria for identifying peremptory norms of general international law are stringent. Article 53 of the 1969 Vienna Convention requires not merely that the norm in question should meet all the criteria for recognition as a norm of general international law, binding as such, but further that it should be recognized as having a peremptory character by the international community of States as a whole. So far, relatively few peremptory norms have been recognized as such. But various tribunals, national and international, have affirmed the idea of peremptory norms in contexts not limited to the validity of treaties.[415] Those peremptory norms that are clearly accepted and recognized include the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination.[416]

(6) In accordance with article 26, circumstances precluding wrongfulness cannot justify or excuse a breach of a State's obligations under a peremptory rule of general international law. Article 26 does not address the prior issue whether there has been such a breach in any given case. This has particular relevance to certain articles in chapter V. One State cannot dispense another from the obligation to comply with a peremptory norm, e.g. in relation to genocide or torture, whether by treaty or otherwise.[417] But in applying some peremptory norms the consent of a particular State may be relevant. For example, a State may validly consent to a foreign military presence on its territory for a lawful purpose. Determining in which circumstances consent has been validly given is again a matter for other rules of international law and not for the secondary rules of State responsibility.[418]

### *Article 27. Consequences of invoking a circumstance precluding wrongfulness*

**The invocation of a circumstance precluding wrongfulness in accordance with this chapter is without prejudice to:**

**(*a*) compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists;**

**(*b*) the question of compensation for any material loss caused by the act in question.**

[410] See also article 44, paragraph 5, which provides that in cases falling under article 53, no separation of the provisions of the treaty is permitted.

[411] Fourth report on the law of treaties, *Yearbook … 1959* (see footnote 307 above), p. 46. See also S. Rosenne, *Breach of Treaty* (Cambridge, Grotius, 1985), p. 63.

[412] For a possible analogy, see the remarks of Judge *ad hoc* Lauterpacht in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 13 September 1993, I.C.J. Reports 1993*, p. 325, at pp. 439–441. ICJ did not address these issues in its order.

[413] As ICJ noted in its decision in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, "in no case could one breach of the Convention serve as an excuse for another" (*Counter-Claims, Order of 17 December 1997, I.C.J. Reports 1997*, p. 243, at p. 258, para. 35).

[414] For convenience, this limitation is spelled out again in the context of countermeasures in Part Three, chapter II. See article 50 and commentary, paras. (9) and (10).

[415] See, e.g., the decisions of the International Tribunal for the Former Yugoslavia in case IT-95-17/1-T, *Prosecutor* v. *Furundzija*, judgement of 10 December 1998; ILM, vol. 38, No. 2 (March 1999), p. 317, and of the British House of Lords in *Regina* v. *Bow Street Metropolitan Stipendiary Magistrate and Others*, ex parte *Pinochet Ugarte (No. 3)*, ILR, vol. 119. Cf. *Legality of the Threat or Use of Nuclear Weapons* (footnote 54 above), p. 257, para. 79.

[416] Cf. *East Timor* (footnote 54 above).

[417] See paragraph (4) of the commentary to article 45.

[418] See paragraphs (4) to (7) of the commentary to article 20.

*Commentary*

(1) Article 27 is a without prejudice clause dealing with certain incidents or consequences of invoking circumstances precluding wrongfulness under chapter V. It deals with two issues. First, it makes it clear that circumstances precluding wrongfulness do not as such affect the underlying obligation, so that if the circumstance no longer exists the obligation regains full force and effect. Secondly, it refers to the possibility of compensation in certain cases. Article 27 is framed as a without prejudice clause because, as to the first point, it may be that the effect of the facts which disclose a circumstance precluding wrongfulness may also give rise to the termination of the obligation and, as to the second point, because it is not possible to specify in general terms when compensation is payable.

(2) *Subparagraph* (a) of article 27 addresses the question of what happens when a condition preventing compliance with an obligation no longer exists or gradually ceases to operate. It makes it clear that chapter V has a merely preclusive effect. When and to the extent that a circumstance precluding wrongfulness ceases, or ceases to have its preclusive effect for any reason, the obligation in question (assuming it is still in force) will again have to be complied with, and the State whose earlier non-compliance was excused must act accordingly. The words "and to the extent" are intended to cover situations in which the conditions preventing compliance gradually lessen and allow for partial performance of the obligation.

(3) This principle was affirmed by the tribunal in the *"Rainbow Warrior"* arbitration,[419] and even more clearly by ICJ in the *Gabčíkovo-Nagymaros Project* case. In considering Hungary's argument that the wrongfulness of its conduct in discontinuing work on the Project was precluded by a state of necessity, the Court remarked that "[a]s soon as the state of necessity ceases to exist, the duty to comply with treaty obligations revives".[420] It may be that the particular circumstances precluding wrongfulness are, at the same time, a sufficient basis for terminating the underlying obligation. Thus, a breach of a treaty justifying countermeasures may be "material" in terms of article 60 of the 1969 Vienna Convention and permit termination of the treaty by the injured State. Conversely, the obligation may be fully reinstated or its operation fully restored in principle, but modalities for resuming performance may need to be settled. These are not matters which article 27 can resolve, other than by providing that the invocation of circumstances precluding wrongfulness is without prejudice to "compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists". Here "compliance with the obligation in question" includes cessation of the wrongful conduct.

(4) *Subparagraph* (b) of article 27 is a reservation as to questions of possible compensation for damage in cases covered by chapter V. Although the article uses the term "compensation", it is not concerned with compensation within the framework of reparation for wrongful conduct, which is the subject of article 34. Rather, it is concerned with the question whether a State relying on a circumstance precluding wrongfulness should nonetheless be expected to make good any material loss suffered by any State directly affected. The reference to "material loss" is narrower than the concept of damage elsewhere in the articles: article 27 concerns only the adjustment of losses that may occur when a party relies on a circumstance covered by chapter V.

(5) Subparagraph (*b*) is a proper condition, in certain cases, for allowing a State to rely on a circumstance precluding wrongfulness. Without the possibility of such recourse, the State whose conduct would otherwise be unlawful might seek to shift the burden of the defence of its own interests or concerns onto an innocent third State. This principle was accepted by Hungary in invoking the plea of necessity in the *Gabčíkovo-Nagymaros Project* case. As ICJ noted, "Hungary expressly acknowledged that, in any event, such a state of necessity would not exempt it from its duty to compensate its partner".[421]

(6) Subparagraph (*b*) does not attempt to specify in what circumstances compensation should be payable. Generally, the range of possible situations covered by chapter V is such that to lay down a detailed regime for compensation is not appropriate. It will be for the State invoking a circumstance precluding wrongfulness to agree with any affected States on the possibility and extent of compensation payable in a given case.

## Part Two

## CONTENT OF THE INTERNATIONAL RESPONSIBILITY OF A STATE

(1) Whereas Part One of the articles defines the general conditions necessary for State responsibility to arise, Part Two deals with the legal consequences for the responsible State. It is true that a State may face legal consequences of conduct which is internationally wrongful outside the sphere of State responsibility. For example, a material breach of a treaty may give an injured State the right to terminate or suspend the treaty in whole or in part.[422] The focus of Part Two, however, is on the new legal relationship which arises upon the commission by a State of an internationally wrongful act. This constitutes the substance or content of the international responsibility of a State under the articles.

(2) Within the sphere of State responsibility, the consequences which arise by virtue of an internationally wrongful act of a State may be specifically provided for in such terms as to exclude other consequences, in whole or

[419] *"Rainbow Warrior"* (see footnote 46 above), pp. 251–252, para. 75.

[420] *Gabčíkovo-Nagymaros Project* (see footnote 27 above), p. 63, para 101; see also page 38, para. 47.

[421] *Ibid.*, p. 39, para. 48. A separate issue was that of accounting for accrued costs associated with the Project (*ibid*., p. 81, paras. 152–153).

[422] 1969 Vienna Convention, art. 60.

in part.[423] In the absence of any specific provision, however, international law attributes to the responsible State new obligations, and in particular the obligation to make reparation for the harmful consequences flowing from that act. The close link between the breach of an international obligation and its immediate legal consequence in the obligation of reparation was recognized in article 36, paragraph 2, of the PCIJ Statute, which was carried over without change as Article 36, paragraph 2, of the ICJ Statute. In accordance with article 36, paragraph 2, States parties to the Statute may recognize as compulsory the Court's jurisdiction, *inter alia*, in all legal disputes concerning:

(*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.

Part One of the articles sets out the general legal rules applicable to the question identified in subparagraph (*c*), while Part Two does the same for subparagraph (*d*).

(3) Part Two consists of three chapters. Chapter I sets out certain general principles and specifies more precisely the scope of Part Two. Chapter II focuses on the forms of reparation (restitution, compensation, satisfaction) and the relations between them. Chapter III deals with the special situation which arises in case of a serious breach of an obligation arising under a peremptory norm of general international law, and specifies certain legal consequences of such breaches, both for the responsible State and for other States.

## Chapter I

## GENERAL PRINCIPLES

*Commentary*

(1) Chapter I of Part Two comprises six articles, which define in general terms the legal consequences of an internationally wrongful act of a State. Individual breaches of international law can vary across a wide spectrum from the comparatively trivial or minor up to cases which imperil the survival of communities and peoples, the territorial integrity and political independence of States and the environment of whole regions. This may be true whether the obligations in question are owed to one other State or to some or all States or to the international community as a whole. But over and above the gravity or effects of individual cases, the rules and institutions of State responsibility are significant for the maintenance of respect for international law and for the achievement of the goals which States advance through law-making at the international level.

(2) Within chapter I, article 28 is an introductory article, affirming the principle that legal consequences are entailed whenever there is an internationally wrongful act of a State. Article 29 indicates that these consequences are without prejudice to, and do not supplant, the continued obligation of the responsible State to perform the obligation breached. This point is carried further by article 30, which deals with the obligation of cessation and assurances or guarantees of non-repetition. Article 31 sets out the general obligation of reparation for injury suffered in consequence of a breach of international law by a State. Article 32 makes clear that the responsible State may not rely on its internal law to avoid the obligations of cessation and reparation arising under Part Two. Finally, article 33 specifies the scope of the Part, both in terms of the States to which obligations are owed and also in terms of certain legal consequences which, because they accrue directly to persons or entities other than States, are not covered by Parts Two or Three of the articles.

### *Article 28. Legal consequences of an internationally wrongful act*

**The international responsibility of a State which is entailed by an internationally wrongful act in accordance with the provisions of Part One involves legal consequences as set out in this Part.**

*Commentary*

(1) Article 28 serves an introductory function for Part Two and is expository in character. It links the provisions of Part One which define when the international responsibility of a State arises with the provisions of Part Two which set out the legal consequences which responsibility for an internationally wrongful act involves.

(2) The core legal consequences of an internationally wrongful act set out in Part Two are the obligations of the responsible State to cease the wrongful conduct (art. 30) and to make full reparation for the injury caused by the internationally wrongful act (art. 31). Where the internationally wrongful act constitutes a serious breach by the State of an obligation arising under a peremptory norm of general international law, the breach may entail further consequences both for the responsible State and for other States. In particular, all States in such cases have obligations to cooperate to bring the breach to an end, not to recognize as lawful the situation created by the breach and not to render aid or assistance to the responsible State in maintaining the situation so created (arts. 40–41).

(3) Article 28 does not exclude the possibility that an internationally wrongful act may involve legal consequences in the relations between the State responsible for that act and persons or entities other than States. This follows from article 1, which covers all international obligations *of* the State and not only those owed *to* other States. Thus, State responsibility extends, for example, to human rights violations and other breaches of international law where the primary beneficiary of the obligation breached is not a State. However, while Part One applies to all the cases in which an internationally wrongful act may be committed by a State, Part Two has a more limited scope. It does not apply to obligations of reparation to the extent

[423] On the *lex specialis* principle in relation to State responsibility, see article 55 and commentary.

that these arise towards or are invoked by a person or entity other than a State. In other words, the provisions of Part Two are without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State, and article 33 makes this clear.

### *Article 29. Continued duty of performance*

**The legal consequences of an internationally wrongful act under this Part do not affect the continued duty of the responsible State to perform the obligation breached.**

*Commentary*

(1) Where a State commits a breach of an international obligation, questions as to the restoration and future of the legal relationship thereby affected are central. Apart from the question of reparation, two immediate issues arise, namely, the effect of the responsible State's conduct on the obligation which has been breached, and cessation of the breach if it is continuing. The former question is dealt with by article 29, the latter by article 30.

(2) Article 29 states the general principle that the legal consequences of an internationally wrongful act do not affect the continued duty of the State to perform the obligation it has breached. As a result of the internationally wrongful act, a new set of legal relations is established between the responsible State and the State or States to whom the international obligation is owed. But this does not mean that the pre-existing legal relation established by the primary obligation disappears. Even if the responsible State complies with its obligations under Part Two to cease the wrongful conduct and to make full reparation for the injury caused, it is not relieved thereby of the duty to perform the obligation breached. The continuing obligation to perform an international obligation, notwithstanding a breach, underlies the concept of a continuing wrongful act (see article 14) and the obligation of cessation (see subparagraph (*a*) of article 30).

(3) It is true that in some situations the ultimate effect of a breach of an obligation may be to put an end to the obligation itself. For example, a State injured by a material breach of a bilateral treaty may elect to terminate the treaty.[424] But as the relevant provisions of the 1969 Vienna Convention make clear, the mere fact of a breach and even of a repudiation of a treaty does not terminate the treaty.[425] It is a matter for the injured State to react to the breach to the extent permitted by the Convention. The injured State may have no interest in terminating the treaty as distinct from calling for its continued performance. Where a treaty is duly terminated for breach, the termination does not affect legal relationships which have accrued under the treaty prior to its termination, including the obligation to make reparation for any breach.[426] A breach of an obligation under general international law is even less likely to affect the underlying obligation, and indeed will never do so *as such*. By contrast, the secondary legal relation of State responsibility arises on the occurrence of a breach and without any requirement of invocation by the injured State.

(4) Article 29 does not need to deal with such contingencies. All it provides is that the legal consequences of an internationally wrongful act within the field of State responsibility do not affect any continuing duty to comply with the obligation which has been breached. Whether and to what extent that obligation subsists despite the breach is a matter not regulated by the law of State responsibility but by the rules concerning the relevant primary obligation.

### *Article 30. Cessation and non-repetition*

**The State responsible for the internationally wrongful act is under an obligation:**

**(*a*) to cease that act, if it is continuing;**

**(*b*) to offer appropriate assurances and guarantees of non-repetition, if circumstances so require.**

*Commentary*

(1) Article 30 deals with two separate but linked issues raised by the breach of an international obligation: the cessation of the wrongful conduct and the offer of assurances and guarantees of non-repetition by the responsible State if circumstances so require. Both are aspects of the restoration and repair of the legal relationship affected by the breach. Cessation is, as it were, the negative aspect of future performance, concerned with securing an end to continuing wrongful conduct, whereas assurances and guarantees serve a preventive function and may be described as a positive reinforcement of future performance. The continuation in force of the underlying obligation is a necessary assumption of both, since if the obligation has ceased following its breach, the question of cessation does not arise and no assurances and guarantees can be relevant.[427]

(2) Subparagraph (*a*) of article 30 deals with the obligation of the State responsible for the internationally wrongful act to cease the wrongful conduct. In accordance with article 2, the word "act" covers both acts and omissions. Cessation is thus relevant to all wrongful acts extending in time "regardless of whether the conduct of a State is

[424] See footnote 422 above.

[425] Indeed, in the *Gabčíkovo-Nagymaros Project* case, ICJ held that continuing material breaches by both parties did not have the effect of terminating the 1977 Treaty on the Construction and Operation of the Gabčíkovo-Nagymaros Barrage System (see footnote 27 above), p. 68, para. 114.

[426] See, e.g., *"Rainbow Warrior"* (footnote 46 above), p. 266, citing Lord McNair (dissenting) in *Ambatielos, Preliminary Objection, I.C.J. Reports 1952*, p. 28, at p. 63. On that particular point the Court itself agreed, *ibid*., p. 45. In the *Gabčíkovo-Nagymaros Project* case, Hungary accepted that the legal consequences of its termination of the 1977 Treaty on the Construction and Operation of the Gabčíkovo-Nagymaros Barrage System on account of the breach by Czechoslovakia were prospective only, and did not affect the accrued rights of either party (see footnote 27 above), pp. 73–74, paras. 125–127. The Court held that the Treaty was still in force, and therefore did not address the question.

[427] 1969 Vienna Convention, art. 70, para. 1.

an action or an omission … since there may be cessation consisting in abstaining from certain actions".[428]

(3) The tribunal in the *"Rainbow Warrior"* arbitration stressed "two essential conditions intimately linked" for the requirement of cessation of wrongful conduct to arise, "namely that the wrongful act has a continuing character and that the violated rule is still in force at the time in which the order is issued".[429] While the obligation to cease wrongful conduct will arise most commonly in the case of a continuing wrongful act,[430] article 30 also encompasses situations where a State has violated an obligation on a series of occasions, implying the possibility of further repetitions. The phrase "if it is continuing" at the end of subparagraph (*a*) of the article is intended to cover both situations.

(4) Cessation of conduct in breach of an international obligation is the first requirement in eliminating the consequences of wrongful conduct. With reparation, it is one of the two general consequences of an internationally wrongful act. Cessation is often the main focus of the controversy produced by conduct in breach of an international obligation.[431] It is frequently demanded not only by States but also by the organs of international organizations such as the General Assembly and Security Council in the face of serious breaches of international law. By contrast, reparation, important though it is in many cases, may not be the central issue in a dispute between States as to questions of responsibility.[432]

(5) The function of cessation is to put an end to a violation of international law and to safeguard the continuing validity and effectiveness of the underlying primary rule. The responsible State's obligation of cessation thus protects both the interests of the injured State or States and the interests of the international community as a whole in the preservation of, and reliance on, the rule of law.

(6) There are several reasons for treating cessation as more than simply a function of the duty to comply with the primary obligation. First, the question of cessation only arises in the event of a breach. What must then occur depends not only on the interpretation of the primary obligation but also on the secondary rules relating to remedies, and it is appropriate that they are dealt with, at least in general terms, in articles concerning the consequences of an internationally wrongful act. Secondly, continuing wrongful acts are a common feature of cases involving State responsibility and are specifically dealt with in article 14. There is a need to spell out the consequences of such acts in Part Two.

(7) The question of cessation often arises in close connection with that of reparation, and particularly restitution. The result of cessation may be indistinguishable from restitution, for example in cases involving the freeing of hostages or the return of objects or premises seized. Nonetheless, the two must be distinguished. Unlike restitution, cessation is not subject to limitations relating to proportionality.[433] It may give rise to a continuing obligation, even when literal return to the *status quo ante* is excluded or can only be achieved in an approximate way.

(8) The difficulty of distinguishing between cessation and restitution is illustrated by the *"Rainbow Warrior"* arbitration. New Zealand sought the return of the two agents to detention on the island of Hao. According to New Zealand, France was obliged to return them to and to detain them on the island for the balance of the three years; that obligation had not expired since time spent off the island was not to be counted for that purpose. The tribunal disagreed. In its view, the obligation was for a fixed term which had expired, and there was no question of cessation.[434] Evidently, the return of the two agents to the island was of no use to New Zealand if there was no continuing obligation on the part of France to keep them there. Thus, a return to the *status quo ante* may be of little or no value if the obligation breached no longer exists. Conversely, no option may exist for an injured State to renounce restitution if the continued performance of the obligation breached is incumbent upon the responsible State and the former State is not competent to release it from such performance. The distinction between cessation and restitution may have important consequences in terms of the obligations of the States concerned.

(9) Subparagraph (*b*) of article 30 deals with the obligation of the responsible State to offer appropriate assurances and guarantees of non-repetition, if circumstances so require. Assurances and guarantees are concerned with the restoration of confidence in a continuing relationship, although they involve much more flexibility than cessation and are not required in all cases. They are most commonly sought when the injured State has reason to believe that the mere restoration of the pre-existing situation does not protect it satisfactorily. For example, following repeated demonstrations against the United States Embassy in Moscow from 1964 to 1965, President Johnson stated that:

> The U.S. Government must insist that its diplomatic establishments and personnel be given the protection which is required by international law and custom and which is necessary for the conduct of diplomatic relations between states. Expressions of regret and compensation are no substitute for adequate protection.[435]

[428] *"Rainbow Warrior"* (see footnote 46 above), p. 270, para. 113.

[429] *Ibid*., para. 114.

[430] For the concept of a continuing wrongful act, see paragraphs (3) to (11) of the commentary to article 14.

[431] The focus of the WTO dispute settlement mechanism is on cessation rather than reparation: Marrakesh Agreement establishing the World Trade Organization, annex 2 (Understanding on Rules and Procedures governing the Settlement of Disputes), especially article 3, paragraph 7, which provides for compensation "only if the immediate withdrawal of the measure is impracticable and as a temporary measure pending the withdrawal of the measure which is inconsistent with a covered agreement". On the distinction between cessation and reparation for WTO purposes, see, e.g., Report of the Panel, Australia-Subsidies Provided to Producers and Exporters of Automotive Leather (WT/DS126/RW and Corr.1), 21 January 2000, para. 6.49.

[432] For cases where ICJ has recognized that this may be so, see, e.g., *Fisheries Jurisdiction (Federal Republic of Germany* v. *Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 175, at pp. 201–205, paras. 65–76; and *Gabčíkovo-Nagymaros Project* (footnote 27 above), p. 81, para. 153. See also C. D. Gray, *Judicial Remedies in International Law* (Oxford, Clarendon Press, 1987), pp. 77–92.

[433] See article 35 (*b*) and commentary.

[434] UNRIAA, vol. XX, p. 217, at p. 266, para. 105 (1990).

[435] Reprinted in ILM, vol. 4, No. 2 (July 1965), p. 698.

Such demands are not always expressed in terms of assurances or guarantees, but they share the characteristics of being future-looking and concerned with other potential breaches. They focus on prevention rather than reparation and they are included in article 30.

(10) The question whether the obligation to offer assurances or guarantees of non-repetition may be a legal consequence of an internationally wrongful act was debated in the *LaGrand* case. This concerned an admitted failure of consular notification contrary to article 36 of the Vienna Convention on Consular Relations. In its fourth submission, Germany sought both general and specific assurances and guarantees as to the means of future compliance with the Convention. The United States argued that to give such assurances or guarantees went beyond the scope of the obligations in the Convention and that ICJ lacked jurisdiction to require them. In any event, formal assurances and guarantees were unprecedented and should not be required. Germany's entitlement to a remedy did not extend beyond an apology, which the United States had given. Alternatively, no assurances or guarantees were appropriate in the light of the extensive action it had taken to ensure that federal and State officials would in future comply with the Convention. On the question of jurisdiction, the Court held:

> that a dispute regarding the appropriate remedies for the violation of the Convention alleged by Germany is a dispute that arises out of the interpretation or application of the Convention and thus is within the Court's jurisdiction. Where jurisdiction exists over a dispute on a particular matter, no separate basis for jurisdiction is required by the Court to consider the remedies a party has requested for the breach of the obligation … Consequently, the Court has jurisdiction in the present case with respect to the fourth submission of Germany.[436]

On the question of appropriateness, the Court noted that an apology would not be sufficient in any case in which a foreign national had been "subjected to prolonged detention or sentenced to severe penalties" following a failure of consular notification.[437] But in the light of information provided by the United States as to the steps taken to comply in future, the Court held:

> 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.[438]

As to the specific assurances sought by Germany, the Court limited itself to stating that:

> if the United States, notwithstanding its commitment referred to … should fail in its obligation of consular notification to the detriment of German nationals, an apology would not suffice in cases where the individuals concerned have been subjected to prolonged detention or convicted and sentenced to severe penalties. In the case of such a conviction and sentence, it would be incumbent upon the United States to allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention.[439]

The Court thus upheld its jurisdiction on Germany's fourth submission and responded to it in the operative part. It did not, however, discuss the legal basis for assurances of non-repetition.

(11) Assurances or guarantees of non-repetition may be sought by way of satisfaction (e.g. the repeal of the legislation which allowed the breach to occur) and there is thus some overlap between the two in practice.[440] However, they are better treated as an aspect of the continuation and repair of the legal relationship affected by the breach. Where assurances and guarantees of non-repetition are sought by an injured State, the question is essentially the reinforcement of a continuing legal relationship and the focus is on the future, not the past. In addition, assurances and guarantees of non-repetition may be sought by a State other than an injured State in accordance with article 48.

(12) Assurances are normally given verbally, while guarantees of non-repetition involve something more—for example, preventive measures to be taken by the responsible State designed to avoid repetition of the breach. With regard to the kind of guarantees that may be requested, international practice is not uniform. The injured State usually demands either safeguards against the repetition of the wrongful act without any specification of the form they are to take[441] or, when the wrongful act affects its nationals, assurances of better protection of persons and property.[442] In the *LaGrand* case, ICJ spelled out with some specificity the obligation that would arise for the United States from a future breach, but added that "[t]his obligation can be carried out in various ways. The choice of means must be left to the United States".[443] It noted further that a State may not be in a position to offer a firm guarantee of non-repetition.[444] Whether it could properly do so would depend on the nature of the obligation in question.

(13) In some cases, the injured State may ask the responsible State to adopt specific measures or to act in a specified way in order to avoid repetition. Sometimes the injured State merely seeks assurances from the responsible State that, in future, it will respect the rights of the injured State.[445] In other cases, the injured State requires specific instructions to be given,[446] or other specific conduct to be

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[436] *LaGrand, Judgment* (see footnote 119 above), p. 485, para. 48, citing *Factory at Chorzów, Jurisdiction* (footnote 34 above).

[437] *LaGrand, Judgment* (see footnote 119 above), p. 512, para. 123.

[438] *Ibid*., p. 513, para. 124; see also the operative part, p. 516, para. 128 (6).

[439] *Ibid*., pp. 513–514, para. 125. See also paragraph 127 and the operative part (para. 128 (7)).

[440] See paragraph (5) of the commentary to article 36.

[441] In the "Dogger Bank" incident in 1904, the United Kingdom sought "security against the recurrence of such intolerable incidents", G. F. de Martens, *Nouveau recueil général de traités*, 2nd series, vol. XXXIII, p. 642. See also the exchange of notes between China and Indonesia following the attack in March 1966 against the Chinese Consulate General in Jakarta, in which the Chinese Deputy Minister for Foreign Affairs sought a guarantee that such incidents would not be repeated in the future, RGDIP, vol. 70 (1966), pp. 1013 et seq.

[442] Such assurances were given in the *Doane* incident (1886), Moore, *Digest*, vol. VI, pp. 345–346.

[443] *LaGrand, Judgment* (see footnote 119 above), p. 513, para. 125.

[444] *Ibid*., para. 124.

[445] See, e.g., the 1901 case in which the Ottoman Empire gave a formal assurance that the British, Austrian and French postal services would henceforth operate freely in its territory, RGDIP, vol. 8 (1901), p. 777, at pp. 788 and 792.

[446] See, e.g., the incidents involving the *"Herzog"* and the *"Bundesrath"*, two German ships seized by the British Navy in December 1899 and January 1900, during the Boer war, in which Germany drew the attention of Great Britain to "the necessity for issuing instructions

taken.[447] But assurances and guarantees of non-repetition will not always be appropriate, even if demanded. Much will depend on the circumstances of the case, including the nature of the obligation and of the breach. The rather exceptional character of the measures is indicated by the words "if circumstances so require" at the end of subparagraph (*b*). The obligation of the responsible State with respect to assurances and guarantees of non-repetition is formulated in flexible terms in order to prevent the kinds of abusive or excessive claims which characterized some demands for assurances and guarantees by States in the past.

### *Article 31. Reparation*

**1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.**

**2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.**

*Commentary*

(1) The obligation to make full reparation is the second general obligation of the responsible State consequent upon the commission of an internationally wrongful act. The general principle of the consequences of the commission of an internationally wrongful act was stated by PCIJ in the *Factory at Chorzów* case:

> It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself. Differences relating to reparations, which may be due by reason of failure to apply a convention, are consequently differences relating to its application.[448]

In this passage, which has been cited and applied on many occasions,[449] the Court was using the term "reparation" in its most general sense. It was rejecting a Polish argument that jurisdiction to interpret and apply a treaty did not entail jurisdiction to deal with disputes over the form and quantum of reparation to be made. By that stage of the dispute, Germany was no longer seeking for its national the return of the factory in question or of the property seized with it.

(2) In a subsequent phase of the same case, the Court went on to specify in more detail the content of the obligation of reparation. It said:

> The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.[450]

In the first sentence, the Court gave a general definition of reparation, emphasizing that its function was the re-establishment of the situation affected by the breach.[451] In the second sentence, it dealt with that aspect of reparation encompassed by "compensation" for an unlawful act—that is, restitution or its value, and in addition damages for loss sustained as a result of the wrongful act.

(3) The obligation placed on the responsible State by article 31 is to make "full reparation" in the *Factory at Chorzów* sense. In other words, the responsible State must endeavour to "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"[452] through the provision of one or more of the forms of reparation set out in chapter II of this part.

(4) The general obligation of reparation is formulated in article 31 as the immediate corollary of a State's responsibility, i.e. as an obligation of the responsible State resulting from the breach, rather than as a right of an injured State or States. This formulation avoids the difficulties that might arise where the same obligation is owed simultaneously to several, many or all States, only a few of which are specially affected by the breach. But quite apart from the questions raised when there is more than one State entitled to invoke responsibility,[453] the general obligation of reparation arises automatically upon commission of an internationally wrongful act and is not, as such, contingent upon a demand or protest by any State, even if the form which reparation should take in the circumstances may depend on the response of the injured State or States.

(5) The responsible State's obligation to make full reparation relates to the "injury caused by the internationally wrongful act". The notion of "injury", defined in *paragraph 2*, is to be understood as including any damage caused by that act. In particular, in accordance with paragraph 2, "injury" includes any material or moral damage caused thereby. This formulation is intended both as inclusive, covering both material and moral damage broadly understood, and as limitative, excluding merely abstract concerns or general interests of a State which is individu-

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to the British Naval Commanders to molest no German merchantmen in places not in the vicinity of the seat of war", Martens, *op. cit.* (footnote 441 above), vol. XXIX, p. 456 at p. 486.

[447] In the *Trail Smelter* case (see footnote 253 above), the arbitral tribunal specified measures to be adopted by the Trail Smelter, including measures designed to "prevent future significant fumigations in the United States" (p. 1934). Requests to modify or repeal legislation are frequently made by international bodies. See, e.g., the decisions of the Human Rights Committee: *Torres Ramirez* v. *Uruguay*, decision of 23 July 1980, *Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 40* (A/35/40), p. 126, para. 19; *Lanza* v. *Uruguay*, decision of 3 April 1980, *ibid*., p. 119, para. 17; and *Dermit Barbato* v. *Uruguay*, decision of 21 October 1982, *ibid*., *Thirty-eighth Session, Supplement No. 40* (A/38/40), p. 133, para. 11.

[448] *Factory at Chorzów, Jurisdiction* (see footnote 34 above).

[449] Cf. the ICJ reference to this decision in *LaGrand, Judgment* (footnote 119 above), p. 485, para. 48.

[450] *Factory at Chorzów, Merits* (see footnote 34 above), p. 47.

[451] Cf. P.-M. Dupuy, "Le fait générateur de la responsabilité internationale des États", *Collected Courses ... 1984–V* (Dordrecht, Martinus Nijhoff, 1986), vol. 188, p. 9, at p. 94, who uses the term *restauration*.

[452] *Factory at Chorzów, Merits* (see footnote 34 above), p. 47.

[453] For the States entitled to invoke responsibility, see articles 42 and 48 and commentaries. For the situation where there is a plurality of injured States, see article 46 and commentary.

ally unaffected by the breach.[454] "Material" damage here refers to damage to property or other interests of the State and its nationals which is assessable in financial terms. "Moral" damage includes such items as individual pain and suffering, loss of loved ones or personal affront associated with an intrusion on one's home or private life. Questions of reparation for such forms of damage are dealt with in more detail in chapter II of this Part.[455]

(6) The question whether damage to a protected interest is a necessary element of an internationally wrongful act has already been discussed.[456] There is in general no such requirement; rather this is a matter which is determined by the relevant primary rule. In some cases, the gist of a wrong is the causing of actual harm to another State. In some cases what matters is the failure to take necessary precautions to prevent harm even if in the event no harm occurs. In some cases there is an outright commitment to perform a specified act, e.g. to incorporate uniform rules into internal law. In each case the primary obligation will determine what is required. Hence, article 12 defines a breach of an international obligation as a failure to conform with an obligation.

(7) As a corollary there is no general requirement, over and above any requirements laid down by the relevant primary obligation, that a State should have suffered material harm or damage before it can seek reparation for a breach. The existence of actual damage will be highly relevant to the form and quantum of reparation. But there is no general requirement of material harm or damage for a State to be entitled to seek some form of reparation. In the *"Rainbow Warrior"* arbitration it was initially argued that "in the theory of international responsibility, damage is necessary to provide a basis for liability to make reparation", but the parties subsequently agreed that:

> Unlawful action against non-material interests, such as acts affecting the honor, dignity or prestige of a State, entitle the victim State to receive adequate reparation, even if those acts have not resulted in a pecuniary or material loss for the claimant State.[457]

The tribunal held that the breach by France had "provoked indignation and public outrage in New Zealand and caused a new, additional non-material damage … of a moral, political and legal nature, resulting from the affront to the dignity and prestige not only of New Zealand as such, but of its highest judicial and executive authorities as well".[458]

(8) Where two States have agreed to engage in particular conduct, the failure by one State to perform the obligation necessarily concerns the other. A promise has been broken and the right of the other State to performance correspondingly infringed. For the secondary rules of State responsibility to intervene at this stage and to prescribe that there is no responsibility because no identifiable harm or damage has occurred would be unwarranted. If the parties had wished to commit themselves to that formulation of the obligation they could have done so. In many cases, the damage that may follow from a breach (e.g. harm to a fishery from fishing in the closed season, harm to the environment by emissions exceeding the prescribed limit, abstraction from a river of more than the permitted amount) may be distant, contingent or uncertain. Nonetheless, States may enter into immediate and unconditional commitments in their mutual long-term interest in such fields. Accordingly, article 31 defines "injury" in a broad and inclusive way, leaving it to the primary obligations to specify what is required in each case.

(9) Paragraph 2 addresses a further issue, namely the question of a causal link between the internationally wrongful act and the injury. It is only "[i]njury … caused by the internationally wrongful act of a State" for which full reparation must be made. This phrase is used to make clear that the subject matter of reparation is, globally, the injury resulting from and ascribable to the wrongful act, rather than any and all consequences flowing from an internationally wrongful act.

(10) The allocation of injury or loss to a wrongful act is, in principle, a legal and not only a historical or causal process. Various terms are used to describe the link which must exist between the wrongful act and the injury in order for the obligation of reparation to arise. For example, reference may be made to losses "attributable to [the wrongful] act as a proximate cause",[459] or to damage which is "too indirect, remote, and uncertain to be appraised",[460] or to "any direct loss, damage including environmental damage and the depletion of natural resources or injury to foreign Governments, nationals and corporations as a result of" the wrongful act.[461] Thus, causality in fact is a necessary

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[454] Although not individually injured, such States may be entitled to invoke responsibility in respect of breaches of certain classes of obligation in the general interest, pursuant to article 48. Generally on notions of injury and damage, see B. Bollecker-Stern, *Le préjudice dans la théorie de la responsabilité internationale* (Paris, Pedone, 1973); B. Graefrath, "Responsibility and damages caused: relationship between responsibility and damages", *Collected Courses ... 1984–II* (The Hague, Nijhoff, 1985), vol. 185, p. 95; A. Tanzi, "Is damage a distinct condition for the existence of an internationally wrongful act?", Spinedi and Simma, eds., *op. cit.* (footnote 175 above), p. 1; and Brownlie, *System of the Law of Nations …* (footnote 92 above), pp. 53–88.

[455] See especially article 36 and commentary.

[456] See paragraph (9) of the commentary to article 2.

[457] *"Rainbow Warrior"* (see footnote 46 above), pp. 266–267, paras. 107 and 109.

[458] *Ibid*., p. 267, para. 110.

[459] See United States-German Mixed Claims Commission, *Administrative Decision No. II*, UNRIAA, vol. VII (Sales No. 1956.V.5), p. 23, at p. 30 (1923). See also *Dix* (footnote 178 above), p. 121, and the Canadian statement of claim following the disintegration of the *Cosmos 954* Soviet nuclear-powered satellite over its territory in 1978, ILM, vol. 18 (1979), p. 907, para. 23.

[460] See the *Trail Smelter* arbitration (footnote 253 above), p. 1931. See also A. Hauriou, "Les dommages indirects dans les arbitrages internationaux", RGDIP, vol. 31 (1924), p. 209, citing the *"Alabama"* arbitration as the most striking application of the rule excluding "indirect" damage (footnote 87 above).

[461] Security Council resolution 687 (1991) of 3 April 1991, para. 16. This was a resolution adopted with reference to Chapter VII of the Charter of the United Nations, but it is expressed to reflect Iraq's liability "under international law … as a result of its unlawful invasion and occupation of Kuwait". UNCC and its Governing Council have provided some guidance on the interpretation of the requirements of directness and causation under paragraph 16. See, e.g., Recommendations made by the panel of Commissioners concerning individual claims for serious personal injury or death (category "B" claims), report of 14 April 1994 (S/AC.26/1994/1), approved by the Governing Council in its decision 20 of 26 May 1994 (S/AC.26/Dec.20 (1994)); Report and recommendations made by the panel of Commissioners appointed to review the Well Blowout Control Claim (the "WBC claim"), of 15 November 1996 (S/AC.26/1996/5/Annex), paras. 66–86, approved by the Governing

but not a sufficient condition for reparation. There is a further element, associated with the exclusion of injury that is too "remote" or "consequential" to be the subject of reparation. In some cases, the criterion of "directness" may be used,[462] in others "foreseeability"[463] or "proximity".[464] But other factors may also be relevant: for example, whether State organs deliberately caused the harm in question, or whether the harm caused was within the ambit of the rule which was breached, having regard to the purpose of that rule.[465] In other words, the requirement of a causal link is not necessarily the same in relation to every breach of an international obligation. In international as in national law, the question of remoteness of damage "is not a part of the law which can be satisfactorily solved by search for a single verbal formula".[466] The notion of a sufficient causal link which is not too remote is embodied in the general requirement in article 31 that the injury should be in consequence of the wrongful act, but without the addition of any particular qualifying phrase.

(11) A further element affecting the scope of reparation is the question of mitigation of damage. Even the wholly innocent victim of wrongful conduct is expected to act reasonably when confronted by the injury. Although often expressed in terms of a "duty to mitigate", this is not a legal obligation which itself gives rise to responsibility. It is rather that a failure to mitigate by the injured party may preclude recovery to that extent.[467] The point was clearly made in this sense by ICJ in the *Gabčíkovo-Nagymaros Project* case:

> Slovakia also maintained that it was acting under a duty to mitigate damages when it carried out Variant C. It stated that "It is a general principle of international law that a party injured by the non-performance of another contract party must seek to mitigate the damage he has sustained".
>
> It would follow from such a principle that an injured State which has failed to take the necessary measures to limit the damage sustained would not be entitled to claim compensation for that damage which could have been avoided. While this principle might thus provide a basis for the calculation of damages, it could not, on the other hand, justify an otherwise wrongful act.[468]

(12) Often two separate factors combine to cause damage. In the *United States Diplomatic and Consular Staff in Tehran* case,[469] the initial seizure of the hostages by militant students (not at that time acting as organs or agents of the State) was attributable to the combination of the students' own independent action and the failure of the Iranian authorities to take necessary steps to protect the embassy. In the *Corfu Channel* case,[470] the damage to the British ships was caused both by the action of a third State in laying the mines and the action of Albania in failing to warn of their presence. Although, in such cases, the injury in question was effectively caused by a combination of factors, only one of which is to be ascribed to the responsible State, international practice and the decisions of international tribunals do not support the reduction or attenuation of reparation for concurrent causes,[471] except in cases of contributory fault.[472] In the *Corfu Channel* case, for example, the United Kingdom recovered the full amount of its claim against Albania based on the latter's wrongful failure to warn of the mines even though Albania had not itself laid the mines.[473] Such a result should follow *a fortiori* in cases where the concurrent cause is not the act of another State (which might be held separately responsible) but of private individuals, or some natural event such as a flood. In the *United States Diplomatic and Consular Staff in Tehran* case, the Islamic Republic of Iran was held to be fully responsible for the detention of the hostages from the moment of its failure to protect them.[474]

(13) It is true that cases can occur where an identifiable element of injury can properly be allocated to one of several concurrently operating causes alone. But unless some part of the injury can be shown to be severable in causal terms from that attributed to the responsible State, the latter is held responsible for all the consequences, not being too remote, of its wrongful conduct. Indeed, in the *Zafiro* claim the tribunal went further and in effect placed the

Council in its decision 40 of 17 December 1996 (S/AC.26/Dec.40 (1996)).

[462] As in Security Council resolution 687 (1991), para. 16.

[463] See, e.g., the *"Naulilaa"* case (footnote 337 above), p. 1031.

[464] For comparative reviews of issues of causation and remoteness, see, e.g., H. L. A. Hart and A. M. Honoré, *Causation in the Law*, 2nd ed. (Oxford, Clarendon Press, 1985); A. M. Honoré, "Causation and remoteness of damage", *International Encyclopedia of Comparative Law*, A. Tunc, ed. (Tübingen, Mohr/The Hague, Martinus Nijhoff, 1983), vol. XI, part I, chap. 7; Zweigert and Kötz, *op. cit*. (footnote 251 above), pp. 601–627, in particular pp. 609 et seq.; and B. S. Markesinis, *The German Law of Obligations: Volume II The Law of Torts: A Comparative Introduction*, 3rd ed. (Oxford, Clarendon Press, 1997), pp. 95–108, with many references to the literature.

[465] See, e.g., the decision of the Iran-United States Claims Tribunal in *The Islamic Republic of Iran* v. *The United States of America*, cases A15 (IV) and A24, Award No. 590–A15 (IV)/A24–FT, 28 December 1998, *World Trade and Arbitration Materials*, vol. 11, No. 2 (1999), p. 45.

[466] P. S. Atiyah, *An Introduction to the Law of Contract*, 5th ed. (Oxford, Clarendon Press, 1995), p. 466.

[467] In the WBC claim, a UNCC panel noted that "under the general principles of international law relating to mitigation of damages … the Claimant was not only permitted but indeed obligated to take reasonable steps to … mitigate the loss, damage or injury being caused" report of 15 November 1996 (S/AC.26/1996/5/Annex) (see footnote 461 above), para. 54.

[468] *Gabčíkovo-Nagymaros Project* (see footnote 27 above), p. 55, para. 80.

[469] *United States Diplomatic and Consular Staff in Tehran* (see footnote 59 above), pp. 29–32.

[470] *Corfu Channel*, *Merits* (see footnote 35 above), pp. 17–18 and 22–23.

[471] This approach is consistent with the way in which these issues are generally dealt with in national law. "It is the very general rule that if a tortfeasor's behaviour is held to be a cause of the victim's harm, the tortfeasor is liable to pay for all of the harm so caused, notwithstanding that there was a concurrent cause of that harm and that another is responsible for that cause … In other words, the liability of a tortfeasor is not affected *vis-à-vis* the victim by the consideration that another is concurrently liable.": T. Weir, "Complex liabilities", A. Tunc, ed., *op. cit*. (footnote 464 above), part 2, chap. 12, p. 43. The United States relied on this comparative law experience in its pleadings in the *Aerial Incident of 27 July 1955* case when it said, referring to Article 38, paragraph 1 (*c*) and (*d*), of the ICJ Statute, that "in all civilized countries the rule is substantially the same. An aggrieved plaintiff may sue any or all joint tortfeasors, jointly or severally, although he may collect from them, or any one or more of them, only the full amount of his damage" (Memorial of 2 December 1958 (see footnote 363 above), p. 229).

[472] See article 39 and commentary.

[473] See *Corfu Channel, Assessment of Amount of Compensation, Judgment, I.C.J. Reports 1949*, p. 244, at p. 250.

[474] *United States Diplomatic and Consular Staff in Tehran* (see footnote 59 above), pp. 31–33.

onus on the responsible State to show what proportion of the damage was *not* attributable to its conduct. It said:

> We think it clear that not all of the damage was done by the Chinese crew of the *Zafiro*. The evidence indicates that an unascertainable part was done by Filipino insurgents, and makes it likely that some part was done by the Chinese employees of the company. But we do not consider that the burden is on Great Britain to prove exactly what items of damage are chargeable to the *Zafiro*. As the Chinese crew of the *Zafiro* are shown to have participated to a substantial extent and the part chargeable to unknown wrongdoers can not be identified, we are constrained to hold the United States liable for the whole.
>
> In view, however, of our finding that a considerable, though unascertainable, part of the damage is not chargeable to the Chinese crew of the *Zafiro*, we hold that interest on the claims should not be allowed.[475]

(14) Concerns are sometimes expressed that a general principle of reparation of all loss flowing from a breach might lead to reparation which is out of all proportion to the gravity of the breach. However, the notion of "proportionality" applies differently to the different forms of reparation.[476] It is addressed, as appropriate, in the individual articles in chapter II dealing with the forms of reparation.

### *Article 32. Irrelevance of internal law*

**The responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations under this Part.**

*Commentary*

(1) Article 3 concerns the role of internal law in the characterization of an act as wrongful. Article 32 makes clear the irrelevance of a State's internal law to compliance with the obligations of cessation and reparation. It provides that a State which has committed an internationally wrongful act may not invoke its internal law as a justification for failure to comply with its obligations under this part. Between them, articles 3 and 32 give effect for the purposes of State responsibility to the general principle that a State may not rely on its internal law as a justification for its failure to comply with its international obligations.[477]Although practical difficulties may arise for a State organ confronted with an obstacle to compliance posed by the rules of the internal legal system under which it is bound to operate, the State is not entitled to oppose its internal law or practice as a legal barrier to the fulfilment of an international obligation arising under Part Two.

(2) Article 32 is modelled on article 27 of the 1969 Vienna Convention, which provides that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This general principle is equally applicable to the international obligations deriving from the rules of State responsibility set out in Part Two. The principle may be qualified by the relevant primary rule, or by a *lex specialis*, such as article 50 of the European Convention on Human Rights, which provides for just satisfaction in lieu of full reparation "if the internal law of the High Contracting Party concerned allows only partial reparation to be made".[478]

(3) The principle that a responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations arising out of the commission of an internationally wrongful act is supported both by State practice and international decisions. For example, the dispute between Japan and the United States in 1906 over California's discriminatory education policies was resolved by the revision of the Californian legislation.[479] In the incident concerning article 61, paragraph 2, of the Weimar Constitution (Constitution of the Reich of 11 August 1919), a constitutional amendment was provided for in order to ensure the discharge of the obligation deriving from article 80 of the Treaty of Peace between the Allied and Associated Powers and Germany (Treaty of Versailles).[480] In the *Peter Pázmány University* case, PCIJ specified that the property to be returned should be "freed from any measure of transfer, compulsory administration, or sequestration".[481] In short, international law does not recognize that the obligations of a responsible State under Part Two are subject to the State's internal legal system nor does it allow internal law to count as an excuse for non-performance of the obligations of cessation and reparation.

### *Article 33. Scope of international obligations set out in this Part*

**1. The obligations of the responsible State set out in this Part may be owed to another State, to several States, or to the international community as a whole, depending in particular on the character and content of the international obligation and on the circumstances of the breach.**

**2. This Part is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State.**

*Commentary*

(1) Article 33 concludes the provisions of chapter I of Part Two by clarifying the scope and effect of the international obligations covered by the Part. In particular, *paragraph 1* makes it clear that identifying the State or States towards which the responsible State's obligations in Part Two exist depends both on the primary rule establishing

[475] The *Zafiro* case (see footnote 154 above), pp. 164–165.

[476] See articles 35 (*b*), 37, paragraph 3, and 39 and commentaries.

[477] See paragraphs (2) to (4) of the commentary to article 3.

[478] Article 41 of the Convention, as amended by Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby. Other examples include article 32 of the Revised General Act for the Pacific Settlement of International Disputes and article 30 of the European Convention for the Peaceful Settlement of Disputes.

[479] See R. L. Buell, "The development of the anti-Japanese agitation in the United States", *Political Science Quarterly*, vol. 37 (1922), pp. 620 et seq.

[480] See *British and Foreign State Papers, 1919* (London, HM Stationery Office, 1922), vol. 112, p. 1094.

[481] *Appeal from a Judgment of the Hungaro/Czechoslovak Mixed Arbitral Tribunal (The Peter Pázmány University), Judgment, 1933, P.C.I.J., Series A/B, No. 61*, p. 208, at p. 249.

the obligation that was breached and on the circumstances of the breach. For example, pollution of the sea, if it is massive and widespread, may affect the international community as a whole or the coastal States of a region; in other circumstances it might only affect a single neighbouring State. Evidently, the gravity of the breach may also affect the scope of the obligations of cessation and reparation.

(2) In accordance with paragraph 1, the responsible State's obligations in a given case may exist towards another State, several States or the international community as a whole. The reference to several States includes the case in which a breach affects all the other parties to a treaty or to a legal regime established under customary international law. For instance, when an obligation can be defined as an "integral" obligation, the breach by a State necessarily affects all the other parties to the treaty.[482]

(3) When an obligation of reparation exists towards a State, reparation does not necessarily accrue to that State's benefit. For instance, a State's responsibility for the breach of an obligation under a treaty concerning the protection of human rights may exist towards all the other parties to the treaty, but the individuals concerned should be regarded as the ultimate beneficiaries and in that sense as the holders of the relevant rights. Individual rights under international law may also arise outside the framework of human rights.[483] The range of possibilities is demonstrated from the ICJ judgment in the *LaGrand* case, where the Court held that article 36 of the Vienna Convention on Consular Relations "creates individual rights, which, by virtue of Article I of the Optional Protocol, may be invoked in this Court by the national State of the detained person".[484]

(4) Such possibilities underlie the need for *paragraph 2* of article 33. Part Two deals with the secondary obligations of States in relation to cessation and reparation, and those obligations may be owed, *inter alia*, to one or several States or to the international community as a whole. In cases where the primary obligation is owed to a non-State entity, it may be that some procedure is available whereby that entity can invoke the responsibility on its own account and without the intermediation of any State. This is true, for example, under human rights treaties which provide a right of petition to a court or some other body for individuals affected. It is also true in the case of rights under bilateral or regional investment protection agreements. Part Three is concerned with the invocation of responsibility by other States, whether they are to be considered "injured States" under article 42, or other interested States under article 48, or whether they may be exercising specific rights to invoke responsibility under some special rule (art. 55). The articles do not deal with the possibility of the invocation of responsibility by persons or entities other than States, and paragraph 2 makes this clear. It will be a matter for the particular primary rule to determine whether and to what extent persons or entities other than States are entitled to invoke responsibility on their own account. Paragraph 2 merely recognizes the possibility: hence the phrase "which may accrue directly to any person or entity other than a State".

[482] See further article 42 (*b*) (ii) and commentary.

[483] Cf. *Jurisdiction of the Courts of Danzig* (footnote 82 above), pp. 17–21.

[484] *LaGrand, Judgment* (see footnote 119 above), para. 77. In the circumstances the Court did not find it necessary to decide whether the individual rights had "assumed the character of a human right" (para. 78).

## CHAPTER II

## REPARATION FOR INJURY

### *Commentary*

Chapter II deals with the forms of reparation for injury, spelling out in further detail the general principle stated in article 31, and in particular seeking to establish more clearly the relations between the different forms of reparation, viz. restitution, compensation and satisfaction, as well as the role of interest and the question of taking into account any contribution to the injury which may have been made by the victim.

### *Article 34. Forms of reparation*

**Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter.**

### *Commentary*

(1) Article 34 introduces chapter II by setting out the forms of reparation which separately or in combination will discharge the obligation to make full reparation for the injury caused by the internationally wrongful act. Since the notion of "injury" and the necessary causal link between the wrongful act and the injury are defined in the statement of the general obligation to make full reparation in article 31,[485] article 34 need do no more than refer to "[f]ull reparation for the injury caused".

(2) In the *Factory at Chorzów* case, the injury was a material one and PCIJ dealt only with two forms of reparation, restitution and compensation.[486] In certain cases, satisfaction may be called for as an additional form of reparation. Thus, full reparation may take the form of restitution, compensation and satisfaction, as required by the circumstances. Article 34 also makes it clear that full reparation may only be achieved in particular cases by the combination of different forms of reparation. For example, re-establishment of the situation which existed before the breach may not be sufficient for full reparation because the wrongful act has caused additional material damage (e.g. injury flowing from the loss of the use of property wrongfully seized). Wiping out all the consequences of the wrongful act may thus require some or all forms of reparation to be provided, depending on the type and extent of the injury that has been caused.

[485] See paragraphs (4) to (14) of the commentary to article 31.

[486] *Factory at Chorzów, Merits* (see footnote 34 above), p. 47.

(3) The primary obligation breached may also play an important role with respect to the form and extent of reparation. In particular, in cases of restitution not involving the return of persons, property or territory of the injured State, the notion of reverting to the *status quo ante* has to be applied having regard to the respective rights and competences of the States concerned. This may be the case, for example, where what is involved is a procedural obligation conditioning the exercise of the substantive powers of a State. Restitution in such cases should not give the injured State more than it would have been entitled to if the obligation had been performed.[487]

(4) The provision of each of the forms of reparation described in article 34 is subject to the conditions laid down in the articles which follow it in chapter II. This limitation is indicated by the phrase "in accordance with the provisions of this chapter". It may also be affected by any valid election that may be made by the injured State as between different forms of reparation. For example, in most circumstances the injured State is entitled to elect to receive compensation rather than restitution. This element of choice is reflected in article 43.

(5) Concerns have sometimes been expressed that the principle of full reparation may lead to disproportionate and even crippling requirements so far as the responsible State is concerned. The issue is whether the principle of proportionality should be articulated as an aspect of the obligation to make full reparation. In these articles, proportionality is addressed in the context of each form of reparation, taking into account its specific character. Thus, restitution is excluded if it would involve a burden out of all proportion to the benefit gained by the injured State or other party.[488] Compensation is limited to damage actually suffered as a result of the internationally wrongful act, and excludes damage which is indirect or remote.[489] Satisfaction must "not be out of proportion to the injury".[490] Thus, each of the forms of reparation takes such considerations into account.

(6) The forms of reparation dealt with in chapter II represent ways of giving effect to the underlying obligation of reparation set out in article 31. There are not, as it were, separate secondary obligations of restitution, compensation and satisfaction. Some flexibility is shown in practice in terms of the appropriateness of requiring one form of reparation rather than another, subject to the requirement of full reparation for the breach in accordance with article 31.[491] To the extent that one form of reparation is dispensed with or is unavailable in the circumstances, others, especially compensation, will be correspondingly more important.

### *Article 35. Restitution*

**A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:**

**(*a*) is not materially impossible;**

**(*b*) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.**

*Commentary*

(1) In accordance with article 34, restitution is the first of the forms of reparation available to a State injured by an internationally wrongful act. Restitution involves the re-establishment as far as possible of the situation which existed prior to the commission of the internationally wrongful act, to the extent that any changes that have occurred in that situation may be traced to that act. In its simplest form, this involves such conduct as the release of persons wrongly detained or the return of property wrongly seized. In other cases, restitution may be a more complex act.

(2) The concept of restitution is not uniformly defined. According to one definition, restitution consists in re-establishing the *status quo ante*, i.e. the situation that existed prior to the occurrence of the wrongful act. Under another definition, restitution is the establishment or re-establishment of the situation that would have existed if the wrongful act had not been committed. The former definition is the narrower one; it does not extend to the compensation which may be due to the injured party for loss suffered, for example for loss of the use of goods wrongfully detained but subsequently returned. The latter definition absorbs into the concept of restitution other elements of full reparation and tends to conflate restitution as a form of reparation and the underlying obligation of reparation itself. Article 35 adopts the narrower definition which has the advantage of focusing on the assessment of a factual situation and of not requiring a hypothetical inquiry into what the situation would have been if the wrongful act had not been committed. Restitution in this narrow sense may of course have to be completed by compensation in order to ensure full reparation for the damage caused, as article 36 makes clear.

(3) Nonetheless, because restitution most closely conforms to the general principle that the responsible State is bound to wipe out the legal and material consequences of its wrongful act by re-establishing the situation that would exist if that act had not been committed, it comes first among the forms of reparation. The primacy of restitution was confirmed by PCIJ in the *Factory at Chorzów*

[487] Thus, in the judgment in the *LaGrand* case (see footnote 119 above), ICJ indicated that a breach of the notification requirement in article 36 of the Vienna Convention on Consular Relations, leading to a severe penalty or prolonged detention, would require reconsideration of the fairness of the conviction "by taking account of the violation of the rights set forth in the Convention" (p. 514, para. 125). This would be a form of restitution which took into account the limited character of the rights in issue.

[488] See article 35 (*b*) and commentary.

[489] See article 31 and commentary.

[490] See article 37, paragraph 3, and commentary.

[491] For example, the *Mélanie Lachenal* case (UNRIAA, vol. XIII (Sales No. 64.V.3), p. 117, at pp. 130–131 (1954)), where compensation was accepted in lieu of restitution originally decided upon, the Franco-Italian Conciliation Commission having agreed that restitution would require difficult internal procedures. See also paragraph (4) of the commentary to article 35.

case when it said that the responsible State was under "the obligation to restore the undertaking and, if this be not possible, to pay its value at the time of the indemnification, which value is designed to take the place of restitution which has become impossible". The Court went on to add that "[t]he impossibility, on which the Parties are agreed, of restoring the Chorzów factory could therefore have no other effect but that of substituting payment of the value of the undertaking for restitution".[492] It can be seen in operation in the cases where tribunals have considered compensation only after concluding that, for one reason or another, restitution could not be effected.[493] Despite the difficulties restitution may encounter in practice, States have often insisted upon claiming it in preference to compensation. Indeed, in certain cases, especially those involving the application of peremptory norms, restitution may be required as an aspect of compliance with the primary obligation.

(4) On the other hand, there are often situations where restitution is not available or where its value to the injured State is so reduced that other forms of reparation take priority. Questions of election as between different forms of reparation are dealt with in the context of Part Three.[494] But quite apart from valid election by the injured State or other entity, the possibility of restitution may be practically excluded, e.g. because the property in question has been destroyed or fundamentally changed in character or the situation cannot be restored to the *status quo ante* for some reason. Indeed, in some cases tribunals have inferred from the terms of the *compromis* or the positions of the parties what amounts to a discretion to award compensation rather than restitution. For example, in the *Walter Fletcher Smith* case, the arbitrator, while maintaining that restitution should be appropriate in principle, interpreted the *compromis* as giving him a discretion to award compensation and did so in "the best interests of the parties, and of the public".[495] In the *Aminoil* arbitration, the parties agreed that restoration of the *status quo ante* following the annulment of the concession by the Kuwaiti decree would be impracticable.[496]

(5) Restitution may take the form of material restoration or return of territory, persons or property, or the reversal of some juridical act, or some combination of them. Examples of material restitution include the release of detained individuals, the handing over to a State of an individual arrested in its territory,[497] the restitution of ships[498] or other types of property,[499] including documents, works of art, share certificates, etc.[500] The term "juridical restitution" is sometimes used where restitution requires or involves the modification of a legal situation either within the legal system of the responsible State or in its legal relations with the injured State. Such cases include the revocation, annulment or amendment of a constitutional or legislative provision enacted in violation of a rule of international law,[501] the rescinding or reconsideration of an administrative or judicial measure unlawfully adopted in respect of the person or property of a foreigner[502] or a requirement that steps be taken (to the extent allowed by international law) for the termination of a treaty.[503] In some cases, both material and juridical restitution may be involved.[504] In others, an international court or tribunal can, by determining the legal position with binding force for the parties, award what amounts to restitution under another form.[505] The term "restitution" in article 35 thus

[492] *Factory at Chorzów, Merits* (see footnote 34 above), p. 48.

[493] See, e.g., *British Claims in the Spanish Zone of Morocco* (footnote 44 above), pp. 621–625 and 651–742; *Religious Property Expropriated by Portugal*, UNRIAA, vol. I (Sales No. 1948.V.2), p. 7 (1920); *Walter Fletcher Smith*, *ibid*., vol. II (Sales No. 1949.V.1), p. 913, at p. 918 (1929); and *Heirs of Lebas de Courmont*, *ibid*., vol. XIII (Sales No. 64.V.3), p. 761, at p. 764 (1957).

[494] See articles 43 and 45 and commentaries.

[495] *Walter Fletcher Smith* (see footnote 493 above). In the *Greek Telephone Company* case, the arbitral tribunal, while ordering restitution, asserted that the responsible State could provide compensation instead for "important State reasons" (see J. G. Wetter and S. M. Schwebel, "Some little known cases on concessions", BYBIL, *1964*, vol. 40, p. 216, at p. 221.

[496] *Government of Kuwait* v. *American Independent Oil Company (Aminoil)* ILR, vol. 66, p. 519, at p. 533 (1982).

[497] Examples of material restitution involving persons include the *"Trent"* (1861) and *"Florida"* (1864) incidents, both involving the arrest of individuals on board ships (Moore, *Digest*, vol. VII, pp. 768 and 1090–1091), and the *United States Diplomatic and Consular Staff in Tehran* case in which ICJ ordered Iran to immediately release every detained United States national (see footnote 59 above), pp. 44–45.

[498] See, e.g., the *"Giaffarieh"* incident (1886) which originated in the capture in the Red Sea by an Egyptian warship of four merchant ships from Massawa under Italian registry, Società Italiana per l'Organizzazione Internazionale–Consiglio Nazionale delle Ricerche, *La prassi italiana di diritto internazionale*, 1st series (Dobbs Ferry, NY., Oceana, 1970), vol. II, pp. 901–902.

[499] For example, *Temple of Preah Vihear, Merits, Judgment, I.C.J. Reports 1962*, p. 6, at pp. 36–37, where ICJ decided in favour of a Cambodian claim which included restitution of certain objects removed from the area and the temple by Thai authorities. See also the *Hôtel Métropole* case, UNRIAA, vol. XIII (Sales No. 64.V.3), p. 219 (1950); the *Ottoz* case, *ibid*., p. 240 (1950); and the *Hénon* case, *ibid*., p. 248 (1951).

[500] In the *Bužau-Nehoiaşi Railway* case, an arbitral tribunal provided for the restitution to a German company of shares in a Romanian railway company, UNRIAA, vol. III (Sales No. 1949.V.2), p. 1839 (1939).

[501] For cases where the existence of a law itself amounts to a breach of an international obligation, see paragraph (12) of the commentary to article 12.

[502] For example, the *Martini* case, UNRIAA, vol. II (Sales No. 1949. V.1), p. 975 (1930).

[503] In the *Bryan-Chamorro Treaty* case (*Costa Rica* v. *Nicaragua*), the Central American Court of Justice decided that "the Government of Nicaragua, by availing itself of measures possible under the authority of international law, is under the obligation to re-establish and maintain the legal status that existed prior to the Bryan-Chamorro Treaty between the litigant republics in so far as relates to matters considered in this action" (*Anales de la Corte de Justicia Centroamericana* (San José, Costa Rica), vol. VI, Nos. 16–18 (December 1916–May 1917), p. 7); and AJIL, vol. 11, No. 3 (1917), p. 674, at p. 696; see also page 683.

[504] Thus, PCIJ held that Czechoslovakia was "bound to restore to the Royal Hungarian Peter Pázmány University of Budapest the immovable property claimed by it, freed from any measure of transfer, compulsory administration, or sequestration, and in the condition in which it was before the application of the measures in question" (*Appeal from a judgment of the Hungaro-Czechoslovak Mixed Arbitral Tribunal* (see footnote 481 above)).

[505] In the *Legal Status of Eastern Greenland* case, PCIJ decided that "the declaration of occupation promulgated by the Norwegian Government on July 10th, 1931, and any steps taken in this respect by that Government, constitute a violation of the existing legal situation and are accordingly unlawful and invalid" (*Judgment, 1933, P.C.I.J., Series A/B, No. 53*, p. 22, at p. 75). In the case of the *Free Zones of Upper Savoy and the District of Gex* (see footnote 79 above), the Court decided that France "must withdraw its customs line in accordance with

(*Continued on next page.*)

has a broad meaning, encompassing any action that needs to be taken by the responsible State to restore the situation resulting from its internationally wrongful act.

(6) What may be required in terms of restitution will often depend on the content of the primary obligation which has been breached. Restitution, as the first of the forms of reparation, is of particular importance where the obligation breached is of a continuing character, and even more so where it arises under a peremptory norm of general international law. In the case, for example, of unlawful annexation of a State, the withdrawal of the occupying State's forces and the annulment of any decree of annexation may be seen as involving cessation rather than restitution.[506] Even so, ancillary measures (the return of persons or property seized in the course of the invasion) will be required as an aspect either of cessation or restitution.

(7) The obligation to make restitution is not unlimited. In particular, under article 35 restitution is required "provided and to the extent that" it is neither materially impossible nor wholly disproportionate. The phrase "provided and to the extent that" makes it clear that restitution may be only partially excluded, in which case the responsible State will be obliged to make restitution to the extent that this is neither impossible nor disproportionate.

(8) Under article 35, *subparagraph* (a), restitution is not required if it is "materially impossible". This would apply where property to be restored has been permanently lost or destroyed, or has deteriorated to such an extent as to be valueless. On the other hand, restitution is not impossible merely on grounds of legal or practical difficulties, even though the responsible State may have to make special efforts to overcome these. Under article 32 the wrongdoing State may not invoke the provisions of its internal law as justification for the failure to provide full reparation, and the mere fact of political or administrative obstacles to restitution does not amount to impossibility.

(9) Material impossibility is not limited to cases where the object in question has been destroyed, but can cover more complex situations. In the *Forests of Central Rhodopia* case, the claimant was entitled to only a share in the forestry operations and no claims had been brought by the other participants. The forests were not in the same condition as at the time of their wrongful taking, and detailed inquiries would be necessary to determine their condition. Since the taking, third parties had acquired rights to them. For a combination of these reasons, restitution was denied.[507] The case supports a broad understanding of the impossibility of granting restitution, but it concerned questions of property rights within the legal system of the responsible State.[508] The position may be different where the rights and obligations in issue arise directly on the international plane. In that context restitution plays a particularly important role.

(10) In certain cases, the position of third parties may have to be taken into account in considering whether restitution is materially possible. This was true in the *Forests of Central Rhodopia* case. But whether the position of a third party will preclude restitution will depend on the circumstances, including whether the third party at the time of entering into the transaction or assuming the disputed rights was acting in good faith and without notice of the claim to restitution.

(11) A second exception, dealt with in article 35, *subparagraph* (b), involves those cases where the benefit to be gained from restitution is wholly disproportionate to its cost to the responsible State. Specifically, restitution may not be required if it would "involve a burden out of all proportion to the benefit deriving from restitution instead of compensation". This applies only where there is a grave disproportionality between the burden which restitution would impose on the responsible State and the benefit which would be gained, either by the injured State or by any victim of the breach. It is thus based on considerations of equity and reasonableness,[509] although with a preference for the position of the injured State in any case where the balancing process does not indicate a clear preference for compensation as compared with restitution. The balance will invariably favour the injured State in any case where the failure to provide restitution would jeopardize its political independence or economic stability.

### *Article 36. Compensation*

**1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.**

**2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.**

*Commentary*

(1) Article 36 deals with compensation for damage caused by an internationally wrongful act, to the extent that such damage is not made good by restitution. The notion of "damage" is defined inclusively in article 31, paragraph 2, as any damage whether material or moral.[510] Article 36, paragraph 2, develops this definition by specifying that compensation shall cover any financially

(*Footnote 505 continued.*)

the provisions of the said treaties and instruments; and that this régime must continue in force so long as it has not been modified by agreement between the Parties" (p. 172). See also F. A. Mann, "The consequences of an international wrong in international and municipal law", BYBIL, *1976–1977*, vol. 48, p. 1, at pp. 5–8.

[506] See above, paragraph (8) of the commentary to article 30.

[507] *Forests of Central Rhodopia* (see footnote 382 above), p. 1432.

[508] For questions of restitution in the context of State contract arbitration, see *Texaco Overseas Petroleum Company and California Asiatic Oil Company* v. *The Government of the Libyan Arab Republic* (1977), ILR, vol. 53, p. 389, at pp. 507–508, para. 109; *BP Exploration Company (Libya) Limited* v. *Government of the Libyan Arab Republic*, *ibid*., p. 297, at p. 354 (1974); and *Libyan American Oil Company (LIAMCO)* v. *Government of the Libyan Arab Republic ibid*., vol. 62, p. 141, at p. 200 (1977).

[509] See, e.g., J. H. W. Verzijl, *International Law in Historical Perspective* (Leiden, Sijthoff, 1973), part VI, p. 744, and the position taken by the Deutsche Gesellschaft für Völkerrecht (German International Law Association) in *Yearbook ... 1969*, vol. II, p. 149.

[510] See paragraphs (5) to (6) and (8) of the commentary to article 31.

assessable damage including loss of profits so far as this is established in the given case. The qualification "financially assessable" is intended to exclude compensation for what is sometimes referred to as "moral damage" to a State, i.e. the affront or injury caused by a violation of rights not associated with actual damage to property or persons: this is the subject matter of satisfaction, dealt with in article 37.

(2) Of the various forms of reparation, compensation is perhaps the most commonly sought in international practice. In the *Gabčíkovo-Nagymaros Project* case, ICJ declared: "It 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."[511] It is equally well established that an international court or tribunal which has jurisdiction with respect to a claim of State responsibility has, as an aspect of that jurisdiction, the power to award compensation for damage suffered.[512]

(3) The relationship with restitution is clarified by the final phrase of article 36, paragraph 1 ("insofar as such damage is not made good by restitution"). Restitution, despite its primacy as a matter of legal principle, is frequently unavailable or inadequate. It may be partially or entirely ruled out either on the basis of the exceptions expressed in article 35, or because the injured State prefers compensation or for other reasons. Even where restitution is made, it may be insufficient to ensure full reparation. The role of compensation is to fill in any gaps so as to ensure full reparation for damage suffered.[513] As the Umpire said in the *"Lusitania"* case:

> The fundamental concept of "damages" is ... reparation for a *loss* suffered; a judicially ascertained *compensation* for wrong. The remedy should be commensurate with the loss, so that the injured party may be made whole.[514]

Likewise, the role of compensation was articulated by PCIJ in the following terms:

> Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.[515]

Entitlement to compensation for such losses is supported by extensive case law, State practice and the writings of jurists.

(4) As compared with satisfaction, the function of compensation is to address the actual losses incurred as a result of the internationally wrongful act. In other words, the function of article 36 is purely compensatory, as its title indicates. Compensation corresponds to the financially assessable damage suffered by the injured State or its nationals. It is not concerned to punish the responsible State, nor does compensation have an expressive or exemplary character.[516] Thus, compensation generally consists of a monetary payment, though it may sometimes take the form, as agreed, of other forms of value. It is true that monetary payments may be called for by way of satisfaction under article 37, but they perform a function distinct from that of compensation. Monetary compensation is intended to offset, as far as may be, the damage suffered by the injured State as a result of the breach. Satisfaction is concerned with non-material injury, specifically non-material injury to the State, on which a monetary value can be put only in a highly approximate and notional way.[517]

(5) Consistently with other provisions of Part Two, article 36 is expressed as an obligation of the responsible State to provide reparation for the consequences flowing from the commission of an internationally wrongful act.[518] The scope of this obligation is delimited by the phrase "any financially assessable damage", that is, any damage which is capable of being evaluated in financial terms. Financially assessable damage encompasses both damage suffered by the State itself (to its property or personnel or in respect of expenditures reasonably incurred to remedy or mitigate damage flowing from an internationally wrongful act) as well as damage suffered by nationals, whether persons or companies, on whose behalf the State is claiming within the framework of diplomatic protection.

(6) In addition to ICJ, international tribunals dealing with issues of compensation include the International Tribunal for the Law of the Sea,[519] the Iran-United States Claims Tribunal,[520] human rights courts and other

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[511] *Gabčíkovo-Nagymaros Project* (see footnote 27 above), p. 81, para. 152. See also the statement by PCIJ in *Factory at Chorzów*, *Merits* (footnote 34 above), declaring that "[i]t is a principle of international law that the reparation of a wrong may consist in an indemnity" (p. 27).

[512] *Factory at Chorzów, Jurisdiction* (see footnote 34 above); *Fisheries Jurisdiction* (see footnote 432 above), pp. 203–205, paras. 71–76; *Military and Paramilitary Activities in and against Nicaragua* (see footnote 36 above), p. 142.

[513] *Factory at Chorzów, Merits* (see footnote 34 above), pp. 47–48.

[514] UNRIAA, vol. VII (Sales No. 1956.V.5), p. 32, at p. 39 (1923).

[515] *Factory at Chorzów, Merits* (see footnote 34 above), p. 47, cited and applied, *inter alia*, by ITLOS in the case of the *M/V "Saiga" (No. 2) (Saint Vincent and the Grenadines* v. *Guinea)*, *Judgment, ITLOS Reports 1999* , p. 65, para. 170 (1999). See also *Papamichalopoulos and Others* v. *Greece (article 50), Eur. Court H.R., Series A, No. 330–B*, para. 36 (1995); *Velásquez Rodríguez* (footnote 63 above), pp. 26–27 and 30–31; and *Tippetts, Abbett, McCarthy, Stratton* v. *TAMS-AFFA Consulting Engineers of Iran*, Iran-U.S. C.T.R., vol. 6, p. 219, at p. 225 (1984).

[516] In the *Velásquez Rodriguez*, Compensatory Damages case, the Inter-American Court of Human Rights held that international law did not recognize the concept of punitive or exemplary damages (Series C, No. 7 (1989)). See also *Letelier and Moffitt*, ILR, vol. 88, p. 727 (1992), concerning the assassination in Washington, D.C., by Chilean agents of a former Chilean minister; the *compromis* excluded any award of punitive damages, despite their availability under United States law. On punitive damages, see also N. Jørgensen, "A reappraisal of punitive damages in international law", BYBIL, *1997*, vol. 68, pp. 247–266; and S. Wittich, "Awe of the gods and fear of the priests: punitive damages in the law of State responsibility", *Austrian Review of International and European Law*, vol. 3, No. 1 (1998), p. 101.

[517] See paragraph (3) of the commentary to article 37.

[518] For the requirement of a sufficient causal link between the internationally wrongful act and the damage, see paragraphs (11) to (13) of the commentary to article 31.

[519] For example, the *M/V "Saiga"* case (see footnote 515 above), paras. 170–177.

[520] The Iran-United States Claims Tribunal has developed a substantial jurisprudence on questions of assessment of damage and the valuation of expropriated property. For reviews of the tribunal's juris-

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bodies,[521] and ICSID tribunals under the Convention on the Settlement of Investment Disputes between States and Nationals of other States.[522] Other compensation claims have been settled by agreement, normally on a without prejudice basis, with the payment of substantial compensation a term of the agreement.[523] The rules and principles developed by these bodies in assessing compensation can be seen as manifestations of the general principle stated in article 36.

(7) As to the appropriate heads of compensable damage and the principles of assessment to be applied in quantification, these will vary, depending upon the content of particular primary obligations, an evaluation of the respective behaviour of the parties and, more generally, a concern to reach an equitable and acceptable outcome.[524] The following examples illustrate the types of damage that may be compensable and the methods of quantification that may be employed.

(8) Damage to the State as such might arise out of the shooting down of its aircraft or the sinking of its ships, attacks on its diplomatic premises and personnel, damage caused to other public property, the costs incurred in responding to pollution damage, or incidental damage arising, for example, out of the need to pay pensions and medical expenses for officials injured as the result of a wrongful act. Such a list cannot be comprehensive and the categories of compensable injuries suffered by States are not closed.

(9) In the *Corfu Channel* case, the United Kingdom sought compensation in respect of three heads of damage: replacement of the destroyer *Saumarez*, which became a total loss, the damage sustained by the destroyer *"Volage"*, and the damage resulting from the deaths and injuries of naval personnel. ICJ entrusted the assessment to expert inquiry. In respect of the destroyer *Saumarez*, the Court found that "the true measure of compensation" was "the replacement cost of the [destroyer] at the time of its loss" and held that the amount of compensation claimed by the British Government (£ 700,087) was justified. For the damage to the destroyer *"Volage"*, the experts had reached a slightly lower figure than the £ 93,812 claimed by the United Kingdom, "explained by the necessarily approximate nature of the valuation, especially as regards stores and equipment". In addition to the amounts awarded for the damage to the two destroyers, the Court upheld the United Kingdom's claim for £ 50,048 representing "the cost of pensions and other grants made by it to victims or their dependants, and for costs of administration, medical treatment, etc".[525]

(10) In the *M/V "Saiga" (No. 2)* case, Saint Vincent and the Grenadines sought compensation from Guinea following the wrongful arrest and detention of a vessel registered in Saint Vincent and the Grenadines, the *"Saiga"*, and its crew. ITLOS awarded compensation of US$ 2,123,357 with interest. The heads of damage compensated included, *inter alia*, damage to the vessel, including costs of repair, losses suffered with respect to charter hire of the vessel, costs related to the detention of the vessel, and damages for the detention of the captain, members of the crew and others on board the vessel. Saint Vincent and the Grenadines had claimed compensation for the violation of its rights in respect of ships flying its flag occasioned by the arrest and detention of the *"Saiga"*; however, the tribunal considered that its declaration that Guinea acted wrongfully in arresting the vessel in the circumstances, and in using excessive force, constituted adequate reparation.[526] Claims regarding the loss of registration revenue due to the illegal arrest of the vessel and for the expenses resulting from the time lost by officials in dealing with the arrest and detention of the ship and its crew were also unsuccessful. In respect of the former, the tribunal held that Saint Vincent and the Grenadines failed to produce supporting evidence. In respect of the latter, the tribunal considered that such expenses were not recoverable since they were incurred in the exercise of the normal functions of a flag State.[527]

(11) In a number of cases, payments have been directly negotiated between injured and injuring States following wrongful attacks on ships causing damage or sinking of the vessel, and in some cases, loss of life and injury among the crew.[528] Similar payments have been negotiated where damage is caused to aircraft of a State, such as

(*Footnote 520 continued.*)

prudence on these subjects, see, *inter alia*, Aldrich, *op. cit.* (footnote 357 above), chaps. 5–6 and 12; C. N. Brower and J. D. Brueschke, *The Iran-United States Claims Tribunal* (The Hague, Martinus Nijhoff, 1998), chaps. 14–18; M. Pellonpää, "Compensable claims before the Tribunal: expropriation claims", *The Iran-United States Claims Tribunal*: *Its Contribution to the Law of State Responsibility*, R. B. Lillich and D. B. MaGraw, eds. (Irvington-on-Hudson, Transnational, 1998), pp. 185–266; and D. P. Stewart, "Compensation and valuation issues", *ibid*., pp. 325–385.

[521] For a review of the practice of such bodies in awarding compensation, see D. Shelton, *Remedies in International Human Rights Law* (Oxford University Press, 1999), pp. 214–279.

[522] ICSID tribunals have jurisdiction to award damages or other remedies in cases concerning investments arising between States parties and nationals. Some of these claims involve direct recourse to international law as a basis of claim. See, e.g., *Asian Agricultural Products Limited* v. *Republic of Sri Lanka*, *ICSID Reports* (Cambridge University Press, 1997), vol. 4, p. 245 (1990).

[523] See, e.g., *Certain Phosphate Lands in Nauru, Preliminary Objections* (footnote 230 above), and for the Court's order of discontinuance following the settlement, *ibid., Order* (footnote 232 above); *Passage through the Great Belt (Finland* v. *Denmark)*, *Order of 10 September 1992, I.C.J. Reports 1992*, p. 348 (order of discontinuance following settlement); and *Aerial Incident of 3 July 1988 (Islamic Republic of Iran* v. *United States of America), Order of 22 February 1996, I.C.J. Reports 1996,* p. 9 (order of discontinuance following settlement).

[524] See Aldrich, *op. cit.* (footnote 357 above), p. 242. See also Graefrath, "Responsibility and damages caused: relationship between responsibility and damages" (footnote 454 above), p. 101; L. Reitzer, *La réparation comme conséquence de l'acte illicite en droit international* (Paris, Sirey, 1938); Gray, *op. cit.* (footnote 432 above), pp. 33–34; J. Personnaz, *La réparation du préjudice en droit international public* (Paris, 1939); and M. Iovane, *La riparazione nella teoria e nella prassi dell'illecito internazionale* (Milan, Giuffrè, 1990).

[525] *Corfu Channel, Assessment of Amount of Compensation* (see footnote 473 above), p. 249.

[526] The *M/V "Saiga"* case (see footnote 515 above), para. 176.

[527] *Ibid*., para. 177.

[528] See the payment by Cuba to the Bahamas for the sinking by Cuban aircraft on the high seas of a Bahamian vessel, with loss of life among the crew (RGDIP, vol. 85 (1981), p. 540), the payment of compensation by Israel for an attack in 1967 on the USS *Liberty*, with loss of life and injury among the crew (*ibid.*, p. 562), and the payment by Iraq of US$ 27 million for the 37 deaths which occurred in May 1987 when Iraqi aircraft severely damaged the USS *Stark* (AJIL, vol. 83, No. 3 (July 1989), p. 561).

the "full and final settlement" agreed between the Islamic Republic of Iran and the United States following a dispute over the destruction of an Iranian aircraft and the killing of its 290 passengers and crew.[529]

(12) Agreements for the payment of compensation are also frequently negotiated by States following attacks on diplomatic premises, whether in relation to damage to the embassy itself[530] or injury to its personnel.[531] Damage caused to other public property, such as roads and infrastructure, has also been the subject of compensation claims.[532] In many cases, these payments have been made on an *ex gratia* or a without prejudice basis, without any admission of responsibility.[533]

(13) Another situation in which States may seek compensation for damage suffered by the State as such is where costs are incurred in responding to pollution damage. Following the crash of the Soviet *Cosmos 954* satellite on Canadian territory in January 1978, Canada's claim for compensation for expenses incurred in locating, recovering, removing and testing radioactive debris and cleaning up affected areas was based "jointly and separately on (a) the relevant international agreements … and (b) general principles of international law".[534] Canada asserted that it was applying "the relevant criteria established by general principles of international law according to which fair compensation is to be paid, by including in its claim only those costs that are reasonable, proximately caused by the intrusion of the satellite and deposit of debris and capable of being calculated with a reasonable degree of certainty".[535] The claim was eventually settled in April 1981 when the parties agreed on an *ex gratia* payment of Can$ 3 million (about 50 per cent of the amount claimed).[536]

(14) Compensation claims for pollution costs have been dealt with by UNCC in the context of assessing Iraq's liability under international law "for any direct loss, damage—including environmental damage and the depletion of natural resources … as a result of its unlawful invasion and occupation of Kuwait".[537] The UNCC Governing Council decision 7 specifies various heads of damage encompassed by "environmental damage and the depletion of natural resources".[538]

(15) In cases where compensation has been awarded or agreed following an internationally wrongful act that causes or threatens environmental damage, payments have been directed to reimbursing the injured State for expenses reasonably incurred in preventing or remedying pollution, or to providing compensation for a reduction in the value of polluted property.[539] However, environmental damage will often extend beyond that which can be readily quantified in terms of clean-up costs or property devaluation. Damage to such environmental values (biodiversity, amenity, etc.—sometimes referred to as "non-use values") is, as a matter of principle, no less real and compensable than damage to property, though it may be difficult to quantify.

(16) Within the field of diplomatic protection, a good deal of guidance is available as to appropriate compensation standards and methods of valuation, especially as concerns personal injury and takings of, or damage to, tangible property. It is well established that a State may seek compensation in respect of personal injuries suffered by its officials or nationals, over and above any direct injury it may itself have suffered in relation to the same event. Compensable personal injury encompasses not only associated material losses, such as loss of earnings and earning capacity, medical expenses and the like, but also non-material damage suffered by the individual (sometimes, though not universally, referred to as "moral damage" in national legal systems). Non-material damage is generally understood to encompass loss of loved ones, pain and suffering as well as the affront to sensibilities associated with an intrusion on the person, home or private life. No less than material injury sustained by the injured State, non-material damage is financially assessable and may be the subject of a claim of compensation, as stressed in the *"Lusitania"* case.[540] The umpire considered that international law provides compensation for mental

[529] *Aerial Incident of 3 July 1988* (see footnote 523 above) (order of discontinuance following settlement). For the settlement agreement itself, see the General Agreement on the Settlement of Certain International Court of Justice and Tribunal Cases (1996), attached to the Joint Request for Arbitral Award on Agreed Terms, Iran-U.S. C.T.R., vol. 32, pp. 213–216 (1996).

[530] See, e.g., the Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Indonesia concerning the losses incurred by the Government of the United Kingdom and by British nationals as a result of the disturbances in Indonesia in September 1963 (1 December 1966) for the payment by Indonesia of compensation for, *inter alia*, damage to the British Embassy during mob violence (*Treaty Series No. 34 (1967)*) (London, HM Stationery Office) and the payment by Pakistan to the United States of compensation for the sacking of the United States Embassy in Islamabad in 1979 (RGDIP, vol. 85 (1981), p. 880).

[531] See, e.g., Claim of Consul *Henry R. Myers (United States* v. *Salvador)* (1890), *Papers relating to the Foreign Relations of the United States*, pp. 64–65; (1892), pp. 24–44 and 49–51; (1893), pp. 174–179, 181–182 and 184; and Whiteman, *Damages in International Law* (footnote 347 above), pp. 80–81.

[532] For examples, see Whiteman, *Damages in International Law* (footnote 347 above), p. 81.

[533] See, e.g., the United States-China agreement providing for an *ex gratia* payment of US$ 4.5 million, to be given to the families of those killed and to those injured in the bombing of the Chinese Embassy in Belgrade on 7 May 1999, AJIL, vol. 94, No. 1 (January 2000), p. 127.

[534] The claim of Canada against the Union of Soviet Socialist Republics for damage caused by *Cosmos 954*, 23 January 1979 (see footnote 459 above), pp. 899 and 905.

[535] *Ibid*., p. 907.

[536] Protocol between Canada and the Union of Soviet Socialist Republics in respect of the claim for damages caused by the Satellite "Cosmos 954" (Moscow, 2 April 1981), United Nations, *Treaty Series*, vol. 1470, No. 24934, p. 269. See also ILM, vol. 20, No. 3 (May 1981), p. 689.

[537] Security Council resolution 687 (1991), para. 16 (see footnote 461 above).

[538] Decision 7 of 16 March 1992, Criteria for additional categories of claims (S/AC.26/1991/7/Rev.1), para 35.

[539] See the decision of the arbitral tribunal in the *Trail Smelter* case (footnote 253 above), p. 1911, which provided compensation to the United States for damage to land and property caused by sulphur dioxide emissions from a smelter across the border in Canada. Compensation was assessed on the basis of the reduction in value of the affected land.

[540] See footnote 514 above. International tribunals have frequently granted pecuniary compensation for moral injury to private parties. For example, the *Chevreau* case (see footnote 133 above) (English translation in AJIL, vol. 27, No. 1 (January 1933), p. 153); the *Gage* case, UNRIAA, vol. IX (Sales No. 59.V.5), p. 226 (1903); the *Di Caro* case, *ibid*., vol. X (Sales No. 60.V.4), p. 597 (1903); and the *Heirs of Jean Maninat* case, *ibid*., p. 55 (1903).

suffering, injury to feelings, humiliation, shame, degradation, loss of social position or injury to credit and reputation, such injuries being "very real, and the mere fact that they are difficult to measure or estimate by money standards makes them none the less real and affords no reason why the injured person should not be compensated …".[541]

(17) International courts and tribunals have undertaken the assessment of compensation for personal injury on numerous occasions. For example, in the *M/V "Saiga"* case, [542] the tribunal held that Saint Vincent and the Grenadines' entitlement to compensation included damages for injury to the crew, their unlawful arrest, detention and other forms of ill-treatment.

(18) Historically, compensation for personal injury suffered by nationals or officials of a State arose mainly in the context of mixed claims commissions dealing with State responsibility for injury to aliens. Claims commissions awarded compensation for personal injury both in cases of wrongful death and deprivation of liberty. Where claims were made in respect of wrongful death, damages were generally based on an evaluation of the losses of the surviving heirs or successors, calculated in accordance with the well-known formula of Umpire Parker in the *"Lusitania"* case:

> Estimate the amounts (*a*) which the decedent, had he not been killed, would probably have contributed to the claimant, add thereto (*b*) the pecuniary value to such claimant of the deceased's personal services in claimant's care, education, or supervision, and also add (*c*) reasonable compensation for such mental suffering or shock, if any, caused by the violent severing of family ties, as claimant may actually have sustained by reason of such death. The sum of these estimates reduced to its present cash value, will generally represent the loss sustained by claimant.[543]

In cases of deprivation of liberty, arbitrators sometimes awarded a set amount for each day spent in detention.[544] Awards were often increased when abusive conditions of confinement accompanied the wrongful arrest and imprisonment, resulting in particularly serious physical or psychological injury.[545]

(19) Compensation for personal injury has also been dealt with by human rights bodies, in particular the European Court of Human Rights and the Inter-American Court of Human Rights. Awards of compensation encompass material losses (loss of earnings, pensions, medical expenses, etc.) and non-material damage (pain and suffering, mental anguish, humiliation, loss of enjoyment of life and loss of companionship or consortium), the latter usually quantified on the basis of an equitable assessment. Hitherto, amounts of compensation or damages awarded or recommended by these bodies have been modest.[546] Nonetheless, the decisions of human rights bodies on compensation draw on principles of reparation under general international law.[547]

(20) In addition to a large number of lump-sum compensation agreements covering multiple claims,[548] property claims of nationals arising out of an internationally wrongful act have been adjudicated by a wide range of *ad hoc* and standing tribunals and commissions, with reported cases spanning two centuries. Given the diversity of adjudicating bodies, the awards exhibit considerable variability.[549] Nevertheless, they provide useful principles to guide the determination of compensation under this head of damage.

(21) The reference point for valuation purposes is the loss suffered by the claimant whose property rights have been infringed. This loss is usually assessed by reference to specific heads of damage relating to (i) compensation for capital value; (ii) compensation for loss of profits; and (iii) incidental expenses.

(22) Compensation reflecting the capital value of property taken or destroyed as the result of an internationally wrongful act is generally assessed on the basis of the "fair market value" of the property lost.[550] The method used to

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[541] *"Lusitania"* (see footnote 514 above), p. 40.

[542] See footnote 515 above.

[543] *"Lusitania"* (see footnote 514 above), p. 35.

[544] For example, the *"Topaze"* case, UNRIAA, vol. IX (Sales No. 59.V.5), p. 387, at p. 389 (1903); and the *Faulkner* case, *ibid*., vol. IV (Sales No. 1951.V.1), p. 67, at p. 71 (1926).

[545] For example, the *William McNeil* case, *ibid*., vol. V (Sales No. 1952.V.3), p. 164, at p. 168 (1931).

[546] See the review by Shelton, *op. cit.* (footnote 521 above), chaps. 8–9; A. Randelzhofer and C. Tomuschat, eds., *State Responsibility and the Individual: Reparation in Instances of Grave Violations of Human Rights* (The Hague, Martinus Nijhoff, 1999); and R. Pisillo Mazzeschi, "La riparazione per violazione dei diritti umani nel diritto internazionale e nella Convenzione europea", *La Comunità internazionale*, vol. 53, No. 2 (1998), p. 215.

[547] See, e.g., the decision of the Inter-American Court of Human Rights in the *Velásquez Rodríguez* case (footnote 63 above), pp. 26–27 and 30–31. Cf. *Papamichalopoulos* (footnote 515 above).

[548] See, e.g., R. B. Lillich and B. H. Weston, *International Claims*: *Their Settlement by Lump Sum Agreements* (Charlottesville, University Press of Virginia, 1975); and B. H. Weston, R. B. Lillich and D. J. Bederman, *International Claims*: *Their Settlement by Lump Sum Agreements, 1975–1995* (Ardsley, N.Y., Transnational, 1999).

[549] Controversy has persisted in relation to expropriation cases, particularly over standards of compensation applicable in the light of the distinction between lawful expropriation of property by the State on the one hand, and unlawful takings on the other, a distinction clearly drawn by PCIJ in *Factory at Chorzów, Merits* (footnote 34 above), p. 47. In a number of cases, tribunals have employed the distinction to rule in favour of compensation for lost profits in cases of unlawful takings (see, e.g., the observations of the arbitrator in *Libyan American Oil Company (LIAMCO)* (footnote 508 above), pp. 202–203; and also the *Aminoil* arbitration (footnote 496 above), p. 600, para. 138; and *Amoco International Finance Corporation* v. *The Government of the Islamic Republic of Iran*, Iran-U.S. C.T.R., vol. 15, p. 189, at p. 246, para. 192 (1987)). Not all cases, however, have drawn a distinction between the applicable compensation principles based on the lawfulness or unlawfulness of the taking. See, e.g., the decision of the Iran-United States Claims Tribunal in *Phillips Petroleum* (footnote 164 above), p. 122, para. 110. See also *Starrett Housing Corporation* v. *Government of the Islamic Republic of Iran*, Iran-U.S. C.T.R., vol. 16, p. 112 (1987), where the tribunal made no distinction in terms of the lawfulness of the taking and its award included compensation for lost profits.

[550] See *American International Group, Inc*. v. *The Islamic Republic of Iran*, which stated that, under general international law, "the valuation should be made on the basis of the fair market value of the shares", Iran-U.S. C.T.R., vol. 4, p. 96, at p. 106 (1983). In *Starrett Housing Corporation* (see footnote 549 above), the tribunal accepted its expert's concept of fair market value "as the price that a willing buyer would pay to a willing seller in circumstances in which each had good information, each desired to maximize his financial gain, and neither was under duress or threat" (p. 201). See also the Guidelines on the Treatment of Foreign Direct Investment, which state in paragraph 3 of part IV that compensation "will be deemed 'adequate' if it is based on the fair market value of the taken asset as such value is determined immediately before the time at which the taking occurred or the decision to take the asset became publicly known", World Bank, *Legal Framework*

assess "fair market value", however, depends on the nature of the asset concerned. Where the property in question or comparable property is freely traded on an open market, value is more readily determined. In such cases, the choice and application of asset-based valuation methods based on market data and the physical properties of the assets is relatively unproblematic, apart from evidentiary difficulties associated with long outstanding claims.[551] Where the property interests in question are unique or unusual, for example, art works or other cultural property,[552] or are not the subject of frequent or recent market transactions, the determination of value is more difficult. This may be true, for example, in respect of certain business entities in the nature of a going concern, especially if shares are not regularly traded.[553]

(23) Decisions of various *ad hoc* tribunals since 1945 have been dominated by claims in respect of nationalized business entities. The preferred approach in these cases has been to examine the assets of the business, making allowance for goodwill and profitability, as appropriate. This method has the advantage of grounding compensation as much as possible in some objective assessment of value linked to the tangible asset backing of the business. The value of goodwill and other indicators of profitability may be uncertain, unless derived from information provided by a recent sale or acceptable arms-length offer. Yet, for profitable business entities where the whole is greater than the sum of the parts, compensation would be incomplete without paying due regard to such factors.[554]

(24) An alternative valuation method for capital loss is the determination of net book value, i.e. the difference between the total assets of the business and total liabilities as shown on its books. Its advantages are that the figures can be determined by reference to market costs, they are normally drawn from a contemporaneous record, and they are based on data generated for some other purpose than supporting the claim. Accordingly, net book value (or some variant of this method) has been employed to assess the value of businesses. The limitations of the method lie in the reliance on historical figures, the use of accounting principles which tend to undervalue assets, especially in periods of inflation, and the fact that the purpose for which the figures were produced does not take account of the compensation context and any rules specific to it. The balance sheet may contain an entry for goodwill, but the reliability of such figures depends upon their proximity to the moment of an actual sale.

(25) In cases where a business is not a going concern,[555] so-called "break-up", "liquidation" or "dissolution" value is generally employed. In such cases, no provision is made for value over and above the market value of the individual assets. Techniques have been developed to construct, in the absence of actual transactions, hypothetical values representing what a willing buyer and willing seller might agree.[556]

(26) Since 1945, valuation techniques have been developed to factor in different elements of risk and probability.[557] The discounted cash flow (DCF) method has gained some favour, especially in the context of calculations involving income over a limited duration, as in the case of wasting assets. Although developed as a tool for assessing commercial value, it can also be useful in the context of calculating value for compensation purposes.[558] But difficulties can arise in the application of the DCF method to establish capital value in the compensation context. The method analyses a wide range of inherently speculative elements, some of which have a significant impact upon the outcome (e.g. discount rates, currency fluctuations, inflation figures, commodity prices, interest rates and other commercial risks). This has led tribunals to adopt a

*for the Treatment of Foreign Investment* (Washington, D.C., 1992), vol. II, p. 41. Likewise, according to article 13, paragraph 1, of the Energy Charter Treaty, compensation for expropriation "shall amount to the fair market value of the Investment expropriated at the time immediately before the Expropriation".

[551] Particularly in the case of lump-sum settlements, agreements have been concluded decades after the claims arose. See, e.g., the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics concerning the Settlement of Mutual Financial and Property Claims arising before 1939 of 15 July 1986 (*Treaty Series*, No. 65 (1986)) (London, HM Stationery Office) concerning claims dating back to 1917 and the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China concerning the Settlement of Mutual Historical Property Claims of 5 June 1987 (*Treaty Series*, No. 37 (1987), *ibid*.) in respect of claims arising in 1949. In such cases, the choice of valuation method was sometimes determined by availability of evidence.

[552] See Report and recommendations made by the panel of Commissioners concerning part two of the first instalment of individual claims for damages above US$ 100 000 (category "D" claims), 12 March 1998 (S/AC.26/1998/3), paras. 48–49, where UNCC considered a compensation claim in relation to the taking of the claimant's Islamic art collection by Iraqi military personnel.

[553] Where share prices provide good evidence of value, they may be utilized, as in *INA Corporation* v. *The Government of the Islamic Republic of Iran*, Iran-U.S. C.T.R., vol. 8, p. 373 (1985).

[554] Early claims recognized that even where a taking of property was lawful, compensation for a going concern called for something more than the value of the property elements of the business. The American-Mexican Claims Commission, in rejecting a claim for lost profits in the case of a lawful taking, stated that payment for property elements would be "augmented by the existence of those elements which constitute a going concern": *Wells Fargo and Company (Decision No. 22–B)* (1926), American-Mexican Claims Commission (Washington, D.C., United States Government Printing Office, 1948), p. 153 (1926). See also decision No. 9 of the UNCC Governing Council in "Propositions and conclusions on compensation for business losses: types of damages and their valuation" (S/AC.26/1992/9), para. 16.

[555] For an example of a business found not to be a going concern, see *Phelps Dodge Corp.* v. *The Islamic Republic of Iran*, Iran-U.S. C.T.R., vol. 10, p. 121 (1986), where the enterprise had not been established long enough to demonstrate its viability. In *SEDCO, Inc.* v. *National Iranian Oil Co.*, the claimant sought dissolution value only, *ibid*., p. 180 (1986).

[556] The hypothetical nature of the result is discussed in *Amoco International Finance Corporation* (see footnote 549 above), at pp. 256–257, paras. 220–223.

[557] See, for example, the detailed methodology developed by UNCC for assessing Kuwaiti corporate claims (report and recommendations made by the panel of Commissioners concerning the first instalment of "E4" claims, 19 March 1999 (S/AC.26/1999/4), paras. 32–62) and claims filed on behalf of non-Kuwaiti corporations and other business entities, excluding oil sector, construction/engineering and export guarantee claims (report and recommendations made by the panel of Commissioners concerning the third instalment of "E2" claims, 9 December 1999 (S/AC.26/1999/22)).

[558] The use of the discounted cash flow method to assess capital value was analysed in some detail in *Amoco International Finance Corporation* (see footnote 549 above); *Starrett Housing Corporation* (*ibid.*); *Phillips Petroleum Company Iran* (see footnote 164 above); and *Ebrahimi (Shahin Shaine)* v. *Islamic Republic of Iran*, Iran-U.S. C.T.R., vol. 30, p. 170 (1994).

cautious approach to the use of the method. Hence, although income-based methods have been accepted in principle, there has been a decided preference for asset-based methods.[559] A particular concern is the risk of double-counting which arises from the relationship between the capital value of an enterprise and its contractually based profits.[560]

(27) *Paragraph 2* of article 36 recognizes that in certain cases compensation for loss of profits may be appropriate. International tribunals have included an award for loss of profits in assessing compensation: for example, the decisions in the *Cape Horn Pigeon* case[561] and *Sapphire International Petroleums Ltd.* v. *National Iranian Oil Company*.[562] Loss of profits played a role in the *Factory at Chorzów* case itself, PCIJ deciding that the injured party should receive the value of property by way of damages not as it stood at the time of expropriation but at the time of indemnification.[563] Awards for loss of profits have also been made in respect of contract-based lost profits in *Libyan American Oil Company (LIAMCO)*[564] and in some ICSID arbitrations.[565] Nevertheless, lost profits have not been as commonly awarded in practice as compensation for accrued losses. Tribunals have been reluctant to provide compensation for claims with inherently speculative elements.[566] When compared with tangible assets, profits (and intangible assets which are income-based) are relatively vulnerable to commercial and political risks, and increasingly so the further into the future projections are made. In cases where lost future profits have been awarded, it has been where an anticipated income stream has attained sufficient attributes to be considered a legally protected interest of sufficient certainty to be compensable.[567] This has normally been achieved by virtue of contractual arrangements or, in some cases, a well-established history of dealings.[568]

(28) Three categories of loss of profits may be distinguished: first, lost profits from income-producing property during a period when there has been no interference with title as distinct from temporary loss of use; secondly, lost profits from income-producing property between the date of taking of title and adjudication;[569] and thirdly, lost future profits in which profits anticipated after the date of adjudication are awarded.[570]

(29) The first category involves claims for loss of profits due to the temporary loss of use and enjoyment of the income-producing asset.[571] In these cases there is no interference with title and hence in the relevant period the loss compensated is the income to which the claimant was entitled by virtue of undisturbed ownership.

(30) The second category of claims relates to the unlawful taking of income-producing property. In such cases

[559] See, e.g., *Amoco* (footnote 549 above); *Starrett Housing Corporation* (*ibid.*); and *Phillips Petroleum Company Iran* (footnote 164 above). In the context of claims for lost profits, there is a corresponding preference for claims to be based on past performance rather than forecasts. For example, the UNCC guidelines on valuation of business losses in decision 9 (see footnote 554 above) state: "The method of a valuation should therefore be one that focuses on past performance rather than on forecasts and projections into the future" (para. 19).

[560] See, e.g., *Ebrahimi* (footnote 558 above), p. 227, para. 159.

[561] *Navires* (see footnote 222 above) (*Cape Horn Pigeon* case), p. 63 (1902) (including compensation for lost profits resulting from the seizure of an American whaler). Similar conclusions were reached in the *Delagoa Bay Railway* case, Martens, *op. cit.* (footnote 441 above), vol. XXX, p. 329 (1900); Moore, *History and Digest*, vol. II, p. 1865 (1900); the *William Lee* case (footnote 139 above), pp. 3405–3407; and the *Yuille Shortridge and Co.* case *(Great Britain* v. *Portugal)*, Lapradelle–Politis, *op. cit.* (*ibid*.), vol. II, p. 78 (1861). Contrast the decisions in the *Canada* case *(United States of America* v. *Brazil)*, Moore, *History and Digest*, vol. II, p. 1733 (1870) and the *Lacaze* case (footnote 139 above).

[562] ILR, vol. 35, p. 136, at pp. 187 and 189 (1963).

[563] *Factory at Chorzów, Merits* (see footnote 34 above), pp. 47–48 and 53.

[564] *Libyan American Oil Company (LIAMCO)* (see footnote 508 above), p. 140.

[565] See, e.g., *Amco Asia Corporation and Others* v. *The Republic of Indonesia*, *First Arbitration* (1984); *Annulment* (1986); *Resubmitted case* (1990), *ICSID Reports* (Cambridge, Grotius, 1993), vol. 1, p. 377; and *AGIP SpA* v. *the Government of the People's Republic of the Congo*, *ibid*., p. 306 (1979).

[566] According to the arbitrator in the *Shufeldt* case (see footnote 87 above), "the *lucrum cessans* must be the direct fruit of the contract and not too remote or speculative" (p. 1099). See also *Amco Asia Corporation and Others* (footnote 565 above), where it was stated that "non-speculative profits" were recoverable (p. 612, para. 178). UNCC has also stressed the requirement for claimants to provide "clear and convincing evidence of ongoing and expected profitability" (see report and recommendations made by the panel of Commissioners concerning the first instalment of "E3" claims, 17 December 1998 (S/AC.26/1998/13), para. 147). In assessing claims for lost profits on construction contracts, Panels have generally required that the claimant's calculation take into account the risk inherent in the project (*ibid*., para. 157; report and recommendations made by the panel of Commissioners concerning the fourth instalment of "E3" claims, 30 September 1999 (S/AC.26/1999/14), para. 126).

[567] In considering claims for future profits, the UNCC panel dealing with the fourth instalment of "E3" claims expressed the view that in order for such claims to warrant a recommendation, "it is necessary to demonstrate by sufficient documentary and other appropriate evidence a history of successful (i.e. profitable) operation, and a state of affairs which warrants the conclusion that the hypothesis that there would have been future profitable contracts is well founded" (S/AC.26/1999/14), para. 140 (see footnote 566 above).

[568] According to Whiteman, "in order to be allowable, prospective profits must not be too speculative, contingent, uncertain, and the like. There must be proof that they were *reasonably* anticipated; and that the profits anticipated were probable and not merely possible" (*Damages in International Law* (Washington, D.C., United States Government Printing Office, 1943), vol. III, p. 1837).

[569] This is most commonly associated with the deprivation of property, as opposed to wrongful termination of a contract or concession. If restitution were awarded, the award of lost profits would be analogous to cases of temporary dispossession. If restitution is not awarded, as in the *Factory at Chorzów, Merits* (see footnote 34 above) and *Norwegian Shipowners' Claims* (footnote 87 above), lost profits may be awarded up to the time when compensation is made available as a substitute for restitution.

[570] Awards of lost future profits have been made in the context of a contractually protected income stream, as in *Amco Asia Corporation and Others* v. *The Republic of Indonesia*, *First Arbitration*; *Annulment; Resubmitted case* (see footnote 565 above), rather than on the basis of the taking of income-producing property. In the UNCC report and recommendations on the second instalment of "E2" claims, dealing with reduced profits, the panel found that losses arising from a decline in business were compensable even though tangible property was not affected and the businesses continued to operate throughout the relevant period (S/AC.26/1999/6, para. 76).

[571] Many of the early cases concern vessels seized and detained. In the *"Montijo"*, an American vessel seized in Panama, the Umpire allowed a sum of money per day for loss of the use of the vessel (see footnote 117 above). In the *"Betsey"*, compensation was awarded not only for the value of the cargo seized and detained, but also for demurrage for the period representing loss of use: Moore, *International Adjudications* (New York, Oxford University Press, 1933) vol. V, p. 47, at p. 113.

lost profits have been awarded for the period up to the time of adjudication. In the *Factory at Chorzów* case,[572] this took the form of re-invested income, representing profits from the time of taking to the time of adjudication. In the *Norwegian Shipowners' Claims* case,[573] lost profits were similarly not awarded for any period beyond the date of adjudication. Once the capital value of income-producing property has been restored through the mechanism of compensation, funds paid by way of compensation can once again be invested to re-establish an income stream. Although the rationale for the award of lost profits in these cases is less clearly articulated, it may be attributed to a recognition of the claimant's continuing beneficial interest in the property up to the moment when potential restitution is converted to a compensation payment.[574]

(31) The third category of claims for loss of profits arises in the context of concessions and other contractually protected interests. Again, in such cases, lost future income has sometimes been awarded.[575] In the case of contracts, it is the future income stream which is compensated, up to the time when the legal recognition of entitlement ends. In some contracts this is immediate, e.g. where the contract is determinable at the instance of the State,[576] or where some other basis for contractual termination exists. Or it may arise from some future date dictated by the terms of the contract itself.

(32) In other cases, lost profits have been excluded on the basis that they were not sufficiently established as a legally protected interest. In the *Oscar Chinn* case[577] a monopoly was not accorded the status of an acquired right. In the *Asian Agricultural Products* case,[578] a claim for lost profits by a newly established business was rejected for lack of evidence of established earnings. Claims for lost profits are also subject to the usual range of limitations on the recovery of damages, such as causation, remoteness, evidentiary requirements and accounting principles, which seek to discount speculative elements from projected figures.

(33) If loss of profits are to be awarded, it is inappropriate to award interest under article 38 on the profit-earning capital over the same period of time, simply because the capital sum cannot be simultaneously earning interest and generating profits. The essential aim is to avoid double recovery while ensuring full reparation.

(34) It is well established that incidental expenses are compensable if they were reasonably incurred to repair damage and otherwise mitigate loss arising from the breach.[579] Such expenses may be associated, for example, with the displacement of staff or the need to store or sell undelivered products at a loss.

### *Article 37. Satisfaction*

**1. The State responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation.**

**2. Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality.**

**3. Satisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible State.**

*Commentary*

(1) Satisfaction is the third form of reparation which the responsible State may have to provide in discharge of its obligation to make full reparation for the injury caused by an internationally wrongful act. It is not a standard form of reparation, in the sense that in many cases the injury caused by an internationally wrongful act of a State may be fully repaired by restitution and/or compensation. The rather exceptional character of the remedy of satisfaction, and its relationship to the principle of full reparation, are emphasized by the phrase "insofar as [the injury] cannot be made good by restitution or compensation". It is only in those cases where those two forms have not provided full reparation that satisfaction may be required.

(2) Article 37 is divided into three paragraphs, each dealing with a separate aspect of satisfaction. Paragraph 1 addresses the legal character of satisfaction and the types of injury for which it may be granted. Paragraph 2 describes, in a non-exhaustive fashion, some modalities of satisfaction. Paragraph 3 places limitations on the obliga-

[572] *Factory at Chorzów, Merits* (see footnote 34 above).

[573] *Norwegian Shipowners' Claims* (see footnote 87 above).

[574] For the approach of UNCC in dealing with loss of profits claims associated with the destruction of businesses following the Iraqi invasion of Kuwait, see S/AC.26/1999/4 (footnote 557 above), paras. 184–187.

[575] In some cases, lost profits were not awarded beyond the date of adjudication, though for reasons unrelated to the nature of the income-producing property. See, e.g., *Robert H. May (United States* v. *Guatemala)*, 1900 For. Rel. 648; and Whiteman, *Damages in International Law*, vol. III (footnote 568 above), pp. 1704 and 1860, where the concession had expired. In other cases, circumstances giving rise to *force majeure* had the effect of suspending contractual obligations: see, e.g., *Gould Marketing, Inc.* v. *Ministry of Defence of the Islamic Republic of Iran*, Iran-U.S. C.T.R., vol. 6, p. 272 (1984); and *Sylvania Technical Systems, Inc.* v. *The Government of the Islamic Republic of Iran, ibid*., vol. 8, p. 298 (1985). In the *Delagoa Bay Railway* case (footnote 561 above), and in *Shufeldt* (see footnote 87 above), lost profits were awarded in respect of a concession which had been terminated. In *Sapphire International Petroleums Ltd.* (see footnote 562 above), p. 136; *Libyan American Oil Company (LIAMCO)* (see footnote 508 above), p. 140; and *Amco Asia Corporation and Others* v. *The Republic of Indonesia, First Arbitration; Annulment; Resubmitted case* (see footnote 565 above), awards of lost profits were also sustained on the basis of contractual relationships.

[576] As in *Sylvania Technical Systems, Inc.* (see the footnote above).

[577] See footnote 385 above.

[578] See footnote 522 above.

[579] Compensation for incidental expenses has been awarded by UNCC (report and recommendations on the first instalment of "E2" claims (S/AC.26/1998/7) where compensation was awarded for evacuation and relief costs (paras. 133, 153 and 249), repatriation (para. 228), termination costs (para. 214), renovation costs (para. 225) and expenses in mitigation (para. 183)), and by the Iran-United States Claims Tribunal (see *General Electric Company* v. *The Government of the Islamic Republic of Iran*, Iran-U.S. C.T.R., vol. 26, p. 148, at pp. 165–169, paras. 56–60 and 67–69 (1991), awarding compensation for items resold at a loss and for storage costs).

tion to give satisfaction, having regard to former practices in cases where unreasonable forms of satisfaction were sometimes demanded.

(3) In accordance with paragraph 2 of article 31, the injury for which a responsible State is obliged to make full reparation embraces "any damage, whether material or moral, caused by the internationally wrongful act of a State". Material and moral damage resulting from an internationally wrongful act will normally be financially assessable and hence covered by the remedy of compensation. Satisfaction, on the other hand, is the remedy for those injuries, not financially assessable, which amount to an affront to the State. These injuries are frequently of a symbolic character, arising from the very fact of the breach of the obligation, irrespective of its material consequences for the State concerned.

(4) The availability of the remedy of satisfaction for injury of this kind, sometimes described as "non-material injury",[580] is well established in international law. The point was made, for example, by the tribunal in the *"Rainbow Warrior"* arbitration:

> There is a long established practice of States and international Courts and Tribunals of using satisfaction as a remedy or form of reparation (in the wide sense) for the breach of an international obligation. This practice relates particularly to the case of moral or legal damage done directly to the State, especially as opposed to the case of damage to persons involving international responsibilities.[581]

State practice also provides many instances of claims for satisfaction in circumstances where the internationally wrongful act of a State causes non-material injury to another State. Examples include situations of insults to the symbols of the State, such as the national flag,[582] violations of sovereignty or territorial integrity,[583] attacks on ships or aircraft,[584] ill-treatment of or deliberate attacks on heads of State or Government or diplomatic or consular representatives or other protected persons[585] and violations of the premises of embassies or consulates or of the residences of members of the mission.[586]

(5) *Paragraph 2* of article 37 provides that satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality. The forms of satisfaction listed in the article are no more than examples. The appropriate form of satisfaction will depend on the circumstances and cannot be prescribed in advance.[587] Many possibilities exist, including due inquiry into the causes of an accident resulting in harm or injury,[588] a trust fund to manage compensation payments in the interests of the beneficiaries, disciplinary or penal action against the individuals whose conduct caused the internationally wrongful act[589] or the award of symbolic damages for non-pecuniary injury.[590] Assurances or guarantees of non-repetition, which are dealt with in the articles in the context of cessation, may also amount to a form of satisfaction.[591] Paragraph 2 does not attempt to list all the possibilities, but neither is it intended to exclude them. Moreover, the order of the modalities of satisfaction in paragraph 2 is not intended to reflect any hierarchy or preference. Paragraph 2 simply gives examples which are not listed in order of appropriateness or seriousness. The appropriate mode, if any, will be determined having regard to the circumstances of each case.

(6) One of the most common modalities of satisfaction provided in the case of moral or non-material injury to the State is a declaration of the wrongfulness of the act by a competent court or tribunal. The utility of declaratory relief as a form of satisfaction in the case of non-material injury to a State was affirmed by ICJ in the *Corfu Channel* case, where the Court, after finding unlawful a minesweeping operation (Operation Retail) carried out by the British Navy after the explosion, said:

> [T]o ensure respect for international law, of which it is the organ, the Court must declare that the action of the British Navy constituted a violation of Albanian sovereignty.

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[580] See C. Dominicé, "De la réparation constructive du préjudice immatériel souffert par un État", *L'ordre juridique international entre tradition et innovation: recueil d'études* (Paris, Presses Universitaires de France, 1997), p. 349, at p. 354.

[581] *"Rainbow Warrior"* (see footnote 46 above), pp. 272–273, para. 122.

[582] Examples are the *Magee* case (Whiteman, *Damages in International Law*, vol. I (see footnote 347 above), p. 64 (1874)), the *Petit Vaisseau* case (*La prassi italiana di diritto internazionale*, 2nd series (see footnote 498 above), vol. III, No. 2564 (1863)) and the case that arose from the insult to the French flag in Berlin in 1920 (C. Eagleton, *The Responsibility of States in International Law* (New York University Press, 1928), pp. 186–187).

[583] As occurred in the *"Rainbow Warrior"* arbitration (see footnote 46 above).

[584] Examples include the attack carried out in 1961 against a Soviet aircraft transporting President Brezhnev by French fighter planes over the international waters of the Mediterranean (RGDIP, vol. 65 (1961), p. 603); and the sinking of a Bahamian ship in 1980 by a Cuban aircraft (*ibid*., vol. 84 (1980), pp. 1078–1079).

[585] See F. Przetacznik, "La responsabilité internationale de l'État à raison des préjudices de caractère moral et politique causés à un autre État", RGDIP, vol. 78 (1974), p. 919, at p. 951.

[586] Examples include the attack by demonstrators in 1851 on the Spanish Consulate in New Orleans (Moore, *Digest*, vol. VI, p. 811, at p. 812), and the failed attempt of two Egyptian policemen, in 1888, to intrude upon the premises of the Italian Consulate at Alexandria (*La prassi italiana di diritto internazionale*, 2nd series (see footnote 498 above), vol. III, No. 2558). Also see cases of apologies and expressions of regret following demonstrations in front of the French Embassy in Belgrade in 1961 (RGDIP, vol. 65 (1961), p. 610), and the fires in the libraries of the United States Information Services in Cairo in 1964 (*ibid*., vol. 69 (1965), pp. 130–131) and in Karachi in 1965 (*ibid*., vol. 70 (1966), pp. 165–166).

[587] In the *"Rainbow Warrior"* arbitration the tribunal, while rejecting New Zealand's claims for restitution and/or cessation and declining to award compensation, made various declarations by way of satisfaction, and in addition a recommendation "to assist [the parties] in putting an end to the present unhappy affair". Specifically, it recommended that France contribute US$ 2 million to a fund to be established "to promote close and friendly relations between the citizens of the two countries" (see footnote 46 above), p. 274, paras. 126–127. See also L. Migliorino, "Sur la déclaration d'illicéité comme forme de satisfaction: à propos de la sentence arbitrale du 30 avril 1990 dans l'affaire du Rainbow Warrior", RGDIP, vol. 96 (1992), p. 61.

[588] For example, the United States naval inquiry into the causes of the collision between an American submarine and the Japanese fishing vessel, the *Ehime Maru*, in waters off Honolulu, *The New York Times*, 8 February 2001, sect. 1, p. 1.

[589] Action against the guilty individuals was requested in the case of the killing in 1948, in Palestine, of Count Bernadotte while he was acting in the service of the United Nations (Whiteman, *Digest of International Law*, vol. 8, pp. 742–743) and in the case of the killing of two United States officers in Tehran (RGDIP, vol. 80 (1976, p. 257).

[590] See, e.g., the cases *"I'm Alone"*, UNRIAA, vol. III (Sales No. 1949.V.2), p. 1609 (1935); and "*Rainbow Warrior"* (footnote 46 above).

[591] See paragraph (11) of the commentary to article 30.

This declaration is in accordance with the request made by Albania through her Counsel, and is in itself appropriate satisfaction.[592]

This has been followed in many subsequent cases.[593] However, while the making of a declaration by a competent court or tribunal may be treated as a form of satisfaction in a given case, such declarations are not intrinsically associated with the remedy of satisfaction. Any court or tribunal which has jurisdiction over a dispute has the authority to determine the lawfulness of the conduct in question and to make a declaration of its findings, as a necessary part of the process of determining the case. Such a declaration may be a preliminary to a decision on any form of reparation, or it may be the only remedy sought. What the Court did in the *Corfu Channel* case was to use a declaration as a form of satisfaction in a case where Albania had sought no other form. Moreover, such a declaration has further advantages: it should be clear and self-contained and will by definition not exceed the scope or limits of satisfaction referred to in paragraph 3 of article 37. A judicial declaration is not listed in paragraph 2 only because it must emanate from a competent third party with jurisdiction over a dispute, and the articles are not concerned to specify such a party or to deal with issues of judicial jurisdiction. Instead, article 37 specifies the acknowledgement of the breach by the responsible State as a modality of satisfaction.

(7) Another common form of satisfaction is an apology, which may be given verbally or in writing by an appropriate official or even the Head of State. Expressions of regret or apologies were required in the *"I'm Alone"*,[594] *Kellett*[595] and *"Rainbow Warrior"*[596] cases, and were offered by the responsible State in the *Consular Relations*[597] and *LaGrand*[598] cases. Requests for, or offers of, an apology are a quite frequent feature of diplomatic practice and the tender of a timely apology, where the circumstances justify it, can do much to resolve a dispute. In other circumstances an apology may not be called for, e.g. where a case is settled on an *ex gratia* basis, or it may be insufficient. In the *LaGrand* case the Court considered that "an apology is not sufficient in this case, as it would not be in other cases where foreign nationals have not been advised without delay of their rights under article 36, paragraph 1, of the Vienna Convention and have been subjected to prolonged detention or sentenced to severe penalties".[599]

(8) Excessive demands made under the guise of "satisfaction" in the past[600] suggest the need to impose some limit on the measures that can be sought by way of satisfaction to prevent abuses, inconsistent with the principle of the equality of States.[601] In particular, satisfaction is not intended to be punitive in character, nor does it include punitive damages. *Paragraph 3* of article 37 places limitations on the obligation to give satisfaction by setting out two criteria: first, the proportionality of satisfaction to the injury; and secondly, the requirement that satisfaction should not be humiliating to the responsible State. It is true that the term "humiliating" is imprecise, but there are certainly historical examples of demands of this kind.

### *Article 38. Interest*

**1. Interest on any principal sum due under this chapter shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result.**

**2. Interest runs from the date when the principal sum should have been paid until the date the obligation to pay is fulfilled.**

*Commentary*

(1) Interest is not an autonomous form of reparation, nor is it a necessary part of compensation in every case. For this reason the term "principal sum" is used in article 38 rather than "compensation". Nevertheless, an award of interest may be required in some cases in order to provide full reparation for the injury caused by an internationally wrongful act, and it is normally the subject of separate treatment in claims for reparation and in the awards of tribunals.

(2) As a general principle, an injured State is entitled to interest on the principal sum representing its loss, if that sum is quantified as at an earlier date than the date of the settlement of, or judgement or award concerning, the claim and to the extent that it is necessary to ensure full reparation.[602] Support for a general rule favouring the award of interest as an aspect of full reparation is found in international jurisprudence.[603] In the *S.S. "Wimbledon"*, PCIJ awarded simple interest at 6 per cent as from the date of judgment, on the basis that interest was only payable "from the moment when the amount of the sum due

[592] *Corfu Channel, Merits* (see footnote 35 above), p. 35, repeated in the operative part (p. 36).

[593] For example, *"Rainbow Warrior"* (see footnote 46 above), p. 273, para. 123.

[594] See footnote 590 above.

[595] Moore, *Digest*, vol. V, p. 44 (1897).

[596] See footnote 46 above.

[597] *Vienna Convention on Consular Relations (Paraguay* v. *United States of America), Provisional Measures, Order of 9 April 1998, I.C.J. Reports 1998*, p. 248. For the text of the United States' apology, see United States Department of State, Text of Statement Released in Asunción, Paraguay; Press statement by James P. Rubin, Spokesman, 4 November 1998. For the order discontinuing proceedings of 10 November 1998, see *I.C.J. Reports 1998*, p. 426.

[598] See footnote 119 above.

[599] *LaGrand*, *Merits* (*ibid.*), para. 123.

[600] For example, the joint note presented to the Chinese Government in 1900 following the Boxer uprising and the demand by the Conference of Ambassadors against Greece in the *Tellini* affair in 1923: see C. Eagleton, *op. cit.* (footnote 582 above), pp. 187–188.

[601] The need to prevent the abuse of satisfaction was stressed by early writers such as J. C. Bluntschli, *Das moderne Völkerrecht der civilisirten Staten als Rechtsbuch dargestellt*, 3rd ed. (Nördlingen, Beck, 1878); French translation by M. C. Lardy, *Le droit international codifié*, 5th rev. ed. (Paris, Félix Alcan, 1895), pp. 268–269.

[602] Thus, interest may not be allowed where the loss is assessed in current value terms as at the date of the award. See the *Lighthouses* arbitration (footnote 182 above), pp. 252–253.

[603] See, e.g., the awards of interest made in the *Illinois Central Railroad Co. (U.S.A.)* v. *United Mexican States* case, UNRIAA, vol. IV (Sales No. 1951.V.1), p. 134 (1926); and the *Lucas* case, ILR, vol. 30, p. 220 (1966); see also administrative decision No. III of the United States-Germany Mixed Claims Commission, UNRIAA, vol. VII (Sales No. 1956.V.5), p. 66 (1923).

has been fixed and the obligation to pay has been established".[604]

(3) Issues of the award of interest have frequently arisen in other tribunals, both in cases where the underlying claim involved injury to private parties and where the injury was to the State itself.[605] The experience of the Iran-United States Claims Tribunal is worth noting. In *The Islamic Republic of Iran* v. *The United States of America (Case A–19)*, the Full Tribunal held that its general jurisdiction to deal with claims included the power to award interest, but it declined to lay down uniform standards for the award of interest on the ground that this fell within the jurisdiction of each Chamber and related "to the exercise … of the discretion accorded to them in deciding each particular case".[606] On the issue of principle the tribunal said:

> Claims for interest are part of the compensation sought and do not constitute a separate cause of action requiring their own independent jurisdictional grant. This Tribunal is required by [a]rticle V of the Claims Settlement Declaration to decide claims "on the basis of respect for law". In doing so, it has regularly treated interest, where sought, as forming an integral part of the "claim" which it has a duty to decide. The Tribunal notes that the Chambers have been consistent in awarding interest as "compensation for damages suffered due to delay in payment". … Indeed, it is customary for arbitral tribunals to award interest as part of an award for damages, notwithstanding the absence of any express reference to interest in the *compromis*. Given that the power to award interest is inherent in the Tribunal's authority to decide claims, the exclusion of such power could only be established by an express provision in the Claims Settlement Declaration. No such provision exists. Consequently, the Tribunal concludes that it is clearly within its power to award interest as compensation for damage suffered.[607]

The tribunal has awarded interest at a different and slightly lower rate in respect of intergovernmental claims.[608] It has not awarded interest in certain cases, for example where a lump-sum award was considered as reflecting full compensation, or where other special circumstances pertained.[609]

(4) Decision 16 of the Governing Council of the United Nations Compensation Commission deals with the question of interest. It provides:

> 1. Interest will be awarded from the date the loss occurred until the date of payment, at a rate sufficient to compensate successful claimants for the loss of use of the principal amount of the award.
>
> 2. The methods of calculation and of payment of interest will be considered by the Governing Council at the appropriate time.
>
> 3. Interest will be paid after the principal amount of awards.[610]

This provision combines a decision in principle in favour of interest where necessary to compensate a claimant with flexibility in terms of the application of that principle. At the same time, interest, while a form of compensation, is regarded as a secondary element, subordinated to the principal amount of the claim.

(5) Awards of interest have also been envisaged by human rights courts and tribunals, even though the compensation practice of these bodies is relatively cautious and the claims are almost always unliquidated. This is done, for example, to protect the value of a damages award payable by instalments over time.[611]

(6) In their more recent practice, national compensation commissions and tribunals have also generally allowed for interest in assessing compensation. However in certain cases of partial lump-sum settlements, claims have been expressly limited to the amount of the principal loss, on the basis that with a limited fund to be distributed, claims to principal should take priority.[612] Some national court decisions have also dealt with issues of interest under international law,[613] although more often questions of interest are dealt with as part of the law of the forum.

(7) Although the trend of international decisions and practice is towards greater availability of interest as an aspect of full reparation, an injured State has no automatic entitlement to the payment of interest. The awarding of interest depends on the circumstances of each case; in particular, on whether an award of interest is necessary in order to ensure full reparation. This approach is compatible with the tradition of various legal systems as well as the practice of international tribunals.

(8) An aspect of the question of interest is the possible award of compound interest. The general view of courts and tribunals has been against the award of compound interest, and this is true even of those tribunals which hold claimants to be normally entitled to compensatory interest. For example, the Iran-United States Claims Tribunal has consistently denied claims for compound interest, including in cases where the claimant suffered losses through compound interest charges on indebtedness associated with the claim. In *R.J. Reynolds Tobacco Co.* v. *The Government of the Islamic Republic of Iran*, the tribunal failed to find:

> any special reasons for departing from international precedents which normally do not allow the awarding of compound interest. As noted by one authority, "[t]here are few rules within the scope of the

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[604] See footnote 34 above. The Court accepted the French claim for an interest rate of 6 per cent as fair, having regard to "the present financial situation of the world and … the conditions prevailing for public loans".

[605] In the *M/V "Saiga"* case (see footnote 515 above), ITLOS awarded interest at different rates in respect of different categories of loss (para. 173).

[606] *The Islamic Republic of Iran* v. *The United States of America*, Iran-U.S. C.T.R., vol. 16, p. 285, at p. 290 (1987). Aldrich, *op. cit.* (see footnote 357 above), pp. 475–476, points out that the practice of the three Chambers has not been entirely uniform.

[607] *The Islamic Republic of Iran* v. *The United States of America* (see footnote 606 above), pp. 289–290.

[608] See C. N. Brower and J. D. Brueschke, *op. cit*. (footnote 520 above), pp. 626–627, with references to the cases. The rate adopted was 10 per cent, as compared with 12 per cent for commercial claims.

[609] See the detailed analysis of Chamber Three in *McCollough and Company, Inc.* v. *Ministry of Post, Telegraph and Telephone*, Iran-U.S. C.T.R., vol. 11, p. 3, at pp. 26–31 (1986).

[610] Awards of interest, decision of 18 December 1992 (S/AC.26/1992/16).

[611] See, e.g., the *Velásquez Rodríguez*, Compensatory Damages case (footnote 516 above), para. 57. See also *Papamichalopoulos* (footnote 515 above), para. 39, where interest was payable only in respect of the pecuniary damage awarded. See further D. Shelton, *op. cit.* (footnote 521 above), pp. 270–272.

[612] See, e.g., the Foreign Compensation (People's Republic of China), Order, Statutory Instrument No. 2201 (1987) (London, HM Stationery Office), para. 10, giving effect to the settlement Agreement between the United Kingdom and China (footnote 551 above).

[613] See, e.g., *McKesson Corporation* v. *The Islamic Republic of Iran*, United States District Court for the District of Columbia, 116 F, Supp. 2d 13 (2000).

subject of damages in international law that are better settled than the one that compound interest is not allowable" … Even though the term "all sums" could be construed to include interest and thereby to allow compound interest, the Tribunal, due to the ambiguity of the language, interprets the clause in the light of the international rule just stated, and thus excludes compound interest. [614]

Consistent with this approach, the tribunal has gone behind contractual provisions appearing to provide for compound interest, in order to prevent the claimant gaining a profit "wholly out of proportion to the possible loss that [it] might have incurred by not having the amounts due at its disposal".[615] The preponderance of authority thus continues to support the view expressed by Arbitrator Huber in the *British Claims in the Spanish Zone of Morocco* case:

the arbitral case law in matters involving compensation of one State for another for damages suffered by the nationals of one within the territory of the other … is unanimous … in disallowing compound interest. In these circumstances, very strong and quite specific arguments would be called for to grant such interest.[616]

The same is true for compound interest in respect of State-to-State claims.

(9) Nonetheless, several authors have argued for a reconsideration of this principle, on the ground that "compound interest reasonably incurred by the injured party should be recoverable as an item of damage".[617] This view has also been supported by arbitral tribunals in some cases.[618] But given the present state of international law, it cannot be said that an injured State has any entitlement to compound interest, in the absence of special circumstances which justify some element of compounding as an aspect of full reparation.

(10) The actual calculation of interest on any principal sum payable by way of reparation raises a complex of issues concerning the starting date (date of breach,[619] date on which payment should have been made, date of claim or demand), the terminal date (date of settlement agreement or award, date of actual payment) as well as the applicable interest rate (rate current in the respondent State, in the applicant State, international lending rates). There is no uniform approach, internationally, to questions of quantification and assessment of amounts of interest payable.[620] In practice, the circumstances of each case and the conduct of the parties strongly affect the outcome. There is wisdom in the Iran-United States Claims Tribunal's observation that such matters, if the parties cannot resolve them, must be left "to the exercise … of the discretion accorded to [individual tribunals] in deciding each particular case".[621] On the other hand, the present unsettled state of practice makes a general provision on the calculation of interest useful. Accordingly, article 38 indicates that the date from which interest is to be calculated is the date when the principal sum should have been paid. Interest runs from that date until the date the obligation to pay is fulfilled. The interest rate and mode of calculation are to be set so as to achieve the result of providing full reparation for the injury suffered as a result of the internationally wrongful act.

(11) Where a sum for loss of profits is included as part of the compensation for the injury caused by a wrongful act, an award of interest will be inappropriate if the injured State would thereby obtain double recovery. A capital sum cannot be earning interest *and* notionally employed in earning profits at one and the same time. However, interest may be due on the profits which would have been earned but which have been withheld from the original owner.

(12) Article 38 does not deal with post-judgement or moratory interest. It is only concerned with interest that goes to make up the amount that a court or tribunal should award, i.e. compensatory interest. The power of a court or tribunal to award post-judgement interest is a matter of its procedure.

### *Article 39. Contribution to the injury*

**In the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought**.

#### *Commentary*

(1) Article 39 deals with the situation where damage has been caused by an internationally wrongful act of a State, which is accordingly responsible for the damage in accordance with articles 1 and 28, but where the injured State, or the individual victim of the breach, has materially

[614] Iran-U.S. C.T.R., vol. 7, p. 181, at pp. 191–192 (1984), citing Whiteman, *Damages in International Law*, vol. III (see footnote 568 above), p. 1997.

[615] *Anaconda-Iran, Inc.* v. *The Government of the Islamic Republic of Iran*, Iran-U.S. C.T.R., vol. 13, p. 199, at p. 235 (1986). See also Aldrich, *op. cit.* (footnote 357 above), pp. 477–478.

[616] *British Claims in the Spanish Zone of Morocco* (see footnote 44 above), p. 650. Cf. the *Aminoil* arbitration (footnote 496 above), where the interest awarded was compounded for a period without any reason being given. This accounted for more than half of the total final award (p. 613, para. 178 (5)).

[617] F. A. Mann, "Compound interest as an item of damage in international law", *Further Studies in International Law* (Oxford, Clarendon Press, 1990), p. 377, at p. 383.

[618] See, e.g., *Compañía del Desarrollo de Santa Elena, S.A.* v. *Republic of Costa Rica*, case No. ARB/96/1, *ICSID Reports* (Cambridge, Grotius, 2002), vol. 5, final award (17 February 2000), paras. 103–105.

[619] Using the date of the breach as the starting date for calculation of the interest term is problematic as there may be difficulties in determining that date, and many legal systems require a demand for payment by the claimant before interest will run. The date of formal demand was taken as the relevant date in the *Russian Indemnity* case (see footnote 354 above), p. 442, by analogy from the general position in European legal systems. In any event, failure to make a timely claim for payment is relevant in deciding whether to allow interest.

[620] See, e.g., J. Y. Gotanda, *Supplemental Damages in Private International Law* (The Hague, Kluwer, 1998), p. 13. It should be noted that a number of Islamic countries, influenced by the sharia, prohibit payment of interest under their own law or even under their constitution. However, they have developed alternatives to interest in the commercial and international context. For example, payment of interest is prohibited by the Iranian Constitution, articles 43 and 49, but the Guardian Council has held that this injunction does not apply to "foreign governments, institutions, companies and persons, who, according to their own principles of faith, do not consider [interest] as being prohibited" (*ibid*., pp. 38–40, with references).

[621] *The Islamic Republic of Iran* v. *The United States of America (Case No. A-19)* (see footnote 606 above).

contributed to the damage by some wilful or negligent act or omission. Its focus is on situations which in national law systems are referred to as "contributory negligence", "comparative fault", "faute de la victime", etc.[622]

(2) Article 39 recognizes that the conduct of the injured State, or of any person or entity in relation to whom reparation is sought, should be taken into account in assessing the form and extent of reparation. This is consonant with the principle that full reparation is due for the injury—but nothing more—arising in consequence of the internationally wrongful act. It is also consistent with fairness as between the responsible State and the victim of the breach.

(3) In the *LaGrand* case, ICJ recognized that the conduct of the claimant State could be relevant in determining the form and amount of reparation. There, Germany had delayed in asserting that there had been a breach and in instituting proceedings. The Court noted that "Germany may be criticized for the manner in which these proceedings were filed and for their timing", and stated that it would have taken this factor, among others, into account "had Germany's submission included a claim for indemnification".[623]

(4) The relevance of the injured State's contribution to the damage in determining the appropriate reparation is widely recognized in the literature[624] and in State practice.[625] While questions of an injured State's contribution to the damage arise most frequently in the context of compensation, the principle may also be relevant to other forms of reparation. For example, if a State-owned ship is unlawfully detained by another State and while under detention sustains damage attributable to the negligence of the captain, the responsible State may be required merely to return the ship in its damaged condition.

(5) Not every action or omission which contributes to the damage suffered is relevant for this purpose. Rather, article 39 allows to be taken into account only those actions or omissions which can be considered as wilful or negligent, i.e. which manifest a lack of due care on the part of the victim of the breach for his or her own property or rights.[626] While the notion of a negligent action or omission is not qualified, e.g. by a requirement that the negligence should have reached the level of being "serious" or "gross", the relevance of any negligence to reparation will depend upon the degree to which it has contributed to the damage as well as the other circumstances of the case.[627] The phrase "account shall be taken" indicates that the article deals with factors that are capable of affecting the form or reducing the amount of reparation in an appropriate case.

(6) The wilful or negligent action or omission which contributes to the damage may be that of the injured State or "any person or entity in relation to whom reparation is sought". This phrase is intended to cover not only the situation where a State claims on behalf of one of its nationals in the field of diplomatic protection, but also any other situation in which one State invokes the responsibility of another State in relation to conduct primarily affecting some third party. Under articles 42 and 48, a number of different situations can arise where this may be so. The underlying idea is that the position of the State seeking reparation should not be more favourable, so far as reparation in the interests of another is concerned, than it would be if the person or entity in relation to whom reparation is sought were to bring a claim individually.

## CHAPTER III

## SERIOUS BREACHES OF OBLIGATIONS UNDER PEREMPTORY NORMS OF GENERAL INTERNATIONAL LAW

### *Commentary*

(1) Chapter III of Part Two is entitled "Serious breaches of obligations under peremptory norms of general international law". It sets out certain consequences of specific types of breaches of international law, identified by reference to two criteria: first, they involve breaches of obligations under peremptory norms of general international law; and secondly, the breaches concerned are in themselves serious, having regard to their scale or character. Chapter III contains two articles, the first defining its scope of application (art. 40), the second spelling out the legal consequences entailed by the breaches coming within the scope of the chapter (art. 41).

(2) Whether a qualitative distinction should be recognized between different breaches of international law has been the subject of a major debate.[628] The issue was underscored by ICJ in the *Barcelona Traction* case, when it said that:

[622] See C. von Bar, *op. cit*. (footnote 315 above), pp. 544–569.

[623] *LaGrand, Judgment* (see footnote 119 above), at p. 487, para. 57, and p. 508, para. 116. For the relevance of delay in terms of loss of the right to invoke responsibility, see article 45, subparagraph (*b*), and commentary.

[624] See, e.g., B. Graefrath, "Responsibility and damages caused: relationship between responsibility and damages" (footnote 454 above) and B. Bollecker-Stern, *op. cit.* (footnote 454 above), pp. 265–300.

[625] In the *Delagoa Bay Railway* case (see footnote 561 above), the arbitrators noted that: "[a]ll the circumstances that can be adduced against the concessionaire company and for the Portuguese Government mitigate the latter's liability and warrant ... a reduction in reparation." In *S.S. "Wimbledon"* (see footnote 34 above), p. 31, a question arose as to whether there had been any contribution to the injury suffered as a result of the ship harbouring at Kiel for some time, following refusal of passage through the Kiel Canal, before taking an alternative course. PCIJ implicitly acknowledged that the captain's conduct could affect the amount of compensation payable, although it held that the captain had acted reasonably in the circumstances. For other examples, see Gray, *op. cit.* (footnote 432 above), p. 23.

[626] This terminology is drawn from article VI, paragraph 1, of the Convention on International Liability for Damage Caused by Space Objects.

[627] It is possible to envisage situations where the injury in question is entirely attributable to the conduct of the victim and not at all to that of the "responsible" State. Such situations are covered by the general requirement of proximate cause referred to in article 31, rather than by article 39. On questions of mitigation of damage, see paragraph (11) of the commentary to article 31.

[628] For full bibliographies, see M. Spinedi, "Crimes of State: bibliography", *International Crimes of State*, J. H. H. Weiler, A. Cassese and M. Spinedi, eds. (Berlin, De Gruyter, 1989), pp. 339–353; and N. H. B. Jørgensen, *The Responsibility of States for International Crimes* (Oxford University Press, 2000) pp. 299–314.

an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations erga omnes.[629]

The Court was there concerned to contrast the position of an injured State in the context of diplomatic protection with the position of all States in respect of the breach of an obligation towards the international community as a whole. Although no such obligation was at stake in that case, the Court's statement clearly indicates that for the purposes of State responsibility certain obligations are owed to the international community as a whole, and that by reason of "the importance of the rights involved" all States have a legal interest in their protection.

(3) On a number of subsequent occasions the Court has taken the opportunity to affirm the notion of obligations to the international community as a whole, although it has been cautious in applying it. In the *East Timor* case, the Court said that "Portugal's assertion that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character, is irreproachable".[630] At the preliminary objections stage of the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* case, it stated that "the rights and obligations enshrined by the [Genocide] Convention are rights and obligations *erga omnes*":[631] this finding contributed to its conclusion that its temporal jurisdiction over the claim was not limited to the time after which the parties became bound by the Convention.

(4) A closely related development is the recognition of the concept of peremptory norms of international law in articles 53 and 64 of the 1969 Vienna Convention. These provisions recognize the existence of substantive norms of a fundamental character, such that no derogation from them is permitted even by treaty.[632]

(5) From the first it was recognized that these developments had implications for the secondary rules of State responsibility which would need to be reflected in some way in the articles. Initially, it was thought this could be done by reference to a category of "international crimes of State", which would be contrasted with all other cases of internationally wrongful acts ("international delicts").[633] There has been, however, no development of penal consequences for States of breaches of these fundamental norms. For example, the award of punitive damages is not recognized in international law even in relation to serious breaches of obligations arising under peremptory norms. In accordance with article 34, the function of damages is essentially compensatory.[634] Overall, it remains the case, as the International Military Tribunal said in 1946, that "[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced".[635]

(6) In line with this approach, despite the trial and conviction by the Nuremberg and Tokyo Military Tribunals of individual government officials for criminal acts committed in their official capacity, neither Germany nor Japan were treated as "criminal" by the instruments creating these tribunals.[636] As to more recent international practice, a similar approach underlies the establishment of the *ad hoc* tribunals for Yugoslavia and Rwanda by the Security Council. Both tribunals are concerned only with the prosecution of individuals.[637] In its decision relating to a *subpoena duces tecum* in the *Blaskić* case, the Appeals Chamber of the International Tribunal for the Former Yugoslavia stated that "[u]nder present international law it is clear that States, by definition, cannot be the subject of criminal sanctions akin to those provided for in national criminal systems".[638] The Rome Statute of the International Criminal Court likewise establishes jurisdiction over the "most serious crimes of concern to the international community as a whole" (preamble), but limits this jurisdiction to "natural persons" (art. 25, para. 1). The same article specifies that no provision of the Statute "relating to individual criminal responsibility shall affect the responsibility of States under international law" (para. 4).[639]

(7) Accordingly, the present articles do not recognize the existence of any distinction between State "crimes" and "delicts" for the purposes of Part One. On the other hand, it is necessary for the articles to reflect that there are certain *consequences* flowing from the basic concepts of peremptory norms of general international law and obligations to the international community as a whole within the field of State responsibility. Whether or not peremptory norms of general international law and obligations to the international community as a whole are aspects of a single basic idea, there is at the very least substantial overlap between them. The examples which ICJ has given of

[629] *Barcelona Traction* (see footnote 25 above), p. 32, para. 33. See M. Ragazzi, *The Concept of International Obligations* Erga Omnes (Oxford, Clarendon Press, 1997).

[630] See footnote 54 above.

[631] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections* (see footnote 54 above), p. 616, para. 31.

[632] See article 26 and commentary.

[633] See *Yearbook … 1976*, vol. II (Part Two), pp. 95–122, especially paras. (6)–(34). See also paragraph (5) of the commentary to article 12.

[634] See paragraph (4) of the commentary to article 36.

[635] International Military Tribunal (Nuremberg), judgement of 1 October 1946, reprinted in AJIL (see footnote 321 above), p. 221.

[636] This despite the fact that the London Charter of 1945 specifically provided for the condemnation of a "group or organization" as "criminal"; see Charter of the International Military Tribunal, Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, annex, United Nations, Treaty Series, vol. 82, No. 251, p. 279, arts. 9 and 10.

[637] See, respectively, articles 1 and 6 of the statute of the International Tribunal for the Former Yugoslavia; and articles 1 and 7 of the statute of the International Tribunal for Rwanda (footnote 257 above).

[638] *Prosecutor* v. *Blaskić*, International Tribunal for the Former Yugoslavia, Case IT-95-14-AR 108 *bis*, ILR, vol. 110, p. 688, at p. 698, para. 25 (1997). Cf. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections* (footnote 54 above), in which neither of the parties treated the proceedings as being criminal in character. See also paragraph (6) of the commentary to article 12.

[639] See also article 10: "Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute."

obligations towards the international community as a whole[640] all concern obligations which, it is generally accepted, arise under peremptory norms of general international law. Likewise the examples of peremptory norms given by the Commission in its commentary to what became article 53 of the 1969 Vienna Convention[641] involve obligations to the international community as a whole. But there is at least a difference in emphasis. While peremptory norms of general international law focus on the scope and priority to be given to a certain number of fundamental obligations, the focus of obligations to the international community as a whole is essentially on the legal interest of all States in compliance—i.e. in terms of the present articles, in being entitled to invoke the responsibility of any State in breach. Consistently with the difference in their focus, it is appropriate to reflect the consequences of the two concepts in two distinct ways. First, serious breaches of obligations arising under peremptory norms of general international law can attract additional consequences, not only for the responsible State but for all other States. Secondly, all States are entitled to invoke responsibility for breaches of obligations to the international community as a whole. The first of these propositions is the concern of the present chapter; the second is dealt with in article 48.

### *Article 40. Application of this chapter*

**1. This chapter applies to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law.**

**2. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation.**

#### *Commentary*

(1) Article 40 serves to define the scope of the breaches covered by the chapter. It establishes two criteria in order to distinguish "serious breaches of obligations under peremptory norms of general international law" from other types of breaches. The first relates to the character of the obligation breached, which must derive from a peremptory norm of general international law. The second qualifies the intensity of the breach, which must have been serious in nature. Chapter III only applies to those violations of international law that fulfil both criteria.

(2) The first criterion relates to the character of the obligation breached. In order to give rise to the application of this chapter, a breach must concern an obligation arising under a peremptory norm of general international law. In accordance with article 53 of the 1969 Vienna Convention, a peremptory norm of general international law is one which is:

> accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

The concept of peremptory norms of general international law is recognized in international practice, in the jurisprudence of international and national courts and tribunals and in legal doctrine.[642]

(3) It is not appropriate to set out examples of the peremptory norms referred to in the text of article 40 itself, any more than it was in the text of article 53 of the 1969 Vienna Convention. The obligations referred to in article 40 arise from those substantive rules of conduct that prohibit what has come to be seen as intolerable because of the threat it presents to the survival of States and their peoples and the most basic human values.

(4) Among these prohibitions, it is generally agreed that the prohibition of aggression is to be regarded as peremptory. This is supported, for example, by the Commission's commentary to what was to become article 53,[643] uncontradicted statements by Governments in the course of the Vienna Conference on the Law of Treaties,[644] the submissions of both parties in the *Military and Paramilitary Activities in and against Nicaragua* case and the Court's own position in that case.[645] There also seems to be widespread agreement with other examples listed in the Commission's commentary to article 53: viz. the prohibitions against slavery and the slave trade, genocide, and racial discrimination and apartheid. These practices have been prohibited in widely ratified international treaties and conventions admitting of no exception. There was general agreement among Governments as to the peremptory character of these prohibitions at the Vienna Conference. As to the peremptory character of the prohibition against

[640] According to ICJ, obligations *erga omnes* "derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination": *Barcelona Traction* (see footnote 25 above), at p. 32, para. 34. See also *East Timor* (footnote 54 above); *Legality of the Threat or Use of Nuclear Weapons* (*ibid.*); and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections* (*ibid.*).

[641] The Commission gave the following examples of treaties which would violate the article due to conflict with a peremptory norm of general international law, or a rule of *jus cogens*: "(*a*) a treaty contemplating an unlawful use of force contrary to the principles of the Charter, (*b*) a treaty contemplating the performance of any other act criminal under international law, and (*c*) a treaty contemplating or conniving at the commission of such acts, such as trade in slaves, piracy or genocide, in the suppression of which every State is called upon to co-operate … treaties violating human rights, the equality of States or the principle of self-determination were mentioned as other possible examples", *Yearbook … 1966*, vol. II, p. 248.

[642] For further discussion of the requirements for identification of a norm as peremptory, see paragraph (5) of the commentary to article 26, with selected references to the case law and literature.

[643] *Yearbook … 1966*, vol. II, pp. 247–249.

[644] In the course of the conference, a number of Governments characterized as peremptory the prohibitions against aggression and the illegal use of force: see *Official Records of the United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March to 24 May 1968, summary records of the plenary meeting and of the meetings of the Committee of the Whole* (United Nations publication, Sales No. E.68.V.7), 52nd meeting, paras. 3, 31 and 43; 53rd meeting, paras. 4, 9, 15, 16, 35, 48, 59 and 69; 54th meeting, paras. 9, 41, 46 and 55; 55th meeting, paras. 31 and 42; and 56th meeting, paras. 6, 20, 29 and 51.

[645] *Military and Paramilitary Activities in and against Nicaragua* (see footnote 36 above), pp. 100–101, para. 190; see also the separate opinion of magistrate Nagendra Singh (president), p. 153.

genocide, this is supported by a number of decisions by national and international courts.[646]

(5) Although not specifically listed in the Commission's commentary to article 53 of the 1969 Vienna Convention, the peremptory character of certain other norms seems also to be generally accepted. This applies to the prohibition against torture as defined in article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The peremptory character of this prohibition has been confirmed by decisions of international and national bodies.[647] In the light of the description by ICJ of the basic rules of international humanitarian law applicable in armed conflict as "intransgressible" in character, it would also seem justified to treat these as peremptory.[648] Finally, the obligation to respect the right of self-determination deserves to be mentioned. As the Court noted in the *East Timor* case, "[t]he principle of self-determination ... is one of the essential principles of contemporary international law", which gives rise to an obligation to the international community as a whole to permit and respect its exercise.[649]

(6) It should be stressed that the examples given above may not be exhaustive. In addition, article 64 of the 1969 Vienna Convention contemplates that new peremptory norms of general international law may come into existence through the processes of acceptance and recognition by the international community of States as a whole, as referred to in article 53. The examples given here are thus without prejudice to existing or developing rules of international law which fulfil the criteria for peremptory norms under article 53.

(7) Apart from its limited scope in terms of the comparatively small number of norms which qualify as peremptory, article 40 applies a further limitation for the purposes of the chapter, viz. that the breach should itself have been "serious". A "serious" breach is defined in paragraph 2 as one which involves "a gross or systematic failure by the responsible State to fulfil the obligation" in question. The word "serious" signifies that a certain order of magnitude of violation is necessary in order not to trivialize the breach and it is not intended to suggest that any violation of these obligations is not serious or is somehow excusable. But relatively less serious cases of breach of peremptory norms can be envisaged, and it is necessary to limit the scope of this chapter to the more serious or systematic breaches. Some such limitation is supported by State practice. For example, when reacting against breaches of international law, States have often stressed their systematic, gross or egregious nature. Similarly, international complaint procedures, for example in the field of human rights, attach different consequences to systematic breaches, e.g. in terms of the non-applicability of the rule of exhaustion of local remedies.[650]

(8) To be regarded as systematic, a violation would have to be carried out in an organized and deliberate way. In contrast, the term "gross" refers to the intensity of the violation or its effects; it denotes violations of a flagrant nature, amounting to a direct and outright assault on the values protected by the rule. The terms are not of course mutually exclusive; serious breaches will usually be both systematic and gross. Factors which may establish the seriousness of a violation would include the intent to violate the norm; the scope and number of individual violations; and the gravity of their consequences for the victims. It must also be borne in mind that some of the peremptory norms in question, most notably the prohibitions of aggression and genocide, by their very nature require an intentional violation on a large scale.[651]

(9) Article 40 does not lay down any procedure for determining whether or not a serious breach has been committed. It is not the function of the articles to establish new institutional procedures for dealing with individual cases, whether they arise under chapter III of Part Two or otherwise. Moreover, the serious breaches dealt with in this chapter are likely to be addressed by the competent international organizations, including the Security Council and the General Assembly. In the case of aggression, the Security Council is given a specific role by the Charter of the United Nations.

### *Article 41. Particular consequences of a serious breach of an obligation under this chapter*

**1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40.**

[646] See, for example, ICJ in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures* (footnote 412 above), pp. 439–440; *Counter-Claims* (footnote 413 above), p. 243; and the District Court of Jerusalem in the *Attorney-General of the Government of Israel* v. *Adolf Eichmann* case, ILR, vol. 36, p. 5 (1961).

[647] Cf. the United States Court of Appeals, Ninth Circuit, in *Siderman de Blake and Others* v. *The Republic of Argentina and Others*, ILR, vol. 103, p. 455, at p. 471 (1992); the United Kingdom Court of Appeal in *Al Adsani* v. *Government of Kuwait and Others*, ILR, vol. 107, p. 536, at pp. 540–541 (1996); and the United Kingdom House of Lords in *Pinochet* (footnote 415 above), pp. 841 and 881. Cf. the United States Court of Appeals, Second Circuit, in *Filartiga* v. *Pena-Irala*, ILR, vol. 77, p. 169, at pp. 177–179 (1980).

[648] *Legality of the Threat or Use of Nuclear Weapons* (see footnote 54 above), p. 257, para. 79.

[649] *East Timor* (*ibid.*). See Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, General Assembly resolution 2625 (XXV), annex, fifth principle.

[650] See the *Ireland* v. *the United Kingdom* case (footnote 236 above), para. 159; cf., e.g., the procedure established under Economic and Social Council resolution 1503 (XLVIII), which requires a "consistent pattern of gross and reliably attested violations of human rights".

[651] At its twenty-second session, the Commission proposed the following examples as cases denominated as "international crimes":

"(*a*) a serious breach of an international obligation of essential importance for the maintenance of international peace and security, such as that prohibiting aggression;

"(*b*) a serious breach of an international obligation of essential importance for safeguarding the right of self-determination of peoples, such as that prohibiting the establishment or maintenance by force of colonial domination;

"(*c*) a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and *apartheid*;

"(*d*) a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas."

*Yearbook … 1976*, vol. II (Part Two), pp. 95–96.

**2. No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation.**

**3. This article is without prejudice to the other consequences referred to in this Part and to such further consequences that a breach to which this chapter applies may entail under international law.**

*Commentary*

(1) Article 41 sets out the particular consequences of breaches of the kind and gravity referred to in article 40. It consists of three paragraphs. The first two prescribe special legal obligations of States faced with the commission of "serious breaches" in the sense of article 40, the third takes the form of a saving clause.

(2) Pursuant to *paragraph 1* of article 41, States are under a positive duty to cooperate in order to bring to an end serious breaches in the sense of article 40. Because of the diversity of circumstances which could possibly be involved, the provision does not prescribe in detail what form this cooperation should take. Cooperation could be organized in the framework of a competent international organization, in particular the United Nations. However, paragraph 1 also envisages the possibility of non-institutionalized cooperation.

(3) Neither does paragraph 1 prescribe what measures States should take in order to bring to an end serious breaches in the sense of article 40. Such cooperation must be through lawful means, the choice of which will depend on the circumstances of the given situation. It is, however, made clear that the obligation to cooperate applies to States whether or not they are individually affected by the serious breach. What is called for in the face of serious breaches is a joint and coordinated effort by all States to counteract the effects of these breaches. It may be open to question whether general international law at present prescribes a positive duty of cooperation, and paragraph 1 in that respect may reflect the progressive development of international law. But in fact such cooperation, especially in the framework of international organizations, is carried out already in response to the gravest breaches of international law and it is often the only way of providing an effective remedy. Paragraph 1 seeks to strengthen existing mechanisms of cooperation, on the basis that all States are called upon to make an appropriate response to the serious breaches referred to in article 40.

(4) Pursuant to *paragraph 2* of article 41, States are under a duty of abstention, which comprises two obligations, first, not to recognize as lawful situations created by serious breaches in the sense of article 40 and, secondly, not to render aid or assistance in maintaining that situation.

(5) The first of these two obligations refers to the obligation of collective non-recognition by the international community as a whole of the legality of situations resulting directly from serious breaches in the sense of article 40.[652] The obligation applies to "situations" created by these breaches, such as, for example, attempted acquisition of sovereignty over territory through the denial of the right of self-determination of peoples. It not only refers to the formal recognition of these situations, but also prohibits acts which would imply such recognition.

(6) The existence of an obligation of non-recognition in response to serious breaches of obligations arising under peremptory norms already finds support in international practice and in decisions of ICJ. The principle that territorial acquisitions brought about by the use of force are not valid and must not be recognized found a clear expression during the Manchurian crisis of 1931–1932, when the Secretary of State, Henry Stimson, declared that the United States of America—joined by a large majority of members of the League of Nations—would not:

> admit the legality of any situation de facto nor ... recognize any treaty or agreement entered into between those Governments, or agents thereof, which may impair the ... sovereignty, the independence or the territorial and administrative integrity of the Republic of China, ... [nor] recognize any situation, treaty or agreement which may be brought about by means contrary to the covenants and obligations of the Pact of Paris of August 27, 1928.[653]

The Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations affirms this principle by stating unequivocally that States shall not recognize as legal any acquisition of territory brought about by the use of force.[654] As ICJ held in *Military and Paramilitary Activities in and against Nicaragua*, the unanimous consent of States to this declaration "may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves".[655]

(7) An example of the practice of non-recognition of acts in breach of peremptory norms is provided by the reaction of the Security Council to the Iraqi invasion of Kuwait in 1990. Following the Iraqi declaration of a "comprehensive and eternal merger" with Kuwait, the Security Council, in resolution 662 (1990) of 9 August 1990, decided that the annexation had "no legal validity, and is considered null and void", and called upon all States, international organizations and specialized agencies not to recognize that annexation and to refrain from any action or dealing that might be interpreted as a recognition of it, whether direct or indirect. In fact, no State recognized the

[652] This has been described as "an essential legal weapon in the fight against grave breaches of the basic rules of international law" (C. Tomuschat, "International crimes by States: an endangered species?", *International Law: Theory and Practice — Essays in Honour of Eric Suy*, K. Wellens, ed. (The Hague, Martinus Nijhoff, 1998), p. 253, at p. 259.

[653] Secretary of State's note to the Chinese and Japanese Governments, in Hackworth, *Digest of International Law* (Washington, D.C., United States Government Printing Office, 1940), vol. I, p. 334; endorsed by Assembly resolutions of 11 March 1932, *League of Nations Official Journal*, March 1932, Special Supplement No. 101, p. 87. For a review of earlier practice relating to collective non-recognition, see J. Dugard, *Recognition and the United Nations* (Cambridge, Grotius, 1987), pp. 24–27.

[654] General Assembly resolution 2625 (XXV), annex, first principle.

[655] *Military and Paramilitary Activities in and against Nicaragua* (see footnote 36 above), at p. 100, para. 188.

legality of the purported annexation, the effects of which were subsequently reversed.

(8) As regards the denial by a State of the right of self-determination of peoples, the advisory opinion of ICJ in the *Namibia* case is similarly clear in calling for a non-recognition of the situation.[656] The same obligations are reflected in the resolutions of the Security Council and General Assembly concerning the situation in Rhodesia[657] and the Bantustans in South Africa.[658] These examples reflect the principle that where a serious breach in the sense of article 40 has resulted in a situation that might otherwise call for recognition, this has nonetheless to be withheld. Collective non-recognition would seem to be a prerequisite for any concerted community response against such breaches and marks the minimum necessary response by States to the serious breaches referred to in article 40.

(9) Under article 41, paragraph 2, no State shall recognize the situation created by the serious breach as lawful. This obligation applies to all States, including the responsible State. There have been cases where the responsible State has sought to consolidate the situation it has created by its own "recognition". Evidently, the responsible State is under an obligation not to recognize or sustain the unlawful situation arising from the breach. Similar considerations apply even to the injured State: since the breach by definition concerns the international community as a whole, waiver or recognition induced from the injured State by the responsible State cannot preclude the international community interest in ensuring a just and appropriate settlement. These conclusions are consistent with article 30 on cessation and are reinforced by the peremptory character of the norms in question.[659]

(10) The consequences of the obligation of non-recognition are, however, not unqualified. In the *Namibia* advisory opinion the Court, despite holding that the illegality of the situation was opposable *erga omnes* and could not be recognized as lawful even by States not members of the United Nations, said that:

> the non-recognition of South Africa's administration of the Territory should not result in depriving the people of Namibia of any advantages derived from international cooperation. In particular, while official acts performed by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid, this invalidity cannot be extended to those acts, such as, for instance, the registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the Territory.[660]

Both the principle of non-recognition and this qualification to it have been applied, for example, by the European Court of Human Rights.[661]

(11) The second obligation contained in paragraph 2 prohibits States from rendering aid or assistance in maintaining the situation created by a serious breach in the sense of article 40. This goes beyond the provisions dealing with aid or assistance in the commission of an internationally wrongful act, which are covered by article 16. It deals with conduct "after the fact" which assists the responsible State in maintaining a situation "opposable to all States in the sense of barring *erga omnes* the legality of a situation which is maintained in violation of international law".[662] It extends beyond the commission of the serious breach itself to the maintenance of the situation created by that breach, and it applies whether or not the breach itself is a continuing one. As to the elements of "aid or assistance", article 41 is to be read in connection with article 16. In particular, the concept of aid or assistance in article 16 presupposes that the State has "knowledge of the circumstances of the internationally wrongful act". There is no need to mention such a requirement in article 41, paragraph 2, as it is hardly conceivable that a State would not have notice of the commission of a serious breach by another State.

(12) In some respects, the prohibition contained in paragraph 2 may be seen as a logical extension of the duty of non-recognition. However, it has a separate scope of application insofar as actions are concerned which would not imply recognition of the situation created by serious breaches in the sense of article 40. This separate existence is confirmed, for example, in the resolutions of the Security Council prohibiting any aid or assistance in maintaining the illegal apartheid regime in South Africa or Portuguese colonial rule.[663] Just as in the case of the duty of non-recognition, these resolutions would seem to express a general idea applicable to all situations created by serious breaches in the sense of article 40.

(13) Pursuant to *paragraph 3*, article 41 is without prejudice to the other consequences elaborated in Part Two and to possible further consequences that a serious breach in the sense of article 40 may entail. The purpose of this paragraph is twofold. First, it makes it clear that a serious breach in the sense of article 40 entails the legal consequences stipulated for all breaches in chapters I and II of Part Two. Consequently, a serious breach in the sense of article 40 gives rise to an obligation, on behalf of the responsible State, to cease the wrongful act, to continue performance and, if appropriate, to give guarantees and assurances of non-repetition. By the same token, it entails a duty to make reparation in conformity with the rules set out in chapter II of this Part. The incidence of these obligations will no doubt be affected by the gravity of the breach in question, but this is allowed for in the actual language of the relevant articles.

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[656] *Namibia* case (see footnote 176 above), where the Court held that "the termination of the Mandate and the declaration of the illegality of South Africa's presence in Namibia are opposable to all States in the sense of barring *erga omnes* the legality of a situation which is maintained in violation of international law" (p. 56, para. 126).

[657] Cf. Security Council resolution 216 (1965) of 12 November 1965.

[658] See, e.g., General Assembly resolution 31/6 A of 26 October 1976, endorsed by the Security Council in its resolution 402 (1976) of 22 December 1976; Assembly resolutions 32/105 N of 14 December 1977 and 34/93 G of 12 December 1979; see also the statements of 21 September 1979 and 15 December 1981 issued by the respective presidents of the Security Council in reaction to the "creation" of Venda and Ciskei (S/13549 and S/14794).

[659] See also paragraph (7) of the commentary to article 20 and paragraph (4) of the commentary to article 45.

[660] *Namibia* case (see footnote 176 above), p. 56, para. 125.

[661] *Loizidou, Merits* (see footnote 160 above), p. 2216; *Cyprus* v. *Turkey* (see footnote 247 above), paras. 89–98.

[662] *Namibia* case (see footnote 176 above), p. 56, para. 126.

[663] See, e.g., Security Council resolutions 218 (1965) of 23 November 1965 on the Portuguese colonies, and 418 (1977) of 4 November 1977 and 569 (1985) of 26 July 1985 on South Africa.

(14) Secondly, paragraph 3 allows for such further consequences of a serious breach as may be provided for by international law. This may be done by the individual primary rule, as in the case of the prohibition of aggression. Paragraph 3 accordingly allows that international law may recognize additional legal consequences flowing from the commission of a serious breach in the sense of article 40. The fact that such further consequences are not expressly referred to in chapter III does not prejudice their recognition in present-day international law, or their further development. In addition, paragraph 3 reflects the conviction that the legal regime of serious breaches is itself in a state of development. By setting out certain basic legal consequences of serious breaches in the sense of article 40, article 41 does not intend to preclude the future development of a more elaborate regime of consequences entailed by such breaches.

## Part Three

## THE IMPLEMENTATION OF THE INTERNATIONAL RESPONSIBILITY OF A STATE

Part Three deals with the implementation of State responsibility, i.e. with giving effect to the obligations of cessation and reparation which arise for a responsible State under Part Two by virtue of its commission of an internationally wrongful act. Although State responsibility arises under international law independently of its invocation by another State, it is still necessary to specify what other States faced with a breach of an international obligation may do, what action they may take in order to secure the performance of the obligations of cessation and reparation on the part of the responsible State. This, sometimes referred to as the *mise-en-oeuvre* of State responsibility, is the subject matter of Part Three. Part Three consists of two chapters. Chapter I deals with the invocation of State responsibility by other States and with certain associated questions. Chapter II deals with countermeasures taken in order to induce the responsible State to cease the conduct in question and to provide reparation.

## Chapter I

## INVOCATION OF THE RESPONSIBILITY OF A STATE

### *Commentary*

(1) Part One of the articles identifies the internationally wrongful act of a State generally in terms of the breach of any international obligation of that State. Part Two defines the consequences of internationally wrongful acts in the field of responsibility as obligations of the responsible State, not as rights of any other State, person or entity. Part Three is concerned with the implementation of State responsibility, i.e. with the entitlement of other States to invoke the international responsibility of the responsible State and with certain modalities of such invocation. The rights that other persons or entities may have arising from a breach of an international obligation are preserved by article 33, paragraph 2.

(2) Central to the invocation of responsibility is the concept of the injured State. This is the State whose individual right has been denied or impaired by the internationally wrongful act or which has otherwise been particularly affected by that act. This concept is introduced in article 42 and various consequences are drawn from it in other articles of this chapter. In keeping with the broad range of international obligations covered by the articles, it is necessary to recognize that a broader range of States may have a legal interest in invoking responsibility and ensuring compliance with the obligation in question. Indeed, in certain situations, all States may have such an interest, even though none of them is individually or specially affected by the breach.[664] This possibility is recognized in article 48. Articles 42 and 48 are couched in terms of the entitlement of States to invoke the responsibility of another State. They seek to avoid problems arising from the use of possibly misleading terms such as "direct" versus "indirect" injury or "objective" versus "subjective" rights.

(3) Although article 42 is drafted in the singular ("an injured State"), more than one State may be injured by an internationally wrongful act and be entitled to invoke responsibility as an injured State. This is made clear by article 46. Nor are articles 42 and 48 mutually exclusive. Situations may well arise in which one State is "injured" in the sense of article 42, and other States are entitled to invoke responsibility under article 48.

(4) Chapter I also deals with a number of related questions: the requirement of notice if a State wishes to invoke the responsibility of another (art. 43), certain aspects of the admissibility of claims (art. 44), loss of the right to invoke responsibility (art. 45), and cases where the responsibility of more than one State may be invoked in relation to the same internationally wrongful act (art. 47).

(5) Reference must also be made to article 55, which makes clear the residual character of the articles. In addition to giving rise to international obligations for States, special rules may also determine which other State or States are entitled to invoke the international responsibility arising from their breach, and what remedies they may seek. This was true, for example, of article 396 of the Treaty of Versailles, which was the subject of the decision in the *S.S. "Wimbledon"* case.[665] It is also true of article 33 of the European Convention on Human Rights. It will be a matter of interpretation in each case whether such provisions are intended to be exclusive, i.e. to apply as a *lex specialis*.

[664] Cf. the statement by ICJ that "all States can be held to have a legal interest" as concerns breaches of obligations *erga omnes*, *Barcelona Traction* (footnote 25 above), p. 32, para. 33, cited in paragraph (2) of the commentary to chapter III of Part Two.

[665] Four States there invoked the responsibility of Germany, at least one of which, Japan, had no specific interest in the voyage of the *S.S. "Wimbledon"* (see footnote 34 above).

### *Article 42. Invocation of responsibility by an injured State*

**A State is entitled as an injured State to invoke the responsibility of another State if the obligation breached is owed to:**

**(*a*) that State individually; or**

**(*b*) a group of States including that State, or the international community as a whole, and the breach of the obligation:**

**(i) specially affects that State; or**

**(ii) is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation.**

*Commentary*

(1) Article 42 provides that the implementation of State responsibility is in the first place an entitlement of the "injured State". It defines this term in a relatively narrow way, drawing a distinction between injury to an individual State or possibly a small number of States and the legal interests of several or all States in certain obligations established in the collective interest. The latter are dealt with in article 48.

(2) This chapter is expressed in terms of the invocation by a State of the responsibility of another State. For this purpose, invocation should be understood as taking measures of a relatively formal character, for example, the raising or presentation of a claim against another State or the commencement of proceedings before an international court or tribunal. A State does not invoke the responsibility of another State merely because it criticizes that State for a breach and calls for observance of the obligation, or even reserves its rights or protests. For the purpose of these articles, protest as such is not an invocation of responsibility; it has a variety of forms and purposes and is not limited to cases involving State responsibility. There is in general no requirement that a State which wishes to protest against a breach of international law by another State or remind it of its international responsibilities in respect of a treaty or other obligation by which they are both bound should establish any specific title or interest to do so. Such informal diplomatic contacts do not amount to the invocation of responsibility unless and until they involve specific claims by the State concerned, such as for compensation for a breach affecting it, or specific action such as the filing of an application before a competent international tribunal,[666] or even the taking of countermeasures. In order to take such steps, i.e. to invoke responsibility in the sense of the articles, some more specific entitlement is needed. In particular, for a State to invoke responsibility on its own account it should have a specific right to do so, e.g. a right of action specifically conferred by a treaty,[667] or it must be considered an injured State. The purpose of article 42 is to define this latter category.

(3) A State which is injured in the sense of article 42 is entitled to resort to all means of redress contemplated in the articles. It can invoke the appropriate responsibility pursuant to Part Two. It may also—as is clear from the opening phrase of article 49—resort to countermeasures in accordance with the rules laid down in chapter II of this Part. The situation of an injured State should be distinguished from that of any other State which may be entitled to invoke responsibility, e.g. under article 48 which deals with the entitlement to invoke responsibility in some shared general interest. This distinction is clarified by the opening phrase of article 42, "A State is entitled as an injured State to invoke the responsibility".

(4) The definition in article 42 is closely modelled on article 60 of the 1969 Vienna Convention, although the scope and purpose of the two provisions are different. Article 42 is concerned with any breach of an international obligation of whatever character, whereas article 60 is concerned with breach of treaties. Moreover, article 60 is concerned exclusively with the right of a State party to a treaty to invoke a material breach of that treaty by another party as grounds for its suspension or termination. It is not concerned with the question of responsibility for breach of the treaty.[668] This is why article 60 is restricted to "material" breaches of treaties. Only a material breach justifies termination or suspension of the treaty, whereas in the context of State responsibility any breach of a treaty gives rise to responsibility irrespective of its gravity. Despite these differences, the analogy with article 60 is justified. Article 60 seeks to identify the States parties to a treaty which are entitled to respond individually and in their own right to a material breach by terminating or suspending it. In the case of a bilateral treaty, the right can only be that of the other State party, but in the case of a multilateral treaty article 60, paragraph 2, does not allow every other State to terminate or suspend the treaty for material breach. The other State must be specially affected by the breach, or at least individually affected in that the breach necessarily undermines or destroys the basis for its own further performance of the treaty.

(5) In parallel with the cases envisaged in article 60 of the 1969 Vienna Convention, three cases are identified in article 42. In the first case, in order to invoke the responsibility of another State as an injured State, a State must have an individual right to the performance of an obligation, in the way that a State party to a bilateral treaty has *vis-à-vis* the other State party (subparagraph (*a*)). Secondly, a State may be specially affected by the breach of an obligation to which it is a party, even though it cannot be said that the obligation is owed to it individually (subparagraph (*b*) (i)). Thirdly, it may be the case that performance of the obligation by the responsible State is a necessary condition of its performance by all the other States (subparagraph (*b*) (ii)); this is the so-called "integral" or "inter-

[666] An analogous distinction is drawn by article 27, paragraph 2, of the Convention on the Settlement of Investment Disputes between States and Nationals of other States, which distinguishes between the bringing of an international claim in the field of diplomatic protection and "informal diplomatic exchanges for the sole purpose of facilitating a settlement of the dispute".

[667] In relation to article 42, such a treaty right could be considered a *lex specialis*: see article 55 and commentary.

[668] Cf. the 1969 Vienna Convention, art. 73.

dependent" obligation.[669] In each of these cases, the possible suspension or termination of the obligation or of its performance by the injured State may be of little value to it as a remedy. Its primary interest may be in the restoration of the legal relationship by cessation and reparation.

(6) Pursuant to *subparagraph* (a) of article 42, a State is "injured" if the obligation breached was owed to it individually. The expression "individually" indicates that in the circumstances, performance of the obligation was owed to that State. This will necessarily be true of an obligation arising under a bilateral treaty between the two States parties to it, but it will also be true in other cases, e.g. of a unilateral commitment made by one State to another. It may be the case under a rule of general international law: thus, for example, rules concerning the non-navigational uses of an international river which may give rise to individual obligations as between one riparian State and another. Or it may be true under a multilateral treaty where particular performance is incumbent under the treaty as between one State party and another. For example, the obligation of the receiving State under article 22 of the Vienna Convention on Diplomatic Relations to protect the premises of a mission is owed to the sending State. Such cases are to be contrasted with situations where performance of the obligation is owed generally to the parties to the treaty at the same time and is not differentiated or individualized. It will be a matter for the interpretation and application of the primary rule to determine into which of the categories an obligation comes. The following discussion is illustrative only.

(7) An obvious example of cases coming within the scope of subparagraph (*a*) is a bilateral treaty relationship. If one State violates an obligation the performance of which is owed specifically to another State, the latter is an "injured State" in the sense of article 42. Other examples include binding unilateral acts by which one State assumes an obligation *vis-à-vis* another State; or the case of a treaty establishing obligations owed to a third State not party to the treaty.[670] If it is established that the beneficiaries of the promise or the stipulation in favour of a third State were intended to acquire actual rights to performance of the obligation in question, they will be injured by its breach. Another example is a binding judgement of an international court or tribunal imposing obligations on one State party to the litigation for the benefit of the other party.[671]

(8) In addition, subparagraph (*a*) is intended to cover cases where the performance of an obligation under a multilateral treaty or customary international law is owed to one particular State. The scope of subparagraph (*a*) in this respect is different from that of article 60, paragraph 1, of the 1969 Vienna Convention, which relies on the formal criterion of bilateral as compared with multilateral treaties. But although a multilateral treaty will characteristically establish a framework of rules applicable to all the States parties, in certain cases its performance in a given situation involves a relationship of a bilateral character between two parties. Multilateral treaties of this kind have often been referred to as giving rise to " 'bundles' of bilateral relations".[672]

(9) The identification of one particular State as injured by a breach of an obligation under the Vienna Convention on Diplomatic Relations does not exclude that all States parties may have an interest of a general character in compliance with international law and in the continuation of international institutions and arrangements which have been built up over the years. In the *United States Diplomatic and Consular Staff in Tehran* case, after referring to the "fundamentally unlawful character" of the Islamic Republic of Iran's conduct in participating in the detention of the diplomatic and consular personnel, the Court drew:

> the attention of the entire international community, of which Iran itself has been a member since time immemorial, to the irreparable harm that may be caused by events of the kind now before the Court. Such events cannot fail to undermine the edifice of law carefully constructed by mankind over a period of centuries, the maintenance of which is vital for the security and well-being of the complex international community of the present day, to which it is more essential than ever that the rules developed to ensure the ordered progress of relations between its members should be constantly and scrupulously respected.[673]

(10) Although discussion of multilateral obligations has generally focused on those arising under multilateral treaties, similar considerations apply to obligations under rules of customary international law. For example, the rules of general international law governing the diplomatic or consular relations between States establish bilateral relations between particular receiving and sending States, and violations of these obligations by a particular receiving State injure the sending State to which performance was owed in the specific case.

(11) *Subparagraph* (b) deals with injury arising from violations of collective obligations, i.e. obligations that apply between more than two States and whose performance in the given case is not owed to one State individually, but to a group of States or even the international community as a whole. The violation of these obligations only injures any particular State if additional requirements are met. In using the expression "group of States", article 42, subparagraph (*b*), does not imply that the group has any separate existence or that it has separate legal personality. Rather, the term is intended to refer to a group of States, consisting of all or a considerable number of States in the world or in a given region, which have combined to achieve some collective purpose and which may be

[669] The notion of "integral" obligations was developed by Fitzmaurice as Special Rapporteur on the Law of Treaties: see *Yearbook … 1957*, vol. II, p. 54. The term has sometimes given rise to confusion, being used to refer to human rights or environmental obligations which are not owed on an "all or nothing" basis. The term "interdependent obligations" may be more appropriate.

[670] Cf. the 1969 Vienna Convention, art. 36.

[671] See, e.g., Article 59 of the Statute of ICJ.

[672] See, e.g., K. Sachariew, "State responsibility for multilateral treaty violations: identifying the 'injured State' and its legal status", *Netherlands International Law Review*, vol. 35, No. 3 (1988), p. 273, at pp. 277–278; B. Simma, "Bilateralism and community interest in the law of State responsibility", *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne*, Y. Dinstein, ed. (Dordrecht, Martinus Nijhoff, 1989), p. 821, at p. 823; C. Annacker, "The legal régime of *erga omnes* obligations in international law", *Austrian Journal of Public and International Law*, vol. 46, No. 2 (1994), p. 131, at p. 136; and D. N. Hutchinson, "Solidarity and breaches of multilateral treaties", BYBIL, *1988*, vol. 59, p. 151, at pp. 154–155.

[673] *United States Diplomatic and Consular Staff in Tehran* (see footnote 59 above), pp. 41–43, paras. 89 and 92.

considered for that purpose as making up a community of States of a functional character.

(12) *Subparagraph* (b) (i) stipulates that a State is injured if it is "specially affected" by the violation of a collective obligation. The term "specially affected" is taken from article 60, paragraph (2) (*b*), of the 1969 Vienna Convention. Even in cases where the legal effects of an internationally wrongful act extend by implication to the whole group of States bound by the obligation or to the international community as a whole, the wrongful act may have particular adverse effects on one State or on a small number of States. For example a case of pollution of the high seas in breach of article 194 of the United Nations Convention on the Law of the Sea may particularly impact on one or several States whose beaches may be polluted by toxic residues or whose coastal fisheries may be closed. In that case, independently of any general interest of the States parties to the Convention in the preservation of the marine environment, those coastal States parties should be considered as injured by the breach. Like article 60, paragraph (2) (*b*), of the 1969 Vienna Convention, subparagraph (*b*) (i) does not define the nature or extent of the special impact that a State must have sustained in order to be considered "injured". This will have to be assessed on a case-by-case basis, having regard to the object and purpose of the primary obligation breached and the facts of each case. For a State to be considered injured, it must be affected by the breach in a way which distinguishes it from the generality of other States to which the obligation is owed.

(13) In contrast, *subparagraph* (b) (ii) deals with a special category of obligations, the breach of which must be considered as affecting *per se* every other State to which the obligation is owed. Article 60, paragraph 2 (*c*), of the 1969 Vienna Convention recognizes an analogous category of treaties, viz. those "of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations". Examples include a disarmament treaty,[674] a nuclear-free zone treaty, or any other treaty where each party's performance is effectively conditioned upon and requires the performance of each of the others. Under article 60, paragraph 2 (*c*), any State party to such a treaty may terminate or suspend it in its relations not merely with the responsible State but generally in its relations with all the other parties.

(14) Essentially, the same considerations apply to obligations of this character for the purposes of State responsibility. The other States parties may have no interest in the termination or suspension of such obligations as distinct from continued performance, and they must all be considered as individually entitled to react to a breach. This is so whether or not any one of them is particularly affected; indeed they may all be equally affected, and none may have suffered quantifiable damage for the purposes of article 36. They may nonetheless have a strong interest in cessation and in other aspects of reparation, in particular restitution. For example, if one State party to the Antarctic Treaty claims sovereignty over an unclaimed area of Antarctica contrary to article 4 of that Treaty, the other States parties should be considered as injured thereby and as entitled to seek cessation, restitution (in the form of the annulment of the claim) and assurances of non-repetition in accordance with Part Two.

(15) The articles deal with obligations arising under international law from whatever source and are not confined to treaty obligations. In practice, interdependent obligations covered by subparagraph (*b*) (ii) will usually arise under treaties establishing particular regimes. Even under such treaties it may not be the case that just any breach of the obligation has the effect of undermining the performance of all the other States involved, and it is desirable that this subparagraph be narrow in its scope. Accordingly, a State is only considered injured under subparagraph (*b*) (ii) if the breach is of such a character as radically to affect the enjoyment of the rights or the performance of the obligations of all the other States to which the obligation is owed.

### *Article 43. Notice of claim by an injured State*

**1. An injured State which invokes the responsibility of another State shall give notice of its claim to that State.**

**2. The injured State may specify in particular:**

**(*a*) the conduct that the responsible State should take in order to cease the wrongful act, if it is continuing;**

**(*b*) what form reparation should take in accordance with the provisions of Part Two.**

*Commentary*

(1) Article 43 concerns the modalities to be observed by an injured State in invoking the responsibility of another State. The article applies to the injured State as defined in article 42, but States invoking responsibility under article 48 must also comply with its requirements.[675]

(2) Although State responsibility arises by operation of law on the commission of an internationally wrongful act by a State, in practice it is necessary for an injured State and/or other interested State(s) to respond, if they wish to seek cessation or reparation. Responses can take a variety of forms, from an unofficial and confidential reminder of the need to fulfil the obligation through formal protest, consultations, etc. Moreover, the failure of an injured State which has notice of a breach to respond may have legal consequences, including even the eventual loss of the right to invoke responsibility by waiver or acquiescence: this is dealt with in article 45.

(3) Article 43 requires an injured State which wishes to invoke the responsibility of another State to give notice of its claim to that State. It is analogous to article 65 of the 1969 Vienna Convention. Notice under article 43 need not

[674] The example given in the commentary of the Commission to what became article 60: *Yearbook … 1966*, vol. II, p. 255, document A/6309/Rev.1, para. (8).

[675] See article 48, paragraph (3), and commentary.

be in writing, nor is it a condition for the operation of the obligation to provide reparation. Moreover, the requirement of notification of the claim does not imply that the normal consequence of the non-performance of an international obligation is the lodging of a statement of claim. Nonetheless, an injured or interested State is entitled to respond to the breach and the first step should be to call the attention of the responsible State to the situation, and to call on it to take appropriate steps to cease the breach and to provide redress.

(4) It is not the function of the articles to specify in detail the form which an invocation of responsibility should take. In practice, claims of responsibility are raised at different levels of government, depending on their seriousness and on the general relations between the States concerned. In the *Certain Phosphate Lands in Nauru* case, Australia argued that Nauru's claim was inadmissible because it had "not been submitted within a reasonable time".[676] The Court referred to the fact that the claim had been raised, and not settled, prior to Nauru's independence in 1968, and to press reports that the claim had been mentioned by the new President of Nauru in his independence day speech, as well as, inferentially, in subsequent correspondence and discussions with Australian Ministers. However, the Court also noted that:

> It was only on 6 October 1983 that the President of Nauru wrote to the Prime Minister of Australia requesting him to "seek a sympathetic reconsideration of Nauru's position". [677]

The Court summarized the communications between the parties as follows:

> The Court … takes note of the fact that Nauru was officially informed, at the latest by letter of 4 February 1969, of the position of Australia on the subject of rehabilitation of the phosphate lands worked out before 1 July 1967. Nauru took issue with that position in writing only on 6 October 1983. In the meantime, however, as stated by Nauru and not contradicted by Australia, the question had on two occasions been raised by the President of Nauru with the competent Australian authorities. The Court considers that, given the nature of relations between Australia and Nauru, as well as the steps thus taken, Nauru's Application was not rendered inadmissible by passage of time. [678]

In the circumstances, it was sufficient that the respondent State was aware of the claim as a result of communications from the claimant, even if the evidence of those communications took the form of press reports of speeches or meetings rather than of formal diplomatic correspondence.

(5) When giving notice of a claim, an injured or interested State will normally specify what conduct in its view is required of the responsible State by way of cessation of any continuing wrongful act, and what form any reparation should take. Thus, *paragraph 2* (a) provides that the injured State may indicate to the responsible State what should be done in order to cease the wrongful act, if it is continuing. This indication is not, as such, binding on the responsible State. The injured State can only require the responsible State to comply with its obligations, and the legal consequences of an internationally wrongful act are not for the injured State to stipulate or define. But it may be helpful to the responsible State to know what would satisfy the injured State; this may facilitate the resolution of the dispute.

(6) *Paragraph 2* (b) deals with the question of the election of the form of reparation by the injured State. In general, an injured State is entitled to elect as between the available forms of reparation. Thus, it may prefer compensation to the possibility of restitution, as Germany did in the *Factory at Chorzów* case,[679] or as Finland eventually chose to do in its settlement of the *Passage through the Great Belt* case.[680] Or it may content itself with declaratory relief, generally or in relation to a particular aspect of its claim. On the other hand, there are cases where a State may not, as it were, pocket compensation and walk away from an unresolved situation, for example one involving the life or liberty of individuals or the entitlement of a people to their territory or to self-determination. In particular, insofar as there are continuing obligations the performance of which are not simply matters for the two States concerned, those States may not be able to resolve the situation by a settlement, just as an injured State may not be able on its own to absolve the responsible State from its continuing obligations to a larger group of States or to the international community as a whole.

(7) In the light of these limitations on the capacity of the injured State to elect the preferred form of reparation, article 43 does not set forth the right of election in an absolute form. Instead, it provides guidance to an injured State as to what sort of information it may include in its notification of the claim or in subsequent communications.

### *Article 44. Admissibility of claims*

**The responsibility of a State may not be invoked if:**

**(*a*) the claim is not brought in accordance with any applicable rule relating to the nationality of claims;**

**(*b*) the claim is one to which the rule of exhaustion of local remedies applies and any available and effective local remedy has not been exhausted.**

*Commentary*

(1) The present articles are not concerned with questions of the jurisdiction of international courts and tribunals, or in general with the conditions for the admissibility of cases brought before such courts or tribunals. Rather, they define the conditions for establishing the international responsibility of a State and for the invocation of

[676] *Certain Phosphate Lands in Nauru, Preliminary Objections* (see footnote 230 above), p. 253, para. 31.

[677] *Ibid*., p. 254, para. 35.

[678] *Ibid*., pp. 254–255, para. 36.

[679] As PCIJ noted in the *Factory at Chorzów, Jurisdiction* (see footnote 34 above), by that stage of the dispute, Germany was no longer seeking on behalf of the German companies concerned the return of the factory in question or of its contents (p. 17).

[680] In the *Passage through the Great Belt (Finland* v. *Denmark), Provisional Measures, Order of 29 July 1991, I.C.J. Reports 1991*, p. 12, ICJ did not accept Denmark's argument as to the impossibility of restitution if, on the merits, it was found that the construction of the bridge across the Great Belt would result in a violation of Denmark's international obligations. For the terms of the eventual settlement, see M. Koskenniemi, "L'affaire du passage par le Grand-Belt", *Annuaire français de droit international*, vol. 38 (1992), p. 905, at p. 940.

that responsibility by another State or States. Thus, it is not the function of the articles to deal with such questions as the requirement for exhausting other means of peaceful settlement before commencing proceedings, or such doctrines as litispendence or election as they may affect the jurisdiction of one international tribunal *vis-à-vis* another.[681] By contrast, certain questions which would be classified as questions of admissibility when raised before an international court are of a more fundamental character. They are conditions for invoking the responsibility of a State in the first place. Two such matters are dealt with in article 44: the requirements of nationality of claims and exhaustion of local remedies.

(2) *Subparagraph* (a) provides that the responsibility of a State may not be invoked other than in accordance with any applicable rule relating to the nationality of claims. As PCIJ said in the *Mavrommatis Palestine Concessions* case:

> It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels.[682]

Subparagraph (*a*) does not attempt a detailed elaboration of the nationality of claims rule or of the exceptions to it. Rather, it makes it clear that the nationality of claims rule is not only relevant to questions of jurisdiction or the admissibility of claims before judicial bodies, but is also a general condition for the invocation of responsibility in those cases where it is applicable.[683]

(3) *Subparagraph* (b) provides that when the claim is one to which the rule of exhaustion of local remedies applies, the claim is inadmissible if any available and effective local remedy has not been exhausted. The paragraph is formulated in general terms in order to cover any case to which the exhaustion of local remedies rule applies, whether under treaty or general international law, and in spheres not necessarily limited to diplomatic protection.

(4) The local remedies rule was described by a Chamber of the Court in the *ELSI* case as "an important principle of customary international law".[684] In the context of a claim brought on behalf of a corporation of the claimant State, the Chamber defined the rule succinctly in the following terms:

> for an international claim [sc. on behalf of individual nationals or corporations] to be admissible, it is sufficient if the essence of the claim has been brought before the competent tribunals and pursued as far as permitted by local law and procedures, and without success.[685]

The Chamber thus treated the exhaustion of local remedies as being distinct, in principle, from "the merits of the case".[686]

(5) Only those local remedies which are "available and effective" have to be exhausted before invoking the responsibility of a State. The mere existence on paper of remedies under the internal law of a State does not impose a requirement to make use of those remedies in every case. In particular, there is no requirement to use a remedy which offers no possibility of redressing the situation, for instance, where it is clear from the outset that the law which the local court would have to apply can lead only to the rejection of any appeal. Beyond this, article 44, subparagraph (*b*), does not attempt to spell out comprehensively the scope and content of the exhaustion of local remedies rule, leaving this to the applicable rules of international law.[687]

### *Article 45. Loss of the right to invoke responsibility*

**The responsibility of a State may not be invoked if:**

**(*a*) the injured State has validly waived the claim;**

**(*b*) the injured State is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim.**

*Commentary*

(1) Article 45 is analogous to article 45 of the 1969 Vienna Convention concerning loss of the right to invoke a ground for invalidating or terminating a treaty. The article deals with two situations in which the right of an injured State or other States concerned to invoke the responsibility of a wrongdoing State may be lost: waiver and acquiescence in the lapse of the claim. In this regard, the position of an injured State as referred to in article 42 and other States concerned with a breach needs to be distinguished. A valid waiver or settlement of the responsibility dispute

[681] For discussion of the range of considerations affecting jurisdiction and admissibility of international claims before courts, see G. Abi-Saab, *Les exceptions préliminaires dans la procédure de la Cour internationale* (Paris, Pedone, 1967); Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice* (Cambridge, Grotius, 1986), vol. 2, pp. 427–575; and S. Rosenne, *The Law and Practice of the International Court, 1920–1996*, 3rd ed. (The Hague, Martinus Nijhoff, 1997), vol. II, *Jurisdiction*.

[682] *Mavrommatis* (see footnote 236 above), p. 12.

[683] Questions of nationality of claims will be dealt with in detail in the work of the Commission on diplomatic protection. See first report of the Special Rapporteur for the topic "Diplomatic protection" in *Yearbook … 2000*, vol. II (Part One), document A/CN.4/506 and Add.1.

[684] *ELSI* (see footnote 85 above), p. 42, para. 50. See also *Interhandel, Preliminary Objections, I.C.J. Reports 1959*, p. 6, at p. 27. On the exhaustion of local remedies rule generally, see, e.g., C. F. Amerasinghe, *Local Remedies in International Law* (Cambridge, Grotius, 1990); J. Chappez, *La règle de l'épuisement des voies de recours internes* (Paris, Pedone, 1972); K. Doehring, "Local remedies, exhaustion of", *Encyclopedia of Public International Law*, R. Bernhardt, ed. (footnote 409 above), vol. 3, pp. 238–242; and G. Perrin, "La naissance de la responsabilité internationale et l'épuisement des voies de recours internes dans le projet d'articles de la Commission du droit international", *Festschrift für Rudolf Bindschedler* (Bern, Stämpfli, 1980), p. 271. On the exhaustion of local remedies rule in relation to violations of human rights obligations, see, e.g., A. A. Cançado Trindade, *The Application of the Rule of Exhaustion of Local Remedies in International Law: Its Rationale in the International Protection of Individual Rights* (Cambridge University Press, 1983); and E. Wyler, *L'illicite et la condition des personnes privées* (Paris, Pedone, 1995), pp. 65–89.

[685] *ELSI* (see footnote 85 above), p. 46, para. 59.

[686] *Ibid*., p. 48, para. 63.

[687] The topic will be dealt with in detail in the work of the Commission on diplomatic protection. See second report of the Special Rapporteur on diplomatic protection in *Yearbook … 2001*, vol. II (Part One), document A/CN.4/514.

between the responsible State and the injured State, or, if there is more than one, all the injured States, may preclude any claim for reparation. Positions taken by individual States referred to in article 48 will not have such an effect.

(2) *Subparagraph* (a) deals with the case where an injured State has waived either the breach itself, or its consequences in terms of responsibility. This is a manifestation of the general principle of consent in relation to rights or obligations within the dispensation of a particular State.

(3) In some cases, the waiver may apply only to one aspect of the legal relationship between the injured State and the responsible State. For example, in the *Russian Indemnity* case, the Russian embassy had repeatedly demanded from Turkey a certain sum corresponding to the capital amount of a loan, without any reference to interest or damages for delay. Turkey having paid the sum demanded, the tribunal held that this conduct amounted to the abandonment of any other claim arising from the loan.[688]

(4) A waiver is only effective if it is validly given. As with other manifestations of State consent, questions of validity can arise with respect to a waiver, for example, possible coercion of the State or its representative, or a material error as to the facts of the matter, arising perhaps from a misrepresentation of those facts by the responsible State. The use of the term "valid waiver" is intended to leave to the general law the question of what amounts to a valid waiver in the circumstances.[689] Of particular significance in this respect is the question of consent given by an injured State following a breach of an obligation arising from a peremptory norm of general international law, especially one to which article 40 applies. Since such a breach engages the interest of the international community as a whole, even the consent or acquiescence of the injured State does not preclude that interest from being expressed in order to ensure a settlement in conformity with international law.

(5) Although it may be possible to infer a waiver from the conduct of the States concerned or from a unilateral statement, the conduct or statement must be unequivocal. In the *Certain Phosphate Lands in Nauru* case, it was argued that the Nauruan authorities before independence had waived the rehabilitation claim by concluding an agreement relating to the future of the phosphate industry as well as by statements made at the time of independence. As to the former, the record of negotiations showed that the question of waiving the rehabilitation claim had been raised and not accepted, and the Agreement itself was silent on the point. As to the latter, the relevant statements were unclear and equivocal. The Court held there had been no waiver, since the conduct in question "did not at any time effect a clear and unequivocal waiver of their claims".[690] In particular, the statements relied on "[n]otwithstanding some ambiguity in the wording … did not imply any departure from the point of view expressed clearly and repeatedly by the representatives of the Nauruan people before various organs of the United Nations".[691]

(6) Just as it may explicitly waive the right to invoke responsibility, so an injured State may acquiesce in the loss of that right. *Subparagraph* (b) deals with the case where an injured State is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim. The article emphasizes *conduct* of the State, which could include, where applicable, unreasonable delay, as the determining criterion for the lapse of the claim. Mere lapse of time without a claim being resolved is not, as such, enough to amount to acquiescence, in particular where the injured State does everything it can reasonably do to maintain its claim.

(7) The principle that a State may by acquiescence lose its right to invoke responsibility was endorsed by ICJ in the *Certain Phosphate Lands in Nauru* case, in the following passage:

> The Court recognizes that, even in the absence of any applicable treaty provision, delay on the part of a claimant State may render an application inadmissible. It notes, however, that international law does not lay down any specific time limit in that regard. It is therefore for the Court to determine in the light of the circumstances of each case whether the passage of time renders an application inadmissible.[692]

In the *LaGrand* case, the Court held the German application admissible even though Germany had taken legal action some years after the breach had become known to it.[693]

(8) One concern of the rules relating to delay is that additional difficulties may be caused to the respondent State due to the lapse of time, e.g. as concerns the collection and presentation of evidence. Thus, in the *Stevenson* case and the *Gentini* case, considerations of procedural fairness to the respondent State were advanced.[694] In contrast, the plea of delay has been rejected if, in the circumstances of a case, the respondent State could not establish the existence of any prejudice on its part, as where it has always had notice of the claim and was in a position to collect and preserve evidence relating to it.[695]

(9) Moreover, contrary to what may be suggested by the expression "delay", international courts have not engaged simply in measuring the lapse of time and applying clear-cut time limits. No generally accepted time limit,

[688] *Russian Indemnity* (see footnote 354 above), p. 446.

[689] Cf. the position with respect to valid consent under article 20: see paragraphs (4) to (8) of the commentary to article 20.

[690] *Certain Phosphate Lands in Nauru, Preliminary Objections* (see footnote 230 above), p. 247, para. 13.

[691] *Ibid*., p. 250, para. 20.

[692] *Ibid*., pp. 253–254, para. 32. The Court went on to hold that, in the circumstances of the case and having regard to the history of the matter, Nauru's application was not inadmissible on this ground (para. 36). It reserved for the merits any question of prejudice to the respondent State by reason of the delay. See further paragraph (8) of the commentary to article 13.

[693] *LaGrand*, *Provisional Measures* (see footnote 91 above) and *LaGrand, Judgment* (see footnote 119 above), at pp. 486–487, paras. 53–57.

[694] See *Stevenson*, UNRIAA, vol. IX (Sales No. 59.V.5), p. 385 (1903); and *Gentini, ibid.*, vol. X (Sales No. 60.V.4), p. 551 (1903).

[695] See, e.g., *Tagliaferro*, UNRIAA, vol. X (Sales No. 60.V.4), p. 592, at p. 593 (1903); see also the actual decision in *Stevenson* (footnote 694 above), pp. 386–387.

expressed in terms of years, has been laid down.[696] The Swiss Federal Department in 1970 suggested a period of 20 to 30 years since the coming into existence of the claim.[697] Others have stated that the requirements were more exacting for contractual claims than for non-contractual claims.[698] None of the attempts to establish any precise or finite time limit for international claims in general has achieved acceptance.[699] It would be very difficult to establish any single limit, given the variety of situations, obligations and conduct that may be involved.

(10) Once a claim has been notified to the respondent State, delay in its prosecution (e.g. before an international tribunal) will not usually be regarded as rendering it inadmissible.[700] Thus, in the *Certain Phosphate Lands in Nauru* case, ICJ held it to be sufficient that Nauru had referred to its claims in bilateral negotiations with Australia in the period preceding the formal institution of legal proceedings in 1989.[701] In the *Tagliaferro* case, Umpire Ralston likewise held that, despite the lapse of 31 years since the infliction of damage, the claim was admissible as it had been notified immediately after the injury had occurred.[702]

(11) To summarize, a claim will not be inadmissible on grounds of delay unless the circumstances are such that the injured State should be considered as having acquiesced in the lapse of the claim or the respondent State has been seriously disadvantaged. International courts generally engage in a flexible weighing of relevant circumstances in the given case, taking into account such matters as the conduct of the respondent State and the importance of the rights involved. The decisive factor is whether the respondent State has suffered any prejudice as a result of the delay in the sense that the respondent could have reasonably expected that the claim would no longer be pursued. Even if there has been some prejudice, it may be able to be taken into account in determining the form or extent of reparation.[703]

[696] In some cases time limits are laid down for specific categories of claims arising under specific treaties (e.g. the six-month time limit for individual applications under article 35, paragraph 1, of the European Convention on Human Rights) notably in the area of private law (e.g. in the field of commercial transactions and international transport). See the Convention on the Limitation Period in the International Sale of Goods, as amended by the Protocol to the Convention. By contrast, it is highly unusual for treaty provisions dealing with inter-State claims to be subject to any express time limits.

[697] Communiqué of 29 December 1970, in *Annuaire suisse de droit international*, vol. 32 (1976), p. 153.

[698] C.-A. Fleischhauer, "Prescription", *Encyclopedia of Public International Law* (see footnote 409 above), vol. 3, p. 1105, at p. 1107.

[699] A large number of international decisions stress the absence of general rules, and in particular of any specific limitation period measured in years. Rather, the principle of delay is a matter of appreciation having regard to the facts of the given case. Besides *Certain Phosphate Lands in Nauru* (footnotes 230 and 232 above), see, e.g. *Gentini* (footnote 694 above), p. 561; and the *Ambatielos* arbitration, ILR, vol. 23, p. 306, at pp. 314–317 (1956).

[700] For statements of the distinction between notice of claim and commencement of proceedings, see, e.g. R. Jennings and A. Watts, eds., *Oppenheim's International Law*, 9th ed. (Harlow, Longman, 1992), vol. I, *Peace*, p. 527; and C. Rousseau, *Droit international public* (Paris, Sirey, 1983), vol. V, p. 182.

[701] *Certain Phosphate Lands in Nauru, Preliminary Objections* (see footnote 230 above), p. 250, para. 20.

[702] *Tagliaferro* (see footnote 695 above), p. 593.

[703] See article 39 and commentary.

### *Article 46. Plurality of injured States*

**Where several States are injured by the same internationally wrongful act, each injured State may separately invoke the responsibility of the State which has committed the internationally wrongful act.**

*Commentary*

(1) Article 46 deals with the situation of a plurality of injured States, in the sense defined in article 42. It states the principle that where there are several injured States, each of them may separately invoke the responsibility for the internationally wrongful act on its own account.

(2) Several States may qualify as "injured" States under article 42. For example, all the States to which an interdependent obligation is owed within the meaning of article 42, subparagraph (*b*) (ii), are injured by its breach. In a situation of a plurality of injured States, each may seek cessation of the wrongful act if it is continuing, and claim reparation in respect of the injury to itself. This conclusion has never been doubted, and is implicit in the terms of article 42 itself.

(3) It is by no means unusual for claims arising from the same internationally wrongful act to be brought by several States. For example, in the *S.S. "Wimbledon"* case, four States brought proceedings before PCIJ under article 386, paragraph 1, of the Treaty of Versailles, which allowed "any interested Power" to apply in the event of a violation of the provisions of the Treaty concerning transit through the Kiel Canal. The Court noted that "each of the four Applicant Powers has a clear interest in the execution of the provisions relating to the Kiel Canal, since they all possess fleets and merchant vessels flying their respective flags". It held they were each covered by article 386, paragraph 1, "even though they may be unable to adduce a prejudice to any pecuniary interest".[704] In fact, only France, representing the operator of the vessel, claimed and was awarded compensation. In the cases concerning the *Aerial Incident of 27 July 1955*, proceedings were commenced by the United States, the United Kingdom and Israel against Bulgaria concerning the destruction of an Israeli civil aircraft and the loss of lives involved.[705] In the *Nuclear Tests* cases, Australia and New Zealand each claimed to be injured in various ways by the French conduct of atmospheric nuclear tests at Mururoa Atoll.[706]

(4) Where the States concerned do not claim compensation on their own account as distinct from a declaration

[704] *S.S.* "*Wimbledon"* (see footnote 34 above), p. 20.

[705] ICJ held that it lacked jurisdiction over the Israeli claim: *Aerial Incident of 27 July 1955 (Israel* v. *Bulgaria), Judgment, I.C.J. Reports 1959*, p. 131, after which the United Kingdom and United States claims were withdrawn. In its Memorial, Israel noted that there had been active coordination of the claims between the various claimant Governments, and added: "One of the primary reasons for establishing coordination of this character from the earliest stages was to prevent, so far as was possible, the Bulgarian Government being faced with double claims leading to the possibility of double damages" (see footnote 363 above), p. 106.

[706] See *Nuclear Tests (Australia* v. *France)* and *(New Zealand* v. *France)* (footnote 196 above), pp. 256 and 460, respectively.

of the legal situation, it may not be clear whether they are claiming as injured States or as States invoking responsibility in the common or general interest under article 48. Indeed, in such cases it may not be necessary to decide into which category they fall, provided it is clear that they fall into one or the other. Where there is more than one injured State claiming compensation on its own account or on account of its nationals, evidently each State will be limited to the damage actually suffered. Circumstances might also arise in which several States injured by the same act made incompatible claims. For example, one State may claim restitution whereas the other may prefer compensation. If restitution is indivisible in such a case and the election of the second State is valid, it may be that compensation is appropriate in respect of both claims.[707] In any event, two injured States each claiming in respect of the same wrongful act would be expected to coordinate their claims so as to avoid double recovery. As ICJ pointed out in its advisory opinion on *Reparation for Injuries*, "International tribunals are already familiar with the problem of a claim in which two or more national States are interested, and they know how to protect the defendant State in such a case".[708]

### *Article 47. Plurality of responsible States*

**1. Where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act.**

**2. Paragraph 1:**

**(*a*) does not permit any injured State to recover, by way of compensation, more than the damage it has suffered;**

**(*b*) is without prejudice to any right of recourse against the other responsible States.**

*Commentary*

(1) Article 47 deals with the situation where there is a plurality of responsible States in respect of the same wrongful act. It states the general principle that in such cases each State is separately responsible for the conduct attributable to it, and that responsibility is not diminished or reduced by the fact that one or more other States are also responsible for the same act.

(2) Several States may be responsible for the same internationally wrongful act in a range of circumstances. For example, two or more States might combine in carrying out together an internationally wrongful act in circumstances where they may be regarded as acting jointly in respect of the entire operation. In that case the injured State can hold each responsible State to account for the wrongful conduct as a whole. Or two States may act through a common organ which carries out the conduct in question, e.g. a joint authority responsible for the management of a boundary river. Or one State may direct and control another State in the commission of the same internationally wrongful act by the latter, such that both are responsible for the act.[709]

(3) It is important not to assume that internal law concepts and rules in this field can be applied directly to international law. Terms such as "joint", "joint and several" and "solidary" responsibility derive from different legal traditions[710] and analogies must be applied with care. In international law, the general principle in the case of a plurality of responsible States is that each State is separately responsible for conduct attributable to it in the sense of article 2. The principle of independent responsibility reflects the position under general international law, in the absence of agreement to the contrary between the States concerned.[711] In the application of that principle, however, the situation can arise where a single course of conduct is at the same time attributable to several States and is internationally wrongful for each of them. It is to such cases that article 47 is addressed.

(4) In the *Certain Phosphate Lands in Nauru* case,[712] Australia, the sole respondent, had administered Nauru as a trust territory under the Trusteeship Agreement on behalf of the three States concerned. Australia argued that it could not be sued alone by Nauru, but only jointly with the other two States concerned. Australia argued that the two States were necessary parties to the case and that in accordance with the principle formulated in *Monetary Gold*,[713] the claim against Australia alone was inadmissible. It also argued that the responsibility of the three States making up the Administering Authority was "solidary" and that a claim could not be made against only one of them. The Court rejected both arguments. On the question of "solidary" responsibility it said:

> Australia has raised the question whether the liability of the three States would be "joint and several" (*solidaire*), so that any one of the three would be liable to make full reparation for damage flowing from any breach of the obligations of the Administering Authority, and not merely a one-third or some other proportionate share. This … is independent of the question whether Australia can be sued alone. The Court does not consider that any reason has been shown why a claim brought against only one of the three States should be declared inadmissible *in limine litis* merely because that claim raises questions of the administration of the Territory, which was shared with two other States. It cannot be denied that Australia had obligations under the Trusteeship Agreement, in its capacity as one of the three States forming the Administering Authority, and there is nothing in the character of that Agreement which debars the Court from considering a claim of a breach of those obligations by Australia.[714]

The Court was careful to add that its decision on jurisdiction "does not settle the question whether reparation

[707] Cf. *Forests of Central Rhodopia*, where the arbitrator declined to award restitution, *inter alia*, on the ground that not all the persons or entities interested in restitution had claimed (see footnote 382 above), p. 1432.

[708] *Reparation for Injuries* (see footnote 38 above), p. 186.

[709] See article 17 and commentary.

[710] For a comparative survey of internal laws on solidary or joint liability, see T. Weir, *loc. cit.* (footnote 471 above), vol. XI, especially pp. 43–44, sects. 79–81.

[711] See paragraphs (1) to (5) of the introductory commentary to chapter IV of Part One.

[712] See footnote 230 above.

[713] See footnote 286 above. See also paragraph (11) of the commentary to article 16.

[714] *Certain Phosphate Lands in Nauru, Preliminary Objections* (see footnote 230 above), pp. 258–259, para. 48.

would be due from Australia, if found responsible, for the whole or only for part of the damage Nauru alleges it has suffered, regard being had to the characteristics of the Mandate and Trusteeship Systems … and, in particular, the special role played by Australia in the administration of the Territory".[715]

(5) The extent of responsibility for conduct carried on by a number of States is sometimes addressed in treaties.[716] A well-known example is the Convention on International Liability for Damage Caused by Space Objects. Article IV, paragraph 1, provides expressly for "joint and several liability" where damage is suffered by a third State as a result of a collision between two space objects launched by two States. In some cases liability is strict; in others it is based on fault. Article IV, paragraph 2, provides:

> In all cases of joint and several liability referred to in paragraph 1 … the burden of compensation for the damage shall be apportioned between the first two States in accordance with the extent to which they were at fault; if the extent of the fault of each of these States cannot be established, the burden of compensation shall be apportioned equally between them. Such apportionment shall be without prejudice to the right of the third State to seek the entire compensation due under this Convention from any or all of the launching States which are jointly and severally liable.[717]

This is clearly a *lex specialis*, and it concerns liability for lawful conduct rather than responsibility in the sense of the present articles.[718] At the same time, it indicates what a regime of "joint and several" liability might amount to so far as an injured State is concerned.

(6) According to *paragraph 1* of article 47, where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act. The general rule in international law is that of separate responsibility of a State for its own wrongful acts and paragraph 1 reflects this general rule. Paragraph 1 neither recognizes a general rule of joint and several responsibility, nor does it exclude the possibility that two or more States will be responsible for the same internationally wrongful act. Whether this is so will depend on the circumstances and on the international obligations of each of the States concerned.

(7) Under paragraph 1 of article 47, where several States are each responsible for the same internationally wrongful act, the responsibility of each may be separately invoked by an injured State in the sense of article 42. The consequences that flow from the wrongful act, for example in terms of reparation, will be those which flow from the provisions of Part Two in relation to that State.

(8) Article 47 only addresses the situation of a plurality of responsible States in relation to the same internationally wrongful act. The identification of such an act will depend on the particular primary obligation, and cannot be prescribed in the abstract. Of course, situations can also arise where several States by separate internationally wrongful conduct have contributed to causing the same damage. For example, several States might contribute to polluting a river by the separate discharge of pollutants. In the *Corfu Channel* incident, it appears that Yugoslavia actually laid the mines and would have been responsible for the damage they caused. ICJ held that Albania was responsible to the United Kingdom for the same damage on the basis that it knew or should have known of the presence of the mines and of the attempt by the British ships to exercise their right of transit, but failed to warn the ships.[719] Yet, it was not suggested that Albania's responsibility for failure to warn was reduced, let alone precluded, by reason of the concurrent responsibility of a third State. In such cases, the responsibility of each participating State is determined individually, on the basis of its own conduct and by reference to its own international obligations.

(9) The general principle set out in paragraph 1 of article 47 is subject to the two provisos set out in *paragraph 2*. *Subparagraph* (a) addresses the question of double recovery by the injured State. It provides that the injured State may not recover, by way of compensation, more than the damage suffered.[720] This provision is designed to protect the responsible States, whose obligation to compensate is limited by the damage suffered. The principle is only concerned to ensure against the actual recovery of more than the amount of the damage. It would not exclude simultaneous awards against two or more responsible States, but the award would be satisfied so far as the injured State is concerned by payment in full made by any one of them.

(10) The second proviso, in *subparagraph* (b), recognizes that where there is more than one responsible State in respect of the same injury, questions of contribution may arise between them. This is specifically envisaged, for example, in articles IV, paragraph 2, and V, paragraph 2, of the Convention on International Liability for Damage Caused by Space Objects. On the other hand, there may be cases where recourse by one responsible State against another should not be allowed. Subparagraph (*b*) does not address the question of contribution among several States which are responsible for the same wrongful act; it merely provides that the general principle stated in paragraph 1 is without prejudice to any right of recourse which one responsible State may have against any other responsible State.

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[715] *Ibid*., p. 262, para. 56. The case was subsequently withdrawn by agreement, Australia agreeing to pay by instalments an amount corresponding to the full amount of Nauru's claim. Subsequently, the two other Governments agreed to contribute to the payments made under the settlement. See *Certain Phosphate Lands in Nauru, Order* (footnote 232 above) and the settlement agreement (*ibid.*).

[716] A special case is the responsibility of the European Union and its member States under "mixed agreements", where the Union and all or some members are parties in their own name. See, e.g., annex IX to the United Nations Convention on the Law of the Sea. Generally on mixed agreements, see, e.g., A. Rosas, "Mixed Union mixed agreements", *International Law Aspects of the European Union*, M. Koskenniemi, ed. (The Hague, Kluwer, 1998), p. 125.

[717] See also article V, paragraph 2, which provides for indemnification between States which are jointly and severally liable.

[718] See paragraph 4 of the general commentary for the distinction between international responsibility for wrongful acts and international liability arising from lawful conduct.

[719] *Corfu Channel, Merits* (see footnote 35 above), pp. 22–23.

[720] Such a principle was affirmed, for example, by PCIJ in the *Factory at Chorzów, Merits* case (see footnote 34 above), when it held that a remedy sought by Germany could not be granted "or the same compensation would be awarded twice over" (p. 59); see also pp. 45 and 49.

### *Article 48. Invocation of responsibility by a State other than an injured State*

**1. Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if:**

**(*a*) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or**

**(*b*) the obligation breached is owed to the international community as a whole.**

**2. Any State entitled to invoke responsibility under paragraph 1 may claim from the responsible State:**

**(*a*) cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 30; and**

**(*b*) performance of the obligation of reparation in accordance with the preceding articles, in the interest of the injured State or of the beneficiaries of the obligation breached.**

**3. The requirements for the invocation of responsibility by an injured State under articles 43, 44 and 45 apply to an invocation of responsibility by a State entitled to do so under paragraph 1.**

*Commentary*

(1) Article 48 complements the rule contained in article 42. It deals with the invocation of responsibility by States other than the injured State acting in the collective interest. A State which is entitled to invoke responsibility under article 48 is acting not in its individual capacity by reason of having suffered injury, but in its capacity as a member of a group of States to which the obligation is owed, or indeed as a member of the international community as a whole. The distinction is underlined by the phrase "[a]ny State other than an injured State" in paragraph 1 of article 48.

(2) Article 48 is based on the idea that in case of breaches of specific obligations protecting the collective interests of a group of States or the interests of the international community as a whole, responsibility may be invoked by States which are not themselves injured in the sense of article 42. Indeed, in respect of obligations to the international community as a whole, ICJ specifically said as much in its judgment in the *Barcelona Traction* case.[721] Although the Court noted that "all States can be held to have a legal interest in" the fulfilment of these rights, article 48 refrains from qualifying the position of the States identified in article 48, for example by referring to them as "interested States". The term "legal interest" would not permit a distinction between articles 42 and 48, as injured States in the sense of article 42 also have legal interests.

(3) As to the structure of article 48, paragraph 1 defines the categories of obligations which give rise to the wider right to invoke responsibility. Paragraph 2 stipulates which forms of responsibility States other than injured States may claim. Paragraph 3 applies the requirements of invocation contained in articles 43, 44 and 45 to cases where responsibility is invoked under article 48, paragraph 1.

(4) *Paragraph 1* refers to "[a]ny State other than an injured State". In the nature of things, all or many States will be entitled to invoke responsibility under article 48, and the term "[a]ny State" is intended to avoid any implication that these States have to act together or in unison. Moreover, their entitlement will coincide with that of any injured State in relation to the same internationally wrongful act in those cases where a State suffers individual injury from a breach of an obligation to which article 48 applies.

(5) Paragraph 1 defines the categories of obligations, the breach of which may entitle States other than the injured State to invoke State responsibility. A distinction is drawn between obligations owed to a group of States and established to protect a collective interest of the group (paragraph 1 (*a*)), and obligations owed to the international community as a whole (paragraph 1 (*b*)).[722]

(6) Under *paragraph 1* (a), States other than the injured State may invoke responsibility if two conditions are met: first, the obligation whose breach has given rise to responsibility must have been owed to a group to which the State invoking responsibility belongs; and secondly, the obligation must have been established for the protection of a collective interest. The provision does not distinguish between different sources of international law; obligations protecting a collective interest of the group may derive from multilateral treaties or customary international law. Such obligations have sometimes been referred to as "obligations *erga omnes partes*".

(7) Obligations coming within the scope of paragraph 1 (*a*) have to be "collective obligations", i.e. they must apply between a group of States and have been established in some collective interest.[723] They might concern, for example, the environment or security of a region (e.g. a regional nuclear-free-zone treaty or a regional system for the protection of human rights). They are not limited to arrangements established only in the interest of the member States but would extend to agreements established by a group of States in some wider common interest.[724] But in any event the arrangement must transcend the sphere of bilateral relations of the States parties. As to the requirement that the obligation in question protect a collective interest, it is not the function of the articles to provide an enumeration of such interests. If they fall within paragraph 1 (*a*), their principal purpose will be to foster a common interest, over and above any interests of the States concerned individually. This would include situations in

[721] *Barcelona Traction* (see footnote 25 above), p. 32, para. 33.

[722] For the extent of responsibility for serious breaches of obligations to the international community as a whole, see Part Two, chap. III and commentary.

[723] See also paragraph (11) of the commentary to article 42.

[724] In the *S.S. "Wimbledon"* (see footnote 34 above), the Court noted "[t]he intention of the authors of the Treaty of Versailles to facilitate access to the Baltic by establishing an international regime, and consequently to keep the canal open at all times to foreign vessels of every kind" (p. 23).

which States, attempting to set general standards of protection for a group or people, have assumed obligations protecting non-State entities.[725]

(8) Under *paragraph 1* (b), States other than the injured State may invoke responsibility if the obligation in question was owed "to the international community as a whole".[726] The provision intends to give effect to the statement by ICJ in the *Barcelona Traction* case, where the Court drew "an essential distinction" between obligations owed to particular States and those owed "towards the international community as a whole".[727] With regard to the latter, the Court went on to state that "[i]n view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*".

(9) While taking up the essence of this statement, the articles avoid use of the term "obligations *erga omnes*", which conveys less information than the Court's reference to the international community as a whole and has sometimes been confused with obligations owed to all the parties to a treaty. Nor is it the function of the articles to provide a list of those obligations which under existing international law are owed to the international community as a whole. This would go well beyond the task of codifying the secondary rules of State responsibility, and in any event, such a list would be only of limited value, as the scope of the concept will necessarily evolve over time. The Court itself has given useful guidance: in its 1970 judgment it referred, by way of example, to "the outlawing of acts of aggression, and of genocide" and to "the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination".[728] In its judgment in the *East Timor* case, the Court added the right of self-determination of peoples to this list.[729]

(10) Each State is entitled, as a member of the international community as a whole, to invoke the responsibility of another State for breaches of such obligations. Whereas the category of collective obligations covered by paragraph 1 (*a*) needs to be further qualified by the insertion of additional criteria, no such qualifications are necessary in the case of paragraph 1 (*b*). All States are by definition members of the international community as a whole, and the obligations in question are by definition collective obligations protecting interests of the international community as such. Of course, such obligations may at the same time protect the individual interests of States, as the prohibition of acts of aggression protects the survival of each State and the security of its people. Similarly, individual States may be specially affected by the breach of such an obligation, for example a coastal State specially affected by pollution in breach of an obligation aimed at protection of the marine environment in the collective interest.

(11) *Paragraph 2* specifies the categories of claim which States may make when invoking responsibility under article 48. The list given in the paragraph is exhaustive, and invocation of responsibility under article 48 gives rise to a more limited range of rights as compared to those of injured States under article 42. In particular, the focus of action by a State under article 48—such State not being injured in its own right and therefore not claiming compensation on its own account—is likely to be on the very question whether a State is in breach and on cessation if the breach is a continuing one. For example, in the *S.S. "Wimbledon"* case, Japan, which had no economic interest in the particular voyage, sought only a declaration, whereas France, whose national had to bear the loss, sought and was awarded damages.[730] In the *South West Africa* cases, Ethiopia and Liberia sought only declarations of the legal position.[731] In that case, as the Court itself pointed out in 1971, "the injured entity" was a people, viz. the people of South West Africa.[732]

(12) Under *paragraph 2* (a), any State referred to in article 48 is entitled to request cessation of the wrongful act and, if the circumstances require, assurances and guarantees of non-repetition under article 30. In addition, *paragraph 2* (b) allows such a State to claim from the responsible State reparation in accordance with the provisions of chapter II of Part Two. In case of breaches of obligations under article 48, it may well be that there is no State which is individually injured by the breach, yet it is highly desirable that some State or States be in a position to claim reparation, in particular restitution. In accordance with paragraph 2 (*b*), such a claim must be made in the interest of the injured State, if any, or of the beneficiaries of the obligation breached. This aspect of article 48, paragraph 2, involves a measure of progressive development, which is justified since it provides a means of protecting the community or collective interest at stake. In this context it may be noted that certain provisions, for example in various human rights treaties, allow invocation of responsibility by any State party. In those cases where they have been resorted to, a clear distinction has been drawn between the capacity of the applicant State to raise the matter and the interests of the beneficiaries of the obligation.[733] Thus, a State invoking responsibility under article 48 and claiming anything more than a declaratory remedy and cessation may be called on to establish that it is acting in the interest of the injured party. Where the injured party is a State, its Government will be able authoritatively to represent that interest. Other cases may present greater difficulties, which the present articles

[725] Article 22 of the Covenant of the League of Nations, establishing the Mandate system, was a provision in the general interest in this sense, as were each of the Mandate agreements concluded in accordance with it. Cf., however, the much-criticized decision of ICJ in *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, p. 6, from which article 48 is a deliberate departure.

[726] For the terminology "international community as a whole", see paragraph (18) of the commentary to article 25.

[727] *Barcelona Traction* (see footnote 25 above), p. 32, para. 33, and see paragraphs (2) to (6) of the commentary to chapter III of Part Two.

[728] *Barcelona Traction* (*ibid.*), p. 32, para. 34.

[729] See footnote 54 above.

[730] *S.S. "Wimbledon"* (see footnote 34 above), p. 30.

[731] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 319; *South West Africa, Second Phase, Judgment* (see footnote 725 above).

[732] *Namibia* case (see footnote 176 above), p. 56, para. 127.

[733] See, e.g., the observations of the European Court of Human Rights in *Denmark* v. *Turkey* (friendly settlement), judgment of 5 April 2000, Reports of Judgments and Decisions 2000-IV, pp. 7, 10 and 11, paras. 20 and 23.

cannot solve.[734] Paragraph 2 (*b*) can do no more than set out the general principle.

(13) Paragraph 2 (*b*) refers to the State claiming "[p]erformance of the obligation of reparation in accordance with the preceding articles". This makes it clear that article 48 States may not demand reparation in situations where an injured State could not do so. For example, a demand for cessation presupposes the continuation of the wrongful act; a demand for restitution is excluded if restitution itself has become impossible.

(14) *Paragraph 3* subjects the invocation of State responsibility by States other than the injured State to the conditions that govern invocation by an injured State, specifically article 43 (notice of claim), 44 (admissibility of claims) and 45 (loss of the right to invoke responsibility). These articles are to be read as applicable equally, *mutatis mutandis*, to a State invoking responsibility under article 48.

## Chapter II

## COUNTERMEASURES

### *Commentary*

(1) This chapter deals with the conditions for and limitations on the taking of countermeasures by an injured State. In other words, it deals with measures that would otherwise be contrary to the international obligations of an injured State *vis-à-vis* the responsible State, if they were not taken by the former in response to an internationally wrongful act by the latter in order to procure cessation and reparation. Countermeasures are a feature of a decentralized system by which injured States may seek to vindicate their rights and to restore the legal relationship with the responsible State which has been ruptured by the internationally wrongful act.

(2) It is recognized both by Governments and by the decisions of international tribunals that countermeasures are justified under certain circumstances.[735] This is reflected in article 22 which deals with countermeasures in response to an internationally wrongful act in the context of the circumstances precluding wrongfulness. Like other forms of self-help, countermeasures are liable to abuse and this potential is exacerbated by the factual inequalities between States. Chapter II has as its aim to establish an operational system, taking into account the exceptional character of countermeasures as a response to internationally wrongful conduct. At the same time, it seeks to ensure, by appropriate conditions and limitations, that countermeasures are kept within generally acceptable bounds.

(3) As to terminology, traditionally the term "reprisals" was used to cover otherwise unlawful action, including forcible action, taken by way of self-help in response to a breach.[736] More recently, the term "reprisals" has been limited to action taken in time of international armed conflict; i.e. it has been taken as equivalent to belligerent reprisals. The term "countermeasures" covers that part of the subject of reprisals not associated with armed conflict, and in accordance with modern practice and judicial decisions the term is used in that sense in this chapter.[737] Countermeasures are to be contrasted with retorsion, i.e. "unfriendly" conduct which is not inconsistent with any international obligation of the State engaging in it even though it may be a response to an internationally wrongful act. Acts of retorsion may include the prohibition of or limitations upon normal diplomatic relations or other contacts, embargoes of various kinds or withdrawal of voluntary aid programmes. Whatever their motivation, so long as such acts are not incompatible with the international obligations of the States taking them towards the target State, they do not involve countermeasures and they fall outside the scope of the present articles. The term "sanction" is also often used as equivalent to action taken against a State by a group of States or mandated by an international organization. But the term is imprecise: Chapter VII of the Charter of the United Nations refers only to "measures", even though these can encompass a very wide range of acts, including the use of armed force (Articles 39, 41 and 42). Questions concerning the use of force in international relations and of the legality of belligerent reprisals are governed by the relevant primary rules. On the other hand, the articles are concerned with countermeasures as referred to in article 22. They are taken by an injured State in order to induce the responsible State to comply with its obligations under Part Two. They are instrumental in character and are appropriately dealt with in Part Three as an aspect of the implementation of State responsibility.

(4) Countermeasures are to be clearly distinguished from the termination or suspension of treaty relations on account of the material breach of a treaty by another State, as provided for in article 60 of the 1969 Vienna Convention. Where a treaty is terminated or suspended in accordance with article 60, the substantive legal obligations of the States parties will be affected, but this is quite different from the question of responsibility that may already have arisen from the breach.[738] Countermeasures involve conduct taken in derogation from a subsisting treaty

[734] See also paragraphs (3) to (4) of the commentary to article 33.

[735] For the substantial literature, see the bibliographies in E. Zoller, *Peacetime Unilateral Remedies: An Analysis of Countermeasures* (Dobbs Ferry, N.Y., Transnational, 1984), pp. 179–189; O. Y. Elagab, *The Legality of Non-Forcible Counter-Measures in International Law* (Oxford, Clarendon Press, 1988), pp. 227–241; L.-A. Sicilianos, *Les réactions décentralisées à l'illicite: Des contre-mesures à la légitime défense* (Paris, Librairie générale de droit et de jurisprudence, 1990), pp. 501–525; and D. Alland, *Justice privée et ordre juridique international: Etude théorique des contre-mesures en droit international public* (Paris, Pedone, 1994).

[736] See, e.g., E. de Vattel, *The Law of Nations, or the Principles of Natural Law* (footnote 394 above), vol. II, chap. XVIII, p. 342.

[737] *Air Service Agreement* (see footnote 28 above), p. 443, para. 80; *United States Diplomatic and Consular Staff in Tehran* (see footnote 59 above), p. 27, para. 53; *Military and Paramilitary Activities in and against Nicaragua* (see footnote 36 above), at p. 106, para. 201; and *Gabčíkovo-Nagymaros Project* (see footnote 27 above), p. 55, para. 82.

[738] On the respective scope of the codified law of treaties and the law of State responsibility, see paragraphs (3) to (7) of the introductory commentary to chapter V of Part One.

obligation but justified as a necessary and proportionate response to an internationally wrongful act of the State against which they are taken. They are essentially temporary measures, taken to achieve a specified end, whose justification terminates once the end is achieved.

(5) This chapter does not draw any distinction between what are sometimes called "reciprocal countermeasures" and other measures. That term refers to countermeasures which involve suspension of performance of obligations towards the responsible State "if such obligations correspond to, or are directly connected with, the obligation breached".[739] There is no requirement that States taking countermeasures should be limited to suspension of performance of the same or a closely related obligation.[740] A number of considerations support this conclusion. First, for some obligations, for example those concerning the protection of human rights, reciprocal countermeasures are inconceivable. The obligations in question have a non-reciprocal character and are not only due to other States but to the individuals themselves.[741] Secondly, a limitation to reciprocal countermeasures assumes that the injured State will be in a position to impose the same or related measures as the responsible State, which may not be so. The obligation may be a unilateral one or the injured State may already have performed its side of the bargain. Above all, considerations of good order and humanity preclude many measures of a reciprocal nature. This conclusion does not, however, end the matter. Countermeasures are more likely to satisfy the requirements of necessity and proportionality if they are taken in relation to the same or a closely related obligation, as in the *Air Service Agreement* arbitration.[742]

(6) This conclusion reinforces the need to ensure that countermeasures are strictly limited to the requirements of the situation and that there are adequate safeguards against abuse. Chapter II seeks to do this in a variety of ways. First, as already noted, it concerns only non-forcible countermeasures (art. 50, para. 1 (*a*)). Secondly, countermeasures are limited by the requirement that they be directed at the responsible State and not at third parties (art. 49, paras. 1 and 2). Thirdly, since countermeasures are intended as instrumental—in other words, since they are taken with a view to procuring cessation of and reparation for the internationally wrongful act and not by way of punishment—they are temporary in character and must be as far as possible reversible in their effects in terms of future legal relations between the two States (arts. 49, paras. 2 and 3, and 53). Fourthly, countermeasures must be proportionate (art. 51). Fifthly, they must not involve any departure from certain basic obligations (art. 50, para. 1), in particular those under peremptory norms of general international law.

(7) This chapter also deals to some extent with the conditions of the implementation of countermeasures. In particular, countermeasures cannot affect any dispute settlement procedure which is in force between the two States and applicable to the dispute (art. 50, para. 2 (*a*)). Nor can they be taken in such a way as to impair diplomatic or consular inviolability (art. 50, para. 2 (*b*)). Countermeasures must be preceded by a demand by the injured State that the responsible State comply with its obligations under Part Two, must be accompanied by an offer to negotiate, and must be suspended if the internationally wrongful act has ceased and the dispute is submitted in good faith to a court or tribunal with the authority to make decisions binding on the parties (art. 52, para. 3).

(8) The focus of the chapter is on countermeasures taken by injured States as defined in article 42. Occasions have arisen in practice of countermeasures being taken by other States, in particular those identified in article 48, where no State is injured or else on behalf of and at the request of an injured State. Such cases are controversial and the practice is embryonic. This chapter does not purport to regulate the taking of countermeasures by States other than the injured State. It is, however, without prejudice to the right of any State identified in article 48, paragraph 1, to take lawful measures against a responsible State to ensure cessation of the breach and reparation in the interest of the injured State or the beneficiaries of the obligation breached (art. 54).

(9) In common with other chapters of these articles, the provisions on countermeasures are residual and may be excluded or modified by a special rule to the contrary (see article 55). Thus, a treaty provision precluding the suspension of performance of an obligation under any circumstances will exclude countermeasures with respect to the performance of the obligation. Likewise, a regime for dispute resolution to which States must resort in the event of a dispute, especially if (as with the WTO dispute settlement system) it requires an authorization to take measures in the nature of countermeasures in response to a proven breach.[743]

### *Article 49. Object and limits of countermeasures*

**1. An injured State may only take countermeasures against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations under Part Two.**

**2. Countermeasures are limited to the non-performance for the time being of international obligations of the State taking the measures towards the responsible State.**

**3. Countermeasures shall, as far as possible, be taken in such a way as to permit the resumption of performance of the obligations in question.**

[739] See the sixth report of the Special Rapporteur on State responsibility, William Riphagen, article 8 of Part Two of the draft articles, *Yearbook … 1985*, vol. II (Part One), p. 10, document A/CN.4/389.

[740] Contrast the exception of non-performance in the law of treaties, which is so limited: see paragraph (9) of the introductory commentary to chapter V of Part One.

[741] Cf. *Ireland* v. *the United Kingdom* (footnote 236 above).

[742] See footnote 28 above.

[743] See Marrakesh Agreement establishing the World Trade Organization, annex 2 (Understanding on Rules and Procedures governing the Settlement of Disputes), arts. 1, 3, para. 7, and 22.

*Commentary*

(1) Article 49 describes the permissible object of countermeasures taken by an injured State against the responsible State and places certain limits on their scope. Countermeasures may only be taken by an injured State in order to induce the responsible State to comply with its obligations under Part Two, namely, to cease the internationally wrongful conduct, if it is continuing, and to provide reparation to the injured State.[744] Countermeasures are not intended as a form of punishment for wrongful conduct, but as an instrument for achieving compliance with the obligations of the responsible State under Part Two. The limited object and exceptional nature of countermeasures are indicated by the use of the word "only" in paragraph 1 of article 49.

(2) A fundamental prerequisite for any lawful countermeasure is the existence of an internationally wrongful act which injured the State taking the countermeasure. This point was clearly made by ICJ in the *Gabčíkovo Nagymaros Project* case, in the following passage:

> In order to be justifiable, a countermeasure must meet certain conditions …
>
> In the first place it must be taken in response to a previous international wrongful act of another State and must be directed against that State.[745]

(3) *Paragraph 1* of article 49 presupposes an objective standard for the taking of countermeasures, and in particular requires that the countermeasure be taken against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations of cessation and reparation. A State taking countermeasures acts at its peril, if its view of the question of wrongfulness turns out not to be well founded. A State which resorts to countermeasures based on its unilateral assessment of the situation does so at its own risk and may incur responsibility for its own wrongful conduct in the event of an incorrect assessment.[746] In this respect, there is no difference between countermeasures and other circumstances precluding wrongfulness.[747]

(4) A second essential element of countermeasures is that they "must be directed against"[748] a State which has committed an internationally wrongful act, and which has not complied with its obligations of cessation and reparation under Part Two of the present articles.[749] The word "only" in paragraph 1 applies equally to the target of the countermeasures as to their purpose and is intended to convey that countermeasures may only be adopted against a State which is the author of the internationally wrongful act. Countermeasures may not be directed against States other than the responsible State. In a situation where a third State is owed an international obligation by the State taking countermeasures and that obligation is breached by the countermeasure, the wrongfulness of the measure is not precluded as against the third State. In that sense the effect of countermeasures in precluding wrongfulness is relative. It concerns the legal relations between the injured State and the responsible State.[750]

(5) This does not mean that countermeasures may not incidentally affect the position of third States or indeed other third parties. For example, if the injured State suspends transit rights with the responsible State in accordance with this chapter, other parties, including third States, may be affected thereby. If they have no individual rights in the matter they cannot complain. The same is true if, as a consequence of suspension of a trade agreement, trade with the responsible State is affected and one or more companies lose business or even go bankrupt. Such indirect or collateral effects cannot be entirely avoided.

(6) In taking countermeasures, the injured State effectively withholds performance for the time being of one or more international obligations owed by it to the responsible State, and *paragraph 2* of article 49 reflects this element. Although countermeasures will normally take the form of the non-performance of a single obligation, it is possible that a particular measure may affect the performance of several obligations simultaneously. For this reason, paragraph 2 refers to "obligations" in the plural. For example, freezing of the assets of a State might involve what would otherwise be the breach of several obligations to that State under different agreements or arrangements. Different and coexisting obligations might be affected by the same act. The test is always that of proportionality, and a State which has committed an internationally wrongful act does not thereby make itself the target for any form or combination of countermeasures, irrespective of their severity or consequences.[751]

(7) The phrase "for the time being" in paragraph 2 indicates the temporary or provisional character of countermeasures. Their aim is the restoration of a condition of legality as between the injured State and the responsible

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[744] For these obligations, see articles 30 and 31 and commentaries.

[745] *Gabčíkovo-Nagymaros Project* (see footnote 27 above), p. 55, para. 83. See also *"Naulilaa"* (footnote 337 above), p. 1027; *"Cysne"* (footnote 338 above), p. 1057. At the 1930 Hague Conference, all States which responded on this point took the view that a prior wrongful act was an indispensable prerequisite for the adoption of reprisals; see League of Nations, Conference for the Codification of International Law, *Bases of Discussion …* (footnote 88 above), p. 128.

[746] The tribunal's remark in the *Air Service Agreement* case (see footnote 28 above), to the effect that "each State establishes for itself its legal situation vis-à-vis other States" (p. 443, para. 81) should not be interpreted in the sense that the United States would have been justified in taking countermeasures whether or not France was in breach of the Agreement. In that case the tribunal went on to hold that the United States was actually responding to a breach of the Agreement by France, and that its response met the requirements for countermeasures under international law, in particular in terms of purpose and proportionality. The tribunal did not decide that an unjustified belief by the United States as to the existence of a breach would have been sufficient.

[747] See paragraph (8) of the introductory commentary to chapter V of Part One.

[748] *Gabčíkovo-Nagymaros Project* (see footnote 27 above), pp. 55–56, para. 83.

[749] In the *Gabčíkovo-Nagymaros Project* case ICJ held that the requirement had been satisfied, in that Hungary was in continuing breach of its obligations under a bilateral treaty, and Czechoslovakia's response was directed against it on that ground.

[750] On the specific question of human rights obligations, see article 50, paragraph (1) (*b*), and commentary.

[751] See article 51 and commentary. In addition, the performance of certain obligations may not be withheld by way of countermeasures in any circumstances: see article 50 and commentary.

State, and not the creation of new situations which cannot be rectified whatever the response of the latter State to the claims against it.[752] Countermeasures are taken as a form of inducement, not punishment: if they are effective in inducing the responsible State to comply with its obligations of cessation and reparation, they should be discontinued and performance of the obligation resumed.

(8) Paragraph 1 of article 49 refers to the obligations of the responsible State "under Part Two". It is to ensuring the performance of these obligations that countermeasures are directed. In many cases the main focus of countermeasures will be to ensure cessation of a continuing wrongful act, but they may also be taken to ensure reparation, provided the other conditions laid down in chapter II are satisfied. Any other conclusion would immunize from countermeasures a State responsible for an internationally wrongful act if the act had ceased, irrespective of the seriousness of the breach or its consequences, or of the State's refusal to make reparation for it. In this context an issue arises whether countermeasures should be available where there is a failure to provide satisfaction as demanded by the injured State, given the subsidiary role this remedy plays in the spectrum of reparation.[753] In normal situations, satisfaction will be symbolic or supplementary and it would be highly unlikely that a State which had ceased the wrongful act and tendered compensation to the injured State could properly be made the target of countermeasures for failing to provide satisfaction as well. This concern may be adequately addressed by the application of the notion of proportionality set out in article 51.[754]

(9) *Paragraph 3* of article 49 is inspired by article 72, paragraph 2, of the 1969 Vienna Convention, which provides that when a State suspends a treaty it must not, during the suspension, do anything to preclude the treaty from being brought back into force. By analogy, States should as far as possible choose countermeasures that are reversible. In the *Gabčíkovo-Nagymaros Project* case, the existence of this condition was recognized by the Court, although it found that it was not necessary to pronounce on the matter. After concluding that "the diversion of the Danube carried out by Czechoslovakia was not a lawful countermeasure because it was not proportionate", the Court said:

> It is therefore not required to pass upon one other condition for the lawfulness of a countermeasure, namely that its purpose must be to induce the wrongdoing State to comply with its obligations under international law, and that the measure must therefore be reversible.[755]

However, the duty to choose measures that are reversible is not absolute. It may not be possible in all cases to reverse all of the effects of countermeasures after the occasion for taking them has ceased. For example, a requirement of notification of some activity is of no value after the activity has been undertaken. By contrast, inflicting irreparable damage on the responsible State could amount to punishment or a sanction for non-compliance, not a countermeasure as conceived in the articles. The phrase "as far as possible" in paragraph 3 indicates that if the injured State has a choice between a number of lawful and effective countermeasures, it should select one which permits the resumption of performance of the obligations suspended as a result of countermeasures.

### *Article 50. Obligations not affected by countermeasures*

**1. Countermeasures shall not affect:**

**(*a*) the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations;**

**(*b*) obligations for the protection of fundamental human rights;**

**(*c*) obligations of a humanitarian character prohibiting reprisals;**

**(*d*) other obligations under peremptory norms of general international law.**

**2. A State taking countermeasures is not relieved from fulfilling its obligations:**

**(*a*) under any dispute settlement procedure applicable between it and the responsible State;**

**(*b*) to respect the inviolability of diplomatic or consular agents, premises, archives and documents.**

*Commentary*

(1) Article 50 specifies certain obligations the performance of which may not be impaired by countermeasures. An injured State is required to continue to respect these obligations in its relations with the responsible State, and may not rely on a breach by the responsible State of its obligations under Part Two to preclude the wrongfulness of any non-compliance with these obligations. So far as the law of countermeasures is concerned, they are sacrosanct.

(2) The obligations dealt with in article 50 fall into two basic categories. Paragraph 1 deals with certain obligations which, by reason of their character, must not be the subject of countermeasures at all. Paragraph 2 deals with certain obligations relating in particular to the maintenance of channels of communication between the two States concerned, including machinery for the resolution of their disputes.

(3) *Paragraph 1* of article 50 identifies four categories of fundamental substantive obligations which may not be affected by countermeasures: (*a*) the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations; (*b*) obligations for the protection of fundamental human rights; (*c*) obligations of a humanitarian character prohibiting reprisals; and (*d*) other obligations under peremptory norms of general international law.

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[752] This notion is further emphasized by articles 49, paragraph 3, and 53 (termination of countermeasures).

[753] See paragraph (1) of the commentary to article 37.

[754] Similar considerations apply to assurances and guarantees of non-repetition. See article 30, subparagraph (*b*), and commentary.

[755] *Gabčíkovo-Nagymaros Project* (see footnote 27 above), pp. 56–57, para. 87.

(4) *Paragraph 1* (a) deals with the prohibition of the threat or use of force as embodied in the Charter of the United Nations, including the express prohibition of the use of force in Article 2, paragraph 4. It excludes forcible measures from the ambit of permissible countermeasures under chapter II.

(5) The prohibition of forcible countermeasures is spelled out in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, by which the General Assembly proclaimed that "States have a duty to refrain from acts of reprisal involving the use of force".[756] The prohibition is also consistent with the prevailing doctrine as well as a number of authoritative pronouncements of international judicial[757] and other bodies.[758]

(6) *Paragraph 1* (b) provides that countermeasures may not affect obligations for the protection of fundamental human rights. In the *"Naulilaa"* arbitration, the tribunal stated that a lawful countermeasure must be "limited by the requirements of humanity and the rules of good faith applicable in relations between States".[759] The Institut de droit international in its 1934 resolution stated that in taking countermeasures a State must "abstain from any harsh measure which would be contrary to the laws of humanity or the demands of the public conscience".[760] This has been taken further as a result of the development since 1945 of international human rights. In particular, the relevant human rights treaties identify certain human rights which may not be derogated from even in time of war or other public emergency.[761]

(7) In its general comment No. 8 (1997) the Committee on Economic, Social and Cultural Rights discussed the effect of economic sanctions on civilian populations and especially on children. It dealt both with the effect of measures taken by international organizations, a topic which falls outside the scope of the present articles,[762] as well as with countermeasures imposed by individual States or groups of States. It stressed that "whatever the circumstances, such sanctions should always take full account of the provisions of the International Covenant on Economic, Social and Cultural Rights",[763] and went on to state that:

> it is essential to distinguish between the basic objective of applying political and economic pressure upon the governing elite of a country to persuade them to conform to international law, and the collateral infliction of suffering upon the most vulnerable groups within the targeted country.[764]

Analogies can be drawn from other elements of general international law. For example, paragraph 1 of article 54 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) stipulates unconditionally that "[s]tarvation of civilians as a method of warfare is prohibited".[765] Likewise, the final sentence of paragraph 2 of article 1 of the International Covenant on Economic, Social and Cultural Rights and of the International Covenant on Civil and Political Rights states that "In no case may a people be deprived of its own means of subsistence".

(8) *Paragraph 1* (c) deals with the obligations of humanitarian law with regard to reprisals and is modelled on article 60, paragraph 5, of the 1969 Vienna Convention.[766] The paragraph reflects the basic prohibition of reprisals against individuals, which exists in international humanitarian law. In particular, under the Geneva Convention relative to the Treatment of Prisoners of War of 1929, the Geneva Conventions of 12 August 1949 and the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) of 1977, reprisals are prohibited against defined classes of protected persons, and these prohibitions are very widely accepted.[767]

(9) *Paragraph 1* (d) prohibits countermeasures affecting obligations under peremptory norms of general international law. Evidently, a peremptory norm, not subject to derogation as between two States even by treaty, cannot be derogated from by unilateral action in the form of countermeasures. Subparagraph (*d*) reiterates for the purposes of the present chapter the recognition in article 26 that the circumstances precluding wrongfulness elaborated in chapter V of Part One do not affect the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law. The reference to "other" obligations under

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[756] General Assembly resolution 2625 (XXV), annex, first principle. The Final Act of the Conference on Security and Co-operation in Europe also contains an explicit condemnation of forcible measures. Part of Principle II of the Declaration on Principles Guiding Relations between Participating States embodied in the first "Basket" of that Final Act reads: "Likewise [the participating States] will also refrain in their mutual relations from any act of reprisal by force."

[757] See especially *Corfu Channel*, *Merits* (footnote 35 above), p. 35; and *Military and Paramilitary Activities in and against Nicaragua* (footnote 36 above), p. 127, para. 249.

[758] See, e.g., Security Council resolutions 111 (1956) of 19 January 1956, 171 (1962) of 9 April 1962, 188 (1964) of 9 April 1964, 316 (1972) of 26 June 1972, 332 (1973) of 21 April 1973, 573 (1985) of 4 October 1985 and 1322 (2000) of 7 October 2000. See also General Assembly resolution 41/38 of 20 November 1986.

[759] *"Naulilaa"* (see footnote 337 above), p. 1026.

[760] *Annuaire de l'Institut de droit international*, vol. 38 (1934), p. 710.

[761] See article 4 of the International Covenant on Civil and Political Rights; article 15 of the European Convention on Human Rights; and article 27 of the American Convention on Human Rights.

[762] See below, article 59 and commentary.

[763] E/C.12/1997/8, para. 1.

[764] *Ibid*., para. 4.

[765] See also paragraph 2 of article 54 ("objects indispensable to the survival of the civilian population") and article 75. See also Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II).

[766] Paragraph 5 of article 60 of the 1969 Vienna Convention precludes a State from suspending or terminating for material breach any treaty provision "relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties". This paragraph was added at the Vienna Conference on the Law of Treaties on a vote of 88 votes in favour, none against and 7 abstentions.

[767] See K. J. Partsch, "Reprisals", *Encyclopedia of Public International Law*, R. Bernhardt, ed. (Amsterdam, Elsevier, 2000), vol. 4, p. 200, at pp. 203–204; and S. Oeter, "Methods and means of combat", D. Fleck, ed., *op. cit.* (footnote 409 above) p. 105, at pp. 204–207, paras. 476–479, with references to relevant provisions.

peremptory norms makes it clear that subparagraph (*d*) does not qualify the preceding subparagraphs, some of which also encompass norms of a peremptory character. In particular, subparagraphs (*b*) and (*c*) stand on their own. Subparagraph (*d*) allows for the recognition of further peremptory norms creating obligations which may not be the subject of countermeasures by an injured State.[768]

(10) States may agree between themselves on other rules of international law which may not be the subject of countermeasures, whether or not they are regarded as peremptory norms under general international law. This possibility is covered by the *lex specialis* provision in article 55 rather than by the exclusion of countermeasures under article 50, paragraph 1 (*d*). In particular, a bilateral or multilateral treaty might renounce the possibility of countermeasures being taken for its breach, or in relation to its subject matter. This is the case, for example, with the European Union treaties, which have their own system of enforcement.[769] Under the dispute settlement system of WTO, the prior authorization of the Dispute Settlement Body is required before a member can suspend concessions or other obligations under the WTO agreements in response to a failure of another member to comply with recommendations and rulings of a WTO panel or the Appellate Body.[770] Pursuant to article 23 of the WTO Dispute Settlement Understanding (DSU), members seeking "the redress of a violation of obligations or other nullification or impairment of benefits" under the WTO agreements, "shall have recourse to, and abide by" the DSU rules and procedures. This has been construed both as an "exclusive dispute resolution clause" and as a clause "preventing WTO members from unilaterally resolving their disputes in respect of WTO rights and obligations".[771] To the extent that derogation clauses or other treaty provisions (e.g. those prohibiting reservations) are properly interpreted as indicating that the treaty provisions are "intransgressible",[772] they may entail the exclusion of countermeasures.

(11) In addition to the substantive limitations on the taking of countermeasures in paragraph 1 of article 50, *paragraph 2* provides that countermeasures may not be taken with respect to two categories of obligations, viz. certain obligations under dispute settlement procedures applicable between it and the responsible State, and obligations with respect to diplomatic and consular inviolability. The justification in each case concerns not so much the substantive character of the obligation but its function in relation to the resolution of the dispute between the parties which has given rise to the threat or use of countermeasures.

(12) The first of these, contained in *paragraph 2* (a), applies to "any dispute settlement procedure applicable" between the injured State and the responsible State. This phrase refers only to dispute settlement procedures that are related to the dispute in question and not to other unrelated issues between the States concerned. For this purpose the dispute should be considered as encompassing both the initial dispute over the internationally wrongful act and the question of the legitimacy of the countermeasure(s) taken in response.

(13) It is a well-established principle that dispute settlement provisions must be upheld notwithstanding that they are contained in a treaty which is at the heart of the dispute and the continued validity or effect of which is challenged. As ICJ said in *Appeal Relating to the Jurisdiction of the ICAO Council:*

> Nor in any case could a merely unilateral suspension *per se* render jurisdictional clauses inoperative, since one of their purposes might be, precisely, to enable the validity of the suspension to be tested.[773]

Similar reasoning underlies the principle that dispute settlement provisions between the injured and the responsible State and applicable to their dispute may not be suspended by way of countermeasures. Otherwise, unilateral action would replace an agreed provision capable of resolving the dispute giving rise to the countermeasures. The point was affirmed by the Court in the *United States Diplomatic and Consular Staff in Tehran* case:

> In any event, any alleged violation of the Treaty [of Amity] by either party could not have the effect of precluding that party from invoking the provisions of the Treaty concerning pacific settlement of disputes.[774]

(14) The second exception in *paragraph 2* (b) limits the extent to which an injured State may resort, by way of countermeasures, to conduct inconsistent with its obligations in the field of diplomatic or consular relations. An injured State could envisage action at a number of levels. To declare a diplomat *persona non grata*, to terminate or suspend diplomatic relations, to recall ambassadors in situations provided for in the Vienna Convention on Diplomatic Relations—such acts do not amount to countermeasures in the sense of this chapter. At a second level, measures may be taken affecting diplomatic or consular privileges, not prejudicing the inviolability of diplomatic or consular personnel or of premises, archives and documents. Such measures may be lawful as countermeasures if the requirements of this chapter are met. On the other hand, the scope of prohibited countermeasures under article 50, paragraph 2 (*b*), is limited to those obligations which are designed to guarantee the physical safety and inviolability (including the jurisdictional immunity) of diplomatic agents, premises, archives and documents in

[768] See paragraphs (4) to (6) of the commentary to article 40.

[769] On the exclusion of unilateral countermeasures in European Union law, see, for example, joined cases 90 and 91-63 (*Commission of the European Economic Community* v. *Grand Duchy of Luxembourg and Kingdom of Belgium*), *Reports of cases before the Court*, p. 625, at p. 631 (1964); case 52/75 (*Commission of the European Communities* v. *Italian Republic*), *ibid*., p. 277, at p. 284 (1976); case 232/78 (*Commission of the European Economic Communities* v. *French Republic*), *ibid*., p. 2729 (1979); and case C-5/94 (*The Queen.* v. *Ministry of Agriculture, Fisheries and Food,* ex parte *Hedley Lomas (Ireland) Ltd.*), *Reports of cases before the Court of Justice and the Court of First Instance*, p. I–2553 (1996).

[770] See Marrakesh Agreement establishing the World Trade Organization, annex 2 (Understanding on Rules and Procedures governing the Settlement of Disputes), arts. 3, para. 7 and 22.

[771] See WTO, Report of the Panel, United States–Sections 301–310 of the Trade Act of 1974 (footnote 73 above), paras. 7.35–7.46.

[772] To use the synonym adopted by ICJ in its advisory opinion on *Legality of the Threat or Use of Nuclear Weapons* (see footnote 54 above), p. 257, para. 79.

[773] *Appeal Relating to the Jurisdiction of the ICAO Council (India* v. *Pakistan), Judgment, I.C.J. Reports 1972*, p. 46, at p. 53. See also S. M. Schwebel, *International Arbitration: Three Salient Problems* (Cambridge, Grotius, 1987), pp. 13–59.

[774] *United States Diplomatic and Consular Staff in Tehran* (see footnote 59 above), p. 28, para. 53.

all circumstances, including armed conflict.[775] The same applies, *mutatis mutandis*, to consular officials.

(15) In the *United States Diplomatic and Consular Staff in Tehran* case, ICJ stressed that "diplomatic law itself provides the necessary means of defence against, and sanction for, illicit activities by members of diplomatic or consular missions",[776] and it concluded that violations of diplomatic or consular immunities could not be justified even as countermeasures in response to an internationally wrongful act by the sending State. As the Court said:

> The rules of diplomatic law, in short, constitute a self-contained regime which, on the one hand, lays down the receiving State's obligations regarding the facilities, privileges and immunities to be accorded to diplomatic missions and, on the other, foresees their possible abuse by members of the mission and specifies the means at the disposal of the receiving State to counter any such abuse.[777]

If diplomatic or consular personnel could be targeted by way of countermeasures, they would in effect constitute resident hostages against perceived wrongs of the sending State, undermining the institution of diplomatic and consular relations. The exclusion of any countermeasures infringing diplomatic and consular inviolability is thus justified on functional grounds. It does not affect the various avenues for redress available to the receiving State under the terms of the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations.[778] On the other hand, no reference need be made in article 50, paragraph 2 (*b*), to multilateral diplomacy. The representatives of States to international organizations are covered by the reference to diplomatic agents. As for officials of international organizations themselves, no retaliatory step taken by a host State to their detriment could qualify as a countermeasure since it would involve non-compliance not with an obligation owed to the responsible State but with an obligation owed to a third party, i.e. the international organization concerned.

### *Article 51. Proportionality*

**Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question.**

*Commentary*

(1) Article 51 establishes an essential limit on the taking of countermeasures by an injured State in any given case, based on considerations of proportionality. It is relevant in determining what countermeasures may be applied and their degree of intensity. Proportionality provides a measure of assurance inasmuch as disproportionate countermeasures could give rise to responsibility on the part of the State taking such measures.

(2) Proportionality is a well-established requirement for taking countermeasures, being widely recognized in State practice, doctrine and jurisprudence. According to the award in the *"Naulilaa"* case:

> even if one were to admit that the law of nations does not require that the reprisal should be approximately in keeping with the offence, one should certainly consider as excessive and therefore unlawful reprisals out of all proportion to the act motivating them.[779]

(3) In the *Air Service Agreement* arbitration,[780] the issue of proportionality was examined in some detail. In that case there was no exact equivalence between France's refusal to allow a change of gauge in London on flights from the west coast of the United States and the United States' countermeasure which suspended Air France flights to Los Angeles altogether. The tribunal nonetheless held the United States measures to be in conformity with the principle of proportionality because they "do not appear to be clearly disproportionate when compared to those taken by France". In particular, the majority said:

> It is generally agreed that all counter-measures must, in the first instance, have some degree of equivalence with the alleged breach: this is a well-known rule … It has been observed, generally, that judging the "proportionality" of counter-measures is not an easy task and can at best be accomplished by approximation. In the Tribunal's view, it is essential, in a dispute between States, to take into account not only the injuries suffered by the companies concerned but also the importance of the questions of principle arising from the alleged breach. The Tribunal thinks that it will not suffice, in the present case, to compare the losses suffered by Pan Am on account of the suspension of the projected services with the losses which the French companies would have suffered as a result of the counter-measures; it will also be necessary to take into account the importance of the positions of principle which were taken when the French authorities prohibited changes of gauge in third countries. If the importance of the issue is viewed within the framework of the general air transport policy adopted by the United States Government and implemented by the conclusion of a large number of international agreements with countries other than France, the measures taken by the United States do not appear to be clearly disproportionate when compared to those taken by France. Neither Party has provided the Tribunal with evidence that would be sufficient to affirm or reject the existence of proportionality in these terms, and the Tribunal must be satisfied with a very approximative appreciation. [781]

In that case the countermeasures taken were in the same field as the initial measures and concerned the same routes, even if they were rather more severe in terms of their economic effect on the French carriers than the initial French action.

(4) The question of proportionality was again central to the appreciation of the legality of possible countermeasures taken by Czechoslovakia in the *Gabčíkovo-Nagymaros Project* case.[782] ICJ, having accepted that

[775] See, e.g., Vienna Convention on Diplomatic Relations, arts. 22, 24, 29, 44 and 45.

[776] *United States Diplomatic and Consular Staff in Tehran* (see footnote 59 above), p. 38, para. 83.

[777] *Ibid*., p. 40, para. 86. Cf. article 45, subparagraph (*a*), of the Vienna Convention on Diplomatic Relations; article 27, paragraph 1 (*a*), of the Vienna Convention on Consular Relations (premises, property and archives to be protected "even in case of armed conflict").

[778] See articles 9, 11, 26, 36, paragraph 2, 43 (*b*) and 47, paragraph 2 (*a*), of the Vienna Convention on Diplomatic Relations; and articles 10, paragraph 2, 12, 23, 25 (*b*) and (*c*) and article 35, paragraph (3), of the Vienna Convention on Consular Relations.

[779] *"Naulilaa"* (see footnote 337 above), p. 1028.

[780] *Air Service Agreement* (see footnote 28 above), para. 83.

[781] *Ibid*.; Reuter, dissenting, accepted the tribunal's legal analysis of proportionality but suggested that there were "serious doubts on the proportionality of the counter-measures taken by the United States, which the tribunal has been unable to assess definitely" (p. 448).

[782] *Gabčíkovo-Nagymaros Project* (see footnote 27 above), p. 56, paras. 85 and 87, citing *Territorial Jurisdiction of the International Commission of the River Oder, Judgment No. 16, 1929, P.C.I.J., Series A, No. 23*, p. 27.

Hungary's actions in refusing to complete the Project amounted to an unjustified breach of the Treaty on the Construction and Operation of the Gabčíkovo-Nagymaros Barrage System of 1977, went on to say:

> In the view of the Court, an important consideration is that the effects of a countermeasure must be commensurate with the injury suffered, taking account of the rights in question.
>
> In 1929, the Permanent Court of International Justice, with regard to navigation on the River Oder, stated as follows:
>
> "[the] community of interest in a navigable river becomes the basis of a common legal right, the essential features of which are the perfect equality of all riparian States in the user [sic] of the whole course of the river and the exclusion of any preferential privilege of any one riparian State in relation to the others"...
>
> Modern development of international law has strengthened this principle for non-navigational uses of international watercourses as well ...
>
> The Court considers that Czechoslovakia, by unilaterally assuming control of a shared resource, and thereby depriving Hungary of its right to an equitable and reasonable share of the natural resources of the Danube—with the continuing effects of the diversion of these waters on the ecology of the riparian area of the Szigetköz—failed to respect the proportionality which is required by international law ...
>
> The Court thus considers that the diversion of the Danube carried out by Czechoslovakia was not a lawful countermeasure because it was not proportionate.

Thus, the Court took into account the quality or character of the rights in question as a matter of principle and (like the tribunal in the *Air Service Agreement* case) did not assess the question of proportionality only in quantitative terms.

(5) In other areas of the law where proportionality is relevant (e.g. self-defence), it is normal to express the requirement in positive terms, even though, in those areas as well, what is proportionate is not a matter which can be determined precisely.[783] The positive formulation of the proportionality requirement is adopted in article 51. A negative formulation might allow too much latitude, in a context where there is concern as to the possible abuse of countermeasures.

(6) Considering the need to ensure that the adoption of countermeasures does not lead to inequitable results, proportionality must be assessed taking into account not only the purely "quantitative" element of the injury suffered, but also "qualitative" factors such as the importance of the interest protected by the rule infringed and the seriousness of the breach. Article 51 relates proportionality primarily to the injury suffered but "taking into account" two further criteria: the gravity of the internationally wrongful act, and the rights in question. The reference to "the rights in question" has a broad meaning, and includes not only the effect of a wrongful act on the injured State but also on the rights of the responsible State. Furthermore, the position of other States which may be affected may also be taken into consideration.

(7) Proportionality is concerned with the relationship between the internationally wrongful act and the countermeasure. In some respects proportionality is linked to the requirement of purpose specified in article 49: a clearly disproportionate measure may well be judged not to have been necessary to induce the responsible State to comply with its obligations but to have had a punitive aim and to fall outside the purpose of countermeasures enunciated in article 49. Proportionality is, however, a limitation even on measures which may be justified under article 49. In every case a countermeasure must be commensurate with the injury suffered, including the importance of the issue of principle involved and this has a function partly independent of the question whether the countermeasure was necessary to achieve the result of ensuring compliance.

[783] E. Cannizzaro, *Il principio della proporzionalità nell'ordinamento internazionale* (Milan, Giuffrè, 2000).

### *Article 52. Conditions relating to resort to countermeasures*

**1. Before taking countermeasures, an injured State shall:**

**(*a*) call upon the responsible State, in accordance with article 43, to fulfil its obligations under Part Two;**

**(*b*) notify the responsible State of any decision to take countermeasures and offer to negotiate with that State.**

**2. Notwithstanding paragraph 1 (*b*), the injured State may take such urgent countermeasures as are necessary to preserve its rights.**

**3. Countermeasures may not be taken, and if already taken must be suspended without undue delay if:**

**(*a*) the internationally wrongful act has ceased; and**

**(*b*) the dispute is pending before a court or tribunal which has the authority to make decisions binding on the parties.**

**4. Paragraph 3 does not apply if the responsible State fails to implement the dispute settlement procedures in good faith.**

*Commentary*

(1) Article 52 lays down certain procedural conditions relating to the resort to countermeasures by the injured State. Before taking countermeasures an injured State is required to call on the responsible State in accordance with article 43 to comply with its obligations under Part Two. The injured State is also required to notify the responsible State that it intends to take countermeasures and to offer to negotiate with that State. Notwithstanding this second requirement, the injured State may take certain urgent countermeasures to preserve its rights. If the responsible State has ceased the internationally wrongful act and the dispute is before a competent court or tribunal, countermeasures may not be taken; if already taken, they must be suspended. However, this requirement does not apply if the responsible State fails to implement dispute settlement procedures in good faith. In such a case countermeasures do not have to be suspended and may be resumed.

(2) Overall, article 52 seeks to establish reasonable procedural conditions for the taking of countermeasures in a context where compulsory third party settlement of disputes may not be available, immediately or at all.[784] At the same time, it needs to take into account the possibility that there may be an international court or tribunal with authority to make decisions binding on the parties in relation to the dispute. Countermeasures are a form of self-help, which responds to the position of the injured State in an international system in which the impartial settlement of disputes through due process of law is not yet guaranteed. Where a third party procedure exists and has been invoked by either party to the dispute, the requirements of that procedure, e.g. as to interim measures of protection, should substitute as far as possible for countermeasures. On the other hand, even where an international court or tribunal has jurisdiction over a dispute and authority to indicate interim measures of protection, it may be that the responsible State is not cooperating in that process. In such cases the remedy of countermeasures necessarily revives.

(3) The system of article 52 builds upon the observations of the tribunal in the *Air Service Agreement* arbitration.[785] The first requirement, set out in *paragraph 1* (a), is that the injured State must call on the responsible State to fulfil its obligations of cessation and reparation before any resort to countermeasures. This requirement (sometimes referred to as "*sommation*") was stressed both by the tribunal in the *Air Service Agreement* arbitration[786] and by ICJ in the *Gabčíkovo-Nagymaros Project* case.[787] It also appears to reflect a general practice.[788]

(4) The principle underlying the notification requirement is that, considering the exceptional nature and potentially serious consequences of countermeasures, they should not be taken before the other State is given notice of a claim and some opportunity to present a response. In practice, however, there are usually quite extensive and detailed negotiations over a dispute before the point is reached where some countermeasures are contemplated. In such cases the injured State will already have notified the responsible State of its claim in accordance with article 43, and it will not have to do it again in order to comply with paragraph 1 (*a*).

(5) *Paragraph 1* (b) requires that the injured State which decides to take countermeasures should notify the responsible State of that decision to take countermeasures and offer to negotiate with that State. Countermeasures can have serious consequences for the target State, which should have the opportunity to reconsider its position faced with the proposed countermeasures. The temporal relationship between the operation of subparagraphs (*a*) and (*b*) of paragraph 1 is not strict. Notifications could be made close to each other or even at the same time.

(6) Under *paragraph 2*, however, the injured State may take "such urgent countermeasures as are necessary to preserve its rights" even before any notification of the intention to do so. Under modern conditions of communications, a State which is responsible for an internationally wrongful act and which refuses to cease that act or provide any redress therefore may also seek to immunize itself from countermeasures, for example by withdrawing assets from banks in the injured State. Such steps can be taken within a very short time, so that the notification required by paragraph 1 (*b*) might frustrate its own purpose. Hence, paragraph 2 allows for urgent countermeasures which are necessary to preserve the rights of the injured State: this phrase includes both its rights in the subject matter of the dispute and its right to take countermeasures. Temporary stay orders, the temporary freezing of assets and similar measures could fall within paragraph 2, depending on the circumstances.

(7) *Paragraph 3* deals with the case in which the wrongful act has ceased and the dispute is submitted to a court or tribunal which has the authority to decide it with binding effect for the parties. In such a case, and for so long as the dispute settlement procedure is being implemented in good faith, unilateral action by way of countermeasures is not justified. Once the conditions in paragraph 3 are met, the injured State may not take countermeasures; if already taken, they must be suspended "without undue delay". The phrase "without undue delay" allows a limited tolerance for the arrangements required to suspend the measures in question.

(8) A dispute is not "pending before a court or tribunal" for the purposes of paragraph 3 (*b*) unless the court or tribunal exists and is in a position to deal with the case. For these purposes a dispute is not pending before an *ad hoc* tribunal established pursuant to a treaty until the tribunal is actually constituted, a process which will take some time even if both parties are cooperating in the appointment of the members of the tribunal.[789] Paragraph 3 is based on the assumption that the court or tribunal to which it refers has jurisdiction over the dispute and also the power to order provisional measures. Such power is a normal feature of the rules of international courts and tribunals.[790] The rationale behind paragraph 3 is that once the parties submit their dispute to such a court or tribunal for resolution, the injured State may request it to order provisional measures to protect its rights. Such a request, provided the court or tribunal is available to hear it, will perform a function essentially equivalent to that of countermeasures. Provided the order is complied with it will

[784] See above, paragraph (7) of the commentary to the present chapter.

[785] *Air Service Agreement* (see footnote 28 above), pp. 445–446, paras. 91 and 94–96.

[786] *Ibid*., p. 444, paras. 85–87.

[787] *Gabčíkovo-Nagymaros Project* (see footnote 27 above), p. 56, para. 84.

[788] A. Gianelli, *Adempimenti preventivi all'adozione di contromisure internazionali* (Milan, Giuffrè, 1997).

[789] Hence, paragraph 5 of article 290 of the United Nations Convention on the Law of the Sea provides for ITLOS to deal with provisional measures requests "[p]ending the constitution of an arbitral tribunal to which the dispute is being submitted".

[790] The binding effect of provisional measures orders under Part XI of the United Nations Convention on the Law of the Sea is assured by paragraph 6 of article 290. For the binding effect of provisional measures orders under Article 41 of the Statute of ICJ, see the decision in *LaGrand, Judgment* (footnote 119 above), pp. 501–504, paras. 99–104.

make countermeasures unnecessary pending the decision of the tribunal. The reference to a "court or tribunal" is intended to refer to any third party dispute settlement procedure, whatever its designation. It does not, however, refer to political organs such as the Security Council. Nor does it refer to a tribunal with jurisdiction between a private party and the responsible State, even if the dispute between them has given rise to the controversy between the injured State and the responsible State. In such cases, however, the fact that the underlying dispute has been submitted to arbitration will be relevant for the purposes of articles 49 and 51, and only in exceptional cases will countermeasures be justified.[791]

(9) *Paragraph 4* of article 52 provides a further condition for the suspension of countermeasures under paragraph 3. It comprehends various possibilities, ranging from an initial refusal to cooperate in the procedure, for example by non-appearance, through non-compliance with a provisional measures order, whether or not it is formally binding, through to refusal to accept the final decision of the court or tribunal. This paragraph also applies to situations where a State party fails to cooperate in the establishment of the relevant tribunal or fails to appear before the tribunal once it is established. Under the circumstances of paragraph 4, the limitations to the taking of countermeasures under paragraph 3 do not apply.

### *Article 53. Termination of countermeasures*

**Countermeasures shall be terminated as soon as the responsible State has complied with its obligations under Part Two in relation to the internationally wrongful act.**

*Commentary*

(1) Article 53 deals with the situation where the responsible State has complied with its obligations of cessation and reparation under Part Two in response to countermeasures taken by the injured State. Once the responsible State has complied with its obligations under Part Two, no ground is left for maintaining countermeasures, and they must be terminated forthwith.

(2) The notion that countermeasures must be terminated as soon as the conditions which justified them have ceased is implicit in the other articles in this chapter. In view of its importance, however, article 53 makes this clear. It underlines the specific character of countermeasures under article 49.

[791] Under the Convention on the Settlement of Investment Disputes between States and Nationals of other States, the State of nationality may not bring an international claim on behalf of a claimant individual or company "in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute" (art. 27, para. 1); see C. H. Schreuer, *The ICSID Convention: A Commentary* (Cambridge University Press, 2001) pp. 397–414. This excludes all forms of invocation of responsibility by the State of nationality, including the taking of countermeasures. See paragraph (2) of the commentary to article 42.

### *Article 54. Measures taken by States other than an injured State*

**This chapter does not prejudice the right of any State, entitled under article 48, paragraph 1, to invoke the responsibility of another State, to take lawful measures against that State to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached.**

*Commentary*

(1) Chapter II deals with the right of an injured State to take countermeasures against a responsible State in order to induce that State to comply with its obligations of cessation and reparation. However, "injured" States, as defined in article 42, are not the only States entitled to invoke the responsibility of a State for an internationally wrongful act under chapter I of this Part. Article 48 allows such invocation by any State, in the case of the breach of an obligation to the international community as a whole, or by any member of a group of States, in the case of other obligations established for the protection of the collective interest of the group. By virtue of article 48, paragraph 2, such States may also demand cessation and performance in the interests of the beneficiaries of the obligation breached. Thus, with respect to the obligations referred to in article 48, such States are recognized as having a legal interest in compliance. The question is to what extent these States may legitimately assert a right to react against unremedied breaches.[792]

(2) It is vital for this purpose to distinguish between individual measures, whether taken by one State or by a group of States each acting in its individual capacity and through its own organs on the one hand, and institutional reactions in the framework of international organizations on the other. The latter situation, for example where it occurs under the authority of Chapter VII of the Charter of the United Nations, is not covered by the articles.[793] More generally, the articles do not cover the case where action is taken by an international organization, even though the member States may direct or control its conduct.[794]

(3) Practice on this subject is limited and rather embryonic. In a number of instances, States have reacted against what were alleged to be breaches of the obligations referred to in article 48 without claiming to be individually injured. Reactions have taken such forms as economic sanctions or other measures (e.g. breaking off air links or other contacts). Examples include the following:

[792] See, e.g., M. Akehurst, "Reprisals by third States", BYBIL, *1970*, vol. 44, p. 1; J. I. Charney, "Third State remedies in international law", *Michigan Journal of International Law*, vol. 10, No. 1 (1989), p. 57; Hutchinson, *loc. cit*. (footnote 672 above); Sicilianos, *op. cit.* (footnote 735 above), pp. 110–175; B. Simma, "From bilateralism to community interest in international law", *Collected Courses ..., 1994–VI* (The Hague, Martinus Nijhoff, 1997), vol. 250, p. 217; and J. A. Frowein, "Reactions by not directly affected States to breaches of public international law", *Collected Courses ..., 1994–IV* (Dordrecht, Martinus Nijhoff, 1995), vol. 248, p. 345.

[793] See article 59 and commentary.

[794] See article 57 and commentary.

• *United States-Uganda (1978).* In October 1978, the United States Congress adopted legislation prohibiting exports of goods and technology to, and all imports from, Uganda.[795] The legislation recited that "[t]he Government of Uganda … has committed genocide against Ugandans" and that the "United States should take steps to dissociate itself from any foreign government which engages in the international crime of genocide".[796]

• *Certain Western countries-Poland and the Soviet Union (1981).* On 13 December 1981, the Polish Government imposed martial law and subsequently suppressed demonstrations and detained many dissidents.[797] The United States and other Western countries took action against both Poland and the Soviet Union. The measures included the suspension, with immediate effect, of treaties providing for landing rights of Aeroflot in the United States and LOT in the United States, Great Britain, France, the Netherlands, Switzerland and Austria.[798] The suspension procedures provided for in the respective treaties were disregarded.[799]

• *Collective measures against Argentina (1982).* In April 1982, when Argentina took control over part of the Falkland Islands (Malvinas), the Security Council called for an immediate withdrawal.[800] Following a request by the United Kingdom, European Community members, Australia, Canada and New Zealand adopted trade sanctions. These included a temporary prohibition on all imports of Argentine products, which ran contrary to article XI:1 and possibly article III of the General Agreement on Tariffs and Trade. It was disputed whether the measures could be justified under the national security exception provided for in article XXI (*b*) (iii) of the Agreement.[801] The embargo adopted by the European countries also constituted a suspension of Argentina's rights under two sectoral agreements on trade in textiles and trade in mutton and lamb,[802] for which security exceptions of the Agreement did not apply.

• *United States-South Africa (1986).* When in 1985, the Government of South Africa declared a state of emergency in large parts of the country, the Security Council recommended the adoption of sectoral economic boycotts and the freezing of cultural and sports relations.[803] Subsequently, some countries introduced measures which went beyond those recommended by the Security Council. The United States Congress adopted the Comprehensive Anti-Apartheid Act which suspended landing rights of South African Airlines on United States territory.[804] This immediate suspension was contrary to the terms of the 1947 United States of America and Union of South Africa Agreement relating to air services between their respective territories[805] and was justified as a measure which should encourage the Government of South Africa "to adopt reforms leading to the establishment of a non-racial democracy".[806]

• *Collective measures against Iraq (1990).* On 2 August 1990, Iraqi troops invaded and occupied Kuwait. The Security Council immediately condemned the invasion. European Community member States and the United States adopted trade embargoes and decided to freeze Iraqi assets.[807] This action was taken in direct response to the Iraqi invasion with the consent of the Government of Kuwait.

• C*ollective measures against the Federal Republic of Yugoslavia (1998).* In response to the humanitarian crisis in Kosovo, the member States of the European Community adopted legislation providing for the freezing of Yugoslav funds and an immediate flight ban.[808] For a number of countries, such as France, Germany and the United Kingdom, the latter measure implied the non-performance of bilateral aviation agreements.[809] Because of doubts about the legitimacy of the action, the British Government initially was prepared to follow the one-year denunciation procedure provided for in article 17 of its agreement with Yugoslavia. However, it later changed its position and denounced flights with immediate effect. Justifying the measure, it stated that "President Milosevic's ... worsening record on human rights means that, on moral and political grounds, he has forfeited the right of his Government to insist upon the 12 months notice which would normally ap-

[795] Uganda Embargo Act, Public Law 95-435 of 10 October 1978, *United States Statutes at Large 1978*, vol. 92, part 1 (Washington, D.C., United States Government Printing Office, 1980), pp. 1051–1053.

[796] *Ibid*., sects. 5(*a*) and (*b*).

[797] RGDIP, vol. 86 (1982), pp. 603–604.

[798] *Ibid*., p. 606.

[799] See, e.g., article 15 of the Air Transport Agreement between the Government of the United States of America and the Government of the Polish People's Republic of 1972 (*United States Treaties and Other International Agreements*, vol. 23, part 4 (1972), p. 4269); and article 17 of the United States-Union of Soviet Socialist Republics Civil Air Transport Agreement of 1966, ILM, vol. 6, No. 1 (January 1967), p. 82 and vol. 7, No. 3 (May 1968), p. 571.

[800] Security Council resolution 502 (1982) of 3 April 1982.

[801] Western States' reliance on this provision was disputed by other GATT members; cf. communiqué of Western countries, GATT document L. 5319/Rev.1 and the statements by Spain and Brazil, GATT document C/M/157, pp. 5–6. For an analysis, see M. J. Hahn, *Die einseitige Aussetzung von GATT-Verpflichtungen als Repressalie* (Unilateral Suspension of GATT Obligations as Reprisal (English summary)) (Berlin, Springer, 1996), pp. 328–334.

[802] The treaties are reproduced in *Official Journal of the European Communities*, No. L 298 of 26 November 1979, p. 2; and No. L 275 of 18 October 1980, p. 14.

[803] Security Council resolution 569 (1985) of 26 July 1985. For further references, see Sicilianos, *op. cit.* (footnote 735 above), p. 165.

[804] For the text of this provision, see ILM, vol. 26, No. 1 (January 1987), p. 79 (sect. 306).

[805] United Nations, *Treaty Series*, vol. 66, p. 239 (art. VI).

[806] For the implementation order, see ILM (footnote 804 above), p. 105.

[807] See, e.g., President Bush's Executive Orders of 2 August 1990, reproduced in AJIL, vol. 84, No. 4 (October 1990), pp. 903–905.

[808] Common positions of 7 May and 29 June 1998, *Official Journal of the European Communities*, No. L 143 of 14 May 1998, p. 1 and No. L 190 of 4 July 1998, p. 3; implemented through Council Regulations 1295/98, *ibid*., No. L 178 of 23 June 1998, p. 33 and 1901/98, *ibid.*, No. L 248 of 8 September 1998, p. 1.

[809] See, e.g., United Kingdom, *Treaty Series* No. 10 (1960) (London, HM Stationery Office, 1960); and *Recueil des Traités et Accords de la France*, 1967, No. 69.

ply".[810] The Federal Republic of Yugoslavia protested these measures as "unlawful, unilateral and an example of the policy of discrimination".[811]

(4) In some other cases, certain States similarly suspended treaty rights in order to exercise pressure on States violating collective obligations. However, they did not rely on a right to take countermeasures, but asserted a right to suspend the treaty because of a fundamental change of circumstances. Two examples may be given:

• *Netherlands-Suriname (1982).* In 1980, a military Government seized power in Suriname. In response to a crackdown by the new Government on opposition movements in December 1982, the Dutch Government suspended a bilateral treaty on development assistance under which Suriname was entitled to financial subsidies.[812] While the treaty itself did not contain any suspension or termination clauses, the Dutch Government stated that the human rights violations in Suriname constituted a fundamental change of circumstances which gave rise to a right of suspension.[813]

• *European Community member States-the Federal Republic of Yugoslavia (1991).* In the autumn of 1991, in response to resumption of fighting within the Federal Republic of Yugoslavia, European Community members suspended and later denounced the 1983 Cooperation Agreement with Yugoslavia.[814] This led to a general repeal of trade preferences on imports and thus went beyond the weapons embargo ordered by the Security Council in resolution 713 (1991) of 25 September 1991. The reaction was incompatible with the terms of the Cooperation Agreement, which did not provide for the immediate suspension but only for denunciation upon six months' notice. Justifying the suspension, European Community member States explicitly mentioned the threat to peace and security in the region. But as in the case of Suriname, they relied on fundamental change of circumstances, rather than asserting a right to take countermeasures.[815]

(5) In some cases, there has been an apparent willingness on the part of some States to respond to violations of obligations involving some general interest, where those States could not be considered "injured States" in the sense of article 42. It should be noted that in those cases where there was, identifiably, a State primarily injured by the breach in question, other States have acted at the request and on behalf of that State.[816]

(6) As this review demonstrates, the current state of international law on countermeasures taken in the general or collective interest is uncertain. State practice is sparse and involves a limited number of States. At present, there appears to be no clearly recognized entitlement of States referred to in article 48 to take countermeasures in the collective interest. Consequently, it is not appropriate to include in the present articles a provision concerning the question whether other States, identified in article 48, are permitted to take countermeasures in order to induce a responsible State to comply with its obligations. Instead, chapter II includes a saving clause which reserves the position and leaves the resolution of the matter to the further development of international law.

(7) Article 54 accordingly provides that the chapter on countermeasures does not prejudice the right of any State, entitled under article 48, paragraph 1, to invoke the responsibility of another State, to take lawful measures against the responsible State to ensure cessation of the breach and reparation in the interest of the injured State or the beneficiaries of the obligation breached. The article speaks of "lawful measures" rather than "countermeasures" so as not to prejudice any position concerning measures taken by States other than the injured State in response to breaches of obligations for the protection of the collective interest or those owed to the international community as a whole.

## Part Four

## GENERAL PROVISIONS

This Part contains a number of general provisions applicable to the articles as a whole, specifying either their scope or certain matters not dealt with. First, article 55 makes it clear by reference to the *lex specialis* principle that the articles have a residual character. Where some matter otherwise dealt with in the articles is governed by a special rule of international law, the latter will prevail to the extent of any inconsistency. Correlatively, article 56 makes it clear that the articles are not exhaustive, and that they do not affect other applicable rules of international law on matters not dealt with. There follow three saving clauses. Article 57 excludes from the scope of the articles questions concerning the responsibility of international organizations and of States for the acts of international organizations. The articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State, and this is made clear by article 58. Finally, article 59 reserves the effects of the Charter of the United Nations itself.

[810] BYBIL, *1998*, vol. 69, p. 581; see also BYBIL, *1999*, vol. 70, pp. 555–556.

[811] Statement of the Government of the Federal Republic of Yugoslavia on the suspension of flights of Yugoslav Airlines of 10 October 1998. See M. Weller, *The Crisis in Kosovo 1989-1999* (Cambridge, Documents & Analysis Publishing, 1999), p. 227.

[812] *Tractatenblad van het Koninkrijk der Nederlanden*, No. 140 (1975). See H.-H. Lindemann, "The repercussions resulting from the violation of human rights in Surinam on the contractual relations between the Netherlands and Surinam", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, vol. 44 (1984), p. 64, at pp. 68–69.

[813] R. C. R. Siekmann, "Netherlands State practice for the parliamentary year 1982–1983", NYIL, 1984, vol. 15, p. 321.

[814] *Official Journal of the European Communities*, No. L 41 of 14 February 1983, p. 1; No. L 315 of 15 November 1991, p. 1, for the suspension; and No. L 325 of 27 November 1991, p. 23, for the denunciation.

[815] See also the decision of the European Court of Justice in *A. Racke GmbH and Co.* v. *Hauptzollamt Mainz*, case C-162/96, *Reports of cases before the Court of Justice and the Court of First Instance*, 1998-6, p. I–3655, at pp. 3706–3708, paras. 53–59.

[816] Cf. *Military and Paramilitary Activities in and against Nicaragua* (footnote 36 above) where ICJ noted that action by way of collective self-defence could not be taken by a third State except at the request of the State subjected to the armed attack (p. 105, para. 199).

### *Article 55.* Lex specialis

**These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law.**

*Commentary*

(1) When defining the primary obligations that apply between them, States often make special provision for the legal consequences of breaches of those obligations, and even for determining whether there has been such a breach. The question then is whether those provisions are exclusive, i.e. whether the consequences which would otherwise apply under general international law, or the rules that might otherwise have applied for determining a breach, are thereby excluded. A treaty may expressly provide for its relationship with other rules. Often, however, it will not do so and the question will then arise whether the specific provision is to coexist with or exclude the general rule that would otherwise apply.

(2) Article 55 provides that the articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or its legal consequences are determined by special rules of international law. It reflects the maxim *lex specialis derogat legi generali*. Although it may provide an important indication, this is only one of a number of possible approaches towards determining which of several rules potentially applicable is to prevail or whether the rules simply coexist. Another gives priority, as between the parties, to the rule which is later in time.[817] In certain cases the consequences that follow from a breach of some overriding rule may themselves have a peremptory character. For example, States cannot, even as between themselves, provide for legal consequences of a breach of their mutual obligations which would authorize acts contrary to peremptory norms of general international law. Thus, the assumption of article 55 is that the special rules in question have at least the same legal rank as those expressed in the articles. On that basis, article 55 makes it clear that the present articles operate in a residual way.

(3) It will depend on the special rule to establish the extent to which the more general rules on State responsibility set out in the present articles are displaced by that rule. In some cases, it will be clear from the language of a treaty or other text that only the consequences specified are to flow. Where that is so, the consequence will be "determined" by the special rule and the principle embodied in article 55 will apply. In other cases, one aspect of the general law may be modified, leaving other aspects still applicable. An example of the former is the WTO Understanding on Rules and Procedures governing the Settlement of Disputes as it relates to certain remedies.[818] An example of the latter is article 41 of Protocol No. 11 to the European Convention on Human Rights.[819] Both concern matters dealt with in Part Two of the articles. The same considerations apply to Part One. Thus, a particular treaty might impose obligations on a State but define the "State" for that purpose in a way which produces different consequences than would otherwise flow from the rules of attribution in chapter II.[820] Or a treaty might exclude a State from relying on *force majeure* or necessity.

(4) For the *lex specialis* principle to apply it is not enough that the same subject matter is dealt with by two provisions; there must be some actual inconsistency between them, or else a discernible intention that one provision is to exclude the other. Thus, the question is essentially one of interpretation. For example, in the *Neumeister* case, the European Court of Human Rights held that the specific obligation in article 5, paragraph 5, of the European Convention on Human Rights for compensation for unlawful arrest or detention did not prevail over the more general provision for compensation in article 50. In the Court's view, to have applied the *lex specialis* principle to article 5, paragraph 5, would have led to "consequences incompatible with the aim and object of the Convention".[821] It was sufficient, in applying article 50, to take account of the specific provision.[822]

(5) Article 55 is designed to cover both "strong" forms of *lex specialis*, including what are often referred to as self-contained regimes, as well as "weaker" forms such as specific treaty provisions on a single point, for example, a specific treaty provision excluding restitution. PCIJ referred to the notion of a self-contained regime in the *S.S. "Wimbledon"* case with respect to the transit provisions concerning the Kiel Canal in the Treaty of Versailles,[823]

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[817] See paragraph 3 of article 30 of the 1969 Vienna Convention.

[818] See Marrakesh Agreement establishing the World Trade Organization, annex 2, especially art. 3, para. 7, which provides for compensation "only if the immediate withdrawal of the measure is impractical and as a temporary measure pending the withdrawal of the measure which is inconsistent with a covered agreement". For WTO purposes, "compensation" refers to the future conduct, not past conduct, and involves a form of countermeasure. See article 22 of the Understanding. On the distinction between cessation and reparation for WTO purposes, see, e.g., Report of the Panel, Australia–Subsidies Provided to Producers and Exporters of Automotive Leather (footnote 431 above).

[819] See paragraph (2) of the commentary to article 32.

[820] Thus, article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment only applies to torture committed "by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity". This is probably narrower than the bases for attribution of conduct to the State in Part One, chapter II. Cf. "federal" clauses, allowing certain component units of the State to be excluded from the scope of a treaty or limiting obligations of the federal State with respect to such units (e.g. article 34 of the Convention for the Protection of the World Cultural and Natural Heritage).

[821] *Neumeister* v. *Austria, Eur. Court H.R., Series A, No. 17* (1974), paras. 28–31, especially para. 30.

[822] See also *Mavrommatis* (footnote 236 above), pp. 29–33; *Marcu Colleanu* v. *German State*, *Recueil des décisions des tribunaux arbitraux mixtes institués par les traités de paix* (Paris, Sirey, 1930), vol. IX, p. 216 (1929); WTO, Report of the Panel, Turkey–Restrictions on Imports of Textile and Clothing Products (footnote 130 above), paras. 9.87–9.95; *Case concerning a dispute between Argentina and Chile concerning the Beagle Channel*, UNRIAA, vol. XXI (Sales No. E/F. 95.V.2), p. 53, at p. 100, para. 39 (1977). See further C. W. Jenks, "The conflict of law-making treaties", BYBIL, *1953*, vol. 30, p. 401; M. McDougal, H. D. Lasswell and J. C. Miller, *The Interpretation of International Agreements and World Public Order: Principles of Content and Procedure* (New Haven Press, 1994), pp. 200–206; and P. Reuter, *Introduction to the Law of Treaties* (footnote 300 above), para. 201.

[823] *S.S.* "*Wimbledon"* (see footnote 34 above), pp. 23–24.

as did ICJ in the *United States Diplomatic and Consular Staff in Tehran* case with respect to remedies for abuse of diplomatic and consular privileges.[824]

(6) The principle stated in article 55 applies to the articles as a whole. This point is made clear by the use of language ("the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State") which reflects the content of each of Parts One, Two and Three.

### *Article 56. Questions of State responsibility not regulated by these articles*

**The applicable rules of international law continue to govern questions concerning the responsibility of a State for an internationally wrongful act to the extent that they are not regulated by these articles.**

*Commentary*

(1) The present articles set out by way of codification and progressive development the general secondary rules of State responsibility. In that context, article 56 has two functions. First, it preserves the application of the rules of customary international law concerning State responsibility on matters not covered by the articles. Secondly, it preserves other rules concerning the effects of a breach of an international obligation which do not involve issues of State responsibility but stem from the law of treaties or other areas of international law. It complements the *lex specialis* principle stated in article 55. Like article 55, it is not limited to the legal consequences of wrongful acts but applies to the whole regime of State responsibility set out in the articles.

(2) As to the first of these functions, the articles do not purport to state all the consequences of an internationally wrongful act even under existing international law and there is no intention of precluding the further development of the law on State responsibility. For example, the principle of law expressed in the maxim *ex injuria jus non oritur* may generate new legal consequences in the field of responsibility.[825] In this respect, article 56 mirrors the preambular paragraph of the 1969 Vienna Convention which affirms that "the rules of customary international law will continue to govern questions not regulated by the provisions of the present Convention". However, matters of State responsibility are not only regulated by customary international law but also by some treaties; hence article 56 refers to the "applicable rules of international law".

(3) A second function served by article 56 is to make it clear that the present articles are not concerned with any legal effects of a breach of an international obligation which do not flow from the rules of State responsibility, but stem from the law of treaties or other areas of law. Examples include the invalidity of a treaty procured by an unlawful use of force,[826] the exclusion of reliance on a fundamental change of circumstances where the change in question results from a breach of an international obligation of the invoking State to any other State party,[827] or the termination of the international obligation violated in the case of a material breach of a bilateral treaty.[828]

### *Article 57. Responsibility of an international organization*

**These articles are without prejudice to any question of the responsibility under international law of an international organization, or of any State for the conduct of an international organization.**

*Commentary*

(1) Article 57 is a saving clause which reserves two related issues from the scope of the articles. These concern, first, any question involving the responsibility of international organizations, and secondly, any question concerning the responsibility of any State for the conduct of an international organization.

(2) In accordance with the articles prepared by the Commission on other topics, the expression "international organization" means an "intergovernmental organization".[829] Such an organization possesses separate legal personality under international law,[830] and is responsible for its own acts, i.e. for acts which are carried out by the organization through its own organs or officials.[831] By contrast, where a number of States act together through their own organs as distinct from those of an international organization, the conduct in question is that of the States concerned, in accordance with the principles set out in chapter II of Part One. In such cases, as article 47 confirms, each State remains responsible for its own conduct.

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[824] *United States Diplomatic and Consular Staff in Tehran* (see footnote 59 above), at p. 40, para. 86. See paragraph (15) of the commentary to article 50 and also B. Simma, "Self-contained regimes", NYIL, 1985, vol. 16, p. 111.

[825] Another possible example, related to the determination whether there has been a breach of an international obligation, is the so-called principle of "approximate application", formulated by Sir Hersch Lauterpacht in *Admissibility of Hearings of Petitioners by the Committee on South West Africa, Advisory Opinion, I.C.J. Reports 1956*, p. 23, at p. 46. In the *Gabčíkovo-Nagymaros Project* case (see footnote 27 above), the Court said that "even if such a principle existed, it could by definition only be employed within the limits of the treaty in question" (p. 53, para. 76). See also S. Rosenne, *Breach of Treaty* (footnote 411 above), pp. 96–101.

[826] 1969 Vienna Convention, art. 52.

[827] *Ibid*., art. 62, para. 2 (*b*).

[828] *Ibid*., art. 60, para 1.

[829] See article 2, paragraph 1 (*i*), of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (hereinafter "the 1986 Vienna Convention").

[830] A firm foundation for the international personality of the United Nations is laid in the advisory opinion of the Court in *Reparation for Injuries* (see footnote 38 above), at p. 179.

[831] As the Court has observed, "the question of immunity from legal process is distinct from the issue of compensation for any damages incurred as a result of acts performed by the United Nations or by its agents acting in their official capacity. The United Nations may be required to bear responsibility for the damage arising from such acts", *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* (see footnote 56 above).

(3) Just as a State may second officials to another State, putting them at its disposal so that they act for the purposes of and under the control of the latter, so the same could occur as between an international organization and a State. The former situation is covered by article 6. As to the latter situation, if a State seconds officials to an international organization so that they act as organs or officials of the organization, their conduct will be attributable to the organization, not the sending State, and will fall outside the scope of the articles. As to the converse situation, in practice there do not seem to be convincing examples of organs of international organizations which have been "placed at the disposal of" a State in the sense of article 6,[832] and there is no need to provide expressly for the possibility.

(4) Article 57 also excludes from the scope of the articles issues of the responsibility of a State for the acts of an international organization, i.e. those cases where the international organization is the actor and the State is said to be responsible by virtue of its involvement in the conduct of the organization or by virtue of its membership of the organization. Formally, such issues could fall within the scope of the present articles since they concern questions of State responsibility akin to those dealt with in chapter IV of Part One. But they raise controversial substantive questions as to the functioning of international organizations and the relations between their members, questions which are better dealt with in the context of the law of international organizations.[833]

(5) On the other hand article 57 does not exclude from the scope of the articles any question of the responsibility of a State for its own conduct, i.e. for conduct attributable to it under chapter II of Part One, not being conduct performed by an organ of an international organization. In this respect the scope of article 57 is narrow. It covers only what is sometimes referred to as the derivative or secondary liability of member States for the acts or debts of an international organization.[834]

### *Article 58. Individual responsibility*

**These articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State.**

*Commentary*

(1) Article 58 makes clear that the articles as a whole do not address any question of the individual responsibility under international law of any person acting on behalf of a State. It clarifies a matter which could be inferred in any case from the fact that the articles only address issues relating to the responsibility of States.

(2) The principle that individuals, including State officials, may be responsible under international law was established in the aftermath of the Second World War. It was included in the London Charter of 1945 which established the Nuremberg Tribunal[835] and was subsequently endorsed by the General Assembly.[836] It underpins more recent developments in the field of international criminal law, including the two *ad hoc* tribunals and the Rome Statute of the International Criminal Court.[837] So far this principle has operated in the field of criminal responsibility, but it is not excluded that developments may occur in the field of individual civil responsibility.[838] As a saving clause, article 58 is not intended to exclude that possibility; hence the use of the general term "individual responsibility".

(3) Where crimes against international law are committed by State officials, it will often be the case that the State itself is responsible for the acts in question or for failure to prevent or punish them. In certain cases, in particular aggression, the State will by definition be involved. Even so, the question of individual responsibility is in principle distinct from the question of State responsibility.[839] The

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[832] Cf. *Yearbook ... 1974*, vol. II (Part One), pp. 286–290. The High Commissioner for the Free City of Danzig was appointed by the League of Nations Council and was responsible to it; see *Treatment of Polish Nationals* (footnote 75 above). Although the High Commissioner exercised powers in relation to Danzig, it is doubtful that he was placed at the disposal of Danzig within the meaning of article 6. The position of the High Representative, appointed pursuant to annex 10 of the General Framework Agreement for Peace in Bosnia and Herzegovina of 14 December 1995, is also unclear. The Constitutional Court of Bosnia and Herzegovina has held that the High Representative has a dual role, both as an international agent and as an official in certain circumstances acting in and for Bosnia and Herzegovina; in the latter respect, the High Representative's acts are subject to constitutional control. See *Case U 9/00 on the Law on the State Border Service*, Official Journal of Bosnia and Herzegovina, No. 1/01 of 19 January 2001.

[833] This area of international law has acquired significance following controversies, *inter alia*, over the International Tin Council: *J. H. Rayner (Mincing Lane) Ltd.* v. *Department of Trade and Industry*, case 2 A.C. 418 (1990) (England, House of Lords); *Maclaine Watson and Co., Ltd.* v. *Council and Commission of the European Communities*, case C-241/87, *Reports of cases before the Court of Justice and the Court of First Instance*, 1990-5, p. I–1797; and the Arab Organization for Industrialization (*Westland Helicopters Ltd.* v. *Arab Organization for Industrialization*, ILR, vol. 80, p. 595 (1985) (International Chamber of Commerce Award); *Arab Organization for Industrialization* v. *Westland Helicopters Ltd., ibid*., p. 622 (1987) (Switzerland, Federal Supreme Court); *Westland Helicopters Ltd.* v. *Arab Organization for Industrialization, ibid*., vol. 108, p. 564 (1994) (England, High Court). See also *Waite and Kennedy* v. *Germany*, *Eur. Court H.R.*, *Reports*, 1999–I, p. 393 (1999).

[834] See the work of the Institute of International Law under R. Higgins, *Yearbook of the Institute of International Law*, vol. 66–I (1995), p. 251, and vol. 66–II (1996), p. 444. See also P. Klein, *La responsabilité des organisations internationales dans les ordres juridiques internes et en droit des gens* (Brussels, Bruylant Editions de l'Université de Bruxelles, 1998). See further WTO, Report of the Panel, Turkey: Restrictions on Imports of Textile and Clothing Products (footnote 130).

[835] See footnote 636 above.

[836] General Assembly resolution 95 (I) of 11 December 1946. See also the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, elaborated by the International Law Commission, *Yearbook ... 1950*, vol. II, p. 374, document A/1316.

[837] See paragraph (6) of the commentary to chapter III of Part Two.

[838] See, e.g., article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, dealing with compensation for victims of torture.

[839] See, e.g., *Streletz, Kessler and Krenz* v. *Germany* (application Nos. 34044/96, 35532/97 and 44801/98), judgment of 22 March 2001, *Eur. Court H.R.*, *Reports*, 2001–II: "If the GDR still existed, it would be responsible from the viewpoint of international law for the acts concerned. It remains to be established that alongside that State responsibility the applicants individually bore criminal responsibility at the material time" (para. 104).

State is not exempted from its own responsibility for internationally wrongful conduct by the prosecution and punishment of the State officials who carried it out.[840] Nor may those officials hide behind the State in respect of their own responsibility for conduct of theirs which is contrary to rules of international law which are applicable to them. The former principle is reflected, for example, in article 25, paragraph 4, of the Rome Statute of the International Criminal Court, which provides that: "[n]o provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law." The latter is reflected, for example, in the well-established principle that official position does not excuse a person from individual criminal responsibility under international law.[841]

(4) Article 58 reflects this situation, making it clear that the articles do not address the question of the individual responsibility under international law of any person acting on behalf of a State. The term "individual responsibility" has acquired an accepted meaning in the light of the Rome Statute and other instruments; it refers to the responsibility of individual persons, including State officials, under certain rules of international law for conduct such as genocide, war crimes and crimes against humanity.

[840] Prosecution and punishment of responsible State officials may be relevant to reparation, especially satisfaction: see paragraph (5) of the commentary to article 36.

[841] See, e.g., the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, Principle III (footnote 836 above), p. 375; and article 27 of the Rome Statute of the International Criminal Court.

### *Article 59. Charter of the United Nations*

**These articles are without prejudice to the Charter of the United Nations.**

*Commentary*

(1) In accordance with Article 103 of the Charter of the United Nations, "[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail". The focus of Article 103 is on treaty obligations inconsistent with obligations arising under the Charter. But such conflicts can have an incidence on issues dealt with in the articles, as for example in the *Lockerbie* cases.[842] More generally, the competent organs of the United Nations have often recommended or required that compensation be paid following conduct by a State characterized as a breach of its international obligations, and article 103 may have a role to play in such cases.

(2) Article 59 accordingly provides that the articles cannot affect and are without prejudice to the Charter of the United Nations. The articles are in all respects to be interpreted in conformity with the Charter.

[842] *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Provisional Measures, Order of 14 April 1992, I.C.J. Reports 1992*, p. 3; *(Libyan Arab Jamahiriya* v. *United States of America), ibid.*, p. 114.

# Annex 38

United Nations A/CN.4/727

General Assembly

Distr.: General
31 January 2019

Original: English

**International Law Commission**
**Seventy-first session**
Geneva, 29 April–7 June and 8 July–9 August 2019

# Fourth report on peremptory norms of general international law (*jus cogens*) by Dire Tladi, Special Rapporteur*

## Contents



* This fourth report was prepared during tenure as a Global Visiting Professor at the University of California Irvine on a Fulbright Grant. The Special Rapporteur is grateful to Mr. Francisco Lobo (New York University), Ms. Tanishta Vaid (Gujarata National Law University) and Ms. Cheree Olivier (Institute for Comparative and International Law in Africa, University of Pretoria) for the materials they provided to assist in the preparation of the present report.

# I. Introduction

1. At its sixty-seventh session (2015), the Commission decided to place the topic on its current programme of work and to appoint a Special Rapporteur.[1]

2. At its sixty-eighth session (2016), the Commission considered the first report of the Special Rapporteur[2] and decided to refer two draft conclusions to the Drafting Committee.[3] At its sixty-ninth session (2017), the Commission had before it the second report of the Special Rapporteur.[4] In his second report, the Special Rapporteur sought to identify the criteria for the identification of peremptory norms of general international law (*jus cogens*). The Commission decided to refer all six draft conclusions to the Drafting Committee.[5] The Commission also decided to change the name of the topic from "*Jus cogens*" to "Peremptory norms of general international law (*jus cogens*)".

3. At its seventieth session (2018), the Commission had before it the third report of the Special Rapporteur, which addressed the legal consequences of peremptory norms of general international law (*jus cogens*).[6] The Commission decided to refer 12 draft conclusions to the Drafting Committee.[7]

4. The purpose of the present report is to address two main outstanding issues. First, the report will address the issue of regional *jus cogens* as promised in the third report. Second, the report will address the question of the illustrative list.

# II. Previous consideration of the topic

## A. Debate in the Commission

5. During the seventieth session, the third report elicited an intense debate spanning seven days with a total of 27 members of the Commission taking the floor. Nearly all members expressed agreement with the Special Rapporteur that the subject of the third report was particularly complicated and sensitive. On the whole, with some strongly worded exceptions,[8] the members of the Commission were supportive of the approach of the Special Rapporteur and the proposed draft conclusions.[9] A full

[1] See Report of the Commission on the work of its sixty-seventh session, *Official Records of the General Assembly, Seventieth Session, Supplement No. 10* (A/70/10), para. 286.

[2] A/CN.4/693.

[3] See Report of the Commission on the work of it sixty-eighth session, *Official Records of the General Assembly*, *Seventy-first Session, Supplement No. 10* (A/71/10), para. 100.

[4] A/CN.4/706.

[5] See Report of the Commission on the work of its sixty-ninth session, *Official Records of the General Assembly, Seventy-Second Session, Supplement No. 10* (A/72/10), para. 146.

[6] A/CN.4/714 and Corr.1.

[7] See Report of the Commission on the work of its seventieth session, *Official Records of the General Assembly, Seventy-third Session, Supplement No. 10* (A/73/10), para. 96.

[8] Strongly critical statements were made by Mr. Zagaynov (A/CN.4/SR.3416); Mr. Murphy (A/CN.4/SR.3416); Mr. Rajput (A/CN.4/SR.3418); Mr. Huang (A/CN.4/SR.3419); Sir Michael Wood (A/CN.4/SR.3421); and Mr. Valencia-Ospina (A/CN.4/SR.3421). It bears mentioning that, unlike other critical members, Mr. Valencia-Ospina's criticism was not the Special Rapporteur went too far, but, on the contrary, that he did not go far enough. It might also be mentioned that Mr. Nolte (A/CN.4/SR.3417), while generally critical, was not as severe as the others.

[9] Most members adopted, on the whole, a positive attitude towards to the report and the draft conclusions, although some did suggest some drafting changes: Mr. Saboia (A/CN.4/SR.3415); Mr. Nguyen (*ibid.*); Mr. Šturma (A/CN.4/SR.3416); Mr. Park (*ibid.*); Mr. Ruda Santolaria (A/CN.4/SR.3417); Ms. Lehto (*ibid.*); Mr. Jalloh (A/CN.4/SR.3418); Mr. Ouazzani Chahdi (*ibid.*); Mr. Vázquez-Bermúdez (*ibid.*); Ms. Galvão Teles (A/CN.4/SR.3419); Mr. Hassouna (*ibid.*); Ms. Oral (*ibid.*); Mr. Reinisch (*ibid.*); Mr. Cissé (A/CN.4/SR.3420); Mr. Grossman

response by the Special Rapporteur to the debate addressed the major criticisms that had been raised.[10] A summary of the debate can be found in the report of the Commission and will not be reproduced here.[11] The current report will therefore only highlight those issues that attracted significant criticism.

6. It is useful to begin with a methodological criticism raised by Mr. Nolte[12] and supported by Mr. Grossman,[13] Mr. Murase[14] and Mr. Rajput[15] – particularly since this methodological criticism suddenly became the flavour of the day during the Sixth Committee's consideration of the Commission's report. In their statements, these members criticized the working method of the Commission *on this topic* in not sending the draft conclusions adopted by the Drafting Committee for adoption by the Commission with commentaries. They suggested that this manner of working reduced the possibility for Member States to influence the work of Commission.

7. There were several suggestions for consistency of terms.[16] On a more substantive level, some members suggested that the report (and its conclusions) were not supported by sufficient State practice.[17] Other members, however, expressed the view that the report was well supported by practice.[18]

8. As a general matter, many members raised the absence of the consideration of general principles of law as a source of international law.[19] Members pointed out that the legal consequences of *jus cogens* on general principles should also be addressed in the draft conclusions.

9. Although some fundamental structural issues were raised by two members,[20] on the whole members were satisfied with the content and structure of the first group of draft proposals.[21] There were, however, a number of drafting suggestions intended to bring draft conclusions into alignment with the Vienna Convention on the Law of Treaties (hereinafter, "1969 Vienna Convention").[22] Furthermore, while most members supported the third paragraph of draft conclusion 10 concerning the effects

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Guiloff (*ibid.*); Mr. Hmoud (*ibid.*); Mr. Al-Marri (*ibid.*); Mr. Peter (A/CN.4/SR.3421); Ms. Escobar Hernández (*ibid.*); and Mr. Gómez-Robledo (*ibid.*).

[10] A/CN.4/SR.3425.

[11] See A/73/10, paras. 111-152.

[12] A/CN.4/SR.3417.

[13] A/CN.4/SR.3420.

[14] A/CN.4/SR.3418.

[15] *Ibid*.

[16] See, for example, Mr. Vázquez-Bermúdez (A/CN.4/SR.3418) and Sir Michael Wood (A/CN.4/SR.3421) concerning the use of the word "effect" instead of "consequences".

[17] See, e.g., Mr. Zagaynov (A/CN.4/SR.3416). Other members, e.g. Mr. Murphy (*ibid.*), Mr. Rajput (A/CN.4/SR.3418) and Sir Michael Wood (A/CN.4/SR.3421), expressed the view that specific parts of the report and the associated draft conclusions were not supported by practice but fell short of making a general assertion about the lack of practice in the report.

[18] See, e.g., Mr. Saboia (A/CN.4/SR.3415); Mr. Šturma (A/CN.4/SR.3416); Mr. Ruda Santolaria (A/CN.4/SR.3417); Ms. Lehto (*ibid.*); Mr. Jalloh (A/CN.4/SR.3418); Mr. Vázquez-Bermúdez (*ibid.*); Ms. Oral (A/CN.4/SR.3419); and Mr. Hmoud (A/CN.4/SR.3420).

[19] See, e.g., Mr. Zagaynov (A/CN.4/SR.3416), Mr. Vázquez-Bermúdez (A/CN.4/SR.3418); Mr. Grossman Guiloff (A/CN.4/SR.3420); and Ms. Escobar Hernández (A/CN.4/SR.3421).

[20] Mr. Murphy (A/CN.4/SR.3416) and Ms. Oral (A/CN.4/SR.3419). See, for contrary views on the structure, Mr. Saboia (A/CN.4/SR.3415) and Mr. Nguyen (*ibid.*).

[21] As an example of issues that were raised, it was questioned whether it was appropriate to retain the distinction between emerging *jus cogens* and pre-existing *jus cogens,* for the purposes of severability.

[22] Vienna Convention on the Law of Treaties (Vienna, 23 May 1969), United Nations, *Treaty Series*, vol. 1155, No. 18232, p. 331.

of *jus cogens* on interpretation,[23] several members expressed the view that the paragraph should be a general one applicable to all the sources of international law.[24]

10. The main source of discussion in the treaty-related group of draft conclusions concerned the appropriateness of draft conclusion 14 (recommended procedures for dispute settlement). While some members supported draft conclusion 14,[25] the provision was subjected to criticism from two opposing and mutually contradictory fronts. On the one front, some members suggested that the provision, notwithstanding its recommendatory status, sought to impose treaty obligations on States not party to the 1969 Vienna Convention and to States that had explicitly expressed their objection by entering a reservation to the dispute settlement provisions of that Convention.[26] On the other hand, other members suggested that the non-inclusion of the full framework of the 1969 Vienna Convention and reduction of the dispute settlement provisions to mere recommended procedures was diminishing what was a condition for the agreement on the *jus cogens* provisions in the Convention (arts. 53 and 64).[27]

11. The contents of draft conclusions 15 and 16 were generally supported, with minor suggestions made for drafting improvements.[28] Similarly, the contents of draft conclusion 17 were generally supported, the main issue of contention concerning the question of whether the text of the draft conclusion should explicitly refer to decisions of the Security Council.[29] The contents of draft conclusions 18, 19, 20 and 21 were also generally supported.[30] Other than minor issues, there were two main issues for discussion. First, one member lamented the fact that the issue of standing as reflected in article 48 of the articles on the responsibility of States for internationally wrongful acts of 2001 (hereinafter, "articles on State responsibility") was not included in the proposed draft conclusions.[31] The Special Rapporteur is in agreement with this criticism and hopes the Drafting Committee will be in a position to include a provision to that effect as a second paragraph of draft conclusion 18. Second, the exclusion of the word "serious" from the draft conclusions, contrary to the articles on State responsibility, was criticized by several members.[32]

12. It was, however, draft conclusions 22 and 23 that attracted the most debate. Strong criticism was expressed by some members.[33] Other members expressed support for the draft conclusions.[34] Taking into account the debate, and having

[23] Mr. Saboia (A/CN.4/SR.3415), Mr. Park (A/CN.4/SR.3416) and Ms. Lehto (A/CN.4/SR.3417) did, however, sound cautionary calls that this interpretative proposition should not be used to avoid the effects of *jus cogens*.

[24] See, e.g., Mr. Nolte (A/CN.4/SR.3417); Mr. Jalloh (A/CN.4/SR.3418); and Ms. Escobar Hernández (A/CN.4/SR.3421).

[25] See, e.g., Mr. Saboia (A/CN.4/SR.3415); Mr. Nguyen (*ibid.*); and Mr. Šturma (A/CN.4/SR.3416).

[26] See, e.g., Mr. Park (A/CN.4/SR.3416); Mr. Zagyanov (*ibid.*); and Ms. Galvão Teles (A/CN.4/SR.3419).

[27] See, especially, Mr. Murphy (A/CN.4/SR.3416) and Sir Michael Wood (A/CN.4/SR.3421).

[28] See, however, statements by Mr. Zagaynov (A/CN.4/SR.3416); Mr. Rajput (A/CN.4/SR.3418) and Sir Michael Wood (A/CN.4/SR.3421).

[29] This issue gave rise to two mini-debates (see A/CN.4/SR.3420 and A/CN.4/SR.3421).

[30] See, however, the strong criticism raised by Mr. Rajput (A/CN.4/SR.3418).

[31] Ms. Oral (A/CN.4/SR.3419). For the articles on State responsibility, see General Assembly resolution 56/83 of 12 December 2001, annex. The draft articles adopted by the Commission and the commentaries thereto are reproduced in *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, paras. 76-77.

[32] See, especially, Mr. Murphy (A/CN.4/SR.3416); Mr. Rajput (A/CN.4/SR.3418); and Sir Michael Wood (A/CN.4/SR.3421). For a strong of defence of the exclusion of the word "serious", see Mr. Hmoud (A/CN.4/SR.3420).

[33] Members that opposed these draft conclusions were: Mr. Zagaynov (A/CN.4/SR.3416); Mr. Murphy (*ibid.*); Mr. Nolte (A/CN.4/SR.3417); Mr. Rajput (A/CN.4/SR.3418); Mr. Huang (A/CN.4/SR.3419); and Sir Michael Wood (A/CN.4/SR.3421).

[34] Mr. Saboia (A/CN.4/SR.3415); Mr. Nguyen (*ibid.*); Mr. Šturma (A/CN.4/SR.3416); Mr. Ruda

responded to the criticism of draft conclusions 22 and 23, the Special Rapporteur proposed the replacement of draft conclusions 22 and 23 by a without prejudice clause.[35]

## B. Debate in the Sixth Committee of the General Assembly

13. Before proceeding to describe (and in part respond to) the debate of the topic in the Sixth Committee during the seventy-third session of the General Assembly, the Special Rapporteur wishes to express his deep gratitude to the Chair of the Commission during its seventieth session for his statement at the end of the debate, in which he explained that members of the Commission, including Special Rapporteurs, attend the Sixth Committee voluntarily and at their own expense.[36] An unfortunate impression was created by an off-the-cuff remark of one delegation, that Special Rapporteurs were enjoying the beaches of Miami at the expense of the United Nations.[37]

14. While some States expressed concern with the approach of the Commission, most States welcomed the work of the Special Rapporteur and of the Commission on this topic.[38] In addition to commenting on specific draft conclusions, Member States

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Santolaria (A/CN.4/SR.3417); Ms. Lehto (*ibid.*); Mr. Jalloh (A/CN.4/SR.3418); Mr. Ouazzani Chahdi (*ibid.*); Ms. Galvão Teles (A/CN.4/SR.3419); Mr. Hassouna (*ibid.*); Ms. Oral (*ibid.*); Mr. Cissé (A/CN.4/SR.3420); Mr. Grossman Guilof (*ibid.*); Mr. Hmoud (*ibid.*); Mr. Peter (A/CN.4/SR.3421); and Ms. Escobar Hernández (*ibid.*). See, however, Mr. Reinisch (A/CN.4/SR.3419) who, though not questioning the substance of draft conclusion 23, suggested it ought not be included in these draft conclusions since it was being addressed in another topic.

[35] A/CN.4/SR.3425.

[36] Mr. Valencia-Ospina (A/C.6/73/SR.30).

[37] For the record, the Special Rapporteur routinely attends the Sixth Committee sessions at his own personal expense without assistance from the United Nations, his Government or any other institution.

[38] Of the States that commented on the topic, the following adopted a generally negative stance: China (A/C.6/73/SR.25); France (A/C.6/73/SR.26); Romania (*ibid.*); Israel (A/C.6/73/SR.27); Turkey (*ibid.*); and the United States of America (A/C.6/73/SR.29). States that adopted an overall positive stance were: Bahamas, on behalf of behalf of the Caribbean Community (CARICOM) (A/C.6/73/SR.20); Austria (statement of 26 October 2018; see also A/C.6/73/SR.25) (reiterating its appreciation of the Commission's work on this topic) (all statements to the Sixth Committee cited in the present report are available from the United Nations PaperSmart portal, at http://papersmart.unmeetings.org); Brazil (A/C.6/73/SR.25); Cyprus (*ibid.*); Egypt (*ibid.*); Mexico (*ibid.*) ("welcomed the fact that most of the draft conclusions proposed by the Special Rapporteur were based on provisions of instruments adopted by the Commission, in particular the Vienna Convention, the articles on State responsibility for internationally wrongful acts and the Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations. It supported the inclusion of a draft conclusion on the consequences of *jus cogens* norms for the general principles of law, so as to embrace all sources of international law"); Singapore (statement of 30 October 2018; see also A/C.6/73/SR.25) (which emphasized that its comments did not seek to detract from its appreciation of the work done as a whole and the in-depth analysis which had gone into the preparation of the report); Estonia (A/C.6/73/SR.26); Japan (*ibid.*) ("his delegation supported the Special Rapporteur's approach"); New Zealand (*ibid.*); Portugal (*ibid.*); Thailand (*ibid.*); Greece (A/C.6/73/SR.27 and statement of 30 October 2018) ("commended the Special Rapporteur for the pragmatic and holistic approach he had managed to take in his third report … in spite of the scarcity of relevant State practice" and it extended appreciation to the Drafting Committee for its ongoing consideration of the draft conclusions); Islamic Republic of Iran (A/C.6/73/SR.27); Malaysia (statement of 30 October 2018; see also A/C.6/73/SR.27) (which expressed appreciation for the work done so far by the Special Rapporteur); Republic of Korea (A/C.6/73/SR.27 and statement of 30 October 2018) ("The Special Rapporteur had been able to prepare a comprehensive report that attempted to clarify those fundamental issues of international law, despite the dearth of State practice and jurisprudence" and the delegation highly commended the Special Rapporteur and the

addressed a range of issues, including the methodological approach of the Special Rapporteur and the Commission to the topic. Although the issues of regional *jus cogens* and the illustrative list also arose in the debates, they will not be addressed in the present section of the report, but rather in subsequent sections.

15. Like several members of the Commission, many States expressed dissatisfaction with the methodology employed by the Commission of retaining the draft conclusions in the Drafting Committee until a full set had been completed.[39] It is interesting to note that, while this approach was explicitly adopted several years earlier,[40] it is only being raised in the debates now. Moreover, the impression created that this is the first time that the Commission has worked in this way is not accurate. The Commission placed the topic "Formation and evidence of customary international law" (later renamed "Identification of customary international law") on its agenda in 2012. That topic was considered by the Commission in 2012, 2013, 2014, 2015, with the full set of draft conclusions and commentaries thereto adopted in 2016. The first time that the report of the Commission for that topic contained any draft conclusions with commentaries was in 2016 – the year in which the full set was adopted on first reading – yet not a single member of the Commission nor any Member States raised any concern about this methodology. Indeed, it is interesting that the delegation of France, in its intervention during the debate in the Sixth Committee, referred to the manner in which the topic "Identification of customary international law" was handled as the ideal method of working.[41] Yet the same delegation expressed concern about this same method of work now being employed in the topic "Peremptory norms of general international law (*jus cogens*)". The summary in the report of the Commission of the Special Rapporteur's response to the criticism of the three members of the Commission that initially raised the issue appears more apologetic than the response actually given in the summation of the debate.[42] It is therefore necessary to provide the verbatim response:

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Commission for the invaluable work); South Africa (A/C.6/73/SR.27); Viet Nam (*ibid.*); and Mozambique (A/C.6/73/SR.28). Other States expressed their views on various provisions, without showing either a positive or a negative overall disposition to the manner in which the topic was being handled. Those included: Czech Republic (A/C.6/73/SR.25); Poland (*ibid.*); Germany (A/C.6/73/SR.26); India (*ibid.*); Netherlands (*ibid.*); Slovakia (*ibid.*); and the United Kingdom of Great Britain and Northern Ireland (A/C.6/73/SR.27). Italy (A/C.6/73/SR.25) is somewhat difficult to place. While the overall tone of its statement seemed positive, its proposal for the Commission to adopt a report suggested a strong negative disposition.

[39] France (A/C.6/73/SR.20) ("The Drafting Committee had provisionally adopted several conclusions on the topic 'Peremptory norms of general international law (*jus cogens*)', but none of them had yet been discussed or adopted by the Commission in plenary, and no commentaries had yet been provided. The profusion of topics also made it difficult for States to submit the comments that the Commission requested every year. It was therefore essential to return to the Commission's earlier practice of examining only a limited number of topics at each session, which would allow it to analyse the topics in detail and take stock of practice and case law around the world."); Finland (on behalf of the Nordic countries) (A/C.6/73/SR.24); China (A/C.6/73/SR.25); Singapore (*ibid.*); Germany (A/C.6/73/SR.26); Romania (*ibid.*); Israel (A/C.6/73/SR.27); and United States (A/C.6/73/SR.29).

[40] See, e.g., A/72/10, para. 210 ("[t]he Special Rapporteur reiterated his preference that the Drafting Committee finalize its work on all proposals for draft conclusions that he intended to make during the first reading before transmitting them back to the plenary"). See also statement of 9 August 2016 of the Chair of the Drafting Committee (Mr. Šturma) on *jus cogens* and statement of 26 July 2017 of the Chair of the Drafting Committee (Mr. Rajput) on peremptory norms of general international law (*jus cogens*).

[41] France (A/C.6/73/SR.20) ("For that reason, efforts must be made to enable Special Rapporteurs to receive useful information on different legal systems. The method adopted for the Commission's work on the topic 'Identification of customary international law' was a model that could be adopted in the future").

[42] A/73/10, para. 162.

I wish to begin my comments by responding to Mr. Nolte's concern about the methods of work. This concern was shared by Mr. Rajput, Mr. Grossman and Mr. Murase ….

It should be remembered that the particular method of work in this topic was first proposed to the Commission by the Special Rapporteur during the summary of the debate on the first report as a compromise in response to concerns by members like Mr. Nolte, Mr. Murphy, Mr. Wood who queried the suggestion in that first report that the Commission should adopt a fluid approach, i.e. adopt some conclusions but tweak them as the work progressed. The alternative, as I understood their suggestion then, was a more radical departure from the practice of the Commission. It was that the Special Rapporteur produce several reports without any draft conclusions and only later when all the issues were clear, prepare draft conclusions. Perhaps he has forgotten, but there is a saying in South Africa, the victim never forgets.

It is true that subsequent to this proposal, as Special Rapporteur I did see additional benefits to this approach, so that, while I initially proposed it as a compromise, I later fully embraced it.

But, I should also add that, even if this were not an intentional choice by the Special Rapporteur, the records will show that this topic has always been considered in the second half of the session. In none of the sessions that this topic had been considered, would it have been possible, in the two or three weeks left after its finalization in the Drafting Committee, to prepare the commentaries, submit them to editing and translation and have them ready for adoption by the Commission.

It is true that this could have been done for the following year, so that the draft conclusions considered in 2016 are adopted in 2017, draft conclusions considered in 2017 are adopted in 2018 and the draft conclusions that may be considered this year may be adopted in 2019. But this might be even more confusing for States who now receive both the summary of debate on the as yet unadopted text of the current year, plus the adopted text from the report of the previous year.

16. A second methodological issue raised by several delegations concerned the importance of practice in the consideration of the topic. A number of States questioned the Special Rapporteur's reliance on theory and doctrine rather than State practice.[43] It should be noted that, although a few States made this assertion, this was not the majority view and, in fact, some States explicitly observed that the Special Rapporteur's third report relied on State practice, notwithstanding the dearth

[43] Czech Republic (A/C.6/73/SR.25) ("the Special Rapporteur's approach was based primarily on references to doctrine rather than to international practice"); France (A/C.6/73/SR.26); Romania (*ibid*.) ("The Commission's consideration of the topic must be based on State practice, rather than on doctrinal approaches"); Slovakia (*ibid*.) ("Slovakia noted with concern that several of the draft conclusions on the topic proposed by the Special Rapporteur were based merely on doctrinal opinions rather than State practice"); and Israel (A/C.6/73/SR.27 and statement of 30 October 2018) (which had a number of concerns regarding the methodology employed by the Special Rapporteur, including that "the Special Rapporteur had relied too much on theory and doctrine, rather than on relevant State practice"). See also United States (A/C.6/73/SR.29) ("More generally, the lack of State practice or jurisprudence on the bulk of the questions addressed in the project had clear implications for the role and function of any draft conclusions ultimately adopted on the topic. Although framed as 'draft conclusions', the statements contained in the project were not grounded in legal authority, but rather reflected an effort to imagine, through deductive reasoning, ways in which certain principles could apply in hypothetical circumstances.").

thereof.[44] It is difficult to respond to the criticism that the work of the Special Rapporteur and the Commission has followed a theoretical approach and not relied on practice, since none of the States have pointed to a single draft conclusion entirely unsupported by practice. Not a single draft conclusion proposed in the third report (or for that matter any of the previous reports) is based solely on doctrine. Although only a small minority of States made this allegation, it is so serious and damning that,[45] exceptionally, some examples to refute it are necessary. State practice in the form of national judicial decisions,[46] statements by States,[47] treaty practice,[48] resolutions of the General Assembly,[49] and resolutions of the Security Council[50] is provided in the third report in abundance. The report is also replete with invocations of international and regional jurisprudence.[51]

17. As in the Commission, many States focused their attention on draft conclusion 14, as provisionally approved by the Drafting Committee in 2018,[52] concerning the

[44] Examples of States that explicitly made this observation include: Austria (statement of 26 October 2018; see also A/C.6/73/SR.25) (which welcomed the initial proposed draft conclusions 10 to 12, which it felt largely reflected the current state of the law as laid down in the 1969 Vienna Convention and corresponding customary international law); Brazil (A/C.6/73/SR.25) ("the Special Rapporteur was to be commended for the quality of his research and for proposing draft conclusions that reflected State practice in a manner consistent with the Vienna Convention on the Law of Treaties"); Japan (A/C.6/73/SR.26) ("his delegation supported the Special Rapporteur's … reliance on State practice and the decisions of international courts and tribunals to give content and meaning to the article"); Portugal (*ibid.*) ("The Commission had struck a good balance between theory and practice in its work on the topic at its seventieth session"); and South Africa (A/C.6/73/SR.27).

[45] The criticism is particularly serious in the light of the Special Rapporteur's commitment to avoiding a theoretical approach and focusing on practice. See third report (A/CN.4/714 and Corr.1), para. 23.

[46] See randomly selected examples from the third report (citations omitted): footnote 363 referring to *Nada (Youssef) v. State Secretariat for Economic Affairs* (Switzerland); footnote 352 for a reference to, *inter alia, Sabbithi v. Al Saleh* (United States); footnote 264 for a reference to *Nulyarimma v. Thompson* (Australia). Cases relating to draft conclusions 22 and 23 have been left out here because of the obvious controversy caused by those draft conclusions, which was unrelated to the use or not of State practice, but rather concerned the sufficiency of the practice.

[47] See, as randomly selected examples from the third report (citations omitted): footnote 79 of the third report containing statements by the Netherlands, Cyprus and Israel, on various treaties; footnote 81, containing the arguments of Australia in the *East Timor* case in relation to the Timor Gap Treaty; footnote 83 on the view of the United States concerning the Treaty of Friendship between the Soviet Union and Afghanistan; footnote 126 referring to the statement of Rwanda in connection with article 66 of the 1969 Vienna Convention; footnote 147 referring to the statements of several States (United Kingdom, Turkey) in a Security Council meeting pertaining to a complaint by Cyprus on the use of force by Turkey in Cyprus; footnote 266 referring to the statements of Burkina Faso and the Czech Republic concerning the relationship between *erga omnes* obligations and *jus cogens*.

[48] It suffices here to say that much of the work in the third report (A/CN.4/714 and Corr.1) is based on the 1969 Vienna Convention.

[49] See for randomly selected examples from the third report (citations omitted): footnote 86 referring to General Assembly resolution 33/28 A of 7 December 1979; footnote 248 referring to General Assembly resolution 3411 D of 28 November 1975.

[50] See for randomly selected examples from the third report (citations omitted): footnote 150 Security Council resolution 353 (1974); footnote 241 referring to Security Council resolution 276 (1970).

[51] See for randomly selected examples from the third report (citations omitted): footnote 88 referring to *Prosecutor v. Taylor* (Special Court for Sierra Leone); footnote 124 referring to *Armed Activities on the Territory of the Congo* (judgment of the International Court of Justice), which advanced a narrow reading of article 66 of the 1969 Vienna Convention; footnote 154 referring to *Council of the European Union v. Front populaire pour la libération de la sauguia-el-hamra et du rio de oro (Front Polisario)*; footnote 163 referring to the *Oil Platforms case* (International Court of Justice).

[52] Available from http://legal.un.org/ilc/.

dispute settlement mechanism for the invalidation of treaties. In many ways, the comments expressed pull in different directions and reveal why the solution arrived at by the Drafting Committee is the optimal solution. At one end of the spectrum, States suggested a close alignment of the procedures with the 1969 Vienna Convention model, since doing otherwise might diminish the importance of the dispute settlement provisions contained in the Convention, which were an essential component of the *jus cogens* regime therein.[53] Other States, at the other end of the spectrum, viewed the inclusion of the draft conclusion, notwithstanding its basis in the 1969 Vienna Convention, as an imposition of a treaty rule on States that are not party to the treaty, since the draft conclusion cannot constitute a rule of customary international law.[54] In the Special Rapporteur's view, both of these concerns have *some* merit but also have flaws. Draft conclusion 14, as provisionally adopted by the Drafting Committee, seeks to mediate between these two conflicting concerns.

18. The present report will turn now to address two issues that are indirectly related to the role of practice and illustrate misunderstandings of some aspects of the third report. First, in its statement, Israel asserted that draft conclusions 20 and 21 were unacceptable as they were based solely on the articles on State responsibility, which, in its view, did not reflect customary international law.[55] The Commission routinely relies on its previous work and it would be strange if the Commission in this case departed from its previous work without offering any good reason. But more than that, those draft conclusions are based on more than just the articles on State responsibility. They are based on judicial decisions (national, regional and international),[56] statements by States[57] and resolutions of the Security Council and the General Assembly.[58] It is thus simply not accurate to say that those draft conclusions were based solely on the articles on State responsibility. At any rate, in the view of the Special Rapporteur, it would be difficult for the Commission, in 2018, to create the impression that it is in accordance with international law for States not to cooperate to bring to an end situations created by breaches of *jus cogens* and, even more, that it is, under international law, permissible for States to assist in the maintenance of such situations. In its statement, Turkey stated that the Special Rapporteur had argued that "non-derogability was a criterion ..., not a consequence of, *jus cogens*".[59] This is clearly a mistake because, in various places, the reports of the Special Rapporteur have made it clear that, in his view, non-derogability is a consequence.[60] The criterion is "acceptance and recognition" of non-derogability, referred to in the second report as *opinio juris cogentis*.

19. Divergent views were also expressed with respect to the question of the explicit mention of the Security Council in draft conclusion 17. Those views, no doubt, will

[53] See, e.g., India (A/C.6/73/SR.26); Netherlands (*ibid*.); and United Kingdom (statement of 30 October 2018; also A/C.6/73/SR.27);

[54] See, e.g., Poland (A/C.6/73/SR.25); Singapore (A/C.6/73/SR.25); Greece (A/C.6/73/SR.27); and Israel (A/C.6/73/SR.27).

[55] Israel (A/C.6/73/SR.27). See also United Kingdom (statement of 30 October 2018; also A/C.6/73/SR.27).

[56] See, e.g., from the third report, footnote 222 referring to *Legal Consequences of the Construction of Wall, Advisory Opinion*; footnote 225 referring to *South West Africa Cases, Preliminary Objections;* footnote 228 referring to the *Namibia* advisory opinion; footnote 239 referring to *A and others v. Secretary of State*; and footnote 215 referring to *La Cantuta v. Perú.*

[57] See, from the third report, footnote 222 referring to the statement of Iraq in a Security Council debate (S/PV.4503).

[58] See, e.g., from the third report, footnote 241 referring to Security Council resolution 276 (1970) and footnote 244 referring to General Assembly resolution 2145 (XXI) of 27 October 1966.

[59] Turkey (A/C.6/73/SR.27).

[60] See, e.g., second report (A/CN.4/706), para. 38, where the Special Rapporteur states that non-derogability "would not be criteria but rather a consequence of *jus cogens*". See also first report (A/CN.4/693), para. 62 ("[non-derogability] is a consequence of peremptoriness").

be taken into account into by the Drafting Committee when it considers draft conclusion 17.

20. As in the Commission, many States addressed the issue of individual criminal responsibility. Given the proposal by the Special Rapporteur to include a without prejudice clause, it is unnecessary to say more on this subject.

# III. Regional *jus cogens*

21. The third report intimated that the question of regional *jus cogens* would be addressed in the fourth report.[61] The Special Rapporteur had already, in his first report, expressed his preliminary views on the question of regional *jus cogens:*

> The idea that *jus cogens* norms are universally applicable has itself two implications … A second, and more complicated implication of universal application is that *jus cogens* norms do not apply on a regional or bilateral basis. While there are some authors that hold the view that regional *jus cogens* is possible, the basis for this remains somewhat obscure. Since, if it exists, regional *jus cogens* would be an exception to this general principle of universal application of *jus cogens* norms. The subject of whether international law permits the doctrine of regional *jus cogens* will be considered in the final report, on miscellaneous issues.[62]

22. States have long been concerned about how the Commission would, eventually, address the question of regional *jus cogens.*[63] States have, in the course of the debate of the Commission's report in 2018, commented on the question of regional *jus cogens.* In their statements, those States that commented on the question of regional *jus cogens* generally rejected the possibility of regional *jus cogens.* Malaysia, while looking forward to further discussion on regional *jus cogens*, noted that such application "might not be consistent with … *jus cogens*" and that the concept of regional *jus cogens* "might also create confusion and should therefore be avoided".[64] The United Kingdom said it was "doubtful as to the utility of considering 'regional' *jus cogens*".[65] In its view, the "concept of 'regional' *jus cogens* would undermine the integrity of universally applicable *jus cogens* norms". In its statement, Thailand indicated that it was of the view that "that the acceptance of the existence of regional *jus cogens* would contradict and undermine the notion of *jus cogens* being norms 'accepted and recognized by the international community of States as a whole'" and therefore "would not be possible under international law".[66] Similarly, Finland, on behalf of the Nordic countries, said it was "unconvinced about the possibility of reconciling regional *jus cogens* with the notion of *jus cogens* as peremptory norms of general international law".[67] In even stronger terms, Greece stated that it firmly believed that the idea of regional *jus cogens* "ran contrary to the very notion of *jus cogens*, which was by definition universal".[68] Similarly, South Africa said that was "concerned that entertaining a concept such as regional *jus cogens* would have a watering-down effect on the supreme and universal nature of *jus cogens.*".[69] The United States, for its part, "questioned the utility of considering 'regional *jus cogens*'

[61] A/CN.4/714 and Corr.1, para. 162.
[62] A/CN.4/693, para. 68.
[63] K. Gastorn, "Defining the imprecise contours of *jus cogens* in international law", *Chinese Journal of International Law*, vol. 16 (2017), pp. 643–662, at pp. 659–660.
[64] Malaysia (A/C.6/73/SR.27).
[65] United Kingdom (statement of 30 October 2018; see also A/C.6/73/SR.27).
[66] Thailand (A/C.6/73/SR.26).
[67] Finland (on behalf of the Nordic countries) (A/C.6/73/SR.24).
[68] Greece (A/C.6/73/SR.27).
[69] South Africa (A/C.6/73/SR.27).

and agreed with other delegations that that concept appeared to be at variance with the view that *jus cogens* norms were 'accepted and recognized by the international community as a whole'".[70] Even Portugal, which stated that it may be "an appealing exercise from the intellectual point of view" to study the issue of regional *jus cogens,* urged some caution since the "integrity of peremptory norms of general international law as norms that are universally recognizable and applicable should not be jeopardized".[71]

23. As the Special Rapporteur's first report notes, some authors have advanced the idea of a regional *jus cogens.*[72] Chief amongst these is Robert Kolb.[73] However, Kolb's approach to *jus cogens*, discussed at length in the first report, which lacks the universalist, absolutist and hierarchical superiority ambition, may, in contrast to the approach adopted by the Commission, be fully consistent with the idea of regional *jus cogens*.[74] He views *jus cogens* as a "legal technique", one that can apply and be employed in variety of ways.[75] For him there are "different types of *jus cogens* whose role and effects in international law are not the same".[76] Under his theory, any rule which cannot be altered, including procedural rules of the International Court of Justice, can constitute *jus cogens*.[77] For example, the fact that parties to a dispute cannot request an advisory opinion from the Court, or cannot request the Court to provide them a non-official indication of the outcomes of its deliberations would be examples of *jus cogens* norms.[78] Under his broad conception of *jus cogens,* it is not difficult to conceive of regional (or even bilateral) *jus cogens*, since any agreement between States that a rule, any rule, may not be derogated from would qualify as a peremptory norm.[79] The conception of *jus cogens* reflected in the practice of States, as elaborated in the first, second and third reports, supports the idea of *jus cogens* based on a "hierarchy (of norms) [and] linked in turn with the idea of safeguarding via primacy what is most important, a supposedly universal, common core of human values".[80]

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[70] United States (A/C.6/73/SR.29).

[71] Portugal (statement of 26 October 2018 and A/C.6/73/SR.26).

[72] For a description of the debate, see U. Linderfalk, "Understanding the *jus cogens* debate: the pervasive influence of legal positivism and legal idealism", *Netherlands Yearbook of International Law*, vol. 46 (2015), pp. 51 ff., at pp. 70, 72 and 81. See also R. Hasmath, "The utility of regional *jus cogens*", paper presented at the American Political Science Association Annual Meeting (New Orleans, United States), 30 August-2 September 2012.

[73] See, also W. Czapliński, "*Jus Cogens* and the law of treaties" in C. Tomuschat and J.-M. Thouvenin (eds.), *The Fundamental Rules of the International Legal Order:* Jus Cogens *and Obligations* Erga Omnes (Leiden, Martinus Nijhoff, 2006), pp. 83-98, at pp. 92-93. See also G. Gaja, "*Jus cogens* beyond the Vienna Convention", *Collected Courses of the Hague Academy of International Law, 1981-III*, vol. 172, pp. 271–278, at p. 284.

[74] See, generally, R. Kolb, *Peremptory International Law (*Jus Cogens*): A General Inventory* (Oxford, Hart, 2015), especially at pp. 97 *et seq.* See, for discussion, the first report (A/CN.4/693), especially para. 57.

[75] See, for description, T. Kleinlein, "*Jus cogens* re-examined: value formalism in international law", *European Journal of International Law*, vol. 28 (2017), pp. 295–315, who, at p. 297, describes Kolb's approach to the subject as "non-ideological, technical and analytical approach".

[76] Kolb, *Peremptory International Law (*Jus Cogens*) ...* (footnote 72 above), p. 45.

[77] *Ibid*., pp. 51-54.

[78] *Ibid*., pp. 51–52.

[79] *Ibid.*, p. 97 ("If one follows the legal technique view of *jus cogens,* as advocated in this monograph, there is no reason to deny the existence of regional peremptory norms").

[80] H.R. Fabri, "Enhancing the rhetoric of *jus cogens*", *European Journal of International Law*, vol. 23 (2012), pp. 1049–1058, at p. 1050. See C. Tomuschat, "The Security Council and *jus cogens*", in E. Cannizzaro (ed.), *The Present and Future of* Jus Cogens (Rome, Sapienza, 2015), pp. 7–98, at p. 8, who describes *jus cogens* as "the class of norms that protect the fundamental values of the international community". Later on, at p. 23, he notes that "*jus cogens* has strong moral overtones". See, especially, draft conclusion 2 of the draft conclusions on peremptory norms of

24. However, even some authors who generally accept the "absolutist" ideas of *jus cogens* seem to, albeit more cautiously, accept the view that, theoretically at least, regional *jus cogens* is possible. Erika de Wet, for example, tentatively suggests that the obligations in the European Convention on Human Rights [81] have become "regional customary law and arguably even … regional *jus cogens*".[82] This, she states, is evidenced by the "special status" that the European Convention enjoys in the territory of its members.[83] Czapliński adopts a somewhat ambivalent approach. First, echoing the sentiments expressed by States above, he states that it is "doubtful whether regional (particular) norms can be of a peremptory nature" since the definition of *jus cogens* in article 53 of the 1969 Vienna Convention is "composed exclusively of norms of general international law which are accepted and recognized by the international community as a whole".[84] Immediately thereafter, however, he states that the notion has developed since 1969, and that he could accept, *theoretically,* the existence of regional *jus cogens.*[85] Former member of the Commission, and judge of the International Court of Justice, Giorgio Gaja, has also adopted an open approach to the question of regional *jus cogens*:

> [T]he Convention indicates that peremptory norms necessarily pertain to "general international law" and apply to the "international community of States as a whole". No convincing reason has ever been given for ruling out the possibility of the existence of non-universal, or "regional" peremptory norms. Values prevailing in regional groups do not necessarily conflict with values operating in a larger framework. There may be norms which acquire a peremptory character only in a regional context.[86]

25. Another former member of the Commission, Alain Pellet, adopts a similar approach.[87] First, he suggests, correctly in the Special Rapporteur's view, that very often, the emergence of a universal norm of *jus cogens* originates from demands of civil society (he speaks broadly of non-State actors) and regions.[88] By this he does not mean, it seems, that norms of universal *jus cogens* are necessarily first regional *jus cogens*. Rather, as I understand Pellet, normal rules emerging in the regional context are often the impetus for the emergence of norms of *jus cogens*. But he does add, in explicit parentheses,[89] that he believes that there could be "regional *jus cogens* – there *is* a European system of peremptory human rights which is certainly more

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general international law (*jus cogens*) provisionally adopted by the Drafting Committee in 2017 (statement of the Chair of the Drafting Committee of 26 July 2017 (footnote 40 above), annex). In explaining this draft conclusion, the Chair of the Drafting Committee stated that the "view of the majority of members was that this was an important provision which provided a general orientation for the provisions that followed" (*ibid.*). See, for the substantiation of this approach in the practice of States and the decisions of international courts and tribunals, first report (A/CN.4/693), paras. 61-72; and second report (A/CN.4/706), paras. 18-30.

[81] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) (Rome, 4 November 1950), United Nations, *Treaty Series*, vol. 213, No. 2889, p. 221.

[82] E. de Wet, "The emergence of international and regional value systems as a manifestation of the emerging international constitutional order", *Leiden Journal of International Law*, vol. 19 (2006), pp. 611–632, at p. 617.

[83] *Ibid.*

[84] Czapliński, "*Jus cogens* and the law of treaties" (footnote 73 above), pp. 92–93.

[85] *Ibid*., p. 93.

[86] Gaja, "*Jus cogens* beyond the Vienna Convention" (footnote 73 above), p. 284.

[87] A. Pellet "Comments in response to Christine Chinkin and in defense of *jus cogens* as the best bastion against the excesses of fragmentation", *Finnish Yearbook of International Law*, vol. 17 (2006), p. 83.

[88] *Ibid*., p. 89.

[89] Which is to say, he places the comment in parentheses *and* states that the comments are in parentheses.

elaborate and more demanding than the very loose network of '*cogens*' human rights at the world level".[90]

26. While there are writers that have supported the notion of regional *jus cogens*, there are at least two problems with the concept. The first problem concerns the lack of practice to substantiate the existence of regional *jus cogens*. The second is a more theoretical one, which lies at the heart of the objections raised by States. For convenience's sake, the report will begin with the second, more theoretical problem. The problem is aptly captured in a set of questions posed by the Secretary-General of the Asian-African Legal Consultative Organization, Kennedy Gastorn.[91] He asks, for example, whether "it is meaningful for there to be *jus cogens* norms which only apply to certain States … in a way that distinguishes its peremptory character from the character of a normal particular regional custom" and whether a "peremptory norm [would] still be peremptory if only *some* States are bound by it but not all States".[92]

27. Orakhelashvili similarly questions the possibility of regional *jus cogens.*[93] He advances arguments very similar to those raised by States in the course of the 2018 debate in the Sixth Committee. In particular, he notes that the notion of regional *jus cogens* would not be compatible with the definition of *jus cogens* in article 53 of the 1969 Vienna Convention[94] – a definition that the Commission has largely accepted. Renowned German scholar (and former member of the Commission), Tomuschat, similarly makes the point that *jus cogens* "could never exist as a purely 'bilateral' norm since it derives its authority from the interests of the international community".[95] The same reasoning would appear to exclude the possibility of the existence of a regional *jus cogens*. However, over and above the definitional issues raised, the notion of regional *jus cogens* raises other fundamental difficulties.[96] These conceptual and practical difficulties flow from the inherently universal character of *jus cogens*, which applies "everywhere".[97]

28. The first conceptual difficulty concerns the establishment (or formation) of a regional *jus cogens.* It is difficult to explain, theoretically, why an individual State, in a region, perhaps a region hostile to that State, has to be bound, to the absolute extent that *jus cogens* norms bind States, to a norm that is not universal *jus cogens* and to which it has not consented (or if it has consented, has not consented to its peremptory status with the all attendant consequences). For peremptory norms of general international law (*jus cogens*), the rationale for this exceptional power of *jus cogens* and the possibility for its capacity to bind *sans* consent can be found in the fact that these are norms that are so fundamental to the international community that

[90] Pellet, "Comments in response to Christine Chinkin …" (footnote 87 above), p. 89 (emphasis in the original).

[91] Gastorn, "Defining the imprecise contours of *jus cogens* in international law" (footnote 63 above), p. 661.

[92] *Ibid.*

[93] A. Orakhelashvili, *Peremptory Norms of General International Law* (Oxford, Oxford University Press, 2006), pp. 38-39.

[94] *Ibid.*, p. 39.

[95] Tomuschat, "The Security Council and *jus cogens*" (footnote 80 above), p. 28.

[96] An objective reading of Tomuschat's contribution as a whole would confirm this conclusion. See especially at p. 33 (*ibid.*), where Tomuschat rejects Kolb's relativist (read non-absolutist) approach to *jus cogens* ("Recently, Robert Kolb has attempted to demonstrate that the exclusive reliance on the international value system is not correct and that *jus cogens* should be interpreted in a much broader sense. But all his examples miss the point. On the one hand, Kolb argues that certain axiological premises of the international legal order cannot be changed by States, thus the principle of *pacta sunt servanda.* But these are matters which lie outside the jurisdiction of an individual State. The maxims of *jus cogens* are not needed to deny the validity to (*sic*) attempts to destroy the legal edifice of the international legal order".).

[97] *Ibid.,* p. 25.

derogation from them cannot be permitted. The exceptional power thus derives from the very absolute pretence that Kolb denies as the essence of the *jus cogens*.[98] It is the case that the Commission has recently accepted the possibility of regional customary international law – referred to by the Commission as a "particular customary international law".[99] The question may thus be asked whether the same doctrinal reasoning that allows us to clear the hurdle of regional customary international law does not, in a similar manner, allow for the possibility of clearing the hurdle of regional *jus cogens*. The answer must be a definitive no. While regional customary international law must surely be subject to the persistent objector rule (at least if general customary international law is), this is probably not the case for any notion of regional *jus cogens*, otherwise it ceases to be *jus cogens* in any sense. If regional *jus cogens* were subject to the persistent objector rule, or any rule of objection for that matter, it would cease to have the character of peremptoriness.

29. The second conceptual difficulty relates to the question of definition of "region". Universal application is easily defined as all States. Regional *jus cogens*, as a matter of law, is, however, indeterminate. Does Southern Africa, as a region, include Burundi (which had applied to join the Southern African Development Community); does Europe, as a region and for the purposes of regional *jus cogens,* include Eastern Europe and, in particular, the Russian Federation? The same question(s) can be posed *vis-à-vis* the Americas, which have a number of components that can be configured differently depending on context. Normally, these concepts depend on and will, for the most part, require the agreement on the part of the States for the particular purpose. It is for this reason that the Southern African region means different things in the African Union and in the United Nations context. In the light of this uncertainty, the concept of regional *jus cogens* would create the conceptual and practical difficulty of knowing which States were bound by a particular norm of regional *jus cogens*.

30. Third, and linked to the above difficulty, it is not clear whether regional *jus cogens* must always be linked to an existing regional treaty regime. The examples of practice – discussed below – proffered to justify the notion of regional *jus cogens* have related either to the protection of rights in Europe or the inter-American human rights system. Yet, as treaty systems based on the agreement of the parties to those regional systems, it is unclear to what extent those could generate norms of *jus cogens* properly so called.[100] That doubt is cast on the ability of regional treaty regimes to establish regional *jus cogens* does not exclude the possibility that these regional treaty norms could lead to the evolution of norms of *jus cogens* properly so called. It may be argued (and here perhaps the Special Rapporteur jumps ahead of himself) that the prohibition of enforced disappearance, the origins of which are undoubtedly from the region of the Americas, is an example of how a regional treaty or customary norm can evolve to one of *jus cogens*.

31. The most common example advanced to justify the notion of regional *jus cogens* is Europe – either norms of the European Community or of the European Convention on Human Rights.[101] Thus, Kolb refers to the "European public order, which goes further than the universal one on issues of democracy, pre-eminence of law and separation of powers", in putting forward the idea of regional *jus cogens*.[102] Similarly,

[98] See Kolb, *Peremptory International Law (*Jus Cogens*) ...* (footnote 74 above), pp. 97 *et seq.*

[99] See draft conclusion 16 of the draft conclusions on the identification of customary international law, adopted by the Commission on second reading, A/73/10, para. 65, at p. 154.

[100] See, for discussion, the Special Rapporteur's second report (A/CN.4/706), paras. 53-59.

[101] Although the Inter-American system is also often referred to in the context of regional *jus cogens*, unlike the example of Europe, it is often referred to in the context of specific norms. This example will thus be considered when considering whether there exists practice in support of the notion of *jus cogens*.

[102] Kolb, *Peremptory International Law (*Jus Cogens*) ...* (footnote 74 above), p. 97.

De Wet refers to "the obligations in the" European Convention on Human Rights, which she argues, have evolved "arguably … into regional *jus cogens* norms".[103] These arguments are often based on the idea of a common identity forged by membership of a common community and, thus, the special nature of the rules that bind such a common community. Yet, this reasoning erroneously ascribes peremptory status to the special role or status that particular rules in a section of the community of States have. The fact that a set of rules binding on a particular community of States are, for that community of States, of special status does not make that set of rules *jus cogens*, regional or otherwise. *Jus cogens* norms are a particular type of norm that meet particular requirements as defined in the second report of the Special Rapporteur and for which particular consequences ensue.

32. Fourth, and flowing from the first three reasons, it should be recalled that *jus cogens* is exceptional. In general and as a rule, rules of international law are derogable and can be modified freely through the exercise of sovereignty.[104] It should not easily be assumed that, except where States have freely curtailed their right to contract out of international law rules, there are, outside of generally accepted norms of *jus cogens*, norms which constrain States. To the extent that norms of regional *jus cogens* are deemed to flow from the free exercise of the will of States to constrain their sovereignty, then these are not norms of *jus cogens* properly so called. Such rules, in which States agree to constrain themselves, are similar to non-derogability provisions in treaties that do not constitute *jus cogens*, at least not in the manner understood in the 1969 Vienna Convention. An example of similar provisions would be Article 20 of the Covenant of the League of Nations,[105] which provides, first, that the Covenant abrogates all obligations inconsistent with its terms and that members "will not enter into any engagements inconsistent" with the terms of the Covenant. As the first report noted, being itself a treaty rule, applicable only to members and subject to amendment and even abrogation by *any* later agreement, Article 20 could not be advanced as an example of peremptoriness in any significant way.

33. From a conceptual (and practical) perspective, the greatest difficulty for the notion of regional *jus cogens* relates not so much to the formation of norms of regional *jus cogens* but to their consequences. The Special Rapporteur proceeds here on the basis of the consequences of *jus cogens* identified in the third report. Although the Commission has yet to adopt any draft conclusions, and although a number of issues were raised in the plenary debate concerning the drafting of the proposed draft conclusions, no major issues were raised concerning the substance of the draft conclusions proposed by the Special Rapporteur.[106] It is difficult, particularly given the absence of practice, to see how these consequences might be given effect in respect of regional *jus cogens*. These difficulties can be illustrated with reference to the consequences identified in the third report.

34. The consequence of nullity of treaties in conflict with norms of *jus cogens* – the main consequence of *jus cogens* and the one provided for in article 53 of the 1969 Vienna Convention – provides a good starting point. According to article 53, any

[103] De Wet, "The emergence of international and regional value systems as a manifestation of the emerging international constitutional order" (footnote 82 above), p. 617.

[104] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 42, para. 72 ("Without attempting to enter into, still less pronounce upon any question of *jus cogens*, it is well understood that, in practice, rules of international law can, by agreement, be derogated from in particular cases, or as between particular parties"); *South West Africa, Second Phase, I.C.J. Reports 1966*, p. 6, dissenting opinion of Judge Tanaka, p. 298 ("*jus cogens*, recently examined by the International Law Commission, [is] a kind of imperative law which constitutes the contrast to the *jus dispositivum*, capable of being changed by way of agreement between States").

[105] Covenant of the League of Nations (Versailles, 28 April 1919), League of Nations, *Official Journal*, No. 1, February 1920, p. 3.

[106] See generally A/73/10.

treaty that, at the time of its conclusion, is in conflict with a norm of *jus cogens* is void.[107] At the same time, article 64 provides that a treaty that is in conflict with a subsequently emerging norm of *jus cogens* becomes void. Leaving aside the issues of formation identified above, i.e., assuming that it were possible for a norm of regional *jus cogens* to emerge, nullity as a consequence of regional *jus cogens* would presumably mean that members of that region may not, *inter partes*, conclude treaties in conflict with such a norm and that any such treaties concluded by members of that region *inter se* would be void (or would become void). Yet, it is inconceivable to think that such treaties concluded with third States would also be void. It may, of course, be argued that a peculiar consequence of regional *jus cogens* is that it does not affect treaties concluded with States that are not members of the region. Yet, that would suggest that such norms do permit derogation and could thus not qualify as a peremptory norm in the manner we have thus far understood.

35. While some theoretical issues were raised by some members of the Commission,[108] no single member questioned the conclusion that a customary international law rule could not arise if it conflicted with norms of *jus cogens.* Yet regional *jus cogens* could not, in the face of a general practice accepted as law, prevent the emergence of a norm of customary international law, even if that general practice were not accompanied by acceptance and recognition of non-derogability (*opinio juris cogentis*). Indeed, in respect of regional *jus cogens*, it is unclear why a widespread practice within the region, accepted by members of the region as law, could not displace a so-called regional *jus cogens*, even if the new norm did not have the peremptory quality of the former

36. Matters become more complicated when other consequences are considered. One of the consequences identified in the third report, for which there was widespread support in the Commission,[109] is that a binding decision of an international organization does not establish legal obligations if they are in conflict with a norm of *jus cogens*. Yet, it is unclear why a binding decision of the United Nations, or an organ of the United Nations such as the Security Council, in conflict with a norm of regional *jus cogens* would not establish binding obligations for members of that region. It is not only in respect of nullity of rules that difficulties arise. The third report also proposed the existence of a duty not to recognize as lawful situations created by breach of a norm of *jus cogens.* Would a member in a region subject to a regional *jus cogens* be under a duty not to recognize a situation that is otherwise lawful if that situation were created by a breach of a peremptory norm of regional international law?

37. The possibility of regional *jus cogens* raises many theoretical problems. It is true that some responses to these theoretical problems can be advanced.[110] These responses, however, require intellectual gymnastics which, in the end, take non-derogability out of regional *jus cogens.* However, even if these responses to the theoretical problems were acceptable, there is a more serious (and insurmountable) problem with the notion of regional *jus cogens*, namely the lack of State practice

[107] See also draft conclusion 11 on separability of treaty provisions in conflict with a peremptory norm of general international law (*jus cogens*), provisionally adopted by the Drafting Committee (see statement of the Chair of the Drafting Committee of 26 July 2017 (footnote 40 above), annex).

[108] Mr. Zagaynov (A/CN.4/SR.3416), Mr. Rajput (A/CN.4/SR.3418), and Sir Michael Wood (A/CN.4/SR.3421) raised issues concerning the role of the persistent objector, while Mr. Murphy (A/CN.4/SR.3416) raised issues concerning modification. See also Report of the Commission on the work of its seventieth session (A/73/10), para. 128.

[109] Other than issues of drafting, the only real point of contention was whether the decisions of the Security Council should be explicitly mentioned in the draft conclusion.

[110] See, especially, Kolb, *Peremptory International Law (*Jus Cogens*)* ... (footnote 74 above), pp. 97-98.

supporting such a notion. In this respect, the United Kingdom in its statement noted that the concept did not have "any significant support in State practice". That there is no support in the practice of States is borne out by the absence of examples in the writings of those advocating for regional *jus cogens.*

38. To take Pellet as an example, while he states unambiguously (albeit in parenthesis) that he believes that "there *is* a European system of peremptory human rights which is certainly more elaborate and more demanding than the very loose network of '*cogens*' human rights at the world level",[111] no example is offered of this European peremptory rights system, of what makes the rights peremptory and not *jus dispositivum* or of what makes them exclusively European, i.e., whether such rights are not also rights in the African, Asian and Latin American regions. Kolb similarly refers to the European public order, which, he states, goes further than the universal one on issues such as democracy, the pre-eminence of the law and the separation of powers.[112] In the same vein, De Wet highlights the European system as "arguably" being "regional *jus cogens*".[113] She refers to the "special status that the [European Convention on Human Rights] enjoys within member States" as evidence of the potential regional *jus cogens* status of the European human rights.[114] Yet, neither a special status, nor the fact that regional rules are more stringent than universal, can be sufficient to translate into *jus cogens* within a region.

39. The decision of the Inter-American Commission on Human Rights in 1987 in *Roach and Pinkerton*[115] has also been advanced as evidence of the existence of regional *jus cogens.*[116] It is the case that, in *Roach and Pinkerton*, the Commission took the view that "in the member States of the [Organization of American States] there is recognized a norm of *jus cogens* which prohibits the State execution of children", noting that such a norm was "accepted by all States of the inter-American system".[117] Yet, it should be remembered that this was a decision of the Commission and not of any court, national, regional or international. Furthermore, the particular conclusion of the Commission was unsubstantiated save for the fact that *the norm* in question was "accepted", i.e., the Commission did not aver that the non-derogability of the norm in question was accepted. Moreover, to the extent that the quote should be read as referring to the acceptance of non-derogation, there is no indication that this acceptance is not by the international community of States as a whole. Indeed, in 2002, the Inter-American Commission concluded that the prohibition of the execution of persons under the age of 18 years was a peremptory norm of general international law.[118]

40. While it is the case that the inter-American system (the Commission and the Court) have more readily found the existence of norms of *jus cogens*,[119] this is not the

[111] Pellet, "Comments in response to Christine Chinkin …" (footnote 87 above), p. 89 (emphasis in original).

[112] Kolb, *Peremptory International Law (*Jus Cogens*) …* (footnote 74 above), p. 97.

[113] De Wet, "The emergence of international and regional value systems as a manifestation of the emerging international constitutional order" (footnote 82 above), p. 617.

[114] *Ibid.*

[115] *Roach and Pinkerton v. United States*, Case No. 9647, resolution No. 3/87, Inter-American Commission on Human Rights, 22 September 1987. See, for discussion, Hasmath, "The utility of regional *jus cogens*" (footnote 72 above).

[116] Kolb, *Peremptory International Law (*Jus Cogens*) …* (footnote 74 above), p. 97.

[117] *Roach and Pinkerton* (footnote 115 above), para. 56.

[118] *Michael Domingues v. United States,* Case No. 12.285, Merits, Inter-American Commission on Human Rights, 22 October 2002, para. 85 ("Moreover, the Commission is satisfied, based upon the information before it, that this rule has been recognized as being of a sufficiently indelible nature to now constitute a norm of *jus cogens*, a development anticipated by the Commission in its *Roach and Pinkerton* decision.").

[119] See, generally, L. Burgorgue-Larsen and A. Úbeda de Torres, *The Inter-American Court of*

same as an acceptance of the notion of regional *jus cogens*. While the Inter-American Court and Commission have been more open to recognizing norms of *jus cogens*, those norms of *jus cogens* have not been characterized as regional *jus cogens.* Thus, the Inter-American human rights system does not provide support for the notion of regional *jus cogens.*

41. During the height of the cold war, Grigory Tunkin advanced the idea of "particular" *jus cogens* norms among "countries of the socialist camp" – a sort of regional *jus cogens* not based on geography.[120] Such a "higher type of international law – a socialist international law", he argued, "is coming to replace contemporary general international law" but only "among States of the socialist system" or "in relations between countries of the world system of socialism".[121] Although Tunkin does not here refer to "regional" law in the sense of a geographic conception, what he describes is what is similar to the concept of "particular" custom in the Commission's draft conclusions on the identification of customary international law.[122] He states, for example, that the principles to which he refers "operate in relations between countries of the socialist commonwealth" and have "a more limited sphere of application in comparison with general international law".[123] Those principles would be peremptory in the manner that the Special Rapporteur (and the Drafting Committee) have defined the concept because they are "higher type" of law and evince a "higher quality".[124]

42. It would be tempting to dismiss Tunkin's arguments as *passé* given the end of the cold war and, with it, the divide between the law applicable in the relations between countries of the socialist commonwealth and general international law, the latter being heavily influenced by what Tunkin referred to as "bourgeois doctrine".[125] Yet, even if no longer valid, the existence of a regional or particular *jus cogens* for socialist State during the cold war would indicate the possibility (at least theoretically) of regional *jus cogens.*

43. There are, however, at least two problems with Tunkin's proposition as support for a regional *jus cogens.* First, like Kolb, Tunkin had advanced a very different understanding of *jus cogens* than the one advanced by the Special Rapporteur and accepted by the majority of members of the Commission. More importantly, the conception of *jus cogens* on which the reports of the Special Rapporteur are based is that reflected in the 1969 Vienna Convention and the practice of States. The theory

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*Human Rights: Case Law and Commentary* (Oxford, Oxford University Press, 2011). See, for examples of findings, *Case of Maritza Urrutia v. Guatemala*, Judgment (Merits, Reparations and Costs), Inter-American Court of Human Rights, 27 November 2007, Series C, No. 103, para. 92 ("The absolute prohibition of torture, in all its forms, is now part of international *jus cogens*)"; *Case of the "Mapiripán Massacre" v. Colombia,* Judgment (Merits, Reparations and Costs), Inter-American Court of Human Rights, 15 September 2005, Series C, No. 134, para. 178, holding that "the principle of equality and non-discrimination" has attained the status of *jus cogens*; *Case of Goiburú et al. v. Paraguay*, Judgment (Merits, Reparations and Costs), Inter-American Court of Human Rights, 22 September 2006, Series C, No. 153, para. 84 ("the prohibition of the forced disappearance of persons and the corresponding obligation to investigate and punish those responsible has attained the status of *jus cogens"*). For a further case on enforced disappearance, see *Case of Trujillo Oroza v. Bolivia*, Order (Monitoring Compliance with Judgment), Inter-American Court of Human Rights, 16 November 2009, Series C, No. 92, para. 34.

[120] G.I. Tunkin, *Theory of International Law*, p. 444. See Hasmath, "The utility of regional *jus cogens*" (footnote 72 above).

[121] *Ibid.*, pp. 444–446.

[122] Draft conclusion 16 of the draft conclusions on the identification of customary international law (see footnote 99 above).

[123] Tunkin, *Theory of International Law* (footnote 120 above), p. 445.

[124] *Ibid.*, pp. 444–445.

[125] *Ibid.*, p. 158.

advanced by Tunkin seems to be based unambiguously on State consent and the will of the respective States. In Tunkin's view, *jus cogens* norms "[a]s all other principles and norms of general international law … may be modified by the agreement of States".[126] Yet, as described in the second report of the Special Rapporteur, acceptance and recognition in article 53 of the 1969 Vienna Convention mean more than just State consent.[127] A conception of *jus cogens* that is based on a pure theory of State consent is much more compatible with the notion of regional (or particular) *jus cogens.* Tunkin's theory of a higher law for the "socialist commonwealth" of States cannot be advanced as support for regional *jus cogens* because, presumably, individual States could leave the commonwealth and thus no longer be bound by that higher law.

44. More importantly, since the Special Rapporteur has insisted, and States have demanded, that the work be based on practice, other than the ideological call for solidarity among socialist States, there exists no practice in support of a notion of a particular *jus cogens* applicable among socialist States. Although Tunkin does provide examples of the "operation of principles and norms of general international law in relations between countries of the socialist commonwealth", these are hardly norms of *jus cogens*, and to Tunkin's credit, he does not suggest that they are.[128] At best, Tunkin's claim can be supported as the (quite correct) insistence that a group of States can have, as applicable between them, rules of international law that are distinct from general international law and that, as in relations between those States, take priority over rules of general international law. This, however, is not *jus cogens* or even a species of *jus cogens*, since it allows derogation in several ways as described above.

45. That the notion of regional or particular *jus cogens* is not supported in practice does not mean that regions, or groups of States, cannot have a common set of unifying (and binding) norms that are, at least between those States, even more important than other rules.[129] The area of human rights perhaps best exemplifies this, as different regions may well have different conceptions of human rights. For example, the African human rights system is well known for its distinctive appeal to the collective.[130] The very name of the primary human rights instrument of Africa, the African Charter on Human and Peoples' Rights, is reflective of this distinctive character. Moreover, the African Charter contains a number of collective rights, such as the right to development and the right to the environment. It also contains, in addition to rights, duties for individuals.[131] There is also, without question, as put forward by De Wet, Kolb and Pellet, a distinct European conception of human rights.[132] The European Court of Human Rights' appeal to the "European public order" in its judgment in *Loizidou v. Turkey* is an example of such a conception.[133] It may even be argued that there is a more distinctive (and one might say generous) approach to the identification of norms in the inter-American system of human rights as can be seen by the number of *jus cogens* norms declared.

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[126] *Ibid.,* p. 159.

[127] See second report (A/CN.4/706), paras. 68 *et seq.*

[128] Tunkin, *Theory of International Law* (footnote 120 above), p. 446.

[129] See De Wet, "The emergence of international and regional value systems as a manifestation of the emerging international constitutional order" (footnote 82 above), p. 617.

[130] African Charter on Human and Peoples' Rights (Nairobi, 27 June 1981), United Nations, *Treaty Series*, vol. 1520, No. 26363, p. 217.

[131] *Ibid*., e.g., arts. 18–20.

[132] See De Wet, "The emergence of international and regional value systems as a manifestation of the emerging international constitutional order" (footnote 80 above), p. 617; Kolb, *Peremptory International Law (*Jus Cogens*) …* (footnote 74 above), p. 97; Pellet, "Comments in response to Christine Chinkin …" (footnote 82 above), p. 89.

[133] *Loizidou v. Turkey* (preliminary objections), Judgment, European Court of Human Rights, 23 March 1995, Series A, No. 310.

46. The existence of a common set of unifying and binding norms in different regions does not, however, translate into a recognition of regional *jus cogens.* It is simply a reflection of the general structure of international law, namely that States are free to have particular rules different and distinct from general rules of international law.

47. In the light of the analysis above, it can be concluded that the notion of regional *jus cogens* does not find support in the practice of States. While a draft conclusion explicitly stating that international law does not recognize the notion of regional *jus cogens* is possible, the Special Rapporteur is of the view that such a conclusion is not necessary, and an appropriate explanation could be included in the commentary. For this reason, no draft conclusion is proposed in relation to *regional* jus cogens.

# IV. Illustrative list

## A. To have or not to have (an illustrative list)

48. The syllabus of the Commission on the current topic identified an illustrative list as one of the issues to be addressed. During the debate leading up to adoption of the syllabus, the issue of the illustrative list was, unlike the other three elements of the syllabus, very contentious. While most members supported the idea of an illustrative list, several members questioned the appropriateness of the Commission compiling an illustrative list of norms of *jus cogens.* One member had suggested that, while there would "great value" in the elaboration of a list, such elaboration might change the nature of the project and that, accordingly, the Commission should not make an early decision but should wait until closer to the end to make a decision.[134] The time has now come for the Commission to make that decision.

49. The Special Rapporteur pauses to recall that, in adopting its 1966 draft articles on the law of treaties, the Commission had considered including a non-exhaustive list but decided against that course of action for fear that it might lead to, first, prolonged discussions within the Commission and, second, misunderstanding concerning the status of norms that were not included in the list. During the United Nations Conference on the Law of Treaties, held in Vienna in 1968 and 1969 (hereinafter, "Vienna Conference"), the United Kingdom expressed the view that a list of *jus cogens* should not "be rejected out of hand".[135] The United Kingdom, then set out two options for including a list of *jus cogens* norms: an exhaustive list or a non-exhaustive list.[136] It is thus not the first time that the question of whether to include some sort of a list has been considered.

50. During the Commission's consideration of the Special Rapporteur's first report, a number of members of the Commission expressed doubt about the elaboration of an illustrative list,[137] while many expressed support for such a course.[138] During the consideration of the second report of the Special Rapporteur, members who had been

[134] Mr. Donald McRae (A/CN.4/SR.3315).

[135] See the views of the United Kingdom, *Official Records of the United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March–24 May 1968, Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole* (A/CONF.39/11, United Nations publication, Sales No. E.68.V.7), 53rd meeting, 6 May 1968, para. 55.

[136] *Ibid.*, paras. 55–56.

[137] Members opposed to or expressing doubt about the illustrative list were: Sir Michael Wood (A/CN.4/SR.3314); Mr. Nolte (A/CN.4/SR.3315); and Mr. Murphy (A/CN.4/SR.3316).

[138] Members supporting an illustrative list were: Mr. Murase (A/CN.4/SR.3314); Mr. Caflisch (*ibid.*); Mr. Kittichaisaree (A/CN.4/SR.3315); Mr. Park (A/CN.4/SR.3316); Mr. Saboia (*ibid.*); Mr. Candioti (A/CN.4/SR.3317); Mr. Forteau (*ibid.*); Mr. Vásquez Bermúdez (A/CN.4/SR.3322); Ms. Escobar Hernández (*ibid.*); and Mr. Niehaus (A/CN.4/SR.3323).

newly elected to the Commission and other members that had not had the opportunity to express their views on the issue of the illustrative list took the opportunity state their preferences. Many of these members expressed support for the illustrative list.[139] One member, however, suggested that "it might be unwise" to include an illustrative list.[140] There were also suggestions for some kind of middle ground.[141]

51. The difference of views within the Commission on whether an illustrative list should be elaborated is mirrored in the views of States, which were also divided. States expressed their views during the debate in the Sixth Committee on the report of the Commission at its sixty-sixth session. As in the Commission, a slight majority of the States that spoke supported the elaboration of an illustrative list.[142] States also expressed their views during the consideration of the 2018 report of the Commission. Again, as in the Commission, some States were supportive of an illustrative list[143] while other States were opposed to it.[144] Still other States seemed to be open-minded.[145]

52. Those members of the Commission and States that have supported the elaboration of an illustrative list have pointed out two main reasons for the inclusion of such a list. The main reason has been that it will be useful and valuable to identify examples of norms that already meet the criteria for *jus cogens*. The second reason is that an elaboration of an illustrative list will demonstrate how the criteria developed by the Commission are to be applied. Both of the reasons have some merit. Those that have opposed the elaboration of an illustrative list have also raised arguments with merit. First, they have pointed out that an elaboration of a list, no matter how carefully the caveats thereto are crafted, would create the impression that other norms are not *jus cogens*. This reason is rather reminiscent of the reasons advanced by the Commission when drafting the 1966 draft articles on the law of treaties for not including an illustrative list of norms therein.[146] Second, it has been noted that an attempt to elaborate an illustrative list would be inordinately difficult. Indeed, one former member quipped in an informal meeting that "it would take five minutes or fifty years to elaborate such a list". It will be recalled that the Special Rapporteur himself has oscillated between the two views. In introducing his first report, the

[139] Mr. Nguyen (A/CN.4/SR.3369); Mr. Šturma (A/CN.4/SR.3370); Mr. Jalloh (A/CN.4/SR.3372); Mr. Reinisch (*ibid.*); Ms. Galvão Teles (A/CN.4/SR.3373); and Ms. Oral (*ibid.*).

[140] Mr. Rajput (A/CN.4/SR.3369).

[141] For example, Mr. Hassouna suggested that an indirect illustrative list could be provided in the commentaries (A/CN.4/SR.3315), a view supported by Ms. Lehto (A/CN.4/SR.3372) and Mr. Ouazzani Chahdi (A/CN.4/SR.3373). This view was also adopted by Mr. Nolte (A/CN.4/SR.3315) during the consideration of the second report of the Special Rapporteur.

[142] See first report (A/CN.4/693), para. 9.

[143] Austria (A/C.6/73/SR.25); Cyprus (*ibid.*); Japan (A/C.6/73/SR.26); and Republic of Korea (A/C.6/73/SR.27);

[144] Finland (on behalf of the Nordic countries) (A/C.6/73/SR.24); Germany (A/C.6/73/SR.26); Netherlands (*ibid.*); Thailand (*ibid.*); Israel (A/C.6/73/SR.27); South Africa (*ibid.*); and Sudan (A/C.6/73/SR.28).

[145] Brazil (A/C.6/73/SR.25) ("It would be useful to find a creative way of elaborating an illustrative list of *jus cogens* norms while respecting the understanding that the Commission should be discussing process and method, as opposed to the content of the peremptory norms."); New Zealand (A/C.6/73/SR.26); Portugal (*ibid.*) ("an illustrative list would not impair the progressive development of *jus cogens*. However, it was likely that a debate on that list would be time-consuming and complex"); and Slovakia (*ibid.*) ("His delegation was open-minded about the elaboration of an illustrative list of peremptory norms and its future inclusion in the outcome of the topic. If such a list was not included in the text itself, it might be useful to mention it in the commentaries to the individual draft conclusions").

[146] Para. (3) of the commentary to draft article 50 of the draft articles on the law of treaties, *Yearbook ... 1966*, vol. II ("the mention of some cases of treaties void for conflict with a rule of *jus cogens* might, even with the most careful drafting, lead to misunderstanding as to the position concerning other cases not mentioned in the article").

Special Rapporteur asked members of the Commission to comment on the desirability of an illustrative list, and expressed his oscillation in the following terms:

> The view of the Special Rapporteur on this question remains that the Commission cannot exclude an issue for fear that it may be misinterpreted. In other words, we cannot decide not to provide an illustrative list simply because some might interpret it as a *numerus clausus* when we have clearly described it as an illustrative list.
>
> Nonetheless, I do wonder whether the provision of an illustrative list would substantially change the nature of our topic. The current topic is concerned with methodological and secondary rules. It is not concerned with the substantive or normative rules in different areas of international law. Would the Commission's inclusion of, for example, the prohibition of genocide as a *jus cogens* require the Commission do an in-depth study of the crime of genocide? Would this be consistent with the nature of the project? Although we can all agree that genocide is *jus cogens*, there may be other norms that are not as clear and whose inclusion in the list might require an in-depth study. The point is that deciding to provide an illustrative list might blur, perhaps slightly, the fundamentally process/methodological-oriented nature of the topic by shifting the focus towards the legal status of particular norms.[147]

53. In other words, while there would be great value in an illustrative list, it is a question whether the elaboration of such a list would fundamentally change the nature of the project. The Commission would need to go into detail on specific rules that themselves could be future topics for consideration by the Commission. Indeed, one norm that would be a candidate for inclusion on an illustrative list, the prohibition of the crime against humanity, is a topic currently being considered by the Commission. Another norm that would be a candidate, the right to self-determination, had been mentioned as a possible topic for future consideration by the Commission. While it might arguably not be necessary to go into detail with regard to "obvious" norms, it would certainly be necessary for other norms that have yet to be recognized by, for example, the International Court of Justice or the Commission itself. This tension was expressed by Brazil in its statement on the report of the Commission in 2018, when it encouraged the Special Rapporteur to "find a creative way of elaborating an illustrative list of *jus cogens* norms while respecting the understanding that the Commission should be discussing process and method, as opposed to the content of the peremptory norms".[148]

54. While this last reason for not having an illustrative list is compelling, the Special Rapporteur is of the view that that it would be a missed opportunity if the Commission did not provide "something". In this respect, inspiration may be taken from the encouragement of Brazil that a creative way be found to balance the two competing interests, i.e., the value of the illustrative list on the one hand and the fundamentally methodological nature of the current topic on the other. The Special Rapporteur found the alternative proposal of the Netherlands particularly helpful in this regard. While not supporting an illustrative list, the Netherlands did make the following observation:

> If the inclusion of a list was nevertheless considered necessary, a reference should be made to the commentaries to articles 26 and 40 of the articles on responsibility of States for internationally wrongful acts, which included tentative and non-limitative lists of *jus cogens* norms. [149]

[147] Statement by the Special Rapporteur introducing the first report (A/CN.4/693) (on file).
[148] Brazil (A/C.6/73/SR.25). See also Mr. McRae (A/CN.4/SR.3315).
[149] Netherlands (A/C.6/73/SR.26).

55. On this basis, the Special Rapporteur proposes to refer, in a single draft conclusion, to norms recognized by the Commission and to qualify the draft conclusion appropriately. However, it would not be sufficient to refer only to the work of the Commission and the International Court of Justice. The commentary would still need to show evidence of acceptance and recognition. It is on this basis that the report now turns to the norms that have been recognized by the Commission and the Court, while also providing other evidence.

## B. Norms previously recognized by the Commission as possessing a peremptory character

### 1. General

56. The commentary to draft article 50 of the Commission's 1966 draft articles on the law of treaties, which eventually became article 53 of the 1969 Vienna Convention, identified "the law of the Charter concerning the prohibition of the use of force" as a "conspicuous example of a rule in international law having the character of *jus cogens*".[150] Other norms that were considered by the Commission included the prohibition of "act[s] criminal under international law … trade in slaves, piracy, or genocide", and "human rights, the equality of States [and] … self-determination".[151] The commentary states that that the "Commission decided against including any examples of rules of *jus cogens* in *the article*"[152] It is important to note that the commentary does not say that the Commission decided against including any of these other examples. The commentary only states that the Commission decides against including "*any* examples … in *the article*" (emphasis added). Thus, the attitude of the Commission at the time towards these other examples is ambiguous – it may either be read as the Commission having considered and rejected the peremptory status of these rules or that it considered all of the peremptory norms and decided to only refer to them in the commentary and not in the draft article itself. The latter would imply that the Commission, in 1966, believed all the norms mentioned in the commentary to be *jus cogens.* Indeed, in the commentary to the articles on State responsibility, the Commission seems to be of the view that all the norms in the 1966 draft articles constitute a list of that the Commission accepted as having attained the status of *jus cogens.*[153] It is also possible, and perhaps most likely, that the Commission did not take a position on the peremptory status of these norms, save for the "the law of the Charter concerning the prohibition of the use of force". Whatever the position of the Commission in 1966, the types of the norms in that list may provide a useful starting point for the identification of *jus cogens.*

57. While it is clear from that commentary that the Commission did not believe the rule concerning the prohibition on the use of force to be the only norms of *jus cogens,* it is equally clear that it had adopted the position that norms of *jus cogens* were few

[150] Para. (1) of the commentary to draft article 50 of the draft articles on the law of treaties, *Yearbook …1966*, vol. II, chap. II, sect. C, at p. 247.

[151] Para. (3), *ibid*.

[152] *Ibid.* (emphasis added).

[153] See para. (4) of the commentary to article 40 of the draft articles on State responsibility, *Yearbook … 2001*, vol. II (Part Two) and corrigendum, paras. 76–77, at p. 112 ("There also seems to be widespread agreement with other examples listed in the Commission's commentary to article 53: viz. the prohibitions against slavery and the slave trade, genocide, and racial discrimination and apartheid."). See also the statement by the United States, *Official Records of the United Nations Conference on the Law of Treaties, First Session* (footnote 135 above), 52nd meeting, 4 May 1968, para. 16 ("In its commentary, the Commission had given examples of what was covered by *jus cogens*, such as treaties contemplating or conniving at aggressive war, genocide, piracy, or the slave trade, but had decided against inclusion of examples in the article itself").

in number.[154] That position is appropriate: since the idea of norms of general international law that cannot be derogated from is exceptional, it should be the case that such norms are few in number.

58. In addition to the commentary to draft article 50, the Commission has identified norms of *jus cogens* in other outcomes. The report of the Study Group on "Fragmentation of international law: difficulties arising from diversification and expansion of international law" (hereinafter, "Study Group on fragmentation of international law") identified the following as "the most frequently cited candidates for the status of *jus cogens*": the prohibition of "aggressive use of force", the right of self-defence, the prohibition of genocide, the prohibition of torture, crimes against humanity, the prohibition of slavery and the slave trade, the prohibition of piracy, the prohibition of "racial discrimination and *apartheid*", and the prohibition of "hostilities directed at civilian population ('basic rules of international humanitarian law')".[155] The list in the conclusions of the Study Group, contained in the report of the Commission of 2006, is different in that, while the report refers to "self-defence", the conclusions do not.[156] The decision to exclude self-defence probably makes sense because, by definition, the prohibition on the use of aggressive force does not include the right to use force in self-defence. In other words, the reference to aggressive force rather than just "the use of force" already caters for the right to use force in self-defence as part of the *jus cogens* norm. Instead of the right to use force in self-defence, the conclusions instead refer to the right of self-determination, which is not included in the 2006 report of the Study Group.[157]

59. In the articles on State responsibility, the Commission provided examples of norms of *jus cogens* that are the most cited.[158] In the commentary to article 26, the Commission identifies as "norms that are clearly accepted and recognized" as having achieved the status of *jus cogens* "the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination".[159] The commentary to article 40 itself provides a list of norms that, in the Commission's view, constituted norms of *jus cogens,* seemingly based on the commentary to article 50 of the draft articles on the law of treaties of 1966. First, consistent with paragraph (1) of the commentary to the 1966 draft articles, it refers to the prohibition of aggression[160] – referred to in 1966 as "the law of the Charter concerning the prohibition of the use of force". Second, the commentary identifies the norms referred to in paragraph (3) of the commentary to article 50 of the 1966

[154] Para. (2) of the commentary to draft article 50 of the draft articles on the law of treaties, *Yearbook …1966*, vol. II, chap. II, sect. C, at p. 248 ("Moreover, the majority of the general rules of international law do not have that character").

[155] See "Fragmentation of international law: difficulties arising from the diversification and expansion of international law", report of the Study Group of the International Law Commission finalized by Martti Koskenniemi (A/CN.4/L.682 and Corr.1 and Add.1) (available on the Commission's website, documents of the fifty-eighth session; the final text will be published as an addendum to *Yearbook … 2006*, vol. II (Part One)), para. 374.

[156] See conclusions of the work of the Study Group on fragmentation of international law, *Yearbook … 2006,* vol II (Part II), para. 251, at para. (33).

[157] *Ibid.*

[158] M. den Heijer and H. van der Wilt, "*Jus cogens* and the humanization and fragmentation of international law", *Netherlands Yearbook of International Law*, vol. 46 (2015), p. 3, at p. 9, describing the *jus cogens* status of the norms in the articles on State responsibility as "beyond contestation". See also J.E. Christófolo, *Solving Antinomies between Peremptory Norms in Public International Law* (Geneva, Schulthess, 2016), pp. 151–152; and T. Weatherall, Jus Cogens*: International Law and Social Contract* (Cambridge, Cambridge University Press, 2015), p. 202.

[159] See para. (5) of the commentary to article 26 of the articles on State responsibility, *Yearbook ….2001*, vol. II (Part Two) and corrigendum, paras. 76–77, at p. 85.

[160] Para. (4) of the commentary to article 40, *ibid.*, at p. 112.

draft articles, i.e., "the prohibitions against slavery and the slave trade, genocide, and racial discrimination and apartheid", as norms that had achieved status of *jus cogens.*[161] While, as described above, the commentary to draft article 50 of the 1966 draft articles is rather ambiguous as to the status of these norms, the commentary to article 40 is clear that these norms have attained the status of *jus cogens.*[162] In addition to those norms, the commentary to draft article 40 identifies other norms not "specifically listed in the Commission's commentary to" article 50 of the 1966 draft articles.[163] These include "the prohibition against torture as defined" in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter, "Convention against Torture"),[164] the basic rules of international humanitarian law applicable in armed conflict and "the obligation to respect the right of self-determination".[165]

60. Although at times cautious, the Commission – including its Study Group on fragmentation of international law – has been fairly consistent with the norms it has alluded to as having attained the status of *jus cogens.* From the description above, the norms that the Commission has recognized as having attained the status of peremptory norms are:

- the prohibition of aggression or aggressive force (sometimes referred to as "the law of the Charter concerning the prohibition of the use of force");
- the prohibition of genocide;
- the prohibition of slavery;
- the prohibition of apartheid and racial discrimination;
- the prohibition of crimes against humanity;
- the prohibition of torture;
- the right to self-determination; and
- the basic rules of international humanitarian law.

61. Although this list has generally been accepted and recognized by States and writers,[166] it is still worth assessing, albeit briefly, on the basis of State practice and the jurisprudence of international courts and tribunals, whether the peremptory character of those norms is "accepted and recognized by the international community of States as a whole".[167] For the purpose of this assessment, the first criterion identified in the second report and provisionally adopted by the Drafting Committee, namely whether the norm is one of general international law, is assumed since there can be very little doubt that the rules identified above are rules of general international law. Second, given the methodological nature of the current topic, there is no attempt

[161] *Ibid*.

[162] *Ibid.* "There also seems to be widespread agreement with other examples listed in the Commission's commentary to draft article 50 (subsequently adopted as article 53 of the 1969 Vienna Convention): *viz.* the prohibitions against slavery and the slave trade, genocide, and racial discrimination and apartheid. These practices have been prohibited in widely ratified international treaties and conventions admitting of no exception."

[163] Para. (5) of the commentary to article 40, *ibid*., p. 113.

[164] Convention against Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (New York, 10 December 1984), United Nations, *Treaty Series*, vol. 1465, No. 24841, p. 85.

[165] Para. (5) of the commentary to article 40 of the articles on State responsibility, *Yearbook ….2001*, vol. II (Part Two) and corrigendum, paras. 76–77, at p. 113.

[166] One notable exception was Israel (A/C.6/73/SR.27), which questioned whether the right to self-determination was a norm of *jus cogens*.

[167] For comparison, see C. Mik, "*Jus cogens* in contemporary international law", *Polish Yearbook of International Law*, vol. 33 (2013), pp. 27–94, at p. 56.

to be comprehensive. Flowing from the last-mentioned reservation, the Special Rapporteur has, for the most part, omitted references to dissenting and concurring opinions, although these are very important.

### 2. The prohibition of aggression

62. It is appropriate to begin by assessing whether, in addition to the recognition in the work of the Commission, the prohibition of the use of force as a norm of *jus cogens* is recognized in practice as the Commission has broadly defined it. As a terminological matter, the present report will, from this point onwards, refer to the prohibition of aggression *in lieu* of the possible alternatives, i.e., the prohibition of the use of force, prohibition of aggressive force and the law of the Charter on the prohibition of force, save in cases of direct quotes.

63. The most cited example of the recognition of the prohibition of aggression is the *Military and Paramilitary Activities* case. In that case, the International Court of Justice famously made the following statement:

> A further confirmation of the validity as customary international law of the principle of the prohibition of the use of force expressed in Article 2, paragraph 4, of the Charter of the United Nations may be found in the fact that it is frequently referred to in statements by State representatives as being not only a principle of customary international law but also *a fundamental or cardinal principle of such law*. The International Law Commission, in the course of its work on the codification of the law of treaties, expressed the view that "the law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of *jus cogens*".[168]

64. Much has been written about whether the Court's comment can be seen as support for the proposition that the prohibition of aggression constitutes a norm of *jus cogens*.[169] While the Court is reluctant to "own" the identification of the prohibition as *jus cogens*, preferring to refer to the "statements by State representatives" and the view of the Commission "in the course of its work on the codification of the law of treaties", the Special Rapporteur is of the view, like Green, that on balance the Court can be said to have endorsed the peremptory character of the prohibition of aggression.[170] Moreover, the Commission itself, in its commentary to article 40 of the articles on State responsibility, took the view that the Court, in the *Military and Paramilitary Activities* case recognized the *jus cogens* status of the prohibition.[171] The ambivalence of the Court in the *Military and Paramilitary Activities* case, however, does not undermine the value of the Commission's determinations in the commentaries to both the 1966 draft articles on the law of treaties and the 2001 articles on State responsibility that the prohibition of aggression was a norm of *jus cogens*. First, the Court has subsequently, slightly less ambiguously, reaffirmed the

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[168] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua. v. United States) Merits, Judgment*, *I.C.J. Reports 1986*, p. 14, at p. 100, para. 190 (emphasis added).

[169] First report (A/CN.4/693), para. 46.

[170] J. Green, "Questioning the peremptory status of the prohibition of the use of force", *Michigan Journal of International Law*, vol. 32 (2011), pp. 215–258, at p. 223 ("It is the view of the present writer that the Court concluded here that the prohibition of the use of the force was a peremptory norm, although it must be said that others have a different interpretation of this passage").

[171] Para. (4) of the commentary to article 40 of the articles on State responsibility, *Yearbook … 2001,* vol. II (Part II) and corrigendum, paras. 76–77, at p. 112, referring to "the submissions of both parties in the *Military and Paramilitary Activities in and against Nicaragua* case and the Court's own position in that case" as evidence of the peremptory status of the prohibition of aggression.

*jus cogens* status of the prohibition of aggression. In the *Kosovo* advisory opinion, the Court stated that the illegality attached to previous unilateral declarations "stemmed, not from the unilateral character of the declarations as such, but from the fact that they were, or would have been, connected with the unlawful use of force or other egregious violations of norms of general international law, in particular those of a peremptory character".[172] Admittedly, it is possible that the Court excluded "the unlawful use of force" from the "other egregious violations of norms of international law, in particular those of peremptory character". However, such a reading would be far-fetched at best. Second, the conclusion of the Commission that the prohibition of aggression has the status of *jus cogens* is strongly supported by State practice. It is to this State practice that the report now turns.

65. General Assembly resolution 3314 (XXIX), on the definition of aggression, provides evidence of the acceptance and recognition of non-derogability of the prohibition against aggression. The resolution, adopted by consensus, defines aggression as "the most serious and dangerous form of the illegal use of force" and "the possible threat of a world conflict and all its catastrophic consequences".[173] Moreover, the preamble makes plain "that territory of a State shall not be violated by being the object, even temporarily, of military occupation or of other measures of force taken by another State in contravention of the Charter".[174] The prohibition, moreover, is not subject to any derogation.[175]

66. In the commentary to article 40 of the articles on State responsibility, the Commission referred to "uncontradicted statements by Governments in the course of the Vienna Conference" as evidence for the recognition and acceptance of the prohibition of aggression as a norm of *jus cogens.*[176] Several States explicitly identified the prohibition of aggression as one of several examples of modern *jus cogens*.[177] Other States at the Vienna Conference referred broadly to principles enumerated in Article 2 of the Charter of the United Nations, which would of course include Article 2, paragraph 4.[178] Even prior to the adoption of the 1966 draft articles on the law of treaties, States had, in the course of commenting on the Commission's work, frequently identified the prohibition of aggression as an example of a norm with the status of *jus cogens.*[179] States have also frequently identified the prohibition

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[172] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010*, p. 403, at p. 437, para. 81.

[173] See General Assembly resolution 3314 (XXIX) of 14 December 1974, annex, preamble.

[174] *Ibid*.

[175] *Ibid.* See, especially, art. 5. Although, article 7 may suggest derogation, it pertains more to the definition of aggression rather than any derogation ("Nothing in this Definition, and in particular article 3, could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right and referred to in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, particularly peoples under colonial and racist régimes or other forms of alien domination: nor the right of these peoples to struggle to that end and to seek and receive support, in accordance with the principles of the Charter and in conformity with the above-mentioned Declaration").

[176] Para. (4) of the commentary to article 40 of the articles on State responsibility, *Yearbook … 2001,* vol. II (Part II) and corrigendum, paras. 76–77, at p. 112.

[177] See Ghana, *Official Records of the United Nations Conference on the Law of Treaties, First Session* (footnote 135 above), 53rd meeting, 6 May 1968, para. 15; Uruguay, *ibid.*, para. 48; Cyprus *ibid.*, para. 70; Soviet Union, *ibid.*, 52nd meeting, 4 May 1968, para. 3; and Kenya, *ibid*., para. 31.

[178] See, e.g., Sierra Leone, *ibid.*, 53rd meeting, 6 May 1968, para. 9; Madagascar, *ibid.*, para. 22; Poland, *ibid.*, para. 35; Cuba, *ibid.*, 52nd meeting, 4 May 1968, para. 34; and Lebanon, *ibid.*, para. 43.

[179] See, e.g., Netherlands (A/C.6/SR.781, para. 2); Cyprus (A/C.6/SR.783, para. 18); Brazil (A/C.6/SR.793, para. 14); and the Federal Republic of Germany (A/C.6/41/SR.14, para. 33).

of aggression as *jus cogens* in the Security Council.[180] The *jus cogens* status of the prohibition of aggression has also been recognized by States in the course of the deliberations on the current topic.[181] Moreover, the prohibition of aggression has been cited as an example of *jus cogens* in many national court decisions.[182] The decision of German Federal Administrative Court concerning a disciplinary hearing of a person who had refused to comply with an order in respect of a war that was deemed to be illegal – the war in Iraq – is of particular interest.[183] There, the Court stated that "[i]nternational *ius cogens* includes *inter alia* the international prohibition of the use of force, as reflected in article 2 (4) of the Charter of the United Nations".[184]

67. In addition to the examples of State practice and the *Military and Paramilitary Activities* case cited above, the prohibition of aggression as a norm of *jus cogens* has also been referred to widely in dissenting and separate opinions of judges of international courts. Indeed, in the *Military and Paramilitary Activities* case, Judge Schwebel noted that "there was general agreement that, if *jus cogens* has any agreed

[180] Japan (S/PV.2350) ("The principle of the non-use of force is, in other words, a peremptory norm of international law."); Portugal (S/PV.2476) ("No argument relating to the security of States can be invoked as a pretext for the use of force in conditions which jeopardize the recognized principles of *jus cogens* and accepted norms of the international community"); Cyprus (S/PV.2537) ("it is guilty of aggression against the Republic of Cyprus by virtue of the use of its armed forces within the territory of the Republic in contravention of the peremptory norms of international law"); Azerbaijan (S/PV.6897) ("in particular its peremptory norms such those prohibiting the threat or use of force"); Peru (S/PV.8262) ("We cannot maintain international peace and security without respect for the rule of law. For example, one of the cornerstones of the international order is the prohibition of the use of force in any way that is incompatible with the Charter of the United Nations."); and Greece (S/PV.8262) ("the peremptory rule of the Charter that prohibits the use or the threat of use of force and acts of aggression in international relations is of utmost importance").

[181] See, e.g., South Africa (A/C.6/69/SR.20, para. 111) ("it was generally accepted that the prohibition on the use of force was *jus cogens* in nature"); Cyprus (A/C.6/73/SR.25) ("a breach of a peremptory norm, such as the prohibition of the threat or use of force, was deemed serious and entailed State responsibility"); Mozambique (A/C.6/73/SR.28) ("*Jus cogens* norms included principles set out in the Charter of the United Nations such as the prohibition of the use of force between States"); and Holy See (Observer) (*ibid.*).

[182] *A v. Federal Department of Economic Affairs*, Judgment of the Swiss Federal Supreme Court of 23 January 2008, *ILCD* 1200 (CH 2008), para. 8.2 ("A titre d'exemple, on cite généralement les normes ayant trait à l'interdiction du recours à la force" [As an example, we can generally cite the norms concerning the prohibition of the recourse to force"]); *Committee of US Citizens Living in Nicaragua and Others v. President Reagan and Others,* 859 F2d 929, at 941; *RM v. Attorney-General,* Judgment, High Court of Kenya, 1 December 2006, *ILDC* 699 (KE 2006), para. 42.

[183] *Federal Administrative Court,* Order of 21 June 2005, BVerwG 2 WD 12.04.

[184] *Ibid.* Translation courtesy of the Federal Republic of Germany.

core, it is Article 2, paragraph 4" of the Charter of the United Nations.[185] This prohibition is also generally recognized in the writings of authors.[186]

68. The brief survey above was not intended to be comprehensive. It was also not intended to delineate the scope of the prohibition of aggression or to address all the nuances relating to the prohibition, such as exceptions, the scope of the right to self-defence and other interesting debates surrounding the prohibition.[187] The purpose was simply to show that the Commission's recognition of the prohibition of aggression as a norm of *jus cogens* is supported by practice and other subsidiary materials.

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[185] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua. v. United States of America) Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 392, dissenting opinion of Judge Schwebel, at p. 615. See, other examples, in the *Military and Paramilitary Activities* case (footnote 168 above), separate opinion of President Nagendra Singh, at p. 151; *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, dissenting of opinion of Judge Koroma, at p. 561; *Fisheries Jurisdiction (Spain v. Canada), Jurisdiction of the Court, I.C.J. Reports 1998*, p. 432, dissenting of opinion of Vice-President Weeramantry, at p. 502, para. 25; *Oil Platforms (Islamic Republic of Iran v. United States), Judgment, I.C.J. Reports 2003*, p. 161, dissenting opinion of Judge Kooijmans, at p. 262, para. 46, and separate opinion of Judge Simma, at pp. 326–327, para. 5; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Provisional Measures, I.C.J. Reports 2011*, p. 6, separate opinion of Judge *ad hoc* Dugard, at p. 65, para. 15. See also *Prosecutor v. Jandrako Prlić*, IT-04-74-T, Judgment, International Tribunal for the Former Yugoslavia, 29 May 2013, separate and partially dissenting opinion of Jean-Claude Antonetti, at p. 249. See, further, D. Tladi, "The use of force against non-State actors, decline of collective security and the rise of unilateralism: whither international law?" in M.E. O'Connell, C. Tams and D. Tladi, *Max Planck Trialogues on War and Peace: Vol I – The Use of Force against Non-State Actors* (Cambridge, 2019, forthcoming), footnote 48.

[186] See, e.g., M.E. O'Connell, "Self-defence, pernicious doctrines, peremptory norms" in O'Connell, Tams and Tladi, *Max Planck Trialogues on War and Peace …* (footnote 185 above) ("Arguments to expand the right to resort to force … conflict with the peremptory prohibition on the use of force"). See C. Tams "Self-defence against non-State actors: making sense of the 'armed attack' requirement", *ibid.* ("self-defence operates on the same hierarchical level as the ban on force. Arguments about the peremptory status [of the prohibition of the use of force] should reflect as much: what is peremptory is the rule against unlawful uses of force"); D. Costelloe, *Legal Consequences of Peremptory Norms in International Law* (Cambridge, Cambridge University Press, 2017), p. 16; S. Knuchel, Jus Cogens*: Identification and Enforcement of Peremptory Norms* (Schultess, Zurich, 2015), p. 41; Christófolo, *Solving Antinomies between Peremptory Norms in Public International Law* (footnote 152 above), p. 153 ("The prohibition of the use of force is a norm of general international law that undeniably possesses a *ius cogens* feature … [it] stands out … as one of the few consensual matters in the theory of *ius cogens*"); A.C. de Beer, *Peremptory Norms of General International Law (*Jus Cogens*) and the Prohibition of Terrorism* (Brill, 2019, forthcoming), especially chap. 5; Orakhelashvili, *Peremptory Norms of General International Law* (footnote 93 above), p. 113; L. Hannikainen, *Peremptory Norms* (Jus Cogens) *in International Law* (Helsinki, Finnish Lawyers', 1988), pp. 323 and 356; J.A. Frowein, "*Jus cogens*" in R. Wolfrum (ed.), *Max Planck Encyclopaedia of Public International Law*, vol. VI (Oxford, Oxford University Press, 2009), pp. 443 ff., at p. 444, para. 8; J. Crawford, *The Creation of States in International Law* (2nd ed., Oxford, Clarendon, 2006), p. 146; T. Kleinlein, "*Jus cogens* as the 'highest law'? Peremptory norms and legal hierarchies", *Netherlands Yearbook of International Law*, vol. 46 (2015), pp. 173–210, at p. 180; E. Santalla Vargas, "In quest of the practical value of *jus cogens* norms", *Netherlands Yearbook of International Law*, vol. 46 (2015), pp. 211–240, at p. 229; and T. Cottier, "Improving compliance: *jus cogens* and international economic law", *Netherlands Yearbook of International Law*, vol. 46 (2015), pp. 329–356, at p. 330.

[187] On this, see U. Linderfalk, "The effect of *jus cogens* norms: whoever opened Pandora's box, did you ever think about the consequences?", *European Journal of International Law*, vol. 18 (2008), pp. 853–871, at pp. 859-863.

### 3. The prohibition of torture

69. The recognition by the International Court of Justice of the prohibition of torture has been explicit and unambiguous. The Court, in the *Belgium v. Senegal* case, stated unequivocally that in its "opinion, the prohibition of torture is part of customary international law and it has become a peremptory norm (*jus cogens*)".[188] The International Tribunal for the Former Yugoslavia, in its Trial Chamber, had, already in 1998, in *Prosecutor v. Delalić*, determined that the prohibition of torture was a norm of *jus cogens.*[189] A month later, in *Prosecutor v. Furundžija*, the Tribunal's Trial Chamber confirmed that "because of … the values it protects", the prohibition of torture "has evolved into a peremptory norm or *jus cogens*".[190] Those Trial Chamber judgments have been confirmed by the Appeals Chamber of the Tribunal.[191]

70. In addition to the jurisprudence of the International Court of Justice and the International Tribunal for the Former Yugoslavia, regional courts and other bodies have also recognized the peremptory status of the prohibition of torture. The Inter-American Court of Human Rights has consistently held that the prohibition of torture is a norm of *jus cogens.* In *Espinoza Gonzáles v. Peru,* for example, the Court made the following observations concerning torture:

> The prohibition of torture and cruel, inhuman or degrading treatment or punishment is absolute and non-derogable, even under the most difficult circumstances, such as war, threat of war, the fight against terrorism and any other crimes, states of emergency, or internal unrest or conflict, suspension of constitutional guarantees, internal political instability or other public emergencies or catastrophes. Nowadays, this prohibition is part of international *jus cogens*.[192]

71. The first reference to the prohibition of torture as *jus cogens* in the inter-American system was in a detailed separate opinion of Judge Cançado Trindade in *Blake v. Guatemala.*[193] There, Judge Cançado Trindade noted that the prohibition of the practice of torture "pave[s] the way for us to enter into the *terra nova* of the international *jus cogens*".[194] The Court itself recognized the prohibition of torture as *jus cogens* in 2000, in *Bámaca-Velásquez v. Guatemala*.[195] This position has been reiterated and confirmed in many subsequent judgments of the Inter-American

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[188] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, I.C.J. Reports 2012*, p. 422, at p. 457, para. 99.

[189] *Prosecutor v. Zejnil Delalić, Zdravko Mucić also known as "Pavo", Hazim Delić, Esad Landžo also known as "Zenga"*, No. IT-96-21-T, Judgment, Trial Chamber, International Tribunal for the Former Yugoslavia, 16 November 1998, *Judicial Reports 1998*, para. 454 ("Based on the foregoing, it can be said that the prohibition of torture is a norm of customary international law. It further constitutes a norm of *jus cogens*."). See also *Prosecutor v. Dragoljub Kunarac et al*., No. IT-96-23-T, Judgment, Trial Chamber, International Tribunal for the Former Yugoslavia, 22 February 2001, para. 466, among several other judgments of the Tribunal recognizing the prohibition of torture as *jus cogens.*

[190] *Prosecutor v. Anto Furundžija,* No. IT-95-17/1, Judgment, International Tribunal for the Former Yugoslavia, 10 December 1998, *Judicial Reports 1998*, paras. 153-156.

[191] *Prosecutor v. Zejnil Delalić, Zdravko Mucić (aka "Pavo"), Hazim Deli and Esad Landžo (aka "Zenga")*, No. IT-96-21-A, Judgment, Appeals Chamber, International Tribunal for the Former Yugoslavia, 20 February 2001, para. 172, in particular footnote 225.

[192] *Espinoza Gonzáles v. Peru*, Judgment (Preliminary objections, merits, reparations and costs), Inter-American Court of Human Rights, 20 November 2014, Series C, No. 289, para. 141.

[193] *Blake v. Guatemala*, Judgment (Merits), Inter-American Court of Human Rights, 24 January 1998, Series C, No. 36, separate opinion of Judge Cançado Trindade.

[194] *Ibid.*, para. 15.

[195] *Bámaca-Velásquez v. Guatemala*, Judgment (Merits), Inter-American Court of Human Rights, 25 November 2000, Series C, No. 70, para. 25.

Court.[196] This consistent jurisprudence has been affirmed by the Inter-American Commission on Human Rights in, for example, *Ortiz Hernandez v. Venezuela.*[197]

72. Like the Inter-American Court, the European Court of Human Rights has also been unequivocal in recognizing the *jus cogens* character of the prohibition against torture. In *Al-Adsani v. the United Kingdom,* a case often referred to as authority for the view that there are no exceptions to immunity even for *jus cogens* violations, the Court, having surveyed international practice, "accepts, on the basis of [that practice], that the prohibition of torture has achieved the status of a peremptory norm in international law".[198] Similarly, in the *Jones v. the United Kingdom* case, the Court proceeded from the assumption that the prohibition of torture is *jus cogens* and upheld, in all material respects, the *Al-Adsani* case.[199] The African Commission on Human and Peoples' Rights has likewise recognized, in *Mohammed Abdullah Saleh al-Asad v. Djibouti*, the prohibition of torture as a norm of *jus cogens*.[200]

73. This abundant jurisprudence of international courts and bodies has been largely inspired by the conclusion of the very first report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Mr. Kooijmans (later to become judge at the International Court of Justice), in 1986.[201] Having described the factual character of torture as "the plague of the second half of the twentieth century" in the first paragraph of that report, the Special Rapporteur went on to describe the legal character of its prohibition in the following terms:

> The struggle against torture has become one of the leading themes within the international community. Torture is now absolutely and without any reservation prohibited under international law whether in time of peace or of war. In all human rights instruments the prohibition of torture belongs to the group of rights from which no derogation can be made. The International Court of Justice has qualified the obligation to respect the basic human rights, to which

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[196] See, e.g., *Mendoza et al. v. Argentina*, Judgment (Preliminary objections, merits and reparations), Inter-American Court of Human Rights, 14 May 2013, Series C, No. 260, para. 199 ("the Court reiterates its case law to the effect that, today, the absolute prohibition of torture, both physical and mental, is part of international *jus cogens*"); *Case of the Massacres of El Mozote and Nearby Places v. El Salvador*, Judgment (Merits, reparations and costs), Inter-American Court of Human Rights, 25 October 2012, Series C, No. 252; *The Barrios Family v. Venezuela*, Judgment (Merits, reparations and costs), Inter-American Court of Human Rights, 24 November 2011, Series C, No. 237, para. 50; *Case of the "Las Dos Erres" Massacre v. Guatemala*, Judgment (Preliminary objection, merits, reparations, and costs), Inter-American Court of Human Rights, 24 November 2009, Series C, No. 211.

[197] *Johan Alexis Ortiz Hernández v. Venezuela,* Case 12.270, Report of the Inter-American Commission on Human Rights, Report No. 2/15 of 29 January 2015, para. 212. See also *Omar Maldonado Vargas, Alvaro Yánez del Villar, Mario Antonio Cornejo et al. v. Chile,* Case 12.500, Report of the Inter-American Commission on Human Rights, Report No. 119/13 of 8 November 2013; *Cosme Rosa Genoveva, Evandro de Oliveira and Others v. Brazil,* Cases 11.566 and 11.694, Report of the Inter-American Commission on Human Rights, Report No. 141/11 of 31 October 2011, para. 167.

[198] *Al-Adsani v. the United Kingdom*, No. 35763/91, Judgment, Grand Chamber, European Court of Human Rights, 21 November 2001, ECHR 2001-XI, para. 61.

[199] *Jones and Others v. the United Kingdom*, No. 34356/06 and 40528/06, Judgment, European Court of Human Rights, 14 January 2014, ECHR 2014, especially paras. 205-215. See also *A v. The Netherlands*, No. 4900/06, Judgment, European Court of Human Rights, 20 July 2010, para. 133, holding that "the rule prohibiting expulsion to face torture or ill-treatment … had arguably also attained the status of *ius cogens*, meaning that it had become a peremptory, non-derogable norm of international law".

[200] *Mohammed Abdullah Saleh al-Asad v. the Republic of Djibouti*, Communication 383/10, Decision of April-May 2014, para. 179 ("The prohibition of torture is a *jus cogens* rule of international law").

[201] Report by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Mr. P. Kooijmans (E/CN.4/1986/15).

> the right not to be tortured belongs beyond any doubt, as obligations *erga omnes* ... In view of these qualifications the prohibition of torture can be considered to belong to the rules of *jus cogens*.[202]

74. As the International Court of Justice held, torture is prohibited in practically all national legislation.[203] There is, in addition to legislation, widespread treaty practice on the prohibition of torture as a non-derogable obligation. The Convention against Torture, which has 165 State parties, prohibits torture and obliges States parties to take measures to prevent torture.[204] Article 2 of the Convention against Torture provides that "[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture", emphasizing the non-derogability of the prohibition.[205] Similarly article 7 of the International Covenant on Civil and Political Rights prohibits torture and cruel, inhuman or degrading treatment or punishment. More importantly, article 7 is included as a non-derogable right under the Covenant.[206] The right to be free from torture is also included in the Universal Declaration of Human Rights.[207] The prohibition is also reflected in regional human rights treaties.[208]

75. The recognition of the prohibition of torture as a norm of *jus cogens* has also been ubiquitous in the decisions of national courts. In Australia, the Federal Court, in *Habib v. the Commonwealth of Australia,* recognized that the prohibition of torture is "a peremptory norm of international law from which no derogation is permitted".[209] The *jus cogens* status of the prohibition of torture has also been recognized in other

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[202] *Ibid.*, para. 3.

[203] *Questions relating to the Obligation to Prosecute or Extradite* (footnote 188 above), para. 99. See, for a comprehensive list of national legislation prohibiting torture, Association for the Prevention of Torture, Compilation of Torture Laws, available at https://apt.ch/en/resources/compilation-of-torture-laws/ (accessed on 15 February 2019). See, for random examples of legislation prohibiting torture in absolute terms: sect. 25 of the Constitution, sects. 74, 86 and 87 of the Criminal Code, sect. 5 of the Criminal Procedure Code (Albania); arts. 34 and 132 of the Constitution and arts. 263 *bis, ter, quater* of the Penal Code (Algeria); sect. 274 of the Criminal Code Act (Australia); art. 5 of the Constitution (Brazil); art. 38 of the Constitution (Cambodia); art. 259A of the Penal Code (Czech Republic); sect. 157A of the Civil Criminal Code, sects. 10A and 27A of the Military Criminal Code (Denmark); sect. 44 of the Constitution (Iceland); art. 401 of the Criminal Code (Lebanon); art. 36 of the Constitution, art. 486 of the Penal Code, art. 227 of the Criminal Procedure Code (Malta); art. 31 of the Constitution (Kuwait).

[204] Convention against Torture, arts. 1 and 2, para. 1, and arts. 4 and 5.

[205] *Ibid.*, art. 2, para. 2.

[206] International Covenant on Civil and Political Rights (New York, 16 December 1966), United Nations, *Treaty Series*, vol. 999, No. 14668, p. 171, at art. 4, para. 2 ("No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision").

[207] Universal Declaration of Human Rights (1948), art. 5 ("No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment").

[208] See, e.g., African Charter on Human and Peoples' Rights, art. 5 ("Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited"); American Convention on Human Rights (San José, 22 November 1969), United Nations, *Treaty Series*, vol. 1144, No. 17955, p. 123, art. 5, para. 2 ("No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment"); European Convention on Human Rights, art. 3 ("No one shall be subjected to torture or to inhuman or degrading treatment or punishment"). See especially article 15, paragraph 2, which prohibits derogations from article 3.

[209] *Mamdouh Habib v. the Commonwealth of Australia,* Judgment, Federal Court of Australia, 25 February 2010 [2010] FCAFC 1518, para. 9.

jurisdictions, including Canada,[210] France,[211] Italy,[212] South Africa,[213] the United States,[214] the United Kingdom[215] and other jurisdictions.[216] The view that the prohibition of torture constituted a norm of *jus cogens* had also been expressed by States in the Sixth Committee.[217]

76. In addition to the abundance of practice, the prohibition of torture is also accepted as *jus cogens* in the literature.[218] Tomuschat, for example, states that "offences which debase the affected individual, striking at his/her dignity and existence, must be comprised in the circle of norms coming with the purview of *jus cogens*", including the "prohibition[] on ... torture".[219]

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[210] *Bouzari v. Islamic Republic of Iran and the Attorney-General of Canada,* Judgment, Court of Appeal for Ontario, Canada, 30 June 2004, para. 36 ("First, the action is based on torture by a foreign State, which is a violation of both international human rights and peremptory norms of public international law").

[211] *Lydienne X Prosecutor,* Appeal Judgment, Court of Cassation of France (Criminal Division), 19 March 2013, *ILDC* 2035 (FR2013), para. 10.4 ("l'interdiction de la torture a valeur de norme imperative ou jus cogens en droit international, laquelle prime les autres règles du droit international et constitute une restriction légitime á l'immunité de jurisdiction." [the prohibition of torture is of an imperative nature or *jus cogens,* which takes precedence over other rules of international law and constitutes a legitimate restriction of immunity from jurisdiction]).

[212] *Lozano v. Italy,* Judgment, Italian Court of Cassation (First Criminal Chamber), 24 July 2008, ILDC 1085, para. 6.

[213] *S v. Mthembu,* Judgment, South African Supreme Court of Appeal, 10 April 2008, para. 31 ("The [Convention against Torture] prohibits torture in absolute terms and no derogation from it is permissible, even in the event of a public emergency. It is thus a peremptory norm of international law").

[214] See, e.g., *Committee of US Citizens Living in Nicaragua and Others v. Reagan* (footnote 182 above), para. 56; *Siderman de Blake v. Argentina,* Judgment, United States Court of Appeal, Ninth Circuit, at 714 ("we agree with the Sidermans that official acts of torture of the sort they allege Argentina to have committed constitute a *jus cogens* violation"); *Yousuf v. Samantar,* Judgment, United States Court of Appeal, Fourth Circuit, at 19.

[215] See *Belhaj v. Straw; Rahmatullah v. Minister of Defence*, Judgment, United Kingdom Supreme Court, 17 January 2017, especially opinion of Lord Sumption, at 717, ("The prohibition has the status of *jus cogens erga omnes*. That is to say that it is a peremptory norm of international law which gives rise to obligations owed by each state to all other states and from which no derogation can be justified by any countervailing public interest"); *Jones and Others v. Ministry of Interior of Saudi Arabia*, Judgment, House of Lords of the United Kingdom, 14 June 2006, paras. 43 and 44 ("there is no doubt that the prohibition on torture is such a norm [of *jus cogens*] … The jus cogens is the prohibition on torture").

[216] See *Koigi v. Attorney-General,* Judgment, Court of Appeal of Kenya, 8 March 2015, at 6 ("The absolute ban on torture is a principle of jus cogens and is a peremptory norm of international law binding independent of treaty, convention or covenant"); *Mann v. Republic of Equatorial Guinea,* Judgment, the High Court of Zimbabwe, 23 January 2008, at 12 ("principle against torture has evolved into a peremptory norm or *jus cogens*, viz. a principle endowed with primacy in the hierarchy of rules that constitute the international normative order"); *A v. Federal Department of Economic Affairs* (footnote 182 above), at para. 8.2.

[217] See, e.g., South Africa (A/C.6/69/SR.20), para. 109; Israel (A/C.6/70/SR.18), para. 6; Islamic Republic of Iran (A/C.6/71/SR.26), para. 116; United Kingdom (A/C.6/71/SR.28), para. 29; and Argentina (A/C.6/72/SR.26), para. 13.

[218] See generally, E. de Wet, "The prohibition of torture as an international norm of *jus cogens* and its implications for national and customary law", *European Journal of International Law*, vol. 15 (2004), pp. 97–121. See also De Beer (footnote 186 above). See also De Wet, "The emergence of international and regional value systems as a manifestation of the emerging international constitutional order" (footnote 82 above), p. 616.

[219] Tomuschat, "The Security Council and *jus cogens*" (footnote 80 above), p. 36. See also Pellet, "Comments in response to Christine Chinkin …" (footnote 87 above), p. 83; K. Parker and L.B. Neylon, "*Jus cogens*: compelling the law of human rights", *Hastings International and Comparative Law Review*, vol. 11 (1988-1989), pp. 411–464, at p. 414; A.A. Cançado Trindade, "*Jus cogens*: the determination and the gradual expansion of its material content in contemporary international case-law", *Curso de Derecho Internacional*, vol. 35 (2008), pp. 3–30, at p. 5;

77. As with the discussion of the prohibition of aggression above, the preceding discussion was meant only to show that the Commission's conclusion that the prohibition of torture constitutes a norm of *jus cogens* can be supported with reference to both practice and doctrine. The discussion was not meant to address other incidental issues, such as whether other aspects related to the prohibition, such as non-refoulement, are also part of the *jus cogens* prohibition. Neither was the discussion concerned with the scope of the prohibition.

### 4. The prohibition of genocide

78. As with the prohibition of torture, the International Court of Justice has unambiguously recognized the prohibition of genocide as a norm of *jus cogens*. Although in the *Reservations to the Convention on Genocide* advisory opinion, the Court does not use the terms "*jus cogens*", "peremptory norms" or even "*erga omnes* obligations", the language the Court uses to describes the prohibition of genocide is consistent with the description of *jus cogens*.[220] In that advisory opinion, the Court made the following, oft-quoted remarks:

> The origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as "a crime under international law" involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations (Resolution 96 (I) of the General Assembly, December 11th 1946). The first consequence arising from this conception is that the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation. A second consequence 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). The Genocide Convention was therefore intended by the General Assembly and by the contracting parties to be definitely universal in scope.[221]

79. Although the Court does not ascribe the status of *jus cogens* to the prohibition of genocide contained in the *Convention* on the Prevention and Punishment of the Crime of *Genocide* (hereinafter, "Genocide Convention"),[222] the language used reflects the general nature of peremptory norms as described in draft conclusion 2 on the present topic, provisionally adopted by the Drafting Committee in 2017.[223] More importantly, the Court itself, more than half a century later, in confirming the *jus cogens* character of the prohibition of genocide, had referred to the quotation from the 1951 advisory opinion as authority.[224] Having repeated the oft-quoted phrase from

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Knuchel, Jus Cogens*: Identification and Enforcement of Peremptory Norms* (footnote 186 above), p. 41; Costelloe, *Legal Consequences of Peremptory Norms in International Law* (footnote 186 above), p. 16; Christófolo, *Solving Antinomies between Peremptory Norms in Public International Law* (footnote 158 above), pp. 209-212; A. Bianchi, "Human rights and the magic of *jus cogens*", *European Journal of International Law*, vol. 19 (2008), pp. 491–508, at p. 492; M. Cherif Bassiouni, "International crimes: *jus cogens* and *obligatio erga omnes" Law and Contemporary Problems*, vol. 59 (1996), pp. 63–74, at p. 70; and Kleinlein, "*Jus cogens* as the 'highest law'? Peremptory norms and legal hierarchies" (footnote 186 above), p. 180.

[220] *Reservations to the Convention on Genocide, Advisory Opinion, I.C.J. Reports 1951*, p.15.

[221] *Ibid.,* at p. 23.

[222] Convention on the Prevention and Punishment of the Crime of Genocide (Paris, 9 December 1948), United Nations, *Treaty Series*, vol. 78, No. 1021, p. 277.

[223] See statement of the Chair of the Drafting Committee of 26 July 2017 (footnote 40 above), annex.

[224] *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, I.C.J. Reports 2006*, p. 6, at pp. 31–32, para. 64.

the 1951 advisory opinion, the Court proceeds to state that "it follows that" the prohibition contained in the Genocide Convention constitutes an *erga omnes* obligation and a norm of *jus cogens.*[225] More important, the Court affirms, expressly and unreservedly, that the prohibition of genocide is *jus cogens.*[226] The Court has, moreover, confirmed the *jus cogens* character of the prohibition of genocide in subsequent cases.[227] This view has also been supported in many dissenting and separate opinions of the Court.[228] As with the prohibition of torture, the prohibition of genocide had also been recognized as *jus cogens* in the International Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda.[229]

80. The *jus cogens* status of the prohibition of genocide is also generally accepted in the literature. Already in 1971, Roberto Ago had recognized the prohibition of genocide as a norm of *jus cogens*.[230] In their work, Criddle and Fox-Decent advance what they term a fiduciary model of *jus cogens* which, they claim, limits a State's legislative and administrative power and, in that way, prohibits offences such as genocide.[231] Bianchi, takes the view that norms of *jus cogens* can be described as either "'human rights', without any further qualification, or refer to particular human rights obligations like the prohibition of genocide or torture".[232] Among what he terms

[225] *Ibid.* See also *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), I.C.J. Reports 2007*, p. 43, at pp. 110–111, para. 161, where the Court, having quoted the 1951 advisory opinion, states that it, in the 2006 judgment, had "reaffirmed the 1951 … statement[] … *when* it added that the norm prohibiting genocide was assuredly a peremptory norm of international law (*jus cogens*)" (emphasis added).

[226] *Armed Activities on the Territory of the Congo* (footnote 224 above), pp. 31-32, para. 64 ("the fact that a dispute relates to compliance with a norm having such a character [of *jus cogens*], which is assuredly the case with regard to the prohibition of genocide, cannot of itself provide a basis for the jurisdiction of the Court").

[227] See *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (footnote 225 above), para. 162; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), I.C.J. Reports 2015*, p. 3, at pp. 47–48, para. 88.

[228] First among these was the separate opinion of Judge *ad hoc* Lauterpacht in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 13 September 1993*, *I.C.J. Reports 1993*, p. 325, at p. 440, para. 100 ("the prohibition of genocide has long been regarded as one of the few undoubted examples of *jus cogens*"). See, e.g., *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)* (footnote 227 above), dissenting opinion of Judge Cançado Trindade, pp. 234 and 238, paras. 83 and 92; *Legality of the Threat or Use of Nuclear Weapons* (footnote 185 above), dissenting opinion of Judge Weeramantry, at p. 496.

[229] See, e.g., *Prosecutor v. Zoran Kupreškić et al*., IT-95-16-T, Judgment, Trial Chamber, International Tribunal for the Former Yugoslavia, *Judicial Reports 2000*, para. 520; *Prosecutor v. Radislav Krstić,* IT-98-33-T, Judgment, Trial Chamber, International Tribunal for the Former Yugoslavia, 2 August 2001, para. 541; *Prosecutor v. Milomir Stakić,* IT-97-24-T, Judgment, Trial Chamber, International Tribunal for the Former Yugoslavia, 31 July 2003; *Prosecutor v. Vidoje Blagojević and Dragan Jokić,* IT-02-60-T, Judgment, Trial Chamber, International Tribunal for the Former Yugoslavia (), 17 January 2005. For decisions of the International Tribunal for Rwanda see, for example, *Prosecutor v. Clément Kayishema and Obed Ruzindana*, ICTR-95-1-T, Judgment, International Tribunal for Rwanda, 21 May 1999, *Reports of Orders, Decisions and Judgements 1999, vol. II*, para. 88 ("The Genocide Convention became widely accepted as an international human rights instrument. Furthermore, the crime of genocide is considered part of international customary law and, moreover, a norm of *jus cogens*.")

[230] R. Ago, "Droit des traités à la lumière de la Convention de Vienne", *Collected Courses of The Hague Academy of International Law*, vol. 134 (1971), pp. 297–332, at p. 324, footnote 37.

[231] E.J. Criddle and E. Fox-Decent, "A fiduciary theory of *jus* cogens", *Yale Journal of International Law*, vol. 34 (2009), pp. 331–388, at p. 369.

[232] Bianchi, "Human rights and the magic of *jus cogens*" (footnote 224 above), pp. 491–492. See also Kleinlein, "*Jus cogens* as the 'highest law'? Peremptory norms and legal hierarchies" (footnote 186 above), p. 180; and Cottier, "Improving compliance: *jus cogens* and international

"*jus cogens* crimes" – a term employed by the Special Rapporteur in the third report[233] – Cherif Bassiouni includes the prohibition of genocide, which, he states, "shock[s] mankind's conscience".[234] Similarly, justifying the existence of *jus cogens* in contemporary international law, Alain Pellet observed that the absolute non-derogability of genocide could, today, not be disputed.[235]

81. In addition to strong international jurisprudence confirming the *jus cogens* status of the prohibition of genocide, there is an abundance of State practice recognizing and accepting the prohibition of genocide as a norm of *jus cogens*, including in the form of domestic court decisions. The prohibition of genocide was, for example, recognized as a norm of *jus cogens* by the Swiss Federal Court in *A v. Federal Department of Economic Affairs.*[236] Similarly, in *RM v. Attorney-General*, the High Court of Kenya, denying the *jus cogens* status of the prohibition of discrimination against children born out of wedlock (and their mothers), included the prohibition of genocide in its list of norms that did qualify as *jus cogens*.[237] The German Constitutional Court, in the case concerning an appeal in relation to a conviction of a Bosnian-Serb for acts of genocide, relied on the International Court of Justice's finding that the prohibition of genocide constituted an *erga omnes* obligation and a norm of *jus cogens*.[238] The Canadian Court of Appeal, in *R v. Munyaneza,* a case concerning a Rwandan national implicated in the commission of genocide in Rwanda in 1994, determined that "the crime of genocide in 1994 was in contravention of all the peremptory rules of customary international law".[239] The United States Court of Appeal, in *Sarei v. Rio Tinto*, also held that that "the status of genocide as a *jus cogens* norm remains indisputable".[240]

82. As a matter of treaty practice, the criminalization of genocide, in addition to in the 1951 Genocide Convention, can be found in the Rome Statute of the International Criminal Court,[241] as well as the Malabo Protocol to the Statute of the African Court.[242] Though not treaties, the Statutes of the International Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda also criminalize in absolute

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economic law" (footnote 186 above), p. 380.

[233] A/CN.4/714 and Corr.1. See also D. Tladi, "The International Law Commission's recent work on exceptions to immunity: charting the course for a brave new world in international law?", *Leiden Journal of International Law*, vol. 31 (2019).

[234] Cherif Bassiouni, "International crimes …" (footnote 219 above), p. 70; and A. Cassese, "The enhanced role of *jus cogens*" in Cassese (ed.), *Realizing Utopia: The Future of International Law* (Oxford, Oxford University Press, 2012), pp. 158–171, at p. 162.

[235] A. Pellet, "Conclusions" in C. Tomuschat and J.M. Thouvenin (eds.), *The Fundamental Rules of the International Legal Order:* Jus Cogens *and Obligations* Erga Omnes (Leiden, Martinus Nijhoff, 2005), pp. 417–424, at p. 419 ("Personne aujourd'hui ne peut sérieusement prétendre qu'un traité organisant un génocide ou une agression n'est pas entaché de nullité" [No one today can seriously claim that a treaty organizing genocide or aggression is not a nullity]).

[236] *A v. Federal Department of Economic Affairs* (footnote 182 above), para. 8.2. See also *Committee of US Citizens Living in Nicaragua* (footnote 182 above), at 941; *Siderman de Blake* (footnote 214 above), at 714; *Yousuf v. Samantar* (footnote 214 above), at 19; *Lozano* (footnote 212 above), at para. 6.

[237] *RM v. Attorney-General,* Judgment, High Court of Kenya, 1 December 2006, [2006] *EKL.*

[238] *Beschluss der 4. Kammer des Zweiten Senats vom 12. Dezember 2000* [Federal Constitutional Court Order of 12 December 2000], 2 BVR 1290/90.

[239] *R v. Munyaneza,* Judgment, Superior Court (Criminal Division) of Canada, 22 May 2009, para. 75.

[240] *Sarei and Others v. Rio Tinto, PLC,* Judgment, United States Court of Appeals for the Ninth District, 25 October 2011, at 19360.

[241] Rome Statute of the International Criminal Court (Rome, 17 July 1998), United Nations, *Treaty Series*, vol. 2187, No. 38544, p. 3, art. 6.

[242] Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo, 27 June 2014), available from www.au.int, annex, art. 28 (*b*).

terms acts of genocide.[243] None of those instruments provide any possibility for derogation. While grounds for excluding responsibility may be provided,[244] these are not derogations but affect the elements of the crime, such as the unlawfulness of the act and the *mens rea.*[245] There is also widespread legislative practice recognizing the non-derogability of the prohibition of genocide.[246] The view that the prohibition of genocide is a norm of *jus cogens* has also been expressed by States before organs of the United Nations.[247] It is inconceivable that today anyone would question the peremptory status of the prohibition of genocide.

83. On the basis of the above, it can be concluded that the Commission's inclusion of the prohibition of genocide in its previous list of norms of *jus cogens* is justified by the existing practice.

### 5. The prohibition of crimes against humanity

84. In addition to its previous works wherein it has provided lists of generally accepted norms of *jus cogens*, the Commission has recognized the prohibition of crimes against humanity as a norm of *jus cogens* in the preamble of the draft articles on crimes against humanity adopted on first reading during the sixty-ninth session.[248] As the Commission noted in the commentary to the preamble, the International Court of Justice, by recognizing the prohibition of torture as *jus cogens* in *Belgium v. Senegal*,[249] "*a fortiori* suggests that a prohibition of the perpetration of that act on a widespread or systematic basis amounting to crimes against humanity would also have the character of *jus cogens*". The peremptory status of the prohibition of crimes against humanity has also been affirmed in judgments of the International Tribunal for the Former Yugoslavia. In *Prosecutor v. Kupreškić*, the Trial Chamber of the Tribunal held that the prohibition of crimes against humanity along with the prohibition of genocide constituted peremptory norms of general international law.[250] The jurisprudence of the Tribunal has also, in some instances, identified torture, when committed as a crime against humanity, as a violation of a peremptory norm of general international law. In *Prosecutor v. Simić,* the accused had been "convicted of two

[243] Statute of the International Tribunal for the Former Yugoslavia, S/25704, annex, art. 4; statute of the International Tribunal for Rwanda, Security Council resolution 955 (1994), annex, art. 2.

[244] See, e.g., Rome Statute, art. 31.

[245] For example, mental illness (art. 31, para. 1 (*a*), of the Rome Statute), excludes the fault element, while self-defence (art. 31, para. 1 (*c*), of the Rome Statute), excludes the unlawfulness of any conduct.

[246] See, e.g., Criminal Code of Burkina Faso, art. 313; Penal Code of Côte d'Ivoire, art. 317; Criminal Code Amendment Act of 1993 of Ghana, sect. 1; Organization of Prosecutions for Offences constituting the Crime of Genocide or Crimes against Humanity committed since October 1, 1990 of Rwanda, art. 2; Implementation of the Rome Statute of the International Criminal Court Act of South Africa, Schedule 1, Part 1; United States Code, chap. 50A, sect. § 1091; Law No. 2.889 of 1956 of Brazil, art. 1; Penal Code of Mexico, sect. 149 *bis*; Penal Code of Nicaragua, arts. 549 and 550; Penal Code of Cuba, art. 116; Law No. 5710-1950 on the Prevention and Punishment of Genocide of Israel; Penal Code of the Fiji Islands, chap. VIII; Criminal Code of the Republic of Tajikistan, art. 398; Criminal Code of the Republic of Albania, art. 73; Criminal Code of Austria, art. 321; Law Concerning the Repression of Grave Violations of International Law of Belgium, art. 1; Criminal Code of the Czech Republic, art. 259; Criminal Code of France, art. 211-1; Penal Code of Finland, sect. 6; Criminal Code of Germany, art. 220; Genocide Convention Act of Ireland, sect. 2; Law No. 962 of 1967; Penal Code of Portugal, art. 239; Penal Code of Spain, art. 607; Federal Criminal Code of the Russian Federation, art. 357.

[247] See, e.g., Belarus (A/C.6/73/SR.26); Mozambique (A/C.6/73/SR.28); Spain (A/C.6/73/SR.29). See also Azerbaijan in the Security Council, 17 October 2012 (S/PV.6849).

[248] Para. (4) of commentary to preamble to the draft articles on crimes against humanity, A/72/10, paras. 45-46, at p. 23.

[249] *Questions relating to the Obligation to Prosecute or Extradite* (footnote 188 above), at para. 99.

[250] *Kupreškić* (footnote 229 above), para. 520.

counts of torture, as crimes against humanity".[251] The Chamber stated that the prohibition of torture was a crime against humanity.[252] While the Chamber did not directly ascribe the status of *jus cogens* to the prohibition of crimes against humanity, it described the right to not to be tortured, or the prohibition against torture, as being "recognised in customary and conventional law and as a norm of *jus cogens*".[253] Since the torture for which the accused was convicted was a deemed a crime against humanity, it can be inferred that the Chamber accepted the prohibition of torture as a crime against humanity as constituting *jus cogens.* The International Criminal Court has similarly described the prohibition of crimes against humanity as *jus cogens*.[254]

85. The jurisprudence under the inter-American system has, likewise, described the prohibition of crimes against humanity as having peremptory status. In *Miguel Castro-Castro Prison v. Peru,* the Inter-American Court of Human Rights determined that the prohibition of crimes against humanity was part of peremptory norms of general international law.[255] The *Miguel Castro-Castro Prison* judgment was itself based on *Almonacid-Arellano v. Chile*, which concluded that the prohibition of crimes against humanity was a norm of *jus cogens* after an assessment of practice starting with the Nuremburg Principles.[256] The Inter-American Commission has also affirmed the *jus cogens* status of the prohibition of crimes against humanity.[257]

86. The peremptory status of the prohibition of crimes against humanity has also been affirmed in the decisions of national courts. In the United States, for example, the District Court for the Eastern District of New York stated, citing Cherif Bassiouni, [258] that the prohibition of crimes against humanity has "existed in customary international law for over half a century", and is "also deemed to be part of *jus cogens* – the highest standing in international legal norms".[259] The Supreme Court of Argentina, in the *Mazzeo, Julio Lilo* case, described *jus cogens* as the highest

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[251] *Prosecutor v. Milan Simić,* IT-95-9/2-S, Sentencing Judgment, Trial Chamber, International Tribunal for the Former Yugoslavia, 17 October 2002, para. 34.

[252] *Ibid.*

[253] *Ibid.*

[254] See, e.g., *Prosecutor v. William Samoei Ruto and Joshua Arap Sang,* ICC-01/09-01/11, Decision of Trial Chamber on the Request of Mr. Ruto for Excusal from Continued Presence at Trial, International Criminal Court, 18 June 2013, para. 90 ("It is generally agreed that the interdiction of crimes against humanity enjoys the stature of *jus cogens*. In contrast, democracy as an international legal norm has not, so far, been known to enjoy the *jus cogens* status. Hence, in the event of any perceived conflict between the two norms, considerations of democracy must yield to the need to conduct proper inquiry into criminal responsibility of an elected official for crimes against humanity").

[255] *Miguel Castro-Castro Prison v. Peru,* Judgment (Merits, Reparations and Costs), Inter-American Court of Human Rights, 25 November 2006, para. 402.

[256] *Almonacid-Arellano and Others v. Chile*, Judgment (Preliminary Objections, Merits and Costs), Inter-American Court of Human Rights, 26 September 2006, Series C, No. 154, para. 99. See also *Goiburú* (footnote 119 above), para. 128, which described the prohibition of torture and enforced disappearance as crimes against humanity and *jus cogens.* See further *Manuel Cepeda Vargas v. Colombia*, Judgment (Preliminary Objections, Merits, Reparations and Costs), Inter-American Court of Human Rights, 26 May 2010, Series C, No. 213, para. 42.

[257] See, e.g., *Manuel Cepeda Vargas v. Republic of Colombia,* Case 12.531, Decision, Inter-American Commission on Human Rights, 14 November 2008, footnote 66; *Julia Gomes Lund and Others (Guerrilha do Araguaia) v. Brazil*, Case 11.552, Decision, Inter-American Commission on Human Rights, 26 March 2009, para. 185 (duty to investigate and prosecute crimes against humanity described as *jus cogens*); *Juan Gelman and Others v. Uruguay,* Case 12.607, Decision, Inter-American Commission on Human Rights, 21 January 2010, para. 66; *Marino Lopez and Others (Operation Genesis) v. Colombia,* Case 12.573, Merits, Decision, Inter-American Commission, 31 March 2011, Report No. 64/11, para. 256, at footnote 275.

[258] M. Cherif Bassiouni, "Crimes against humanity", in R. Gutman and D. Rieff (eds.) *Crimes of War: What the Public Should Know* (New York, Norton, 1999), pp. 135–136.

[259] *In Re Agent Orange Product Liability Litigation,* Judgment, District Court of the United States, Easter District of New York, 28 March 2005, at 136.

international law imposed on States, noting that it "prohibits the commission of crimes against humanity, even during times of war".[260] In other jurisdictions it has been held that rules relating to the punishment of crimes against humanity, such as the inapplicability of prescription and the duty to prevent and punish, constitute peremptory norms of international law.[261] Similarly, though not explicitly describing the prohibition of crimes against humanity as *jus cogens*, the South African Constitutional Court's judgment in the *National Commissioner of Police v. Southern African Litigation Centre* appears to endorse the *jus cogens* status of the prohibition:

> Along with torture, the international crimes of piracy, slave-trading, war crimes, crimes against humanity, genocide and apartheid require States, even in the absence of binding international treaty law, to suppress such conduct because "all States have an interest as they violate values that constitute the foundation of the world public order".[262]

87. Although the quoted extract does not directly relate to the *jus cogens* status of the relevant crime, two points are worth noting. First, the list of crimes identified by the Court, with the exception of the crime of piracy, correspond to the Commission's list of the most widely cited examples of norms of *jus cogens* in the articles on State responsibility. Second, the description of these crimes by the Court uses language that is similar to the descriptive characteristics provisionally adopted by the Drafting Committee, namely the protection of the "values that constitute the foundation of the world public order".[263] Other decisions, such as by the Court of Appeal of Kenya, have also described the prohibition of crimes against humanity in language that confirms its non-derogability.[264]

88. As mentioned earlier, the Commission, in its draft articles on crimes against humanity provisionally adopted on first reading in 2017, recognized in the preamble that the prohibition of crimes against humanity is a peremptory norm of general international law. The written responses of States to the preambular paragraph of those draft articles also point to the general recognition of States of the peremptory character of the prohibition of crimes against humanity. Of the 33 written comments [265] received at the time of writing the present report,[266] only one State, France, questioned

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[260] *Mazzeo, Julio Lilo and Others*, Judgment, Supreme Court of Argentina, 13 July 2007, para. 15 ("Se trata de la más alta fuente del derecho internacional que se impone a los estados y que prohíbe la comisión de crímenes contra la humanidad, incluso en épocas de guerra" [It is the highest source of international law that is imposed on States and that prohibits the commission of crimes against humanity, even in times of war]). See also *Arancibia Clavel, Enrique Lautaro*, Judgment, Supreme Court of Argentina, 24 August 2004, para. 28, and *Office of the Prosecutor v. Priebke*, Judgment, Supreme Court of Argentina, 2 November 1995, paras. 2-5.

[261] See, e.g., *Exp No. 0024-2010-PI/TC,* Judgment, Peruvian Constitutional Court, 21 March 2011, para. 53.

[262] *National Commissioner of Police v. Southern African Litigation Centre,* Judgment, South African Constitutional Court, 30 October 2014, para. 137.

[263] Draft conclusion 2, provisionally adopted by the Drafting Committee (see statement of the Chair of the Drafting Committee of 26 July 2017 (footnote 40 above), annex), refers to the protection of "fundamental values of the international community".

[264] See *Attorney-General and Others v. Kenya Section of International Commission of Jurists*, Judgment, Court of Appeal of Kenya, 16 February 2018, at 44.

[265] In his fourth report (A/CN.4/725 and Add.1), the Special Rapporteur for crimes against humanity, Mr. Sean Murphy, looked at more than just the written comments. He also reviewed the oral interventions of States during the Sixth Committee debates. According to that report, in statements before the Sixth Committee, other States questioned *the inclusion* of the preambular paragraph for various reasons, including that peremptory norms were being considered as part of another topic, that the commentary to the preambular paragraph provided little support for the paragraph, and that the preambular paragraph was inappropriate for a topic focused on criminalization and individual criminal responsibility.

[266] Argentina, Australia, Austria, Belarus, Belgium, Bosnia and Herzegovina, Brazil, Canada, Chile,

the inclusion of the preambular paragraph. Tellingly, in its written input, France did not question the correctness of the preambular paragraph, but merely tentatively expressed doubt about its appropriateness given that the subject of *jus cogens* was being considered in a different topic.[267] Most of the comments did not even mention the inclusion of the paragraph describing the prohibition of crimes against humanity as a peremptory norm of international law – a suggestion that it is such an obvious statement of fact that it does not require mention. Those States that did comment on it, other than France, did so with approval. Belgium, for example noted that that, in the "draft preamble, it is rightly stated that the prohibition of crimes against humanity is a peremptory norm of general international law (*jus cogens*)".[268] The United Kingdom, simply took note of the paragraph, stating that the Commission "has taken this view previously".[269] The written observations of Sierra Leone, similarly, take note of the *jus cogens* status of the prohibition of crimes against humanity when commenting on amnesties.[270]

89. Unsurprisingly, there is also ample support in academic writings for the view that the prohibition of crimes against humanity is a norm of *jus cogens*.[271] Where lists of norms of *jus cogens* are provided, invariably the prohibition of crimes against humanity is included.[272] Even when not identifying the prohibition of crimes against humanity explicitly as *jus cogens*, authors tend to assume its peremptory status.[273] Leila Sadat, for example, without explicitly stating that the prohibition of crimes against humanity is *jus cogens*, observes that the provisions in the Commission's draft articles on crimes against humanity are appropriate for "a convention addressing a *jus cogens* offence with the robust inter-State cooperation, mutual legal assistance and enforcement provisions".[274] In this respect, Christófolo observes that the "peremptory

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Costa Rica, Cuba, Czech Republic, El Salvador, Estonia, France, Germany, Greece, Israel, Japan, Liechtenstein, Malta, Morocco, New Zealand, Nordic countries (Denmark, Iceland, Sweden, Finland, Norway), Panama, Peru, Portugal, Sierra Leone, Singapore, Switzerland, Ukraine, United Kingdom, and Uruguay. See A/CN.4/726.

[267] *Ibid.* ("There is some doubt, however, as to the desirability of qualifying the prohibition of crimes against humanity as a peremptory norm of general international law, since the Commission is currently working on the topic 'Peremptory norms of general international law (jus cogens)', and since the preamble of the Rome Statute of the International Criminal Court itself does not refer to them.").

[268] *Ibid*. See also the written observations of Panama.

[269] *Ibid*.

[270] *Ibid*.

[271] See, e.g., Den Heijer and Van der Wilt, "*Jus cogens* and the humanization and fragmentation of international law" (footnote 158 above), p. 9.

[272] See, e.g. Linderfalk, "Understanding the *jus cogens* debate …" (footnote 72 above), p. 53; Kleinlein, "*Jus cogens* as the 'highest law'? Peremptory norms and legal hierarchies" (footnote 186 above), p. 197; L.J. Kotzé, "Constitutional conversations in the Anthropocene: in search of environmental *jus cogens* norms", *Netherlands Yearbook of International Law*, vol. 46 (2015), pp. 241–272, at p. 243; Criddle and Fox-Decent, "A fiduciary theory of *jus* cogens" (footnote 231 above), p. 369; and E. de Wet, "*Jus cogens* and obligations *erga omnes*", in D. Shelton (ed.) *The Oxford Handbook of International Human Rights Law* (Oxford, Oxford University Press, 2013), pp. 541–561.

[273] See, e.g., D. Shelton, "Sherlock Holmes and the mystery of *jus cogens*", *Netherlands Yearbook of International Law*, vol. 46 (2015), pp. 23–50, especially at p. 37, where she gives the invocation of accountability for crimes against humanity as an example of a function of *jus cogens* beyond rendering treaties void.

[274] L.N. Sadat, "A contextual and historical analysis of the International Law Commission's 2017 draft articles for a new global treaty on crimes against humanity", *Journal of International Criminal Justice*, vol. 16 (2018), pp. 683–704, at pp. 688 and 700 ("This language should be stronger still in light of current State and international practice, and given the *jus cogens* nature of crimes against humanity").

nature of the prohibition of crimes against humanity is inscribed within the same normative development of other norms of *ius cogens*".[275]

90. This brief of survey of sources illustrates that the prohibition of crimes against humanity is firmly established in both practice and doctrine as a norm that is accepted and recognized as one from which no derogation is permitted.

### 6. The prohibition of apartheid and racial discrimination

91. As with the discussion on the prohibition of aggression, it is useful to begin the consideration of the prohibition of apartheid by addressing a terminological issue. In some instances, reference has been made to the prohibition of apartheid, while in others the reference is made to the prohibition of racial discrimination. Like the commentary to draft article 40 of the articles on State responsibility, the Special Rapporteur will, throughout the fourth report, refer to the "the prohibition of apartheid and racial discrimination" except where a direct quote uses a different term. The phrase is not meant, in this context, to indicate separate prohibitions, namely the prohibition of racial discrimination *and* the prohibition of apartheid (or for that matter the prohibition of racial discrimination or the prohibition of apartheid). Rather it is intended to signify a composite act, namely the prohibition of apartheid with racial discrimination as an integral part of that. In this regard, the International Convention on the Suppression and Punishment of Apartheid defines apartheid in a broad sense to include "similar policies and practices of racial segregation and discrimination as practised in southern Africa" and covers and a number of specified acts.[276]

92. As a second preliminary point, acts of apartheid are prohibited as crimes against humanity. If, as the analysis above illustrates, crimes against humanity are *jus cogens*, then it stands to reason that acts of apartheid, which constitute crimes against humanity, would themselves also be prohibited as *jus cogens.* As with crimes against humanity, the International Court of Justice has not explicitly determined the prohibition of apartheid and racial discrimination to be a norm of *jus cogens.* In its famous declaration in the *Barcelona Traction* case, however, the Court included the prohibition of racial discrimination among norms with an *erga omnes* quality. The Court stated that obligations *erga omnes*

> derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.[277]

93. It will be noted that the examples provided by the Court are all part of the Commission's list of examples of norms of *jus cogens*. Moreover, like Pellet and

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[275] Christófolo, *Solving Antinomies between Peremptory Norms in Public International Law* (footnote 186 above), p. 219.

[276] International Convention on the Suppression and Punishment of the Crime of Apartheid (New York, 30 November 1973), United Nations, *Treaty Series*, vol. 1015, No. 14861, p. 243, art. II. The acts specified in article II include: denial to a member or members of a racial group or groups of the right to life and liberty of person by specified means; deliberate imposition on a racial group or groups of living conditions calculated to cause its or their physical destruction in whole or in part; any legislative measures and other measures calculated to prevent a racial group or groups from participation in the political, social, economic and cultural life of the country; any measures including legislative measures, designed to divide the population along racial lines by the creation of separate reserves and ghettos for the members of a racial group or groups; exploitation of the labour of the members of a racial group or groups; and persecution of organizations and persons, by depriving them of fundamental rights and freedoms, because they oppose apartheid.

[277] *Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970*, p. 3, at p. 32, para. 34.

Cherif Bassiouni, the Special Rapporteur has taken the view that, while the concepts of *erga omnes* obligations and *jus cogens* are different, they are related in that one (*jus cogens*) concerns the content of the rule, while the other (*erga omnes*) tells us the addressees of the rule and is a consequence of the former.[278] In the *Namibia* advisory opinion, the Court determined that the apartheid and racial policies of South Africa constituted "a denial of fundamental human rights [that] is a flagrant violation of the purposes and principles of the Charter".[279] This is certainly an indication, though not definitive, that the International Court of Justice would include the prohibition of apartheid and racial discrimination as an example of *jus cogens*.

94. There is also ample State practice recognizing the prohibition of apartheid and racial discrimination as a peremptory norm of general international law. There have, for example, been many General Assembly and Security Council resolutions which attest to the non-derogability of the prohibition of apartheid and racial discrimination. In 1960, the General Assembly determined that the "subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights and is contrary to the Charter of the United Nations".[280] While this declaration did not address apartheid and racial discrimination specifically, it laid the foundation for further declarations expressing rejection of the policy of apartheid and racial discrimination. In 1965, for example, the General Assembly declared that the "all States shall contribute to the complete elimination of racial discrimination and colonialism in all its manifestations".[281] It is noteworthy that the resolution places an obligation on *all* States, and not only the affected States, to contribute to the eradication of racial discrimination and the domination of people. This, it will be recalled from the third report, is one of the key consequences of peremptory norms of international law – the obligation on all States to cooperate in the elimination of the legal consequences of breaches of *jus cogens*.

95. What is more, the relevant resolutions not only require States to cooperate in the eradication of the discriminatory policies, but they also *seem to*, or could be read to, exempt liberation movements fighting the scourge of apartheid and racial discrimination from particular rules of international law in efforts to liberate peoples

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[278] Pellet, "Conclusions" (footnote 235 above), p. 418 ("'Les règles fondamentales de l'ordre juridique international', en particulier le *jus cogens* et les obligations *erga omnes* – sans d'ailleurs que l'on sache très bien s'il s'agit d'un seul et même concept ou de deux choses différentes – même si pour ma part … je pense qu'il s'agit de deux notions distinctes: la caractère *cogens* d'une norme concerne la qualité du contenu même de celle-ci; l'expression *erga omnes* attire plutôt l'attention sur ses destinataires" ['The fundamental rules of international law', particularly *jus cogens* and *erga omnes* obligations – without, however, knowing very well if they constitute a single concept or two different things – though, for my part …, I think there are two separate concepts: the *cogens* character of a norm concerns the quality of the actual content of the norm; the expression *erga omnes* rather draws attention to its addressees]); Cherif Bassiouni, "International crimes …" (footnote 219 above), p. 63, who notes that the term *jus cogens* "refers to the legal status" of particular norms while "*obligatio erga omnes* pertains to the legal implications arising out of a … characterization of *jus cogens*".

[279] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 16, at p. 57, para. 131.

[280] General Assembly resolution 1514 (XV) on the declaration on the granting of independence to colonial countries and peoples of 14 December 1960, para. 1.

[281] General Assembly resolution 2131 (XX) of 21 December 1965 on the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty, para. 6. See also General Assembly resolution 2625 (XXV) on the Declaration of Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, annex, para. 1 ("Solemnly proclaim [that] … States shall cooperate in the promotion of universal respect for, and observance of, human rights and fundamental freedoms for all and in the elimination of all forms of racial discrimination ").

from the racial domination and apartheid. For example, the General Assembly resolution on the definition of aggression was subject to the caveat that the definition did not prejudice "in any way" the right of "peoples under colonial and racist regimes or other forms of alien domination …[to] struggle" for their rights and "to seek and receive support".

96. The General Assembly has also adopted South Africa and apartheid-specific resolutions and declarations. In 1975, the General Assembly adopted the resolution on the special responsibility of the United Nations towards the oppressed people of South Africa, in which it proclaimed that "the United Nations and the international community" owe a duty to the "oppressed people of South Africa and their liberation movements" to contribute to the end of *apartheid*.[282] Resolution 32/105 J, having reaffirmed "the legitimacy of the struggle of the oppressed people of South Africa", described the policy of South Africa as "the criminal policy of *apartheid*".[283] The resolution went as far as to endorse the "right to … struggle for the seizure of power by all available and appropriate means …, including armed struggle".[284] Importantly, consistent with the duty to cooperate to bring to an end violations of *jus cogens,* the resolution declared that "the international community should provide all assistance to the national liberation movement of South Africa" in its struggle to overthrow apartheid.[285] The General Assembly adopted many similar resolutions over a prolonged period of time, describing apartheid as, for example*,* "inhuman" and calling on the international community to assist in its eradication.[286] While these resolutions did not use the language of "*jus cogens*" or "peremptory norms", they did use language describing the prohibition in terms akin to those used to describe, for example, genocide and torture.

97. It is important to recall that it was not just the General Assembly that adopted a string of resolutions on the illegality and inhumanity of apartheid and racial discrimination. The Security Council also adopted its own resolutions. In 1984, in a strongly worded resolution, the Security Council described apartheid and racial discrimination as "a crime against the conscience and dignity of mankind" and as being "incompatible with the rights and dignity of man"[287] – language reminiscent of the International Court of Justice's oft-quote description of genocide in the advisory opinion on *Reservations to the Convention on Genocide*.[288] Reflecting the duty to cooperate to bring to an end serious breaches of *jus cogens* and not to provide

[282] General Assembly resolution 3411 C (XXX) of 28 November 1975 on the special responsibility of the United Nations and the international community towards the oppressed people of South Africa, para. 1.

[283] General Assembly resolution 32/105 J on assistance to the national liberation movement of South Africa of 14 December 1977, paras. 2–3.

[284] *Ibid.*, para. 3.

[285] *Ibid.* para. 4.

[286] In addition to those referred to above, see General Assembly resolution 31/6 A on the so-called independent Transkei and other bantustans of 26 October 1976, para. 1 ("strongly condemns the establishment of bantustans as designed to consolidate the inhuman policies of *apartheid*."). See also General Assembly resolution 34/93 O of 12 December 1979 on the Declaration on South Africa; General Assembly resolution 39/72 A of 13 December 1984 on comprehensive sanctions against the *apartheid* régime and support to the liberation struggle in South Africa; and General Assembly resolution 39/72 G of 13 December 1984 on concerted international action for the elimination of *apartheid*.

[287] Security Council resolution 473 (1980), para. 3. See also Security Council resolution 418 (1977); Security Council resolution 554 (1984) and resolution 569 (1985).

[288] *Reservations to the Convention on Genocide* (footnote 220 above), p. 23 ("it was the intention of the United Nations to condemn and punish genocide as 'a crime under international law' involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations").

assistance for the maintenance of situations created by such breaches of *jus cogens,* in this case apartheid and racial discrimination, the Security Council provided for members of the United Nations to adopt various sanctions against South Africa.[289]

98. The complete and total rejection of the policy of apartheid and the discriminatory policies attendant to it, as a crime against humanity and the conscience of mankind, was codified in the International Convention on the Suppression and Punishment of the Crime of Apartheid.[290] In its preamble, the Convention condemned "racial segregation and apartheid" and committed parties "to prevent, prohibit and eradicate *all practices*" of racial segregation and apartheid.[291] The Convention declares apartheid to be "a crime against humanity" and that "inhuman acts" connected with the crime of apartheid, such as racial segregation and racial discrimination, "are crimes violating the principles of international law, in particular the purposes and principles of Charter of the United Nations".[292] Furthermore, consistent with the consequences of the serious breaches of *jus cogens,* the Convention provides for responsibility "irrespective of the motive" for anyone who commits or assists or cooperates in the commission of the crime of apartheid.[293]

99. The peremptory character of the prohibition of apartheid and racial discrimination has also been recognized in judicial decisions of national courts. For example, racial discrimination and inequality was recognized as one of the examples of norms of *jus cogens* in the Swiss case *A v. Department of Economic Affairs.*[294] Similarly, the United States Court of Appeals in *Committee of US Citizens Living in Nicaragua*, included racial discrimination in the list of norms of *jus cogens*.[295] In *Sarei v. Rio Tinto,* the United States Court of Appeal stated that there was "a great deal of support for the proposition that systematic racial discrimination by a State violates a *jus cogens* norm".[296]

100. Writings have also generally recognized the prohibition of apartheid and racial discrimination as a norm of *jus cogens.*[297] The clear recognition of the prohibition of apartheid and racial discrimination as a norm of *jus cogens* is aptly captured by Pellet, who states that "the universal (official) reprobation of racial discrimination has certainly resulted in a 'peremptorization' of the prohibition of racial discrimination (at least when committed on a large and/or systematic scale)".[298]

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[289] See, e.g. Security Council resolution 418 (1977); Security Council resolution 569 (1985); and Security Council resolution 591 (1986).

[290] International Convention on the Suppression and Punishment of the Crime of Apartheid.

[291] *Ibid.*, fourth preambular paragraph (emphasis added).

[292] *Ibid.*, art. I.

[293] *Ibid.*, art. III

[294] *A v. Department of Economic Affairs* (footnote 182 above), at para. 8.2.

[295] *Committee of US Citizens Living in Nicaragua v. Reagan* (footnote 182 above), at 941. See also *Siderman de Blake v. Argentina* (footnote 214 above) at 717.

[296] *Sarei v. Rio Tinto* (footnote 240 above), at 19378.

[297] See J. Dugard, *Confronting Apartheid: A Personal History of South Africa, Namibia and Palestine* (Johannesburg, Jacana, 2018), pp. 86 and 137. See also Ago, "Droit des traités à la lumière de la Convention de Vienne" (footnote 230 above), p. 324, footnote 37; Costelloe, *Legal Consequences of Peremptory Norms in International Law* (footnote 186 above), p. 16; Christófolo, *Solving Antinomies between Peremptory Norms in Public International Law* (footnote 150 above), p. 222; Knuchel, Jus Cogens*: Identification and Enforcement of Peremptory Norms* (footnote 186 above), p. 41; De Wet, "The emergence of international and regional value systems as a manifestation of the emerging international constitutional order" (footnote 82 above), p. 616; Cassese, "The enhanced role of *jus cogens*" (footnote 234 above), p. 162; and Cottier, "Improving compliance: *jus cogens* and international economic law" (footnote 186 above).

[298] Pellet, "Comments in response to Christine Chinkin …" (footnote 87 above), p. 85.

101. The above discussion illustrates that the Commission's decision to include apartheid and racial discrimination in its list of examples of most cited norms of *jus cogens* was justified.

### 7. The prohibition of slavery

102. Understandably there are not many cases of what may be termed classical slavery in the modern world. As a result, the International Court of Justice has not had to rule on the prohibition of slavery and has thus not addressed the status of slavery as a norm of *jus cogens*. As with the prohibition of apartheid and racial discrimination, the Court's recognition of the *jus cogens* status of the prohibition of slavery has been indirect and through its inclusion of the prohibition in the list of rules creating *erga omnes* obligations.[299] Yet, the prohibition of slavery is one of the classical examples, with virtually universal acceptance, of peremptory norms of international law.[300] Its recognition as a norm from which no derogation is permitted can be seen in the practice of States, particularly in context of multilateral instruments.

103. Evidence of the *jus cogens* status of the prohibition of slavery can be seen in the practice of States adopting multilateral instruments. Slavery was first condemned in an international instrument in the 1815 Declaration Relative to the Universal Abolition of the Slave Trade.[301] In 1948, the Universal Declaration of Human Rights was adopted and it provides that "[n]o one shall be held in slavery or servitude" and that "slavery and the slave trade shall be prohibited in all their forms".[302] In the Durban Declaration, world leaders acknowledged that "slavery and the slave trade … were appalling tragedies in the history of humanity" in part "because of their abhorrent barbarism".[303] The Declaration further acknowledged "that slavery and the slave trade are a crime against humanity and should always have been so".[304]

104. The absolute and non-derogable nature of the prohibition on slavery is also evident in the treaty practice. In the 1926 Slavery Convention, States undertook to prevent and suppress "slavery" and the "slave trade".[305] The commitment in the Convention was subject to a number of qualifiers, which raise questions about the non-derogability of the prohibition at that time.[306] First, the Contracting States committed themselves to bring to an end slavery "progressively and as soon as possible".[307] This qualifier might suggest that the prohibition was viewed as derogable by the Contracting States. However, the qualifier seemed less a normative

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[299] *Barcelona Traction* (footnote 277 above), p. 32, para. 34.

[300] Christófolo, *Solving Antinomies between Peremptory Norms in Public International Law* (footnote 158 above), p. 216 ("The prohibition of slavery is placed among the first undisputable peremptory norms that emerged in contemporary international law").

[301] Declaration Relative to the Universal Abolition of the Slave Trade (8 February 1815), *Consolidated Treaty Series*, vol. 63, No. 473. See D. Weissbrodt and Anti-Slavery International, *Abolishing Slavery and its Contemporary Forms* (New York and Geneva, United Nations, 2002; HR/PUB/02/4), p. 3.

[302] Art. 4.

[303] Durban Declaration adopted by the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, contained in *Report of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Durban, 31 August – 8 September 2001*, A/CONF.189/12, p. 5, at para. 13.

[304] *Ibid.*

[305] Slavery Convention (Geneva, 25 September 1926), League of Nations, *Treaty* Series, vol. LX, No. 1414, p. 253, art. 2 (*a*) and (*b*).

[306] See Christófolo, *Solving Antinomies between Peremptory Norms in Public International Law* (footnote 158 above), p. 216 ("But the 1926 Convention did not peremptorily abolish[] slavery. Article 2 only stipulates that States Parties agreed to upon the obligation to progressively bring about the complete elimination of slavery in all its forms").

[307] Slavery Convention, art. 2 (*b*).

qualifier and more of an empirical acceptance that slavery, even if completely illegal, did take place. This is in the same way that crimes against humanity today may take place notwithstanding their absolute proscription as a norm of *jus cogens.* This view is supported by the fact that the obligation to impose severe penalties was immediate and not subject the qualification of progressive eradication.[308] Nevertheless, the Convention did foresee the legal continuation of "forced labour" under certain strict conditions, and as such established a transitional arrangement to deal with instances of forced labour.[309] Forced labour, however, was not at the time characterized as slavery. Slavery was defined as the condition over which some form of ownership was exercised over a person,[310] while forced labour was always compensated and labourers could not be compelled to relocate.[311] The Supplementary Convention of 1956 extended the scope of the prohibition to cover practices similar to slavery, which would include the practice of forced labour.[312]

105. In addition to the 1926 and 1956 Slavery Conventions, other non-slavery-specific treaties prohibit slavery in absolute and non-derogable terms. The International Covenant on Civil and Political Rights provides an apt illustration. In article 8, "slavery and the slave-trade in all their forms" and "servitude" are prohibited. While the Covenant makes provision for derogation from certain rights, the prohibition of "slavery and slave-trade in all their forms" and "servitude" is explicitly excluded from the possibility of derogation.[313] Protocol II to the 1949 Geneva Conventions similarly states that "slavery and the slave trade in all their forms" "remain prohibited at any time and in any place whatsoever".[314] Examples of other treaties that, in some way or another, prohibit and/or criminalize slavery in absolute terms include the African Charter on Human and Peoples' Rights,[315] the Rome Statute of the International Criminal Court, which criminalizes slavery as a crime against humanity,[316] and the Protocol to Prevent and Punish Trafficking in Persons.[317]

106. In addition to State practice in the form of multilateral instruments, national court cases have also recognized slavery as a norm of *jus cogens.*[318] The peremptory

[308] See, e.g. article 6, which obliges States to adopt "severe penalties" for slavery. This obligation is not subject to the "progressive" qualifier of article 2 (*b*).

[309] *Ibid.*, art. 5.

[310] *Ibid.*, art. 1 ("Slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised").

[311] *Ibid.*, art. 5, para. 2 ("So long as such forced or compulsory labour exists, this labour shall invariably be of an exceptional character, shall always receive adequate remuneration, and shall not involve the removal of the labourers from their usual place of residence").

[312] Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (Geneva, 7 September 1956), United Nations, *Treaty Series*, vol. 226, No. 3822, p. 40.

[313] International Covenant on Civil and Political Rights, art. 4, para. 2.

[314] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II) (Geneva, 8 June 1977), United Nations, *Treaty Series*, vol. 1125, No. 17513, p. 609, art. 4, para. 2 (*f*).

[315] African Charter on Human and Peoples' Rights, art. 5 ("All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited").

[316] Rome Statute, art. 7, para. 1 (*c*), and 7, para. 2 (*c*).

[317] Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime (New York, 15 November 2000), United Nations, *Treaty Series*, vol. 2237, No. 39574, p. 319. See especially definition of "trafficking" and "exploitation" in article 3 (*a*). See also article 3 (b), which excludes "consent" as a justification.

[318] *Okenyo v. Attorney-General,* Judgment of the 29 March 2012, para. para. 61; *RM v. Attorney-General* (above footnote 237); *Committee of US Citizens Living in Nicaragua v. Reagan* (above footnote 182), at 941; *United States v. Yousef*, Judgment, United States Court of Appeal, Second

status of the prohibition has also been recognized in decisions of regional courts, in particular the Inter-American Court. In *Aloeboetoe v. Suriname,* for example, the Inter-American Court held that a treaty between the Netherlands and the Saramakas community providing for the transport of slaves would be "null and void because it contradicts the norms of *jus cogens superveniens*".[319] In *Río Negro Massacres v. Guatemala,* the Court held that the failure to investigate and prosecute "slavery and involuntary servitude" contravened "non-derogable norms (*jus cogens*)".[320] The prohibition of slavery is also recognized in academic writings as a norm of *jus cogens.*[321] The *jus cogens* status of the prohibition of slavery is so well accepted that Trindade has remarked, "I understand that no one … would dare to deny that, e.g., slave work … would likewise affront the universal juridical conscience, and effectively collide with the peremptory norms of the *jus cogens*".[322] Similarly, Den Heijer and Van der Wilt include slavery among *jus cogens* norms "beyond contestation".[323] Likewise, Christófolo states that "it seems undisputable that the general prohibition of slavery and slave trade has reached a universal peremptory nature in public international law".[324]

107. It can be concluded, on the basis of the brief description above, that the Commission's inclusion of the prohibition of slavery in the list of notable examples of norms of *jus cogens* is justified. What the discussion did not address is what types of conduct are prohibited under the general prohibition of slavery and slave trade. Nonetheless, given the constant refrain contained in the instruments that slavery "in all its forms" is prohibited, it can be stated that modern forms of slavery, however they may be defined, fall within the scope of the prohibition.

### 8. The right to self-determination

108. The right to self-determination is another norm previously identified by the Commission as a norm of *jus cogens.* The right to self-determination is a classical

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Circuit, 4 April 2003, at 94 *et seq*., where the Court stated that only a few rules of international law possessed *jus cogens* character and illustrating this by noting that a treaty providing for trade in slaves would be void while one providing for trade in ivory, even if violating some rule of international law, would not be void; *Siderman de Blake v. Argentina* (footnote 214 above), at 714; *Yousuf v. Samantar* (footnote 214 above), at 19. See also opinion of Kirby, J in *R v. Tang,* High Court of Australia of 28 August 2008, paras. 110-117.

[319] *Aloeboetoe and Others v. Suriname, Reparation and Costs,* Judgment, Inter-American Court of Human Rights, 10 September 1993, Series C, No. 15, para. 57.

[320] *Río Negro Massacres v. Guatemala,* Judgement, Inter-American Court of Human Rights, 4 September 2012, Series C, No. 250, at para. 227.

[321] See, e.g., Ago, "Droit des traités à la lumière de la Convention de Vienne" (footnote 230 above), p. 324, footnote 37. See also A. Verdross, "*Jus dispositivum* and *jus cogens* in international law", *American Journal of International Law*, vol. 60 (1966), pp. 55–63, at p. 59; Mik, "*Jus cogens* in contemporary international law" (footnote 167 above), p. 59; S. Kadelbach, "Genesis, function and identification of *jus cogens* norms", *Netherlands Yearbook of International Law*, vol. 46 (2015), pp. 147–172, at p. 151; Bianchi, "Human rights and the magic of *jus cogens*" (footnote 232 above), p. 495; Criddle and Fox-Decent, "A fiduciary theory of *jus* cogens" (footnote 231 above), p. 355; Knuchel, Jus Cogens*: Identification and Enforcement of Peremptory Norms* (footnote 186 above), p. 41; Costelloe, *Legal Consequences of Peremptory Norms in International Law* (footnote 186 above), p. 16; Cassese, "The enhanced role of *jus cogens*" (footnote 234 above), p. 162; Cherif Bassiouni, "International crimes …" (footnote 219 above), p. 70; and Cottier, "Improving compliance: *jus cogens* and international economic law" (footnote 186 above), p. 133.

[322] Cançado Trindade, "*Jus cogens*: the determination and the gradual expansion of its material content in contemporary international case-law" (footnote 219 above), p. 13.

[323] Den Heijer and Van der Wilt, "*Jus cogens* and the humanization and fragmentation of international law" (footnote 158 above), p. 9.

[324] Christófolo, *Solving Antinomies between Peremptory Norms in Public International Law* (footnote 158 above), p. 219.

norm of *jus cogens* whose peremptory status is virtually universally accepted. It is true that one State, in the Sixth Committee debate on the work of the Commission during its seventieth session (2018), expressed the view that, contrary to the Commission's previous conclusions, the *jus cogens* status of self-determination was "questionable".[325] For the reasons that will be advanced in the coming paragraphs of the present report, the Special Rapporteur is of the view that the Commission's previous conclusions concerning the right to self-determination was justified by the practice and that its inclusion in the list previously provided by the Commission is not in error.

109. The report has already referred to the relationship between *erga omnes* and *jus cogens* above and the Special Rapporteur's view that the latter from flows from the former. In its judgment in the *East Timor* case, the International Court of Justice stated that the "assertion that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character, is irreproachable".[326] It described the principle of self-determination as "one of the essential principles of contemporary international law".[327] Before the *East Timor* case, the Court had emphasized the importance of the right to self-determination in its advisory opinions on *Nambia* and *Western Sahara.*[328] The *erga omnes* character of the obligation to respect the right to self-determination was also recognized in the *Wall* advisory opinion.[329] Moreover, the Court applied the consequences of serious breaches of *jus cogens* – in particular the duty to cooperate to bring to end a situation created by the breach – to the breach of the duty to respect the right to self-determination.[330]

110. The *jus cogens* status of the right to self-determination has also been recognized in the practice of States in the context of multilateral instruments. There have, for example, been many General Assembly resolutions proclaiming the fundamental character of the right to self-determination. Perhaps one of the most important instruments in this respect is the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples, which provided for a right to self-determination in absolute terms and was referred to by the International Court of Justice in establishing the *erga omnes* nature of the right.[331] Equally important is the 1970 Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations.[332] In the preamble to that Declaration, the principle of self-determination is described as "significant".[333] In several places the declaration stresses the importance of the right to self-determination.[334] The 1965 Declaration on the Inadmissibility of Intervention

[325] Israel (A/C.6/73/SR.27).

[326] *East Timor (Portugal v. Australia), I.C.J. Reports 1995*, p. 90, p. 102, para. 29.

[327] *Ibid.*

[328] See, generally, *Namibia* (footnote 279 above); *Western Sahara, Advisory Opinion, ICJ Reports 1975*, p. 12.

[329] *Legal Consequences of the Construction of the Wall in Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136, especially at pp. 171–172, 196, paras. 88, 149 and 155.

[330] *Ibid.*, para. 159 ("[there is a duty on] all States … 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").

[331] General Assembly resolution 1514 (XV), especially paras. 1 and 2. See *Namibia* (footnote 279 above), p. 31, para. 52, where the Court considered the Declaration as an "further important stage" in the development of the *erga omnes* applicability of the right of self-determination "which embraces all peoples and territories which 'have not yet attained independence'".

[332] General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

[333] *Ibid.*, fourteenth preambular para.

[334] For example: "By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and

in the Domestic Affairs of States and the Protection of their Independence and Sovereignty, for its part, provided that "[a]ll States shall respect the right of self-determination and independence of peoples and nations, to be freely exercised without any foreign pressure, and with absolute respect for human rights and fundamental freedoms".[335] The importance and fundamental character of the right to self-determination is evident from the fact that General Assembly resolution 3314 (XXIX) on the definition of aggression provided that none of the rules identified by the Assembly on aggression "could in any way prejudice the right to self-determination".[336] The fundamental character of the right to self-determination has also been affirmed in country-specific resolutions.[337] The General Assembly has also declared an agreement invalid on account of it being inconsistent with the right to self-determination.[338]

111. The Security Council has itself also affirmed the right to self-determination, albeit not as often or as directly as the General Assembly.[339] In resolution 384 (1975), the Council recognized "the inalienable right of the people of Timor-Leste to self-determination" and called upon all States to respect that right.[340] The resolution also applied the consequences of serious breaches of *jus cogens*, namely the duty to cooperate to bring to an end situations created by the breach, to the breach of the right of self-determination of the people of Timor-Leste.[341]

112. The right to self-determination has also been reflected in treaty practice. The Charter of the United Nations provides that the purposes of the United Nations are, *inter alia*, to "develop friendly relations among nations based on respect for the

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cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter"; "Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle "; and "Every State has the duty to refrain from any forcible action which deprives peoples referred to above in the elaboration of the present principle of their right to self-determination and freedom and independence".

[335] General Assembly resolution 2131 (XX), annex, para. 6.

[336] General Assembly resolution 3314 (XXIX), annex, art. 7.

[337] See, e.g., General Assembly resolution 66/146 of 19 December 2011 on the right of the Palestinian people to self-determination, which, in its preamble, recalls the International Court of Justice's description of the right to self-determination as establishing an *erga omnes* obligation and, in paragraph 1, reaffirms the right of Palestine to self-determination. See also General Assembly resolution 67/19 of 29 November 2012 on the status of Palestine in the United Nations, which, for example, refers to "the inalienable rights of the Palestinian people, primarily the right to self-determination" (ninth preambular para.). On South Africa, see, for example, General Assembly resolution 32/105 J, para. 2, and resolution 34/93 O, para. 3.

[338] General Assembly resolution 33/28 A of 7 December 1978 on the question of Palestine, para. 4 ("the validity of agreements purporting to solve the problem of Palestine requires that they be within the framework of the United Nations and its Charter and its resolutions on the basis of the full attainment and exercise of the inalienable rights of the Palestinian people, including the right of return and the right to national independence and sovereignty in Palestine, and with the participation of the Palestine Liberation Organization").

[339] See, for an example of an indirect affirmation of the right to self-determination, Security Council resolution 554 (1984), preamble ("Reaffirming the legitimacy of the struggle of the oppressed people of South Africa for the elimination of *apartheid* and for the establishment of a society in which all the people of South Africa as a whole, irrespective of race, colour, sex or creed, will enjoy equal and full political and other rights and participate freely in the determination of their destiny").

[340] Security Council resolution 384 (1975), preamble and para. 1.

[341] *Ibid.,* para. 4 ("Urges all States and other parties to cooperate fully with the efforts of the United Nations to achieve a peaceful solution to the existing situation and to facilitate the decolonisation of the Territory"). See also Security Council resolution 389 (1976).

principle of equal rights and self-determination of peoples".[342] Both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights proclaim that "[a]ll peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development".[343] In its general comment No. 12, the Human Rights Committee observed that the "right of self-determination is of particular importance because its realization is an essential condition for the effective" protection of human rights.[344] According to the Committee, that was the reason that States included the right "in a provision of positive law in both Covenants and placed this provision as article 1 apart from and before all of the other rights in the two Covenants".[345] The Committee described it as an "inalienable right". Importantly, according to the Committee, the obligations flowing from the right exist independent of the Covenants.[346] The African Charter on Human and Peoples Rights provides that "[a]ll peoples shall have the right to existence" and that they "shall have the unquestionable and inalienable right to self-determination".[347]

113. The *jus cogens* status of the right to self-determination has also been affirmed in national and regional court decisions. The German Constitutional Court, for example, included the right to self-determination as a rule of *jus cogens,* describing the latter as "rules of law which are firmly rooted in the legal conviction of the community of States".[348] In the *Council of the European Union v. Front populaire pour la libération de la saguia-el-hamra et du rio de oro,* the Grand Chamber of the European Court of Justice described the right to self-determination as a principle of international law that is a "legally enforceable right *erga omnes* and one of the essential principles of international law".[349] The African Commission on Human and Peoples' Rights has also affirmed the fundamental importance of the right to self-determination.[350]

114. Writers have also generally recognized the right to self-determination as a norm of *jus cogens*.[351] Kadelbach includes the right to self-determination among the norms

[342] Charter of the United Nations, Art. I, para. 2.

[343] International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights (New York, 16 December 1966), United Nations, *Treaty Series*, vol. 993, No. 14531, p. 3, common art. 1.

[344] Human Rights Committee, general comment No. 12 (1984), *Official Records of the General Assembly, Thirty-ninth Session, Supplement No. 40* (A/39/40), annex VI, para. 1.

[345] *Ibid.*

[346] *Ibid.*, paras. 2 and 6 ("The obligations exist irrespective of whether a people entitled to self-determination depends on a State party to the Covenant or not. It follows that all States parties to the Covenant should take positive action to facilitate realization of and respect for the right of peoples to self-determination").

[347] African Charter on Human and Peoples' Rights, art. 20, para. 1.

[348] Federal Constitutional Court Order of 26 October 2004 – 2 BVR 1038/01 (English translation) provided by Permanent Mission of the Federal Republic of Germany to the United Nations (New York). See also *Saharawi Arab Democratic Republic and Others v. Cherry Blossom and Others,* Judgment of the High Court of South Africa of 15 June 2016, especially at para. 39 *et seq.*

[349] *Council of the European Union v. Front populaire pour la libération de la saguia-el-hamra et du rio de oro (Front Polisario)*, Case C-104/16 P, Judgment, Grand Chamber, European Court of Justice, 21 December 2016, *Official Journal of the European Union*, C 53/19 (20 February 2017), para. 88.

[350] *Congrès du peuple katangais v. DRC,* Communication 75/92, Decision, African Commission on Human and Peoples' Rights, para. 4, and *Kevin Mgwanga Gunme et al. v Cameroon,* Communication 266/03, Decision, African Commission on Human and Peoples' Rights. In both cases, the Commission stressed that the right could be exercised in ways other than secession.

[351] See, e.g., S.Y. Marochkin, "On the recent development of international law: some Russian perspectives", *Chinese Journal of International Law*, vol. 8 (2009), pp. 695–714, at p. 710; Tomuschat, "The Security Council and *jus cogens*" (footnote 80 above), p. 35; Frowein, "*Jus*

whose *jus cogens* status is "widely undisputed".[352] Alexidze, similarly, expresses the view that the *jus cogens* status of the right to self-determination is beyond dispute.[353] He states, definitively, that there is "not a single corner on the Earth" that would not recognize the fundamental importance of self-determination.[354] "[E]qual rights and self-determination of peoples", he asserts, are among the "principles any derogation from which is *absolutely* forbidden, even *inter se*".[355] He includes the right to self-determination as one of those norms whose *jus cogens* status is "obvious".[356] Mik notes that norms that are principles should not be accorded *jus cogens* status.[357] This would include a rule like the right to self-determination. However, he notes that a principle such as the right to self-determination may have regulatory implications and can thus be recognized as a norm of *jus cogens*.[358]

115. Consistent with the general approach adopted in the present report, the discussion above has not attempted to solve the more complex problem of what constitutes the right to self-determination, i.e., whether the right applies only in the context of decolonization and whether the circumstances in which the right applies would permit external self-determination (secession) and, if so, under what circumstances. The discussion has only sought to show that the Commission's choice in including the right to self-determination, however it may be defined, as one of the widely accepted norms of *jus cogens* is justifiable.

### 9. The basic rules of international humanitarian law

116. It is, as in previous sections, necessary to preface the present section with some comments about terminology. What is termed here "basic rules of international humanitarian law", is variably referred to elsewhere as "principles of humanitarian law", "principles of international humanitarian law", "grave breaches" and the "prohibition of war crimes". For purposes of the present report, the phrase "basic rules of international humanitarian law" is used, since this is the phrase adopted by the Commission in its articles on State responsibility, on which the current section of the report is based.

117. The *jus cogens* status of basic rules of international humanitarian law has been affirmed in the jurisprudence of international courts and tribunals. The International Court of Justice, in the *Nuclear Weapons* advisory opinion, considered the question of whether "rules and principles of humanitarian law" rose to the level of *jus cogens*.[359] The Court, however, opted not to directly address the question.[360] It did,

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*cogens*" (footnote 186 above), p. 443, para. 3; Cassese, "The enhanced role of *jus cogens*" (footnote 234 above), p. 162; Costelloe, *Legal Consequences of Peremptory Norms in International Law* (footnote 186 above), p. 16.

[352] Kadelbach, "Genesis, function and identification of *jus cogens* norms" (footnote 321 above), p. 152; Santalla Vargas, "In quest of the practical value of *jus cogens* norms" (footnote 186 above), p. 227. See also Pellet, "Comments in response to Christine Chinkin …" (footnote 87 above), p. 86.

[353] L. Alexidze, "The legal nature of *jus cogens* in contemporary international law", *Collected Courses of the Hague Academy of International Law, 1981-III*, vol. 172, pp. 219 ff., at p. 229.

[354] *Ibid.,* p. 251.

[355] *Ibid.*, p. 260. He notes further that the principle of territorial integrity, while also fundamental, can be derogated from as long as the principle of self-determination is observed.

[356] *Ibid*., p. 262.

[357] Mik, "*Jus cogens* in contemporary international law" (footnote 167 above), p. 34.

[358] *Ibid.* See also pp. 36, 82 and 83 for confirmation of the peremptory status of *jus cogens.*

[359] *Legality of the Threat or Use of Nuclear Weapons* (footnote 185 above), at p. 258, para. 83. See also *Corfu Channel case, Judgment of April 9th 1949, I.C.J. Reports 1949*, p. 4, at p. 22 ("Such obligations are based, not on the Hague Convention of 1907, No. VIII, which is applicable in time of war, but on certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war").

[360] *Legality of the Threat or Use of Nuclear Weapons* (footnote 185 above), at p. 258, para. 83 ("The

however, indirectly recognize the *jus cogens* status of some principles of international humanitarian law when it described these as "intransgressible".[361] It may be contended that the term "intransgressible" does not mean the same thing as *jus cogens* peremptory norms. However, it is not clear what else the term can mean in that context. It surely could not mean rules that may not be violated – the literal meaning of the term "intransgressible" – since, by definition all rules, including rules of a *jus dispositivum* character, would be of that nature.[362] At any rate some individual opinions in the *Nuclear Weapons* advisory opinion did address the question of the *jus cogens* status of the rule directly.[363] Moreover, the *erga omnes* character of some rules of international humanitarian law was later proclaimed by the Court in its advisory opinion on the *Wall.*[364]

118. While the International Court of Justice's recognition of the *jus cogens* status of basic principles of international humanitarian law has been tentative and indirect, other courts and tribunals have been less tentative. In *Kupreškić*, the Trial Chamber of the International Tribunal for the Former Yugoslavia stated that "most norms of international humanitarian law", including in particular "those prohibiting war crimes … are also peremptory norms of international law or *jus cogens*, i.e. of a non-derogable and overriding character".[365] Similarly, in the *Tadić* decision on the defence motion for interlocutory appeal on jurisdiction, the Tribunal's Appeals Chamber, in determining the applicable rules of international law, held that it may apply any treaty

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question whether a norm is part of the *jus cogens* relates to the legal character of the norm. The request addressed to the Court by the General Assembly raises the question of the applicability of the principles and rules of humanitarian law in cases of recourse to nuclear weapons and the consequences of that applicability for the legality of recourse to these weapons. But it does not raise the question of the character of the humanitarian law which would apply to the use of nuclear weapons. There is, therefore, no need for the Court to pronounce on this matter."). *Cf. Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Report 2012*, p. 99, at p. 140, para. 93, where the Court, without deciding the matter, assumes that principles of humanitarian law allegedly breached by Germany had the character of *jus cogens* ("Assuming for this purpose that the rules of the law of armed conflict which prohibit the murder of civilians in occupied territory, the deportation of civilian inhabitants to slave labour and the deportation of prisoners of war to slave labour are rules of *jus cogens*, there is no conflict between those rules and the rules on State immunity").

[361] *Legality of the Threat or Use of Nuclear Weapons* (footnote 185 above), at p. 257, para. 79 ("It is undoubtedly because a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and 'elementary considerations of humanity' … that the Hague and Geneva Conventions have enjoyed a broad accession. Further these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law").

[362] See Christófolo, *Solving Antinomies between Peremptory Norms in Public International Law* (footnote 158 above), p. 231.

[363] See, e.g., *Legality of the Threat or Use of Nuclear Weapons* (footnote 185 above), declaration of Judge Bedjaoui, at p. 273, para. 21 ("I have no doubt that most of the principles and rules of humanitarian law and, in any event, the two principles, one of which prohibits the use of weapons with indiscriminate effects and the other the use of arms causing unnecessary suffering, form part of *jus cogens*"); *ibid.*, dissenting opinion of Judge Weeramantry, at p. 496 ("The rules of the humanitarian law of war have clearly acquired the status of *jus cogens*, for they are fundamental rules of a humanitarian character, from which no derogation is possible without negating the basic considerations of humanity which they are intended to protect"); *ibid.*, dissenting opinion of Judge Koroma, at pp. 573 *et seq*., see especially at p. 574, where Judge Koroma criticizes the Court for its "judicial policy of 'non-pronouncement'".

[364] *Wall* (footnote 329 above), p. 199, para. 155 ("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").

[365] *Kupreškić* (footnote 229 above), para. 520.

which was "not in conflict with or derogating from peremptory norms of international law, as are most customary rules of international humanitarian law".[366]

119. The *jus cogens* status of the prohibition of war crimes, as a subset of the basic rules of humanitarian law, has also been recognized in decisions of national courts. In *Agent Orange Product Liability Litigation*, the United States District Court held that the "rules against torture, war crimes and genocide" were *jus cogens.*[367] The Argentine Supreme Court had similarly held that the prohibition of war crimes, including the non-applicability of prescription for war crimes, was *jus cogens*.[368] The Constitutional Court of Colombia also held that rules of humanitarian law "are binding on States and all parties in armed conflict, even if they have not approved the respective treaties, because [of their] peremptoriness".[369]

120. The *jus cogens* status of basic rules of humanitarian law is also generally recognized in the literature.[370] Kleinlein, having identified those norms that the International Court of Justice has described as *jus cogens* (torture and genocide), states that the "[m]ore inclusive lists also refer to war crimes and the basic principles of international humanitarian law".[371]

121. There are obvious issues of uncertainty in relation to *jus cogens* and basic rules of international humanitarian law, most notably which rules of international humanitarian law qualify as the "most basic" and thus meet the criteria of *jus cogens.* It was not the purpose of this discussion to delineate the scope – that may well be a topic for the future. What this discussion has illustrated, however, is that the Commission's decision in the articles on responsibility to include these basic rules of international humanitarian law was well justified.

## C. Other possible norms of *jus cogens* not identified in the Commission's previous works

122. As explained above, the list in the Commission's commentaries to the articles on State responsibility represents the norms that are most widely cited as examples of norms of *jus cogens.* It is these norms which, in the view of the Special Rapporteur,

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[366] *Prosecutor v. Dušan Tadić et al*., Case No. IT-94-1, Decision of the Appeals Chamber on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, *Judicial Reports 1994–1995*, para. 143. See also *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T, Judgment, Trial Chamber, International Tribunal for the Former Yugoslavia, 5 December 2003, para. 98.

[367] *In Re Agent Orange Product Liability Litigation* (footnote 259 above).

[368] *Arancibia Clavel, Enrique Lautaro s/ Homicidio Calificado y Asociación Ilícita y Otros*, Case No. 259, judgment, Supreme Court of Argentina, 24 August 2004 ("Que esta convención sólo afirma la imprescriptibilidad, lo que importa el reconocimiento de una norma ya vigente (jus cogens) en función del derecho internacional público de origen consuetudinario" [That this Convention only affirms imprescriptibility, which is important for the recognition of a norm already in force (*jus cogens*) in function of the public international law of customary origin]).

[369] Judgment No C-225/95 of the Constitutional Court of Colombia.

[370] See Christófolo, *Solving Antinomies between Peremptory Norms in Public International Law* (footnote 158 above); Den Heijer and Van der Wilt, "*Jus cogens* and the humanization and fragmentation of international law" (footnote 158 above), p. 12; Linderfalk, "Understanding the *jus cogens* debate …" (footnote 72 above), p. 53; A. Orakhelashvili, "Audience and authority – the merit of the doctrine of *jus cogens*", *Netherlands Yearbook of International Law*, vol. 46 (2015), pp. 115–146, at pp. 138 *et seq*.; Kleinlein, "*Jus cogens* as the 'highest law'? Peremptory norms and legal hierarchies" (footnote 186 above), p. 184; Knuchel, Jus Cogens*: Identification and Enforcement of Peremptory Norms* (footnote 186 above), p. 41; Cherif Bassiouni, "International crimes …" (above footnote 219), p. 70; and Frowein, "*Jus cogens*" (footnote 186 above), p. 443, at para. 3.

[371] Kleinlein, "*Jus cogens* as the 'highest law'? Peremptory norms and legal hierarchies" (footnote 186 above), p. 197.

should be included in a draft conclusion. This is the *only* objective means by which to determine which norms to include and which norms to exclude in a potential non-exhaustive or illustrative list, given the methodological slant of this topic, which prevents a comprehensive assessment of all possible norms. A confession is appropriate here. This list – and indeed *any* list, even if accurate and as comprehensive possible – is likely to raise questions, and likely to be unsatisfactory to some, at least from a normative perspective.[372] In particular, it is likely to be criticized for not including other deserving norms. Two points in (tentative) response can be offered. First, the list of examples in the draft conclusion itself is only a confirmation in a text (as opposed to a commentary) of a previous list of *jus cogens* norms identified by the Commission. There most certainly are other norms of *jus cogens* beyond the ones identified and the draft conclusion will make it clear that the list is not exhaustive. Second, to the extent that any normatively deserving norm has not acquired the status of *jus cogens* because of insufficient recognition and acceptance by the international community of States as a whole, nothing prevents such a norm from acquiring the status of *jus cogens* in the future. Indeed, in many instances, there may be insufficient evidence as to its status only because States and courts – both national and international – have not given thought to addressing a specific norm or because problems relating to that norm have not arisen. The present report (and any possible conclusions and commentaries adopted by the Commission) may serve as impetus for the generation of further evidence of acceptance and recognition by the international community of States as a whole of the peremptory character of additional norms.

123. Beyond the list here proposed, other norms that have been cited as norms of *jus cogens*, and whose *jus cogens* status enjoys a degree of support, include the prohibition of enforced disappearance, the right to life, the principle of non-refoulement, the prohibition of human trafficking, the right to due process (the right to a fair trial), the prohibition of discrimination, environmental rights, and the prohibition of terrorism. The number and diversity of norms that have been put forward as candidates for *jus cogens* are large. In this regard, Shelton makes the following observation:

> Proponents have argued for inclusion of all human rights, all humanitarian norms (human rights and the laws of war), the duty not to cause transboundary environmental harm, the duty to assassinate dictators, the right to life of animals, self-determination and territorial integrity (despite legions of treaties transferring territory from one State to another).[373]

124. The present section of the report provides a very brief account of the support in practice and doctrine for the peremptory status of some of the norms listed above. There is no attempt at comprehensiveness, either in respect of the number of norms (breadth) or in relation to particular norms (depth). The point is merely to illustrate that there are other norms, i.e., other than the ones proposed for inclusion in the draft conclusion, that have been advanced as examples of *jus cogens*. For this purpose, the present section will provide some discussion on three norms that enjoy wide support though not included in the draft conclusion.

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[372] See, for a critique, H. Charlesworth and C. Chinkin, "The gender of *jus cogens*", *Human Rights Quarterly*, vol. 15 (1993), pp. 63–76.

[373] Shelton, "Sherlock Holmes and the mystery of *jus cogens*" (footnote 273 above), p. 47. See also Kleinlein, "*Jus cogens* as the 'highest law'? Peremptory norms and legal hierarchies" (footnote 186 above), pp. 197-198 ("Less safe candidates are the basic rights of the human person in general and basic principles of environmental law. All these norms, due to their subject matter, carry a particular normative weight. This normative weight establishes a '*material* hierarchy of norms'. Yet, *jus cogens* is defined not just by its weight, but also by the reasons for its weightiness.").

125. The *jus cogens* nature of the prohibition of enforced disappearance has received a large degree of support. The main instrument for the prohibition of enforced disappearance is the International Convention for the Protection of All Persons from Enforced Disappearance (hereinafter the "Enforced Disappearance Convention").[374] Article 1 states, in absolute terms, that "[n]o shall be subject to enforced disappearance". The Enforced Disappearance Convention also provides, in what is clear indication of the impermissibility of derogations, "[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for enforced disappearance".[375] It further states that enforced disappearance, when committed as part of a "widespread or systematic practice", constitutes a crime against humanity (art. 5).

126. The recognition of the prohibition of enforced disappearance as a norm of *jus cogens* has been particularly consistent in the inter-American system. In the case of *Goiburú*, the Inter-American Court of Human Rights held that not only was "the prohibition of the forced disappearance of persons" a norm of *jus cogens,* but also attributed *jus cogens* status to the "corresponding obligation to investigate and punish those responsible" for acts of enforced disappearance.[376] In the *Osorio Rivera and Family Members v. Peru* case, the Court noted that enforced disappearance "constitutes a gross violation of human rights" and "involves a blatant rejection of the essential principles", before affirming that its prohibition was a norm of *jus cogens*.[377]

127. The *jus cogens* character of the prohibition of enforced disappearance has also been recognized in a number of domestic jurisdictions. The Supreme Court of Argentina stated that the prohibition contained in the Enforced Disappearance

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[374] International Convention for the Protection of All Persons from Enforced Disappearance (New York, 20 December 2006), United Nations, *Treaty Series*, vol. 2716, No. 48088, p. 3.

[375] *Ibid.,* art. 1, para. 2.

[376] *Goiburú* (footnote 119 above), para. 84.

[377] *Osorio Rivera and Family Members v. Peru*, Judgment (Preliminary objections, merits, reparations, and costs), Inter-American Court of Human Rights, 26 November 2013, Series C, No. 274, para. 112. See also, for other examples, *García and Family Members v. Guatemala,* Judgment (Merits, reparations and costs), Inter-American Court of Human Rights, 29 November 2012, Series C, No. 258, para. 96 ("In sum, the practice of forced disappearance involves a heinous abandonment of the essential principles on which the inter-American human rights system is founded and its prohibition has achieved *jus cogens* status"); *Gudiel Álvarez et al. ("Diario Militar") v. Guatemala*, Judgment (Merits, reparations and costs), Inter-American Court of Human Rights, 20 November 2012, Series C, No. 253, para. 232; *Contreras et al. v. El Salvador,* Judgment (Merits, reparations and costs), Inter-American Court of Human Rights, 30 August 2011, Series C, No. 232, para. 83; *Gelman v. Uruguay,* Judgment (Merits and reparations), Inter-American Court of Human Rights, 24 February 2011, Series C, No. 221, para. 75 ("The practice of enforced disappearance of persons constitutes an inexcusable abandonment of the essential principles on which the Inter-American System of Human Rights is founded, and whose prohibition has reached the character of *jus cogens*"); *Gomes Lund et al. ("Guerrilha Do Araguaia") v. Brazil,* Judgment (Preliminary objections, merits, reparations, and costs), Inter-American Court of Human Rights, 24 November 2010, Series C, No. 219, para. 105; *Ibsen Cárdenas and Ibsen Peña v. Bolivia,* Judgment (Merits, reparations, and costs), Inter-American Court of Human Rights, 1 September 2010, Series C, No. 217, paras. 61 and 197; *Chitay Nech et al. v. Guatemala,* Judgment (Preliminary objections, merits, reparations, and costs), Inter-American Court of Human Rights, 25 May 2010, Series C, No. 212, para. 193; *Radilla-Pacheco v. Mexico*, Judgment (Preliminary objections, merits, reparations, and costs), Inter-American Court of Human Rights, 23 November 2009, Series C, No. 209, para. 139 ("Forced disappearance constitutes an inexcusable abandonment of the essential principles on which the Inter-American System is based and its prohibition has reached a nature of jus cogens"); and *Anzualdo Castro v. Peru*, Judgment (Preliminary objections, merits, reparations, and costs), Inter-American Court of Human Rights, 22 September 2009, Series C, No. 202, para. 59.

Convention enshrined the inderogable law of *jus cogens.* [378] Similarly, the Constitutional Court of Peru has described the prohibition of enforced disappearance as part of core inderogable rules of peremptory international law, in addition to being part of the Peruvian constitutional framework.[379] Referring to the Third Restatement, the United States Court of Appeals has, in *Siderman de Blake*, also referred to the prohibition of "causing disappearance of individuals" as a norm of *jus cogens*.[380] The prohibition of enforced disappearance has also been recognized in writings as a norm of *jus cogens.* Criddle and Fox-Decent, whose fiduciary theory of *jus cogens* serves to prevent "flagrant abuses of State power [that] deny a State's beneficiaries secure and equal freedom", would include as a norm of *jus cogens* "forced disappearances".[381]

128. There is also some support for the peremptory character of the right to life, or at least the prohibition on the arbitrary deprivation of life (right not to be arbitrarily deprived of life). In *Nada v. State Secretariat for Economic Affairs,* the Swiss Federal Supreme Court determined that "*jus cogens* includes elementary human rights such as the right to life".[382] In *RM v. Attorney-General,* the High Court of Kenya, having rejected the argument that parental rights were *jus cogens*, said that the closest linkage between the parental rights and *jus cogens* was the right to life (which was *jus cogens*), but did not accept that the actions complained of threatened that right. [383]

129. The right not to be arbitrarily deprived of life is also recognized as non-derogable in treaty law. Article 6 of the International Covenant on Civil and Political Rights provides that everyone "has the inherent right to life" and further provides that "[n]o one shall be arbitrarily deprived of his life".[384] The rights in article 6 are included in the list of non-derogable rights under article 4 of the Covenant. Similarly the European Convention on Human Rights provides for the right to life and that no one may be deprived of life save in very specifically enumerated circumstances.[385] As with the International Covenant on Civil and Political Rights, the right to life in the European Convention is non-derogable.[386] The importance of this right under the European system has been underscored by the case law, where the right has been described as "one of the most fundamental provisions in the Convention, from which

[378] *Simón (Julio Héctor) v. Office of the Public Prosecutor,* Judgment, Supreme Court of Argentina, 14 June 2005, para. 38.

[379] *Guillén de Rivero v. Peruvian Supreme Court,* Judgment, Constitutional Court of Peru, 12 August 2005.

[380] See, e.g., *Hanoch Tel-Oren v. Libya,* Judgment, United States Court of Appeals, District of Columbia, 3 February 1984, at 391; See also *Siderman de Blake v. Argentina* (footnote 214 above), at 714.

[381] Criddle and Fox-Decent, "A fiduciary theory of *jus* cogens" (footnote 231 above), pp. 369–370. See also J. Sarkin, "Why the prohibition of enforced disappearance has attained *jus cogens* status in international law", *Nordic Journal of International Law*, vol. 81 (2012), pp. 537–584; A.A. Cançado Trindade, "Enforced disappearances of persons as a violation of *jus cogens*: the contribution of the Inter-American Court of Human Rights", *Nordic Journal of International Law*, vol. 81 (2012), pp. 507–536; Shelton, "Sherlock Holmes and the mystery of *jus cogens*" (footnote 273 above), p. 39; and Kadelbach, "Genesis, function and identification of *jus cogens* norms" (footnote 321 above), p. 168.

[382] *Nada v. State Secretariat for Economic Affairs* (footnote 46 above), at 7.3 ("Allgemein werden zum ius cogens elementare menschenrechte wie das Recht auf Leben" [In general, fundamental human rights such as the right to life become *jus cogens*]).

[383] See *RM v. Attorney-General* (footnote 237 above) ("On this, a perusal of the authoritative sources and international jurisprudence reveals that although the applicants are correct in the definition of *jus cogens* as outlined above and its current classifications it has not yet embraced parental responsibility and the rights associated with it. The closest linkage is the right to life and we are not convinced that the challenged section(s) threaten the right to life").

[384] International Covenant on Civil and Political Rights, art. 6 para. 1.

[385] European Convention on Human Rights, art. 2.

[386] *Ibid.*, art 15.

no derogation is permitted" and one which "enshrines one of the basic values of the democratic societies making up the Council of Europe".[387] The prohibition of arbitrary deprivation of life is also contained in other human rights instruments, such as the African Charter[388] and the American Convention on Human Rights.[389] In its general comment No. 29, the Human Rights Committee, while recognizing that not all the rights that were non-derogable under article 4 were *jus cogens*, expressed the view that the right not be arbitrarily deprived of life was a norm of *jus cogens*.[390] Similarly, the African Commission on Human and Peoples' Rights has stated that "right not to be arbitrarily deprived of one's life is recognised as part of customary international law … and is also recognised as a *jus cogens* norm, universally binding at all times".[391]

130. In the view of the Special Rapporteur, the permissibility of the death penalty is not an obstacle to the emergence of the right not to be arbitrarily deprived of life as a norm of *jus cogens.* Whatever view one adopts concerning the consistency of the death penalty with international law,[392] this ought to have no effect on the question of the peremptory character of the prohibition of arbitrary deprivation of life since, rightly or wrongly, the death penalty imposed after strict observance with due process standards is probably not "arbitrary".

131. The principle of non-refoulement is another principle of international law whose candidacy for peremptory status has ample support.[393] In its advisory opinion on *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection,* the Inter-American Court of Human Rights linked the principle of non-refoulement to the prohibition of torture and held that because of its relation with the prohibition of torture, the principle is "is absolute and also becomes

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[387] *Makaratzis v. Greece*, No. 50385/99, Judgment, Grand Chamber, European Court of Human Rights, 20 December 2004, ECHR 2004-XI, para. 56.

[388] African Charter on Human and Peoples' Rights, art. 4.

[389] American Convention on Human Rights, art. 4.

[390] Human Rights Committee, general comment No. 29 (2001) on derogation during a state of emergency, *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 40*, vol. I (A/56/40 (Vol. I)), annex VI, para. 11. Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions (A/HRC/23/47), para. 36 ("The Special Rapporteur recalls the supremacy and non-derogability of the right to life under both treaty and customary international law").

[391] African Commission on Human and Peoples' Rights, general comment No 3 on the African Charter on Human and Peoples' Rights: The right to life (article 4), para. 5. See also *Victims of the Tugboat "13 de Marzo" v. Cuba*, Case 11.436, Decision of the Inter-American Commission on Human Rights, 16 October 1996, Report 47/96, para. 79 ("Another point that the Inter-American Commission on Human Rights must stress is that the right to life, understood as a basic right of human beings enshrined in the American Declaration and in various international instruments of regional and universal scope, has the status of *jus cogens*. That is, it is a peremptory rule of international law, and, therefore, cannot be derogable. The concept of *jus cogens* is derived from a higher order of norms established in ancient times and which cannot be contravened by the laws of man or of nations").

[392] See *S v. Makwanyane and Another* [1995] (6) BCLR 665, para. 36.

[393] See for examples of writings offering deep analysis of the peremptory status of non-refoulment, C. Costello and M. Foster, "Non-refoulement as custom and *jus cogens*? Putting the prohibition to the test", *Netherlands Yearbook of International Law*, vol. 46 (2015), pp. 273–323; and J. Allain, "The *jus cogens* nature of non-refoulement", *International Journal of Refugee* Law, vol. 13 (2001), pp. 533–558. For discussion of the implication of this, see A. Farmer, "Non-refoulement and *jus cogens:* limiting anti-terror measures that threaten refugee protection", *Georgetown Immigration Law Journal*, vol. 23 (2008), pp. 1–38. See however, *Sale v. Haitian Centres Council,* Judgment, United States Supreme Court, 21 June 1993, which upheld an executive order permitting refoulment. See, for discussion, H. Hongju Koh, "Reflections on *refoulement* and the Haitian Centres Council", *Harvard International Law Journal*, vol. 35 (1994), p. 1.

a peremptory norm of customary international law; in other words, of *ius cogens*".[394] In response, Latin American States have recognized the jurisprudence of the Court relating to "the right to seek and be granted asylum enshrined in the regional human rights instruments" and its "relationship to international refugee instruments [and] the *jus cogens* character of the principle of *non-refoulement*".[395] The principle has been described by the General Assembly as "a fundamental principle" which "is not subject to derogation".[396] The General Assembly has also "[d]eplore[d] the refoulement and unlawful expulsion of refugees and asylum-seekers".[397] In 2009, the African Union undertook "to deploy all necessary measures to ensure full respect for the fundamental principle of non-refoulement".[398]

132. There is also much support for the principle in treaty practice. It is contained, in particular, in refugee-related conventions. The Convention relating to the Status of Refugees (hereinafter, "Refugee Convention") provides for the principle of non-refoulement in its article 33.[399] Under the Convention, non-refoulement is subject to the security interests of the State concerned.[400] The Organization of African Unity's Convention Governing the Specific Aspects of Refugee Problems in Africa also contains the principle of non-refoulement with similar exclusions as the Refugee Convention.[401] The Convention against Torture provides for the principle of non-refoulement in the context of torture without any of the restrictions contained in the Refugee Convention.[402] Similarly, the Enforced Disappearance Convention prohibits, in absolute terms, refoulement if it could lead to enforced disappearance.[403]

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[394] *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection,* Advisory Opinion, Inter-American Court of Human Rights, 19 August 2014, para. 225.

[395] Brazil Declaration: "A Framework for Cooperation and Regional Solidarity to Strengthen the International Protection of Refugees, Displaced and Stateless Persons in Latin America and the Caribbean", 3 December 2014.

[396] General Assembly resolution 51/75 of 12 December 1996 on the Office of the United Nations High Commissioner for Refugees, para. 3. See also General Assembly resolution 34/60 of 29 November 1979 on the report of the United Nations High Commissioner for Refugees, para. 3, where the General Assembly urged governments to "grant[] asylum to those seeking refuge and [to] scrupulously observ[e] the principle of *non-refoulement*".

[397] General Assembly resolution 63/148 of 18 December 2008 on the Office of the United Nations High Commissioner for Refugees, para. 13.

[398] Kampala Declaration on Refugees, Returnees and Internally Displaced Persons in Africa, 23 October 2009, para. 6.

[399] Convention relating to the Status of Refugees (Geneva, 28 July 1951), United Nations, *Treaty Series*, vol. 189, No. 2545, p. 137, art. 33 ("No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion").

[400] *Ibid.*, art. 33, para. 2 ("The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country"). See Farmer, "Non-refoulement and *jus cogens* ..." (footnote 394 above), who argues that the peremptory status of non-refoulement would require a restricted interpretation of article 33, paragraph 2.

[401] OAU Convention Governing Specific Aspects of Refugee Problems in Africa (Addis Ababa, 10 September 1969), United Nations, *Treaty Series*, vol. 1001, No. 14691, p. 45, art. II, para. 3, read with art. I, para. 5. See also the American Convention on Human Rights, art. 22, para. 8 ("In no case may an alien be deported or returned to country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinion").

[402] Convention against Torture, art. 3 ("No State Party shall expel, return (*refouler*) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture").

[403] International Convention for the Protection of All Persons from Enforced Disappearance, art. 16,

133. Several writers have described the principle of non-refoulement as a norm of *jus cogens.* These include Allain, Orakhelashvili and Farmer.[404] There have, of course, been authors who have concluded that the principle of non-refoulement is not a norm of *jus cogens*.[405] Cassese regarded the principle of non-refoulement as an emerging norm of *jus cogens.*[406] Costello and Foster undertake an excellent, in-depth analysis, looking at both arguments for and against, and come to the conclusion that the principle of non-refoulement is a norm of *jus cogens*.[407]

134. The present report does not take a view on whether the norms in this section do qualify as norms of *jus cogens.* The Special Rapporteur would note, however, that there is strong support for the *jus cogens* status of these norms. Additionally, there exist other norms whose *jus cogens* status enjoys *some* support. These include the prohibition against arbitrary arrest,[408] the right to due process[409] and the prohibition of terrorism, among others.[410] Other norms that have been advanced as *jus cogens,* and that may in the future attain the necessary recognition and acceptance of non-derogability, include the duty to protect the environment (or some aspects of this duty) and the prohibition of discrimination.

135. The principle of non-discrimination is one that has also received some support for peremptory status and that raises interesting questions (and exemplifies the dangers of an illustrative list). The question has often been raised, why is the prohibition of racial discrimination on most lists but not the prohibition of gender discrimination[411] (the Special Rapporteur leaves aside the fact that the report has not included the prohibition of racial discrimination as such, but rather the prohibition of apartheid and racial discrimination as a composite prohibition)? There certainly is

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para. 1 ("No State Party shall expel, return ('refouler'), surrender or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to enforced disappearance").

[404] See Allain, "The *jus cogens* nature of non-refoulement" (footnote 394 above); Farmer, "Non-refoulement and *jus cogens* ..." (footnote 394 above); and Orakhelashvili, *Peremptory Norms of General International Law* ( footnote 93 above), p. 56.

[405] See, e.g., A. Duffy "Expulsion to face torture? *Non-refoulement* in international law", *International Journal of Refugee Law*, vol. 20 (2008), pp. 373–390, who expresses doubt about the *jus cogens* status of non-refoulement.

[406] Cassese, "The enhanced role of *jus cogens*" (footnote 234 above), pp. 162–163.

[407] Costello and Foster, "Non-refoulement as custom and *jus cogens*? Putting the prohibition to the test" (footnote 394 above).

[408] *Belhaj v. Straw; Rahmatullah v. Minister of Defence* (above footnote 215), Opinion of Lord Sumption, para. 271 ("The … Working Group regarded this irreducible core as *jus cogens*… In my opinion they were right to do so"); *Committee of US Citizens Living in Nicaragua v Reagan* (footnote 182 above), at 941. See also Report of the Working Group on Arbitrary Detention, United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of their Liberty to Bring Proceedings Before a Court (A/HRC/30/37), especially at para. 11.

[409] *AA v. Austria,* Judgment, Supreme Court of Justice of Austria, 30 September 2008. See, however, *A v. State Secretariat for Economic Affairs and Federal Department of Economic Affairs,* Judgment, Switzerland Federal Supreme Court, 22 April 2008, and *Nada v. State Secretariat for Economic Affairs* (footnote 46 above).

[410] See, for discussion, De Beer (footnote 186 above).

[411] See generally Charlesworth and Chinkin, "The gender of *jus cogens*" (footnote 372 above). While the Special Rapporteur believes, as a normative proposition, that gender discrimination should be prohibited in the same way as other *jus cogens* norms, one of the hurdles that this proposition would have to overcome is the significant number of reservations that are attached to the principal instrument on gender discrimination, namely the Convention on the Elimination of All Forms of Discrimination against Women (New York, 18 December 1979), United Nations, *Treaty Series*, vol. 1249, No. 20378, p. 13, which has, at present, more than 55 reservations. See, Declarations, reservations, objections and notifications of withdrawal of reservations relating to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW/SP/2006/2).

*some* support for the idea that the prohibition of discrimination *as a whole*, which would include both race and gender discrimination, but also other forms of discrimination, is a norm of *jus cogens.* For the most part, the proposition that the prohibition of discrimination as a whole is a peremptory norm can be found in the jurisprudence of the Inter-American Court of Human Rights.[412] From a normative and moral perspective, there can be no argument against this call for the prohibition arbitrary discrimination to be accorded *jus cogens* status. Yet, there is limited explicit *opinio juris cogentis*[413] regarding the prohibition of discrimination in general (or the more limited, prohibition of gender discrimination).

136. By virtue of the importance of the subject matter and the catastrophic consequence that could result from the destruction of the environment,[414] it might seem obvious that norms that aim at protecting the environment (at least some of them) would have the status of *jus cogens*.[415] Yet, there seems to be little evidence of

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[412] See, e.g., *Yatama v. Nicaragua*, Judgment (Preliminary objections, merits, reparations and costs), Inter-American Court of Human Rights, 23 June 2005, Series C, No. 127, para. 184 ("At the current stage of the evolution of international law, the fundamental principle of equality and non-discrimination has entered the realm of *jus cogens*"); *Servellón-García et al. v. Honduras*, Judgment (Merits, reparations and costs), Inter-American Court of Human Rights, 21 September 2006, Series C, No. 152, para. 94 ("This Tribunal considers that the fundamental principle of equality and non-discrimination belongs to the realm of *jus cogens* that, of a peremptory character, entails obligations *erga omnes* of protection that bind all States and result in effects with regard to third parties, including individuals"); *Expelled Dominicans and Haitians v. Dominican Republic*, Judgment (Preliminary objections, merits, reparations and costs), Inter-American Court of Human Rights, 28 August 2014, Series C, No. 282, para. 264 ("the Court reiterates that the *jus cogens* principle of equal and effective protection of the law and non-discrimination requires States, when regulating the mechanisms for granting nationality, to abstain from establishing discriminatory regulations or regulations that have discriminatory effects on different groups of a population when they exercise their rights"); *Norín Catrimán et al. (Leaders, Members and Activist of the Mapuche Indigenous People) v. Chile,* Judgment (Merits, reparations and costs), Inter-American Court of Human Rights, 29 May 2014, Series C, No. 279, para. 197 ("Regarding the principle of equality before the law and non-discrimination, the Court has indicated that 'the notion of equality springs directly from the oneness of the human family, and is linked to the essential dignity of the individual.' Thus, any situation is incompatible with this concept that, by considering one group superior to another group, leads to treating it in a privileged way; or, inversely, by considering a given group to be inferior, treats it with hostility or otherwise subjects it to discrimination in the enjoyment of rights that are accorded to those who are not so classified. The Court's case law has also indicated that, at the current stage of the evolution of international law, the fundamental principle of equality and non-discrimination has entered the sphere of jus cogens. It constitutes the foundation for the legal framework of national and international public order and permeate[s] the whole legal system."); *Veliz Franco et al. v. Guatemala,* Judgment (Preliminary objections, merits, reparations and costs), Inter-American Court of Human Rights, 19 May 2014, Series C, No. 277, para. 205 ("At the actual stage of the evolution of international law, the fundamental principle of equality and non-discrimination has entered the realm *of jus cogens*").

[413] This refers to the acceptance and recognition of the international community of States as a whole. See generally, second report (A/CN.4/706).

[414] On the importance of the environment, see *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 7, separate opinion of Judge Weeramantry, at pp. 91–92 ("The protection of the environment is likewise a vital part of contemporary human rights doctrine, for it is a *sine qua non* for numerous human rights such as the right to health and the right to life itself. It is scarcely necessary to elaborate on this, as damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments").

[415] This theme was explored in E.M. Kornicker Uhlmann, "State community interests, *jus cogens* and protection of the global environment: developing criteria for peremptory norms", *Georgetown International Environmental Law Review*, vol. 11 (1998), pp. 101–136. Her article was "based on the premise that today State community interests play a paramount role in the creation of fundamental international norms and that the protection of the global environment is the prototype of a State community interest". See also Orakhelashvili, *Peremptory Norms of*

the required "acceptance and recognition of the international community of States as a whole" that the environmental norms (or some of them) have acquired peremptory status, notwithstanding this empirical fact of the importance of environmental rules for the very survival of humanity and the planet.[416] The paradox was noted by Krista Singleton-Cambage, who noted that, at the time (1995), "environmental rights and responsibilities are not recognized as having" the status of *jus cogens* "despite the fact that global environmental preservation represents an essential interest of all individuals within the entire international society".[417] In the Commission's own work, the importance of the atmosphere, as an empirical fact, has been acknowledged, yet there has been no recognition of the peremptory status of protecting the atmosphere – a resource on which life on earth depends.[418] It is the case that there are many declarations and treaties on the environment, yet none of them provide strong evidence of non-derogability. Orakhelashvili does make a spirited argument for the *jus cogens* status of specific norms related to the environment, yet even he accepts that there is "lack of evidence". Although not referring to norms of *jus cogens*, John Dugard has described particular rules relating to the protection of the environment as establishing obligations *erga omnes*.[419] It may well be that that some rules, like some relating to the environment, have the status of *jus cogens* which has yet to be accepted and recognized by the international community of States as a whole, with the result that the effects in law of *jus cogens* do not yet flow from such.[420]

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*General International Law* (footnote 93 above), p. 65 ("The system of environmental law, like human rights law, protects community interests, not merely those of States *inter se*").

[416] See, e.g., P. Birnie, A. Boyle, and C. Redgwell, *International Law and the Environment* (3rd ed., Oxford, Oxford University Press, 2009), pp. 109–110 ("No such [*jus cogens*] norms of international environmental law have yet been convincingly identified"). In her analysis, Kornicker Uhlman ("State community interests, *jus cogens* and protection of the global environment: developing criteria for peremptory norms" (footnote 416 above)) comes to the conclusion that, while the "prohibition of willful serious damage to the environment during armed conflicts is a *jus cogens* norm", the "general prohibition of causing or not preventing environmental damage that threatens the international community as a whole has not yet fully developed into *jus cogens*" (*ibid.*, p. 35). See also N.A. Robinson "Environmental law: is an obligation *erga omnes* emerging?" paper presented at a panel discussion at the United Nations, 4 June 2018. Available at www.iucn.org/sites/dev/files/content/documents/2018/environmental_law_is_an_obligation_erga_omnes_emerging_interamcthradvisoryopinionjune2018_pdf (accessed 15 January 2019). See however, Orakhelashvili, *Peremptory Norms of General International Law* (footnote 93 above), p. 65.

[417] K. Singleton-Cambage, "International legal sources and global environmental crises: the inadequacy of principles, treaties, and custom", *ILSA Journal of International and Comparative Law*, vol. 2 (1995), pp. 171–188, at p. 185.

[418] See draft guidelines on the protection of the atmosphere, together with preamble, adopted by the Commission on first reading, A/73/10, para. 77, at preamble ("Acknowledging that the atmosphere is essential for sustaining life on Earth, human health and welfare, and aquatic and terrestrial ecosystems").

[419] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Compensation Owed by the Republic of Nicaragua to the Republic of Costa Rica, Judgment*, the International Court of Justice, 2 February 2018, dissenting opinion of Judge *ad hoc* Dugard, para. 35 ("The obligation not to engage in wrongful deforestation that results in the release of carbon into the atmosphere and the loss of gas sequestration services is certainly an obligation *erga omnes*").

[420] See, for discussion, first report (A/CN.4/693), para. 59. See also M. Koskenniemi, *From Apology to Utopia: The Structure of Legal Argument* (Cambridge, Cambridge University Press, 2006), pp. 307 *et seq.*, especially p. 308 ("neither contrasting position can be consistently preferred because they also rely on each other"). At p. 323, specifically on *jus cogens*, he says: "Initially, *jus cogens* seems to be descending, non-consensualist. It seems to bind States irrespective of their consent. But a law which would make no reference to what States have consented to would seem to collapse into a natural morality [but] the reference to recognition by 'international community of States' [makes it] … ascending, consensualist.".

# V. Proposed draft conclusion

137. On the basis of the above discussion, the Special Rapporteur proposes one draft conclusion in relation to the question of an illustrative list. No proposal is made with respect to regional *jus cogens.* The proposed draft conclusion reads as follows:

**Draft conclusion 24**
**Non-exhaustive list of peremptory norms of general international law (*jus cogens*)**

Without prejudice to the existence of other peremptory norms of general international law (*jus cogens*), the most widely recognized examples of peremptory norms of general international law (*jus cogens*) are:

(*a*) the prohibition of aggression or aggressive force;

(*b*) the prohibition of genocide;

(*c*) the prohibition of slavery;

(*d*) the prohibition of apartheid and racial discrimination;

(*e*) the prohibition of crimes against humanity;

(*f*) the prohibition of torture;

(*g*) the right to self-determination; and

(*h*) the basic rules of international humanitarian law.

138. Other norms, that have not been included, but for which there is *some* support, would be referred to in the commentary with the necessary caveats and qualifiers.

# VI. Future work

139. It is anticipated that a full set of draft conclusions could be adopted on first reading in 2019. The Special Rapporteur intends to produce a full set of commentaries to the draft conclusions adopted by the Drafting Committee by the beginning May 2019.

140. If the topic is completed on first reading at the end of 2019, a second reading could be completed in 2021, during the final year of the quinquennium.

# Annex 39

**UNITED NATIONS** **A**

**General Assembly**

Distr.
GENERAL

A/HRC/10/61
15 January 2009

Original: ENGLISH

HUMAN RIGHTS COUNCIL
Tenth session
Agenda item 2

# ANNUAL REPORT OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS AND REPORTS OF THE OFFICE OF THE HIGH COMMISSIONER AND THE SECRETARY-GENERAL

## Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights* **

**Summary**

This report discusses how observed and projected impacts of climate change have implications for the enjoyment of human rights and for the obligations of States under international human rights law.

Chapter I discusses the main features of climate change as defined in the reports of the Intergovernmental Panel on Climate Change (IPCC) and central aspects of current climate change debates under the United Nations Framework Convention on Climate Change. Chapter II outlines various implications of climate change for human rights, commenting on: (a) the relationship between the environment and human rights; (b) implications of the effects of climate change for the enjoyment of specific rights; (c) vulnerabilities of specific groups; (d) human rights implications of climate change-induced displacement and conflict; and (e) human rights implications of measures to address climate change. Chapter III relates the discussion of the impacts of climate change on human rights with relevant obligations under international human rights law, which are also summarized in annex I to the present report. Chapter IV draws conclusions on the relationship between climate change and human rights.

* Late submission.

** The annex and footnotes are circulated in the language of submission only.

## CONTENTS

## Introduction

1. The present report is submitted pursuant to Human Rights Council resolution 7/23 in which the Office of the United Nations High Commissioner for Human Rights (OHCHR) was requested to conduct a detailed analytical study of the relationship between climate change and human rights, taking into account the views of States and other stakeholders.

2. Written submissions were received from States, intergovernmental organizations, national human rights institutions, non-governmental organizations, and individual experts. OHCHR also organized a one-day open-ended consultation on the relationship between climate change and human rights, held on 22 October 2008 in Geneva. The inputs received during the consultation process have informed the preparation of this report.[1]

3. This report seeks to outline main aspects of the relationship between climate change and human rights. Climate change debates have traditionally focused on scientific, environmental and economic aspects. As scientific understanding of the causes and consequences of climate change has evolved and impacts on human lives and living conditions have become more evident, the focus of debates has progressively broadened with increasing attention being given to human and social dimensions of climate change. Human Rights Council resolution 7/23 on human rights and climate change exemplifies this broadening of the debate.

4. Special procedures of the Human Rights Council have also addressed the human rights implications of climate change in recent statements and reports,[2] while the Organization of American States and the Alliance of Small Island States have recently drawn attention to the relationship between climate change and human rights.[3] In addition, a growing volume of reports and studies address the interface between climate change and human rights.[4]

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[1] Most of the submissions made and a summary of discussions of the consultation meeting containing various recommendations made by participants are available at http://www2.ohchr.org/english/issues/climatechange/study.htm.

[2] For example, in a joint statement on International Human Rights Day, 10 December 2008, the special procedures mandate holders of the Human Rights Council emphasized that climate change has "potentially massive human rights and development implications".

[3] AG/RES.2429 (XXXVIII-O/08), Human rights and climate change in the Americas; Male' Declaration on the Human Dimension of Global Climate Change, 2007.

[4] Many of these studies and reports have been submitted to the Office of the United Nations High Commissioner for Human Rights (OHCHR) and are available at: http://www2.ohchr.org/english/issues/climatechange/submissions.htm.

# I. CLIMATE CHANGE: AN OVERVIEW

## Global warming and its causes

5. The United Nations Framework Convention on Climate Change, which has near universal membership, provides the common international framework to address the causes and consequences of climate change, also referred to as "global warming". The Convention defines climate change as "a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods".[5]

6. The Intergovernmental Panel on Climate Change (IPCC) has greatly contributed to improving understanding about and raising awareness of climate change risks.[6] Since the publication of its First Assessment Report (IPCC AR1) in 1990, climate science has rapidly evolved, enabling the IPCC to make increasingly definitive statements about the reality, causes and consequences of climate change. Its Fourth Assessment Report (IPCC AR4), issued in 2007, presents a clear scientific consensus that global warming "is unequivocal" and that, with more than 90 per cent certainty, most of the warming observed over the past 50 years is caused by manmade greenhouse gas emissions.[7] Current levels of greenhouse gas concentrations far exceed pre-industrial levels as recorded in polar ice cores dating back 650,000 years, and the predominant source of this increase is the combustion of fossil fuels.[8]

7. The IPCC AR4 presents the current scientific consensus on climate change. It is based on the contributions of three working groups focusing on: the physical science basis (Working Group I); impacts, adaptation and vulnerability (Working Group II); and mitigation of climate change (Working Group III). The Synthesis Report and Summaries for Policymakers have been adopted and approved by member States at an IPCC plenary session. The findings provide the main scientific resource for this study in exploring the relationship between climate change and human rights.

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[5] United Nations Framework Convention on Climate Change (UNFCCC), art. 1, para. 2. The Intergovernmental Panel on Climate Change (IPCC) uses a similar definition, the main difference being that IPCC covers all aspects of climate change and does not make a distinction between climate change attributable to human activity and climate change and variability attributable to natural causes.

[6] IPCC was set up jointly by the World Meteorological Organization (WMO) and the United Nations Environment Programme (UNEP) in 1988 to provide authoritative assessments, based on the best available scientific literature, on climate change causes, impacts and possible response strategies.

[7] Climate Change 2007 - Synthesis Report, adopted at IPCC Plenary XXVII, Valencia, Spain, 12-17 November 2007 (IPCC AR4 Synthesis Report), p. 72.

[8] See IPCC AR4 Working Group I (WGI) Report, pp. 23-25.

**Observed and projected impacts**

8. Amongst the main observed and projected changes in weather patterns related to global warming are:[9]

- Contraction of snow-covered areas and shrinking of sea ice
- Sea level rise and higher water temperatures
- Increased frequency of hot extremes and heatwaves
- Heavy precipitation events and increase in areas affected by drought
- Increased intensity of tropical cyclones (typhoons and hurricanes)

9. The IPCC assessments and a growing volume of studies provide an increasingly detailed picture of how these changes in the physical climate will impact on human lives. IPCC AR4 outlines impacts in six main areas: ecosystems; food; water; health; coasts; and industry, settlement and society,[10] some of which are described further below in relation to their implications for specific human rights.

**Unequal burden and the equity principle**

10. Industrialized countries, defined as annex I countries under the United Nations Framework Convention on Climate Change, have historically contributed most to manmade greenhouse gas emissions. At the same time, the impacts of climate change are distributed very unevenly, disproportionally affecting poorer regions and countries, that is, those who have generally contributed the least to human-induced climate change.

11. The unequal burden of the effects of climate change is reflected in article 3 of the Convention (referred to as "the equity article"). It stipulates that parties should protect the climate system "on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities"; that developed countries "should take the lead in combating climate change and the adverse effects thereof" and that full consideration should be given to the needs of developing countries, especially "those that are particularly vulnerable to the adverse effects of climate change" and "that would have to bear a disproportionate or abnormal burden under the Convention".[11] Giving operational meaning to the "equity principle" is a key challenge in ongoing climate change negotiations.

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[9] With the exception of impacts on tropical cyclones, the IPCC AR4 considers these impacts *very likely* (more than 90 per cent certainty). Projections on increased intensity of tropical cyclones are considered *likely* (more than 66 per cent certainty).

[10] See IPCC AR4 Synthesis Report, pp. 48-53.

[11] UNFCCC, art. 3, paras. 1 and 2.

**Response measures: mitigation and adaptation**

12. Mitigation and adaptation are the two main strategies to address climate change. Mitigation aims to minimize the extent of global warming by reducing emission levels and stabilizing greenhouse gas concentrations in the atmosphere. Adaptation aims to strengthen the capacity of societies and ecosystems to cope with and adapt to climate change risks and impacts.

13. Reaching an agreement on required global mitigation measures lies at the heart of international climate change negotiations. Article 2 defines the "ultimate objective" of the Convention and associated instruments as "the stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system". A key question is to operationally define the term "dangerous".[12]

14. Over the past decades, scientific studies and policy considerations have converged towards a threshold for dangerous climate change of a maximum rise in global average temperature of 2º C above the pre-industrial level.[13] Staying below this threshold will significantly reduce the adverse impacts on ecosystems and human lives. It will require that global greenhouse gas emissions peak within the next decade and be reduced to less than 50 per cent of the current level by 2050. Yet, even this stabilization scenario would lead to a "best estimate" global average temperature increase of 2° C - 2.4° C above pre-industrial levels.[14] Moreover, the possibility of containing the temperature rise to around 2°C becomes increasingly unlikely if emission reductions are postponed beyond the next 15 years.

15. Adaptation and the financing of adaptation measures are also central in international climate change negotiations. Irrespective of the scale of mitigation measures taken today and over the next decades, global warming will continue due to the inertia of the climate system and the long-term effects of previous greenhouse gas emissions. Consequently, adaptation measures are required to enable societies to cope with the effects of now unavoidable global warming. Climate change adaptation covers a wide range of actions and strategies, such as building sea defences, relocating populations from flood-prone areas, improved water management, and early warning systems. Equally, adaptation requires strengthening the capacities and coping mechanisms of individuals and communities.

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[12] While UNFCCC does not include specific greenhouse gas reduction targets, its Kyoto Protocol assigns legally binding caps on greenhouse gas emissions for industrialized countries and emerging economies for the period 2008-2012. The Protocol entered into force in 2005 and has to date been ratified by 183 parties to UNFCCC.

[13] See IPCC AR4 Working Group III (WGIII) Report, pp. 99-100.

[14] Four other scenarios of higher stabilization levels estimate the likely temperature increases in the range of 2.8º C to 6.1º C, IPCC AR4 WGIII Report, pp. 227-228.

## II. IMPLICATIONS FOR THE ENJOYMENT OF HUMAN RIGHTS

### A. Climate change, environmental harm and human rights

16. An increase in global average temperatures of approximately 2° C will have major, and predominantly negative, effects on ecosystems across the globe, on the goods and services they provide. Already today, climate change is among the most important drivers of ecosystem changes, along with overexploitation of resources and pollution.[15] Moreover, global warming will exacerbate the harmful effects of environmental pollution, including higher levels of ground-level ozone in urban areas. In view of such effects, which have implications for a wide range of human rights, it is relevant to discuss the relationship between human rights and the environment.

17. Principle 1 of the 1972 Declaration of the United Nations Conference on the Human Environment (the Stockholm Declaration) states that there is "a fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being". The Stockholm Declaration reflects a general recognition of the interdependence and interrelatedness of human rights and the environment.[16]

18. While the universal human rights treaties do not refer to a specific right to a safe and healthy environment, the United Nations human rights treaty bodies all recognize the intrinsic link between the environment and the realization of a range of human rights, such as the right to life, to health, to food, to water, and to housing.[17] The Convention on the Rights of the Child provides that States parties shall take appropriate measures to combat disease and malnutrition "through the provision of adequate nutritious foods and clean drinking water, taking into consideration the dangers and risks of environmental pollution".[18]

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[15] See Millennium Ecosystems Assessment 2005, *Ecosystems and Human Well-being*, Synthesis, pp. 67 and 79.

[16] A joint seminar on human rights and the environment organized by OHCHR and UNEP in 2002 also documented a growing recognition of the connection between human rights, environmental protection and sustainable development (see E/CN.4/2002/WP.7).

[17] ILO Convention No. 169 (1989) concerning Indigenous and Tribal Peoples in Independent Countries provides for special protection of the environment of the areas which indigenous peoples occupy or otherwise use. At the regional level, the African Charter on Human and Peoples' Rights and the San Salvador Protocol to the American Convention on Human Rights recognize the right to live in a healthy or satisfactory environment. Moreover, many national constitutions refer to a right to an environment of a certain quality.

[18] Convention on the Rights of the Child (CRC), art. 24, para. 2 (c).

19. Equally, the Committee on Economic, Social and Cultural Rights (CESCR) has clarified that the right to adequate food requires the adoption of "appropriate economic, environmental and social policies" and that the right to health extends to its underlying determinants, including a healthy environment.[19]

## B. Effects on specific rights

20. Whereas global warming will potentially have implications for the full range of human rights, the following subsections provide examples of rights which seem to relate most directly to climate change-related impacts identified by IPCC.

### 1. The right to life

21. The right to life is explicitly protected under the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child.[20] The Human Rights Committee has described the right to life as the "supreme right", "basic to all human rights", and it is a right from which no derogation is permitted even in time of public emergency.[21] Moreover, the Committee has clarified that the right to life imposes an obligation on States to take positive measures for its protection, including taking measures to reduce infant mortality, malnutrition and epidemics.[22] The Convention on the Rights of the Child explicitly links the right to life to the obligation of States "to ensure to the maximum extent possible the survival and development of the child".[23] According to the Committee on the Rights of the Child, the right to survival and development must be implemented in a holistic manner, "through the enforcement of all the other provisions of the Convention, including rights to health, adequate nutrition, social security, an adequate standard of living, a healthy and safe environment …".[24]

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[19] Committee on Economic, Social and Cultural Rights (CESCR), general comments No. 12 (1999) on the right to adequate food (art. 11), para. 4, and No. 14 (2000) on the right to the highest attainable standard of health (art. 12), para. 4.

[20] International Covenant on Civil and Political Rights (ICCPR), art. 6; CRC, art. 6.

[21] Human Rights Committee, general comments No. 6 (1982) on art. 6 (Right to life), para. 1, and No. 14 (1984) on art. 6 (Right to life), para. 1.

[22] Human Rights Committee, general comment No. 6, para. 5. Likewise, the Committee has asked States to provide data on pregnancy and childbirth-related deaths and gender-disaggregated data on infant mortality rates when reporting on the status of implementation of the right to life (general comment No. 28 (2000) on art. 3 (The equality of rights between men and women), para. 10).

[23] CRC, art. 6, para. 2.

[24] Committee on the Rights of the Child, general comment No. 7 (2006) on implementing rights in early childhood, para. 10.

22. A number of observed and projected effects of climate change will pose direct and indirect threats to human lives. IPCC AR4 projects with high confidence an increase in people suffering from death, disease and injury from heatwaves, floods, storms, fires and droughts. Equally, climate change will affect the right to life through an increase in hunger and malnutrition and related disorders impacting on child growth and development; cardiorespiratory morbidity and mortality related to ground-level ozone.[25]

23. Climate change will exacerbate weather-related disasters which already have devastating effects on people and their enjoyment of the right to life, particularly in the developing world. For example, an estimated 262 million people were affected by climate disasters annually from 2000 to 2004, of whom over 98 per cent live in developing countries.[26] Tropical cyclone hazards, affecting approximately 120 million people annually, killed an estimated 250,000 people from 1980 to 2000.[27]

24. Protection of the right to life, generally and in the context of climate change, is closely related to measures for the fulfilment of other rights, such as those related to food, water, health and housing. With regard to weather-related natural disasters, this close interconnectedness of rights is reflected in the Inter-Agency Standing Committee (IASC) operational guidelines on human rights and natural disasters.[28]

### 2. The right to adequate food

25. The right to food is explicitly mentioned under the International Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of the Child and the Convention on the Rights of Persons with Disabilities and implied in general provisions on an adequate standard of living of the Convention on the Elimination of All Forms of Discrimination against Women and the International Convention on the Elimination of All Forms of Racial Discrimination.[29] In addition to a right to adequate food, the International Covenant on Economic, Social and

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[25] IPCC AR4 Working Group II (WGII) Report, p. 393.

[26] United Nations Development Programme (UNDP), Human Development Report 2007/2008, *Fighting climate change: Human solidarity in a divided world*, p. 8.

[27] IPCC AR4 Working Group II Report, p. 317.

[28] Inter-Agency Standing Committee, *Protecting Persons Affected by Natural Disasters - IASC Operational Guidelines on Human Rights and Natural Disasters*, Brooking-Bern Project on Internal Displacement, 2006.

[29] International Covenant on Economic, Social and Cultural Rights (ICESCR), art. 11; CRC, art. 24 (c); Convention on the Rights of Persons with Disabilities (CRPD), art. 25 (f) and art. 28, para. 1; Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), art. 14, para. 2 (h); International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), art. 5 (e).

Cultural Rights also enshrines "the fundamental right of everyone to be free from hunger".[30] Elements of the right to food include the availability of adequate food (including through the possibility of feeding oneself from natural resources) and accessible to all individuals under the jurisdiction of a State. Equally, States must ensure freedom from hunger and take necessary action to alleviate hunger, even in times of natural or other disasters.[31]

26. As a consequence of climate change, the potential for food production is projected initially to increase at mid to high latitudes with an increase in global average temperature in the range of 1-3° C. However, at lower latitudes crop productivity is projected to decrease, increasing the risk of hunger and food insecurity in the poorer regions of the word.[32] According to one estimate, an additional 600 million people will face malnutrition due to climate change,[33] with a particularly negative effect on sub-Saharan Africa.[34] Poor people living in developing countries are particularly vulnerable given their disproportionate dependency on climate-sensitive resources for their food and livelihoods.[35]

27. The Special Rapporteur on the right to food has documented how extreme climate events are increasingly threatening livelihoods and food security.[36] In responding to this threat, the realization of the right to adequate food requires that special attention be given to vulnerable and disadvantaged groups, including people living in disaster prone areas and indigenous peoples whose livelihood may be threatened.[37]

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[30] ICESCR, art. 11, para. 2.

[31] CESCR general comment No. 12 (1999) on the right to adequate food (art. 11), para. 6.

[32] IPCC AR4 Synthesis Report, p. 48.

[33] UNDP Human Development Report 2006, *Beyond scarcity: Power, poverty and the global water crisis*.

[34] IPCC AR4 WGII Report, p. 275.

[35] IPCC AR4 WGII, p. 359. United Nations Millennium Project 2005, *Halving Hunger: It Can Be Done*, Task Force on Hunger, p. 66. Furthermore, according to the Human Rights Council Special Rapporteur on the right to food, "half of the world's hungry people … depend for their survival on lands which are inherently poor and which may be becoming less fertile and less productive as a result of the impacts of repeated droughts, climate change and unsustainable land use" (A/HRC/7/5, para. 51).

[36] See e.g. A/HRC/7/5, para. 51; A/HRC/7/5/Add.2, paras. 11 and 15.

[37] See e.g. CESCR general comment No. 12 (1999) on the right to adequate food (art. 11), para. 28.

### 3. The right to water

28. CESCR has defined the right to water as the right of everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses, such as drinking, food preparation and personal and household hygiene.[38] The Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of Persons with Disabilities explicitly refer to access to water services in provisions on an adequate standard of living, while the Convention on the Rights of the Child refers to the provision of "clean drinking water" as part of the measures States shall take to combat disease and malnutrition.[39]

29. Loss of glaciers and reductions in snow cover are projected to increase and to negatively affect water availability for more than one-sixth of the world's population supplied by meltwater from mountain ranges. Weather extremes, such as drought and flooding, will also impact on water supplies.[40] Climate change will thus exacerbate existing stresses on water resources and compound the problem of access to safe drinking water, currently denied to an estimated 1.1 billion people globally and a major cause of morbidity and disease.[41] In this regard, climate change interacts with a range of other causes of water stress, such as population growth, environmental degradation, poor water management, poverty and inequality.[42]

30. As various studies document, the negative effects of climate change on water supply and on the effective enjoyment of the right to water can be mitigated through the adoption of appropriate measures and policies.[43]

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[38] CESCR general comment No. 15 (2002) on the right to water (arts. 11 and 12), para. 2. While not explicitly mentioned in ICESCR, the right is seen to be implicit in arts. 11 (adequate standard of living) and 12 (heath). General comment No. 15 provides further guidance on the normative contents of the right to water and related obligations of States.

[39] See CEDAW, art. 14, para. 2 (h); CRPD, art. 28, para. 2 (a); CRC, art. 24, para. 2 (c).

[40] IPCC AR4 Synthesis Report, pp. 48-49.

[41] Millennium Ecosystems Assessment 2005, *Ecosystems and Human Well-being*, Synthesis, p. 52.

[42] According to the UNDP Human Development Report 2006, the root causes of the current water crisis lie in poor water management, poverty and inequality, rather than in an absolute shortage of physical supply.

[43] IPCC AR4 WGII Report, p. 191. UNDP Human Development Report 2006.

### 4. The right to health

31. The right to the highest attainable standard of physical and mental health (the right to health) is most comprehensively addressed in article 12 of the International Covenant on Economic, Social and Cultural Rights and referred to in five other core international human rights treaties.[44] This right implies the enjoyment of, and equal access to, appropriate health care and, more broadly, to goods, services and conditions which enable a person to live a healthy life. Underlying determinants of health include adequate food and nutrition, housing, safe drinking water and adequate sanitation, and a healthy environment.[45] Other key elements are the availability, accessibility (both physically and economically), and quality of health and health-care facilities, goods and services.[46]

32. Climate change is projected to affect the health status of millions of people, including through increases in malnutrition, increased diseases and injury due to extreme weather events, and an increased burden of diarrhoeal, cardiorespiratory and infectious diseases.[47] Global warming may also affect the spread of malaria and other vector borne diseases in some parts of the world.[48] Overall, the negative health effects will disproportionately be felt in sub-Saharan Africa, South Asia and the Middle East. Poor health and malnutrition increases vulnerability and reduces the capacity of individuals and groups to adapt to climate change.

33. Climate change constitutes a severe additional stress to health systems worldwide, prompting the Special Rapporteur on the right to health to warn that a failure of the international community to confront the health threats posed by global warming will endanger the lives of millions of people.[49] Most at risk are those individuals and communities with a low adaptive capacity. Conversely, addressing poor health is one central aspect of reducing vulnerability to the effects of climate change.

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[44] CEDAW, arts. 12 and 14, para. 2 (b); ICERD, art. 5 (e) (iv); CRC, art. 24; CRPD, arts. 16, para. 4, 22, para. 2, and 25; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW), arts. 43, para. 1 (e), 45, para. 1 (c), and 70. See also ICESCR arts. 7 (b) and 10.

[45] CESCR general comment No. 12, para. 8.

[46] See CESCR general comment No. 12, CEDAW general recommendation No. 24 (1999) on art. 12 of the Convention (women and health); CRC general comment No. 4 (2003) on Adolescent health and development in the context of the Convention on the Rights of the Child.

[47] IPCC AR4 Synthesis, p. 48.

[48] Uncertainty remains about the potential impact of climate change on malaria at local and global scales because of a lack of data and the interplay of other contributing non-climatic factors such as socio-economic development, immunity and drug resistance (see IPCC WGII Report, p. 404).

[49] A/62/214, para. 102.

34. Non-climate related factors, such as education, health care, public health initiatives, are critical in determining how global warming will affect the health of populations.[50] Protecting the right to health in the face of climate change will require comprehensive measures, including mitigating the adverse impacts of global warming on underlying determinants of health and giving priority to protecting vulnerable individuals and communities.

### 5. The right to adequate housing

35. The right to adequate housing is enshrined in several core international human rights instruments and most comprehensively under the International Covenant on Economic, Social and Cultural Rights as an element of the right to an adequate standard of living.[51] The right to adequate housing has been defined as "the right to live somewhere in security, peace and dignity".[52] Core elements of this right include security of tenure, protection against forced evictions,[53] availability of services, materials, facilities and infrastructure, affordability, habitability, accessibility, location and cultural adequacy.[54]

36. Observed and projected climate change will affect the right to adequate housing in several ways. Sea level rise and storm surges will have a direct impact on many coastal settlements.[55] In the Arctic region and in low-lying island States such impacts have already led to the relocation of peoples and communities.[56] Settlements in low-lying mega-deltas are also particularly at risk, as evidenced by the millions of people and homes affected by flooding in recent years.

37. The erosion of livelihoods, partly caused by climate change, is a main "push" factor for increasing rural to urban migration. Many will move to urban slums and informal settlements where they are often forced to build shelters in hazardous areas.[57] Already today, an estimated 1 billion people live in urban slums on fragile hillsides or flood-prone riverbanks and face acute vulnerability to extreme climate events.[58]

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[50] IPCC AR4 WGII Report, p. 12.

[51] ICESCR, art. 11. See also Universal Declaration of Human Rights, art. 25, para. 1; ICERD, art. 5 (e) (iii); CEDAW, art. 14, para. 2; CRC, art. 27, para. 3; ICRMW, art. 43, para. 1 (d); CRPD, arts. 9, para. 1 (a), and 28, paras. 1 and 2 (d).

[52] CESCR general comment No. 12, para. 6.

[53] See CESCR general comment No. 7 (1997) on the right to adequate housing (art. 11 (1) of the Covenant): Forced evictions.

[54] CESCR general comment No. 12, para. 8.

[55] IPCC AR4 WGII Report, p. 333.

[56] IPCC AR4 WGII Report, p. 672.

[57] A/63/275, paras. 31-38.

[58] UNDP Human Development Report 2007/2008, *Fighting climate change: Human solidarity in a divided world*, p. 9.

38. Human rights guarantees in the context of climate change include: (a) adequate protection of housing from weather hazards (habitability of housing); (b) access to housing away from hazardous zones; (c) access to shelter and disaster preparedness in cases of displacement caused by extreme weather events; (d) protection of communities that are relocated away from hazardous zones, including protection against forced evictions without appropriate forms of legal or other protection, including adequate consultation with affected persons.[59]

### 6. The right to self-determination

39. The right to self-determination is a fundamental principle of international law. Common article 1, paragraph 1, of the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights establishes that "all peoples have the right of self-determination", by virtue of which "they freely determine their political status and freely pursue their economic, social and cultural development".[60] Important aspects of the right to self-determination include the right of a people not to be deprived of its own means of subsistence and the obligation of a State party to promote the realization of the right to self-determination, including for people living outside its territory.[61] While the right to self-determination is a collective right held by peoples rather than individuals, its realization is an essential condition for the effective enjoyment of individual human rights.

40. Sea level rise and extreme weather events related to climate change are threatening the habitability and, in the longer term, the territorial existence of a number of low-lying island States. Equally, changes in the climate threaten to deprive indigenous peoples of their traditional territories and sources of livelihood. Either of these impacts would have implications for the right to self-determination.

41. The inundation and disappearance of small island States would have implications for the right to self-determination, as well as for the full range of human rights for which individuals depend on the State for their protection. The disappearance of a State for climate change-related reasons would give rise to a range of legal questions, including concerning the status of people inhabiting such disappearing territories and the protection afforded to them under international law (discussed further below). While there is no clear precedence to follow, it is clear that insofar as climate change poses a threat to the right of peoples to self-determination, States have

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[59] In this regard the Guiding Principles on Internal Displacement (E/CN.4/1998/53/Add.2, annex) provide that "at the minimum, regardless of the circumstances, and without discrimination, competent authorities shall provide internally displaced persons with and ensure safe access to: … basic shelter and housing" (principle 18).

[60] The right to self-determination is enshrined in Articles 1 and 55 of the Charter of the United Nations and also contained in the Declaration on the Right to Development, art. 1, para. 2, and the United Nations Declaration on the Rights of Indigenous Peoples, arts. 3 and 4.

[61] Human Rights Committee, general comment No. 12 (1984) on art. 1 (Right to self-determination), para. 6. See also Committee on the Elimination of Racial Discrimination (CERD), general recommendation 21 (1996) on the right to self-determination.

a duty to take positive action, individually and jointly, to address and avert this threat. Equally, States have an obligation to take action to avert climate change impacts which threaten the cultural and social identity of indigenous peoples.

## C. Effects on specific groups

42. The effects of climate change will be felt most acutely by those segments of the population who are already in vulnerable situations due to factors such as poverty, gender, age, minority status, and disability.[62] Under international human rights law, States are legally bound to address such vulnerabilities in accordance with the principle of equality and non-discrimination.

43. Vulnerability and impact assessments in the context of climate change largely focus on impacts on economic sectors, such as health and water, rather than on the vulnerabilities of specific segments of the population.[63] Submissions to this report and other studies indicate awareness of the need for more detailed assessments at the country level and point to some of the factors which affect individuals and communities.

44. The present section focuses on factors determining vulnerability to climate change for women, children and indigenous peoples.

### 1. Women

45. Women are especially exposed to climate change-related risks due to existing gender discrimination, inequality and inhibiting gender roles. It is established that women, particularly elderly women and girls, are affected more severely and are more at risk during all phases of weather-related disasters: risk preparedness, warning communication and response, social and economic impacts, recovery and reconstruction.[64] The death rate of women is markedly higher than that of men during natural disasters (often linked to reasons such as: women are more likely to be looking after children, to be wearing clothes which inhibit movement and are less likely to be able to swim). This is particularly the case in disaster-affected societies in which the socio-economic status of women is low.[65] Women are susceptible to gender-based violence

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[62] See e.g. IPCC AR4 WGII Report, p. 374.

[63] National communications, submitted according to arts. 4 and 12 of UNFCCC, make frequent references to the human impacts of climate change, but generally do so in an aggregate and general manner, mentioning for example that people living in poverty are particularly vulnerable.

[64] IPCC AR4 WGII, p. 398. See also submission by the United Nations Development Fund for Women available at: http://www2.ohchr.org/english/issues/climatechange/index.htm.

[65] E. Neumayer and T. Plümper, *The Gendered Nature of Natural Disasters: The Impact of Catastrophic Events on the Gender Gap in Life Expectancy, 1981-2002*, available at http://ssrn.com/abstract=874965. As the authors conclude, based on the study of disasters in 141 countries, "[a] systematic effect on the gender gap in life expectancy is only plausible if natural disasters exacerbate previously existing patterns of discrimination that render females more vulnerable to the fatal impact of disasters" (p. 27).

during natural disasters and during migration, and girls are more likely to drop out of school when households come under additional stress. Rural women are particularly affected by effects on agriculture and deteriorating living conditions in rural areas. Vulnerability is exacerbated by factors such as unequal rights to property, exclusion from decision-making and difficulties in accessing information and financial services.[66]

46. Studies document how crucial for successful climate change adaptation the knowledge and capacities of women are. For example, there are numerous examples of how measures to empower women and to address discriminatory practices have increased the capacity of communities to cope with extreme weather events.[67]

47. International human rights standards and principles underline the need to adequately assess and address the gender-differentiated impacts of climate change. In the context of negotiations on the United Nations Framework Convention on Climate Change, States have highlighted gender-specific vulnerability assessments as important elements in determining adaptation options.[68] Yet, there is a general lack of accurate data disaggregated by gender data in this area.

### 2. Children

48. Studies show that climate change will exacerbate existing health risks and undermine support structures that protect children from harm.[69] Overall, the health burden of climate change will primarily be borne by children in the developing world.[70] For example, extreme weather events and increased water stress already constitute leading causes of malnutrition and infant and child mortality and morbidity. Likewise, increased stress on livelihoods will make it more difficult for children to attend school. Girls will be particularly affected as traditional household chores, such as collecting firewood and water, require more time and energy when supplies are scarce. Moreover, like women, children have a higher mortality rate as a result of weather-related disasters.

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[66] Y. Lambrou and R. Laub, "Gender perspectives on the conventions on biodiversity, climate change and desertification", *Food and Agriculture Organization of the United Nations (FAO), Gender and Population Division*, pp. 7-8.

[67] See e.g. IPCC AR4 WGII Report, p. 398; International Strategy for Disaster Reduction, *Gender Perspectives: Integrating Disaster Risk Reduction into Climate Change Adaptation. Good Practices and Lessons Learned*, UN/ISDR 2008.

[68] UNFCCC, *Climate Change: Impacts, Vulnerabilities and Adaptation in Developing Countries*, 2007, p. 16.

[69] UNICEF Innocenti Research Centre, *Climate Change and Children: A Human Security Challenge*, New York and Florence, 2008; UNICEF UK, *Our Climate, Our Children, Our Responsibility: The Implications of Climate Change for the World's Children*, London, 2008.

[70] World Bank, *Global Monitoring Report 2008 - MDGs and the Environment: Agenda for Inclusive and Sustainable Development*, p. 211.

49. As today's children and young persons will shape the world of tomorrow, children are central actors in promoting behaviour change required to mitigate the effects of global warming. Children's knowledge and awareness of climate change also influence wider households and community actions.[71] Education on environmental matters among children is crucial and various initiatives at national and international levels seek to engage children and young people as actors in the climate change agenda.[72]

50. The Convention on the Rights of the Child, which enjoys near universal ratification, obliges States to take action to ensure the realization of all rights in the Convention for all children in their jurisdiction, including measures to safeguard children's right to life, survival and development through, inter alia, addressing problems of environmental pollution and degradation. Importantly, children must be recognized as active participants and stewards of natural resources in the promotion and protection of a safe and healthy environment.[73]

### 3. Indigenous peoples

51. Climate change, together with pollution and environmental degradation, poses a serious threat to indigenous peoples, who often live in marginal lands and fragile ecosystems which are particularly sensitive to alterations in the physical environment.[74] Climate change-related impacts have already led to the relocation of Inuit communities in polar regions and affected their traditional livelihoods. Indigenous peoples inhabiting low-lying island States face similar pressures, threatening their cultural identity which is closely linked to their traditional lands and livelihoods.[75]

52. Indigenous peoples have been voicing their concern about the impacts of climate change on their collective human rights and their rights as distinct peoples.[76] In particular, indigenous peoples have stressed the importance of giving them a voice in policymaking on climate change at both national and international levels and of taking into account and building upon their

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[71] UNICEF UK (see footnote 69 above), p. 29.

[72] For example, UNEP and UNICEF have developed an environmental resource pack for child-friendly schools designed to empower children (see footnote 69 above, UNICEF Innocenti Research Centre, p. 28).

[73] See e.g. CRC, general comment No. 4 (2003) on adolescent health and development in the context of the Convention on the Rights of the Child.

[74] M. Macchi and others, *Indigenous and Traditional Peoples and Climate Change*, International Union for Conservation of Nature, 2008.

[75] See e.g. report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, A/HRC/4/32, para. 49.

[76] In April 2008, the Permanent Forum for Indigenous Issues stated that climate change "is an urgent and immediate threat to human rights" (E/C.19/2008/13, para. 23).

traditional knowledge.[77] As a study cited by the IPCC in its Fourth Assessment Report observes, "Incorporating indigenous knowledge into climate change policies can lead to the development of effective adaptation strategies that are cost-effective, participatory and sustainable".[78]

53. The United Nations Declaration on the Rights of Indigenous Peoples sets out several rights and principles of relevance to threats posed by climate change.[79] Core international human rights treaties also provide for protection of indigenous peoples, in particular with regard to the right to self-determination and rights related to culture.[80] The rights of indigenous peoples are also enshrined in ILO Convention No. 169 (1989) concerning Indigenous and Tribal Peoples in Independent Countries.

54. Indigenous peoples have brought several cases before national courts and regional and international human rights bodies claiming violations of human rights related to environmental issues. In 2005, a group of Inuit in the Canadian and Alaskan Arctic presented a case before the Inter-American Commission on Human Rights seeking compensation for alleged violations of their human rights resulting from climate change caused by greenhouse gas emissions from the United States of America.[81] While the Inter-American Commission deemed the case inadmissible, it drew international attention to the threats posed by climate change to indigenous peoples.

## D. Displacement

55. The First Assessment Report of the IPCC (1990) noted that the greatest single impact of climate change might be on human migration. The report estimated that by 2050, 150 million people could be displaced by climate change-related phenomena, such as desertification,

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[77] E/C.19/2008/13, para. 4. The Permanent Forum also recommended that a mechanism be put in place for the participation of indigenous peoples in climate change negotiations under UNFCCC (ibid., para. 30).

[78] IPCC AR4 WGII Report, p. 865 (citing Robinson and Herbert, 2001).

[79] Key provisions include the right to effective mechanisms for prevention of, and redress for, actions which have the aim or effect of dispossessing them of their lands, territories or resources (art. 8); the principle of free, prior and informed consent (art. 19), the right to the conservation and protection of the environment and indigenous lands and territories (art. 29), the right to maintain, control, protect and develop their cultural heritage and traditional knowledge and cultural expressions (art. 31).

[80] See the provisions on cultural rights in ICCPR, art. 27, and ICESCR, art. 15.

[81] Available at: http://inuitcircumpolar.com/files/uploads/icc-files/FINALPetitionICC.pdf.

increasing water scarcity, and floods and storms.[82] It is estimated that climate change-related displacement will primarily occur within countries and that it will affect primarily poorer regions and countries.[83]

56. It is possible to distinguish between four main climate change-related displacement scenarios,[84] where displacement is caused by:

- Weather-related disasters, such as hurricanes and flooding
- Gradual environmental deterioration and slow onset disasters, such as desertification, sinking of coastal zones and possible total submersion of low-lying island States
- Increased disaster risks resulting in relocation of people from high-risk zones
- Social upheaval and violence attributable to climate change-related factors

57. Persons affected by displacement within national borders are entitled to the full range of human rights guarantees by a given State,[85] including protection against arbitrary or forced displacement and rights related to housing and property restitution for displaced persons.[86] To the extent that movement has been forced, persons would also qualify for increased assistance and protection as a vulnerable group in accordance with the Guiding Principles on Internal

[82] More recent studies refer to estimates for the same period of 200 million (Stern Review on the Economics of Climate Change, 2006, available at http://www.hm-treasury.gov.uk/sternreview_ index.htm) and 250 million (*Human tide: the real migration crisis*, Christian Aid 2007). See also IPCC AR4 WGII Report, p. 365 and the Norwegian Refugee Council, *Future floods of refugees: A comment on climate change, conflict and forced migration*, 2008.

[83] See e.g. contributions to *Forced Migration Review, vol. 1, No. 31*, October 2008.

[84] Adapted from typology proposed by the Representative of the Secretary-General on human rights of internally displaced persons and also used in the working paper submitted by the IASC informal group on migration/displacement and climate change, "Climate Change, Migration and Displacement: who will be affected", 31 October 2008.

[85] Guiding Principles on Internal Displacement (E/CN.4/1998/53/Add.2, annex), principles 1, para. 1, and 6, para. 1 .

[86] Principle 8.2, Principles on Housing and Property Restitution for Refugees and Displaced Persons (endorsed by the Sub-Commission on the Promotion and Protection of Human Rights in resolution 2005/2); FAO/IDMC/NRC/OCHA/OHCHR/UN-Habitat/UNHCR: *Housing and Property Restitution for Refugees and Displaced Persons: Implementing the "Pinheiro Principles"*, 2007.

Displacement.[87] However, with regard to slow-onset disasters and environmental degradation it remains challenging to distinguish between voluntary and forced population movements.

58. Persons moving voluntarily or forcibly across an international border due to environmental factors would be entitled to general human rights guarantees in a receiving State, but would often not have a right of entry to that State. Persons forcibly displaced across borders for environmental reasons have been referred to as "climate refugees" or "environmental refugees". The Office of the United Nations High Commissioner for Refugees, the International Organization for Migration and other humanitarian organizations have advised that these terms have no legal basis in international refugee law and should be avoided in order not to undermine the international legal regime for the protection of refugees.[88]

59. The Representative of the Secretary-General on human rights of internally displaced persons has suggested that a person who cannot be reasonably expected to return (e.g. if assistance and protection provided by the country of origin is far below international standards) should be considered a victim of forced displacement and be granted at least a temporary stay.[89]

60. One possible scenario of forcible displacement across national borders is the eventual total submergence of small island States.[90] Two working papers of the Sub-Commission on the Promotion and Protection of Human Rights point to some of the human rights issues such situations would raise, such as the rights of affected populations vis-à-vis receiving States and possible entitlement to live in community.[91] Human rights law does not provide clear answers as to the status of populations who have been displaced from sinking island States. Arguably,

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[87] The Guiding Principles have gained wide acceptance and were recognized by the General Assembly in the 2005 World Summit Outcome (A/RES/60/1) "as an important international framework for the protection of internally displaced persons".

[88] See IASC working paper referred to in footnote 84 above.

[89] Representative of the Secretary-General on human rights of internally displaced persons, *Displacement Caused by the Effects of Climate Change: Who will be affected and what are the gaps in the normative framework for their protection?* background paper, 2008, available at: http://www2.ohchr.org/english/issues/climatechange/submissions.htm.

[90] In the face of rising sea levels, migration is one adaptation strategy which is already being implemented in low-lying island States, such as Kiribati, the Maldives, and Tuvalu. So far this population movement has mainly taken the form of in-country resettlement schemes (IPCC AR4 WGII Report, p. 708).

[91] The papers (E/CN.4/Sub.2/AC.4/2004/CRP.1; E/CN.4/Sub.2/2005/28) were prepared by Françoise Hampson pursuant to a request from the Commission on Human Rights (decision 2004/122) to prepare a report on the legal implications of the disappearance of States for environmental reasons. A questionnaire was prepared in 2006 (E/CN.4/Sub.2/AC.4/2006/CRP.2) with a view to obtaining more accurate data on the nature, scale and imminence of the problem, but as yet no follow-up has been given to this initiative.

dealing with such possible disasters and protecting the human rights of the people affected will first and foremost require adequate long-term political solutions, rather than new legal instruments.[92]

## E. Conflict and security risks

61. Recent reports and studies identify climate change as a key challenge to global peace and stability.[93] This was also recognized by the Norwegian Nobel Committee when, in 2007, it awarded the Nobel Peace Prize jointly to the IPCC and Al Gore for raising awareness of man-made climate change.[94] Equally, in 2007, the Security Council held a day-long debate on the impact of climate change on peace and security.

62. According to one study, the effects of climate change interacting with economic, social and political problems will create a high risk of violent conflict in 46 countries - home to 2.7 billion people.[95] These countries, mainly in sub-Saharan Africa, Asia and Latin America, are also the countries which are particularly exposed to projected negative impacts of climate change.

63. Climate change-related conflicts could be one driver of forced displacement. In such cases, in addition to the general human rights protection framework, other international standards would be applicable, including the Guiding Principles on Internal Displacement, international humanitarian law, international refugee law and subsidiary and temporary protection regimes for persons fleeing from armed conflict. Violent conflict, irrespective of its causes, has direct implications for the protection and enjoyment of human rights.

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[92] This point was made by Ms. Hampson and other panellists at the consultation meeting organized by OHCHR on 22 October 2008, summary of discussions available at: http://www2.ohchr.org/english/issues/climatechange/docs/SummaryofDiscussions.doc.

[93] See e.g. Government of the United Kingdom of Great Britain and Northern Ireland, *The National Security Strategy of the United Kingdom: Security in an interdependent world*, 2008 and German Advisory Council on Global Change, *World in Transition - Climate Change as a Security Risk*, 2008.

[94] As the Chairman of the Nobel Committee stated: "The chief threats may be direct violence, but deaths may also have less direct sources in starvation, disease, or natural disasters" (Presentation speech 10 December 2007).

[95] International Alert and Swedish International Development Cooperation Agency (SIDA), *A Climate of Conflict*, 2008, p. 7. In the same vein, the Special Rapporteur on the right to food observes that conflicts in Africa, including in the Darfur region, are linked to land degradation and related fights over resources (A/HRC/7/5, para. 51).

64. It should be noted, however, that knowledge remains limited as to the causal linkages between environmental factors and conflict and there is little empirical evidence to substantiate the projected impacts of environmental factors on armed conflict.[96]

## F. Human rights implications of response measures

65. The United Nations Framework Convention on Climate Change and its Kyoto Protocol commit States parties to minimize adverse economic, social and environmental impacts resulting from the implementation of measures taken to mitigate or adapt to climate change impacts ("response measures").[97] With regard to measures to reduce the concentration of greenhouse gases in the atmosphere (mitigation), agro-fuel production is one example of how mitigation measures may have adverse secondary effects on human rights, especially the right to food.[98]

66. Whereas agro-fuel production could bring positive benefits for climate change and for farmers in developing countries, agro-fuels have also contributed to increasing the price of food commodities "because of the competition between food, feed and fuel for scarce arable land".[99] CESCR has urged States to implement strategies to combat global climate change that do not negatively affect the right to adequate food and freedom from hunger, but rather promote sustainable agriculture, as required by article 2 of the United Nations Framework Convention on Climate Change.[100]

67. Apart from the impact on the right to food, concerns have also been raised that demand for biofuels could encroach on the rights of indigenous peoples to their traditional lands and culture.[101]

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[96] See e.g. H. Buhaug, N.P. Gleditsch and O.M. Theisen, *Implications of Climate Change for Armed Conflict*, 2008. As the IPCC AR4 WGII Report points out (citing Fairhead, 2004) there are many other intervening and contributing causes of conflict and many environmentally-influenced conflicts in Africa are related to abundance of natural resources (e.g. oil and diamonds) rather than scarcity, suggesting "caution in the prediction of such conflicts as a result of climate change" (p. 365).

[97] UNFCCC, art. 4, para. 8, and Kyoto Protocol, arts. 2, para. 3, and 3, para. 14.

[98] For a discussion of the human rights dimensions of mitigation and adaptation policies see International Council on Human Rights Policy, *Climate Change and Human Rights: A Rough Guide*, 2008, chapter II.

[99] Statement of the Special Rapporteur on the right to food, 22 May 2008, at the special session of the Human Rights Council on the global food crisis.

[100] E/C.12/2008/1, para. 13.

[101] See e.g. M. Macchi and others, *Indigenous and Traditional Peoples and Climate Change*, International Union for Conservation of Nature, 2008. CERD expressed concern about plans to establish a large-scale biofuel plantation and the threat it constituted to the rights of indigenous peoples to own their lands and enjoy their culture (CERD/C/IDN/CO/3, para. 17).

68. Concerns have also been raised about possible adverse effects of reduced emissions from deforestation and degradation (REDD) programmes. These programmes provide compensation for retaining forest cover and could potentially benefit indigenous peoples who depend on those forest resources. However, indigenous communities fear expropriation of their lands and displacement and have concerns about the current framework for REDD. The Permanent Forum on Indigenous Issues stated that new proposals for reduced emissions from deforestation "must address the need for global and national policy reforms … respecting rights to land, territories and resources, and the rights of self-determination and the free, prior and informed consent of the indigenous peoples concerned".[102]

## III. RELEVANT HUMAN RIGHTS OBLIGATIONS

69. There exists broad agreement that climate change has generally negative effects on the realization of human rights. This section seeks to outline how the empirical reality and projections of the adverse effects of climate change on the effective enjoyment of human rights relate to obligations assumed by States under the international human rights treaties.

70. While climate change has obvious implications for the enjoyment of human rights, it is less obvious whether, and to what extent, such effects can be qualified as human rights violations in a strict legal sense.[103] Qualifying the effects of climate change as human rights violations poses a series of difficulties. First, it is virtually impossible to disentangle the complex causal relationships linking historical greenhouse gas emissions of a particular country with a specific climate change-related effect, let alone with the range of direct and indirect implications for human rights. Second, global warming is often one of several contributing factors to climate change-related effects, such as hurricanes, environmental degradation and water stress. Accordingly, it is often impossible to establish the extent to which a concrete climate change-related event with implications for human rights is attributable to global warming. Third, adverse effects of global warming are often projections about future impacts, whereas human rights violations are normally established after the harm has occurred.[104]

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[102] E/C.19/2008/13, para. 45.

[103] In recent years, several lawsuits related to greenhouse gas emissions and their contribution to climate change have been filed at national level against State authorities and private actors. However, the Inuit petition to the Inter-American Commission on Human Rights (see footnote 81 above) remains the only case to have invoked human rights law. For an overview of recent climate change-related lawsuits, see e.g. International Council for Human Rights Policy, *Climate Change and Human Rights: A Rough Guide*, 2008.

[104] The Human Rights Committee has clarified that for a person to claim to be a victim of a violation of a right, "he or she must show either that an act or an omission of a State party has already adversely affected his or her enjoyment of such a right, or that such an effect is imminent …" *Aalbersberg v. The Netherlands* (No. 1440/2005). In several cases concerning environmental harms, the Committee has found that the author(s) did not meet these criteria for a victim of a human rights violation.

71. Irrespective of whether or not climate change effects can be construed as human rights violations, human rights obligations provide important protection to the individuals whose rights are affected by climate change or by measures taken to respond to climate change.

## A. National level obligations

72. Under international human rights law, individuals rely first and foremost on their own States for the protection of their human rights. In the face of climate change, however, it is doubtful, for the reasons mentioned above, that an individual would be able to hold a particular State responsible for harm caused by climate change. Human rights law provides more effective protection with regard to measures taken by States to address climate change and their impact on human rights.

73. For example, if individuals have to move away from a high-risk zone, the State must ensure adequate safeguards and take measures to avoid forced evictions. Equally, several claims about environmental harm have been considered by national, regional and international judicial and quasi-judicial bodies, including the Human Rights Committee, regarding the impact on human rights, such as the right to life, to heath, to privacy and family life and to information.[105] Similar cases in which an environmental harm is linked to climate change could also be considered by courts and quasi-judicial human rights treaty bodies. In such cases, it would appear that the matter of the case would rest on whether the State through its acts or omissions had failed to protect an individual against a harm affecting the enjoyment of human rights.

74. In some cases, States may have an obligation to protect individuals against foreseeable threats to human rights related to climate change, such as an increased risk of flooding in certain areas. In that regard, the jurisprudence of the European Court of Human Rights gives some indication of how a failure to take measures against foreseeable risks could possibly amount to a violation of human rights. The Court found a violation of the right to life in a case where State authorities had failed to implement land-planning and emergency relief policies while they were aware of an increasing risk of a large-scale mudslide. The Court also noted that the population had not been adequately informed about the risk.[106]

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[105] For a review of relevant jurisprudence, see Asia Pacific Forum of National Human Rights Institutions, *Human Rights and the Environment,* 12th Annual Meeting, Sydney, 2007; D. Shelton, "Human rights and the environment: jurisprudence of human rights bodies", background paper No. 2, Joint UNEP-OHCHR Expert Seminar on Human Rights and the Environment, January 2002, available at http://www.unhchr.ch/environment/bp2.html.

[106] *Budayeva and Others v. Russia*, European Court of Human Rights (ECHR), No. 15339/02.

### 1. Progressive realization of economic, social and cultural rights

75. As discussed in chapter II, climate change will have implications for a number of economic, social and cultural rights. As specified in the relevant treaty provisions, States are obliged to take measures towards the full realization of economic, social and cultural rights to the maximum extent of their available resources.[107] As climate change will place an additional burden on the resources available to States, economic and social rights are likely to suffer.

76. While international human rights treaties recognize that some aspects of economic, social and cultural rights may only be realized progressively over time, they also impose obligations which require immediate implementation. First, States parties must take deliberate, concrete and targeted measures, making the most efficient use of available resources, to move as expeditiously and effectively as possible towards the full realization of rights.[108] Second, irrespective of resource limitations, States must guarantee non-discrimination in access to economic, social and cultural rights. Third, States have a core obligation to ensure, at the very least, minimum essential levels of each right enshrined in the Covenant. For example, a State party in which "any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education" would be failing to meet its minimum core obligations and, prima facie, be in violation of the Covenant.[109]

77. In sum, irrespective of the additional strain climate change-related events may place on available resources, States remain under an obligation to ensure the widest possible enjoyment of economic, social and cultural rights under any given circumstances. Importantly, States must, as a matter of priority, seek to satisfy core obligations and protect groups in society who are in a particularly vulnerable situation.[110]

### 2. Access to information and participation in decision-making

78. Awareness-raising and access to information are critical to efforts to address climate change. For example, it is critically important that early-warning information be provided in a manner accessible to all sectors of society. Under the United Nations Framework Convention on Climate Change, the parties commit to promote and facilitate public access to information on climate change.[111] Under international human rights law, access to information is implied in the

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[107] See CESCR general comment No. 3 (1990) on the nature of States parties' obligations (art. 2, para. 1, of the Covenant). For a discussion of the concept of progressive realization under the international human rights treaties, see report of the United Nations High Commissioner for Human Rights to the Economic and Social Council (E/2007/82).

[108] See e.g. CESCR general comments No. 3, paras. 2 and 9, and No. 14 (2000) on the right to the highest attainable standard of health (art. 12), para. 31.

[109] CESCR general comment No. 3, para. 10.

[110] See Statement by CESCR (E/C.12/2007/1, paras. 4 and 6).

[111] UNFCCC, art. 6.

rights to freedom of opinion and expression.[112] Jurisprudence of regional human rights courts has also underlined the importance of access to information in relation to environmental risks.[113]

79. Participation in decision-making is of key importance in efforts to tackle climate change. For example, adequate and meaningful consultation with affected persons should precede decisions to relocate people away from hazardous zones.[114] Under the Convention, States parties shall promote and facilitate "public participation in addressing climate change and its effects and developing adequate responses".[115] The right to participation in decision-making is implied in article 25 of the International Covenant on Civil and Political Rights which guarantees the right to "take part in the conduct of public affairs". Equally, the United Nations Declaration on the Rights of Indigenous Peoples states that States shall consult and cooperate with indigenous peoples "to obtain their free, prior and informed consent" before adopting measures that may affect them.[116] The Convention on the Rights of the Child in article 12 enshrines the right of children to express their views freely in all matters affecting them.

### 3. Guiding principles for policymaking

80. Human rights standards and principles should inform and strengthen policymaking in the area of climate change, promoting policy coherence and sustainable outcomes. The human rights framework draws attention to the importance of aligning climate change policies and measures with overall human rights objectives, including through assessing possible effects of such policies and measures on human rights.

81. Moreover, looking at climate change vulnerability and adaptive capacity in human rights terms highlights the importance of analysing power relationships, addressing underlying causes of inequality and discrimination, and gives particular attention to marginalized and vulnerable members of society. The human rights framework seeks to empower individuals and underlines the critical importance of effective participation of individuals and communities in decision-making processes affecting their lives.

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[112] Universal Declaration of Human Rights, art. 19, and ICCPR, art. 19.

[113] See e.g. *Guerra and Others v. Italy*, ECHR 14967/89; Inter-American Court of Human Rights, Case of *Claude Reyes et al. v. Chile*. Merits, Reparations and Costs, Series C, No. 151.

[114] See A/63/275, para. 38.

[115] Article 6. The amended New Delhi work programme on article 6 elaborates on and reinforces this point (FCCC/CP/2007/6/Add.1, decision 9/CP.13, annex, para. 17 (k)).

[116] United Nations Declaration on the Rights of Indigenous Peoples, art. 19.

82. Equally, human rights standards underline the need to prioritize access of all persons to at least basic levels of economic, social and cultural rights, such as access to basic medical care, essential drugs and to compulsory primary education free of charge.

83. The human rights framework also stresses the importance of accountability mechanisms in the implementation of measures and policies in the area of climate change and requires access to administrative and judicial remedies in cases of human rights violations.[117]

## B. Obligations of international cooperation

84. Climate change can only be effectively addressed through cooperation of all members of the international community.[118] Moreover, international cooperation is important because the effects and risk of climate change are significantly higher in low-income countries.

85. International cooperation to promote and protect human rights lies at the heart of the Charter of the United Nations.[119] The importance of such cooperation is explicitly stated in provisions of the International Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of the Child, the Convention on the Rights of People with Disabilities and in the Declaration on the Right to Development.[120] According to CESCR and the Committee on the Rights of the Child, the obligation to take steps to the maximum of available resources to implement economic, social and cultural rights includes an obligation of States, where necessary, to seek international cooperation.[121] States have also committed themselves not only to

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[117] Useful guidance on how human rights standards and principles can be incorporated into policy measures are found in various guidance tools, including *Frequently Asked Questions on a Human Rights-Based Approach to Development Cooperation*; OHCHR (2006), *Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies*, available at http://www.ohchr.org/EN/PublicationsResources/Pages/SpecialIssues.aspx.

[118] In the words of the special procedures mandate holders of the Human Rights Council, in a joint statement on International Human Rights Day, 10 December 2008: “Today the interests of States, and the impacts of actions by States, are ever more interconnected. New challenges include ensuring global access to food, and those presented by climate change and financial crisis have potentially massive human rights and development implications. If we are to confront them effectively we must do so collectively.”

[119] See articles 1, paragraph 3, 55 and 56.

[120] ICESCR, arts. 2, para. 1, 11, para. 2, 15, para. 4, 22 and 23; Convention on the Rights of the Child, arts. 4 and 24, para. 4; CRPD, art. 32; Declaration on the Right to Development, arts. 3, 4 and 6.

[121] CESCR, general comment No. 3, para. 11; Committee on the Rights of the Child, general comment No. 5 (2003) on general measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6), para. 7.

implement the treaties within their jurisdiction, but also to contribute, through international cooperation, to global implementation.[122] Developed States have a particular responsibility and interest to assist the poorer developing States.[123]

86. The Committee on Economic, Social and Cultural Rights identifies four types of extraterritorial obligations to promote and protect economic, social and cultural rights. Accordingly, States have legal obligations to:

- Refrain from interfering with the enjoyment of human rights in other countries
- Take measures to prevent third parties (e.g. private companies) over which they hold influence from interfering with the enjoyment of human rights in other countries
- Take steps through international assistance and cooperation, depending on the availability of resources, to facilitate fulfilment of human rights in other countries, including disaster relief, emergency assistance, and assistance to refugees and displaced persons
- Ensure that human rights are given due attention in international agreements and that such agreements do not adversely impact upon human rights[124]

87. Human rights standards and principles are consistent with and further emphasize "the principle of common but differentiated responsibilities" contained in the United Nations Framework Convention on Climate Change. According to this principle, developed country Parties (annex I) commit to assisting developing country Parties (non-annex I) in meeting the costs of adaptation to the adverse effects of climate change and to take full account of the specific needs of least developed countries in funding and transfer of technology.[125] The human rights framework complements the Convention by underlining that "the human person is the central subject of development",[126] and that international cooperation is not merely a matter of the obligations of a State towards other States, but also of the obligations towards individuals.

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[122] See e.g. CRC, general comment No. 5, para. 7.

[123] See CESCR general comment No. 3, para. 14.

[124] See e.g. CESCR general comments No. 12 (1999) on the right to adequate food (art. 11); No. 13 (1999) on the right to education (art. 13); No. 14 (2000) on the right to the highest attainable standard of health (art. 12); and No. 15 (2002) on the right to water (arts. 11 and 12 of the Covenant).

[125] UNFCCC, art. 4, paras. 4 and 9.

[126] Declaration on the Right to Development, art. 2, para. 1.

88. Human rights standards and principles, underpinned by universally recognized moral values, can usefully inform debates on equity and fair distribution of mitigation and adaptation burdens. Above all, human rights principles and standards focus attention on how a given distribution of burden affects the enjoyment of human rights.

**Intergenerational equity and the precautionary principle**

89. The United Nations Framework Convention on Climate Change stresses principles of particular importance in the context of climate change which are less well developed in human rights law. Notably, these include the notion of "intergenerational equity and justice" and "the precautionary principle", both of which are well-established in international environmental law.

90. Human rights treaty bodies have alluded to the notion of intergenerational equity.[127] However, the human rights principles of equality and non-discrimination generally focus on situations in the present, even if it is understood that the value of these core human rights principles would not diminish over time and be equally applicable to future generations.[128]

91. The precautionary principle reflected in article 3 of the United Nations Framework Convention on Climate Change, states that lack of full scientific certainty should not be used as a reason for postponing precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects. As discussed above, human rights litigation is not well-suited to promote precautionary measures based on risk assessments, unless such risks pose an imminent threat to the human rights of specific individuals. Yet, by drawing attention to the broader human rights implications of climate change risks, the human rights perspective, in line with the precautionary principle, emphasizes the need to avoid unnecessary delay in taking action to contain the threat of global warming.

## IV. CONCLUSIONS

92. **Climate change-related impacts, as set out in the assessment reports of the Intergovernmental Panel on Climate Change, have a range of implications for the effective enjoyment of human rights. The effects on human rights can be of a direct nature, such as the threat extreme weather events may pose to the right to life, but will often have an indirect and gradual effect on human rights, such as increasing stress on health systems and vulnerabilities related to climate change-induced migration.**

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[127] See CESCR general comments No. 12, para. 7, and No. 15, para. 11. Equally the concern for how current needs and rights affect the future health and development of the child is central to the Convention on the Rights of the Child (see e.g. Committee on the Rights of the Child general comment No. 4 (2003) on adolescent health and development in the context of the Convention on the Rights of the Child, para. 13).

[128] For a discussion on the relationship between intergenerational equity and human rights in the context of climate change, see S. Caney, "Human rights, climate change, and discounting", *Environmental Politics*, vol. 17, No. 4, August 2008, p. 536.

93. **The effects of climate change are already being felt by individuals and communities around the world. Particularly vulnerable are those living on the "front line" of climate change, in places where even small climatic changes can have catastrophic consequences for lives and livelihoods. Vulnerability due to geography is often compounded by a low capacity to adapt, rendering many of the poorest countries and communities particularly vulnerable to the effects of climate change.**

94. **Within countries, existing vulnerabilities are exacerbated by the effects of climate change. Groups such as children, women, the elderly and persons with disabilities are often particularly vulnerable to the adverse effects of climate change on the enjoyment of their human rights. The application of a human rights approach in preventing and responding to the effects of climate change serves to empower individuals and groups, who should be perceived as active agents of change and not as passive victims.**

95. **Often the effects of climate change on human rights are determined by non-climatic factors, including discrimination and unequal power relationships. This underlines the importance of addressing human rights threats posed by climate change through adequate policies and measures which are coherent with overall human rights objectives. Human rights standards and principles should inform and strengthen policy measures in the area of climate change.**

96. **The physical impacts of global warming cannot easily be classified as human rights violations, not least because climate change-related harm often cannot clearly be attributed to acts or omissions of specific States. Yet, addressing that harm remains a critical human rights concern and obligation under international law. Hence, legal protection remains relevant as a safeguard against climate change-related risks and infringements of human rights resulting from policies and measures taken at the national level to address climate change.**

97. **There is a need for more detailed studies and data collection at country level in order to assess the human rights impact of climate change-related phenomena and of policies and measures adopted to address climate change. In this regard, States could usefully provide information on measures to assess and address vulnerabilities and impacts related to climate change as they affect individuals and groups, in reporting to the United Nations human rights treaty monitoring bodies and the United Nations Framework Convention on Climate Change.**

98. **Further study is also needed of protection mechanisms for persons who may be considered to have been displaced within or across national borders due to climate change-related events and for those populations which may be permanently displaced as a consequence of inundation of low-lying areas and island States.**

99. **Global warming can only be dealt with through cooperation by all members of the international community. Equally, international assistance is required to ensure sustainable development pathways in developing countries and enable them to adapt to now unavoidable climate change. International human rights law complements the United Nations Framework Convention on Climate Change by underlining that international cooperation is not only expedient but also a human rights obligation and that its central objective is the realization of human rights.**

## Annex

## SELECTED HUMAN RIGHTS STANDARDS AND GUIDELINES RELEVANT TO EFFECTS OF CLIMATE CHANGE[a]

| Effects | Examples of rights affected | Human rights standards and climate change |
|---|---|---|
| Extreme weather events | Right to life:<br><br>ICCPR art. 5; CRC art. 6; Universal Declaration of Human Rights, art. 3. | Human Rights Committee, general comment No. 6 (1982) on article 6 (Right to life).<br><br>Inter-Agency Standing Committee, *Protecting Persons Affected by Natural Disasters - IASC Operational Guidelines on Human Rights and Natural Disasters.*<br><br>Guiding Principles on Internal Displacement (E/CN.4/1998/53/Add.2, annex). |
| Increased food insecurity and risk of hunger | Right to adequate food, right to be free from hunger:<br><br>ICESCR art. 11; CRC art. 24 (c); CRPD arts. 25 (f), 28, para. 1; CEDAW art. 14, para. 2 (h); ICERD art. 5 (e); Universal Declaration of Human Rights, art. 25. | CESCR, general comment No. 12 (1999) on the right to adequate food (art. 11).<br><br>FAO, *Voluntary guidelines to support the progressive realization of the right to adequate food.* |
| Increased water stress | Right to safe drinking water:<br><br>ICESCR arts. 11 and 12; CEDAW art. 14, para. 2 (h); CRPD art. 28, para. 2 (a); CRC art. 24, para. 2 (c). | CESCR, general comment No. 15 (2002) on the right to water (arts. 11 and 12 of the Covenant).<br><br>Report of the United Nations High Commissioner for Human Rights on the scope and content of human rights obligations related to equitable access to safe drinking water and sanitation under international human rights instruments (A/HRC/6/3).<br><br>Realization of the right to drinking water and sanitation (E/CN.4/Sub.2/2005/25). |

[a] General comments/recommendations of the treaty bodies are available in document HRI/GEN/1/Rev.9 (vols. I and II).

| Effects | Examples of rights affected | Human rights standards and climate change |
|---|---|---|
| Stress on health status | Right to the highest attainable standard of health:<br><br>ICESCR arts. 7 (b), 10 and 12; CEDAW arts. 12 and 14, para. 2 (b); Universal Declaration of Human Rights, art. 25; ICERD art. 5 (e) (iv); CRC art. 24; CRPD arts. 16, para. 4, 22, para. 2, and 25; ICRMW arts. 43, para. 1 (e), 45, para. 1 (c) and 70. | CESCR, general comment No. 14 (2000) on the right to the highest attainable standard of health (art. 12).<br><br>Committee on the Rights of the Child, general comment No. 4 (2003) on adolescent health and development in the context of the Convention on the Rights of the Child.<br><br>Committee on the Elimination of Discrimination against Women, general recommendation No. 24 (1999) on article 12 of the Convention (women and health).<br><br>Human Rights Committee, general comment No. 6. |
| Sea-level rise and flooding | Right to adequate housing:<br><br>ICESCR art. 11; ICERD art. 5 (e) (iii); CEDAW art. 14, para. 2; CRC art. 27, para. 3; ICRMW art. 43, para. 1 (d); CRPD arts. 9, para. 1 (a), 28, paras. 1 and 2 (d); Universal Declaration of Human Rights, art. 25. | CESCR, general comment No. 4 (1991) on the right to adequate housing (art. 11, para. 1, of the Covenant).<br><br>CESCR, general comment No. 7 (1997) on the right to adequate housing (art. 11, para. 1, of the Covenant): Forced evictions.<br><br>OHCHR, OCHA, UN-HABITAT, UNHCR, FAO, NRC, *Handbook on Housing and Property Restitution for Refugees and Displaced Persons - Implementing the "Pinheiro Principles"*. |

# Annex 40

United Nations A/CN.4/752/Add.1

General Assembly

Distr.: General
14 June 2022

Original: English

**International Law Commission**
**Seventy-third session**
Geneva, 18 April–3 June and 4 July–5 August 2022

# Sea-level rise in relation to international law

## Second issues paper by Patrícia Galvão Teles and Juan José Ruda Santolaria, Co-Chairs of the Study Group on sea-level rise in relation to international law

### Addendum

### Selected bibliography related to (i) statehood issues and (ii) issues related to the protection of persons affected by sea-level rise*

The subject of sea-level rise in relation to international law is an emerging area on which much continues to be written. The bibliography contained in the annex to the present document does not seek to be exhaustive (see annex).** Some references are relevant for both sections relating to statehood and the protection of persons affected by sea-level rise.

* This bibliography expands upon the bibliography annexed to the syllabus on the topic "Sea-level rise in relation to international law" (see Report of the International Law Commission on the work of its seventieth session (2018), *Official Records of the General Assembly, Seventy-third Session, Supplement No. 10* (A/73/10), annex B, pp. 331–334), as well as the selected bibliography related to the law of the sea aspects of sea-level rise (A/CN.4/740/Add.1).

** Circulated in the language of submission only.

# Annex

## (i) Statehood issues

*Books and articles*

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# Annex 41

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

# RÉSERVES A LA CONVENTION POUR LA PRÉVENTION ET LA RÉPRESSION DU CRIME DE GÉNOCIDE

## AVIS CONSULTATIF DU 28 MAI 1951

# 1951

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

# RESERVATIONS TO THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE

## ADVISORY OPINION OF MAY 28th, 1951

LEYDE
SOCIÉTÉ D'ÉDITIONS
A. W. SIJTHOFF

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PUBLISHING COMPANY

Le présent avis doit être cité comme suit :

« *Réserves à la Convention sur le Génocide, Avis consultatif : C. I. J. Recueil 1951, p. 15.* »

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This Opinion should be cited as follows:

"*Reservations to the Convention on Genocide, Advisory Opinion : I.C.J. Reports 1951, p. 15.*"

**N° de vente : Sales number 59**

INTERNATIONAL COURT OF JUSTICE

YEAR 1951.

1951
May 28th
General List :
No. 12

**May 28th, 1951**

# RESERVATIONS TO THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE

*Advisory jurisdiction of the Court.—Objection based : on alleged existence of a dispute ; on alleged exclusive right of the parties to the Genocide Convention to interpret it ; on Article IX of the Convention.—Rejection of objection.*

*Replies limited to Genocide Convention.—Abstract questions.*

*Reservations.—Objections thereto.—Right of a State which has made a reservation to be a party to the Convention notwithstanding the objection made to its reservation by certain parties.—Circumstances justifying a relaxation of the rule of integrity.—Faculty of making reservations to the Convention ; intention of the General Assembly and of the contracting States ; high ideals of the Convention.—Criterion of the compatibility of the reservation with object and purpose of the Convention.—Individual appraisal by States.—Absence of a rule of international law concerning the effects of reservations.—Administrative practice of the League of Nations and of the United Nations.*

*Effect of the reservation : between the State which makes it and the State which objects thereto.—Application of the criterion of compatibility.*

*Objection made : by a State which has not signed the Convention ; by a signatory which has not ratified.—Provisional status of signatory State.*

## ADVISORY OPINION

*Present :* *President* BASDEVANT ; *Vice-President* GUERRERO ; *Judges* ALVAREZ, HACKWORTH, WINIARSKI, ZORIČIĆ, DE VISSCHER, Sir Arnold MCNAIR, KLAESTAD, BADAWI PASHA, READ, HSU MO ; *Registrar* HAMBRO.

THE COURT,

composed as above,

gives the following Advisory Opinion :

On November 16th, 1950, the General Assembly of the United Nations adopted the following resolution :

"The General Assembly,

Having examined the report of the Secretary-General regarding reservations to multilateral conventions,

Considering that certain reservations to the Convention on the Prevention and Punishment of the Crime of Genocide have been objected to by some States,

Considering that the International Law Commission is studying the whole subject of the law of treaties, including the question of reservations,

Considering that different views regarding reservations have been expressed during the fifth session of the General Assembly, and particularly in the Sixth Committee,

1. Requests the International Court of Justice to give an Advisory Opinion on the following questions :

In so far as concerns the Convention on the Prevention and Punishment of the Crime of Genocide in the event of a State ratifying or acceding to the Convention subject to a reservation made either on ratification or on accession, or on signature followed by ratification :

I. Can the reserving State be regarded as being a party to the Convention while still maintaining its reservation if the reservation is objected to by one or more of the parties to the Convention but not by others ?

II. If the answer to Question I is in the affirmative, what is the effect of the reservation as between the reserving State and :

*(a)* The parties which object to the reservation ?
*(b)* Those which accept it ?

III. What would be the legal effect as regards the answer to Question I if an objection to a reservation is made :

*(a)* By a signatory which has not yet ratified ?
*(b)* By a State entitled to sign or accede but which has not yet done so ?

2. Invites the International Law Commission :

*(a)* In the course of its work on the codification of the law of treaties, to study the question of reservations to multilateral conventions both from the point of view of codification and from that of the progressive development of international law ; to give priority to this study and to report thereon, especially as regards multilateral conventions of which the Secretary-General is the

depositary, this report to be considered by the General Assembly at its sixth session ;

*(b)* In connection with this study, to take account of all the views expressed during the fifth session of the General Assembly, and particularly in the Sixth Committee ;

3. Instructs the Secretary-General, pending the rendering of the Advisory Opinion by the International Court of Justice, the receipt of a report from the International Law Commission and further action by the General Assembly, to follow his prior practice with respect to the receipt of reservations to conventions and with respect to the notification and solicitation of approvals thereof, all without prejudice to the legal effect of objections to reservations to conventions as it may be recommended by the General Assembly at its sixth session."

By a letter of November 17th, 1950, filed in the Registry on November 20th, the Secretary-General of the United Nations transmitted to the Court a certified true copy of the General Assembly's resolution.

On November 25th, 1950, in accordance with Article 66, paragraph 1, of the Court's Statute, the Registrar gave notice of the request to all States entitled to appear before the Court.

On December 1st, 1950, the President—as the Court was not sitting—made an order by which he appointed January 20th, 1951, as the date of expiry of the time-limit for the filing of written statements and reserved the rest of the procedure for further decision. Under the terms of this order, such statements could be submitted to the Court by all States entitled to become parties to the Genocide Convention, namely, any Member of the United Nations as well as any non-member State to which an invitation to this effect had been addressed by the General Assembly. Furthermore, written statements could also be submitted by any international organization considered by the Court as likely to be able to furnish information on the questions referred to it for an Advisory Opinion, namely, the International Labour Organization and the Organization of American States.

On the same date, the Registrar addressed the special and direct communication provided for in Article 66, paragraph 2, of the Statute to all States entitled to appear before the Court, which had been invited to sign and ratify or accede to the Genocide Convention, either under Article XI of that Convention or by virtue of a resolution adopted by the General Assembly on December 3rd, 1949, which refers to Article XI ; by application of the provisions of Article 63, paragraph 1, and Article 68 of the Statute, the same communication was addressed to other States invited to sign and ratify or accede to the Convention, by virtue of the resolution of the General Assembly, namely, the following States : Albania, Austria, Bulgaria, Cambodia, Ceylon, Finland, Hungary,

Ireland, Italy, Jordan, Korea, Laos, Monaco, Portugal, Romania, and Viet-Nam. Finally, the Registrar's communication was addressed to the International Labour Organization and the Organization of American States.

Written statements were deposited within the prescribed time-limit by the following governments and international organizations : the Organization of American States, the Union of Soviet Socialist Republics, the Hashemite Kingdom of Jordan, the United States of America, the United Kingdom of Great Britain and Northern Ireland, the Secretary-General of the United Nations, Israel, the International Labour Organization, Poland, Czechoslovakia, the Netherlands, the People's Republic of Romania, the Ukrainian Soviet Socialist Republic, the People's Republic of Bulgaria, the Byelorussian Soviet Socialist Republic, the Republic of the Philippines.

By a despatch dated December 14th, 1950, and received on January 29th, 1951, the Secretary-General of the United Nations transmitted to the Registry the documents which he had been requested to furnish pursuant to Article 65 of the Court's Statute. All these documents are enumerated in the list attached to the present Opinion.

As the Federal German Republic had been invited on December 20th, 1950, to accede to the Genocide Convention, the Registrar, by a telegram and a letter of January 17th, 1951, which constituted the special and direct communication provided for under Article 66, paragraph 2, of the Statute, informed the Federal German Government that the Court was prepared to receive a written statement and to hear an oral statement on its behalf ; no action was taken in pursuance of this suggestion.

By a letter dated March 9th, 1951, filed in the Registry on March 15th, the Secretary-General of the United Nations announced that he had designated Dr. Ivan S. Kerno, Assistant Secretary-General in charge of the Legal Department, as his representative before the Court, and that Dr. Kerno was authorized to present any statement likely to assist the Court.

The Government of the United Kingdom, the French Government and the Government of Israel stated, in letters dated respectively January 17th, March 12th and March 19th, 1951, that they intended to present oral statements.

At public sittings held from April 10th to 14th, 1951, the Court heard oral statements presented :

on behalf of the Secretary-General of the United Nations by Dr. Ivan S. Kerno, Assistant Secretary-General in charge of the Legal Department ;

on behalf of the Government of Israel by Mr. Shabtai Rosenne, Legal Adviser to the Ministry of Foreign Affairs ;

on behalf of the Government of the United Kingdom of Great Britain and Northern Ireland by the Right Honourable Sir Hartley

Shawcross, K.C., M.P., Attorney-General, and by Mr. G. G. Fitzmaurice, C.M.G., Second Legal Adviser to the Foreign Office ;

on behalf of the Government of the French Republic by M. Charles Rousseau, Professor at the Faculty of Law in Paris, Assistant Legal Adviser of the Ministry of Foreign Affairs.

* * *

In the communications which they have addressed to the Court, certain governments have contended that the Court is not competent to exercise its advisory functions in the present case.

A first objection is founded on the argument that the making of an objection to a reservation made by a State to the Convention on the Prevention and Punishment of the Crime of Genocide constitutes a dispute and that, in order to avoid adjudicating on that dispute, the Court should refrain from replying to Questions I and II. In this connection, the Court can confine itself to recalling the principles which it laid down in its Opinion of March 30th, 1950 (I.C.J. Reports 1950, p. 71). A reply to a request for an Opinion should not, in principle, be refused. The permissive provision of Article 65 of the Statute recognizes that the Court has the power to decide whether the circumstances of a particular case are such as to lead the Court to decline to reply to the request for an Opinion. At the same time, Article 68 of the Statute recognizes that the Court has the power to decide to what extent the circumstances of each case must lead it to apply to advisory proceedings the provisions of the Statute which apply in contentious cases. The object of this request for an Opinion is to guide the United Nations in respect of its own action. It is indeed beyond dispute that the General Assembly, which drafted and adopted the Genocide Convention, and the Secretary-General, who is the depositary of the instruments of ratification and accession, have an interest in knowing the legal effects of reservations to that Convention and more particularly the legal effects of objections to such reservations.

Following a similar line of argument, it has been contended that the request for an opinion would constitute an inadmissible interference by the General Assembly and by States hitherto strangers to the Convention in the interpretation of that Convention, as only States which are parties to the Convention are entitled to interpret it or to seek an interpretation of it. It must be pointed out in this connection that, not only did the General Assembly take the initiative in respect of the Genocide Convention, draw up its terms and open it for signature and accession by States, but that express provisions of the Convention (Articles XI and XVI) associate the General Assembly with the life of the Convention ; and finally, that the General Assembly actually associated itself with it by endeavouring to secure the adoption of the Convention by as great a number of

States as possible. In these circumstances, there can be no doubt that the precise determination of the conditions for participation in the Convention constitutes a permanent interest of direct concern to the United Nations which has not disappeared with the entry into force of the Convention. Moreover, the power of the General Assembly to request an Advisory Opinion from the Court in no way impairs the inherent right of States parties to the Convention in the matter of its interpretation. This right is independent of the General Assembly's power and is exercisable in a parallel direction. Furthermore, States which are parties to the Convention enjoy the faculty of referring the matter to the Court in the manner provided in Article IX of the Convention.

Another objection has been put forward to the exercise of the Court's advisory jurisdiction : it is based on Article IX of the Genocide Convention which provides that disputes relating to the interpretation, application of fulfilment of that Convention shall be submitted to the International Court of Justice at the request of any of the parties to the dispute. It has been contended that there exists no dispute in the present case and that, consequently, the effect of Article IX is to deprive the Court, not only of any contentious jurisdiction, but also of any power to give an Advisory Opinion. The Court cannot share this view. The existence of a procedure for the settlement of disputes, such as that provided by Article IX, does not in itself exclude the Court's advisory jurisdiction, for Article 96 of the Charter confers upon the General Assembly and the Security Council in general terms the right to request this Court to give an Advisory Opinion "on any legal question". Further, Article IX, before it can be applied, presupposes the status of "contracting parties" ; consequently, it cannot be invoked against a request for an Opinion the very object of which is to determine, in relation to reservations and objections thereto, the conditions in which a State can become a party.

In conclusion, the Court considers that none of the above-stated objections to the exercise of its advisory function is well founded.

* * *

The Court observes that the three questions which have been referred to it for an Opinion have certain common characteristics.

All three questions are expressly limited by the terms of the Resolution of the General Assembly to the Convention on the Prevention and Punishment of the Crime of Genocide, and the same Resolution invites the International Law Commission to study the general question of reservations to multilateral conventions both from the point of view of codification and from that of the progressive development of international law. The questions thus having a clearly defined object, the replies which the Court is called upon to give to them are necessarily and strictly limited to that Convention. The Court will seek these replies in the rules of law relating to the effect to be given to the intention of the parties to multilateral conventions.

The three questions are purely abstract in character. They refer neither to the reservations which have, in fact, been made to the Convention by certain States, nor to the objections which have been made to such reservations by other States. They do not even refer to the reservations which may in future be made in respect of any particular article ; nor do they refer to the objections to which these reservations might give rise.

Question I is framed in the following terms :

> "Can the reserving State be regarded as being a party to the Convention while still maintaining its reservation if the reservation is objected to by one or more of the parties to the Convention but not by others ?"

The Court observes that this question refers, not to the possibility of making reservations to the Genocide Convention, but solely to the question whether a contracting State which has made a reservation can, while still maintaining it, be regarded as being a party to the Convention, when there is a divergence of views between the contracting parties concerning this reservation, some accepting the reservation, others refusing to accept it.

It is well established that in its treaty relations a State cannot be bound without its consent, and that consequently no reservation can be effective against any State without its agreement thereto. It is also a generally recognized principle that a multilateral convention is the result of an agreement freely concluded upon its clauses and that consequently none of the contracting parties is entitled to frustrate or impair, by means of unilateral decisions or particular agreements, the purpose and *raison d'être* of the convention. To this principle was linked the notion of the integrity of the convention as adopted, a notion which in its traditional concept involved the proposition that no reservation was valid unless it was accepted by all the contracting parties without exception, as would have been the case if it had been stated during the negotiations.

This concept, which is directly inspired by the notion of contract, is of undisputed value as a principle. However, as regards the Genocide Convention, it is proper to refer to a variety of circumstances which would lead to a more flexible application of this principle. Among these circumstances may be noted the clearly universal character of the United Nations under whose auspices the Convention was concluded, and the very wide degree of participation envisaged by Article XI of the Convention. Extensive participation in conventions of this type has already given rise to greater flexibility in the international practice concerning multilateral conventions. More general resort to reservations, very great allowance made for tacit assent to reservations, the existence of practices which go so far as to admit that the author of reservations

which have been rejected by certain contracting parties is nevertheless to be regarded as a party to the convention in relation to those contracting parties that have accepted the reservations—all these factors are manifestations of a new need for flexibility in the operation of multilateral conventions.

It must also be pointed out that although the Genocide Convention was finally approved unanimously, it is nevertheless the result of a series of majority votes. The majority principle, while facilitating the conclusion of multilateral conventions, may also make it necessary for certain States to make reservations. This observation is confirmed by the great number of reservations which have been made of recent years to multilateral conventions.

In this state of international practice, it could certainly not be inferred from the absence of an article providing for reservations in a multilateral convention that the contracting States are prohibited from making certain reservations. Account should also be taken of the fact that the absence of such an article or even the decision not to insert such an article can be explained by the desire not to invite a multiplicity of reservations. The character of a multilateral convention, its purpose, provisions, mode of preparation and adoption, are factors which must be considered in determining, in the absence of any express provision on the subject, the possibility of making reservations, as well as their validity and effect.

Although it was decided during the preparatory work not to insert a special article on reservations, it is none the less true that the faculty for States to make reservations was contemplated at successive stages of the drafting of the Convention. In this connection, the following passage may be quoted from the comments on the draft Convention prepared by the Secretary-General: ".... (1) It would seem that reservations of a general scope have no place in a convention of this kind which does not deal with the private interests of a State, but with the preservation of an element of international order.... ; (2) perhaps in the course of discussion in the General Assembly it will be possible to allow certain limited reservations."

Even more decisive in this connection is the debate on reservations in the Sixth Committee at the meetings (December 1st and 2nd, 1948) which immediately preceded the adoption of the Genocide Convention by the General Assembly. Certain delegates clearly announced that their governments could only sign or ratify the Convention subject to certain reservations.

Furthermore, the faculty to make reservations to the Convention appears to be implicitly admitted by the very terms of Question I.

The Court recognizes that an understanding was reached within the General Assembly on the faculty to make reservations

to the Genocide Convention and that it is permitted to conclude therefrom that States becoming parties to the Convention gave their assent thereto. It must now determine what kind of reservations may be made and what kind of objections may be taken to them.

The solution of these problems must be found in the special characteristics of the Genocide Convention. The origins and character of that Convention, the objects pursued by the General Assembly and the contracting parties, the relations which exist between the provisions of the Convention, *inter se*, and between those provisions and these objects, furnish elements of interpretation of the will of the General Assembly and the parties. The origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as "a crime under international law" involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations (Resolution 96 (I) of the General Assembly, December 11th 1946). The first consequence arising from this conception is that the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation. A second consequence 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). The Genocide Convention was therefore intended by the General Assembly and by the contracting parties to be definitely universal in scope. It was in fact approved on December 9th, 1948, by a resolution which was unanimously adopted by fifty-six States.

The objects of such a convention must also be considered. The Convention was manifestly adopted for a purely humanitarian and civilizing purpose. It is indeed difficult to imagine a convention that might have this dual character to a greater degree, since its object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality. In such a convention the contracting States do not have any interests of their own ; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties. The high ideals which inspired the Convention provide, by virtue of the common will of the parties, the foundation and measure of all its provisions.

The foregoing considerations, when applied to the question of reservations, and more particularly to the effects of objections to reservations, lead to the following conclusions.

The object and purpose of the Genocide Convention imply that it was the intention of the General Assembly and of the States which adopted it that as many States as possible should participate. The complete exclusion from the Convention of one or more States would not only restrict the scope of its application, but would detract from the authority of the moral and humanitarian principles which are its basis. It is inconceivable that the contracting parties readily contemplated that an objection to a minor reservation should produce such a result. But even less could the contracting parties have intended to sacrifice the very object of the Convention in favour of a vain desire to secure as many participants as possible. The object and purpose of the Convention thus limit both the freedom of making reservations and that of objecting to them. It follows that it is the compatibility of a reservation with the object and purpose of the Convention that must furnish the criterion for the attitude of a State in making the reservation on accession as well as for the appraisal by a State in objecting to the reservation. Such is the rule of conduct which must guide every State in the appraisal which it must make, individually and from its own standpoint, of the admissibility of any reservation.

Any other view would lead either to the acceptance of reservations which frustrate the purposes which the General Assembly and the contracting parties had in mind, or to recognition that the parties to the Convention have the power of excluding from it the author of a reservation, even a minor one, which may be quite compatible with those purposes.

It has nevertheless been argued that any State entitled to become a party to the Genocide Convention may do so while making any reservation it chooses by virtue of its sovereignty. The Court cannot share this view. It is obvious that so extreme an application of the idea of State sovereignty could lead to a complete disregard of the object and purpose of the Convention.

On the other hand, it has been argued that there exists a rule of international law subjecting the effect of a reservation to the express or tacit assent of all the contracting parties. This theory rests essentially on a contractual conception of the absolute integrity of the convention as adopted. This view, however, cannot prevail if, having regard to the character of the convention, its purpose and its mode of adoption, it can be established that the parties intended to derogate from that rule by admitting the faculty to make reservations thereto.

It does not appear, moreover, that the conception of the absolute integrity of a convention has been transformed into a rule of international law. The considerable part which tacit assent has always played in estimating the effect which is to be given to reservations

scarcely permits one to state that such a rule exists, determining with sufficient precision the effect of objections made to reservations. In fact, the examples of objections made to reservations appear to be too rare in international practice to have given rise to such a rule. It cannot be recognized that the report which was adopted on the subject by the Council of the League of Nations on June 17th, 1927, has had this effect. At best, the recommendation made on that date by the Council constitutes the point of departure of an administrative practice which, after being observed by the Secretariat of the League of Nations, imposed itself, so to speak, in the ordinary course of things on the Secretary-General of the United Nations in his capacity of depositary of conventions concluded under the auspices of the League. But it cannot be concluded that the legal problem of the effect of objections to reservations has in this way been solved. The opinion of the Secretary-General of the United Nations himself is embodied in the following passage of his report of September 21st, 1950 : "While it is universally recognized that the consent of the other governments concerned must be sought before they can be bound by the terms of a reservation, there has not been unanimity either as to the procedure to be followed by a depositary in obtaining the necessary consent or as to the legal effect of a State's objecting to a reservation."

It may, however, be asked whether the General Assembly of the United Nations, in approving the Genocide Convention, had in mind the practice according to which the Secretary-General, in exercising his functions as a depositary, did not regard a reservation as definitively accepted until it had been established that none of the other contracting States objected to it. If this were the case, it might be argued that the implied intention of the contracting parties was to make the effectiveness of any reservation to the Genocide Convention conditional on the assent of all the parties.

The Court does not consider that this view corresponds to reality. It must be pointed out, first of all, that the existence of an administrative practice does not in itself constitute a decisive factor in ascertaining what views the contracting States to the Genocide Convention may have had concerning the rights and duties resulting therefrom. It must also be pointed out that there existed among the American States members both of the United Nations and of the Organization of American States, a different practice which goes so far as to permit a reserving State to become a party irrespective of the nature of the reservations or of the objections raised by other contracting States. The preparatory work of the Convention contains nothing to justify the statement that the contracting States implicitly had any definite practice in mind. Nor is there any such indication in the subsequent attitude of the contracting States : neither the reservations made by certain States nor the position adopted by other States towards those reservations permit

the conclusion that assent to one or the other of these practices had been given. Finally, it is not without interest to note, in view of the preference generally said to attach to an established practice, that the debate on reservations to multilateral treaties which took place in the Sixth Committee at the fifth session of the General Assembly reveals a profound divergence of views, some delegations being attached to the idea of the absolute integrity of the Convention, others favouring a more flexible practice which would bring about the participation of as many States as possible.

It results from the foregoing considerations that Question I, on account of its abstract character, cannot be given an absolute answer. The appraisal of a reservation and the effect of objections that might be made to it depend upon the particular circumstances of each individual case.

* * *

Having replied to Question I, the Court will now examine Question II, which is framed as follows :

> "If the answer to Question I is in the affirmative, what is the effect of the reservation as between the reserving State and :
>
> *(a)* the parties which object to the reservation ?
> *(b)* those which accept it ?"

The considerations which form the basis of the Court's reply to Question I are to a large extent equally applicable here. As has been pointed out above, each State which is a party to the Convention is entitled to appraise the validity of the reservation, and it exercises this right individually and from its own standpoint. As no State can be bound by a reservation to which it has not consented, it necessarily follows that each State objecting to it will or will not, on the basis of its individual appraisal within the limits of the criterion of the object and purpose stated above, consider the reserving State to be a party to the Convention. In the ordinary course of events, such a decision will only affect the relationship between the State making the reservation and the objecting State ; on the other hand, as will be pointed out later, such a decision might aim at the complete exclusion from the Convention in a case where it was expressed by the adoption of a position on the jurisdictional plane.

The disadvantages which result from this possible divergence of views—which an article concerning the making of reservations could have obviated—are real ; they are mitigated by the common duty of the contracting States to be guided in their judgment by the compatibility or incompatibility of the reservation with the

object and purpose of the Convention. It must clearly be assumed that the contracting States are desirous of preserving intact at least what is essential to the object of the Convention; should this desire be absent, it is quite clear that the Convention itself would be impaired both in its principle and in its application.

It may be that the divergence of views between parties as to the admissibility of a reservation will not in fact have any consequences. On the other hand, it may be that certain parties who consider that the assent given by other parties to a reservation is incompatible with the purpose of the Convention, will decide to adopt a position on the jurisdictional plane in respect of this divergence and to settle the dispute which thus arises either by special agreement or by the procedure laid down in Article IX of the Convention.

Finally, it may be that a State, whilst not claiming that a reservation is incompatible with the object and purpose of the Convention, will nevertheless object to it, but that an understanding between that State and the reserving State will have the effect that the Convention will enter into force between them, except for the clauses affected by the reservation.

Such being the situation, the task of the Secretary-General would be simplified and would be confined to receiving reservations and objections and notifying them.

* * *

Question III is framed in the following terms:

> "What would be the legal effect as regards the answer to Question I if an objection to a reservation is made:
>
> *(a)* By a signatory which has not yet ratified?
> *(b)* By a State entitled to sign or accede but which has not yet done so?"

The Court notes that the terms of this question link it to Question I. This link is regarded by certain States as presupposing a negative reply to Question I.

The Court considers, however, that Question III could arise in any case. Even should the reply to Question I not tend to exclude, from being a party to the Convention, a State which has made a reservation to which another State has objected, the fact remains that the Convention does not enter into force as between the reserving State and the objecting State. Even if the objection has this reduced legal effect, the question would still arise whether the States mentioned under *(a)* and *(b)* of Question III are entitled to bring about such a result by their objection.

An extreme view of the right of such States would appear to be that these two categories of States have a *right to become* parties to

the Convention, and that by virtue of this right they may object to reservations in the same way as any State which is a party to the Convention with full legal effect, i.e. the exclusion from the Convention of the reserving State. By denying them this right, it is said, they would be obliged either to renounce entirely their right of participating in the Convention, or to become a party to what is, in fact, a different convention. The dilemma does not correspond to reality, as the States concerned have always a right to be parties to the Convention in their relations with other contracting States.

From the date when the Genocide Convention was opened for signature, any Member of the United Nations and any non-member State to which an invitation to sign had been addressed by the General Assembly, had the *right to be a party* to the Convention. Two courses of action were possible to this end : either signature, from December 9th, 1948, until December 31st, 1949, followed by ratification, or accession as from January 1st, 1950 (Article XI of the Convention). The Court would point out that the right to become a party to the Convention does not express any very clear notion. It is inconceivable that a State, even if it has participated in the preparation of the Convention, could, before taking one or the other of the two courses of action provided for becoming a party to the Convention, exclude another State. Possessing no rights which derive from the Convention, that State cannot claim such a right from its status as a Member of the United Nations or from the invitation to sign which has been addressed to it by the General Assembly.

The case of a signatory State is different. Without going into the question of the legal effect of signing an international convention, which necessarily varies in individual cases, the Court considers that signature constitutes a first step to participation in the Convention.

It is evident that without ratification, signature does not make the signatory State a party to the Convention ; nevertheless, it establishes a provisional status in favour of that State. This status may decrease in value and importance after the Convention enters into force. But, both before and after the entry into force, this status would justify more favourable treatment being meted out to signatory States in respect of objections than to States which have neither signed nor acceded.

As distinct from the latter States, signatory States have taken certain of the steps necessary for the exercise of the right of being a party. Pending ratification, the provisional status created by signature confers upon the signatory a right to formulate as a precautionary measure objections which have themselves a provisional character. These would disappear if the signature were not followed by ratification, or they would become effective on ratification.

Until this ratification is made, the objection of a signatory State can therefore not have an immediate legal effect in regard to the reserving State. It would merely express and proclaim the eventual attitude of the signatory State when it becomes a party to the Convention.

The legal interest of a signatory State in objecting to a reservation would thus be amply safeguarded. The reserving State would be given notice that as soon as the constitutional or other processes, which cause the lapse of time before ratification, have been completed, it would be confronted with a valid objection which carries full legal effect and consequently, it would have to decide, when the objection is stated, whether it wishes to maintain or withdraw its reservation. In the circumstances, it is of little importance whether the ratification occurs within a more or less long time-limit. The resulting situation will always be that of a ratification accompanied by an objection to the reservation. In the event of no ratification occurring, the notice would merely have been in vain.

For these reasons,

THE COURT IS OF OPINION,

In so far as concerns the Convention on the Prevention and Punishment of the Crime of Genocide, in the event of a State ratifying or acceding to the Convention subject to a reservation made either on ratification or on accession, or on signature followed by ratification,

*On Question I :*

by seven votes to five,

that a State which has made and maintained a reservation which has been objected to by one or more of the parties to the Convention but not by others, can be regarded as being a party to the Convention if the reservation is compatible with the object and purpose of the Convention ; otherwise, that State cannot be regarded as being a party to the Convention.

*On Question II :*

by seven votes to five,

*(a)* that if a party to the Convention objects to a reservation which it considers to be incompatible with the object and purpose of the Convention, it can in fact consider that the reserving State is not a party to the Convention ;

*(b)* that if, on the other hand, a party accepts the reservation as being compatible with the object and purpose of the Convention,

it can in fact consider that the reserving State is a party to the Convention ;

*On Question III:*

by seven votes to five,

*(a)* that an objection to a reservation made by a signatory State which has not yet ratified the Convention can have the legal effect indicated in the reply to Question I only upon ratification. Until that moment it merely serves as a notice to the other State of the eventual attitude of the signatory State ;

*(b)* that an objection to a reservation made by a State which is entitled to sign or accede but which has not yet done so, is without legal effect.

Done in French and English, the French text being authoritative, at the Peace Palace, The Hague, this twenty-eight day of May, one thousand nine hundred and fifty-one, in two copies, one of which will be placed in the archives of the Court and the other transmitted to the Secretary-General of the United Nations.

*(Signed)* BASDEVANT,
President.

*(Signed)* E. HAMBRO,
Registrar.

Vice-President GUERRERO, Judges Sir Arnold MCNAIR, READ and HSU MO, while agreeing that the Court has competence to give an Opinion, declare that they are unable to concur in the Opinion of the Court and have availed themselves of the right conferred on them by Articles 57 and 68 of the Statute and appended to the Opinion the common statement of their dissenting opinion.

Judge ALVAREZ, declaring that he is unable to concur in the Opinion of the Court, has availed himself of the right conferred on him by Articles 57 and 68 of the Statute and has appended to the Opinion the statement of his dissenting opinion.

*(Initialled)* J. B.

*(Initialled)* E. H.

# ANNEX

## LIST OF DOCUMENTS SUBMITTED TO THE COURT

### I.—DOCUMENTS SUBMITTED DURING THE WRITTEN PROCEEDINGS

#### A.—DOCUMENTS SUBMITTED BY THE SECRETARY-GENERAL OF THE UNITED NATIONS

**(a) Documents transmitted with the Request** (Article 65, para. 2, of the Statute)

(I) RECORDS OF THE GENERAL ASSEMBLY, 5TH SESSION

α—*Inclusion of the Item in the Agenda* (Records of the proceedings)

1. Records of the General Committee : 69th meeting.
   *Idem*, 70th meeting.
2. Records of the General Assembly : 285th plenary meeting.

β—*Inclusion of the Item in the Agenda* (*documents*)

3. Adoption of the Agenda of the 5th Session and allocation of items to Committees : Report of the General Committee (extract).
4. Allocation of items on the Agenda of the 5th Session : Letter dated September 26th, 1950, from the President of the General Assembly to the Chairman of the 6th Committee (extract).

(II) DISCUSSION IN THE 6TH COMMITTEE AND THE GENERAL ASSEMBLY (RECORDS OF THE PROCEEDINGS)

*6th Committee :*

5. 217th meeting.
6. 218th meeting.
7. 219th meeting.
8. 220th meeting.
9. 221st meeting.
10. 222nd meeting.
11. 223rd meeting.
12. 224th meeting.
13. 225th meeting.
14. Corrections to the summary records of the 221st, 222nd and 225th meetings.

*General Assembly :*

15. 305th plenary meeting.

(III) DISCUSSION IN THE 6TH COMMITTEE AND THE GENERAL ASSEMBLY (DOCUMENTS)

16. Report of the Secretary-General to the Assembly (first phase).
17. United States of America : draft resolution.
18. United States of America : revised draft resolution.
19. United Kingdom : amendments to the draft resolution submitted by the United States of America.
20. Uruguay : amendments to the draft resolution submitted by the United States of America.
21. Uruguay : memorandum.
22. France : amendments to the draft resolution submitted by the United States of America.
23. Iran : amendments to the draft resolution submitted by the United States of America.
24. Chile : amendment to the draft resolution amended by Uruguay.
25. Sweden : amendment to the United Kingdom amendments to the draft resolution submitted by the United States of America.
26. Note by the Secretary-General.
27. Note by the Secretary-General (addendum).
28. Egypt, France, Greece, Iran, United Kingdom : joint draft resolution.
29. Belgium, Denmark, Netherlands, Norway, Sweden : amendment to the joint draft resolution submitted by Egypt, France, Greece, Iran, United Kingdom.
30. Belgium, Chile, Denmark, Egypt, France, Greece, Iran, Netherlands, Norway, Sweden, United Kingdom, United States of America, Uruguay : joint draft resolution replacing the foregoing documents.
31. Union of Soviet Socialist Republics : amendment to the joint draft resolution of Belgium, Chile, Denmark, Egypt, France, Greece, Iran, Netherlands, Norway, Sweden, United Kingdom, United States of America and Uruguay.
32. Report of the Sixth Committee to the General Assembly (final phase).
33. Belgium, Chile, Denmark, Egypt, France, Greece, Iran, Netherlands, Norway, Sweden, United Kingdom, United States of America, Uruguay : amendment to the draft resolution submitted by the Sixth Committee.
34. Resolution adopted by the General Assembly at its 305th plenary meeting on 16 November, 1950.

**(b) Documents annexed to the written statement**

| | Annexed document number | |
|---|---|---|
| | English | French |
| Comments by Governments on the Draft Convention prepared by the Secretariat. Communications from non-governmental Organizations | | 138 |
| Report of the *Ad Hoc* Committee on Genocide | | 139 |
| Summary Record of the 26th meeting of the *Ad Hoc* Committee on Genocide | | 140 |
| Report of the Sixth Committee | | 141 |
| The *Ad Hoc* Committee on Genocide: Final provisions | | 142 |
| *Ad Hoc* Committee on Genocide. Summary Record of the 23rd meeting | | 143 |
| Genocide. Draft Convention and Report of the Economic and Social Council. Amendment | | 144 |
| Genocide. Draft Convention and Report of the Economic and Social Council. Amendments | | 145 |
| *Ad Hoc* Committee on Genocide. Summary Record of the 20th Meeting | | 146 |
| *Ad Hoc* Committee on Genocide. Summary Record of the 24th Meeting | | 147 |
| Genocide. Draft Convention and Report of the Economic and Social Council. Amendments | | 148 |
| U.S.S.R.: amendments to the draft convention on the prevention and punishment of genocide proposed by the Sixth Committee | | 149 |
| Ukrainian S.S.R.: amendment to the United Kingdom proposal for the addition to the Draft Convention on Genocide of a new article extending the application of the Convention to territories in regard to which any State performs the functions of the governing and administering authority | | 150 |
| Official Records of the Third Session of the General Assembly. Part I. Plenary Meetings of the General Assembly. Summary Records of Meetings. 21 September-12 December, 1948 | | 151 |
| Official Records of the Third Session of the General Assembly. Part I. Legal Questions. Sixth Committee. Summary Records of Meetings. 21 September-10 December, 1948 | | 152 |
| *Idem.* Annexes | | 153 |

B.—DOCUMENTS SUBMITTED BY THE INTERNATIONAL LABOUR ORGANIZATION

(I) Constitution of the International Labour Organization.

(II) Conventions and recommendations 1919-1949 (volume containing conventions and recommendations adopted by the International Labour Conference from 1919 to 1949).

(III) Official correspondence concerning the ratification of certain international labour conventions.

**(a) Poland**

1. Letter of June 16th, 1920, from the Minister of Labour of Poland to the Director of the I.L.O.
2. Reply from the Director of the I.L.O. to the Minister of Labour of Poland, July 10th, 1920.
3. Summary of the above correspondence as communicated to the Members of the Organization in the "Official Bulletin of the International Labour Office".

**(b) India**

1. Extract from a letter from the Secretary of State for India to the Secretary-General of the League of Nations, July 12th, 1921.
2. Extract from the reply of the Acting Secretary-General of the League of Nations to the Secretary of State for India of July 22nd, 1921.
3. Letter from the Director of the International Labour Office to the Secretary of State for India of September 24th, 1921.

**(c) Cuba**

1. Letter from the Secretary-General of the League of Nations to the Director of the International Labour Office of July 11th, 1928.
2. Letter from the Director of the I.L.O. to the Secretary-General of the League of Nations of July 31st, 1928.
3. Letter from the Secretary-General of the League of Nations to the Director of the I.L.O., August 23rd, 1928.
4. Letter from the Director of the I.L.O. to the Under-Secretary of State for Foreign Affairs of Cuba, August 3rd, 1928.
5. Letter from the Director of the I.L.O. to the Secretary for Agriculture, Commerce and Labour of Cuba of August 3rd, 1928.
6. Letter from the Under-Secretary of State for Foreign Affairs of Cuba to the Director of the I.L.O., February 20th, 1930.

**(d) Peru**

1. Decision of the Peruvian Government dated 6th March, 1936.

2. Letter from the Acting Director of the I.L.O. to the Minister for Foreign Affairs of Peru, May 15th, 1936.
3. Reply from the Minister for External Relations of Peru, 8th July, 1936.

(IV) *Memorandum submitted by the Director of the I.L.O. to the Committee of Experts for the progressive codification of international law and extract from the report submitted by the Committee to the Council of the League of Nations, 1927.*

*(a)* Text of the Memorandum submitted by the Director of the I.L.O. to the Committee of Experts for the progressive codification of international law.

*(b)* Extract from the report by the Committee of Experts for the progressive codification of international law concerning the admissibility of reservations to general conventions, submitted to the Council of the League of Nations, June 15th, 1927.

*(c)* Extract from the Resolution adopted by the Council of the League of Nations on June 17th, 1927.

(V) *Extract from the report submitted to the Governing Body of the I.L.O., at its 60th session (Madrid, October 1932), by its Standing Orders Committee, and document submitted by the I.L.O. to the Committee.*

*(a)* Extract from the report of the Standing Orders Committee.

*(b)* Document submitted by the I.L.O. to the Standing Orders Committee.

(VI) *Communications from the I.L.O. to the Secretary-General of the United Nations concerning the registration of international labour conventions.*

*(a)* Letter from the Legal Adviser of the I.L.O. to the Secretary-General of the United Nations dated 10th August, 1949.

*(b)* Letter from the Legal Adviser of the I.L.O. to the Secretary-General of the United Nations dated 27th June, 1950.

(VII) *Examples of ratifications of International Labour Conventions subject to suspensive conditions, geographical limitations and understandings which have not been regarded as constituting reservations.*

*(a)* Example of ratification subject to suspensive conditions:

1. Conditional ratification by the United Kingdom of Great Britain and Northern Ireland of the Convention concerning the simplification of the inspection of emigrants on board ship, 1926 (Convention No. 21).

*(b)* Examples of ratifications subject to geographical limitations:

1. Formal ratification by India of the conventions concerning workmen's compensation for occupational diseases, 1925 (Convention No. 18), and equality of treatment for national and foreign workers as regards workmen's compensation for accidents, 1925 (Convention No. 19).
2. Formal ratification by Australia of certain International Labour Conventions.

3. Formal ratification by the United Kingdom of Great Britain and Northern Ireland of the Convention concerning Freedom of Association and Protection of the Right to organize, 1948 (Convention No. 87).

*(c)* Examples of ratifications subject to understandings which have not been regarded as constituting reservations:

1. Formal ratification by the United Kingdom of Great Britain and Northern Ireland of the Convention concerning seamen's Articles of Agreement, 1926 (Convention No. 22).

2. Formal ratification by India of the Convention concerning seamen's Articles of Agreement, 1926 (Convention No. 22).

3. Formal ratification by Australia of the Convention concerning hours of work on board ship and manning, 1936 (Convention No. 57).

4. Formal ratification by the United States of America of the Conventions concerning the minimum requirement of professional capacity for masters and officers on board merchant ships, 1936 (Convention No. 53); concerning annual holidays with pay for seamen, 1936 (Convention No. 54); concerning the liability of the shipowner in case of sickness, injury or death of seamen, 1936 (Convention No. 55); concerning hours of work on board ship and manning, 1936 (Convention No. 57); fixing the minimum age for the admission of children to employment at sea (revised 1936) (Convention No. 58).

## II.—DOCUMENTS SUBMITTED DURING THE ORAL PROCEEDINGS

### A.—DOCUMENTS SUBMITTED BY THE SECRETARY-GENERAL OF THE UNITED NATIONS

(1) Report on the Law of Treaties compiled by Professor Brierley for the International Law Commission.

(2) Analytical Report of the 53rd Meeting of the Commission.

(3) Report of the International Law Commission on the proceedings of the 2nd Session (June-July, 1950).

(4) Letter from the Assistant Secretary-General, Legal Department, of February 5th, 1951, regarding communication from Ecuador.

(5) Letter from the Assistant Secretary-General, Legal Department, of February 5th, 1951, regarding communication from Ecuador.

(6) Letter from the Minister for Foreign Affairs of Iran to the Secretary General of January 15th, 1951.

(7) Letter from the Assistant Secretary-General, Legal Department, to the Minister for Foreign Affairs of Iran.

(8) Letter from the Assistant Secretary-General, Legal Department, of February 28th, 1951, regarding communications by Australia.

(9) Letter from the Acting Permanent Australian Representative to the United Nations to the Secretary-General of March 19th, 1951.

(10) Letter from the Permanent Secretary, Ministry for Foreign Affairs, Ceylon, to the Assistant Secretary-General, Legal Department, of January 27th, 1951.

(11) Letter from the Assistant Secretary-General, Legal Department, to the Minister for External Affairs, Ceylon, of March 5th, 1951.

(12) Letter from the Assistant Secretary-General, Legal Department, on the communication from Ceylon, March 7th, 1951.

(13) Letter from the Norwegian Permanent Delegation to the United Nations to the Assistant Secretary-General, Legal Department, February 9th, 1951.

(14) Letter from the Assistant Secretary-General, Legal Department, to the Permanent Representative of Norway to the United Nations, February 16th, 1951.

B.--DOCUMENTS SUBMITTED BY THE REPRESENTATIVE OF ISRAEL

(1) Translation into English of the Israel Crime of Genocide (prevention and punishhment) law. 5710-1950.

(2) "The Genocide Convention, its Origin and Interpretation", by Nehemiah Robinson. 1949. Institute of Jewish Affairs of the World Jewish Congress.

C.—CORRESPONDENCE ADRESSED TO THE REGISTRY BY THE AUSTRALIAN EMBASSY AT THE HAGUE, AND THE CHARGÉ D'AFFAIRES, PHILIPPINES MISSION TO THE UNITED NATIONS

(1) Letter from the Australian Embassy at The Hague to the Registrar, April 3rd, 1951.

(2) Telegram from the Chargé d'affaires, Philippines Mission to the United Nations, to the Registrar, April 6th, 1951.

# Annex 42

## CHAPTER IV

## HUMAN RIGHTS

### 1. CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE

***Paris, 9 December 1948[1]***

**ENTRY INTO FORCE:** 12 January 1951, in accordance with article XIII.

**REGISTRATION:** 12 January 1951, No. 1021.

**STATUS:** Signatories: 41. Parties: 153.

**TEXT:** United Nations, *Treaty Series*, vol. 78, p. 277.

| *Participant[2]* | *Signature* | *Accession(a), Succession(d), Ratification* |
|---|---|---|
| Afghanistan | | 22 Mar 1956 a |
| Albania | | 12 May 1955 a |
| Algeria | | 31 Oct 1963 a |
| Andorra | | 22 Sep 2006 a |
| Antigua and Barbuda | | 25 Oct 1988 d |
| Argentina[3] | | 5 Jun 1956 a |
| Armenia | | 23 Jun 1993 a |
| Australia | 11 Dec 1948 | 8 Jul 1949 |
| Austria | | 19 Mar 1958 a |
| Azerbaijan | | 16 Aug 1996 a |
| Bahamas | | 5 Aug 1975 d |
| Bahrain | | 27 Mar 1990 a |
| Bangladesh | | 5 Oct 1998 a |
| Barbados | | 14 Jan 1980 a |
| Belarus | 16 Dec 1949 | 11 Aug 1954 |
| Belgium | 12 Dec 1949 | 5 Sep 1951 |
| Belize | | 10 Mar 1998 a |
| Benin | | 2 Nov 2017 a |
| Bolivia (Plurinational State of) | 11 Dec 1948 | 14 Jun 2005 |
| Bosnia and Herzegovina[2,4] | | 29 Dec 1992 d |
| Brazil | 11 Dec 1948 | 15 Apr 1952 |
| Bulgaria | | 21 Jul 1950 a |
| Burkina Faso | | 14 Sep 1965 a |
| Burundi | | 6 Jan 1997 a |
| Cabo Verde | | 10 Oct 2011 a |
| Cambodia | | 14 Oct 1950 a |
| Canada | 28 Nov 1949 | 3 Sep 1952 |
| Chile | 11 Dec 1948 | 3 Jun 1953 |
| China[5,6,7] | 20 Jul 1949 | 18 Apr 1983 |
| Colombia | 12 Aug 1949 | 27 Oct 1959 |
| Comoros | | 27 Sep 2004 a |
| Costa Rica | | 14 Oct 1950 a |
| Côte d'Ivoire | | 18 Dec 1995 a |
| Croatia[2] | | 12 Oct 1992 d |
| Cuba[8] | 28 Dec 1949 | 4 Mar 1953 |
| Cyprus[9] | | 29 Mar 1982 a |
| Czech Republic[10] | | 22 Feb 1993 d |
| Democratic People's Republic of Korea | | 31 Jan 1989 a |
| Democratic Republic of the Congo | | 31 May 1962 d |
| Denmark | 28 Sep 1949 | 15 Jun 1951 |
| Dominica | | 13 May 2019 a |
| Dominican Republic | 11 Dec 1948 | |
| Ecuador | 11 Dec 1948 | 21 Dec 1949 |
| Egypt | 12 Dec 1948 | 8 Feb 1952 |
| El Salvador | 27 Apr 1949 | 28 Sep 1950 |
| Estonia | | 21 Oct 1991 a |
| Ethiopia | 11 Dec 1948 | 1 Jul 1949 |
| Fiji | | 11 Jan 1973 d |
| Finland | | 18 Dec 1959 a |
| France | 11 Dec 1948 | 14 Oct 1950 |
| Gabon | | 21 Jan 1983 a |
| Gambia | | 29 Dec 1978 a |
| Georgia | | 11 Oct 1993 a |
| Germany[11,12,13] | | 24 Nov 1954 a |

| *Participant*[2] | *Signature* | *Accession(a), Succession(d), Ratification* |
|---|---|---|
| Ghana | | 24 Dec 1958 a |
| Greece | 29 Dec 1949 | 8 Dec 1954 |
| Guatemala | 22 Jun 1949 | 13 Jan 1950 |
| Guinea | | 7 Sep 2000 a |
| Guinea-Bissau | | 24 Sep 2013 a |
| Haiti | 11 Dec 1948 | 14 Oct 1950 |
| Honduras | 22 Apr 1949 | 5 Mar 1952 |
| Hungary | | 7 Jan 1952 a |
| Iceland | 14 May 1949 | 29 Aug 1949 |
| India | 29 Nov 1949 | 27 Aug 1959 |
| Iran (Islamic Republic of) | 8 Dec 1949 | 14 Aug 1956 |
| Iraq | | 20 Jan 1959 a |
| Ireland | | 22 Jun 1976 a |
| Israel | 17 Aug 1949 | 9 Mar 1950 |
| Italy | | 4 Jun 1952 a |
| Jamaica | | 23 Sep 1968 a |
| Jordan | | 3 Apr 1950 a |
| Kazakhstan | | 26 Aug 1998 a |
| Kuwait | | 7 Mar 1995 a |
| Kyrgyzstan | | 5 Sep 1997 a |
| Lao People's Democratic Republic | | 8 Dec 1950 a |
| Latvia | | 14 Apr 1992 a |
| Lebanon | 30 Dec 1949 | 17 Dec 1953 |
| Lesotho | | 29 Nov 1974 a |
| Liberia | 11 Dec 1948 | 20 Jun 1950 |
| Libya | | 16 May 1989 a |
| Liechtenstein | | 24 Mar 1994 a |
| Lithuania | | 1 Feb 1996 a |
| Luxembourg | | 7 Oct 1981 a |
| Malawi | | 14 Jul 2017 a |
| Malaysia | | 20 Dec 1994 a |
| Maldives | | 24 Apr 1984 a |
| Mali | | 16 Jul 1974 a |
| Malta | | 6 Jun 2014 a |
| Mauritius | | 8 Jul 2019 a |
| Mexico | 14 Dec 1948 | 22 Jul 1952 |
| Monaco | | 30 Mar 1950 a |
| Mongolia | | 5 Jan 1967 a |
| Montenegro[14] | | 23 Oct 2006 d |
| Morocco | | 24 Jan 1958 a |
| Mozambique | | 18 Apr 1983 a |
| Myanmar | 30 Dec 1949 | 14 Mar 1956 |
| Namibia | | 28 Nov 1994 a |
| Nepal | | 17 Jan 1969 a |
| Netherlands (Kingdom of the) | | 20 Jun 1966 a |
| New Zealand[15] | 25 Nov 1949 | 28 Dec 1978 |
| Nicaragua | | 29 Jan 1952 a |
| Nigeria | | 27 Jul 2009 a |
| North Macedonia[2] | | 18 Jan 1994 d |
| Norway | 11 Dec 1948 | 22 Jul 1949 |
| Pakistan | 11 Dec 1948 | 12 Oct 1957 |
| Panama | 11 Dec 1948 | 11 Jan 1950 |
| Papua New Guinea | | 27 Jan 1982 a |
| Paraguay | 11 Dec 1948 | 3 Oct 2001 |
| Peru | 11 Dec 1948 | 24 Feb 1960 |
| Philippines | 11 Dec 1948 | 7 Jul 1950 |
| Poland | | 14 Nov 1950 a |
| Portugal[7] | | 9 Feb 1999 a |
| Republic of Korea | | 14 Oct 1950 a |
| Republic of Moldova | | 26 Jan 1993 a |
| Romania | | 2 Nov 1950 a |
| Russian Federation | 16 Dec 1949 | 3 May 1954 |
| Rwanda | | 16 Apr 1975 a |
| San Marino | | 8 Nov 2013 a |
| Saudi Arabia | | 13 Jul 1950 a |
| Senegal | | 4 Aug 1983 a |
| Serbia[4,16] | | 12 Mar 2001 a |
| Seychelles | | 5 May 1992 a |
| Singapore | | 18 Aug 1995 a |
| Slovakia[10] | | 28 May 1993 d |
| Slovenia[2] | | 6 Jul 1992 d |
| South Africa | | 10 Dec 1998 a |
| Spain | | 13 Sep 1968 a |
| Sri Lanka | | 12 Oct 1950 a |
| St. Vincent and the Grenadines | | 9 Nov 1981 a |
| State of Palestine | | 2 Apr 2014 a |
| Sudan | | 13 Oct 2003 a |
| Sweden | 30 Dec 1949 | 27 May 1952 |
| Switzerland | | 7 Sep 2000 a |
| Syrian Arab Republic | | 25 Jun 1955 a |
| Tajikistan | | 3 Nov 2015 a |
| Togo | | 24 May 1984 a |
| Tonga | | 16 Feb 1972 a |
| Trinidad and Tobago | | 13 Dec 2002 a |
| Tunisia | | 29 Nov 1956 a |

| *Participant*[2] | *Signature* | *Accession(a), Succession(d), Ratification* |
|---|---|---|
| Türkiye | | 31 Jul 1950 a |
| Turkmenistan | | 26 Dec 2018 a |
| Uganda | | 14 Nov 1995 a |
| Ukraine | 16 Dec 1949 | 15 Nov 1954 |
| United Arab Emirates | | 11 Nov 2005 a |
| United Kingdom of Great Britain and Northern Ireland | | 30 Jan 1970 a |
| United Republic of Tanzania | | 5 Apr 1984 a |
| United States of America | 11 Dec 1948 | 25 Nov 1988 |
| Uruguay | 11 Dec 1948 | 11 Jul 1967 |
| Uzbekistan | | 9 Sep 1999 a |
| Venezuela (Bolivarian Republic of) | | 12 Jul 1960 a |
| Viet Nam[17,18] | | 9 Jun 1981 a |
| Yemen[19] | | 6 Apr 1989 a |
| Zambia | | 20 Apr 2022 a |
| Zimbabwe | | 13 May 1991 a |

## *Declarations and Reservations*

***(Unless otherwise indicated, the declarations and reservations were made upon ratification, accession or succession. For objections thereto and territorial applications see hereinafter.)***

### ALBANIA[20]

...

*As regards article XII:* The People's Republic of Albania declares that it is not in agreement with article XII of the Convention and considers that all the provisions of the Convention should extend to Non-Self-Governing Territories, including Trust Territories.

### ALGERIA

The Democratic and Popular Republic of Algeria does not consider itself bound by article IX of the Convention, which confers on the International Court of Justice jurisdiction in all disputes relating to the said Convention.

The Democratic and Popular Republic of Algeria declares that no provision of article VI of the said Convention shall be interpreted as depriving its tribunals of jurisdiction in cases of genocide or other acts enumerated in article III which have been committed in its territory or as conferring such jurisdiction on foreign tribunals.

International tribunals may, as an exceptional measure, be recognized as having jurisdiction, in cases in which the Algerian Government has given its express approval.

The Democratic and Popular Republic of Algeria declares that it does not accept the terms of article XII of the Convention and considers that all the provisions of the said Convention should apply to Non-Self-Governing Territories, including Trust Territories.

### ARGENTINA

*Ad article IX:* The Argentine Government reserves the right not to submit to the procedure laid down in this article any dispute relating directly or indirectly to the territories referred to in its reservation to article XII.

*Ad article XII:* If any other Contracting Party extends the application of the Convention to territories under the sovereignty of the Argentine Republic, this extension shall in no way affect the rights of the Republic.

### BAHRAIN[21,22]

"With reference to article IX of the Convention the Government of the State of Bahrain declares that, for the submission of any dispute in terms of this article to the jurisdiction of the International Court of Justice, the express consent of all the parties to the dispute is required in each case."

### BANGLADESH

"Article IX: For the submission of any dispute in terms of this article to the jurisdiction of the International Court of Justice, the consent of all parties to the dispute will be required in each case."

### BELARUS[23]

The Byelorussian SSR declares that it is not in agreement with article XII of the Convention and considers that all the provisions of the Convention should extend to non-self-governing territories, including trust territories.

### BULGARIA[24]

*As regards article XII:* The People's Republic of Bulgaria declares that it is not in agreement with article XII of the Convention and considers that all the provisions of the Convention should extend to Non-Self-Governing Territories, including Trust Territories.

### CHINA

1. The ratification to the said Convention by the Taiwan local authorities on 19 July 1951 in the name of China is illegal and therefore null and void.

2. The People's Republic of China does not consider itself bound by article IX of the said Convention.

### CZECH REPUBLIC[10]

### FINLAND[25]

### HUNGARY[26]

The Hungarian People's Republic reserves its rights with regard to the provisions of article XII which do not define the obligations of countries having colonies with regard to questions of colonial exploitation and to acts which might be described as genocide.

### INDIA

"With reference to article IX of the Convention, the Government of India declares that, for the submission of any dispute in terms of this article to the jurisdiction of the International Court of Justice, the consent of all the parties to the dispute is required in each case."

### MALAYSIA[27]

"That with reference to article IX of the Convention, before any dispute to which Malaysia is a party may be submitted to the jurisdiction of the International Court of Justice under this article, the specific consent of Malaysia is required in each case."

"That the pledge to grant extradition in accordance with a state's laws and treaties in force found in article VII extends only to acts which are criminal under the law of both the requesting and the requested state."

### MONGOLIA[28]

The Government of the Mongolian People's Republic declares that it is not in a position to agree with article XII of the Convention and considers that the provisions of the said article should be extended to non-self-governing territories, including trust territories.

The Government of the Mongolian People's Republic deems it appropriate to draw attention to the discriminatory character of article XI of the Convention, under the terms of which a number of States are precluded from acceding to the Convention and declares that the Convention deals with matters which affect the interests of all States and it should, therefore, be open for accession by all States.

### MONTENEGRO[14]

"The Federal Republic of Yugoslavia does not consider itself bound by Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide and, therefore, before any dispute to which the Federal Republic of Yugoslavia is a party may be validly submitted to the jurisdiction of the International Court of Justice under this Article, the specific and explicit consent of the FRY is required in each case."

### MOROCCO

With reference to article VI, the Government of His Majesty the King considers that Moroccan courts and tribunals alone have jurisdiction with respect to acts of genocide committed within the territory of the Kingdom of Morocco.

The competence of international courts may be admitted exceptionally in cases with respect to which the Moroccan Government has given its specific agreement.

With reference to article IX, the Moroccan Government states that no dispute relating to the interpretation, application or fulfilment of the present Convention can be brought before the International Court of Justice, without the prior agreement of the parties to the dispute.

### MYANMAR

"(1) With reference to article VI, the Union of Burma makes the reservation that nothing contained in the said Article shall be construed as depriving the Courts and Tribunals of the Union of jurisdiction or as giving foreign Courts and tribunals jurisdiction over any cases of genocide or any of the other acts enumerated in article III committed within the Union territory.

"(2) With reference to article VIII, the Union of Burma makes the reservation that the said article shall not apply to the Union."

### PHILIPPINES

"l. With reference to article IV of the Convention, the Philippine Government cannot sanction any situation which would subject its Head of State, who is not a ruler, to conditions less favorable than those accorded other Heads of State, whether constitutionally responsible rulers or not. The Philippine Government does not consider said article, therefore, as overriding the existing immunities from judicial processes guaranteed certain public officials by the Constitution of the Philippines.

"2. With reference to article VII of the Convention, the Philippine Government does not undertake to give effect to said article until the Congress of the Philippines has enacted the necessary legislation defining and punishing the crime of genocide, which legislation, under the Constitution of the Philippines, cannot have any retroactive effect.

"3. With reference to articles VI and IX of the Convention, the Philippine Government takes the position that nothing contained in said articles shall be construed as depriving Philippine courts of jurisdiction over all cases of genocide committed within Philippine territory save only in those cases where the Philippine Government consents to have the decision of the Philippine courts reviewed by either of the international tribunals referred to in said articles. With further reference to article IX of the Convention, the Philippine Government does not consider said article to extend the concept of State responsibility beyond that recognized by the generally accepted principles of international law."

### POLAND[29]

*As regards article XII:* Poland does not accept the provisions of this article, considering that the Convention should apply to Non-Self-Governing Territories, including Trust Territories.

### ROMANIA[30]

*As regards article XII:* The People's Republic of Romania declares that it is not in agreement with article XII of the Convention, and considers that all the provisions of the Convention should apply to the Non-Self-Governing Territories, including the Trust Territories.

### RUSSIAN FEDERATION[23]

The Union of Soviet Socialist Republics declares that it is not in agreement with article XII of the Convention and considers that all the provisions of the Convention should extend to Non-Self-Governing Territories, including Trust Territories.

### RWANDA[31]

### SERBIA[16,32]

"The Federal Republic of Yugoslavia does not consider itself bound by Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide and, therefore, before any dispute to which the Federal Republic of Yugoslavia is a party may be validly submitted to the jurisdiction of the International Court of Justice under this Article, the specific and explicit consent of the FRY is required in each case."

### SINGAPORE[27]

"That with reference to article IX of the Convention, before any dispute to which the Republic of Singapore is a party may be submitted to the jurisdiction of the International Court of Justice under this article, the

specific consent of the Republic of Singapore is required in each case."

### SLOVAKIA[10]

### SPAIN[33]

### UKRAINE[23]

The Ukrainian SSR declares that it is not in agreement with article XII of the Convention and considers that all the provisions of the Convention should extend to Non-Self-Governing Territories, including Trust Territories.

### UNITED ARAB EMIRATES

The Government of the State of the United Arab Emirates, having considered the aforementioned Convention and approved the contents thereof, formally declares its accession to the Convention and makes a reservation with respect to article 9 thereof concerning the submission of disputes arising between the Contracting Parties relating to the interpretation, application or fulfilment of this Convention, to the International Court of Justice, at the request of any of the parties to the dispute.

### UNITED STATES OF AMERICA[11]

"(1) That with reference to article IX of the Convention, be fore any dispute to which the United States is a party may be submitted to the jurisdiction of the International Court of Justice under this article, the specific consent of the United States is required in each case.

(2) That nothing in the Convention requires or authorizes legislation or other action by the United States of America prohibited by the Constitution of the United States as interpreted by the United States."

"(1) That the term `intent to destroy, in whole or in part, a national, ethnical, racial, or religious group as such' appearing in article II means the specific intent to destroy, in whole or in substantial part, a national, ethnical, racial or religious group as such by the acts specified in article II.

(2) That the term `mental harm' in article II (b) means permanent impairment of mental faculties through drugs, torture or similar techniques.

(3) That the pledge to grant extradition in accordance with a state's laws and treaties in force found in article VII extends only to acts which are criminal under the laws of both the requesting and the requested state and nothing in article VI affects the right of any state to bring to trial before its own tribunals any of its nationals for acts committed outside a state.

(4) That acts in the course of armed conflicts committed without the specific intent required by article II are not sufficient to constitute genocide as defined by this Convention.

(5) That with regard to the reference to an international penal tribunal in article VI of the Convention, the United States declares that it reserves the right to effect its participation in any such tribunal only by a treaty entered into specifically for that purpose with the advice and consent of the Senate."

### VENEZUELA (BOLIVARIAN REPUBLIC OF)

With reference to article VI, notice is given that any proceedings to which Venezuela may be a party before an international penal tribunal would be invalid without Venezuela's prior express acceptance of the jurisdiction of such international tribunal.

With reference to article VII, notice is given that the laws in force in Venezuela do not permit the extradition of Venezuelan nationals.

With reference to article IX, the reservation is made that the submission of a dispute to the International Court of Justice shall be regarded as valid only when it takes place with Venezuela's approval, signified by the express conclusion of a prior agreement in each case.

### VIET NAM

1. The Socialist Republic of Viet Nam does not consider itself bound by article IX of the Convention which provides the jurisdiction of the International Court of Justice in solving disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the Convention at the request of any of the parties to disputes. The Socialist Republic of Viet Nam is of the view that, regarding the jurisdiction of the International Court of Justice in solving disputes referred to in article IX of the Convention, the consent of the parties to the disputes except the criminals is diametrically necessary for the submission of a given dispute to the International Court of Justice for decision.

2. The Socialist Republic of Viet Nam does not accept article XII of the Convention and considers that all provisions of the Convention should also extend to Non-Self-Governing Territories, including Trust Territories.

3. The Socialist Republic of Viet Nam considers that article XI is of a discriminatory nature, depriving a number of States of the opportunity to become parties to the Convention, and holds that the Convention should be open for accession by all States.

### YEMEN[19]

In acceding to this Convention, the People's Democratic Republic of Yemen does not consider itself bound by article IX of the Convention, which provides that disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the Convention shall be submitted to the International Court of Justice at the request of any of the parties to the dispute. It declares that the competence of the International Court of Justice with respect to disputes concerning the interpretation, application or fulfilment of the Convention shall in each case be subject to the express consent of all parties to the dispute.

## *Objections*
## *(Unless otherwise indicated, the objections were made upon ratification, accession or succession.)*

### AUSTRALIA

"The Australian Government does not accept any of the reservations contained in the instrument of accession of the People's Republic of Bulgaria, or in the instrument of ratification of the Republic of the Philippines.

"The Australian Government does not accept any of the reservations made at the time of signature of the Convention by the Byelorussian Soviet Socialist Republic, Czechoslovakia, the Ukrainian Soviet Socialist Republic and the Union of Soviet Socialist Republics."

"The Australian Government does not accept the reservations contained in the instruments of accession of the Governments of Poland and Romania."

### BELGIUM

The Government of Belgium does not accept the reservations made by Bulgaria, Byelorussian Soviet Socialist Republic, Czechoslovakia, Poland, Romania, the Ukrainian Soviet Socialist Republic and the Union of Soviet Socialist Republics.

### BRAZIL[34,35]

The Government of Brazil objects to the reservations made to the Convention by Bulgaria, the Byelorussian Soviet Socialist Republic, Czechoslovakia, the Philippines, Poland, Romania, the Ukrainian Soviet Socialist Republic and the Union of Soviet Socialist Republics. The Brazilian Government considers the said reservations as incompatible with the object and purpose of the Convention.

The position taken by the Government of Brazil is founded on the Advisory Opinion of the International Court of Justice of 28 May 1951 and on the resolution adopted by the sixth session of the General Assembly on 12 January 1952, on reservations to multilateral conventions.

The Brazilian Government reserves the right to draw any such legal consequences as it may deem fit from its formal objection to the above-mentioned reservations.

### CHINA[34]

### CUBA[8]

### DENMARK

"In the view of the Government of Denmark this reservation is subject to general principle of treaty interpretation according to which a party may not invoke the provisions of its internal law as justification for failure to perform a treaty."

### ECUADOR

The Government of is not in agreement with the reservations made to article IX and XII of the Convention by the Governments of the Byelorussian Soviet Socialist Republic, Czechoslovakia, the Ukrainian Soviet Socialist Republic and the Union of Soviet Socialist Republics and, therefore, they do not apply to Ecuador which accepted without any modifications the integral text of the Convention.

*[Same communication, mutatis mutandis, in respect of the reservations made by Bulgaria.]*

The Government of Ecuador does not accept the reservations made by the Governments of Poland and Romania to articles IX and XII of the Convention.

### ESTONIA

"The Estonian Government objects to this reservation on the grounds that it creates uncertainty, as to the extent of the obligations the Government of the United States of America is prepared to assume with regard to the Convention. According to article 27 of the Vienna Convention on the Law of Treaties, no party may invoke the provisions of its domestic law as justification for failure to perform a treaty."

### FINLAND

"In the view of the Government of Finland this reservation is subject to the general principle of treaty interpretation according to which a party may not invoke the provisions of its internal law as justification for failure to perform a treaty."

### GREECE

We further declare that we have not accepted and do not accept any reservation which has already been made or which may hereafter be made by the countries signatory to this instrument or by countries which have acceded or may hereafter accede thereto.

The Government of the Hellenic Republic cannot accept the first reservation entered by the United States of America upon ratifying the Agreement on the Prevention and Punishment of the Crime of Genocide, for it considers such a reservation to be in compatible with the Convention.

*In respect of the second reservation formulated by the United States of America:*

*[Same objection mutatis mutandis, as the one made by Denmark.]*

### IRELAND

"The Government of Ireland is unable to accept the second reservation made by the United States of America on the occasion of its ratification of the [said] Convention on the grounds that as a generally accepted rule of international law a party to an international agreement may not, by invoking the terms of its internal law, purport to override the provisions of the Agreement."

### ITALY

The Government of the Republic of Italy objects to the second reservation entered by the United States of America. It creates uncertainty as to the extent of the obligations which the Government of the United States of America is prepared to assume with regard to the Convention."

### MEXICO

The Government of Mexico believes that the reservation made by the United States Government to article IX of the aforesaid Convention should be considered invalid because it is not in keeping with the object and purpose of the Convention, nor with the principle governing the interpretation of treaties whereby no State can invoke provisions of its domestic law as a reason for not complying with a treaty.

If the aforementioned reservation were applied, it would give rise to a situation of uncertainty as to the scope of the obligations which the United States Government would assume with respect to the Convention.

Mexico's objection to the reservation in question should not be interpreted as preventing the entry into force of the 1948 Convention between the [Mexican] Government and the United States Government.

### NETHERLANDS (KINGDOM OF THE)

"The Government of the Kingdom of the Netherlands declares that it considers the reservations made by Albania, Algeria, Bulgaria, the Byelorussian Soviet Socialist Republic, Czechoslovakia, Hungary, India, Morocco, Poland, Romania, the Ukrainian Soviet Socialist Republic and the Union of Soviet Socialist Republics in respect of article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, opened for signature at Paris on 9 December 1948, to be incompatible with the object and purpose of the Convention. The Government of the Kingdom of the Netherlands therefore does not deem any State which has made or which will make such reservation a party to the Convention."

"As concerns the first reservation, the Government of the Kingdom of the Netherlands recalls its declaration, made on 20 June 1966 on the occasion of the accession of the Kingdom of the Netherlands to the Convention [...] stating that in its opinion the reservations in respect of article IX of the Convention, made at that time by a number of states, were incompatible with the object and purpose of the Convention, and that the Government of the Kingdom of the Netherlands did not consider states making such reservations parties to the Convention. Accordingly, the Government of the Kingdom of the Netherlands does not consider the United States of America a party to the Convention. Similarly, the Government of the Kingdom of the Netherlands does not consider parties to the Convention other states which have made such reservations, i.e., in addition to the states mentioned in the aforementioned declaration, the People's Republic of China, Democratic Yemen, the German Democratic Republic, the Mongolian People's Republic, the Philippines, Rwanda, Spain, Venezuela, and Viet Nam, on the other hand, the Government of the Kingdom of the Netherlands does consider parties to theConvention those states that have since withdrawn their reservations, i.e., the Union of Soviet Socialist Republics, the Byelorussian Soviet Socialist Republic, and the Ukrainian Soviet Socialist Republic.

As the Convention may come into force between the Kingdom of the Netherlands and the United States of America as a result of the latter withdrawing its reservation in respect of article IX, the Government of the Kingdom of the Netherlands deems it useful to express the following position on the second reservation of the United States of America:

The Government of the Kingdom of the Netherlands objects to this reservation on the ground that it creates uncertainty as to the extent of the obligations the Government of the United States of America is prepared to assume with regard to the Convention. Moreover, any failure by the United States of America to act upon the obligations contained in the Convention on the ground that such action would be prohibited by the constitution of the United States would be contrary to the generally accepted rule of international law, as laid down in article 27 of the Vienna Convention on the law of treaties (Vienna, 23 May 1969)".

"The Government of the Kingdom of the Netherlands recalls its declaration made on 20 June 1966 on the occasion of the accession [to the said Convention].

*[See declaration made under "**Netherlands**"]*

Accordingly, the Government of the Netherlands declares that it considers the reservations made by Malaysia and Singapore in respect of article IX of the Convention incompatible with the object and purpose of the Convention. The Government of the Kingdom of the Netherlands does not consider Malaysia and Singapore Parties to the Convention.

On the other hand, the Government of the Kingdom of the Netherlands does consider Parties to the Convention those States that have since withdrawn their reservations in respect of article IX of the Convention, i.e., Hungary, Bulgaria and Mongolia."

### NORWAY

"The Norwegian Government does not accept the reservations made to the Convention by the Government of the Philippines at the time of ratification."

"In the view of the Government of Norway this reservation is subject to the general principle of treaty interpretation according to which a party may not invoke the provisions of its internal law as justification for failure to perform a treaty."

### SPAIN

Spain interprets the reservation entered by the United States of America to the Convention on the Prevention and Punishment of the Crime of Genocide adopted by the General Assembly of the United Nations on 9 December 1948 [...] to mean that legislation or other action by the United States of America will continue to be in accordance with the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.

### SRI LANKA

"The Government of Ceylon does not accept the reservations made by Romania to the Convention."

### SWEDEN

"The Government of Sweden is of the view that a State party to the Convention may not invoke the provisions of its national legislation, including the Constitution, to justify that it does not fulfil its obligations under the Convention and therefore objects to the reservation.

This objection does not constitute an obstacle to the entry into force of the Convention between Sweden and the United States of America."

### UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

"The Government of the United Kingdom do not accept the reservations to articles IV, VII, VIII, IX or XII of the Convention made by Albania, Algeria, Argentina, Bulgaria, Burma, the Byelorussian Soviet Socialist Republic, Czechoslovakia, Hungary, India, Mongolia, Morocco, the Philippines, Poland, Romania, Spain, the Ukrainian Soviet Socialist Republic, the Union of Soviet Socialist Republics or Venezuela."

" The Government of the United Kingdom of Great Britain and Northern Ireland have consistently stated that they are unable to accept reservations in respect of article IX of the said Convention; in their view this is not the kind of reservation which intending parties to the Convention have the right to make.

Accordingly, the Government of the United Kingdom do not accept the reservation entered by the Republic of Rwanda against article IX of the Convention. They also wish to place on record that they take the same view of the similar reservation made by the German Democratic Republic as notified by the circular letter [...] of 25 April 1973."

"The Government of the United Kingdom have [...] consistently stated that they are unable to accept reservations to [article IX]. Likewise, in conformity with the attitude adopted by them in previous cases, the Government of the United Kingdom do not accept the reservation entered by Viet Nam relating to article XII."

"The Government of the United Kingdom of Great Britain and Northern Ireland have consistently stated that they are unable to accept reservations in respect of article IX of the said Convention; in their view this is not the kind of reservation which intending parties to the Convention hve the right to make.

Accordingly the Government of the United Kingdom of Great Britain and Northern Ireland do not accept the reservation entered by the People's Democratic Republic of Yemen against article IX of the Convention."

"The Government of the United Kingdom have consistently stated that they are unable to accept reservations to article IX. Accordingly, in conformity with the attitude adopted by them in previous cases, the Government of the United Kingdom do not accept the first reservation entered by the United States of America.

The Government of the United Kingdom object to the second reservation entered by the United States of

America. It creates uncertainty as to the extent of the obligations which the Government of the United States of America is prepared to assume with regard to the Convention."

"The Government of the United Kingdom of Great Britain and Northern Ireland have consistently stated that they are unable to accept reservations to article IX. In their view, these are not the kind of reservations which intending parties to the Convention have the right to make.

Accordingly, the Government of the United Kingdom do not accept the reservations entered by the Government of Singapore and Malaysia to article IX of the Convention."

### *Territorial Application*

| *Participant* | *Date of receipt of the notification* | *Territories* |
|---|---|---|
| Australia | 8 Jul 1949 | All Overseas Territories of Australia |
| United Kingdom of Great Britain and Northern Ireland[3,5] | 2 Jun 1970 | Bahamas, Bermuda, British Virgin Islands, Channel Islands, Dominica, Falkland Islands (Malvinas) and Dependencies, Fiji, Gibraltar, Grenada, Hong Kong, Isle of Man, Pitcairn Island, St. Helena and Dependencies, St. Lucia, Seychelles, St. Vincent and Turks and Caicos Islands |
| | 2 Jun 1970 | Tonga |

***Notes:***

[1] Resolution 260 (III), *Official Records of the General Assembly, Third Session* , Part I (A/810), p. 174.

[2] The former Yugoslavia had signed and ratified the Convention on 11 December 1948 and 29 August 1950, respectively. See also note 1 under "Bosnia and Herzegovina", "Croatia", "former Yugoslavia", "Slovenia", "The Former Yugoslav Republic of Macedonia" and "Yugoslavia" in the "Historical Information" section (click on the tab "Status of Treaties" and then on "Historical Information").

[3] On 3 October 1983, the Secretary-General received from the Government of Argentina the following objection:

[The Government of Argentina makes a] formal objection to the declaration of territorial extension issued by the United Kingdom with regard to the Malvinas Islands (and dependencies), which that country is illegally occupying and refers to as the "Falkland Islands". The Argentine Republic rejects and considers null and void the [said declaration] of territorial extension.

With reference to the above-mentioned objection the Secretary-General received, on 28 February 1985, from the Government of the United Kingdom of Great Britain and Northern Ireland the following declaration:

"The Government of the United Kingdom of Great Britain and Northern Ireland have no doubt as to their right, by notification to the Depositary under the relevant provisions of the above-mentioned Convention, to extend the application of the Convention in question to the Falkland Islands or to the Falkland Islands Dependencies, as the case may be.

For this reason alone, the Government of the United Kingdom are unable to regard the Argentine [communication] under reference as having any legal effect."

[4] The following communication, received by the Secretary-General on 15 June 1993, was transmitted prior to Yugoslavia's admission to membership in the United Nations by General Assembly resolution A/55/12 on 1 November 2000, and its accession to the Convention, deposited with the Secretary-General on 12 March 2001:

"Considering the fact that the replacement of sovereignty on the part of the territory of the Socialist Federal Republic of Yugoslavia previously comprising the Republic of Bosnia and Herzegovina was carried out contrary to the rules of international law, the Government of the Federal Republic of Yugoslavia herewith states that it does not consider the so-called Republic of Bosnia and Herzegovina a party to the Convention on the Prevention and Punishment of the Crime of Genocide, but does consider that the so-called Republic of Bosnia and Herzegovina is bound by the obligation to respect the norms on preventing and punishing the crime of genocide in accordance with general international law irrespective of the Convention on the Prevention and Punishment of the Crime of Genocide.

See also note 2 in this chapter and note 1 under "former Yugoslavia" in the "Historical Information" section (click on the tab "Status of Treaties" and then on "Historical Information").

[5] On 6 and 10 June 1997, the Secretary-General received communications concerning the status of Hong Kong from the Governments of the United Kingdom and China (see also note 2 under "China" and note 2 under "United Kingdom of Great Britain and Northern Ireland" regarding Hong Kong in the "Historical Information" section (click on the tab "Status of Treaties" and then on "Historical Information")). Upon resuming the exercise of sovereignty over Hong Kong, China notified the Secretary-General that the Convention with the reservation made by China will also apply to the Hong Kong Special Administrative Region.

[6] Ratified on behalf of the Republic of China on 19 July 1951. See note 1 under “China” in the “Historical Information” (click on the tab "Status of Treaties" and then on "Historical Information").

[7] On 16 September 1999, the Government of Portugal informed the Secretary-General that the Convention would apply to Macao. Subsequently, the Secretary-General received communications regarding the status of Macao from Portugal and China (see note 3 under “China” and note 1 under “Portgual” in the “Historical Information” section (click on the tab "Status of Treaties" and then on "Historical Information")). Upon resuming the exercise of sovereignty over Macao, China notified the Secretary-General that the Convention with the reservation made by China will also apply to the Macao Special Administrative Region.

[8] By a notification received by the Secretary-General on 29 January 1982, the Government of Cuba withdrew the declaration made on its behalf upon ratification of the said Convention with respect to the reservations to articles IX and XII by Bulgaria, the Byelorussian Soviet Socialist Republic, Czechoslovakia, Poland, Romania, the Ukrainian Soviet Socialist Republic and the Union of Soviet Socialist Republics.

[9] On 18 May 1998, the Government of Cyprus notified the Secretary-General of the following:

“The Government of the Republic of Cyprus has taken note of the reservations made by a number of countries when acceding to the [Convention] and wishes to state that in its view these are not the kind of reservations which intending parties to the Convention have the right to make.

Accordingly, the Government of the Republic of Cyprus does not accept any reservations entered by any Government with regard to any of the Articles of the Convention.”

[10] Czechoslovakia had signed and ratified the Convention on 28 December 1949 and 21 December 1950, respectively, with a reservation. Subsequently, by a notification received on 26 April 1991, the Government of Czechoslovakia notified the Secretary-General of its decision to withdraw the reservation to article IX made upon signature and confirmed upon ratification. For the text of the reservation, see United Nations, *Treaty Series* , vol. 78, p. 303. See also note 1 under “Czech Republic” and note 1 under “Slovakia” in the “Historical Information” section (click on the tab "Status of Treaties" and then on "Historical Information").

[11] On 11 January 1990, the Secretary-General received from the Government of the Federal Republic of Germany the following declaration:

"The Government of the Federal Republic of Germany has taken note of the declarations made under the heading "Reservations" by the Government of the United States of America upon ratification of the Convention on the Prevention and Punishment of the Crime of Genocide adopted by the General Assembly of the United Nations on 9 December 1948. The Government of the Federal Republic of Germany interprets paragraph (2) of the said declarations as a reference to article V of the Convention and therefore as not in any way affecting the obligations of the United States of America as a State Party to the Convention.".

[12] See note 1 under “Germany” regarding Berlin (West) in the “Historical Information” (click on the tab "Status of Treaties" and then on "Historical Information").

[13] The German Democratic Republic had acceded to the Convention with reservation and declaration on 27 March 1973. For the text of the reservation and the declarations see United Nations, *Treaty Series* , vol. 861, p. 200. See also note 2 under “Germany” in the “Historical Information” section in the front matter of this volume.

[14] See note 1 under "Montenegro" in the "Historical Information" section (click on the tab "Status of Treaties" and then on "Historical Information").

[15] See note 1 under "New Zealand" regarding Tokelau in the "Historical Information" section (click on the tab "Status of Treaties" and then on "Historical Information").

[16] The Secretary-General received communications from the following States on the dates indicated hereinafter regarding the accession of Yugoslavia to the Convention:

*Croatia (18 May 2001):*

"The Government of the Republic of Croatia objects to the deposition of the instrument of accession of the Federal Republic of Yugoslavia to the Convention on the Prevention and Punishment of the Crime of Genocide, due to the fact that the Federal Republic of Yugoslavia is already bound by the Convention since its emergence as one of the five equal successor states to the former Socialist Federal Republic of Yugoslavia.

This fact was confirmed by the Federal Republic of Yugoslavia in its Declaration of 27 April 1992, as communicated to the Secretary-General (UN doc. A/46/915). Notwithstanding the political reasoning behind it, in its 1992 Declaration the Federal Republic of Yugoslavia stated that it "shall strictly abide by all the commitments that the former Socialist Federal Republic of Yugoslavia assumed internationally".

In this regard the Republic of Croatia notes in particular the decision of the International Court of Justice in its Judgement of 11 July 1996 that the Federal Republic of Yugoslavia "was bound by provisions of the [Genocide] Convention on the date of the filing of [the Application by Bosnia and Herzegovina], namely on 20 March 1993" (ICJ Reports 1996, p. 595, at para. 17).

The Government of the Republic of Croatia further objects to the reservation made by the Federal Republic of Yugoslavia in respect of Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, and considers it to be incompatible with the object and purpose of the Convention. The Government of the Republic of Croatia considers the Convention on the Prevention and Punishment of the Crime of Genocide to be fully in force and applicable between the Republic of Croatia and the Federal Republic of Yugoslavia, including Article IX.

The Government of the Republi of Croatia deems that neither the purported way of becoming a party to the Genocide Convention *ex nunc* by the Federal Republic of Yugoslavia,

nor its purported reservation, have any legal effect regarding the jurisdiction of the International Court of Justice with respect to the pending proceedings initiated before the International Court of Justice by the Republic of Croatia against the Federal Republic of Yugoslavia pursuant to the Genocide Convention."

*Bosnia-Herzegovina (27 December 2001):*

On 21 March 2001 the Secretary-General of the United Nations confirmed to the Permanent Representative of Yugoslavia to the United Nations the receipt of a 'Notification of Accession to the Convention on the Prevention and Punishment of the Crime of Genocide (1948). The note of the Secretary -General carries reference as: LA 41 TR/221/1(4-1).

The Presidency of Bosnia and Herzegovina objects to the deposition of this instrument of accession.

On 29 June 2001, Bosnia and Herzegovina, the Republic of Croatia, the Republic of Macedonia, the Republic of Slovenia and the Federal Republic of Yugoslavia signed an "Agreement on Succession Issues" in which these States, among other things, declare that they are "in sovereign equality the five successor States to the former Socialist Federal Republic of Yugoslavia". A copy of the Agreement is enclosed. *[Copy not reproduced herein.]* For this reason, there can be no question of "accession", but rather there is an issue of succession. This, in itself, implies that the Federal Republic of Yugoslavia has effectively succeeded the former Socialist Federal Republic of Yugoslavia as of 27 April 1992 (the date of the proclamation of the FRY) as a Party to the Genocide Convention.

Apart from that, the Federal Republic of Yugoslavia upon its proclamation on 27 April 1992 declared - and communicated this to the Secretary-General that it would "strictly abide by all the commitments that the Socialist Federal Republic of Yugoslavia assumed internationally"(UN Doc. A/46/915).

For these two reasons it is not possible for the FRY to effectively lay down a reservation with regards to part of the Genocide Convention (i.e. Article IX of the Convention) several years after 27 April 1992, the day on which FRY became bound to the Genocide Convention in its entirety. Bosnia and Herzegovina refers to Articles 2 (1) (d) and 19 of the 1969 Vienna Convention on the Law of Treaties, which explicitly states that a reservation may only be formulated "when signing, ratifying, accepting, approving or acceding to a treaty".

The Presidency of Bosnia and Herzegovina therefore deems the so-called "Notification of Accession to the Convention on the Prevention and Punishment of the Crime of Genocide (1948)" submitted by the Government of the Federal Republic of Yugoslavia to be null and void. Moreover, the International Court of Justice declared in its Judgement of 11 July 1996, "Yugoslavia was bound by the provisions of the Convention" at least at the date of the filing of the Application in the case introduced by Bosnia and Herzegovina on 20 March 1993/ICJ Rep. 1996, p.610, para. 17). The Federal Republic of Yugoslavia continues to be bound under the same conditions, that is without any reservation."

[17] The Secretary-General received on 9 November 1981 from the Government of the Democratic Republic of Kampuchea the following objection with regard to the accession by Viet Nam:

The Government of Democratic Kampuchea, as a party to the Convention on the Prevention and Punishment of the Crime of Genocide, considers that the signing of that Convention by the Government of the Socialist Republic of Viet Nam has no legal force, because it is no more than a cynical, macabre charade intended to camouflage the foul crimes of genocide committed by the 250,000 soldiers of the Vietnamese invasion army in Kampuchea. It is an odious insult to the memory of the more than 2,500,000 Kampucheans who have been massacred by these same Vietnamese armed forces using conventional weapons, chemical weapons and the weapon of famine, created deliberately by them for the purpose of eliminating all national resistance at its source.

It is also a gross insult to hundreds of thousands of Laotians who have been massacred or compelled to take refuge abroad since the occupation of Laos by the Socialist Republic of Viet Nam, to the Hmong national minority in Laos, exterminated by Vietnamese conventional and chemical weapons and, finally, to over a million Vietnamese "boat people" who died at sea or sought refuge abroad in their flight to escape the repression carried out in Viet Nam by the Government of the Socialist Republic of Viet Nam.

This shameless accession by the Socialist Republic of Viet Nam violates and discredits the noble principles and ideals of the United Nations and jeopardizes the prestige and moral authority of our world Organization. It represents an arrogant challenge to the international community, which is well aware of these crimes of genocide committed by the Vietnamese army in Kampuchea, has constantly denounced and condemned them since 25 December 1978, the date on which the Vietnamese invasion of Kampuchea began, and demands that these Vietnamese crimes of genocideght to an end by the total withdrawal of the Vietnamese forces from Kampuchea and the restoration of the inalienable right of the people of Kampuchea to decide its own destiny without any foreign interference, as provided in United Nations resolutions 34/22, 35/6 and 36/5.

[18] Accession on behalf of the Republic of Viet-Nam on 11 August 1950 (See C.N.134.1950 ). (For the text of objections to some of the reservations made upon the said accession, see publication, *Multilateral Treaties for which the Secretary-General acts as Depositary* (ST/LEG/SER.D/13, p. 91). See also note 1 under "Viet Nam" in the "Historical Information" section Accession on behalf of the Republic of Viet-Nam.

[19] The Yemen Arab Republic had acceded to the Convention on 6 April 1989. See also note 1 under "Yemen" in the "Historical Information" section (click on the tab "Status of Treaties" and then on "Historical Information").

[20] On 19 July 1999, the Government of Albania informed the Secretary-General that it had decided to withdraw its reservation regarding article IX made upon accession. For the text of the reservation, see United Nations, *Treaty Series* , vol. 210, p. 332.

[21] On 25 June 1990, the Secretary-General received from the Government of Israel the following objection:

"The Government of the State of Israel has noted that the instrument of accession of Bahrain to the [said] Convention contains a declaration in respect of Israel.

In the view of the Government of the State of Israel, such declaration, which is explicitly of a political character, is incompatible with the purpose and objectives of this Convention and cannot in any way affect whatever obligations are binding upon Bahrain under general International Law or under particular Conventions.

The Government of the State of Israel will, in so far as concerns the substance of the matter, adopt towards Bahrain an attitude of complete reciprocity".

[22] On 8 July 2021, the Government of Bahrain notified the Secretary-General of its withdrawal of the following reservation made upon accession:

"[T]he accession by the State of Bahrain to the said Convention shall in no way constitute recognition of Israel or be a cause for the establishment of any relations of any kind therewith."

[23] In communications received on 8 March, 19 and 20 April 1989, respectively, the Governments of the Union of Soviet Socialist Republics, the Byelorussian Soviet Socialist Republic and the Ukrainian Soviet Socialist Republic notified the Secretary-General that they had decided to withdraw the reservation relating to article IX. For the texts of the reservations, see United Nations, *Treaty Series* , vol. 190, p. 381, vol.196, p. 345 and vol. 201, p. 368, respectively.

[24] On 24 June 1992, the Government of Bulgaria notified the Secretary-General its decision to withdraw the reservation to article IX of the Convention, made upon accession. For the text of the reservation, see United Nations, *Treaty Series* , vol. 78, p. 318.

[25] On 5 January 1998, the Government of Finland notified the Secretary-General that it had decided to withdraw its reservation made upon accession to the Convention. For the text of the reservation, see United Nations, *Treaty Series* , vol. 346, p. 324.

[26] In a communication received on 8 December 1989, the Government of Hungary notified the Secretary-General that it had decided to withdraw the reservation relating to article IX made upon accession. For the text of the reservation, see United Nations, *Treaty Series* , vol. 118, p. 306.

[27] In this regard, on 14 October 1996, the Secretary-General received from the Government of Norway, the following communication:

"... In [the view of the Government of Norway], reservations in respect of article IX of the Convention are incompatible with the object and purpose of the said Convention. Accordingly, the Government of Norway does not accept the reservations entered by the Governments of Singapore and Malaysia to article IX of the Convention."

[28] In a communication received on 19 July 1990, the Government of Mongolia notified the Secretary-General of its decision to withdraw the reservation relating to article IX made upon accession. For the text of the reservation see United Nations, *Treaty Series* , vol. 587, p. 326.

[29] On 16 October 1997, the Government of Poland notified the Secretary-General that it had decided to withdraw its reservation with regard to article IX of the Convention made upon accession. For the text of the reservation see United Nations, *Treaty Series* , vol. 78, p. 277.

[30] On 2 April 1997, the Government of Romania informed the Secretary-General that it had decided to withdraw its reservation with regard to article IX of the Convention. For the text of the reservation, see United Nations, *Treaty Series* , vol. 78, p. 314.

[31] In a communication received on 15 December 2008, the Government of Rwanda notified the Secretary-General that it had decided to withdraw the reservation relating to article IX made upon accession to the Convention. The text of the reservation reads as follows:

The Rwandese Republic does not consider itself as bound by article IX of the Convention.

[32] With regard to the reservation made by the Government of Yugoslavia upon accession, the Secretary-General received from the following State, a communication on the date indicated hereinafter:

*Sweden (2 April 2002):*

"The Government of Sweden has taken note of the Secretary-General's circular notification 164.2001.TREATIES-.1 of 15 March 2001, stating the intent of the Federal Republic of Yugoslavia to accede, with a reservation, to the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. The Government of Sweden regards the Federal Republic of Yugoslavia as one successor state to the Socialist Federal Republic of Yugoslavia and, as such, a Party to the Convention from the date of the entering into force of the Convention for the Socialist Federal Republic of Yugoslavia. The Government of Sweden hereby communicates that it considers the said reservation as having been made too late, according to article 19 of the 1969 Vienna Convention on the Law of Treaties, and thus null and void."

[33] On 24 September 2009, the Government of Spain informed the Secretary-General that it had decided to withdraw the reservation in respect of the whole article IX (Jurisdiction of the International Court of Justice) made upon accession to the Convention.

[34] For the Advisory Opinion of the International Court of Justice of 28 May 1951, see *I.C.J., Report 1951* , p. 15.

[35] For the resolution adopted on 12 January 1952 by the sixth session of the General Assembly concerning reservations to multilateral conventions, see Resolution 598 (VI); *Official Records of the General Assembly, Sixth Session, Supplement No. 20 (A/2119)* , p. 84.

# Annex 43

United Nations A/HRC/48/78

General Assembly

Distr.: General
21 September 2021

Original: English

**Human Rights Council**
**Forty-eighth session**
Agenda item 9
**Racism, racial discrimination, xenophobia and related forms of intolerance: follow-up to and implementation of the Durban Declaration and Programme of Action**

# Environmental justice, the climate crisis and people of African descent*

## Report of the Working Group of Experts on People of African Descent

*Summary*

In the present report, the Working Group of Experts on People of African Descent presents its conclusions and recommendations of its twenty-eighth session, on "Environmental justice, the climate crisis and people of African descent", held from 24 to 26 March 2021. The Working Group provides guidance on how to effectively address environmental injustice, racial disparities, unequal protection and the unique impact of the climate crisis and environmental racism on people of African descent. The report also includes an overview of the Working Group's other activities over the past year.

* The present report was submitted after the deadline in order to reflect the most recent information.

# I. Introduction

1. In the present report, submitted to the Human Rights Council in accordance with Council resolutions 9/14, 18/28, 27/25, 36/23 and 45/24, the Working Group of Experts on People of African Descent focuses on its twenty-eighth public session, on the theme "Environmental justice, the climate crisis and people of African descent", held from 24 to 26 March 2021. The coronavirus disease (COVID-19) pandemic and related travel restrictions had a direct impact on the Working Group's mandated activities; country visits were postponed, and sessions and other events were held virtually.

2. In August 2020, Dominique Day was appointed Chair of the Working Group, replacing Ahmed Reid. On 1 May 2021, Sabelo Gumedze completed his term as member of the Working Group, and Catherine S. Namakula (South Africa) began her term. On 4 June 2021, Mr. Reid resigned as member of the Working Group to accept a post with an international organization. On 1 August 2021, Ricardo Sunga and Michal Balcerzak completed their terms as members of the Working Group and were replaced by Sushil Raj (India) and Miriam Ekiudoko (Hungary). A new member from the Latin American and Caribbean Group will be appointed by the Human Rights Council at its forty-eighth session.

# II. Activities of the Working Group

3. During the period under review (from August 2020 to June 2021), the Working Group's expertise was in high demand. The Chair and members participated in many online events as global interest in the mandate peaked following the murder of George Floyd, global protests for racial justice, and the glaring racial disparities surfacing during the pandemic, turned a spotlight on systemic racism and generated an unprecedented opportunity to address the concerns of people of African descent.

4. The Working Group presented a report on COVID-19, systemic racism and global protests to the Human Rights Council at its forty-fifth session (A/HRC/45/44). It also reported on its country visits to Ecuador and Peru (A/HRC/45/44/Add.1 and Add.2), and participated in an interactive dialogue with the Council. The Working Group also submitted its annual report to the General Assembly (A/75/275) and participated in an interactive dialogue with the Third Committee of the Assembly on 2 November 2020.

5. On 20 November 2020, the Working Group held an expert meeting on its operational guidelines on the inclusion of people of African descent in the 2030 Agenda for Sustainable Development. The discussions with experts from the United Nations Population Fund and the Economic Commission for Latin America and the Caribbean assisted in the finalization of the operational guidelines, which were adopted by the Working Group on 9 December 2020.[1] The guidelines were prepared as a tool for United Nations country teams, States Members of the United Nations, financial and development institutions and all stakeholders to assist them in the implementation of the 2030 Agenda and the Sustainable Development Goals contained therein, with a specific focus on people of African descent. They refer to international human rights law and available official and unofficial data, including reports and other studies of the Working Group.

6. Owing to the COVID-19 pandemic, the Working Group postponed both its twenty-sixth session (scheduled for 30 March to 3 April 2020) and its twenty-seventh session (rescheduled for 31 August to 4 September 2020) until the end of the year.

7. The Working Group held its twenty-sixth session, on a virtual platform, from 23 to 25 November 2020. The session included a series of five public regional meetings with representatives of civil society to strategize on the way forward at the mid-term of the International Decade for People of African Descent and the twentieth anniversary of the Durban Declaration and Programme of Action.[2] These regional meetings informed the

[1] See https://ohchr.org/Documents/Issues/Racism/WGEAPD/Guidelines_inclusion_2030_Agenda.pdf.
[2] See https://ohchr.org/EN/Issues/Racism/WGAfricanDescent/Pages/Session26.aspx.

twenty-seventh session. The Working Group also held several private meetings to consult on and plan for future activities.

8. The Working Group held its twenty-seventh session, on a virtual platform, dedicated to systemic racism and the lessons of 2020, from 30 November to 3 December 2020. This public thematic session built on the report of the Working Group on COVID-19, systemic racism and global protests, and set the scene for the mid-term review of the International Decade for People of African Descent and the twentieth anniversary of the Durban Declaration and Programme of Action. It included discussions on key themes and priorities for the protection of the human rights of people of African descent, positive developments, good practices and how to address systemic racism on the basis of international human rights law.[3] The Working Group will present a report on the twenty-sixth and twenty-seventh sessions to the General Assembly at its seventy-sixth session.

9. The Working Group thanks all those who sent written submissions following its call for inputs.[4] The input received was extremely useful to the Working Group for its sessions and in the preparation of the present report.

10. On 5 March 2021, the Working Group organized a civil society consultation to continue to engage with and learn from civil society in the run-up to its twenty-eighth session. The consultation was an opportunity to identify the human rights concerns that should be prioritized and to make recommendations for preventing the racial discrimination faced by people of African descent.

11. On 23 March 2021, the Working Group organized a virtual screening and discussion of the award-winning documentary *Mossville: When Great Trees Fall*. The documentary tells the story of Mossville, in Louisiana, United States of America, a once-thriving community founded by formerly enslaved and free people of colour, and an economically flourishing haven for generations of African American families. Today it is an area crowded with petrochemical plants and covered by toxic black clouds. Many residents have been forced from their homes, many have died, and those who remain are subject to prolonged exposure to contamination and pollution. The event, held on the eve of the twenty-eighth thematic session of the Working Group on environmental justice, the climate crisis and people of African descent, was organized jointly with the Mossville team. More than 200 people participated in the event.[5]

12. The Working Group held its twenty-eighth session, dedicated to the theme of environmental justice, the climate crisis and people of African Descent, from 24 to 26 March 2021 (see sect. III).

13. Owing to COVID-19-related travel restrictions, the Working Group's visit to Australia, planned for December 2020, was postponed. The Working Group thanks all Governments that have invited it to undertake visits to their countries and looks forward to confirming the dates thereof. The Working Group is currently rescheduling country visits for 2021, 2022 and 2023.

14. During the period under review, and in accordance with its mandate, the Working Group sent 16 communications under the special procedures communications procedure regarding allegations of human rights violations to, inter alia, Brazil, Colombia, Cuba, Mauritius, Spain, the United States of America, the United Kingdom of Great Britain and Northern Ireland, and other actors, including the Formosa Plastics Corporation.[6] The Working Group also issued 12 media releases and statements. It urges States to address the human rights violations that people of African descent face, and to take effective measures to end impunity and structural racism.

15. On 16 February 2021, the Working Group sent an open letter to Congresswoman Sheila Jackson Lee, Subcommittee Chairman Steve Cohen and Chairman Jerrold Nadler on

[3] See https://www.ohchr.org/EN/Issues/Racism/WGAfricanDescent/Pages/Session27.aspx.

[4] The submissions received by the Working Group are available at https://ohchr.org/EN/Issues/Racism/WGAfricanDescent/Pages/WGEPADIndex.aspx.

[5] The panel discussion held at the event is available from https://vimeo.com/528449034.

[6] For communications sent and replies received, see A/HRC/46/3, A/HRC/47/3 and A/HRC/48/3.

the Commission to Study and Develop Reparation Proposals for African-Americans Act (H.R.40),[7] a bill on reparations currently under examination in the United States. The Working Group, inter alia, welcomed the hearings held by the House Judiciary Committee on the bill, and the broad base of support for the bill within the United States Congress. The Working Group emphasized the importance of reparations and how the bill can play an important role in understanding, acknowledging, addressing and ultimately dismantling systemic racism in the United States and promoting racial equity.

16. Throughout the current year, the Working Group has actively assisted the Office of the United Nations High Commissioner for Human Rights (OHCHR) in preparing a report on systemic racism, violations of international human rights law against Africans and people of African descent by law enforcement agencies, in accordance with Human Rights Council resolution 43/1. The Working Group's analysis is reflected in the final report (A/HRC/47/53), which also builds on the work of the Working Group and its many reports and recommendations on this subject. The Chair of the Working Group also participated in the OHCHR #FIGHTracism campaign,[8] featuring in videos and feature stories.

17. The Working Group continued to advocate for the implementation of the programme of activities for the International Decade for People of African Descent and protection of the human rights of people of African descent. It actively participated in several consultations for the establishment of the Permanent Forum of People of African Descent.

18. During the period under review, the Working Group contributed to many virtual events and webinars on the issue of racism, racial discrimination, xenophobia and related intolerance. In that time, the Chair of the Working Group participated in, inter alia, a seminar of the Working Group on the theme "Advancements and challenges 20 years after Durban" (14 October 2020); the seminar "COVID-19 and its impact on women of African descent", hosted by the non-governmental organization Afroresistance (28 October); a discussion on "Preventing and addressing racism: a core issue of corporate human rights due diligence", held by the Forum on Business and Human Rights on 17 November; a workshop on the theme "Environmental racism", held in the framework of the Geneva Dialogues (17 December); in the United Nations Educational, Scientific and Cultural Organization (UNESCO) masterclass against racism and discrimination, organized under the Slave Route Project (29 January 2021); in the special event entitled "Equal Justice for All", organized by the United Nations Office on Drugs and Crime (UNODC) (9 March); in the event organized to mark the International Day against Racism entitled "Mid-term Review of the International Decade for People of African Descent and COVID-19" (11 March); in a meeting of the Commission on Narcotic Drugs (13 April); in the roundtable on "Anti-Racism: Avenues for active UN engagement", organized by the Permanent Mission of Germany (21 April); in an event on children's rights, organized by Afroresistance (4 June); and in an event hosted by the Council for World Mission and the World Council of Churches to discuss antiracist action (21 June). She also participated in a symposium organized by the International Bar Association entitled "United Nations Human Rights Council Emergency Session on Systemic Racism in Review". In follow-up to the Working Group's country visit to Peru, the Chair participated, on 23 June, in an international Forum to launch the first national action plan on business and human rights organized by the Ministry of Justice and Human Rights of Peru, and on 25 June, in a panel discussion on the theme "The rights of indigenous and Afro-descendant peoples in the public policy of Responsible Business Conduct", moderated by the Director of Policies for the Afro-Peruvian Population Ministry of Culture. She also spoke at several university and education-based events, including in the event "Racial Inequality in Higher Education: A Transatlantic Conversation"; and gave a number of media interviews, including to the BBC and Al Jazeera plus.

19. A member of the Working Group, Ahmed Reid, participated in several events, including one organized by the European Parliament on the theme "Recognizing the past, repairing the present and building the future", on 2 December 2020, as part of the inaugural commemoration of the European Day for the Abolition of the Slave Trade; on 4 March 2021, in an event on Marcus Garvey's 1920 Declaration of the Rights of the Negro Peoples of the

[7] See www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=27325&LangID=E.

[8] See www.ohchr.org/EN/Issues/Racism/Pages/Implementation-HRC-Resolution-43-1.aspx.

World, part of the Mona Law Master Class Series at the University of the West Indies, Mona Campus; on 18 March, in a United Nations Academic Impact event in the Digital Dialogue Series on "Countering Racism through Education"; on 22 March, in a conference on "the Possibility and Impossibility of Reparations for Slavery and Colonialism", held at Columbia University, United States of America,; and, on 25 March, in a seminar on "Royalty, racism, republicanism and reparations: preparing for the sixtieth anniversary of nationhood in the CARICOM region", held at the University of the West Indies.

20. Another member of the Working Group, Ricardo Sunga, gave media interviews to Russia Today (UK) and Chinese media. On 22 June 2021, he also delivered a presentation at a side event for special procedures of the Human Rights Council during its forty-seventh session.

# III. Twenty-eighth session

## A. Opening of the session

21. In her opening statement, the United Nations High Commissioner for Human Rights stated that the killing of George Floyd, and the disproportionate impact of COVID-19 on people of African descent had catalysed a global uprising against systemic racial injustice. The climate crisis had an immense and disproportionate impact on the rights of people of African descent, tied to historical and structural racism. People of African descent, like other discriminated peoples and communities, were forced to live in areas vulnerable to environmental degradation, where their right to a safe, clean, healthy and sustainable environment was often not fulfilled. The negative impact of climate change was disproportionately borne by people living in the least well protected situations. Environmental racism posed a serious and disproportionate threat to the enjoyment of multiple human rights, including the right to life, the right to health, the right to an adequate standard of living and cultural rights. In many parts of the world, people of African descent seeking to defend their human rights related to the environment faced unacceptable violence, threats and intimidation.

22. In line with the Guiding Principles on Business and Human Rights, business corporations should refrain from violating the rights of others. Building back from the coronavirus disease (COVID-19) pandemic was an opportunity to build fairer, more resilient systems in a world that was cleaner, greener and safer. This would require a human rights-based approach that promoted the meaningful participation of all, including those at greatest risk. People of African descent had to be part of the climate solution. The organizers of the upcoming twenty-sixth session of the Conference of the Parties to the United Nations Framework Convention on Climate Change in Glasgow had pledged to make the Conference the most inclusive ever. United Nations actors and States should join civil society in seeking to hold them to that promise. It was vital to ensure the inclusion of – and recognize the leadership of – people of African descent in decision-making at all stages of environmental action.

23. Following an exchange with the High Commissioner, the Working Group adopted the agenda and programme of work for its twenty-eighth session.

24. The Chair provided a summary of the activities conducted by the Working Group over the past year. She highlighted the operational guidelines on the inclusion of people of African descent in the 2030 Agenda adopted by the Working Group on 9 December 2020. The Working Group had actively supported OHCHR in its preparation of a report on racial justice and the implementation of Human Rights Council resolution 43/1. The Working Group had also sent an open letter in support of H.R.40 before the United States Congress (see para. 16 above).

## B. Summary of deliberations

25. During the thematic session, the Working Group discussed human rights approaches to environmental injustice, racial disparities, unequal protection and the unique impact of the climate crisis and environmental racism on people of African descent. The session comprised three panel discussions.

### 1. Environmental racism: Earth, wind and fire (and water)

26. In her introductory remarks, the Chair of the Working Group stressed the importance of centring people of African descent in order to recognize the racial dimension of the climate crisis. Race was used to normalize exploitation and disregard, opening opportunities to generate profit at the expense of people's lives, resources and lands. The Chair recalled the opening screening of "Mossville: When Great Trees Fall" and the discussion thereon co-organized with the Mossville team, and thanked it for making such an important documentary, which showed the deadly cost of environmental racism. Other climate justice experts would take the floor during the session and examine how systemic racism and the environment and climate crisis were affecting people of African descent.

27. Rosamund Kissi-Debrah, World Health Organization advocate for health and air quality and co-founder of the Ella Roberta Family Foundation, spoke about her 9-year-old daughter, Ella, who died in 2013 from a severe form of asthma. Ella was the first person in the United Kingdom to have air pollution listed as a cause of death on her death certificate. A second coroner's inquest into Ella's death, in a landmark decision in December 2020, found that air pollution had been a significant contributory factor to both the induction and exacerbations of her asthma. Between 2010 and 2013, Ella was exposed to levels of nitrogen dioxide and particulate matter (mainly from traffic emissions) in excess of World Health Organization guidelines. Even though the failure to reduce the level of nitrogen dioxide to limits set by the European Union and domestic law was recognized as a cause of her death, Ella's mother was not informed by health professionals of the health risks posed by air pollution and its potential to exacerbate asthma, or of steps that might have prevented Ella's death. There was no dispute at the inquest that atmospheric air pollution was the cause of many thousands of premature deaths every year in the United Kingdom of Great Britain and Northern Ireland. Delays in reducing the levels of atmospheric air pollution caused avoidable deaths.[9] Ella's mother was campaigning to create "Ella's law", which would replace outdated clean air legislation. The twenty-sixth session of the Conference of the Parties (see para. 23 above) was an opportunity to ask leaders what they were doing to protect the right to clean air, to advocate for and demand monitoring of air quality, to educate and raise the awareness of those most at risk, and to ensure that waste was not simply dumped in people's backyards.

28. Dr. Angelique Walker-Smith, National Senior Associate for Pan African and Orthodox Church Engagement at Bread for the World, discussed the lack of environmental justice in the climate crisis and how it affected the people of Africa and people of African descent around the world. She referred to Flint, Michigan, in the United States of America, a community affected for years by toxic water because of government negligence and disregard for Black and brown lives. In 2014, the town decided to switch its drinking water supply from a municipal water system to a local river in order to save money. Inadequate treatment and testing resulted in major water quality and health issues for Flint residents. Grievances were systematically ignored and even dismissed by government officials, despite reports for 18 months of the odour, discoloration and bad taste of the water, as well as skin irritation and hair loss. The Michigan Civil Rights Commission had concluded that the poor governmental response to the Flint crisis was the result of systemic racism. Dr. Walker-Smith pointed out that African Americans were five times as likely as other people to live in areas of concentrated poverty, which were more exposed to climate shocks and lacked community amenities that could mitigate the effects of climate change, such as trees that help to clean the air and to cool neighbourhoods during heatwaves. The historic reality of colonialism and structural racism had designed systems that lived on today through environmental racism and a myriad of other injustices that had grown out of the same evil roots. Global protests for

[9] See www.judiciary.uk/wp-content/uploads/2021/04/Ella-Kissi-Debrah-2021-0113-1.pdf.

racial justice continued amidst unprecedented climate-induced disasters, an economic crisis and the death of more than 1 million people globally from the pandemic.

29. Eva Okoth, for Natural Justice: Lawyers for Communities and the Environment, shared perspectives from Africa. She recalled that while only a small share of $CO_2$ emissions came from Africa, it was the continent most vulnerable to climate change. Africa had been plagued by natural disasters due to climate change: droughts, floods, rising sea levels and desert locusts. Environmental racism was closely linked to environmental justice, and it had its roots in colonialism. In the post-colonial period, former colonies were used as dumping grounds for the North, and for the trade in harmful and toxic products. African countries were used as waste deposits and chosen as the sites for harmful industries, and certain communities faced disproportionate impact from environmental crises. In Africa, environmental racism had been institutionalized. The debt burden of many African countries was growing owing to development financing. Multinationals were evading their environmental responsibilities. Indigenous and marginalized people were losing their land rights. At the same time, credible solutions were overlooked; while research and knowledge were monopolized by the North, collectively held knowledge important to addressing the climate crisis, including indigenous knowledge, was being ignored.

30. Isabel Padilla, Executive Secretary of Pastoral Social Caritas del Vicariato Apostolico de Esmeraldas, discussed the structural and environmental racism endured by people of African descent in Ecuador. Their territories were exploited for gold mines, palm oil crops and the timber industry, which had led to the contamination of 90 per cent of the country's rivers. Afro-Ecuadorian communities had brought cases to court for violations of their collective territorial rights but were denied restitution. Community defenders were criminalized. The absence of oversight by the State had allowed pillaging of land; the lack of protection of rights was an added manifestation of environmental racism. The benefits from extractive industries went directly to foreign actors, while all harm was endured by the local population of African descent whose land was being exploited. Even when one judge ordered precautionary measures to be taken, State authorities had failed to implement them. In 2020, five people lost their lives in a mine but no reparations were made, nor was investigative process initiated. Lax oversight and policies with respect to the extractive industry had left the local people impoverished and the environment destroyed. Ms. Padilla called for community justice and reparations.

31. During the interactive dialogue, in response to a question by Mr. Sunga about establishing causality between air pollution and Ella's death, Rosamund Kissi-Debrah stated that it was important to investigate pollutants during post-mortem examinations. Mr. Balcerzak noted that it was important to advance drafting of the declaration on the promotion and full respect of the human rights of people of African descent, and that it should include environmental racism. The representative of China stated that, as States commemorated the twentieth anniversary of the adoption of the Durban Declaration and Programme of Action, they should also be encouraged to implement it.

### 2. Race and the climate crisis: preparedness and response

32. Several people provided information and analyses of the impact that the climate crisis was having on people of African descent globally, grounded in lived expertise and professional experience in the local communities and affected regions. According to Colette Pichon Battle, founder of the Gulf Coast Center for Law & Policy in the United States, communities in the Gulf South were experiencing new levels of extreme weather conditions with 2020 as the most active hurricane season on record. In February 2021, an Arctic storm from the North had already left thousands without drinkable water after infrastructure damage. Those who lacked water were mostly poor, many were Black, and all were in the South, raising important questions about racial equity and climate disaster recovery. In the United States of America, the Red, Black and Green New Deal, promoted by civil society, centres voices of African descent, in order to acknowledge that climate and environmental impacts are particularly pervasive in the Global South, and bi-products of economic systems of extraction, exploitation, accumulation through dispossession, and white supremacy. In this, climate change is not an isolated crisis, but a symptom of an economic system that

jeopardizes Black lives.[10] Ms. Pichon Battle defined broadly the concept of "preparedness" for an climate emergency, including investment and providing information to Black communities, were clearly not a priority of State actors in the Gulf South. Preparedness involved moving infrastructure to renewable energy, namely, to sources that were available in the immediate aftermath of a climate disaster. Preparedness also required a conversation about the climate crisis and solutions in order to be able both to adapt to imminent events and to mitigate the impact of human exploitation and extractivism. The context must also be acknowledged; access to clean water and sewage was already limited in southern communities, Black communities and frontline communities even before climate disaster became the norm. Moving away from fossil fuel-based energy and combustion engines towards renewable, clean energy also implied commitments to effective disaster recovery, given that access to solar, wind and water energy would allow communities to recover more quickly. A key obstacle to the conversation on climate was that it was still rooted in capitalism, oppression and profitmaking for only a few. This dialogue failed to embrace principles of equity, repair and justice or to consider other complex conversations being held by social movements around the world. The climate crisis was a Black issue, affecting people of African descent everywhere. Equity, repair and justice were urgently required.

33. Miriam Miranda of the Black Fraternal Organization of Honduras (OFRANEH) stated that climate change had made Honduras extremely vulnerable to natural disasters and the impact of hurricanes. *Garifuna*, Honduran people of African descent, live in the most affected coastal regions of the country. The national production model saw the country as a monoculture, agricultural society, generally to the detriment of local people. Huge plantations of African palm had replaced food crops. Traditional methods of food production had been lost as numerous hectares of forest had been replaced by monocultures. Throughout, decision-makers had failed to acknowledge the true effects of disregard, or to learn from diverse community experiences and issues. The climate crisis required a re-examination of existing production and consumption models, given the disproportionate cost-benefit ratio of industrial mega projects to their impact. Existing production and consumer models affected the whole of humanity, and vulnerable Black communities in particular.

34. Sharon Lavigne, the founder of RISE St. James, discussed the impact of decades of environmental racism. She stated that the sickness of industry greed and systemic racism were evident in the soil and the air of "Death Alley" in Louisiana. Ms. Lavigne was a lifelong resident of St. James Parish in Louisiana, United States of America, a town in which 85 per cent of residents were African American and located in the 85-mile stretch along the Mississippi River between Baton Rouge and New Orleans. In that area, more than 100 petrochemical plants and refineries defined the popularly-termed "Cancer Alley," given the prevalence of cancer among its residents, and recently recharacterized as "Death Alley" by the community. St. James had been devastated by industrial exploitation; people could not drink the water, plant a garden or breathe clean air. St. James residents suffered high rates of cancer, respiratory diseases and other severe health problems from exposure to industrial pollutants. When the COVID-19 pandemic hit, a disproportionate number of residents died because of their immune-compromised status due to industrial pollution. Racial disparities were evident even in real estate buyouts, which favoured white property owners and left Black homeowners involuntary holdouts amidst the industrial development of the area. Nonetheless, State leadership continued to see the community as expendable: in spring 2018, without community consultation, the Governor of Louisiana announced that a site had been approved for a new project involving the creation of 14 chemical plants by Formosa Plastics Group, a Taiwanese supplier of plastic resins and petrochemicals, in St. James parish. The announcement reflected how easy it was to establish environmentally toxic plants in communities where the residents were poor, Black and without powerful protectors. Even though the project would desecrate ancestral burial grounds, community members had already been threatened with arrest, ejected from land and prevented by police from placing flowers on graves. The community had sought assistance and advocated for a moratorium on industrial exploitation and extractivism in St. James Parish and throughout "Cancer Alley", including by seeking to bar new industries and the expansion of existing industries, and to obtain reparations for the people of St. James, an investigation into the cause of the high rates

[10] See https://redblackgreennewdeal.org/.

of illness and mortality, and a study on the impact of chemicals released into the air and water.

35. Biko Rodrigues of the National Coalition of Quilombola communities spoke about Quilombola communities, communities of escaped enslaved people found throughout Brazil, the Amazon, the semi-arid region, and also in the Pantanal. The communities were vulnerable socioeconomically and were subjected to environmental racism, in addition to other manifestations of racism in Brazil. Violence against their communities had surged during the COVID-19 pandemic, to which the authorities had turned a blind eye. More than 1,200 mega projects, a military base and several major hydroelectric projects, including a dam, were planned on Quilombo land that would displace Quilombo communities, particularly those without land demarcation. Although there were more than 6,000 communities, fewer than 200 (mostly in the Amazon region of Brazil) had land titles. One fact that was not widely understood was that 70 per cent of people living in the Amazon region were Black, and that the Quilombos played a vital role in preserving ecosystems and lives, despite the increasing threat to their lands, the murder of several leaders and the pillaging of natural resources during the pandemic. Indigenous, Quilombo, traditional and rural communities protected biodiversity on the frontlines, trying to prevent agribusinesses from destroying the countryside and seeking to preserve the lands of their ancestors so that their grandchildren would be able to live there. Mr. Rodrigues emphasized the efforts made by these communities to save lives. Biodiversity and the environment were the source of life, and were desperately in need of conservation.

36. James Bhagwan, the General Secretary of the Pacific Conference of Churches, stated that the Pacific was rarely recognized as a diverse region, even though more than a quarter of the world's distinct languages were spoken there. Pacific island nations made up some very large exclusive economic zones and played an important role in safeguarding natural resources. Pacific island people saw themselves as part of the land and had an almost spiritual relationship with land and sea, seeing the Pacific as the blue heart of the planet, providing oxygen, a carbon sink, food, minerals and more. Pacific island States had been at the forefront of advocating for climate justice, not only from a human rights perspective but also as a moral imperative, as it concerned the possible extinction of living cultures and the disappearance of sovereign States. Structural racism might explain the slowness and lack of resources provided to engage on climate change or developing adaptation and mitigation policies. Some development aid was being inappropriately recharacterized as climate adaptation and mitigation resources, while pressing issues, such as climate-induced relocation due to rising seas and extreme weather patterns, had broad implications for security. The issues of dignity, justice and human rights were prevalent in the context of climate-induced migration. The work done to address COVID-19 should not come at the expense of addressing climate change and the climate crisis.

37. During the interactive dialogue, in response to a question by Mr. Sunga, Sharon Lavigne cited categories of reparations and restitution, including coverage of medical expenses related to industrial pollution, restoration of land and water, the acknowledgement of ancestors with gravesites and monuments, payment for pain and suffering, and restoration of the values of properties owned by the people still living in the 4th and 5th districts of St. James parish. Mr. Gumedze stated that, in addressing the climate crisis, people should not forget the historical and structural racism that have pushed many communities of Africa into marginalization and poverty. Myriam Miranda pointed out that the climate crisis required holistic and robust action. Companies should be held to account and assume their true obligations with regard to the future and the climate. Decision-makers should take sustainable decisions that were valid for the future. Destroying the environment was an abdication of responsibility to future generations. Policies should recognize the global emergency for humankind.

38. The representative of the European Union spoke about climate action and the European Green Deal package of measures, which had the aim of protecting the planet but also of making the transition just and inclusive for all. The European Union was also working to improve access to justice in environmental matters, such as through the Aarhus Convention. As part of its action plan against racism 2020–2025, the European Union had adopted a new Roma strategic framework that included action to mitigate the

disproportionate impact of crises on the Roma community and to deliver environmental justice.

39. The representative of the United States of America pointed out that addressing systemic racism and environmental challenges, including climate change, were core priorities for the United States, which had rejoined the Paris Agreement and appointed the country's first presidential envoy for climate. That commitment included advancing environmental justice at home and holding polluters accountable, including those who disproportionately harmed communities of colour and low-income communities. An executive order on environmental justice had made environmental justice a part of the mission of every federal agency by directing the development of programmes, policies and activities to address the disproportionate health, economic, environmental and climate impact on disadvantaged communities. The order had established two new White House environmental justice councils to ensure a whole-of-government approach to address current and historical environmental injustices, including by strengthening and monitoring enforcement by the Environmental Protection Agency, the Department of Justice and the Department of Health and Human Services. The order also created the government-wide "Justice40" initiative, which had the goal of delivering 40 per cent of the overall benefits of relevant federal investments to disadvantaged communities. It had also created an environmental justice scorecard to track performance.

40. The representative of Brazil agreed that traditional communities were important to ecosystem preservation, and that they should be consulted. He underlined the role of the human rights ombudsman and other institutions in Brazil to respond to threats to human rights. Brazil had produced data on the impact of COVID-19, disaggregated by race, which had proved essential to act to benefit the most vulnerable. The representative of Cuba emphasized the importance of this topic, and confirmed that the hurricane and storm season in the Caribbean was becoming more intense because of the climate crisis.

### 3. Environmental racism, the climate crisis and reparatory justice

41. Mr. Reid stated that the focus of the panel discussion was the matrix of exploitation, the destructive impact of colonialism on the environment, the exploitation of people of African descent, the long-term consequences of such exploitation and the ongoing concerns and problems that people of African descent faced today.

42. Prof. Hilary Beckles, Chair of the Caribbean Community (CARICOM) Reparations Commission and Vice-Chancellor of the University of West Indies**,** stated that the cross-cutting concerns of combating institutional racism within environmental thinking were critical to discussions. The connection between global movements for reparatory justice for crimes against humanity and the climate crisis judgement are all relevant to global considerations. The injustices of the past now collided with the climate crisis of today. The Black community seeking to overcome the legacy of slavery was now suffering the effects of climate change. The frequency and intensity of increasingly frequent hurricanes were the result of rising global temperatures. Death and destruction were now the norm within this changed reality; history and hurricanes constituted the new cocktail posing an existential threat to the people of the Caribbean. Against a backdrop of mass poverty arising from the planation world of slavery, the climate crisis was increasing the vulnerability of communities. Reparatory justice was therefore the common demand; there could be no other perspective, no other policy framework.

43. According to the Vice Chair of the Committee on the Elimination of Racial Discrimination, Prof. Verene Shepherd, small island developing States like those in the Caribbean were extremely susceptible to the effects of climate change. She referred to the role that European colonialism played in the current crisis, adding that the climate crisis had been generated by the system of planation slavery and centuries of agricultural practices, including mass deforestation, which had led to erosion, the loss of soil fertility and of valuable protected forestry. The United Nations Environmental Programme had pointed out that the production of sugarcane had led to the loss of greater biodiversity than any other single crop in the world because of its impact on ecosystems and increased soil erosion. Historical injustices had undeniably contributed to the poverty, underdevelopment, marginalization, social exclusion, economic disparities, instability and insecurity that affect

many people in different parts of the world, in particular in developing countries, where the vast majority of people of African descent resided and suffered from the legacy of colonialism. States should engage with people of African descent on appropriate and effective measures to halt and reverse the lasting consequences of slavery and colonialism, and eliminate continuing harm, including environmental harm that threatened their well-being. She underscored the need to implement the CARICOM 10-point action plan for reparatory justice, which demanded a full formal apology; the establishment of an indigenous peoples development programme; repatriation for those who chose it; the building of cultural institutions; attention to the public health crisis; the eradication of illiteracy; the creation of an African knowledge programme; psychological rehabilitation; technology transfers; and debt cancellation.

44. If the case for slavery reparations were to encompass the damage to island environments by plantations and the destitution of populations descended from enslavement, which have left them especially vulnerable to climate change, and the role of slavery systems in the financial foundations of global economies, banks and insurance firms that had directly financed the rise of multinational fossil fuel (and mining) extractive economies, then it could be shown that the beneficiaries of slavery had exposed the Caribbean to ecological damage, social vulnerability and risks of climate change. In a reparations approach, climate adaptation measures for countries that were most exposed to but least responsible for climate change would be funded on this basis.

45. William A. Darity Jr. of the Lancet Commission on Reparations and Distributive Justice stated that the impact of structural racism in the United States was manifest in the disproportionately compromised health status of African Americans. Health disparities had increased during the course of the pandemic; by the beginning of March 2021, the actual Black mortality rate from COVID-19 was 1.2 times that for white Americans. African Americans were more likely to have pre-existing conditions that made them more vulnerable after contracting the disease; inequitable access to quality medical care only aggravated the situation. An important contributor to the imbalanced presence of pre-existing conditions in the Black population in the United States was the far greater likelihood of exposure to environmental hazards. In his recent book, *From Here to Equality: Reparations for Black Americans in the Twenty-First Century*, he had catalogued an array of environmental threats to Black health, including a greater likelihood of living in communities located near hazardous-waste sites; of exposure to nitrogen dioxide poisoning; of lacking potable water and proper sanitation; and of living in the presence of heavily polluting corporations, that emitted cancer-causing agents into the surrounding air. Wealth deprivation was the pre-existing condition from which flowed so much of the harm inflicted on Black lives in the United States. A proper plan of action to close the Black-white wealth gap – a reparations plan – would cost the federal Government to spend at least $14 trillion to implement.

46. Mr. Darity argued that a reparations plan was warranted because federal government policies had created a racial wealth gap in the United States. At the end of the Civil War, formerly enslaved persons, who had virtually no assets, were promised land grants of 40 acres as restitution for their years of bondage, to allow them to become participants in full citizenship. That promise was intentionally never kept, and full citizenship has never been achieved. Simultaneously, under the Homestead Act of 1862, the federal Government had undertaken the allocation of 160 acres land grants to more than 1.5 million white families in the western territories to complete the nation's colonial settler project. Between the end of civil war and Second World War, the Black community was devastated by more than 100 white terrorist massacres in all regions, including in Wilmington in 1898 and in Tulsa in 1921. White riots took countless Black lives, blocked Black political participation and resulted in the destruction or appropriation of Black-owned property by white mobsters. The capacity to accumulate wealth was denied, and the federal Government was complicit either by turning a blind eye or by supporting the white rioters. In the late nineteenth century, government asset-building policies focused on land distribution; in the twentieth century, the focus shifted to home ownership. In both cases, federal programmes promoted white wealth accumulation while exacerbating Black wealth decumulation. The discriminatory application of home buying provisions of the enabling legislation for the Federal Housing Administration and the Servicemen's Readjustment Act (more commonly known as the "GI Bill") gave white Americans another important boost in acquiring property, while African Americans were

denied comparable access to the same resources. Federal policy in the United States created the racial wealth gap, and federal policy should be mobilized to provide a remedy. The federal Government, on its long overdue path towards redress and justice, should adopt a reparations plan for African Americans, with three critical elements: a specific focus on Black Americans who were descendants of persons enslaved in the United States as the eligible recipients; the elimination of the racial wealth gap in its entirety, in order to provide Black Americans with the material basis for full citizenship; and direct payments to eligible recipients, replicating restitution practices elsewhere.

47. Jose Luis Rengifo Balanta, a human rights defender and member of Mesa Ambiental y de derecho del Pueblo Negro de Colombia, emphasized that Afro-descendants in Colombia, like in other parts of the world, had suffered greatly from structural and environmental racism and savage capitalism. The ancestral territories, natural resources, water and forests of Afro-descendant communities were being plundered by transnational corporations and the State. The Constitutional Court of Colombia had ruled that the State authorities were responsible for violations of the rights to life, health, water and food security, the right to a healthy environment, and the cultural and territorial rights of the claimant ethnic communities. The Court found that the authorities had failed to comply with their constitutional obligation to take concrete and effective measures to stop illegal mining activities, thereby precipitating a humanitarian and environmental crisis in the river basin, its tributaries and the surrounding territories. Communities of Afro-descendant people still struggled to achieve legal recognition of their collective territories. On the Pacific coast, communities had a maritime culture in harmony with the environment, with fisheries, mining and natural resources in a territory that was biodiverse and biocultural; they also produced traditional medicine. Large-scale projects, such as the building of ports, had had a negative impact on the environment and the communities, which had been displaced from the coastal regions into the cities, and corporations and extractive industries, the beneficiaries of State concessions, had taken over. Afro-descendants, under external pressure, had been pushed off their lands, while the State did not provide them with any safeguards, thereby alienating them from the rights and territories linked to their identity and culture. Mr. Balanta referred to the emblematic case of the Anchicaya river, which transnational corporations had polluted, leading to the displacement of hundreds of thousands of people who had lived in those territories and used the river for generations as a source of livelihood. A resolution had been issued by the Minister for the Environment, which was given to the State to remedy the damage caused; to date, however, the communities were still fighting to defend and protect their rights and to ensure that the law was respected. The speaker emphasized a number of key elements: legal and collective recognition of the use of traditional territories; policies that recognized traditional and ancestral knowledge, which helped to mitigate climate change; policies and programmes of capacity-building, to help to protect nature and to strengthen people's ability to resist climate change. He called upon all Afro-descendant peoples to mobilize until ancestral territories and knowledge were recognized. He also called for genuine action to ensure environmental justice, including effective participation for people of African descent.

48. During the interactive dialogue, in reply to a question by Mr. Reid, Mr. Darity explained his focus on reparations for people of African descent born in the United States of America, a community that had descended from the individuals promised land grants in the aftermath of the civil war, and were denied such restitution, which had laid the foundation for the wealth disparities now observed between Blacks and whites. Black people throughout the African diaspora had a claim for reparations, but not all had a claim for reparations from the Government of the United States. Every diaspora community had to be careful about carving out a claim that was relevant to their history.

49. The Chair of the Working Group spoke about the ongoing extractivism that Afro-descendant communities were facing, such as in the case of "Death Alley" in Louisiana, where vast numbers of petrochemical plants were operating with the green light from the State despite the massive and intergenerational threat to Black communities. She referred to the study that Prof. Darity had co-authored, and the finding that, if reparations had been awarded after enslavement, the COVID-19 footprint in Louisiana would have been 30 to 60 per cent smaller. She asked about the COVID-19 pandemic and reparations, and how the transnational actions of private companies that were disproportionately cited in Black communities played into the reparations debate. Prof. Darity replied that the actions of

corporations that were currently heavy polluters in all regions of the United States should be regulated, particularly in Louisiana, the location of "Cancer Alley". Reparations alone were not enough; they should be combined with an effort to stop the processes responsible for the damage caused.

50. Mr. Sunga confirmed that the Working Group endorses the CARICOM 10- point action plan.

51. Mr. Balcerzak spoke about the operational guidelines on the inclusion of people of African descent in the 2030 Agenda for Sustainable Development.

52. Jose Luis Rengifo Balanta emphasized that the extractive policies that had emerged from large-scale megaprojects and mono crops were strategies designed to deprive peoples of their land. States should step in and protect communities. There was also a relationship between mining, the law and armed conflict. The women who had played a key part throughout this struggle deserved praise.

53. The representative of the Bolivarian Republic of Venezuela stated that the Government was working on a draft bill on climate change, and had identified three cases for reparatory processes of environmental racism. The representative of Indonesia reported the Government of Indonesia was providing assistance to small island States.

54. The twenty-eighth session ended with closing remarks, including statements by outgoing members of the Working Group ending their term in 2021, Mr. Gumedze, Mr. Sunga and Mr. Balcerzak.

# IV. Conclusions and recommendations

## A. Conclusions

55. **People of African descent continue to be subjected to environmental racism and are disproportionately affected by the climate crisis. Environmental racism refers to environmental injustice in practice and in policies in racialized societies. Environmental racism is a measurable contemporary manifestation of racism, racial discrimination, xenophobia, Afrophobia and related intolerance.**

56. **Environmental racism cannot be discussed in isolation. As a consequence of historical and structural racism, exploitative economic models and the legacy of the trade in enslaved Africans, people of African descent have lived segregated, and decisions have been taken that have disproportionately exposed them to environmental hazards. In addition, generations of racism, economic divestment and targeting must be acknowledged and addressed.**

57. **In many parts of the world, policymakers, legislators and others subject people of African descent to discrimination, and provide insufficient respect for and protection of their human rights, including the right to a safe, clean, healthy and sustainable environment. This is manifest in the siting of landfills, toxic waste dispensaries, extractive industries, industrial and mining areas, factories and power plants and environmentally hazardous activities, and the lack of enforcement of environmental protection regulations in communities heavily populated by people of African descent, often resulting in high rates of asthma, cancer and other chronic environment-related illnesses, as well as less visible and long-term effects.**

58. **Environmental racism is present at both the national and international levels. At the national level, people of African descent have reduced access to information about environmental matters, to participation in environmental decision-making and to remedies for environmental harm. States authorizing hazardous facilities in communities that are predominantly composed of people of African descent disproportionately interfere with their rights, including their rights to life, health, food and water. Internationally, hazardous wastes continue to be exported to countries in the global South with lax environmental policies and safety practices. Transnational corporations develop lucrative endeavours that disregard or deny the impact on local**

**populations. The persistent failure to take sufficiently ambitious action to reduce greenhouse gas emissions and thereby mitigate climate change has the heaviest impact on States and communities that have been subject to historic exploitation, discrimination and marginalization. States must pay attention to historical or persistent prejudice, recognize that environmental harm can result from and reinforce existing patterns of discrimination, and take measures against the conditions that cause or perpetuate discrimination. States should take measures to protect those who are at particular risk of environmental harm.**

59. **Environmental justice and reparations are human rights to which people of African descent are entitled. As environmental human rights defenders, people of African descent have faced threats, intimidation and violent attacks while defending their communities' human rights or campaigning for the promotion of economic alternatives that contribute to the development of environmentally safe livelihoods for people of African descent.**

60. **Environmental racism is perpetrated by States, international corporations and other non-State actors, often in violation of international human rights obligations and local law, and also with deliberate indifference to the impact on communities of African descent. It is for this reason that the Durban Declaration and Programme of Action requested States, supported by international cooperation as appropriate, to consider positively concentrating additional investments in environmental control in communities of primarily African descent.**

61. **The climate crisis has now become a ticking time bomb. This global emergency, characterized by global warming and climate change as a result of human decision-making, including the burning of fossil fuels and the release of excessive amounts of carbon into the environment, has already had a disproportionate impact on the lives of people of African descent. Disproportionate effects have also been reported on the African continent. Communities and even entire States that occupy and rely upon low-lying coastal lands, tundra and Arctic ice, arid lands, and other delicate ecosystems are at particular risk. Policymaking, including how States respond to the climate crisis, may strengthen the impact of the climate crisis on communities of African descent, which often have less political and positional power locally and globally. Addressing the climate crisis requires a human rights-based approach that prioritizes the inclusion of people of African descent in decision-making at all stages, including preparedness, mitigation, response and recovery. Protection should be equal and effective.**[11]

62. **The evidence from climate tipping points in the climate system, which suggests that "we are in a state of planetary emergency", points to a worsening situation for people of African descent.** [12] **Among other things, the Durban Declaration and Programme of Action invites States to consider non-discriminatory measures to provide for a safe and healthy environment for individuals and groups of individuals victims of or subject to racism, racial discrimination, xenophobia and related intolerance, and in particular, to ensure that relevant concerns are taken into account in the public process of decision-making on the environment. This further requires appropriate remedial measures, as possible, to clean, re-use and develop contaminated sites, and where appropriate, relocate those affected on a voluntary basis after consultation.**

63. **The world is currently facing a climate crisis, environmental racism, pervasive toxic pollution, dramatic loss of biodiversity and a surge in emerging infectious diseases of zoonotic origin, such as COVID-19. These interlocking environmental crises have a negative impact on a wide range of human rights, including the rights to life, health, water, sanitation, food, decent work, development, education, peaceful assembly and cultural rights, as well as the right to live in a healthy environment.**

64. **The adverse effects have a disproportionate impact on women and girls and the rights of billions of people, especially those who are already vulnerable to**

[11] See www.ohchr.org/EN/Issues/HRAndClimateChange/Pages/HRClimateChangeIndex.aspx.

[12] Timothy M. Lenton et al., "Climate tipping points — too risky to bet against", *Nature*, 2019; 575 (7784).

**environmental harm, including people living in poverty, minorities, older persons, LGBT persons, racially and ethnically marginalized groups, indigenous peoples, people of African descent, persons with disabilities, migrants, internally displaced persons, and children.**

65. **Peoples and communities historically subject to exploitation, including people of African descent, continue to bear the brunt of pollution, environmental degradation and climate change, including in some actions ostensibly intended to protect the environment. In addition, environmental human rights defenders have been subject to a shocking rate of killings, threats, arbitrary arrests, harassment and intimidation as a direct result of their legitimate work on human rights and the environment.**

66. **Climate change is a biproduct of an economic system that is heavily reliant on extraction, exploitation and accumulation through dispossession. There are credible authorities, including civil society organizations, academics and individual experts, that can attest to the racialized impact of environmental racism and the climate crisis, in every region. Resources abound to facilitate the understanding of the severe, ongoing and systemic impact of the climate crisis and environmental racism on communities of African descent. Although people of African descent should be at the centre of climate and environmental analyses, particularly as communities subject to historical and ongoing exploitation, any genuine understanding or acknowledgment that climatic and other environmental effects are particularly pervasive in the global South has been lacking. The climate crisis, and specifically any effort to exclude, minimize or ignore its dramatic impact on communities of African descent in particular (including in the most developed countries) and on the Global South in general, reflect a mindset that is a legacy of white supremacy. A racialized analysis illustrates that climate change is not an isolated crisis but a symptom of economic and political systems that have disregarded the right to life and other core human rights.**

67. **Transformative actions are urgently required to address systemic racism and the COVID-19 pandemic, to protect the environment and human rights, and to address the drivers of the climate emergency, toxic pollution, biodiversity loss and zoonotic diseases, including by requiring businesses to respect the rights of affected communities and the environment.**

68. **A human rights-based approach would help to address inequality and ensure protection for people in vulnerable situations, including people of African descent.**

69. **The right to a healthy environment includes the rights to clean air, safe and sufficient water, sanitation, healthy and sustainable food, a toxic-free environment, a safe and stable climate and healthy ecosystems and biodiversity. It also includes the rights to environmental information, participation in decision-making and access to justice with effective remedies.**

70. **The Working Group welcomes the steps taken towards environmental justice and the inclusion of people of African descent in all conversations on the climate crisis worldwide. It also welcomes, in the United States of America, the Executive Order on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis of 20 January 2021. It calls upon the Government of the United States to deliver environmental justice in communities in America, including areas like "Death Alley" and other areas that face environmental degradation, climate crises and disaster, all of which are compounded by infrastructure deficiencies, including a lack of potable water, sanitation, plumbing, and assurances of air quality. The Working Group calls upon all Governments to protect the right to a healthy environment and to partner with communities for environmental justice for people of African descent globally.**

71. **The Working Group welcomes the considerations made by the Committee on the Elimination of Racial Discrimination to prepare a new general recommendation on the right to health and racial discrimination. In the light of the climate crisis, the impact of environmental racism and of climate-related disasters on communities of African descent, it is clear that the right to health and the right to environmental justice are inextricably linked.**

## B. Recommendations

72. **People of African descent must be part of the solution to climate change and other environmental crises. States should include the leadership, experience and expertise of frontline communities, such as communities of people of African descent, in all stages of environmental policies, processes and implementation in an equitable way.**

73. **Priority should be given to increasing the participation of people of African descent in the design and implementation of climate change emergency response, adaptation and mitigation measures. Opportunities should be taken to address both climate change and racial discrimination together, rather than treating them separately.**

74. **The Working Group recommends that States and other duty bearers:**

(a) **Implement the International Convention on the Elimination of Racial Discrimination, the Durban Declaration and Programme of Action and the Programme of Activities for the International Decade for People of African Descent, and take action to address the root causes and current manifestations of racism, racial discrimination, xenophobia, Afrophobia and related intolerance, including environmental racism;**

(b) **Take urgent and timely action at the global level to recognize and implement the right to a safe, clean, healthy and sustainable environment as a vital response to the current multi-faceted environmental crisis; support the adoption of key United Nations resolutions recognizing that everyone has the right to a safe, clean, healthy and sustainable environment to serve as a catalyst for constitutional recognition, stronger laws and increased resources to deliver essential services; and hasten the process of drafting United Nations declarations and treaties in this connection;**

(c) **Take urgent action to mitigate the climate crisis, and address environmental degradation and environmental racism, applying a human rights-based approach; emphasize prevention and participation, focus on the needs of those most affected, and increase accountability; address the root causes of systemic racism and interrelated environmental disasters, and seize the opportunity to "build forward better" in order to achieve a just and sustainable future in which no one is left behind.**

75. **States must take urgent action to ensure protection and support for environmental human rights defenders, including defenders of African descent.**

76. **States, corporations, institutions and individuals must develop a facility to recognize racial discrimination to effectively address it. This includes in policies that balance extraction against community health and safety. Corporations should conduct environmental and human rights impact assessments as part of their due diligence processes, and engage in fair contracting and siting practices that respect local communities and do not exploit or coerce favourable outcomes at the expense of communities with less power and privilege. Member States must not shirk their oversight obligations, particularly with respect to transnational corporations and businesses headquartered outside communities where they operate.**

77. **States should introduce legally binding targets based on World Health Organization (WHO) guidelines to reduce the number of deaths from air pollution. They should ensure that the national limits for particulate matter are in accordance with WHO guidelines as minimum requirements. They should engage in awareness-raising within communities at risk to help individuals to reduce their personal exposure to air pollution. The capacity to monitor air quality must be increased. The adverse effects of air pollution on health should also be communicated to patients and their carers by medical and nursing professionals.**

78. **States should also support and invest in Africa and other countries affected by the legacy of colonialism, and smallholder farmers of African descent, with special regard for women and the local food producers who create resilience and liveable**

**communities in the midst of crises. Investments in climate resilience programmes help farmers to adapt and to protect food security.**

79. **Developed nations, multinational corporations and investors should help to develop new sustainable development models, such as sustainable energy. They should support COVID-19 recovery plans aimed at radical reductions in carbon in Africa and communities of the African descent in the diaspora. They should also make serious and immediate efforts to transition from extractive energy systems to sustainable energy, to demand corporate accountability for water pollution, to ensure common access to clean water, and to understand anti-poverty measures as fundamental to climate preparedness.**

80. **The multiple crises of climate change and other forms of environmental degradation, racial inequity and the COVID-19 pandemic demand recovery efforts that prioritize women, young people and other marginalized communities. Government immigration policies should accommodate climate migrants and others moving for reasons related to climate change, and meet their needs. Governments should also plan climate resiliency into global nutrition and food security programmes for Africa and communities of African descent. They should support food system strategies that mitigate the emissions caused by both food production and consumption.**

81. **States should recognize the rights of people of African descent to ancestral territories and value ancestral knowledge to mitigate climate change; and develop policies and of capacity-building programmes to help communities to protect nature and to strengthen their ability to resist climate change and other environmental destruction.**

82. **All States should address the ways in which systemic racism and multiple and intersecting systems of discrimination have disproportionately affected people of African descent; this includes directing climate adaptation and mitigation funding to communities that have historically experienced discrimination, and seeking climate solutions that also serve to rectify historical inequities. Climate financing should be localized to support community-led solutions. An assessment of racial impact should be a part of human rights due diligence efforts for all climate and environmental action, and there should be accountability for human rights violations and environmental damage, including reparations. There must be free, prior and informed consent from communities to ensure people of African descent are consulted and enjoy the benefits arising from the use of their land, and meaningfully addressing climate change-related loss and damage experienced by marginalized communities.**

83. **All States should recognize and pay reparations for the centuries of harm to Afro-descendants rooted in slavery and colonialism. States should consider the CARICOM 10-point action plan for reparations for guidance in this regard.**

84. **Decision-makers should examine the effect of interaction of historical and structural discrimination on people of African descent and climate change to inform their policymaking, in particular with regard to any unintended impact of emergency response plans; have greater recognition of the existing vulnerability of people of African descent when designing adaptation measures; ensure the interaction of climate mitigation policies for existing sites of concentrated air pollution and the demographic makeup of these areas (such as mitigation of environmentally-induced asthma in communities of African descent); and bear in mind the risk of climate mitigation policies incentivizing the seizure of land.**

85. **Special measures should be regarded as part of a State's climate change response to enhance the effectiveness of emergency response and adaptation measures by reducing the vulnerability of people of African descent and the social impact of climate mitigation measures. Special measures include granting access to health and housing, given that climate change presents a significant threat to both and they are a major source of accumulation of disadvantage; to land, particularly to reduce the impact of mitigation policies that might incentivize the seizure of land; and to education, to ensure that people of African descent have greater access to economic opportunities, political participation and justice. These are fundamental to reduce vulnerabilities and the**

**potential negative impact of climate change and related policies on the rights of people of African descent.**

86. **Work should be fast-tracked to develop a United Nations declaration on the promotion of and full respect for the human rights of people of African descent, in full collaboration with people of African descent. The declaration should include protection from environmental racism.**

87. **Governments, businesses and civil society should implement the Guiding Principles on Business and Human Rights to prevent, address and remedy human rights violations suffered by people of African descent at the hands of business enterprises.**

# Annex 44

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

# LEGAL CONSEQUENCES FOR STATES OF THE CONTINUED PRESENCE OF SOUTH AFRICA IN NAMIBIA (SOUTH WEST AFRICA) NOTWITHSTANDING SECURITY COUNCIL RESOLUTION 276 (1970)

**ADVISORY OPINION OF 21 JUNE 1971**

# 1971

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

# CONSÉQUENCES JURIDIQUES POUR LES ÉTATS DE LA PRÉSENCE CONTINUE DE L'AFRIQUE DU SUD EN NAMIBIE (SUD-OUEST AFRICAIN) NONOBSTANT LA RÉSOLUTION 276 (1970) DU CONSEIL DE SÉCURITÉ

**AVIS CONSULTATIF DU 21 JUIN 1971**

Official citation:

*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 16.

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Mode officiel de citation:

*Conséquences juridiques pour les Etats de la présence continue de l'Afrique du Sud en Namibie (Sud-Ouest africain) nonobstant la résolution 276 (1970) du Conseil de sécurité, avis consultatif, C.I.J. Recueil 1971*, p. 16.

**Sales number**
**N° de vente: 352**

INTERNATIONAL COURT OF JUSTICE

YEAR 1971

1971
21 June
General List
No. 53

**21 June 1971**

# LEGAL CONSEQUENCES FOR STATES OF THE CONTINUED PRESENCE OF SOUTH AFRICA IN NAMIBIA (SOUTH WEST AFRICA) NOTWITHSTANDING SECURITY COUNCIL RESOLUTION 276 (1970)

*Composition and competence of the Court—Propriety of the Court's giving the Opinion—Concept of mandates—Characteristics of the League of Nations Mandate for South West Africa—Situation on the dissolution of the League of Nations and the setting-up of the United Nations: survival of the Mandate and transference of supervision and accountability to the United Nations—Developments in the United Nations prior to the termination of the Mandate—Revocability of the Mandate—Termination of the Mandate by the General Assembly—Action in the Security Council and effect of Security Council resolutions leading to the request for Opinion—Requests by South Africa to supply further factual information and for the holding of a plebiscite—Legal consequences for States*

## ADVISORY OPINION

*Present:* *President* Sir Muhammad ZAFRULLA KHAN; *Vice-President* AMMOUN; *Judges* Sir Gerald FITZMAURICE, PADILLA NERVO, FORSTER, GROS, BENGZON, PETRÉN, LACHS, ONYEAMA, DILLARD, IGNACIO-PINTO, DE CASTRO, MOROZOV, JIMÉNEZ DE ARÉCHAGA; *Registrar* AQUARONE.

Concerning the legal consequences for States of the continued presence of South Africa in Namibia (South West Africa), notwithstanding Security Council resolution 276 (1970),

THE COURT,

composed as above,

*gives the following Advisory Opinion:*

1. The question upon which the advisory opinion of the Court has been asked was laid before the Court by a letter dated 29 July 1970, filed in the Registry on 10 August, and addressed by the Secretary-General of the United Nations to the President of the Court. In his letter the Secretary-General informed the Court that, by resolution 284 (1970) adopted on 29 July 1970, certified true copies of the English and French texts of which were transmitted with his letter, the Security Council of the United Nations had decided to submit to the Court, with the request for an advisory opinion to be transmitted to the Security Council at an early date, the question set out in the resolution, which was in the following terms:

> "*The Security Council,*
>
> *Reaffirming* the special responsibility of the United Nations with regard to the territory and the people of Namibia,
>
> *Recalling* Security Council resolution 276 (1970) on the question of Namibia,
>
> *Taking note* of the report and recommendations submitted by the *Ad Hoc* Sub-Committee established in pursuance of Security Council resolution 276 (1970),
>
> *Taking further note* of the recommendation of the *Ad Hoc* Sub-Committee on the possibility of requesting an advisory opinion from the International Court of Justice,
>
> *Considering* that an advisory opinion from the International Court of Justice would be useful for the Security Council in its further consideration of the question of Namibia and in furtherance of the objectives the Council is seeking
>
> 1. *Decides* to submit in accordance with Article 96 (1) of the Charter, the following question to the International Court of Justice with the request for an advisory opinion which shall be transmitted to the Security Council at an early date:
>
> 'What are the legal consequences for States of the continued presence of South Africa in Namibia, notwithstanding Security Council resolution 276 (1970)?'
>
> 2. *Requests* the Secretary-General to transmit the present resolution to the International Court of Justice, in accordance with Article 65 of the Statute of the Court, accompanied by all documents likely to throw light upon the question."

2. On 5 August 1970, that is to say, after the despatch of the Secretary-General's letter but before its receipt by the Registry, the English and French texts of resolution 284 (1970) of the Security Council were communicated to the President of the Court by telegram from the United Nations Secretariat. The President thereupon decided that the States Members of the United Nations were likely to be able to furnish information on the question, in accordance with Article 66, paragraph 2, of the Statute, and by an Order dated 5 August 1970, the President fixed 23 September 1970 as the time-limit within which the

Court would be prepared to receive written statements from them. The same day, the Registrar sent to the States Members of the United Nations the special and direct communication provided for in Article 66 of the Statute.

3. The notice of the request for advisory opinion, prescribed by Article 66, paragraph 1, of the Statute, was given by the Registrar to all States entitled to appear before the Court by letter of 14 August 1970.

4. On 21 August 1970, the President decided that in addition to the States Members of the United Nations, the non-member States entitled to appear before the Court were also likely to be able to furnish information on the question. The same day the Registrar sent to those States the special and direct communication provided for in Article 66 of the Statute.

5. On 24 August 1970, a letter was received by the Registrar from the Secretary for Foreign Affairs of South Africa, whereby the Government of South Africa, for the reasons therein set out, requested the extension to 31 January 1971 of the time-limit for the submission of a written statement. The President of the Court, by an Order dated 28 August 1970, extended the time-limit for the submission of written statements to 19 November 1970.

6. The Secretary-General of the United Nations, in two instalments, and the following States submitted to the Court written statements or letters setting forth their views: Czechoslovakia, Finland, France, Hungary, India, the Netherlands, Nigeria, Pakistan, Poland, South Africa, the United States of America, Yugoslavia. Copies of these communications were transmitted to all States entitled to appear before the Court, and to the Secretary-General of the United Nations, and, in pursuance of Articles 44, paragraph 3, and 82, paragraph 1, of the Rules of Court, they were made accessible to the public as from 5 February 1971.

7. The Secretary-General of the United Nations, in pursuance of Article 65, paragraph 2, of the Statute transmitted to the Court a dossier of documents likely to throw light upon the question, together with an Introductory Note; these documents were received in the Registry in instalments between 5 November and 29 December 1970.

8. Before holding public sittings to hear oral statements in accordance with Article 66, paragraph 2, of the Statute, the Court had first to resolve two questions relating to its composition for the further proceedings.

9. In its written statement, filed on 19 November 1970, the Government of South Africa had taken objection to the participation of three Members of the Court in the proceedings. Its objections were based on statements made or other participation by the Members concerned, in their former capacity as representatives of their Governments, in United Nations organs which were dealing with matters concerning South West Africa. The Court gave careful consideration to the objections raised by the Government of South Africa, examining each case separately. In each of them the Court reached the conclusion that the participation of the Member concerned in his former capacity as representative of his Government, to which objection was taken in the South African Government's written statement, did not attract the application of Article 17, paragraph 2, of the Statute of the Court. In making Order No. 2 of 26 January 1971, the Court found no reason to depart in the present advisory proceedings from the decision adopted by the Court in the Order of 18 March 1965 in the *South West Africa* cases (Ethiopia *v.* South Africa; Liberia *v.* South Africa) after hearing the same contentions as have now been advanced by the Government of South Africa. In deciding the other two objections, the

Court took into consideration that the activities in United Nations organs of the Members concerned, prior to their election to the Court, and which are referred to in the written statement of the Government of South Africa, do not furnish grounds for treating these objections differently from those raised in the application to which the Court decided not to accede in 1965, a decision confirmed by its Order No. 2 of 26 January 1971. With reference to Order No. 3 of the same date, the Court also took into consideration a circumstance to which its attention was drawn, although it was not mentioned in the written statement of the Government of South Africa, namely the participation of the Member concerned, prior to his election to the Court, in the formulation of Security Council resolution 246 (1968), which concerned the trial at Pretoria of thirty-seven South West Africans and which in its preamble took into account General Assembly resolution 2145 (XXI). The Court considered that this participation of the Member concerned in the work of the United Nations, as a representative of his Government, did not justify a conclusion different from that already reached with regard to the objections raised by the Government of South Africa. Account must also be taken in this respect of precedents established by the present Court and the Permanent Court wherein judges sat in certain cases even though they had taken part in the formulation of texts the Court was asked to interpret. (*P.C.I.J., Series A, No. 1*, p. 11; *P.C.I.J., Series C, No. 84*, p. 535; *P.C.I.J., Series E, No. 4*, p. 270; *P.C.I.J., Series E, No. 8*, p. 251.) After deliberation, the Court decided, by three Orders dated 26 January 1971, and made public on that date, not to accede to the objections which had been raised.

10. By a letter from the Secretary for Foreign Affairs dated 13 November 1970, the Government of South Africa made an application for the appointment of a judge *ad hoc* to sit in the proceedings, in terms of Article 31, paragraph 2, of the Statute of the Court. The Court decided, in accordance with the terms of Article 46 of the Statute of the Court, to hear the contentions of South Africa on this point in camera, and a closed hearing, at which representatives of India, the Netherlands, Nigeria and the United States of America were also present, was held for the purpose on 27 January 1971.

11. By an Order dated 29 January 1971, the Court decided to reject the application of the Government of South Africa. The Court thereafter decided that the record of the closed hearing should be made accessible to the public.

12. On 29 January 1971, the Court decided, upon the application of the Organization of African Unity, that that Organization was also likely to be able to furnish information on the question before the Court, and that the Court would therefore be prepared to hear an oral statement on behalf of the Organization.

13. The States entitled to appear before the Court had been informed by the Registrar on 27 November 1970 that oral proceedings in the case would be likely to open at the beginning of February 1971. On 4 February 1971, notification was given to those States which had expressed an intention to make oral statements, and to the Secretary-General of the United Nations and the Organization of African Unity, that 8 February had been fixed as the opening date. At 23 public sittings held between 8 February and 17 March 1971, oral statements were made to the Court by the following representatives:

| | |
|---|---|
| for the Secretary-General of the United Nations: | Mr. C. A. Stavropoulos, Under-Secretary-General, Legal Counsel of the United Nations, and Mr. D. B. H. Vickers, Senior Legal Officer, Office of Legal Affairs; |
| for Finland: | Mr. E. J. S. Castrén, Professor of International Law in the University of Helsinki; |
| for the Organization of African Unity: | Mr. T. O. Elias, Attorney-General and Commissioner for Justice of Nigeria; |
| for India: | Mr. M. C. Chagla, M.P., Former Minister for Foreign Affairs in the Government of India; |
| for the Netherlands: | Mr. W. Riphagen, Legal Adviser to the Ministry of Foreign Affairs; |
| for Nigeria: | Mr. T. O. Elias, Attorney-General and Commissioner for Justice; |
| for Pakistan: | Mr. S. S. Pirzada, S.Pk., Attorney-General of Pakistan; |
| for South Africa: | Mr. J. D. Viall, Legal Adviser to the Department of Foreign Affairs,<br>Mr. D. P. de Villiers, S.C., Advocate of the Supreme Court of South Africa,<br>Mr. E. M. Grosskopf, S.C., Member of the South African Bar,<br>Mr. H. J. O. van Heerden, Member of the South African Bar,<br>Mr. R. F. Botha, Member of the South African Bar,<br>Mr. M. Wiechers, Professor of Law in the University of South Africa; |
| for the Republic of Viet-Nam: | Mr. Le Tai Trien, Attorney-General, Supreme Court of Viet-Nam; |
| for the United States of America: | Mr. J. R. Stevenson, The Legal Adviser, Department of State. |

14. Prior to the opening of the public sittings, the Court decided to examine first of all certain observations made by the Government of South Africa in its written statement, and in a letter dated 14 January 1971, in support of its submission that the Court should decline to give an advisory opinion.

15. At the opening of the public sittings on 8 February 1971, the President of the Court announced that the Court had reached a unanimous decision thereon. The substance of the submission of the Government of South Africa and the decision of the Court are dealt with in paragraphs 28 and 29 of the Advisory Opinion, below.

16. By a letter of 27 January 1971, the Government of South Africa had submitted a proposal to the Court regarding the holding of a plebiscite in the Territory of Namibia (South West Africa), and this proposal was elaborated in a further letter of 6 February 1971, which explained that the plebiscite was to determine whether it was the wish of the inhabitants "that the Territory should continue to be administered by the South African Government or should henceforth be administered by the United Nations".

17. At the hearing of 5 March 1971, the representative of South Africa explained further the position of his Government with regard to the proposed plebiscite, and indicated that his Government considered it necessary to adduce considerable evidence on the factual issues which it regarded as underlying the question before the Court. At the close of the hearing, on 17 March 1971, the President made the following statement:

> "The Court has considered the request submitted by the representative of South Africa in his letter of 6 February 1971 that a plebiscite should be held in the Territory of Namibia (South West Africa) under the joint supervision of the Court and the Government of the Republic of South Africa.
>
> The Court cannot prónounce upon this request at the present stage without anticipating, or appearing to anticipate, its decision on one or more of the main issues now before it. Consequently, the Court must defer its answer to this request until a later date.
>
> The Court has also had under consideration the desire of the Government of the Republic to supply the Court with further factual material concerning the situation in Namibia (South West Africa). However, until the Court has been able first to examine some of the legal issues which must, in any event, be dealt with, it will not be in a position to determine whether it requires additional material on the facts. The Court must accordingly defer its decision on this matter as well.
>
> If, at any time, the Court should find itself in need of further arguments or information, on these or any other matters, it will notify the governments and organizations whose representatives have participated in the oral hearings."

18. On 14 May 1971 the President sent the following letter to the representatives of the Secretary-General, of the Organization of African Unity and of the States which had participated in the oral proceedings:

> "I have the honour to refer to the statement which I made at the end of the oral hearing on the advisory proceedings relating to the Territory of Namibia (South West Africa) on 17 March last . . . , to the effect that the Court considered it appropriate to defer until a later date its decision regarding the requests of the Government of the Republic of South Africa *(a)* for the holding in that Territory of a plebiscite under the joint supervision of the Court and the Government of the Republic; and *(b)* to be allowed to supply the Court with further factual material concerning the situation there.
>
> I now have the honour to inform you that the Court, having examined the matter, does not find itself in need of further arguments or information, and has decided to refuse both these requests."

* * *

19. Before examining the merits of the question submitted to it the Court must consider the objections that have been raised to its doing so.

20. The Government of South Africa has contended that for several reasons resolution 284 (1970) of the Security Council, which requested

the advisory opinion of the Court, is invalid, and that, therefore, the Court is not competent to deliver the opinion. A resolution of a properly constituted organ of the United Nations which is passed in accordance with that organ's rules of procedure, and is declared by its President to have been so passed, must be presumed to have been validly adopted. However, since in this instance the objections made concern the competence of the Court, the Court will proceed to examine them.

21. The first objection is that in the voting on the resolution two permanent members of the Security Council abstained. It is contended that the resolution was consequently not adopted by an affirmative vote of nine members, including the concurring votes of the permanent members, as required by Article 27, paragraph 3, of the Charter of the United Nations.

22. However, the proceedings of the Security Council extending over a long period supply abundant evidence that presidential rulings and the positions taken by members of the Council, in particular its permanent members, have consistently and uniformly interpreted the practice of voluntary abstention by a permanent member as not constituting a bar to the adoption of resolutions. By abstaining, a member does not signify its objection to the approval of what is being proposed; in order to prevent the adoption of a resolution requiring unanimity of the permanent members, a permanent member has only to cast a negative vote. This procedure followed by the Security Council, which has continued unchanged after the amendment in 1965 of Article 27 of the Charter, has been generally accepted by Members of the United Nations and evidences a general practice of that Organization.

23. The Government of South Africa has also argued that as the question relates to a dispute between South Africa and other Members of the United Nations, South Africa, as a Member of the United Nations, not a member of the Security Council and a party to a dispute, should have been invited under Article 32 of the Charter to participate, without vote, in the discussion relating to it. It further contended that the proviso at the end of Article 27, paragraph 3, of the Charter, requiring members of the Security Council which are parties to a dispute to abstain from voting, should have been complied with.

24. The language of Article 32 of the Charter is mandatory, but the question whether the Security Council must extend an invitation in accordance with that provision depends on whether it has made a determination that the matter under its consideration is in the nature of a dispute. In the absence of such a determination Article 32 of the Charter does not apply.

25. The question of Namibia was placed on the agenda of the Security Council as a "situation" and not as a "dispute". No member State made any suggestion or proposal that the matter should be examined as a dispute, although due notice was given of the placing of the question

on the Security Council's agenda under the title "Situation in Namibia". Had the Government of South Africa considered that the question should have been treated in the Security Council as a dispute, it should have drawn the Council's attention to that aspect of the matter. Having failed to raise the question at the appropriate time in the proper forum, it is not open to it to raise it before the Court at this stage.

26. A similar answer must be given to the related objection based on the proviso to paragraph 3 of Article 27 of the Charter. This proviso also requires for its application the prior determination by the Security Council that a dispute exists and that certain members of the Council are involved as parties to such a dispute.

* * *

27. In the alternative the Government of South Africa has contended that even if the Court had competence to give the opinion requested, it should nevertheless, as a matter of judicial propriety, refuse to exercise its competence.

28. The first reason invoked in support of this contention is the supposed disability of the Court to give the opinion requested by the Security Council, because of political pressure to which the Court, according to the Government of South Africa, has been or might be subjected.

29. It would not be proper for the Court to entertain these observations, bearing as they do on the very nature of the Court as the principal judicial organ of the United Nations, an organ which, in that capacity, acts only on the basis of the law, independently of all outside influence or interventions whatsoever, in the exercise of the judicial function entrusted to it alone by the Charter and its Statute. A court functioning as a court of law can act in no other way.

30. The second reason advanced on behalf of the Government of South Africa in support of its contention that the Court should refuse to accede to the request of the Security Council is that the relevant legal question relates to an existing dispute between South Africa and other States. In this context it relies on the case of *Eastern Carelia* and argues that the Permanent Court of International Justice declined to rule upon the question referred to it because it was directly related to the main point of a dispute actually pending between two States.

31. However, that case is not relevant, as it differs from the present one. For instance one of the States concerned in that case was not at the time a Member of the League of Nations and did not appear before the Permanent Court. South Africa, as a Member of the United Nations, is bound by Article 96 of the Charter, which empowers the Security Council to request advisory opinions on any legal question. It has appeared before the Court, participated in both the written and oral pro-

ceedings and, while raising specific objections against the competence of the Court, has addressed itself to the merits of the question.

32. Nor does the Court find that in this case the Security Council's request relates to a legal dispute actually pending between two or more States. It is not the purpose of the request to obtain the assistance of the Court in the exercise of the Security Council's functions relating to the pacific settlement of a dispute pending before it between two or more States. The request is put forward by a United Nations organ with reference to its own decisions and it seeks legal advice from the Court on the consequences and implications of these decisions. This objective is stressed by the preamble to the resolution requesting the opinion, in which the Security Council has stated "that an advisory opinion from the International Court of Justice would be useful for the Security Council in its further consideration of the question of Namibia and in furtherance of the objectives the Council is seeking". It is worth recalling that in its Advisory Opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, the Court stated: "The object of this request for an Opinion is to guide the United Nations in respect of its own action" (*I.C.J. Reports 1951*, p. 19).

33. The Court does not find either that in this case the advisory opinion concerns a dispute between South Africa and the United Nations. In the course of the oral proceedings Counsel for the Government of South Africa stated:

> "... our submission is not that the question is a dispute, but that in order to answer the question the Court will have to decide legal and factual issues which are actually in dispute between South Africa and other States"

34. The fact that, in the course of its reasoning, and in order to answer the question submitted to it, the Court may have to pronounce on legal issues upon which radically divergent views exist between South Africa and the United Nations, does not convert the present case into a dispute nor bring it within the compass of Articles 82 and 83 of the Rules of Court. A similar position existed in the three previous advisory proceedings concerning South West Africa: in none of them did South Africa claim that there was a dispute, nor did the Court feel it necessary to apply the Rules of Court concerning "a legal question actually pending between two or more States". Differences of views among States on legal issues have existed in practically every advisory proceeding; if all were agreed, the need to resort to the Court for advice would not arise.

35. In accordance with Article 83 of the Rules of Court, the question whether the advisory opinion had been requested "upon a legal question actually pending between two or more States" was also of decisive im-

portance in the Court's consideration of the request made by the Government of South Africa for the appointment of a judge *ad hoc*. As already indicated, the Court heard argument in support of that request and, after due deliberation, decided, by an Order of 29 January 1971, not to accede to it. This decision was based on the conclusion that the terms of the request for advisory opinion, the circumstances in which it had been submitted (which are described in para. 32 above), as well as the considerations set forth in paragraphs 33 and 34 above, were such as to preclude the interpretation that an opinion had been "requested upon a legal question actually pending between two or more States". Thus, in the opinion of the Court, South Africa was not entitled under Article 83 of the Rules of Court to the appointment of a judge *ad hoc*.

36. It has been urged that the possible existence of a dispute was a point of substance which was prematurely disposed of by the Order of 29 January 1971. Now the question whether a judge *ad hoc* should be appointed is of course a matter concerning the composition of the Bench and possesses, as the Government of South Africa recognized, absolute logical priority. It has to be settled prior to the opening of the oral proceedings, and indeed before any further issues, even of procedure, can be decided. Until it is disposed of the Court cannot proceed with the case. It is thus a logical necessity that any request for the appointment of a judge *ad hoc* must be treated as a preliminary matter on the basis of a prima facie appreciation of the facts and the law. This cannot be construed as meaning that the Court's decision thereon may involve the irrevocable disposal of a point of substance or of one related to the Court's competence. Thus, in a contentious case, when preliminary objections have been raised, the appointment of judges *ad hoc* must be decided before the hearing of those objections. That decision, however, does not prejudge the Court's competence if, for instance, it is claimed that no dispute exists. Conversely, to assert that the question of the judge *ad hoc* could not be validly settled until the Court had been able to analyse substantive issues is tantamount to suggesting that the composition of the Court could be left in suspense, and thus the validity of its proceedings left in doubt, until an advanced stage in the case.

37. The only question which was in fact settled with finality by the Order of 29 January 1971 was the one relating to the Court's composition for the purpose of the present case. That decision was adopted on the authority of Article 3, paragraph 1, of the Rules of Court and in accordance with Article 55, paragraph 1, of the Statute. Consequently, after the adoption of that decision, while differing views might still be held as to the applicability of Article 83 of the Rules of Court in the present case, the regularity of the composition of the Court for the

purposes of delivering the present Advisory Opinion, in accordance with the Statute and the Rules of Court, is no longer open to question.

38. In connection with the possible appointment of judges *ad hoc*, it has further been suggested that the final clause in paragraph 1 of Article 82 of the Rules of Court obliges the Court to determine as a preliminary question whether the request relates to a legal question actually pending between two or more States. The Court cannot accept this reading, which overstrains the literal meaning of the words "*avant tout*". It is difficult to conceive that an Article providing general guidelines in the relatively unschematic context of advisory proceedings should prescribe a rigid sequence in the action of the Court. This is confirmed by the practice of the Court, which in no previous advisory proceedings has found it necessary to make an independent preliminary determination of this question or of its own competence, even when specifically requested to do so. Likewise, the interpretation of the Rules of Court as imposing a procedure *in limine litis*, which has been suggested, corresponds neither to the text of the Article nor to its purpose, which is to regulate advisory proceedings without impairing the flexibility which Articles 66, paragraph 4, and 68 of the Statute allow the Court so that it may adjust its procedure to the requirements of each particular case. The phrase in question merely indicates that the test of legal pendency is to be considered "above all" by the Court for the purpose of exercising the latitude granted by Article 68 of the Statute to be guided by the provisions which apply in contentious cases to the extent to which the Court recognizes them to be applicable. From a practical point of view it may be added that the procedure suggested, analogous to that followed in contentious procedure with respect to preliminary objections, would not have dispensed with the need to decide on the request for the appointment of a judge *ad hoc* as a previous, independent decision, just as in contentious cases the question of judges *ad hoc* must be settled before any hearings on the preliminary objections may be proceeded with. Finally, it must be observed that such proposed preliminary decision under Article 82 of the Rules of Court would not necessarily have predetermined the decision which it is suggested should have been taken subsequently under Article 83, since the latter provision envisages a more restricted hypothesis: that the advisory opinion is requested *upon* a legal question actually pending and not that it *relates* to such a question.

39. The view has also been expressed that even if South Africa is not entitled to a judge *ad hoc* as a matter of right, the Court should, in the exercise of the discretion granted by Article 68 of the Statute, have allowed such an appointment, in recognition of the fact that South Africa's interests are specially affected in the present case. In this connection the Court wishes to recall a decision taken by the Permanent Court at a time when the Statute did not include any provision concerning advisory opinions, the entire regulation of the procedure in the matter being thus left to the Court (*P.C.I.J., Series E, No. 4*, p. 76). Confronted with a

request for the appointment of a judge *ad hoc* in a case in which it found there was no dispute, the Court, in rejecting the request, stated that "the decision of the Court must be in accordance with its Statute and with the Rules duly framed by it in pursuance of Article 30 of the Statute" (Order of 31 October 1935, *P.C.I.J.*, *Series A/B*, *No. 65*, Annex 1, p. 69 at p. 70). It found further that the "exception cannot be given a wider application than is provided for by the Rules" (*ibid.*, p. 71). In the present case the Court, having regard to the Rules of Court adopted under Article 30 of the Statute, came to the conclusion that it was unable to exercise discretion in this respect.

40. The Government of South Africa has also expressed doubts as to whether the Court is competent to, or should, give an opinion, if, in order to do so, it should have to make findings as to extensive factual issues. In the view of the Court, the contingency that there may be factual issues underlying the question posed does not alter its character as a "legal question" as envisaged in Article 96 of the Charter. The reference in this provision to legal questions cannot be interpreted as opposing legal to factual issues. Normally, to enable a court to pronounce on legal questions, it must also be acquainted with, take into account and, if necessary, make findings as to the relevant factual issues. The limitation of the powers of the Court contended for by the Government of South Africa has no basis in the Charter or the Statute.

41. The Court could, of course, acting on its own, exercise the discretion vested in it by Article 65, paragraph 1, of the Statute and decline to accede to the request for an advisory opinion. In considering this possibility the Court must bear in mind that: "A reply to a request for an Opinion should not, in principle, be refused." (*I.C.J. Reports 1951*, p. 19.) The Court has considered whether there are any "compelling reasons", as referred to in the past practice of the Court, which would justify such a refusal. It has found no such reasons. Moreover, it feels that by replying to the request it would not only "remain faithful to the requirements of its judicial character" (*I.C.J. Reports 1960*, p. 153), but also discharge its functions as "the principal judicial organ of the United Nations" (Art. 92 of the Charter).

* * *

42. Having established that it is properly seised of a request for an advisory opinion, the Court will now proceed to an analysis of the question placed before it: "What are the legal consequences for States of the continued presence of South Africa in Namibia, notwithstanding Security Council resolution 276 (1970)?"

43. The Government of South Africa in both its written and oral statements has covered a wide field of history, going back to the origin and functioning of the Mandate. The same and similar problems were

dealt with by other governments, the Secretary-General of the United Nations and the Organization of African Unity in their written and oral statements.

44. A series of important issues is involved: the nature of the Mandate, its working under the League of Nations, the consequences of the demise of the League and of the establishment of the United Nations and the impact of further developments within the new organization. While the Court is aware that this is the sixth time it has had to deal with the issues involved in the Mandate for South West Africa, it has nonetheless reached the conclusion that it is necessary for it to consider and summarize some of the issues underlying the question addressed to it. In particular, the Court will examine the substance and scope of Article 22 of the League Covenant and the nature of "C" mandates.

45. The Government of South Africa, in its written statement, presented a detailed analysis of the intentions of some of the participants in the Paris Peace Conference, who approved a resolution which, with some alterations and additions, eventually became Article 22 of the Covenant. At the conclusion and in the light of this analysis it suggested that it was quite natural for commentators to refer to "'C' mandates as being in their practical effect not far removed from annexation". This view, which the Government of South Africa appears to have adopted, would be tantamount to admitting that the relevant provisions of the Covenant were of a purely nominal character and that the rights they enshrined were of their very nature imperfect and unenforceable. It puts too much emphasis on the intentions of some of the parties and too little on the instrument which emerged from those negotiations. It is thus necessary to refer to the actual text of Article 22 of the Covenant, paragraph 1 of which declares:

> "1. To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilisation and that securities for the performance of this trust should be embodied in this Covenant."

As the Court recalled in its 1950 Advisory Opinion on the *International Status of South-West Africa*, in the setting-up of the mandates system "two principles were considered to be of paramount importance: the principle of non-annexation and the principle that the well-being and development of such peoples form 'a sacred trust of civilization'" (*I.C.J. Reports 1950*, p. 131).

46. It is self-evident that the "trust" had to be exercised for the benefit of the peoples concerned, who were admitted to have interests of their

own and to possess a potentiality for independent existence on the attainment of a certain stage of development: the mandates system was designed to provide peoples "not yet" able to manage their own affairs with the help and guidance necessary to enable them to arrive at the stage where they would be "able to stand by themselves". The requisite means of assistance to that end is dealt with in paragraph 2 of Article 22:

> "2. The best method of giving practical effect to this principle is that the tutelage of such peoples should be entrusted to advanced nations who by reason of their resources, their experience or their geographical position can best undertake this responsibility, and who are willing to accept it, and that this tutelage should be exercised by them as Mandatories on behalf of the League."

This made it clear that those Powers which were to undertake the task envisaged would be acting exclusively as mandatories on behalf of the League. As to the position of the League, the Court found in its 1950 Advisory Opinion that: "The League was not, as alleged by [the South African] Government, a 'mandator' in the sense in which this term is used in the national law of certain States." The Court pointed out that: "The Mandate was created, in the interest of the inhabitants of the territory, and of humanity in general, as an international institution with an international object—a sacred trust of civilisation." Therefore, the Court found, the League "had only assumed an international function of supervision and control" (*I.C.J. Reports 1950*, p. 132).

47. The acceptance of a mandate on these terms connoted the assumption of obligations not only of a moral but also of a binding legal character; and, as a corollary of the trust, "securities for [its] performance" were instituted (para. 7 of Art. 22) in the form of legal accountability for its discharge and fulfilment:

> "7. In every case of mandate, the Mandatory shall render to the Council an annual report in reference to the territory committed to its charge."

48. A further security for the performance of the trust was embodied in paragraph 9 of Article 22:

> "9. A permanent Commission shall be constituted to receive and examine the annual reports of the Mandatories and to advise the Council on all matters relating to the observance of the mandates."

Thus the reply to the essential question, *quis custodiet ipsos custodes?*, was given in terms of the mandatory's accountability to international

organs. An additional measure of supervision was introduced by a resolution of the Council of the League of Nations, adopted on 31 January 1923. Under this resolution the mandatory Governments were to transmit to the League petitions from communities or sections of the populations of mandated territories.

49. Paragraph 8 of Article 22 of the Covenant gave the following directive:

> "8. The degree of authority, control or administration to be exercised by the Mandatory shall, if not previously agreed upon by the Members of the League, be explicitly defined in each case by the Council."

In pursuance of this directive, a Mandate for German South West Africa was drawn up which defined the terms of the Mandatory's administration in seven articles. Of these, Article 6 made explicit the obligation of the Mandatory under paragraph 7 of Article 22 of the Covenant by providing that "The Mandatory shall make to the Council of the League of Nations an annual report to the satisfaction of the Council, containing full information with regard to the territory, and indicating the measures taken to carry out the obligations assumed under Articles 2, 3, 4 and 5" of the Mandate. As the Court said in 1950: "the Mandatory was to observe a number of obligations, and the Council of the League was to supervise the administration and see to it that these obligations were fulfilled" (*I.C.J. Reports 1950*, p. 132). In sum the relevant provisions of the Covenant and those of the Mandate itself preclude any doubt as to the establishment of definite legal obligations designed for the attainment of the object and purpose of the Mandate.

50. As indicated in paragraph 45 above, the Government of South Africa has dwelt at some length on the negotiations which preceded the adoption of the final version of Article 22 of the League Covenant, and has suggested that they lead to a different reading of its provisions. It is true that as that Government points out, there had been a strong tendency to annex former enemy colonial territories. Be that as it may, the final outcome of the negotiations, however difficult of achievement, was a rejection of the notion of annexation. It cannot tenably be argued that the clear meaning of the mandate institution could be ignored by placing upon the explicit provisions embodying its principles a construction at variance with its object and purpose.

51. Events subsequent to the adoption of the instruments in question should also be considered. The Allied and Associated Powers, in their Reply to Observations of the German Delegation, referred in 1919 to "the mandatory Powers, which in so far as they may be appointed trustees by the League of Nations will derive no benefit from such trusteeship". As to the Mandate for South West Africa, its preamble

recited that "His Britannic Majesty, for and on behalf of the Government of the Union of South Africa, has agreed to accept the Mandate in respect of the said territory and has undertaken to exercise it on behalf of the League of Nations".

52. Furthermore, the subsequent development of 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 of them. The concept of the sacred trust was confirmed and expanded to all "territories whose peoples have not yet attained a full measure of self-government" (Art. 73). Thus it clearly embraced territories under a colonial régime. Obviously the sacred trust continued to apply to League of Nations mandated territories on which an international status had been conferred earlier. A further important stage in this development was the Declaration on the Granting of Independence to Colonial Countries and Peoples (General Assembly resolution 1514 (XV) of 14 December 1960), which embraces all peoples and territories which "have not yet attained independence". Nor is it possible to leave out of account the political history of mandated territories in general. All those which did not acquire independence, excluding Namibia, were placed under trusteeship. Today, only two out of fifteen, excluding Namibia, remain under United Nations tutelage. This is but a manifestation of the general development which has led to the birth of so many new States.

53. All these considerations are germane to the Court's evaluation of the present case. Mindful as it is of the primary necessity of interpreting an instrument in accordance with the intentions of the parties at the time of its conclusion, the Court is bound to take into account the fact that the concepts embodied in Article 22 of the Covenant—"the strenuous conditions of the modern world" and "the well-being and development" of the peoples concerned—were not static, but were by definition evolutionary, as also, therefore, was the concept of the "sacred trust". The parties to the Covenant must consequently be deemed to have accepted them as such. That is why, viewing the institutions of 1919, the Court must take into consideration the changes which have occurred in the supervening half-century, and its interpretation cannot remain unaffected by the subsequent development of law, through the Charter of the United Nations and by way of customary law. Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation. In the domain to which the present proceedings relate, the last fifty years, as indicated above, have brought important developments. These developments leave little doubt that the ultimate objective of the sacred trust was the self-determination and independence of the peoples concerned. In this domain, as elsewhere, the *corpus iuris gentium* has been

considerably enriched, and this the Court, if it is faithfully to discharge its functions, may not ignore.

54. In the light of the foregoing, the Court is unable to accept any construction which would attach to "C" mandates an object and purpose different from those of "A" or "B" mandates. The only differences were those appearing from the language of Article 22 of the Covenant, and from the particular mandate instruments, but the objective and safeguards remained the same, with no exceptions such as considerations of geographical contiguity. To hold otherwise would mean that territories under "C" mandate belonged to the family of mandates only in name, being in fact the objects of disguised cessions, as if the affirmation that they could "be best administered under the laws of the Mandatory as integral portions of its territory" (Art. 22, para. 6) conferred upon the administering Power a special title not vested in States entrusted with "A" or "B" mandates. The Court would recall in this respect what was stated in the 1962 Judgment in the *South West Africa* cases as applying to all categories of mandate:

> "The rights of the Mandatory in relation to the mandated territory and the inhabitants have their foundation in the obligations of the Mandatory and they are, so to speak, mere tools given to enable it to fulfil its obligations." (*I.C.J. Reports 1962*, p. 329.)

* * *

55. The Court will now turn to the situation which arose on the demise of the League and with the birth of the United Nations. As already recalled, the League of Nations was the international organization entrusted with the exercise of the supervisory functions of the Mandate. Those functions were an indispensable element of the Mandate. But that does not mean that the mandates institution was to collapse with the disappearance of the original supervisory machinery. To the question whether the continuance of a mandate was inseparably linked with the existence of the League, the answer must be that an institution established for the fulfilment of a sacred trust cannot be presumed to lapse before the achievement of its purpose. The responsibilities of both mandatory and supervisor resulting from the mandates institution were complementary, and the disappearance of one or the other could not affect the survival of the institution. That is why, in 1950, the Court remarked, in connection with the obligations corresponding to the sacred trust:

> "Their *raison d'être* and original object remain. Since their fulfilment did not depend on the existence of the League of Nations, they could not be brought to an end merely because this supervisory

> organ ceased to exist. Nor could the right of the population to have the Territory administered in accordance with these rules depend thereon." (*I.C.J. Reports 1950*, p. 133.)

In the particular case, specific provisions were made and decisions taken for the transfer of functions from the organization which was to be wound up to that which came into being.

56. Within the framework of the United Nations an international trusteeship system was established and it was clearly contemplated that mandated territories considered as not yet ready for independence would be converted into trust territories under the United Nations international trusteeship system. This system established a wider and more effective international supervision than had been the case under the mandates of the League of Nations.

57. It would have been contrary to the overriding purpose of the mandates system to assume that difficulties in the way of the replacement of one régime by another designed to improve international supervision should have been permitted to bring about, on the dissolution of the League, a complete disappearance of international supervision. To accept the contention of the Government of South Africa on this point would have entailed the reversion of mandated territories to colonial status, and the virtual replacement of the mandates régime by annexation, so determinedly excluded in 1920.

58. These compelling considerations brought about the insertion in the Charter of the United Nations of the safeguarding clause contained in Article 80, paragraph 1, of the Charter, which reads as follows:

> "1. Except as may be agreed upon in individual trusteeship agreements, made under Articles 77, 79 and 81, placing each territory under the trusteeship system, and until such agreements have been concluded, nothing in this Chapter shall be construed in or of itself to alter in any manner the rights whatsoever of any States or any peoples or the terms of existing international instruments to which Members of the United Nations may respectively be parties."

59. A striking feature of this provision is the stipulation in favour of the preservation of the rights of "any peoples", thus clearly including the inhabitants of the mandated territories and, in particular, their indigenous populations. These rights were thus confirmed to have an existence independent of that of the League of Nations. The Court, in the 1950 Advisory Opinion on the *International Status of South-West Africa*, relied on this provision to reach the conclusion that "no such rights of the peoples could be effectively safeguarded without inter-

national supervision and a duty to render reports to a supervisory organ" (*I.C.J. Reports 1950*, p. 137). In 1956 the Court confirmed the conclusion that "the effect of Article 80 (1) of the Charter" was that of "preserving the rights of States and peoples" (*I.C.J. Reports 1956*, p. 27).

60. Article 80, paragraph 1, of the Charter was thus interpreted by the Court as providing that the system of replacement of mandates by trusteeship agreements, resulting from Chapter XII of the Charter, shall not "be construed in or of itself to alter in any manner the rights whatsoever of any States or any peoples".

61. The exception made in the initial words of the provision, "Except as may be agreed upon in individual trusteeship agreements, made under Articles 77, 79 and 81, placing each territory under the trusteeship system, and until such agreements have been concluded", established a particular method for changing the status quo of a mandate régime. This could be achieved only by means of a trusteeship agreement, unless the "sacred trust" had come to an end by the implementation of its objective, that is, the attainment of independent existence. In this way, by the use of the expression "until such agreements have been concluded", a legal hiatus between the two systems was obviated.

62. The final words of Article 80, paragraph 1, refer to "the terms of existing international instruments to which Members of the United Nations may respectively be parties". The records of the San Francisco Conference show that these words were inserted in replacement of the words "any mandate" in an earlier draft in order to preserve "any rights set forth in paragraph 4 of Article 22 of the Covenant of the League of Nations".

63. In approving this amendment and inserting these words in the report of Committee II/4, the States participating at the San Francisco Conference obviously took into account the fact that the adoption of the Charter of the United Nations would render the disappearance of the League of Nations inevitable. This shows the common understanding and intention at San Francisco that Article 80, paragraph 1, of the Charter had the purpose and effect of keeping in force all rights whatsoever, including those contained in the Covenant itself, against any claim as to their possible lapse with the dissolution of the League.

64. The demise of the League could thus not be considered as an unexpected supervening event entailing a possible termination of those rights, entirely alien to Chapter XII of the Charter and not foreseen by the safeguarding provisions of Article 80, paragraph 1. The Members of the League, upon effecting the dissolution of that organization, did not declare, or accept even by implication, that the mandates would be cancelled or lapse with the dissolution of the League. On the contrary,

paragraph 4 of the resolution on mandates of 18 April 1946 clearly assumed their continuation.

65. The Government of South Africa, in asking the Court to reappraise the 1950 Advisory Opinion, has argued that Article 80, paragraph 1, must be interpreted as a mere saving clause having a purely negative effect.

66. If Article 80, paragraph 1, were to be understood as a mere interpretative provision preventing the operation of Chapter XII from affecting any rights, then it would be deprived of all practical effect. There is nothing in Chapter XII—which, as interpreted by the Court in 1950, constitutes a framework for future agreements—susceptible of affecting existing rights of States or of peoples under the mandates system. Likewise, if paragraph 1 of Article 80 were to be understood as a mere saving clause, paragraph 2 of the same Article would have no purpose. This paragraph provides as follows:

> "2. Paragraph 1 of this Article shall not be interpreted as giving grounds for delay or postponement of the negotiation and conclusion of agreements for placing mandated and other territories under the trusteeship system as provided for in Article 77."

This provision was obviously intended to prevent a mandatory Power from invoking the preservation of its rights resulting from paragraph 1 as a ground for delaying or postponing what the Court described as "the normal course indicated by the Charter, namely, conclude Trusteeship Agreements" (*I.C.J. Reports 1950*, p. 140). No method of interpretation would warrant the conclusion that Article 80 as a whole is meaningless.

67. In considering whether negative effects only may be attributed to Article 80, paragraph 1, as contended by South Africa, account must be taken of the words at the end of Article 76 *(d)* of the Charter, which, as one of the basic objectives of the trusteeship system, ensures equal treatment in commercial matters for all Members of the United Nations and their nationals. The proviso "subject to the provisions of Article 80" was included at the San Francisco Conference in order to preserve the existing right of preference of the mandatory Powers in "C" mandates. The delegate of the Union of South Africa at the Conference had pointed out earlier that "the 'open door' had not previously applied to the 'C' mandates", adding that "his Government could not contemplate its application to their mandated territory". If Article 80, paragraph 1, had no conservatory and positive effects, and if the rights therein preserved could have been extinguished with the disappearance of the League of Nations, then the proviso in Article 76 *(d) in fine* would be deprived of any practical meaning.

68. The Government of South Africa has invoked as "new facts" not fully before the Court in 1950 a proposal introduced by the Chinese delegation at the final Assembly of the League of Nations and another submitted by the Executive Committee to the United Nations Preparatory Commission, both providing in explicit terms for the transfer of supervisory functions over mandates from the League of Nations to United Nations organs. It is argued that, since neither of these two proposals was adopted, no such transfer was envisaged.

69. The Court is unable to accept the argument advanced. The fact that a particular proposal is not adopted by an international organ does not necessarily carry with it the inference that a collective pronouncement is made in a sense opposite to that proposed. There can be many reasons determining rejection or non-approval. For instance, the Chinese proposal, which was never considered but was ruled out of order, would have subjected mandated territories to a form of supervision which went beyond the scope of the existing supervisory authority in respect of mandates, and could have raised difficulties with respect to Article 82 of the Charter. As to the establishment of a Temporary Trusteeship Committee, it was opposed because it was felt that the setting up of such an organ might delay the negotiation and conclusion of trusteeship agreements. Consequently two United States proposals, intended to authorize this Committee to undertake the functions previously performed by the Mandates Commission, could not be acted upon. The non-establishment of a temporary subsidiary body empowered to assist the General Assembly in the exercise of its supervisory functions over mandates cannot be interpreted as implying that the General Assembly lacked competence or could not itself exercise its functions in that field. On the contrary, the general assumption appeared to be that the supervisory functions over mandates previously performed by the League were to be exercised by the United Nations. Thus, in the discussions concerning the proposed setting-up of the Temporary Trusteeship Committee, no observation was made to the effect that the League's supervisory functions had not been transferred to the United Nations. Indeed, the South African representative at the United Nations Preparatory Commission declared on 29 November 1945 that "it seemed reasonable to create an interim body as the Mandates Commission was now in abeyance and countries holding mandates should have a body to which they could report".

70. The Government of South Africa has further contended that the provision in Article 80, paragraph 1, that the terms of "existing international instruments" shall not be construed as altered by anything in Chapter XII of the Charter, cannot justify the conclusion that the duty to report under the Mandate was transferred from the Council of the

League to the United Nations.

71. This objection fails to take into consideration Article 10 in Chapter IV of the Charter, a provision which was relied upon in the 1950 Opinion to justify the transference of supervisory powers from the League Council to the General Assembly of the United Nations. The Court then said:

> "The competence of the General Assembly of the United Nations to exercise such supervision and to receive and examine reports is derived from the provisions of Article 10 of the Charter, which authorizes the General Assembly to discuss any questions or any matters within the scope of the Charter and to make recommendations on these questions or matters to the Members of the United Nations." (*I.C.J. Reports 1950*, p. 137.)

72. Since a provision of the Charter—Article 80, paragraph 1—had maintained the obligations of the Mandatory, the United Nations had become the appropriate forum for supervising the fulfilment of those obligations. Thus, by virtue of Article 10 of the Charter, South Africa agreed to submit its administration of South West Africa to the scrutiny of the General Assembly, on the basis of the information furnished by the Mandatory or obtained from other sources. The transfer of the obligation to report, from the League Council to the General Assembly, was merely a corollary of the powers granted to the General Assembly. These powers were in fact exercised by it, as found by the Court in the 1950 Advisory Opinion. The Court rightly concluded in 1950 that—

> "... the General Assembly of the United Nations is legally qualified to exercise the supervisory functions previously exercised by the League of Nations with regard to the administration of the Territory, and that the Union of South Africa is under an obligation to submit to supervision and control of the General Assembly and to render annual reports to it" (*I.C.J. Reports 1950*, p. 137).

In its 1955 Advisory Opinion on *Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South-West Africa*, after recalling some passages from the 1950 Advisory Opinion, the Court stated:

> "Thus, the authority of the General Assembly to exercise supervision over the administration of South-West Africa as a mandated Territory is based on the provisions of the Charter." (*I.C.J. Reports 1955*, p. 76.)

In the 1956 Advisory Opinion on *Admissibility of Hearings of Petitioners by the Committee on South West Africa*, again after referring to certain passages from the 1950 Advisory Opinion, the Court stated:

"Accordingly, the obligations of the Mandatory continue unimpaired with this difference, that the supervisory functions exercised by the Council of the League of Nations are now to be exercised by the United Nations." (*I.C.J. Reports 1956*, p. 27.)

In the same Opinion the Court further stated:

"... the paramount purpose underlying the taking over by the General Assembly of the United Nations of the supervisory functions in respect of the Mandate for South West Africa formerly exercised by the Council of the League of Nations was to safeguard the sacred trust of civilization through the maintenance of effective international supervision of the administration of the Mandated Territory" (*ibid.*, p. 28).

* * *

73. With regard to the intention of the League, it is essential to recall that, at its last session, the Assembly of the League, by a resolution adopted on 12 April 1946, attributed to itself the responsibilities of the Council in the following terms:

"The Assembly, with the concurrence of all the Members of the Council which are represented at its present session: Decides that, so far as required, it will, during the present session, assume the functions falling within the competence of the Council."

Thereupon, before finally dissolving the League, the Assembly on 18 April 1946, adopted a resolution providing as follows for the continuation of the mandates and the mandates system:

"The Assembly . . .

. . . . . .

3. Recognises that, on the termination of the League's existence, its functions with respect to the mandated territories will come to an end, but notes that Chapters XI, XII and XIII of the Charter of the United Nations embody principles corresponding to those declared in Article 22 of the Covenant of the League;

4. Takes note of the expressed intentions of the Members of the League now administering territories under mandate to continue to administer them for the well-being and development of the peoples concerned in accordance with the obligations contained in the respective Mandates, until other arrangements have been agreed between the United Nations and the respective mandatory Powers."

As stated in the Court's 1962 Judgment:

> "... the League of Nations in ending its own existence did not terminate the Mandates but ... definitely intended to continue them by its resolution of 18 April 1946" (*I.C.J. Reports 1962*, p. 334).

74. That the Mandate had not lapsed was also admitted by the Government of South Africa on several occasions during the early period of transition, when the United Nations was being formed and the League dissolved. In particular, on 9 April 1946, the representative of South Africa, after announcing his Government's intention to transform South West Africa into an integral part of the Union, declared before the Assembly of the League:

> "In the meantime, the Union will continue to administer the territory scrupulously in accordance with the obligations of the Mandate, for the advancement and promotion of the interests of the inhabitants, as she has done during the past six years when meetings of the Mandates Commission could not be held.
>
> The disappearance of those organs of the League concerned with the supervision of mandates, primarily the Mandates Commission and the League Council, will necessarily preclude complete compliance with the letter of the Mandate. The Union Government will nevertheless regard the dissolution of the League as in no way diminishing its obligations under the Mandate, which it will continue to discharge with the full and proper appreciation of its responsibilities until such time as other arrangements are agreed upon concerning the future status of the territory."

The Court referred to this statement in its Judgment of 1962, finding that "there could be no clearer recognition on the part of the Government of South Africa of the continuance of its obligations under the Mandate after the dissolution of the League of Nations" (*I.C.J. Reports 1962*, p. 340).

75. Similar assurances were given on behalf of South Africa in a memorandum transmitted on 17 October 1946 to the Secretary-General of the United Nations, and in statements to the Fourth Committee of the General Assembly on 4 November and 13 November 1946. Referring to some of these and other assurances the Court stated in 1950: "These declarations constitute recognition by the Union Government of the continuance of its obligations under the Mandate and not a mere indication of the future conduct of that Government." (*I.C.J. Reports 1950*, p. 135.)

76. Even before the dissolution of the League, on 22 January 1946, the Government of the Union of South Africa had announced to the General Assembly of the United Nations its intention to ascertain the

views of the population of South West Africa, stating that "when that had been done, the decision of the Union would be submitted to the General Assembly for judgment". Thereafter, the representative of the Union of South Africa submitted a proposal to the Second Part of the First Session of the General Assembly in 1946, requesting the approval of the incorporation of South West Africa into the Union. On 14 December 1946 the General Assembly adopted resolution 65 (I) noting—

> ". . . *with satisfaction* that the Union of South Africa, by presenting this matter to the United Nations, recognizes the interest and concern of the United Nations in the matter of the future status of territories now held under mandate"

and declared that it was—

> ". . . *unable to accede* to the incorporation of the territory of South West Africa in the Union of South Africa".

The General Assembly, the resolution went on,

> "*Recommends* that the mandated territory of South West Africa be placed under the international trusteeship system and invites the Government of the Union of South Africa to propose for the consideration of the General Assembly a trusteeship agreement for the aforesaid Territory."

A year later the General Assembly, by resolution 141 (II) of 1 November 1947, took note of the South African Government's decision not to proceed with its plan for the incorporation of the Territory. As the Court stated in 1950:

> "By thus submitting the question of the future international status of the Territory to the 'judgment' of the General Assembly as the 'competent international organ', the Union Government recognized the competence of the General Assembly in the matter." (*I.C.J. Reports 1950*, p. 142.)

77. In the course of the following years South Africa's acts and declarations made in the United Nations in regard to South West Africa were characterized by contradictions. Some of these acts and declarations confirmed the recognition of the supervisory authority of the United Nations and South Africa's obligations towards it, while others clearly signified an intention to withdraw such recognition. It was only on 11 July 1949 that the South African Government addressed to the Secretary-General a letter in which it stated that it could "no longer see that any

real benefit is to be derived from the submission of special reports on South West Africa to the United Nations and [had] regretfully come to the conclusion that in the interests of efficient administration no further reports should be forwarded".

78. In the light of the foregoing review, there can be no doubt that, as consistently recognized by this Court, the Mandate survived the demise of the League, and that South Africa admitted as much for a number of years. Thus the supervisory element, an integral part of the Mandate, was bound to survive, and the Mandatory continued to be accountable for the performance of the sacred trust. To restrict the responsibility of the Mandatory to the sphere of conscience or of moral obligation would amount to conferring upon that Power rights to which it was not entitled, and at the same time to depriving the peoples of the Territory of rights which they had been guaranteed. It would mean that the Mandatory would be unilaterally entitled to decide the destiny of the people of South West Africa at its discretion. As the Court, referring to its Advisory Opinion of 1950, stated in 1962:

> "The findings of the Court on the obligation of the Union Government to submit to international supervision are thus crystal clear. Indeed, to exclude the obligations connected with the Mandate would be to exclude the very essence of the Mandate." (*I.C.J. Reports 1962*, p. 334.)

79. The cogency of this finding is well illustrated by the views presented on behalf of South Africa, which, in its final submissions in the *South West Africa* cases, presented as an alternative submission, "in the event of it being held that the Mandate as such continued in existence despite the dissolution of the League of Nations",

> ". . . that the Respondent's former obligations under the Mandate to report and account to, and to submit to the supervision, of the Council of the League of Nations, lapsed upon the dissolution of the League, and have not been replaced by any similar obligations relative to supervision by any organ of the United Nations or any other organization or body" (*I.C.J. Reports 1966*, p. 16).

The principal submission, however, had been:

> "That the whole Mandate for South West Africa lapsed on the dissolution of the League of Nations and that Respondent is, in consequence thereof, no longer subject to any legal obligations thereunder." *(Ibid.)*

80. In the present proceedings, at the public sitting of 15 March 1971, the representative of South Africa summed up his Government's position in the following terms:

> "Our contentions concerning the falling away of supervisory and accountability provisions are, accordingly, absolute and unqualified. On the other hand, our contentions concerning the possible lapse of the Mandate as a whole are secondary and consequential and depend on our primary contention that the supervision and the accountability provisions fell away on the dissolution of the League.
>
> In the present proceedings we accordingly make the formal submission that the Mandate has lapsed as a whole by reason of the falling away of supervision by the League, but for the rest we assume that the Mandate still continued . . .
>
> . . . on either hypothesis we contend that after dissolution of the League there no longer was any obligation to report and account under the Mandate."

He thus placed the emphasis on the "falling-away" of the "supervisory and accountability provisions" and treated "the possible lapse of the Mandate as a whole" as a "secondary and consequential" consideration.

81. Thus, by South Africa's own admission, "supervision and accountability" were of the essence of the Mandate, as the Court had consistently maintained. The theory of the lapse of the Mandate on the demise of the League of Nations is in fact inseparable from the claim that there is no obligation to submit to the supervision of the United Nations, and vice versa. Consequently, both or either of the claims advanced, namely that the Mandate has lapsed and/or that there is no obligation to submit to international supervision by the United Nations, are destructive of the very institution upon which the presence of South Africa in Namibia rests, for:

> "The authority which the Union Government exercises over the Territory is based on the Mandate. If the Mandate lapsed, as the Union Government contends, the latter's authority would equally have lapsed. To retain the rights derived from the Mandate and to deny the obligations thereunder could not be justified." (*I.C.J. Reports 1950*, p. 133; cited in *I.C.J. Reports 1962*, p. 333.)

82. Of this South Africa would appear to be aware, as is evidenced by its assertion at various times of other titles to justify its continued presence in Namibia, for example before the General Assembly on 5 October 1966:

"South Africa has for a long time contended that the Mandate is no longer legally in force, and that South Africa's right to administer the Territory is not derived from the Mandate but from military conquest, together with South Africa's openly declared and consistent practice of continuing to administer the Territory as a sacred trust towards the inhabitants."

In the present proceedings the representative of South Africa maintained on 15 March 1971:

". . . if it is accepted that the Mandate has lapsed, the South African Government would have the right to administer the Territory by reason of a combination of factors, being *(a)* its original conquest; *(b)* its long occupation; *(c)* the continuation of the sacred trust basis agreed upon in 1920; and, finally *(d)* because its administration is to the benefit of the inhabitants of the Territory and is desired by them. In these circumstances the South African Government cannot accept that any State or organization can have a better title to the Territory."

83. These claims of title, which apart from other considerations are inadmissible in regard to a mandated territory, lead by South Africa's own admission to a situation which vitiates the object and purpose of the Mandate. Their significance in the context of the sacred trust has best been revealed by a statement made by the representative of South Africa in the present proceedings on 15 March 1971: "it is the view of the South African Government that no legal provision prevents its annexing South West Africa." As the Court pointed out in its Advisory Opinion on the *International Status of South-West Africa*, "the principle of non-annexation" was "considered to be of paramount importance" when the future of South West Africa and other territories was the subject of decision after the First World War (*I.C.J. Reports 1950*, p. 131). What was in consequence excluded by Article 22 of the League Covenant is even less acceptable today.

* * *

84. Where the United Nations is concerned, the records show that, throughout a period of twenty years, the General Assembly, by virtue of the powers vested in it by the Charter, called upon the South African Government to perform its obligations arising out of the Mandate. On 9 February 1946 the General Assembly, by resolution 9 (I), invited all States administering territories held under mandate to submit trusteeship agreements. All, with the exception of South Africa, responded by placing the respective territories under the trusteeship system or offering

them independence. The General Assembly further made a special recommendation to this effect in resolution 65 (I) of 14 December 1946; on 1 November 1947, in resolution 141 (II), it "urged" the Government of the Union of South Africa to propose a trusteeship agreement; by resolution 227 (III) of 26 November 1948 it maintained its earlier recommendations. A year later, in resolution 337 (IV) of 6 December 1949, it expressed "regret that the Government of the Union of South Africa has withdrawn its previous undertaking to submit reports on its administration of the Territory of South West Africa for the information of the United Nations", reiterated its previous resolutions and invited South Africa "to resume the submission of such reports to the General Assembly". At the same time, in resolution 338 (IV), it addressed specific questions concerning the international status of South West Africa to this Court. In 1950, by resolution 449 (V) of 13 December, it accepted the resultant Advisory Opinion and urged the Government of the Union of South Africa "to take the necessary steps to give effect to the Opinion of the International Court of Justice". By the same resolution, it established a committee "to confer with the Union of South Africa concerning the procedural measures necessary for implementing the Advisory Opinion . . .". In the course of the ensuing negotiations South Africa continued to maintain that neither the United Nations nor any other international organization had succeeded to the supervisory functions of the League. The Committee, for its part, presented a proposal closely following the terms of the Mandate and providing for implementation "through the United Nations by a procedure as nearly as possible analogous to that which existed under the League of Nations, thus providing terms no more extensive or onerous than those which existed before". This procedure would have involved the submission by South Africa of reports to a General Assembly committee, which would further set up a special commission to take over the functions of the Permanent Mandates Commission. Thus the United Nations, which undoubtedly conducted the negotiations in good faith, did not insist on the conclusion of a trusteeship agreement; it suggested a system of supervision which "should not exceed that which applied under the Mandates System . . .". These proposals were rejected by South Africa, which refused to accept the principle of the supervision of its administration of the Territory by the United Nations.

85. Further fruitless negotiations were held from 1952 to 1959. In total, negotiations extended over a period of thirteen years, from 1946 to 1959. In practice the actual length of negotiations is no test of whether the possibilities of agreement have been exhausted; it may be sufficient to show that an early deadlock was reached and that one side adamantly refused compromise. In the case of Namibia (South West Africa) this

stage had patently been reached long before the United Nations finally abandoned its efforts to reach agreement. Even so, for so long as South Africa was the mandatory Power the way was still open for it to seek an arrangement. But that chapter came to an end with the termination of the Mandate.

86. To complete this brief summary of the events preceding the present request for advisory opinion, it must be recalled that in 1955 and 1956 the Court gave at the request of the General Assembly two further advisory opinions on matters concerning the Territory. Eventually the General Assembly adopted resolution 2145 (XXI) on the termination of the Mandate for South West Africa. Subsequently the Security Council adopted resolution 276 (1970), which declared the continued presence of South Africa in Namibia to be illegal and called upon States to act accordingly.

* * *

87. The Government of France in its written statement and the Government of South Africa throughout the present proceedings have raised the objection that the General Assembly, in adopting resolution 2145 (XXI), acted *ultra vires*.

88. Before considering this objection, it is necessary for the Court to examine the observations made and the contentions advanced as to whether the Court should go into this question. It was suggested that though the request was not directed to the question of the validity of the General Assembly resolution and of the related Security Council resolutions, this did not preclude the Court from making such an enquiry. On the other hand it was contended that the Court was not authorized by the terms of the request, in the light of the discussions preceding it, to go into the validity of these resolutions. It was argued that the Court should not assume powers of judicial review of the action taken by the other principal organs of the United Nations without specific request to that effect, nor act as a court of appeal from their decisions.

89. Undoubtedly, the Court does not possess powers of judicial review or appeal in respect of the decisions taken by the United Nations organs concerned. The question of the validity or conformity with the Charter of General Assembly resolution 2145 (XXI) or of related Security Council resolutions does not form the subject of the request for advisory opinion. However, in the exercise of its judicial function and since objections have been advanced the Court, in the course of its reasoning, will consider these objections before determining any legal consequences arising from those resolutions.

90. As indicated earlier, with the entry into force of the Charter of the United Nations a relationship was established between all Members of the United Nations on the one side, and each mandatory Power on the other. The mandatory Powers while retaining their mandates assumed,

under Article 80 of the Charter, vis-à-vis all United Nations Members, the obligation to keep intact and preserve, until trusteeship agreements were executed, the rights of other States and of the peoples of mandated territories, which resulted from the existing mandate agreements and related instruments, such as Article 22 of the Covenant and the League Council's resolution of 31 January 1923 concerning petitions. The mandatory Powers also bound themselves to exercise their functions of administration in conformity with the relevant obligations emanating from the United Nations Charter, which member States have undertaken to fulfil in good faith in all their international relations.

91. One of the fundamental principles governing the international relationship thus established is that a party which disowns or does not fulfil its own obligations cannot be recognized as retaining the rights which it claims to derive from the relationship.

92. The terms of the preamble and operative part of resolution 2145 (XXI) leave no doubt as to the character of the resolution. In the preamble the General Assembly declares itself "*Convinced* that the administration of the Mandated Territory by South Africa has been conducted in a manner contrary" to the two basic international instruments directly imposing obligations upon South Africa, the Mandate and the Charter of the United Nations, as well as to the Universal Declaration of Human Rights. In another paragraph of the preamble the conclusion is reached that, after having insisted with no avail upon performance for more than twenty years, the moment has arrived for the General Assembly to exercise the right to treat such violation as a ground for termination.

93. In paragraph 3 of the operative part of the resolution the General Assembly "*Declares* that South Africa has failed to fulfil its obligations in respect of the administration of the Mandated Territory and to ensure the moral and material well-being and security of the indigenous inhabitants of South West Africa and has, in fact, disavowed the Mandate". In paragraph 4 the decision is reached, as a consequence of the previous declaration "that the Mandate conferred upon His Britannic Majesty to be exercised on his behalf by the Government of the Union of South Africa is *therefore* terminated . . .". (Emphasis added.) It is this part of the resolution which is relevant in the present proceedings.

94. In examining this action of the General Assembly it is appropriate to have regard to the general principles of international law regulating termination of a treaty relationship on account of breach. For even if the mandate is viewed as having the character of an institution, as is maintained, it depends on those international agreements which created the system and regulated its application. As the Court indicated in 1962 "this Mandate, like practically all other similar Mandates" was "a special type of instrument composite in nature and instituting a novel international régime. It incorporates a definite agreement . . ." (*I.C.J. Reports 1962*, p. 331). The Court stated conclusively in that Judgment that the

Mandate ". . . in fact and in law, is an international agreement having the character of a treaty or convention" (*I.C.J. Reports 1962*, p. 330). The rules laid down by the Vienna Convention on the Law of Treaties concerning termination of a treaty relationship on account of breach (adopted without a dissenting vote) may in many respects be considered as a codification of existing customary law on the subject. In the light of these rules, only a material breach of a treaty justifies termination, such breach being defined as:

"*(a)* a repudiation of the treaty not sanctioned by the present Convention; or

*(b)* the violation of a provision essential to the accomplishment of the object or purpose of the treaty" (Art. 60, para. 3).

95. General Assembly resolution 2145 (XXI) determines that both forms of material breach had occurred in this case. By stressing that South Africa "has, in fact, disavowed the Mandate", the General Assembly declared in fact that it had repudiated it. The resolution in question is therefore to be viewed as the exercise of the right to terminate a relationship in case of a deliberate and persistent violation of obligations which destroys the very object and purpose of that relationship.

* * *

96. It has been contended that the Covenant of the League of Nations did not confer on the Council of the League power to terminate a mandate for misconduct of the mandatory and that no such power could therefore be exercised by the United Nations, since it could not derive from the League greater powers than the latter itself had. For this objection to prevail it would be necessary to show that the mandates system, as established under the League, excluded the application of the general principle of law that a right of termination on account of breach must be presumed to exist in respect of all treaties, except as regards provisions relating to the protection of the human person contained in treaties of a humanitarian character (as indicated in Art. 60, para. 5, of the Vienna Convention). The silence of a treaty as to the existence of such a right cannot be interpreted as implying the exclusion of a right which has its source outside of the treaty, in general international law, and is dependent on the occurrence of circumstances which are not normally envisaged when a treaty is concluded.

97. The Government of South Africa has contended that it was the intention of the drafters of the mandates that they should not be revocable even in cases of serious breach of obligation or gross misconduct on the part of the mandatory. This contention seeks to draw support from the fact that at the Paris Peace Conference a resolution was adopted in which the proposal contained in President Wilson's draft of the Covenant regarding a right of appeal for the substitution of the mandatory was not

included. It should be recalled that the discussions at the Paris Peace Conference relied upon by South Africa were not directly addressed to an examination of President Wilson's proposals concerning the regulation of the mandates system in the League Covenant, and the participants were not contesting these particular proposals. What took place was a general exchange of views, on a political plane, regarding the questions of the disposal of the former German colonies and whether the principle of annexation or the mandatory principle should apply to them.

98. President Wilson's proposed draft did not include a specific provision for revocation, on the assumption that mandates were revocable. What was proposed was a special procedure reserving "to the people of any such territory or governmental unit the right to appeal to the League for the redress or correction of any breach of the mandate by the mandatory State or agency or for the substitution of some other State or agency, as mandatory". That this special right of appeal was not inserted in the Covenant cannot be interpreted as excluding the application of the general principle of law according to which a power of termination on account of breach, even if unexpressed, must be presumed to exist as inherent in any mandate, as indeed in any agreement.

99. As indicated earlier, at the Paris Peace Conference there was opposition to the institution of the mandates since a mandate would be inherently revocable, so that there would be no guarantee of long-term continuance of administration by the mandatory Power. The difficulties thus arising were eventually resolved by the assurance that the Council of the League would not interfere with the day-to-day administration of the territories and that the Council would intervene only in case of a fundamental breach of its obligations by the mandatory Power.

100. The revocability of a mandate was envisaged by the first proposal which was made concerning a mandates system:

> "In case of any flagrant and prolonged abuse of this trust the population concerned should be able to appeal for redress to the League, who should in a proper case assert its authority to the full, even to the extent of removing the mandate and entrusting it to some other State if necessary." (J. C. Smuts, *The League of Nations: A Practical Suggestion*, 1918, pp. 21-22.)

Although this proposal referred to different territories, the principle remains the same. The possibility of revocation in the event of gross violation of the mandate was subsequently confirmed by authorities on international law and members of the Permanent Mandates Commission

who interpreted and applied the mandates system under the League of Nations.

101. It has been suggested that, even if the Council of the League had possessed the power of revocation of the Mandate in an extreme case, it could not have been exercised unilaterally but only in co-operation with the mandatory Power. However, revocation could only result from a situation in which the Mandatory had committed a serious breach of the obligations it had undertaken. To contend, on the basis of the principle of unanimity which applied in the League of Nations, that in this case revocation could only take place with the concurrence of the Mandatory, would not only run contrary to the general principle of law governing termination on account of breach, but also postulate an impossibility. For obvious reasons, the consent of the wrongdoer to such a form of termination cannot be required.

102. In a further objection to General Assembly resolution 2145 (XXI) it is contended that it made pronouncements which the Assembly, not being a judicial organ, and not having previously referred the matter to any such organ, was not competent to make. Without dwelling on the conclusions reached in the 1966 Judgment in the *South West Africa* contentious cases, it is worth recalling that in those cases the applicant States, which complained of material breaches of substantive provisions of the Mandate, were held not to "possess any separate self-contained right which they could assert ... to require the due performance of the Mandate in discharge of the 'sacred trust' " (*I.C.J. Reports 1966*, pp. 29 and 51). On the other hand, the Court declared that: "... any divergences of view concerning the conduct of a mandate were regarded as being matters that had their place in the political field, the settlement of which lay between the mandatory and the competent organs of the League" (*ibid.*, p. 45). To deny to a political organ of the United Nations which is a successor of the League in this respect the right to act, on the argument that it lacks competence to render what is described as a judicial decision, would not only be inconsistent but would amount to a complete denial of the remedies available against fundamental breaches of an international undertaking.

103. The Court is unable to appreciate the view that the General Assembly acted unilaterally as party and judge in its own cause. In the 1966 Judgment in the *South West Africa* cases, referred to above, it was found that the function to call for the due execution of the relevant provisions of the mandate instruments appertained to the League acting as an entity through its appropriate organs. The right of the League "in the pursuit of its collective, institutional activity, to require the due performance of the Mandate in discharge of the 'sacred trust' ", was specifically recognized (*ibid.*, p. 29). Having regard to this finding, the United Nations as a successor to the League, acting through its competent organs, must be seen above all as the supervisory institution, competent to pronounce, in that capacity, on the conduct of the man-

datory with respect to its international obligations, and competent to act accordingly.

* * *

104. It is argued on behalf of South Africa that the consideration set forth in paragraph 3 of resolution 2145 (XXI) of the General Assembly, relating to the failure of South Africa to fulfil its obligations in respect of the administration of the mandated territory, called for a detailed factual investigation before the General Assembly could adopt resolution 2145 (XXI) or the Court pronounce upon its validity. The failure of South Africa to comply with the obligation to submit to supervision and to render reports, an essential part of the Mandate, cannot be disputed in the light of determinations made by this Court on more occasions than one. In relying on these, as on other findings of the Court in previous proceedings concerning South West Africa, the Court adheres to its own jurisprudence.

* * *

105. General Assembly resolution 2145 (XXI), after declaring the termination of the Mandate, added in operative paragraph 4 "that South Africa has no other right to administer the Territory". This part of the resolution has been objected to as deciding a transfer of territory. That in fact is not so. The pronouncement made by the General Assembly is based on a conclusion, referred to earlier, reached by the Court in 1950:

> "The authority which the Union Government exercises over the Territory is based on the Mandate. If the Mandate lapsed, as the Union Government contends, the latter's authority would equally have lapsed." (*I.C.J. Reports 1950*, p. 133.)

This was confirmed by the Court in its Judgment of 21 December 1962 in the *South West Africa* cases (Ethiopia *v.* South Africa; Liberia *v.* South Africa) (*I.C.J. Reports 1962*, p. 333). Relying on these decisions of the Court, the General Assembly declared that the Mandate having been terminated "South Africa has no other right to administer the Territory". This is not a finding on facts, but the formulation of a legal situation. For it would not be correct to assume that, because the General Assembly is in principle vested with recommendatory powers, it is debarred from adopting, in specific cases within the framework of its competence, resolutions which make determinations or have operative design.

* * *

106. By resolution 2145 (XXI) the General Assembly terminated the Mandate. However, lacking the necessary powers to ensure the withdrawal of South Africa from the Territory, it enlisted the co-operation of the Security Council by calling the latter's attention to the resolution, thus acting in accordance with Article 11, paragraph 2, of the Charter.

107. The Security Council responded to the call of the General Assembly. It "took note" of General Assembly resolution 2145 (XXI) in the preamble of its resolution 245 (1968); it took it "into account" in resolution 246 (1968); in resolutions 264 (1969) and 269 (1969) it adopted certain measures directed towards the implementation of General Assembly resolution 2145 (XXI) and, finally, in resolution 276 (1970), it reaffirmed resolution 264 (1969) and recalled resolution 269 (1969).

108. Resolution 276 (1970) of the Security Council, specifically mentioned in the text of the request, is the one essential for the purposes of the present advisory opinion. Before analysing it, however, it is necessary to refer briefly to resolutions 264 (1969) and 269 (1969), since these two resolutions have, together with resolution 276 (1970), a combined and a cumulative effect. Resolution 264 (1969), in paragraph 3 of its operative part, calls upon South Africa to withdraw its administration from Namibia immediately. Resolution 269 (1969), in view of South Africa's lack of compliance, after recalling the obligations of Members under Article 25 of the Charter, calls upon the Government of South Africa, in paragraph 5 of its operative part, "to withdraw its administration from the territory immediately and in any case before 4 October 1969". The preamble of resolution 276 (1970) reaffirms General Assembly resolution 2145 (XXI) and espouses it, by referring to the decision, not merely of the General Assembly, but of the United Nations "that the Mandate of South-West Africa was terminated". In the operative part, after condemning the non-compliance by South Africa with General Assembly and Security Council resolutions pertaining to Namibia, the Security Council declares, in paragraph 2, that "the continued presence of the South African authorities in Namibia is illegal" and that consequently all acts taken by the Government of South Africa "on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid". In paragraph 5 the Security Council "*Calls upon* all States, particularly those which have economic and other interests in Namibia, to refrain from any dealings with the Government of South Africa which are inconsistent with operative paragraph 2 of this resolution".

109. It emerges from the communications bringing the matter to the Security Council's attention, from the discussions held and particularly from the text of the resolutions themselves, that the Security Council, when it adopted these resolutions, was acting in the exercise of what it deemed to be its primary responsibility, the maintenance of peace and security, which, under the Charter, embraces situations which might

lead to a breach of the peace. (Art. 1, para. 1.) In the preamble of resolution 264 (1969) the Security Council was "*Mindful* of the grave consequences of South Africa's continued occupation of Namibia" and in paragraph 4 of that resolution it declared "that the actions of the Government of South Africa designed to destroy the national unity and territorial integrity of Namibia through the establishment of Bantustans are contrary to the provisions of the United Nations Charter". In operative paragraph 3 of resolution 269 (1969) the Security Council decided "that the continued occupation of the territory of Namibia by the South African authorities constitutes an aggressive encroachment on the authority of the United Nations, . . .". In operative paragraph 3 of resolution 276 (1970) the Security Council declared further "that the defiant attitude of the Government of South Africa towards the Council's decisions undermines the authority of the United Nations".

110. As to the legal basis of the resolution, Article 24 of the Charter vests in the Security Council the necessary authority to take action such as that taken in the present case. The reference in paragraph 2 of this Article to specific powers of the Security Council under certain chapters of the Charter does not exclude the existence of general powers to discharge the responsibilities conferred in paragraph 1. Reference may be made in this respect to the Secretary-General's Statement, presented to the Security Council on 10 January 1947, to the effect that "the powers of the Council under Article 24 are not restricted to the specific grants of authority contained in Chapters VI, VII, VIII and XII ... the Members of the United Nations have conferred upon the Security Council powers commensurate with its responsibility for the maintenance of peace and security. The only limitations are the fundamental principles and purposes found in Chapter I of the Charter."

111. As to the effect to be attributed to the declaration contained in paragraph 2 of resolution 276 (1970), the Court considers that the qualification of a situation as illegal does not by itself put an end to it. It can only be the first, necessary step in an endeavour to bring the illegal situation to an end.

112. It would be an untenable interpretation to maintain that, once such a declaration had been made by the Security Council under Article 24 of the Charter, on behalf of all member States, those Members would be free to act in disregard of such illegality or even to recognize violations of law resulting from it. When confronted with such an internationally unlawful situation, Members of the United Nations would be expected to act in consequence of the declaration made on their behalf. The question therefore arises as to the effect of this decision of the Security Council for States Members of the United Nations in accordance with Article 25 of the Charter.

113. It has been contended that Article 25 of the Charter applies only

to enforcement measures adopted under Chapter VII of the Charter. It is not possible to find in the Charter any support for this view. Article 25 is not confined to decisions in regard to enforcement action but applies to "the decisions of the Security Council" adopted in accordance with the Charter. Moreover, that Article is placed, not in Chapter VII, but immediately after Article 24 in that part of the Charter which deals with the functions and powers of the Security Council. If Article 25 had reference solely to decisions of the Security Council concerning enforcement action under Articles 41 and 42 of the Charter, that is to say, if it were only such decisions which had binding effect, then Article 25 would be superfluous, since this effect is secured by Articles 48 and 49 of the Charter.

114. It has also been contended that the relevant Security Council resolutions are couched in exhortatory rather than mandatory language and that, therefore, they do not purport to impose any legal duty on any State nor to affect legally any right of any State. The language of a resolution of the Security Council should be carefully analysed before a conclusion can be made as to its binding effect. In view of the nature of the powers under Article 25, the question whether they have been in fact exercised is to be determined in each case, having regard to the terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution of the Security Council.

115. Applying these tests, the Court recalls that in the preamble of resolution 269 (1969), the Security Council was "*Mindful* of its responsibility to take necessary action to secure strict compliance with the obligations entered into by States Members of the United Nations under the provisions of Article 25 of the Charter of the United Nations". The Court has therefore reached the conclusion that the decisions made by the Security Council in paragraphs 2 and 5 of resolutions 276 (1970), as related to paragraph 3 of resolution 264 (1969) and paragraph 5 of resolution 269 (1969), were adopted in conformity with the purposes and principles of the Charter and in accordance with its Articles 24 and 25. The decisions are consequently binding on all States Members of the United Nations, which are thus under obligation to accept and carry them out.

116. In pronouncing upon the binding nature of the Security Council decisions in question, the Court would recall the following passage in its Advisory Opinion of 11 April 1949 on *Reparation for Injuries Suffered in the Service of the United Nations*:

> "The Charter has not been content to make the Organization created by it merely a centre 'for harmonizing the actions of nations in the attainment of these common ends' (Article 1, para. 4). It has equipped that centre with organs, and has given it special tasks. It has defined the position of the Members in relation to the Organization

by requiring them to give it every assistance in any action undertaken by it (Article 2, para. 5), and to accept and carry out the decisions of the Security Council." (*I.C.J. Reports 1949*, p. 178.)

Thus when the Security Council adopts a decision under Article 25 in accordance with the Charter, it is for member States to comply with that decision, including those members of the Security Council which voted against it and those Members of the United Nations who are not members of the Council. To hold otherwise would be to deprive this principal organ of its essential functions and powers under the Charter.

* * *

117. Having reached these conclusions, the Court will now address itself to the legal consequences arising for States from the continued presence of South Africa in Namibia, notwithstanding Security Council resolution 276 (1970). A binding determination made by a competent organ of the United Nations to the effect that a situation is illegal cannot remain without consequence. Once the Court is faced with such a situation, it would be failing in the discharge of its judicial functions if it did not declare that there is an obligation, especially upon Members of the United Nations, to bring that situation to an end. As this Court has held, referring to one of its decisions declaring a situation as contrary to a rule of international law: "This decision entails a legal consequence, namely that of putting an end to an illegal situation" (*I.C.J. Reports 1951*, p. 82).

118. South Africa, being responsible for having created and maintained a situation which the Court has found to have been validly declared illegal, has the obligation to put an end to it. It is therefore under obligation to withdraw its administration from the Territory of Namibia. By maintaining the present illegal situation, and occupying the Territory without title, South Africa incurs international responsibilities arising from a continuing violation of an international obligation. It also remains accountable for any violations of its international obligations, or of the rights of the people of Namibia. The fact that South Africa no longer has any title to administer the Territory does not release it from its obligations and responsibilities under international law towards other States in respect of the exercise of its powers in relation to this Territory. Physical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States.

119. The member States of the United Nations are, for the reasons given in paragraph 115 above, under obligation to recognize the illegality and invalidity of South Africa's continued presence in Namibia. They are also under obligation to refrain from lending any support or any form of assistance to South Africa with reference to its occupation of Namibia, subject to paragraph 125 below.

120. The precise determination of the acts permitted or allowed—what measures are available and practicable, which of them should be selected, what scope they should be given and by whom they should be applied—is a matter which lies within the competence of the appropriate political organs of the United Nations acting within their authority under the Charter. Thus it is for the Security Council to determine any further measures consequent upon the decisions already taken by it on the question of Namibia. In this context the Court notes that at the same meeting of the Security Council in which the request for advisory opinion was made, the Security Council also adopted resolution 283 (1970) which defined some of the steps to be taken. The Court has not been called upon to advise on the legal effects of that resolution.

121. The Court will in consequence confine itself to giving advice on those dealings with the Government of South Africa which, under the Charter of the United Nations and general international law, should be considered as inconsistent with the declaration of illegality and invalidity made in paragraph 2 of resolution 276 (1970), because they may imply a recognition that South Africa's presence in Namibia is legal.

122. For the reasons given above, and subject to the observations contained in paragraph 125 below, member States are under obligation to abstain from entering into treaty relations with South Africa in all cases in which the Government of South Africa purports to act on behalf of or concerning Namibia. With respect to existing bilateral treaties, member States must abstain from invoking or applying those treaties or provisions of treaties concluded by South Africa on behalf of or concerning Namibia which involve active intergovernmental co-operation. With respect to multilateral treaties, however, the same rule cannot be applied to certain general conventions such as those of a humanitarian character, the non-performance of which may adversely affect the people of Namibia. It will be for the competent international organs to take specific measures in this respect.

123. Member States, in compliance with the duty of non-recognition imposed by paragraphs 2 and 5 of resolution 276 (1970), are under obligation to abstain from sending diplomatic or special missions to South Africa including in their jurisdiction the Territory of Namibia, to abstain from sending consular agents to Namibia, and to withdraw any such agents already there. They should also make it clear to the South African authorities that the maintenance of diplomatic or consular relations with South Africa does not imply any recognition of its authority with regard to Namibia.

124. The restraints which are implicit in the non-recognition of South Africa's presence in Namibia and the explicit provisions of paragraph 5 of resolution 276 (1970) impose upon member States the obligation to abstain from entering into economic and other forms of relationship

or dealings with South Africa on behalf of or concerning Namibia which may entrench its authority over the Territory.

125. In general, the non-recognition of South Africa's administration of the Territory should not result in depriving the people of Namibia of any advantages derived from international co-operation. In particular, while official acts performed by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid, this invalidity cannot be extended to those acts, such as, for instance, the registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the Territory.

126. As to non-member States, although not bound by Articles 24 and 25 of the Charter, they have been called upon in paragraphs 2 and 5 of resolution 276 (1970) to give assistance in the action which has been taken by the United Nations with regard to Namibia. In the view of the Court, the termination of the Mandate and the declaration of the illegality of South Africa's presence in Namibia are opposable to all States in the sense of barring *erga omnes* the legality of a situation which is maintained in violation of international law: in particular, no State which enters into relations with South Africa concerning Namibia may expect the United Nations or its Members to recognize the validity or effects of such relationship, or of the consequences thereof. The Mandate having been terminated by decision of the international organization in which the supervisory authority over its administration was vested, and South Africa's continued presence in Namibia having been declared illegal, it is for non-member States to act in accordance with those decisions.

127. As to the general consequences resulting from the illegal presence of South Africa in Namibia, all States should bear in mind that the injured entity is a people which must look to the international community for assistance in its progress towards the goals for which the sacred trust was instituted.

* * *

128. In its oral statement and in written communications to the Court, the Government of South Africa expressed the desire to supply the Court with further factual information concerning the purposes and objectives of South Africa's policy of separate development or *apartheid*, contending that to establish a breach of South Africa's substantive international obligations under the Mandate it would be necessary to prove that a particular exercise of South Africa's legislative or administrative powers was not directed in good faith towards the purpose of promoting to the utmost the well-being and progress of the inhabitants. It is claimed by the Government of South Africa that no act or omission on its part would constitute a violation of its international obligations unless it is

shown that such act or omission was actuated by a motive, or directed towards a purpose other than one to promote the interests of the inhabitants of the Territory.

129. The Government of South Africa having made this request, the Court finds that no factual evidence is needed for the purpose of determining whether the policy of *apartheid* as applied by South Africa in Namibia is in conformity with the international obligations assumed by South Africa under the Charter of the United Nations. In order to determine whether the laws and decrees applied by South Africa in Namibia, which are a matter of public record, constitute a violation of the purposes and principles of the Charter of the United Nations, the question of intent or governmental discretion is not relevant; nor is it necessary to investigate or determine the effects of those measures upon the welfare of the inhabitants.

130. It is undisputed, and is amply supported by documents annexed to South Africa's written statement in these proceedings, that the official governmental policy pursued by South Africa in Namibia is to achieve a complete physical separation of races and ethnic groups in separate areas within the Territory. The application of this policy has required, as has been conceded by South Africa, restrictive measures of control officially adopted and enforced in the Territory by the coercive power of the former Mandatory. These measures establish limitations, exclusions or restrictions for the members of the indigenous population groups in respect of their participation in certain types of activities, fields of study or of training, labour or employment and also submit them to restrictions or exclusions of residence and movement in large parts of the Territory.

131. Under the Charter of the United Nations, the former Mandatory had pledged itself to observe and respect, in a territory having an international status, human rights and fundamental freedoms for all without distinction as to race. To establish instead, and to enforce, distinctions, exclusions, restrictions and limitations exclusively based on grounds of race, colour, descent or national or ethnic origin which constitute a denial of fundamental human rights is a flagrant violation of the purposes and principles of the Charter.

* * *

132. The Government of South Africa also submitted a request that a plebiscite should be held in the Territory of Namibia under the joint supervision of the Court and the Government of South Africa (para. 16 above). This proposal was presented in connection with the request to submit additional factual evidence and as a means of bringing evidence before the Court. The Court having concluded that no further evidence

was required, that the Mandate was validly terminated and that in consequence South Africa's presence in Namibia is illegal and its acts on behalf of or concerning Namibia are illegal and invalid, it follows that it cannot entertain this proposal.

* * *

133. For these reasons,

THE COURT IS OF OPINION,

in reply to the question:

> "What are the legal consequences for States of the continued presence of South Africa in Namibia, notwithstanding Security Council resolution 276 (1970)?"

by 13 votes to 2,

(1) that, the continued presence of South Africa in Namibia being illegal, South Africa is under obligation to withdraw its administration from Namibia immediately and thus put an end to its occupation of the Territory;

by 11 votes to 4,

(2) that States Members of the United Nations are under obligation to recognize the illegality of South Africa's presence in Namibia and the invalidity of its acts on behalf of or concerning Namibia, and to refrain from any acts and in particular any dealings with the Government of South Africa implying recognition of the legality of, or lending support or assistance to, such presence and administration;

(3) that it is incumbent upon States which are not Members of the United Nations to give assistance, within the scope of subparagraph (2) above, in the action which has been taken by the United Nations with regard to Namibia.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this twenty-first day of June, one thousand nine hundred and seventy-one, in two copies, one of which will be placed in the archives of the Court and the other transmitted to the Secretary-General of the United Nations.

*(Signed)* ZAFRULLA KHAN,
President.

*(Signed)* S. AQUARONE,
Registrar.

President Sir Muhammad ZAFRULLA KHAN makes the following declaration:

I am in entire agreement with the Opinion of the Court but would wish to add some observations on two or three aspects of the presentation made to the Court on behalf of South Africa.

It was contended that under the supervisory system as devised in the Covenant of the League and the different mandate agreements, the mandatory could, in the last resort, flout the wishes of the Council of the League by casting its vote in opposition to the directions which the Council might propose to give to the mandatory. The argument runs that this system was deliberately so devised, with open eyes, as to leave the Council powerless in face of the veto of the mandatory if the latter chose to exercise it. In support of this contention reliance was placed on paragraph 5 of Article 4 of the Covenant of the League by virtue of which any Member of the League not represented on the Council was to be invited to send a representative to sit as a member at any meeting of the Council during the consideration of matters specially affecting the interests of that Member. This entitled the mandatory to sit as a member at any meeting of the Council in which a matter affecting its interests as a mandatory came under consideration. Under paragraph 1 of Article 5 of the Covenant decisions of the Council required the agreement of all the Members of the League represented at the meeting. This is known as the unanimity rule and by virtue thereof it was claimed that a mandatory possessed a right of veto when attending a meeting of the Council in pursuance of paragraph 5 of Article 4 and consequently the last word on the manner and method of the administration of the mandate rested with the mandatory. This contention is untenable. Were it well founded it would reduce the whole system of mandates to mockery. As the Court, in its Judgment of 1966, observed:

> "In practice, the unanimity rule was frequently not insisted upon, or its impact was mitigated by a process of give-and-take, and by various procedural devices to which both the Council and the mandatories lent themselves. So far as the Court's information goes, there never occurred any case in which a mandatory 'vetoed' what would otherwise have been a Council decision. Equally, however, much trouble was taken to avoid situations in which the mandatory would have been forced to acquiesce in the views of the rest of the Council short of casting an adverse vote. The occasional deliberate absence of the mandatory from a meeting, enabled decisions to be taken that the mandatory might have felt obliged to vote against if it had been present. This was part of the above-mentioned process for arriving at generally acceptable conclusions." (*I.C.J. Reports 1966*, pp. 44-45.)

The representative of South Africa, in answer to a question by a Member of the Court, confessed that there was not a single case on record in which the representative of a mandatory Power ever cast a negative vote in a meeting of the Council so as to block a decision of the Council. It is thus established that in practice the last word always rested with the Council of the League and not with the mandatory.

The Covenant of the League made ample provision to secure the effectiveness of the Covenant and conformity to its provisions in respect of the obligations entailed by membership of the League. A Member of the League which had violated any covenant of the League could be declared to be no longer a Member of the League by a vote of the Council concurred in by the representatives of all the other Members of the League represented thereon (para. 4, Art. 16, of the Covenant).

The representative of South Africa conceded that:

> ". . . if a conflict between a mandatory and the Council occurred and if all the Members of the Council were of the opinion that the mandatory had violated a covenant of the League, it would have been legally possible for the Council to expel the mandatory from the League and thereafter decisions of the Council could no longer be thwarted by the particular mandatory—for instance, a decision to revoke the mandate. The mandatory would then no longer be a Member of the League and would then accordingly no longer be entitled to attend and vote in Council meetings.
> . . . we agree that by expelling a mandatory the Council could have overcome the practical or mechanical difficulties created by the unanimity requirement." (Hearing of 15 March 1971.)

It was no doubt the consciousness of this position which prompted the deliberate absence of a mandatory from a meeting of the Council of the League which enabled the Council to take decisions that the mandatory might have felt obliged to vote against if it had been present.

If a mandatory ceased to be a Member of the League and the Council felt that the presence of its representative in a meeting of the Council dealing with matters affecting the mandate would be helpful, it could still be invited to attend as happened in the case of Japan after it ceased to be a Member of the League. But it could not attend as of right under paragraph 5 of Article 4 of the Covenant.

In addition, if need arose the Covenant could be amended under Article 26 of the Covenant. In fact no such need arose but the authority was provided in the Covenant. It would thus be idle to contend that the mandates system was deliberately devised, with open eyes, so as to leave the Council of the League powerless against the veto of the mandatory if the latter chose to exercise it.

Those responsible for the Covenant were anxious and worked hard

to institute a system which would be effective in carrying out to the full the sacred trust of civilization. Had they deliberately devised a framework which might enable a mandatory so inclined to defy the system with impunity, they would have been guilty of defeating the declared purpose of the mandates system and this is not to be thought of; nor is it to be imagined that these wise statesmen, despite all the care that they took and the reasoning and persuasion that they brought into play, were finally persuaded into accepting as reality that which could so easily be turned into a fiction.

* * *

In my view the supervisory authority of the General Assembly of the United Nations in respect of the mandated territory, being derived from the Covenant of the League and the Mandate Agreement, is not restricted by any provision of the Charter of the United Nations. The extent of that authority must be determined by reference to the relevant provisions of the Covenant of the League and the Mandate Agreement. The General Assembly was entitled to exercise the same authority in respect of the administration of the Territory by the Mandatory as was possessed by the Council of the League and its decisions and determinations in that respect had the same force and effect as the decisions and determinations of the Council of the League. This was well illustrated in the case of General Assembly resolution 289 (IV), adopted on 21 November 1949 recommending that Libya shall become independent as soon as possible and in any case not later than 1 January 1952. A detailed procedure for the achievement of this objective was laid down, including the appointment by the General Assembly of a United Nations Commissioner in Libya and a Council to aid and advise him, etc. All the recommendations contained in this resolution constituted binding decisions; decisions which had been adopted in accordance with the provisions of the Charter but whose binding character was derived from Annex XI to the Treaty of Peace with Italy.

* * *

The representative of South Africa, during the course of his oral submission, refrained from using the expression "*apartheid*" but urged:

> "... South Africa is in the position that its conduct would be unlawful if the differentiation which it admittedly practises should be directed at, and have the result of subordinating the interests of one or certain groups on a racial or ethnic basis to those of others, ... If that can be established in fact, then South Africa would be guilty of violation of its obligations in that respect, otherwise not." (Hearing of 17 March 1971.)

The policy of *apartheid* was initiated by Prime Minister Malan and was then vigorously put into effect by his successors, Strijdom and Verwoerd. It has been continuously proclaimed that the purpose and object of the policy are the maintenance of White domination. Speaking to the South African House of Assembly, as late as 1963, Dr. Verwoerd said:

> "Reduced to its simplest form the problem is nothing else than this: We want to keep South Africa White . . . Keeping it White can only mean one thing, namely, White domination, not leadership, not guidance, but control, supremacy. If we are agreed that it is the desire of the people that the White man should be able to continue to protect himself by White domination . . . we say that it can be achieved by separate development." (*I.C.J. Pleadings, South West Africa*, Vol. IV, p. 264.)

South Africa's reply to this in its Rejoinder in the 1966 cases was in effect that these and other similar pronouncements were qualified by "the promise to provide separate homelands for the Bantu groups" wherein the Bantu would be free to develop his capacities to the same degree as the White could do in the rest of the country. But this promise itself was always subject to the qualification that the Bantu homelands would develop under the guardianship of the White. In this connection it was urged that in 1961 the "Prime Minister spoke of a greater degree of ultimate independence for Bantu homelands than he had mentioned a decade earlier". This makes little difference in respect of the main purpose of the policy which continued to be the domination of the White.

It needs to be remembered, however, that the Court is not concerned in these proceedings with conditions in South Africa. The Court is concerned with the administration of South West Africa as carried on by the Mandatory in discharge of his obligations under the Mandate which prescribed that the well-being and development of people who were not yet able to stand by themselves under the strenuous conditions of the modern world constituted a sacred trust of civilization and that the best method of giving effect to this principle was that the tutelage of such peoples should be entrusted to advanced nations who, by reason of their resources, their experience and their geographical position could best undertake this responsibility (Art. 22, paras. 1 and 2, of the Covenant of the League of Nations).

The administration was to be carried on "in the interests of the indigenous population" (para. 6, Art. 22). For the discharge of this obligation it is not enough that the administration should believe in good faith that the policy it proposes to follow is in the best interests of all sections of the population. The supervisory authority must be satisfied that it is in the

best interests of the indigenous population of the Territory. This follows from Article 6 of the Mandate Agreement for South West Africa, read with paragraph 6 of Article 22 of the Covenant.

The representative of South Africa, while admitting the right of the people of South West Africa to self-determination, urged in his oral statement that the exercise of that right must take into full account the limitations imposed, according to him, on such exercise by the tribal and cultural divisions in the Territory. He concluded that in the case of South West Africa self-determination "may well find itself practically restricted to some kind of autonomy and local self-government within a larger arrangement of co-operation" (hearing of 17 March 1971). This in effect means a denial of self-determination as envisaged in the Charter of the United Nations.

Whatever may have been the conditions in South Africa calling for special measures, those conditions did not exist in the case of South West Africa at the time when South Africa assumed the obligation of a mandatory in respect of the Territory, nor have they come into existence since. In South West Africa the small White element was not and is not indigenous to the Territory. There can be no excuse in the case of South West Africa for the application of the policy of *apartheid* so far as the interests of the White population are concerned. It is claimed, however, that the various indigenous groups of the population have reached different stages of development and that there are serious ethnic considerations which call for the application of the policy of separate development of each group. The following observations of the Director of the Institute of Race Relations, London, are apposite in this context:

> "... White South African arguments are based on the different stages of development reached by various groups of people. It is undisputed fact that groups have developed at different paces in respect of the control of environment (although understanding of other aspects of life has not always grown at the same pace). But the aspect of South African thought which is widely questioned elsewhere is the assumption that an individual is permanently limited by the limitations of his group. His ties with it may be strong; indeed, when considering politics and national survival, the assumption that they will be strong is altogether reasonable. Again, as a matter of choice, people may prefer to mix socially with those of their own group, but to say that by law people of one group must mix with no others can really only proceed from a conviction not only that the other groups are inferior but that every member of each of the other groups is permanently and irremediably inferior. It is this that rankles. 'Separate but equal' is possible so long as it is a matter of choice by both parties; legally imposed by one, it must be regarded by the other as a humiliation, and far more so if it applies not only

to the group as a whole but to individuals. In fact, of course, what separate development has meant has been anything but equal.

These are some reasons why it will be hard to find natives of Africa who believe that to extend the policy of separate development to South West Africa even more completely than at present is in the interest of any but the White inhabitants." (Quoted in *I.C.J. Pleadings, South West Africa*, Vol. IV, p. 339.)

* * *

Towards the close of his oral presentation the representative of South Africa made a plea to the Court in the following terms:

"In our submission, the general requirement placed by the Charter on all United Nations activities is that they must further peace, friendly relations, and co-operation between nations, and especially between member States. South Africa, as a member State, is under a duty to contribute towards those ends, and she desires to do so, although she has no intention of abdicating what she regards as her responsibilities on the sub-continent of southern Africa.

If there are to be genuine efforts at achieving a peaceful solution, they will have to satisfy certain criteria. They will have to respect the will of the self-determining peoples of South West Africa. They will have to take into account the facts of geography, of economics, of budgetary requirements, of the ethnic conditions and of the state of development.

If this Court, even in an opinion on legal questions, could indicate the road towards a peaceful and constructive solution along these lines, then the Court would have made a great contribution, in our respectful submission, to the cause of international peace and security and, more, to the cause of friendly relations amongst not only the nations but amongst all men." (Hearing of 5 March 1971.)

The representative of the United States of America, in his oral presentation, observed that:

". . . the question of holding a free and proper plebiscite under appropriate auspices and with conditions and arrangements which would ensure a fair and informed expression of the will of the people of Namibia deserves study. It is a matter which might be properly submitted to the competent political organs of the United Nations, which have consistently manifested their concern that the

Namibians achieve self-determination. The Court may wish to so indicate in its opinion to the Security Council." (Hearing of 9 March 1971.)

The Court having arrived at the conclusion that the Mandate has been terminated and that the presence of South Africa in South West Africa is illegal, I would, in response to the plea made by the representative of South Africa, suggest that South Africa should offer to withdraw its administration from South West Africa in consultation with the United Nations so that a process of withdrawal and substitution in its place of United Nations' control may be agreed upon and carried into effect with the minimum disturbance of present administrative arrangements. It should also be agreed upon that, after the expiry of a certain period but not later than a reasonable time-limit thereafter, a plebiscite may be held under the supervision of the United Nations, which should ensure the freedom and impartiality of the plebiscite, to ascertain the wishes of the inhabitants of the Territory with regard to their political future. If the result of the plebiscite should reveal a clear preponderance of views in support of a particular course and objective, that course should be adopted so that the desired objective may be achieved as early as possible.

South Africa's insistence upon giving effect to the will of the peoples of South West Africa proceeds presumably from the conviction that an overwhelming majority of the peoples of the Territory desire closer political integration with the Republic of South Africa. Should that prove in fact to be the case the United Nations, being wholly committed to the principle of self-determination of peoples, would be expected to readily give effect to the clearly expressed wishes of the peoples of the Territory. Should the result of the plebiscite disclose their preference for a different solution, South Africa should equally readily accept and respect such manifestation of the will of the peoples concerned and should co-operate with the United Nations in giving effect to it.

The Government of South Africa, being convinced that an overwhelming majority of the peoples of South West Africa truly desire incorporation with the Republic, would run little risk of a contrary decision through the adoption of the procedure here suggested. If some such procedure is adopted and the conclusion that may emerge therefrom, whatever it may prove to be, is put into effect, South Africa would have vindicated itself in the eyes of the world and in the estimation of the peoples of South West Africa, whose freely expressed wishes must be supreme. There would still remain the possibility, and, if South Africa's estimation of the situation is close enough to reality, the strong probability, that once the peoples of South West Africa have been put in a position to manage their own affairs without any outside influence or control and they have had greater experience of the difficulties and problems with which they would be confronted, they may freely decide, in the exercise of their sovereignty, to establish a closer political relationship with South Africa. The adoption

of the course here suggested would indeed make a great contribution "to the cause of international peace and security and, more, to the cause of friendly relations amongst not only the nations but amongst all men".

Vice-President AMMOUN and Judges PADILLA NERVO, PETRÉN, ONYEAMA, DILLARD and DE CASTRO append separate opinions to the Opinion of the Court.

Judges Sir Gerald FITZMAURICE and GROS append dissenting opinions to the Opinion of the Court.

*(Initialled)* Z.K.
*(Initialled)* S.A.

# Annex 45

## 2. International Convention on the Elimination of All Forms of Racial Discrimination

*New York, 7 March 1966*

**ENTRY INTO FORCE:** 4 January 1969, in accordance with article 19.[1]

**REGISTRATION:** 12 March 1969, No. 9464.

**STATUS:** Signatories: 88. Parties: 182.

**TEXT:** United Nations, *Treaty Series* , vol. 660, p. 195.

***Note:*** The Convention was adopted by the General Assembly of the United Nations in resolution 2106 (XX)[2] of 21 December 1965.

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| *Participant*[3] | *Signature* | *Accession(a), Succession(d), Ratification* |
|---|---|---|
| Afghanistan | | 6 Jul 1983 a |
| Albania | | 11 May 1994 a |
| Algeria | 9 Dec 1966 | 14 Feb 1972 |
| Andorra | 5 Aug 2002 | 22 Sep 2006 |
| Angola | 24 Sep 2013 | 2 Oct 2019 |
| Antigua and Barbuda | | 25 Oct 1988 d |
| Argentina | 13 Jul 1967 | 2 Oct 1968 |
| Armenia | | 23 Jun 1993 a |
| Australia | 13 Oct 1966 | 30 Sep 1975 |
| Austria | 22 Jul 1969 | 9 May 1972 |
| Azerbaijan | | 16 Aug 1996 a |
| Bahamas | | 5 Aug 1975 d |
| Bahrain | | 27 Mar 1990 a |
| Bangladesh | | 11 Jun 1979 a |
| Barbados | | 8 Nov 1972 a |
| Belarus | 7 Mar 1966 | 8 Apr 1969 |
| Belgium | 17 Aug 1967 | 7 Aug 1975 |
| Belize | 6 Sep 2000 | 14 Nov 2001 |
| Benin | 2 Feb 1967 | 30 Nov 2001 |
| Bhutan | 26 Mar 1973 | |
| Bolivia (Plurinational State of) | 7 Jun 1966 | 22 Sep 1970 |
| Bosnia and Herzegovina[4] | | 16 Jul 1993 d |
| Botswana | | 20 Feb 1974 a |
| Brazil | 7 Mar 1966 | 27 Mar 1968 |
| Bulgaria | 1 Jun 1966 | 8 Aug 1966 |
| Burkina Faso | | 18 Jul 1974 a |
| Burundi | 1 Feb 1967 | 27 Oct 1977 |
| Cabo Verde | | 3 Oct 1979 a |
| Cambodia | 12 Apr 1966 | 28 Nov 1983 |
| Cameroon | 12 Dec 1966 | 24 Jun 1971 |
| Canada | 24 Aug 1966 | 14 Oct 1970 |
| Central African Republic | 7 Mar 1966 | 16 Mar 1971 |
| Chad | | 17 Aug 1977 a |
| Chile | 3 Oct 1966 | 20 Oct 1971 |
| China[5,6,7,8] | | 29 Dec 1981 a |
| Colombia | 23 Mar 1967 | 2 Sep 1981 |
| Comoros | 22 Sep 2000 | 27 Sep 2004 |
| Congo | | 11 Jul 1988 a |
| Costa Rica | 14 Mar 1966 | 16 Jan 1967 |
| Côte d'Ivoire | | 4 Jan 1973 a |
| Croatia[4] | | 12 Oct 1992 d |
| Cuba | 7 Jun 1966 | 15 Feb 1972 |
| Cyprus | 12 Dec 1966 | 21 Apr 1967 |
| Czech Republic[9] | | 22 Feb 1993 d |
| Democratic Republic of the Congo | | 21 Apr 1976 a |
| Denmark[10] | 21 Jun 1966 | 9 Dec 1971 |
| Djibouti | 14 Jun 2006 | 30 Sep 2011 |
| Dominica | | 13 May 2019 a |
| Dominican Republic | | 25 May 1983 a |
| Ecuador | | 22 Sep 1966 a |
| Egypt | 28 Sep 1966 | 1 May 1967 |
| El Salvador | | 30 Nov 1979 a |
| Equatorial Guinea | | 8 Oct 2002 a |
| Eritrea | | 31 Jul 2001 a |
| Estonia | | 21 Oct 1991 a |
| Eswatini | | 7 Apr 1969 a |
| Ethiopia | | 23 Jun 1976 a |
| Fiji | | 11 Jan 1973 d |

| *Participant*[3] | *Signature* | *Accession(a), Succession(d), Ratification* |
|---|---|---|
| Finland | 6 Oct 1966 | 14 Jul 1970 |
| France | | 28 Jul 1971 a |
| Gabon | 20 Sep 1966 | 29 Feb 1980 |
| Gambia | | 29 Dec 1978 a |
| Georgia | | 2 Jun 1999 a |
| Germany[11] | 10 Feb 1967 | 16 May 1969 |
| Ghana | 8 Sep 1966 | 8 Sep 1966 |
| Greece | 7 Mar 1966 | 18 Jun 1970 |
| Grenada | 17 Dec 1981 | 10 May 2013 |
| Guatemala | 8 Sep 1967 | 18 Jan 1983 |
| Guinea | 24 Mar 1966 | 14 Mar 1977 |
| Guinea-Bissau | 12 Sep 2000 | 1 Nov 2010 |
| Guyana | 11 Dec 1968 | 15 Feb 1977 |
| Haiti | 30 Oct 1972 | 19 Dec 1972 |
| Holy See | 21 Nov 1966 | 1 May 1969 |
| Honduras | | 10 Oct 2002 a |
| Hungary | 15 Sep 1966 | 4 May 1967 |
| Iceland | 14 Nov 1966 | 13 Mar 1967 |
| India | 2 Mar 1967 | 3 Dec 1968 |
| Indonesia | | 25 Jun 1999 a |
| Iran (Islamic Republic of) | 8 Mar 1967 | 29 Aug 1968 |
| Iraq | 18 Feb 1969 | 13 Feb 1970 |
| Ireland | 21 Mar 1968 | 29 Dec 2000 |
| Israel | 7 Mar 1966 | 3 Jan 1979 |
| Italy | 13 Mar 1968 | 5 Jan 1976 |
| Jamaica | 14 Aug 1966 | 4 Jun 1971 |
| Japan | | 15 Dec 1995 a |
| Jordan | | 30 May 1974 a |
| Kazakhstan | | 26 Aug 1998 a |
| Kenya | | 13 Sep 2001 a |
| Kuwait | | 15 Oct 1968 a |
| Kyrgyzstan | | 5 Sep 1997 a |
| Lao People's Democratic Republic | | 22 Feb 1974 a |
| Latvia | | 14 Apr 1992 a |
| Lebanon | | 12 Nov 1971 a |
| Lesotho | | 4 Nov 1971 a |
| Liberia | | 5 Nov 1976 a |
| Libya | | 3 Jul 1968 a |
| Liechtenstein | | 1 Mar 2000 a |
| Lithuania | 8 Jun 1998 | 10 Dec 1998 |
| Luxembourg | 12 Dec 1967 | 1 May 1978 |
| Madagascar | 18 Dec 1967 | 7 Feb 1969 |
| Malawi | | 11 Jun 1996 a |
| Maldives | | 24 Apr 1984 a |
| Mali | | 16 Jul 1974 a |
| Malta | 5 Sep 1968 | 27 May 1971 |
| Marshall Islands | | 11 Apr 2019 a |
| Mauritania | 21 Dec 1966 | 13 Dec 1988 |
| Mauritius | | 30 May 1972 a |
| Mexico | 1 Nov 1966 | 20 Feb 1975 |
| Monaco | | 27 Sep 1995 a |
| Mongolia | 3 May 1966 | 6 Aug 1969 |
| Montenegro[12] | | 23 Oct 2006 d |
| Morocco | 18 Sep 1967 | 18 Dec 1970 |
| Mozambique | | 18 Apr 1983 a |
| Namibia[13] | | 11 Nov 1982 a |
| Nauru | 12 Nov 2001 | |
| Nepal | | 30 Jan 1971 a |
| Netherlands (Kingdom of the) | 24 Oct 1966 | 10 Dec 1971 |
| New Zealand[14] | 25 Oct 1966 | 22 Nov 1972 |
| Nicaragua | | 15 Feb 1978 a |
| Niger | 14 Mar 1966 | 27 Apr 1967 |
| Nigeria | | 16 Oct 1967 a |
| North Macedonia[4] | | 18 Jan 1994 d |
| Norway | 21 Nov 1966 | 6 Aug 1970 |
| Oman | | 2 Jan 2003 a |
| Pakistan | 19 Sep 1966 | 21 Sep 1966 |
| Palau | 20 Sep 2011 | |
| Panama | 8 Dec 1966 | 16 Aug 1967 |
| Papua New Guinea | | 27 Jan 1982 a |
| Paraguay | 13 Sep 2000 | 18 Aug 2003 |
| Peru | 22 Jul 1966 | 29 Sep 1971 |
| Philippines | 7 Mar 1966 | 15 Sep 1967 |
| Poland | 7 Mar 1966 | 5 Dec 1968 |
| Portugal[7] | | 24 Aug 1982 a |
| Qatar | | 22 Jul 1976 a |
| Republic of Korea | 8 Aug 1978 | 5 Dec 1978 |
| Republic of Moldova | | 26 Jan 1993 a |
| Romania | | 15 Sep 1970 a |
| Russian Federation | 7 Mar 1966 | 4 Feb 1969 |
| Rwanda | | 16 Apr 1975 a |
| San Marino | 11 Dec 2001 | 12 Mar 2002 |
| Sao Tome and Principe | 6 Sep 2000 | 10 Jan 2017 |
| Saudi Arabia | | 23 Sep 1997 a |
| Senegal | 22 Jul 1968 | 19 Apr 1972 |

| *Participant*[3] | *Signature* | *Accession(a), Succession(d), Ratification* |
|---|---|---|
| Serbia[4] | | 12 Mar 2001 d |
| Seychelles | | 7 Mar 1978 a |
| Sierra Leone | 17 Nov 1966 | 2 Aug 1967 |
| Singapore | 19 Oct 2015 | 27 Nov 2017 |
| Slovakia[9] | | 28 May 1993 d |
| Slovenia[4] | | 6 Jul 1992 d |
| Solomon Islands | | 17 Mar 1982 d |
| Somalia | 26 Jan 1967 | 26 Aug 1975 |
| South Africa | 3 Oct 1994 | 10 Dec 1998 |
| Spain | | 13 Sep 1968 a |
| Sri Lanka | | 18 Feb 1982 a |
| St. Kitts and Nevis | | 13 Oct 2006 a |
| St. Lucia | | 14 Feb 1990 d |
| St. Vincent and the Grenadines | | 9 Nov 1981 a |
| State of Palestine | | 2 Apr 2014 a |
| Sudan | | 21 Mar 1977 a |
| Suriname | | 15 Mar 1984 d |
| Sweden | 5 May 1966 | 6 Dec 1971 |
| Switzerland | | 29 Nov 1994 a |
| Syrian Arab Republic | | 21 Apr 1969 a |
| Tajikistan | | 11 Jan 1995 a |
| Thailand[15] | | 28 Jan 2003 a |
| Timor-Leste | | 16 Apr 2003 a |
| Togo | | 1 Sep 1972 a |
| Tonga | | 16 Feb 1972 a |
| Trinidad and Tobago | 9 Jun 1967 | 4 Oct 1973 |
| Tunisia | 12 Apr 1966 | 13 Jan 1967 |
| Türkiye | 13 Oct 1972 | 16 Sep 2002 |
| Turkmenistan | | 29 Sep 1994 a |
| Uganda | | 21 Nov 1980 a |
| Ukraine | 7 Mar 1966 | 7 Mar 1969 |
| United Arab Emirates | | 20 Jun 1974 a |
| United Kingdom of Great Britain and Northern Ireland[5,16] | 11 Oct 1966 | 7 Mar 1969 |
| United Republic of Tanzania | | 27 Oct 1972 a |
| United States of America | 28 Sep 1966 | 21 Oct 1994 |
| Uruguay | 21 Feb 1967 | 30 Aug 1968 |
| Uzbekistan | | 28 Sep 1995 a |
| Venezuela (Bolivarian Republic of) | 21 Apr 1967 | 10 Oct 1967 |
| Viet Nam | | 9 Jun 1982 a |
| Yemen[17,18] | | 18 Oct 1972 a |
| Zambia | 11 Oct 1968 | 4 Feb 1972 |
| Zimbabwe | | 13 May 1991 a |

## *Declarations and Reservations*

***(Unless otherwise indicated, the declarations and reservations were made upon ratification, accession or succession.***

***For objections thereto and declarations recognizing the competence of the Committee on the Elimination of Racial Discrimination, see hereinafter.)***

### AFGHANISTAN

While acceding to the International Convention on the Elimination of All Forms of Racial Discrimination, the Democratic Republic of Afghanistan does not consider itself bound by the provisions of article 22 of the Convention since according to this article, in the event of disagreement between two or several States Parties to the Convention on the interpretation and implementation of provisions of the Convention, the matters could be referred to the International Court of Justice upon the request of only one side.

The Democratic Republic of Afghanistan, therefore, states that should any disagreement emerge on the interpretation and implementation of the Convention, the matter will be referred to the International Court of Justice only if all concerned parties agree with that procedure.

Furthermore, the Democratic Republic of Afghanistan states that the provisions of articles 17 and 18 of the International Convention on the Elimination of All Forms of Racial Discrimination have a discriminatory nature against some states and therefore are not in conformity with the principle of universality of international treaties.

### ANTIGUA AND BARBUDA

"The Constitution of Antigua and Barbuda entrenches and guarantees to every person in Antigua and Barbuda the fundamental rights and freedoms of the individual irrespective of race or place of origin. The Constitution prescribes judicial processes to be observed in the event of the violation of any of these rights, whether by the state or by a private individual. Acceptance of the Convention by the Government of Antigua and Barbuda does not imply the acceptance of obligations going beyond the constitutional limits nor the acceptance of any obligations to introduce judicial processes beyond those provided in the Constitution.

The Government of Antigua and Barbuda interprets article 4 of the Convention as requiring a Party to enact measures in the fields covered by subparagraphs (a), (b) and (c) of that article only where it is considered that the need arises to enact such legislation."

### AUSTRALIA

"The Government of Australia ... declares that Australia is not at present in a position specifically to treat as offences all the matters covered by article 4 (a) of the Convention. Acts of the kind there mentioned are punishable only to the extent provided by the existing criminal law dealing with such matters as the maintenance of public order, public mischief, assault, riot, criminal libel, conspiracy and attempts. It is the intention of the Australian Government, at the first suitable moment, to seek from Parliament legislation specifically implementing the terms of article 4 (a)."

### AUSTRIA

"Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination provides that the measures specifically described in sub-paragraphs (a), (b) and (c) shall be undertaken with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of the Convention. The Republic of Austria therefore considers that through such measures the right to freedom of opinion and expression and the right to freedom of peaceful assembly and association may not be jeopardized. These rights are laid down in articles 19 and 20 of the Universal Declaration of Human Rights; they were reaffirmed by the General Assembly of the United Nations when it adopted articles 19 and 21 of the International Covenant on Civil and Political Rights and are referred to in article 5 (d) (viii) and (ix) of the present Convention."

### BAHAMAS

"Firstly the Government of the Commonwealth of the Bahamas wishes to state its understanding of article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination. It interprets article 4 as requiring a party to the Convention to adopt further legislative measures in the fields covered by subparagraphs (a), (b) and (c) of that article only in so far as it may consider with due regard to the principles embodied in the Universal Declaration set out in article 5 of the Convention (in particular to freedom of opinion and expression and the right of freedom of peaceful assembly and association) that some legislative addition to, or variation of existing law and practice in these fields is necessary for the attainment of the ends specified in article 4. Lastly, the Constitution of the Commonwealth of the Bahamas entrenches and guarantees to every person in the Commonwealth of the Bahamas the fundamental rights and freedoms of the individual irrespective of his race or place of origin. The Constitution prescribes judicial process to be observed in the event of the violation of any of these rights whether by the State or by a private individual. Acceptance of this Convention by the Commonwealth of the Bahamas does not imply the acceptance of obligations going beyond the constitutional limits nor the acceptance of any obligations to introduce judicial process beyond these prescribed under the Constitution."

### BAHRAIN[18,19]

"With reference to article 22 of the Convention, the Government of the State of Bahrain declares that, for the submission of any dispute in terms of this article to the jurisdiction of the International Court of Justice, the express consent of all the parties to the dispute is required in each case.

..."

### BARBADOS

"The Constitution of Barbados entrenches and guarantees to every person in Barbados the fundamental rights and freedoms of the individual irrespective of his race or place of origin. The Constitution prescribes judicial processes to be observed in the event of the violation of any of these rights whether by the State or by a private individual. Accession to the Convention does not imply the acceptance of obligations going beyond the constitutional limits nor the acceptance of any obligations to introduce judicial processes beyond those provided in the Constitution.

The Government of Barbados interprets article 4 of the said Convention as requiring a Party to the Convention to enact measures in the fields covered by sub-paragraphs (a), (b) and (c) of that article only where it is considered that the need arises to enact such legislation."

### BELARUS[20]

The Byelorussian Soviet Socialist Republic states that the provision in article 17, paragraph 1, of the Convention on the Elimination of All Forms of Racial Discrimination whereby a number of States are deprived of the opportunity to become Parties to the Convention is of a discriminatory nature, and hold that, in accordance with the principle of the sovereign equality of States, the Convention should be open to participation by all interested States without discrimination or restriction of any kind.

### BELGIUM

In order to meet the requirements of article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination, the Kingdom of Belgium will take care to adapt its legislation to the obligations it has assumed in becoming a party to the said Convention.

The Kingdom of Belgium nevertheless wishes to emphasize the importance which it attaches to the fact that article 4 of the Convention provides that the measures laid down in subparagraphs (a), (b), and (c) should be adopted with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of the Convention. The Kingdom of Belgium therefore considers that the obligations imposed by article 4 must be reconciled with the right to freedom of opinion and expression and the right to freedom of peaceful assembly and association. Those rights are proclaimed in articles 19 and 20 of the Universal Declaration of Human Rights and have been reaffirmed in articles 19 and 21 of the International Covenant on Civil and Political Rights. They have also been stated in article 5, subparagraph (d) (viii) and (ix) of the said Convention.

The Kingdom of Belgium also wishes to emphasize the importance which it attaches to respect for the rights set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms, especially in articles 10 and 11 dealing respectively with freedom of opinion and expression and freedom of peaceful assembly and association.

### BULGARIA[21]

The Government of the People's Republic of Bulgaria considers that the provisions of article 17, paragraph 1, and article 18, paragraph 1, of the International Convention on the Elimination of All Forms of Racial Discrimination, the effect of which is to prevent sovereign States from becoming Parties to the Convention, are of a discriminatory nature. The Convention, in accordance with the principle of the sovereign equality of States, should be open for accession by all States without any discrimination whatsoever.

### CHINA[22]

The People's Republic of China has reservations on the provisions of article 22 of the Convention and will not be bound by it. *(The reservation was circulated by the Secretary-General on 13 January 1982.)*

The signing and ratification of the said Convention by the Taiwan authorities in the name of China are illegal and null and void.

### CUBA

The Government of the Republic of Cuba will make such reservations as it may deem appropriate if and when the Convention is ratified.

The Revolutionary Government of the Republic of Cuba does not accept the provision in article 22 of the Convention to the effect that disputes between two or more States Parties shall be referred to the International Court of Justice, since it considers that such disputes should be settled exclusively by the procedures expressly provided for in the Convention or by negotiation through the diplomatic channel between the disputants.

This Convention, intended to eliminate all forms of racial discrimination, should not, as it expressly does in articles 17 and 18, exclude States not Members of the United Nations, members of the specialized agencies or Parties to the Statute of the International Court of Justice from making an effective contribution under the Convention, since these articles constitute in themselves a form of discrimination that is at variance with the principles set out in the Convention; the Revolutionary Government of the Republic of Cuba accordingly ratifies the Convention, but with the qualification just indicated.

### CZECH REPUBLIC[9]

### DENMARK[10]

### EGYPT[18,23]

"The United Arab Republic does not consider itself bound by the provisions of article 22 of the Convention, under which any dispute between two or more States Parties with respect to the interpretation or application of the Convention is, at the request of any of the parties to the dispute, to be referred to the International Court of Justice for decision, and it states that, in each individual case, the consent of all parties to such a dispute is necessary for referring the dispute to the International Court of Justice."

### EQUATORIAL GUINEA

The Republic of Equatorial Guinea does not consider itself bound by the provisions of article 22 of the Convention, under which any dispute between two or more States Parties with respect to the interpretation or application of the Convention is, at the request of any of the parties to the dispute, to be referred to the International Court of Justice for decision. The Republic of Equatorial Guinea considers that, in each individual case, the consent of all parties is necessary for referring the dispute to the International Court of Justice.

### FIJI[24]

### FRANCE[25]

With regard to article 4, France wishes to make it clear that it interprets the reference made therein to the principles of the Universal Declaration of Human Rights and to the rights set forth in article 5 of the Convention as releasing the States Parties from the obligation to enact anti-discrimination legislation which is incompatible with the freedoms of opinion and expression and of peaceful assembly and association guaranteed by those texts.

With regard to article 6, France declares that the question of remedy through tribunals is, as far as France is concerned, governed by the rules of ordinary law.

With regard to article 15, France's accession to the Convention may not be interpreted as implying any change in its position regarding the resolution mentioned in that provision.

### GRENADA[26]

"The Constitution of Grenada entrenches and guarantees to every person in the State of Grenada the fundamental rights and freedoms of the individual irrespective of his race or place of origin. The Constitution prescribes judicial processes to be observed in the event of the violation of any of these rights whether by the State or by a private individual. Ratification of the Convention by Grenada does not imply the acceptance of obligations going beyond the constitutional limits nor the acceptance of any obligations to introduce judicial processes beyond those provided in the Constitution.

The Government of Grenada interprets article 4 of the said Convention as requiring a Party to the Convention to enact measures in the fields covered by sub-paragraphs (a), (b) and (c) of that article only where it considers that the need arises to enact such legislation."

### GUYANA

"The Government of the Republic of Guyana do not interpret the provisions of this Convention as imposing upon them any obligation going beyond the limits set by the Constitution of Guyana or imposing upon them any obligation requiring the introduction of judicial processes going beyond those provided under the same Constitution."

### HUNGARY[27]

"The Hungarian People's Republic considers that the provisions of article 17, paragraph 1, and of article 18, paragraph 1, of the Convention, barring accession to the Convention by all States, are of a discriminating nature and contrary to international law. The Hungarian People's Republic maintains its general position that multilateral treaties of a universal character should, in conformity with the principles of sovereign equality of States, be open for accession by all States without any discrimination whatever."

### INDIA[28]

"The Government of India declare that for reference of any dispute to the International Court of Justice for decision in terms of Article 22 of the International Convention on the Elimination of all Forms of Racial Discrimination, the consent of all parties to the dispute is necessary in each individual case."

### INDONESIA

"The Government of the Republic of Indonesia does not consider itself bound by the provision of Article 22 and takes the position that disputes relating to the interpretation and application of the [Convention] which cannot be settled through the channel provided for in the said article, may be referred to the International Court of Justice only with the consent of all the parties to the dispute."

### IRAQ[18]

"The Ministry for Foreign Affairs of the Republic of Iraq hereby declares that signature for and on behalf of the Republic of Iraq of the Convention on the Elimination

of All Forms of Racial Discrimination, which was adopted by the General Assembly of the United Nations on 21 December 1965, as well as approval by the Arab States of the said Convention and entry into it by their respective governments, shall in no way signify recognition of Israel or lead to entry by the Arab States into such dealings with Israel as may be regulated by the said Convention.

"Furthermore, the Government of the Republic of Iraq does not consider itself bound by the provisions of article twenty-two of the Convention afore-mentioned and affirms its reservation that it does not accept the compulsory jurisdiction of the International Court of Justice provided for in the said article."

1. The acceptance and ratification of the Convention by Iraq shall in no way signify recognition of Israel or be conducive to entry by Iraq into such dealings with Israel as are regulated by the Convention;

2. Iraq does not accept the provisions of article 22 of the Convention, concerning the compulsory jurisdiction of the International Court of Justice. The Republic of Iraq does not consider itself to be bound by the provisions of article 22 of the Convention and deems it necessary that in all cases the approval of all parties to the dispute be secured before the case is referred to the International Court of Justice.

### IRELAND

"Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination provides that the measures specifically described in sub-paragraphs (a), (b) and (c) shall be undertaken with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in Article 5 of the Convention. Ireland threfore considers that through such measures, the right to freedom of opinion and expression and the right to peaceful assembly and association may not be jeopardised. These rights are laid down in Articles 19 and 20 of the Universal Declaration of Human Rights; they were reaffirmed by the General Assembly of the United Nations when it adopted Articles 19 and 21 of the International Covenant on Civil and Political Rights and are referred to in Article 5 (d)(viii) and (ix) of the present Convention."

### ISRAEL

"The State of Israel does not consider itself bound by the provisions of article 22 of the said Convention."

### ITALY

(a) The positive measures, provided for in article 4 of the Convention and specifically described in sub-paragraphs (a) and (b) of that article, designed to eradicate all incitement to, or acts of, discrimination, are to be interpreted, as that article provides, "with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5" of the Convention. Consequently, the obligations deriving from the aforementioned article 4 are not to jeopardize the right to freedom of opinion and expression and the right to freedom of peaceful assembly and association which are laid down in articles 19 and 20 of the Universal Declaration of Human Rights, were reaffirmed by the General Assembly of the United Nations when it adopted articles 19 and 21 of the International Covenant on Civil and Political Rights, and are referred to in articles 5 (d) (viii) and (ix) of the Convention. In fact, the Italian Government, in conformity with the obligations resulting from Articles 55 (c) and 56 of the Charter of the United Nations, remains faithful to the principle laid down in article 29 (2) of the Universal Declaration, which provides that "in the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society."

(b) Effective remedies against acts of racial discrimination which violate his individual rights and fundamental freedoms will be assured to everyone, in conformity with article 6 ofthe Convention, by the ordinary courts within the framework of their respective jurisdiction. Claims for reparation for any damage suffered as a result of acts of racial discrimination must be brought against the persons responsible for the malicious or criminal acts which caused such damage.

### JAMAICA

"The Constitution of Jamaica entrenches and guarantees to every person in Jamaica the fundamental rights and freedoms of the individual irrespective of his race or place of origin. The Constitution prescribes judicial processes to be observed in the event of the violation of any of these rights whether by the State or by a private individual. Ratification of the Convention by Jamaica does not imply the acceptance of obligations going beyond the constitutional limits nor the acceptance of any obligation to introduce judicial processes beyond those prescribed under the Constitution."

### JAPAN

"In applying the provisions of paragraphs (a) and (b) of article 4 of the [said Convention] Japan fulfills the obligations under those provisions to the extent that fulfillment of the obligations is compatible with the guarantee of the rights to freedom of assembly, association and expression and other rights under the Constitution of Japan, noting the phrase `with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention' referred to in article 4."

### KUWAIT[18]

"In acceding to the said Convention, the Government of the State of Kuwait takes the view that its accession does not in any way imply recognition of Israel, nor does it oblige it to apply the provisions of the Convention in respect of the said country.

"The Government of the State of Kuwait does not consider itself bound by the provisions of article 22 of the Convention, under which any dispute between two or more States Parties with respect to the interpretation or application of the Convention is, at the request of any party to the dispute, to be referred to the International Court of Justice for decision, and it states that, in each individual case, the consent of all parties to such a dispute is necessary for referring the dispute to the International Court of Justice."

### LEBANON

The Republic of Lebanon does not consider itself bound by the provisions of article 22 of the Convention, under which any dispute between two or more States Parties with respect to the interpretation or application of the Convention is, at the request of any party to the dispute, to be referred to the International Court of Justice for decision, and it states that, in each individual case, the consent of all States parties to such a dispute is necessary for referring the dispute to the International Court of Justice.

### LIBYA[18]

"(a) The Kingdom of Libya does not consider itself bound by the provisions of article 22 of the Convention, under which any dispute between two or more States Parties with respect to the interpretation or application of the Convention is, at the request of any of the parties to the dispute, to be referred to the International Court of Justice for decision, and it states that, in each individual case, the consent of all parties to such a dispute is necessary for referring the dispute to the International Court of Justice.

"(b) It is understood that the accession to this Convention does not mean in any way a recognition of Israel by the Government of the Kingdom of Libya. Furthermore, no treaty relations will arise between the Kingdom of Libya and Israel."

### MADAGASCAR

The Government of the Malagasy Republic does not consider itself bound by the provisions of article 22 of the Convention, under which any dispute between two or more States Parties with respect to the interpretation or application of the Convention is, at the request of any of the parties to the dispute, to be referred to the International Court of Justice for decision, and states that, in each individual case, the consent of all parties to such a dispute is necessary for referral of the dispute to the International Court.

### MALTA

"The Government of Malta wishes to state its understanding of certain articles in the Convention.

"It interprets article 4 as requiring a party to the Convention to adopt further measures in the fields covered by sub-paragraphs (a), (b) and (c) of that article should it consider, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights set forth in article 5 of the Convention, that the need arises to enact ' *ad hoc* ' legislation, in addition to or variation of existing law and practice to bring to an end any act of racial discrimination.

"Further, the Government of Malta interprets the requirements in article 6 concerning `reparation or satisfaction' as being fulfilled if one or other of these forms of redress is made available and interprets `satisfaction' as including any form of redress effective to bring the discriminatory conduct to an end."

### MONACO

Monaco reserves the right to apply its own legal provisions concerning the admission of foreigners to the labour market of the Principality.

Monaco interprets the reference in that article to the principles of the Universal Declaration of Human Rights, and to the rights enumerated in article 5 of the Convention as releasing States Parties from the obligation to promulgate repressive laws which are incompatible with freedom of opinion and expression and freedom of peaceful assembly and association, which are guaranteed by those instruments.

### MONGOLIA[29]

The Mongolian People's Republic states that the provision in article 17, paragraph 1, of the Convention whereby a number of States are deprived of the opportunity to become Parties to the Convention is of a discriminatory nature, and it holds that, in accordance with the principle of the sovereign equality of States, the Convention on the Elimination of All Forms of Racial Discrimination should be open to participation by all interested States without discrimination or restriction of any kind.

### MOROCCO

The Kingdom of Morocco does not consider itself bound by the provisions of article 22 of the Convention, under which any dispute between two or more States Parties with respect to the interpretation or application of the Convention is, at the request of any of the parties to the dispute, to be referred to the International Court of Justice for decision. The Kingdom of Morocco states that, in each individual case, the consent of all parties to such a dispute is necessary for referring the dispute to the International Court of Justice.

### MOZAMBIQUE

"The People's Republic of Mozambique does not consider to be bound by the provision of article 22 and wishes to restate that for the submission of any dispute to the International Court of Justice for decision in terms of the said article, the consent of all parties to such a dispute is necessary in each individual case."

### NEPAL

"The Constitution of Nepal contains provisions for the protection of individual rights, including the right to freedom of speech and expression, the right to form unions and associations not motivated by party politics and the right to freedom of professing his/her own religion; and nothing in the Convention shall be deemed to require or to authorize legislation or other action by Nepal incompatible with the provisions of the Constitution of Nepal.

"His Majesty's Government interprets article 4 of the said Convention as requiring a Party to the Convention to adopt further legislative measures in the fields covered by sub-paragraphs (a), (b) and (c) of that article only insofar as His Majesty's Government may consider, with due regard to the principles embodied in the Universal Declaration of Human Rights, that some legislative addition to, or variation of, existing law and practice in those fields is necessary for the attainment of the end specified in the earlier part of article 4. His Majesty's Government interprets the requirement in article 6 concerning `reparation or satisfaction' as being fulfilled if one or other of these forms of redress is made available; and further interprets `satisfaction' as including any form of redress effective to bring the discriminatory conduct to an end.

"His Majesty's Government does not consider itself bound by the provision of article 22 of the Convention under which any dispute between two or more States Parties with respect to the interpretation or application of the Convention is, at the request of any of the parties to the dispute, to be referred to the International Court of Justice for decision."

### PAPUA NEW GUINEA[22]

"The Government of Papua New Guinea interprets article 4 of the Convention as requiring a party to the Convention to adopt further legislative measures in the areas covered by sub-paragraphs (a), (b) and (c) of that article only in so far as it may consider with due regard to the principles contained in the Universal Declaration set out in Article 5 of the Convention that some legislative addition to, or variation of existing law and practice, is necessary to give effect to the provisions of article 4. In addition, the Constitution of Papua New Guinea guarantees certain fundamental rights and freedoms to all persons irrespective of their race or place of origin. The Constitution also provides for judicial protection of these rights and freedoms. Acceptance of this Convention does

not therefore indicate the acceptance of obligations by the Government of Papua New Guinea which go beyond those provided by the Constitution, nor does it indicate the acceptance of any obligation to introduce judicial process beyond that provided by the Constitution". *(The reservation was circulated by the Secretary-General on 22 February 1982.)*

### POLAND[30]

The Polish People's Republic considers that the provisions of article 17, paragraph 1, and article18, paragraph 1, of the International Convention on the Elimination of All Forms of Racial Discrimination, which make it impossible for many States to become parties to the said Convention, are of a discriminatory nature and are incompatible with the object and purpose of that Convention.

The Polish People's Republic considers that, in accordance with the principle of the sovereign equality of States, the said Convention should be open for participation by all States without any discrimination or restrictions whatsoever.

### REPUBLIC OF KOREA

"The Government of the Republic of Korea recognizes the competence of the Committee on the Elimination of Racial Discrimination to receive and consider communications from individuals or groups of individuals within the jurisdiction of the Republic of Korea claiming to be victims of a violation by the Republic of Korea of any of the rights set forth in the said Convention."

### ROMANIA[31]

...

The Council of State of the Socialist Republic of Romania declares that the provisions of articles 17 and 18 of the International Convention on the Elimination of All Forms of Racial Discrimination are not in accordance with the principle that multilateral treaties, the aims and objectives of which concern the world community as a whole, should be open to participation by all States.

### RUSSIAN FEDERATION[20]

The Union of Soviet Socialist Republics states that the provision in article 17, paragraph 1, of the Convention on the Elimination of All Forms of Racial Discrimination whereby a number of States are deprived of the opportunity to become Parties to the Convention is of a discriminatory nature, and hold that, in accordance with the principle of the sovereign equality of States, the Convention should be open to participation by all interested States without discrimination or restriction of any kind.

### RWANDA[32]

### SAUDI ARABIA

[The Government of Saudi Arabia declares that it will] implement the provisions [of the above Convention], providing these do not conflict with the precepts of the Islamic *Shariah* .

The Kingdom of Saudi Arabia shall not be bound by the provisions of article (22) of this Convention, since it considers that any dispute should be referred to the International Court of Justice only with the approval of the States Parties to the dispute.

### SINGAPORE

"The Government of the Republic of Singapore makes the following reservations and declarations in relation to articles 2, 6 and 22 of the International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter referred to as the "Convention") adopted by the General Assembly of the United Nations in New York on the 21st day of December 1965 and signed on behalf of the Republic of Singapore today:

(1) The Republic of Singapore reserves the right to apply its policies concerning the admission and regulation of foreign work pass holders, with a view to promoting integration and maintaining cohesion within its racially diverse society.

(2) The Republic of Singapore understands that the obligation imposed by Article 2, paragraph 1 (d) of the Convention may be implemented by means other than legislation if such means are appropriate, and if legislation is not required by circumstances.

(3) The Republic of Singapore interprets the requirement in Article 6 of the Convention concerning "reparation or satisfaction" as being fulfilled if one or other of these forms of redress is made available and interprets "satisfaction" as including any form of redress effective to bring the discriminatory conduct to an end.

(4) With reference to Article 22 of the Convention, the Republic of Singapore states that before any dispute to which the Republic of Singapore is a party may be submitted to the jurisdiction of the International Court of Justice under this Article, the specific consent of the Republic of Singapore is required in each case."

### SLOVAKIA[9]

### SPAIN[33]

### SWITZERLAND

Switzerland reserves the right to take the legislative measures necessary for the implementation of article 4, taking due account of freedom of opinion and freedom of association, provided for *inter alia* in the Universal Declaration of Human Rights.

Switzerland reserves the right to apply its legal provisions concerning the admission of foreigners to the Swiss market.

### SYRIAN ARAB REPUBLIC[18]

1. The accession of the Syrian Arab Republic to this Convention shall in no way signify recognition of Israel or entry into a relationship with it regarding any matter regulated by the said Convention.

2. The Syrian Arab Republic does not consider itself bound by the provisions of article 22 of the Convention, under which any dispute between two or more States Parties with respect to the interpretation or application of the Convention is, at the request of any of the Parties to the dispute, to be referred to the International Court of Justice for decision. The Syrian Arab Republic states that, in each individual case, the consent of all parties to such a dispute is necessary for referring the dispute to the International Court of Justice.

### THAILAND

"General Interpretative Declaration

The Kingdom of Thailand does not interpret and apply the provisions of this Convention as imposing upon the Kingdom of Thailand any obligation beyond the confines of the Constitution and the laws of the Kingdom of Thailand. In addition, such interpretation and application shall be limited to or consistent with the obligations under other international human rights instruments to which the Kingdom of Thailand is party.

Reservations

1. The Kingdom of Thailand does not consider itself bound by the provisions of Article 22 of the Convention."

### TONGA[34]

"To the extent, [...], that any law relating to land in Tonga which prohibits or restricts the alienation of land by the indigenous inhabitants may not fulfil the obligations referred to in article 5 (d) (v), [...], the Kingdom of Tonga reserves the right not to apply the Convention to Tonga.

"Secondly, the Kingdom of Tonga wishes to state its understanding of certain articles in the Convention. It interprets article 4 as requiring a party to the Convention to adopt further legislative measures in the fields covered by sub-paragraphs (a), (b) and (c) of that article only in so far as it may consider with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of the Convention (in particular the right to freedom of opinion and expression and the right to freedom of peaceful assembly and association) that some legislative addition to or variation of existing law and practice in those fields is necessary for the attainment of the end specified in the earlier part of article 4. Further, the Kingdom of Tonga interprets the requirement in article 6 concerning `reparation or satisfaction' as being fulfilled if one or other of these forms of redress is made available and interprets `satisfaction' as including any form of redress effective to bring the discriminatory conduct to an end. In addition it interprets article 20 and the other related provisions of Part III of the Convention as meaning that if a reservation is not accepted the State making the reservation does not become a Party to the Convention.

"Lastly, the Kingdom of Tonga maintains its position in regard to article 15. In its view this article is discriminatory in that it establishes a procedure for the receipt of petitions relating to dependent territories while making no comparable provision for States without such territories. Moreover, the article purports to establish arocedure applicable to the dependent territories of States whether or not those States have become parties to the Convention. His Majesty's Government have decided that the Kingdom of Tonga should accede to the Convention, these objections notwithstanding because of the importance they attach to the Convention as a whole."

### TÜRKIYE

"The Republic of Turkey declares that it will implement the provisions of this Convention only to the States Parties with which it has diplomatic relations.

The Republic of Turkey declares that this Convention is ratified exclusively with regard to the national territory where the Constitution and the legal and administrative order of the Republic of Turkey are applied.

The Republic of Turkey does not consider itself bound by Article 22 of this Convention. The explicit consent of the Republic of Turkey is necessary in each individual case before any dispute to which the Republic of Turkey is party concerning the interpretation or application of this Convention may be referred to the International Court of Justice."

### UKRAINE[20]

The Ukrainian Soviet Socialist Republic states that the provision in article 17, paragraph 1, of the Convention on the Elimination of All Forms of Racial Discrimination whereby a number of States are deprived of the opportunity to become Parties to the Convention is of a discriminatory nature, and hold that, in accordance with the principle of the sovereign equality of States, the Convention should be open to participation by all interested States without discrimination or restriction of any kind.

### UNITED ARAB EMIRATES[18]

"The accession of the United Arab Emirates to this Convention shall in no way amount to recognition of nor the establishment of any treaty relations with Israel."

### UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

*Subject to the following reservation and interpretative statements:*

"First, in the present circumstances deriving from the usurpation of power in Rhodesia by the illegal régime, the United Kingdom must sign subject to a reservation of the right not to apply the Convention to Rhodesia unless and until the United Kingdom informs the Secretary-General of the United Nations that it is in a position to ensure that the obligations imposed by the Convention in respect of that territory can be fully implemented.

"Secondly, the United Kingdom wishes to state its under- standing of certain articles in the Convention. It interprets article 4 as requiring a party to the Convention to adopt further legislative measures in the fields covered by sub-paragraphs (a), (b) and (c) of that article only in so far as it may consider with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of the Convention (in particular the right to freedom of opinion and expression and the right to freedom of peaceful assembly and association) that some legislative addition to or variation of existing law and practice in those fields is necessary for the attainment of the end specified in the earlier part of article 4. Further, the United Kingdom interprets the requirement in article 6 concerning `reparation or satisfaction' as being fulfilled if one or other of these forms of redress is made available and interprets `satisfaction' as including any form of redress effective to bring the discriminatory conduct to an end. In addition it interprets article 20 and the other related provisions of Part III of the Convention as meaning that if a reservation is not accepted the State making the reservation does not become a Party to the Convention.

"Lastly, the United Kingdom maintains its position in regard to article 15. In its view this article is discriminatory in that it establishes arocedure for the receipt of petitions relating to dependent territories while making no comparable provision for States without such territories. Moreover, the article purports to establish a procedure applicable to the dependent territories of States whether or not those States have become parties to the Convention. Her Majesty's Government have decided that the United Kingdom should sign the Convention, these objections notwithstanding, because of the importance they attach to the Convention as a whole."

"First, the reservation and interpretative statements made by the United Kingdom at the time of signature of the Convention are maintained.

"Secondly, the United Kingdom does not regard the Commonwealth Immigrants Acts, 1962 and 1968, or their application, as involving any racial discrimination within the meaning of paragraph 1 of article 1, or any other provision of the Convention, and fully reserves its right to continue to apply those Acts.

"Lastly, to the extent if any, that any law relating to election in Fiji may not fulfil the obligations referred to in article 5 (c), that any law relating to land in Fiji which prohibits or restricts the alienation of land by the indigenous inhabitants may not fulfil the obligations referred to in article 5 (d) (v), or that the school system of Fiji may not fulfil the obligations referred to in articles 2, 3 or 5 (e) (v), the United Kingdom reserves the right not to apply the Convention to Fiji."

### UNITED STATES OF AMERICA

"The Constitution of the United States contains provisions for the protection of individual rights, such as the right of free speech, and nothing in the Convention shall be deemed to require or to authorize legislation or other action by the United States of America incompatible with the provisions of the Constitution of the United States of America."

"I. The Senate's advice and consent is subject to the following reservations:

(1) That the Constitution and laws of the United States contain extensive protections of individual freedom of speech, expression and association. Accordingly, the United States does not accept any obligation under this Convention, in particular under articles 4 and 7, to restrict those rights, through the adoption of legislation or any other measures, to the extent that they are protected by the Constitution and laws of the United States.

(2) That the Constitution and laws of the United States establish extensive protections against discrimination, reaching significant areas of non-governmental activity. Individual privacy and freedom from governmental interference in private conduct, however, are also recognized as among the fundamental values which shape our free and democratic society. The United States understands that the identification of the rights protected under the Convention by reference in article 1 to fields of `public life' reflects a similar distinction between spheres of public conduct that are customarily the subject of governmental regulation, and spheres of private conduct that are not. To the extent, however, that the Convention calls for a broader regulation of private conduct, the United States does not accept any obligation under this Convention to enact legislation or take other measures under paragraph (1) of article 2, subparagraphs (1) (c) and (d) of article 2, article 3 and article 5 with respect to private conduct except as mandated by the Constitution and laws of the United States.

(3) That with reference to article 22 of the Convention, before any dispute to which the United States is a party may be submitted to the jurisdiction of the International Court of Justice under this article, the specific consent of the United States is required in each case.

II. The Senate's advice and consent is subject to the following understanding, which shall apply to the obligations of the United States under this Convention:

That the United States understands that this Convention shall be implemented by the Federal Government to the extent that it exercises jurisdiction over the matters covered therein, and otherwise by the state and local governments. To the extent that state and local governments exercise jurisdiction over such matters, the Federal Government shall, as necessary, take appropriate measures to ensure the fulfilment of this Convention.

III. The Senate's advice and consent is subject to the following declaration:

That the United States declares that the provisions of the Convention are not self-executing."

### VIET NAM[22]

(1) The Government of the Socialist Republic of Viet Nam declares that the provisions of article 17 (1) and of article 18 (1) of the Convention whereby a number of States are deprived of the opportunity of becoming Parties to the said Convention are of a discriminatory nature and it considers that, in accordance with the principle of the sovereign equality of States, the Convention should be open to participation by all States without discrimination or restriction of any kind.

(2) The Government of the Socialist Republic of Viet Nam does not consider itself bound by the provisions of article 22 of the Convention and holds that, for any dispute with regard to the interpretation or application of the Convention to be brought before the International Court of Justice, the consent of all parties to the dispute is necessary. *(The reservation was circulated by the Secretary-General on 10 August 1982.)*

### YEMEN[17,18]

"The accession of the People's Democratic Republic of Yemen to this Convention shall in no way signify recognition of Israel or entry into a relationship with it regarding any matter regulated by the said Convention.

"The People's Democratic Republic of Yemen does not consider itself bound by the provisions of Article 22 of the Convention, under which any dispute between two or more States Parties with respect to the interpretation or application of the Convention is, at the request of any of the parties to the dispute, to be referred to the International Court of Justice for decision, and states that, in each individual case, the consent of all parties to such a dispute is necessary for referral of the dispute to the International Court of Justice.

"The People's Democratic Republic of Yemen states that the provisions of Article 17, paragraph 1, and Article 18, paragraph 1, of the Convention on the Elimination of All Forms of Racial Discrimination whereby a number of States are deprived of the opportunity to become Parties to the Convention is of a discriminatory nature, and holds that, in accordance with the principle of the sovereign equality of States, the Convention should be opened to participation by all interested States without discrimination or restriction of any kind."

## *Objections*
## *(Unless otherwise indicated, the objections were made upon ratification, accession or succession.)*

### AUSTRALIA

"In accordance with article 20 (2), Australia objects to [the reservations made by Yemen] which it considers impermissible as being incompatible with the object and purpose of the Convention."

### AUSTRIA

"Austria is of the view that a reservation by which a State limits its responsibilities under the Convention in a general and unspecified manner creates doubts as to the commitment of the Kingdom of Saudi Arabia with its obligations under the Convention, essential for the fulfilment of its objection and purpose. According to paragraph 2 of article 20 a reservation incompatible with the object and purpose of this Convention shall not be permitted.

It is in the common interest of States that treaties to which they have chosen to become Parties are prepared to undertake any legislative changes necessary to comply with their obligations under the treaties.

Austria is further of the view that a general reservation of the kind made by the Government of the Kingdom of

Saudi Arabia, which does not clearly specify the provisions of the Convention to which it applies and the extent of the derogation therefrom, contributes to undermining the basis of international treaty law.

According to international law a reservation is inadmissible to the extent as its application negatively affects the compliance by a State with its obligations under the Convention essential for the fulfilment of its object and purpose.

Therefore, Austria cannot consider the reservation made by the Government of the Kingdom of Saudi Arabia as admissible unless the Government of the Kingdom of Saudi Arabia, by providing additional information or through subsequent practice, ensures that the reservation is compatible with the provisions essential for the implementation of the object and purpose of the Convention.

This view by Austria would not preclude the entry into force in its entirety of the Convention between the Kingdom of Saudi Arabia and Austria."

### BELARUS

The ratification of the above-mentioned International Convention by the so-called "Government of Democratic Kampuchea"-the Pol Pot-Ieng Sary clique of hangmen overthrown by the Kampuchean people - is completely unlawful and has no legal force. There is only one State of Kampuchea in the world-The People's Republic of Kampuchea, recognized by a large number of countries. All power in this State is entirely in the hands of its only lawful Government, the Government of the People's Republic of Kampuchea, which has the exclusive right to act in the name of Kampuchea in the international arena, including the right to ratify international agreements prepared within the United Nations.

The farce involving the ratification of the above-mentioned International Convention by a clique representing no one mocks the norms of law and morality and blasphemes the memory of millions of Kampuchean victims of the genocide committed by the Pol Pot-Ieng Sary régime.

### BELGIUM

These reservations are incompatible with the object and purpose of the Convention and consequently are not permitted pursuant to article 20, paragraph 2, of the Convention.

### CANADA

"The effect of these reservations would be to allow racial discrimination in respect of certain of the rights enumerated in Article 5. Since the objective of the International Convention on the Elimination of All Forms of Racial Discrimination, as stated in its Preamble, is to eliminate racial discrimination in all its forms and manifestations, the Government of Canada believes that the reservations made by the Yemen Arab Republic are incompatible with the object and purpose of the International Convention. Moreover, the Government of Canada believes that the principle of non-discrimination is generally accepted and recognized in international law and therefore is binding on all states."

### CYPRUS

".....the Government of the Republic of Cyprus has examined the declaration made by the Government of the Republic of Turkey to the International Convention on the Elimination of all Forms of Racial Discrimination (New York, 7 March 1966) on 16 September 2002 in respect of the implementation of the provisions of the Convention only to the States Parties with which it has diplomatic relations.

In the view of the Government of the Republic of Cyprus, this declaration amounts to a reservation. This reservation creates uncertainty as to the States Parties in respect of which Turkey is undertaking the obligations in the Convention. The Government of the Republic of Cyprus therefore objects to the reservation made by the Government of the Republic of Turkey.

This reservation or the objection to it shall not preclude the entry into force of the Convention between the Republic of Cyprus and the Republic of Turkey."

### CZECH REPUBLIC[9]

### DENMARK

"Article 5 contains undertakings, in compliance with the fundamental obligations laid down in article 2 of the Convention, to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the rights enumerated in the article.

The reservations made by the Government of Yemen are incompatible with the object and purpose of the Convention and the reservations are consequently impermissible according to article 20, paragraph 2 of the Convention. In accordance with article 20, paragraph 1 of the Convention the Government of Denmark therefore formally objects to these reservations. This objection does not have the effect of preventing the Convention from entering into force between Denmark and Yemen, and the reservations cannot alter or modify in any respect, the obligations arising from the Convention."

### ETHIOPIA

"The Provisional Military Government of Socialist Ethiopia should like to reiterate that the Government of the People's Republic of Kampuchea is the sole legitimate representative of the People of Kampuchea and as such it alone has the authority to act on behalf of Kampuchea.

The Provisional Military Government of Socialist Ethiopia, therefore, considers the ratification of the so-called `Government of Democratic Kampuchea' to be null and void."

### FINLAND

"The Government of Finland formally, and in accordance with article 20 (2) of the Convention, objects to the reservations made by Yemen to the above provisions.

In the first place, the reservations concern matters which are of fundamental importance in the Convention. The first paragraph of article 5 clearly brings this out. According to it, the Parties have undertaken to guarantee the rights listed in that article "In compliance with fundamental obligations laid down in article 2 of the Convention". Clearly, provisions prohibiting racial discrimination in the granting of such fundamental political rights and civil liberties as the right to participate in public life, to marry and choose a spouse, to inherit and to enjoy freedom of thought, conscience and religion are central in a convention against racial discrimination. Therefore, the reservations are incompatible with the object and purpose of the Convention, as specified in paragraph 20 (2) thereof and in article 19 (c) of the Vienna Convention on the Law of Treaties.

Moreover, it is the view of the Government of Finland that it would be unthinkable that merely by making a reservation to the said provisions, a State could achieve the liberty to start discriminatory practices on the grounds of race, colour, or national or ethnic origin in regard to such fundamental political rights and civil liberties as the right to participate in the conduct of public affairs, the

right of marriage and choice of spouse, the right of inheritance and the freedom of thought, conscience and religion. Any racial discrimination in respect of those fundamental rights and liberties is clearly against the general principles of human rights law as reflected in the Universal Declaration on Human Rights and the practice of States and international organizations. By making a reservation atate cannot contract out from universally binding human rights standards.

For the above reasons, the Government of Finland notes that the reservations made by Yemen are devoid of legal effect. However, the Government of Finland does not consider that this fact is an obstacle to the entry into force of the Convention in respect of Yemen."

"The Government of Finland is of the view that this general reservation raises doubts as to the commitment of Saudi Arabia to the object and purpose of the Convention and would recall that according to paragraph 2 of article 20 of the Convention, a reservation incompatible with the object and purpose of the Convention shall not be permitted. The Government of Finland would also like to recall that according to the said paragraph a reservation shall be considered incompatible or inhibitive if at least two thirds of the States Parties to the Convention object to it. It is in the common interest of States that treaties to which they have chosen to become parties are respected, as to their object and purpose, by all parties and that States are prepared to undertake any legislative changes necessary to comply with their obligations under the treaties.

The Government of Finland is further of the view that general reservations of the kind made by Saudi Arabia, which do not clearly specify the provisions of the Convention to which they apply and the extent of the derogation therefrom, contribute to undermining the basisof international treaty law.

The Government of Finland therefore objects to the aforesaid general reservation made by the Government of Saudi Arabia to the [Convention].

### FRANCE

The Government of the French Republic, which does not recognize the coalition government of Democratic Cambodia, declares that the instrument of ratification by the coalition government of Democratic Cambodia of the [International] Convention on the Elimination of All Forms of Racial Discrimination, opened for signature at New York on 7 March 1966, is without effect.

France considers that the reservations made by the Yemen Arab Republic to the International Convention on the Elimination of All Forms of Racial Discrimination are not valid as being incompatible with the object and purpose of the Convention.

Such objection is not an obstacle to the entry into force of the said Convention between France and the Yemen Arab Republic.

The Government of the Republic of France has examined the interpretative declaration made by the Government of the Kingdom of Thailand upon accession to the Convention on the Elimination of All Forms of Racial Discrimination of 7 March 1966. The Government of the Republic of France considers that, by making the interpretation and implementation of the provisions of the Convention subject to respect for the Constitution and legislation of the Kingdom of Thailand, the Government of the Kingdom of Thailand is making a reservation of such a general and indeterminate scope that it is not possible to ascertain which changes to obligations under the Convention it is intended to introduce. Consequently, the Government of France considers that this reservation as formulated could make the provisions of the Convention completely ineffective. For these reasons, the Government objects to this interpretative declaration, which it considers to be a reservation likely toe incompatible with the object and purpose of the Convention.

### GERMANY[3]

"These reservations relate to the basic obligations of States Parties to the Convention to prohibit and eliminate racial discrimination in all its forms and to guarantee the right of everyone to equality before the law and include the enjoyment of such fundamental political and civil rights as the right to take part in the conduct of public life, the right to marriage and choice of spouse, the right to inherit and the right to freedom of thought, conscience and religion. As a result, the reservations made by Yemen are incompatible with the object and purpose of the Convention within the meaning of article 20, paragraph 2 thereof."

The Government of the Federal Republic of Germany is of the view that this reservation may raise doubts as to the commitment of Saudi Arabia to the object and purpose of the Convention.

The Government of the Federal Republic of Germany would like to recall that, according to paragraph 2 of article 20 of the Convention, a reservation incompatible with the object and purpose of the Convention shall not be permitted.

The Government of the Federal Republic of Germany therefore objects to the said reservation.

The objection does not preclude the entry into force of the Convention between Saudi Arabia and the Federal Republic of Germany.

"The Government of the Federal Republic of Germany has examined the General Interpretative Declaration to the International Convention on the Elimination of all Forms of Racial Discrimination made by the Government of the Kingdom of Thailand at the time of its accession to the Convention.

The Government of the Federal Repblic of Germany considers that the General Interpretative Declaration made by Thailand is in fact a reservation that seeks to limit the scope of the Convention on an unilateral basis.

The Government of the Federal Republic of Germany notes that a reservation to all provisions of a Convention which consists of a general reference to national law without specifying its contents does not clearly define for the other State Parties to the Convention the extend to which the reserving state has accepted the obligations out of the provisions of the Convention.

The reservation made by the Government of the Kingdom of Thailand in respect to the applications of the provisions of the Convention therefore raises doubts as to the commitment of Thailand to fulfill its obligations out of all provisions of the Convention.

Hence the Government of the Federal Republic of Germany considers this reservation to be incompatible with the object and purpose of the Convention and objects to the General Interpretative Declaration made by the Government of the Kingdom of Thailand.

This objection does not preclude the entry into force of the Convention between the Federal Republic of Germany and the Kingdom of Thailand."

### ITALY

"The Government of the Republic of Italy raises an objection to the reservations entered by the Government of the Arab Republic of Yemen to article 5 [(c) and (d) (iv), (vi) and (vii)] of the above-mentioned Convention."

### MEXICO

The Government of the United Mexican States has concluded that, in view of article 20 of the Convention, the reservation must be deemed invalid, as it is incompatible with the object and purpose of the Convention.

Said reservation, if implemented would result in discrimination to the detriment of a certain sector of the population and, at the same time, would violate the rights established in articles 2, 16 and 18 of the Universal Declaration of Human Rights of 1948.

The objection of the United Mexican States to the reservation in question should not be interpreted as an impediment to the entry into force of the Convention of 1966 between the United States of Mexico and the Government of Yemen.

### MONGOLIA

"The Government of the Mongolian People's Republic considers that only the People's Revolutionary Council of Kampuchea as the sole authentic and lawful representative of the Kampuchean people has the right to assume international obligations on behalf of the Kampuchean people. Therefore the Government of the Mongolian People's Republic considers that the ratification of the International Convention on the Elimination of All Forms of Racial Discrimination by the so-called Democratic Kampuchea, a regime that ceased to exist as a result of the people's revolution in Kampuchea, is null and void."

### NETHERLANDS (KINGDOM OF THE)

"The Kingdom of the Netherlands objects to the above-mentioned reservations, as they are incompatible with object and purpose of the Convention.

These objections are not an obstacle for the entry into force of this Convention between the Kingdom of the Netherlands and Yemen."

### NEW ZEALAND

"The New Zealand Government is of the view that those provisions contain undertakings which are themselves fundamental to the Convention. Accordingly it considers that the reservations purportedly made by Yemen relating to political and civil rights are incompatible with the object and purpose of the Treaty within the terms of the article 19 (c) of the Vienna Convention on the Law of Treaties.

The Government of New Zealand advises therefore under article 20 of the Convention on the Elimination of All Forms of Racial Discrimination that it does not accept the reservations made by Yemen."

### NORWAY

"The Government of Norway hereby enters its formal objection to the reservations made by Yemen."

"The Government of Norway considers that the reservation made by the Government of Saudi Arabia, due to its unlimited scope and undefined character, is contrary to the object and purpose of the Convention, and thus impermissible under article 20, paragraph 2, of the Convention. Under well-established treaty law, a State party may not invoke the provisions of its internal law as justification for its failure to perform treaty obligations. For these reasons, the Government of Norway objects to the reservation made by the Government of Saudi Arabia.

The Government of Norway does not consider this objection to preclude the entry into force of the Convention between the Kingdom of Norway and the Kingdom of Saudi Arabia."

### ROMANIA

"The Government of Romania has examined the general interpretative declaration made by the Government of Thailand at the time of its accession to the Convention on the Elimination of all Forms of Racial Discrimination.

The Government of Romania considers that the general interpretative declaration is, in fact, a reservation formulated in general terms, that not allows to clearly identify the obligations assumed by Thailand with regard to this legal instrument and, consequently, to state the consistency of this reservation with the purpose and object of the above-mentioned Convention, in accordance with the provisions of article 19 (c) of the Vienna Convention on the Law of Treaties (1969).

The Government of Romania therefore objects to the aforesaid reservation made by Thailand to the Convention on the Elimination of all Forms of Racial Discrimination.

This objection, however, shall not preclude the entry into force of the Convention between the Government of Romania and Thailand."

### RUSSIAN FEDERATION

The ratification of the above-mentioned International Convention by the so-called "Government of Democratic Kampuchea"-the Pol Pot clique of hangmen overthrown by the Kampuchean people-is completely unlawful and has no legal force. Only the representatives authorized by the State Council of the People's Republic of Kampuchea can act in the name of Kampuchea. There is only one State of Kampuchea in the world -the People's Republic of Kampuchea, which has been recognized by a large number of countries. All power in this State is entirely in the hands of its only lawful Government, the Government of the People's Republic of Kampuchea, which has the exclusive right to act in the name of Kampuchea in the international arena, including the right to ratify international agreements prepared within the United Nations.

Nor should one fail to observe that the farce involving the ratification of the above-mentioned International Convention by a clique representing no one mocks the norms of law and morality and is a direct insult to the memory of millions of Kampuchean victims of the genocide committed against the Kampuchean people by the Pol Pot Sary régime. The entire international community is familiar with the bloody crimes of that puppet clique.

### SLOVAKIA[9]

### SPAIN

The Government of Spain considers that, given its unlimited scope and undefined nature, the reservation made by the Government of Saudi Arabia is contrary to the object and purpose of the Convention and therefore inadmissible under article 10, paragraph 2, of the Convention. Under the generally accepted law of treaties, a State party may not invoke the provisions of its domestic law as a justification for failure to perform its treaty obligations. The Government of Spain therefore formulates an objection to the reservation made by the Government of Saudi Arabia. The Government of Spain does not consider that this objection constitutes an obstacle to the entry into force of the Convention between the Kingdom of Spain and the Kingdom of Saudi Arabia.

### SWEDEN

"Article 5 contains undertakings, in compliance with the fundamental obligations laid down in article 2 of the Convention, to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the rights enumerated in the article.

The Government of Sweden has come to the conclusion that the reservations made by Yemen are incompatible with the object and purpose of the

Convention and therefore are impermissible according to article 20, paragraph 2 of the Convention. For this reason the Government of Sweden objects to these reservations. This objection does not have the effect of preventing the Convention from entering into force between Sweden and Yemen, and the reservations cannot alter or modify, in any respect, the obligations arising from the Convention."

"The Government of Sweden notes that the said reservation is a reservation of a general kind in respect of the provisions of the Convention which may be in conflict with the precepts of the Islamic *Shariah* .

The Government of Sweden is of the view that this general reservation raises doubts as to the commitment [of] Saudi Arabia to the object and purpose of the Convention and would recall that, according to article 20, paragraph 2, of the Convention, a reservation incompatible with the object and purpose of this Convention shall not be permitted.

It is in the common interest of states that treaties to which they have chosen to become parties are respected, as to their object and purpose, by all parties and that states are prepared to undertake any legislative changes necessar to comply with their obligations under the treaties.

The Government of Sweden is further of the view that general reservations of the kind made by the Government of Saudi Arabia, which do not clearly specify the provisions of the Convention to which they apply and the extent of the derogation therefrom, contribute to undermining the basis of international treaty law.

The Government of Sweden therefore objects to the aforesaid general reservation made by the Government of Saudi Arabia to the [said Convention].

This objection does not preclude the entry into force of the Convention between Saudi Arabia and Sweden. The Convention will thus become operative between the two states without Saudi Arabia benefiting from this reservation."

The Government of Sweden has examined the declarations made by Turkey upon ratifying the International Convention on the Elimination of All Forms of Racial Discrimination.

Paragraph 1 of the declaration states that Turkey will implement the provisions of the Convention only to the States Parties with which it has diplomatic relations. This statement in fact amounts, in the view of the Government of Sweden, to a reservation. The reservation makes it unclear to what extent the Turkey considers itself bound by the obligations of the Convention. In absence of further clarification, therefore, the reservation raises doubts as to the commitment of Turkey to the object and purpose of the Convention.

It is in the common interest ofStates that treaties to which they have chosen to become parties are respected as to their object and purpose, by all parties, and that States are prepared to undertake any legislative changes necessary to comply with their obligations under the treaties. According to article 20 of the International Convention on the Elimination of All Forms of Racial Discrimination, a reservation incompatible with the object and purpose of the convention shall not be permitted.

The Government of Sweden objects to the said reservation made by the Government of Turkey to the International Convention on the Elimination of All Forms of Racial Discrimination.

This objection does not preclude the entry into force of the Convention between Turkey and Sweden. The Convention enters into force in its entiretv between the two States, without Turkey benefiting from its reservation.

"The Government of Sweden has examined the general interpretative declaration made by the Kingdom of Thailand upon acceding to the International Convention on the Elimination of All Forms of Racial Discrimination.

The Government of Sweden recalls that the designation assigned to a statement whereby the legal effect of certain provisions of a treaty is excluded or modified does not determine its status as a reservation to the treaty. The Government of Sweden considers that the interpretative declaration made by the Kingdom of Thailand in substance constitutes a reservation.

The Government of Sweden notes that the application of the Convention is being made subject to a general reservation referring to the confines of national legislation, without specifying its contents. Such a reservation makes it unclear to what extent the reserving state considers itself bound by the obligations of the Convention. The reservation made by the Kingdom of Thailand therefore raises doubts as to the commitment of the Kingdom of Thailand to the object and purpose of the Convention. In addition, according to the Vienna Convention on the Law of Treaties, a party to a treaty may not invoke the provisions of its internal law as justification for its failure to abide by the treaty.

It is in the common interest of States that treaties to which they have chosen to become parties are respected as to their object and purpose, by all parties, and that States are prepared to undertake any legislative changes necessary to comply with their obligations under the treaties. According to customary law as codified in the Vienna Convention on the Law of Treaties, a reservation incompatible with the object and purpose of a treaty shall not be permitted.

The Government of Sweden therefore objects to the aforesaid reservation made by the Kingdom of Thailand to the International Convention on the Elimination of All Forms of Racial Discrimination.

This objection shall not preclude the entry into force of the Convention between the Kingdom of Thailand and Sweden. The Convention enters into force between the two States, without the Kingdom of Thailand benefitting from this reservation."

### UKRAINE

The ratification of the above-mentioned international Convention by the Pol Pot-Ieng Sary clique, which is guilty of the annihilation of millions of Kampucheans and which was overthrown in 1979 by the Kampuchean people, is thoroughly illegal and has no juridical force. There is only one Kampuchean State in the World, namely, the People's Republic of Kampuchea. All authority in this State is vested wholly in its sole legitimate government, the Government of the People's Republic of Kampuchea. This Government alone has the exclusive right to speak on behalf of Kampuchea at the international level, while the supreme organ of State power, the State Council of the People's Republic of Kampuchea has the exclusive right to ratify international agreements drawn up within the framework of the United Nations.

### UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

"The Government of the United Kingdom of Great Britain and Northern Ireland do not accept the reservations made by the Yemen Arab Republic to article 5 (c) and (d) (iv), (vi) and (vii) of the International Convention on the Elimination of All Forms of Racial Discrimination."

"The Government of the United Kingdom have examined the declaration made by the Government of the Republic of Turkey to the International Convention on the Elimination of All Forms of Racial Discrimination (New York, 7 March 1966) on 16 September 2002 in respect of implementation of the provisions of the Convention only to the States Parties with which it has diplomatic relations.

In the view of the Government of the United Kingdom, this declaration amounts to a reservation. This

reservation creates uncertainty as to the States Parties in respect of which Turkey is undertaking the obligations in the Convention. The Government of the United Kingdom therefore object to the reservation made by the Government of the Republic of Turkey.

This objection shall not preclude the entry into force of the Convention between the United Kingdom of Great Britain and Northern Ireland and the Republic of Turkey."

"The Government of the United Kingdom have examined the interpretative declaration made by the Government of the Kingdom of Thailand to the International Convention on the Elimination of All Forms of Racial Discrimination (New York, 7 March 1966) on 28 January 2003 in respect of the Government of the Kingdom of Thailand having no obligation to interpret and apply the provisions of the Convention beyond the confines of the Constitution and the laws of the Kingdom of Thailand and, in addition, that the interpretation and application shall be limited to or consistent with the obligations under other international human rights instruments to which the Kingdom of Thailand is party.

In the view of the Government of the United Kingdom, this declaration amounts to a reservation. This reservation amounts to a general reference to national law without specifying its contents and does not clearly define for the other States Parties to the Convention the extent to which the declaring State has accepted the obligations of the Convention. The Government of the United Kingdom therefore object to the reservation made by the Government of the Kingdom of Thailand.

This objection shall not preclude the entry into force of the Convention between the United Kingdom of Great Britain and Northern Ireland and the Kingdom of Thailand."

"The Government of the United Kingdom has examined the Declaration made by Grenada. In the view of the United Kingdom, the Declaration amounts to a reservation. The Declaration makes only a general reference to national law without specifying its contents and does not clearly define for the other States Parties to the Convention the extent to which Grenada has accepted the obligations of the Convention. The United Kingdom therefore objects to the reservation made by Grenada in its Declaration and hereby gives notice that it does not accept it.

This objection shall not preclude the entry into force of the Convention between the United Kingdom of Great Britain and Northern Ireland and Grenada."

#### VIET NAM

"The Government of the Socialist Republic of Vietnam considers that only the Government of the People's Republic of Kampuchea, which is the sole genuine and legitimate representative of the Kampuchean People, is empowered to act in their behalf to sign, ratify or accede to international conventions.

The Government of the Socialist Republic of Vietnam rejects as null and void the ratification of the above-mentioned international Convention by the so-called "Democratic Kampuchea"- a genocidal regime overthrown by the Kampuchean people since January 7, 1979.

Furthermore, the ratification of the Convention by a genocidal regime, which massacred more than 3 million Kampuchean people in gross violation of fundamental standards of morality and international laws on human rights, simply plays down the significance of the Convention and jeopardises the prestige of the United Nations."

### *Declarations recognizing the competence of the Committee on the Elimination of Racial Discrimination[35] in accordance with article 14 of the Convention*

***(Unless otherwise indicated, the declarations and reservations were made upon ratification, accession or succession.)***

#### ALGERIA

The Algerian Government declares, pursuant to article 14 of the Convention, that it recognizes the competence of the Commit tee to receive and consider communications from individuals or groups of individuals within its jurisdiction claiming to be victims of a violation by it of any of the rights set forth in the Convention.

#### ANDORRA

Pursuant to paragraph 1 of article 14 of the Convention, the Principality of Andorra declares that it recognizes the competence of the Committee on the Elimination of Racial Discrimination to receive and consider communications from individuals or groups of individuals claiming to be victims of a violation by the Principality of Andorra of any of the rights set forth in the Convention. However, this procedure applies only insofar as the Committee has established that the same matter is not being examined, or has not been examined by another international body of investigation or settlement.

#### ARGENTINA

Pursuant to the provisions of article 14, paragraphs 2 and 3, of the International Convention on the Elimination of All Forms of Racial Discrimination, the Government of the Republic of Argentina designates the National Institute to Combat Discrimination, Xenophobia and Racism (INADI) as competent within the national legal system to receive and consider petitions from individuals and groups of individuals within the jurisdiction of the Republic of Argentina, who claims to be victims of a violation by the national government of the rights set forth in the Convention.

#### AUSTRALIA

"The Government of Australia hereby declares that it recognises, for and on behalf of Australia, the competence of the Committee to receive and consider communications from individuals or groups of individuals within its jurisdiction claiming to be victims of a violation by Australia of any of the rights set forth in the aforesaid Convention."

#### AUSTRIA

"The Republic of Austria recognizes the competence of the Committee on the Elimination of Racial Discrimination to receive and consider communications from individuals or groups of individuals within the jurisdiction of Austria claiming to be victims of a violation by Austria of any of the rights set forth in the Convention, with the reservation that the Committee shall not consider any communication from an individual or a group of individuals unless the Committee has ascertained that the facts of the case are not being examined or have not been examined under another procedure of

international investigation or settlement. Austria reserves the right to indicate a national body as set forth in Article 14 paragraph 2."

### AZERBAIJAN

"In accordance with article 14, paragraph 1, of the International Convention on the Elimination of All forms of Racial Discrimination, the Government of the Republic of Azerbaijan declares that it recognizes the competence of the Committee on the Elimination of Racial Discrimination to receive and consider communications from individuals or groups of individuals within its jurisdiction claiming to be victims of a violation of any of the rights set forth in the above-mentioned Convention."

### BELGIUM

Belgium recognizes the competence of the Committee on the Elimination of Racial Discrimination, established by the aforementioned Convention, to receive and consider communications from individuals or groups of individuals within its jurisdiction claiming to be victims of a violation by Belgium of any of the rights set forth in the Convention.

Pursuant to article 14, paragraph 2, of the Convention, the Centre pour l'Egalité des Chances et la Lutte contre le Racisme (Centre for Equal Opportunity and the Struggle against Racism), established by the Act of 15 February 1993, has been designated as competent to receive and consider petitions from individuals and groups of individuals within the jurisdiction of Belgium who claim to be victims of a violation of any of the rights set forth in the Convention.

Pursuant to article 14, paragraph 2, of the Convention, the Centre pour l'Egalité des Chances et la Lutte contre le Racisme (Centre for Equal Opportunity and the Struggle against Racism), established by the Act of 15 February 1993, has been designated as competent to receive and consider petitions from individuals and groups of individuals within the jurisdiction of Belgium who claim to be victims of a violation of any of the rights set forth in the Convention.

### BOLIVIA (PLURINATIONAL STATE OF)

"The Government of Bolivia recognizes the competence of the Committee on the Elimination of Racial Discrimination established under article 8 of the International Convention on the Elimination of All Forms of Racial Discrimination, in compliance with article 14 of the Convention."

### BRAZIL

.....the Federative Republic of Brazil recognizes the competence of the Committee on the Elimination of Racial Discrimination to receive and consider complaints of human rights violations, as provided for under article XIV of the International Convention on the Elimination of All Forms of Racial Discrimination, which was opened for signature in New York on 7th of March 1966.

### BULGARIA

"The Republic of Bulgaria declares that it recognizes the competence of the Committee on the Elimination of Racial Discrimination to receive and consider communications from individuals or groups of individuals within its jurisdiction claiming to be victims of a violation by the Republic of Bulgaria of any of the rights set forth in this Convention."

### CHILE

In accordance with article 14 (1) of the International Convention on the Elimination of All Forms of Racial Discrimination, the Government of Chile declares that it recognizes the competence of the Committee on the Elimination of Racial Discrimination to receive and consider communications from individuals or groups of individuals within its jurisdiction claiming to be victims of a violation by the Government of Chile of any of the rights set forth in this Convention.

### COSTA RICA

Costa Rica recognizes the competence of the Committee on the Elimination of Racial Discrimination established under article 8 of the Convention on the Elimination of All Forms of Racial Discrimination, in accordance with article 14 of the Convention, to receive and consider communications from individuals or groups of individuals within its jurisdiction claiming to be victims of a violation by the State of any of the rights set forth in the Convention.

### CYPRUS

"The Republic of Cyprus recognizes the competence of the Committee on the Elimination of Racial Discrimination established under article 14 (1) of [the Convention] to receive and consider communications from individuals or groups of individuals within its jurisdiction claiming to be victims of a violation by the Republic of Cyprus of any of the rights set forth in this Convention.

### CZECH REPUBLIC

The Czech Republic declares that according to Article 14, paragraph 1 of the International Convention on the Elimination of All Forms of Racial Discrimination it recognizes the competence of the Committee on the Elimination of Racial Discrimination to receive and consider communications from individuals or groups of individuals within its jurisdiction claiming to be victims of a violation of any of the rights set forth in the International Convention on the Elimination of All Forms of Racial Discrimination.

### DENMARK

Denmark recognizes the competence of the Committee on the Elimination of Racial Discrimination to receive and consider communications from individuals or groups of individuals within Danish jurisdiction claiming to be victims of a violation by Denmark of any of the rights set forth in the Convention, with the reservation that the Committee shall not consider any communications unless it has ascertained that the same matter has not been, and is not being, examined under another procedure of international investigation or settlement.

### ECUADOR

The State of Ecuador, by virtue of Article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination, recognizes the competence of the Committee on the Elimination of Racial Discrimination to receive and consider communications from individuals or groups of individuals within its jurisdiction claiming to be victims of a violation of the rights set forth in the above-mentioned Convention.

### EL SALVADOR

… the Government of the Republic of El Salvador recognizes the competence of the Committee on the

Elimination of Racial Discrimination to receive and consider communications from individuals or groups of individuals within the jurisdiction of a State Party who claim to be victims of violations by that State of any of the rights set forth in the International Convention on the Elimination of All Forms of Racial Discrimination, as provided for in article 14 of the said Convention.

### ESTONIA

"The Republic of Estonia declares that pursuant to Article 14 paragraph 1 of the Convention it recognizes the competence of the Committee on the Elimination of Racial Discrimination to receive and consider communications from individuals or groups of individuals within the jurisdiction of Estonia claiming to be victims of a violation by Estonia of any of the rights set forth in the Convention if this violation results from circumstances or events occurring after the deposit of this Declaration.

Estonia recognizes that competence on the understanding that the Committee on the Elimination of Racial Discrimination shall not consider any communications without ascertaining that the same matter is not being considered or has not already been considered by another international body of investigation or settlement."

### FINLAND

"Finland recognizes the competence of the Committee on the Elimination of Racial Discrimination to receive and consider communications from individuals or groups of individuals within the jurisdiction of Finland claiming to be victims of a violation by Finland of any of the rights set forth in the said Convention, with the reservation that the Committee shall not consider any communication from an individual or a group of individuals unless the Committee has ascertained that the same matter is not being examined or has not been examined under another procedure of international investigation or settlement."

### FRANCE

[The Government of the French Republic declares], in accordance with article 14 of the International Convention on the Elimination of all Forms of Racial Discrimination opened for signature on 7 March 1966, [that it] recognizes the competence of the Committee on the Elimination of Racial Discrimination to receive and consider communications from individuals or groups of individuals within French jurisdiction that either by reason of acts or omissions, events or deeds occurring after 15 August 1982, or by reason of a decision concerning the acts or omissions, events or deeds after the said date, would complain of being victims of a violation, by the French Republic, of one of the rights mentioned in the Convention.

### GEORGIA

"In accordance with Article 14, Paragraph 1, of the Convention on the Elimination of All Forms of Racial Discrimination done at New York on March 7, 1966 Georgia recognizes the competence of the Committee for the elimination of racial discrimination to receive and consider communications from individuals or groups of individuals within its jurisdiction claiming to be victims of a violation, by Georgia, of any of the rights set forth in the abovementioned Convention."

### GERMANY

The Federal Republic of Germany hereby declares that pursuant to Article 14 paragraph 1 of the Convention it recognizes the competence of the Committee on the Elimination of Racial Discrimination to receive and consider communications from individuals or groups of individuals within her jurisdiction claiming to be victims of a violation by the Federal Republic of Germany of any of the rights set forth in this Convention. However, this shall only apply insofar as the Committee has determined that the same matter is not being or has not been examined under another procedure of international investigation or settlement.

### HUNGARY

"The Hungarian People's Republic hereby recognizes the competence of the Committee established by the International Convention on the Elimination of All Forms of Racial Discrimination provided for in paragraph 1 of article 14 of the Convention."

### ICELAND

"[The Government of Iceland declares] in accordance with article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination which was opened for signature in New York on 7 March 1966, that Iceland recognizes the competence of the Committee on the Elimination of Racial Discrimination to receive and consider communications from individuals or groups of individuals within the jurisdiction of Iceland claiming to be victims of a violation by Iceland of any of the rights set forth in the Convention, with the reservation that the Committee shall not consider any communication from an individual or group of individuals unless the Committee has ascertained that the same matter is not being examined or has not been examined under another procedure of international investigation or settlement."

### IRELAND

"With reference to article 14, paragraph 1, of the International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature at New York on 7 March 1966, Ireland recognizes the competence of the Committee on the Elimination of Racial Discrimination, established by the afore-mentioned Convention to receive and consider communications from individuals or groups of individuals within Ireland claiming to be victims of a violation by Ireland of any of the rights set forth in the Convention.

Ireland recognizes that competence on the understanding that the said Committee shall not consider any communication without ascertaining that the same matter is not being considered or has not already been considered by another international body of investigation or settlement."

### ITALY

With reference to article 14, paragraph 1, of the International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature at New York on 7 March 1966, the Government of the Italian Republic recognizes the competence of the Committee on the Elimination of Racial Discrimination, established by the afore-mentioned Convention, to receive and consider communications from individuals or groups of individuals within Italian jurisdiction claiming to be victims of a violation by Italy of any of the rights set forth in the Convention.

The Government of the Italian Republic recognizes that competence on the understanding that the Committee on the Elimination of Racial Discrimination shall not consider any communication without ascertaining that the same matter is not being considered or has not already been considered by another international body of investigation or settlement.

## KAZAKHSTAN

“In accordance with article 14, paragraph 1, of the International convention on the elimination of all forms of racial discrimination done at New York on December 21, 1965 the Republic of Kazakhstan hereby declares that it recognizes the competence of the Committee of elimination of racial discrimination within its jurisdiction to receive and consider communications from or on behalf of individuals who claim to be victims of a violation by the Republic of Kazakhstan of the provisions of the Convention.”

## LIECHTENSTEIN

".....the Principality of Liechtenstein recognizes the competence of the Committee on the Elimination of Racial Discrimination to receive and consider communications from individuals or groups of individuals within the jurisdiction of Liechtenstein claiming to be victims of a violation by Liechtenstein of any of the rights set forth in the Convention.

The Principality of Liechtenstein recognizes that competence on the understanding that the said Committee shall not consider any communication without ascertaining that the same matter is not being considered or has not already been considered under another international procedure of investigation or settlement.

Pursuant to article 14, paragraph 2, of the Convention, the Constitutional Court has been designated as competent to receive and consider petitions from individuals and groups of individuals within the jurisdiction of Liechtenstein who claim to be victims of a violation of any of the rights set forth in the Convention."

## LUXEMBOURG

Pursuant to article 14 (1) of the [said Convention], Luxembourg declares that it recognizes the competence of the Committee on the Elimination of Racial Discrimination to receive and consider communications from individuals or groups of individuals within its jurisdiction claiming to be victims of a violation by Luxembourg of any of the rights set forth in the Convention.

Pursuant to article 14 (2) of the [said Convention], the "Commission spéciale permanente contre la discrimination", created in May 1996 pursuant to article 24 of the Law dated 27 July 1993 on the integration of aliens shall be competent to receive and consider petitions from individuals and groups of individuals within the jurisdiction of Luxembourg who claim to be victims of a violation of any of the rights set forth in the Convention.

## MALTA

Malta declares that it recognizes the competence of the Committee to receive and consider communications from individuals subject to the jurisdiction of Malta who claim to be victims of a violation by Malta of any of the rights set forth in the Convention which results from situations or events occurring after the date of adoption of the present declaration, or from a decision relating to situations or events occurring after that date.

The Government of Malta recognizes this competence on the understanding that the Committee on the Elimination of All Forms of Racial Discrimination shall not consider any communication without ascertaining that the same matter is not being considered or has not already been considered by another international body of investigation or settlement."

## MEXICO

The United Mexican States recognizes as duly binding the competence of the Committee on the Elimination of Racial Discrimination, established by article 8 of the International Convention on the Elimination of All Forms of Racial Discrimination, adopted by the United Nations General Assembly in its resolution 2106 (XX) of 21 December 1965 and opened for signature on 7 March 1966.

The United Mexican States declares, pursuant to article 14 of the Convention, that it recognizes the competence of the Committee to receive and consider communications from individuals or groups of individuals within its jurisdiction claiming to be victims of a violation by that State of any of the rights stipulated in the Convention.

Accordingly, in exercise of the power vested in me under article 89, subparagraph X, of the Political Constitution of the United Mexican States and in accordance with article 5 of the Conclusion of Treaties Act, I hereby issue this instrument of acceptance, the Declaration on Recognition of the Competence of the Committee on the Elimination of Racial Discrimination, as set out in the Declaration adopted by the Senate of the Distinguished Congress of the Union, and promise, on behalf of the Mexican Nation, to implement it, uphold it and ensure that it is implemented and upheld.

## MONACO

We hereby declare that we recognize the competence of the Committee on the Elimination of Racial Discrimination to receive and examine communications from individuals or groups of individuals under its jurisdiction who claim to be victims of a violation by the Principality of Monaco of any of the rights set forth in the said Convention, such competence to be exercised only when all domestic remedies have been exhausted, and we pledge our word as Prince and promise, on behalf of ourselves and our successors, to observe and execute it faithfully and loyally.

## MONTENEGRO

“By affirming its commitment to establish the principles of the rule of law and promote and protect human rights, the Government of the Federal Republic of Yugoslavia recognizes the competence of the Committee on the elimination of Racial Discrimination to receive and consider complaints submitted by individuals and groups alleging violations of rights guaranteed under the International Convention on the Elimination of All Forms of Racial Discrimination.

The Government of the Federal Republic of Yugoslavia determines the competence of the Federal Constitutional Court to accept and consider, within its domestic legal system, the complaints submitted by individuals and groups under the State jurisdiction, alleging to have been victims of rights violations under the Convention, and who have exhausted all available legal means provided for by the national legislation.”

## MOROCCO

In accordance with article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination, the Government of the Kingdom of Morocco declares that it recognizes, on the date of deposit of the present document, the competence of the Committee on the Elimination of Racial Discrimination to receive and consider communications from individuals or groups of individuals within its jurisdiction claiming to be victims of a violation, subsequent to the date of deposit of the present document, of any of the rights set forth in this Convention.

## NETHERLANDS (KINGDOM OF THE)

In accordance with article 14, paragraph 1, of the Convention on the Elimination of All Forms of Racial

Discrimination concluded at New York on 7 March 1966, the Kingdom of the Netherlands recognizes, for the Kingdom in Europe, Surinam and the Netherlands Antilles, the competence of the Committee for the Elimination of Racial Discrimination to receive and consider communications from individuals or groups of individuals within its jurisdiction claiming to be victims of a violation, by the Kingdom of the Netherlands, of any of the rights set forth in the above-mentioned Convention.

See also notes 1 and 2 under "Netherlands" regarding Aruba/Netherlands Antilles in the "Historical Information" section (click on the tab "Status of Treaties" and then on "Historical Information")..

### NORTH MACEDONIA

“The Republic of Macedonia declares that it recognizes the competence of the Committee on the Elimination of Racial Discrimination to receive and consider communcations from individuals or groups of individuals within its jurisdiction claiming to be victims of a violation by the Republic of Macedonia of any of its rights set forth in this Convention, with the reservation that the Committee shall not consider any communication from individuals or groups of individuals, unless it has ascertained that the same matter has not been, and is not being, examined under another procedure of international investigation or settlement."

### NORWAY

"The Norwegian Government recognizes the competence of the Committee on the Elimination of Racial Discrimination to receive and consider communications from individuals or groups of individuals within the jurisdiction of Norway claiming to be victims of a violation by Norway of any of the rights set forth in the International Convention of 21 December 1965 on the Elimination of All Forms of Racial Discrimination according to article 14 of the said Convention, with the reservation that the Committee shall not consider any communication from an individual or group of individuals unless the Committee has ascertained that the same matter is not being examined or has not been examined under another procedure of international investigation or settlement."

### PANAMA

… the Republic of Panama recognizes the competence of the Committee on the Elimination of Racial Discrimination to receive and consider communications from individuals or groups of individuals within its jurisdiction claiming to be victims of violations by the Republic of Panama of any of the rights set forth in the referred Convention.

### PERU

[The Government of the Republic of Peru declares] that, in accordance with its policy of full respect for human rights and fundamental freedoms, without distinctions as to race, sex, language or religion, and with the aim of strengthening the international instruments on the subject, Peru recognizes the competence of the Committee on the Elimination of Racial Discrimination to receive and consider communications from individuals or groups of individuals within its jurisdiction, who claim to be victims of violations of any of the rights set forth in the Convention on the Elimination of All Forms of Racial Discrimination, in conformity with the provisions of article 14 of the Convention.

### POLAND

The Government of the Republic of Poland recognizes the competence of the Committee on the Elimination of Racial Discrimination, established by the provisions of the afore-mentioned Convention, to receive and consider communications from individuals or groups of individuals within jurisdiction of the Republic of Poland claiming, to be victims of a violation by the Republic of Poland of the rights set forth in the above Convention and concerning all deeds, decisions and facts which will occur after the day this Declaration has been deposited with the Secretary-General of the United Nations.

### PORTUGAL

".....The Government of Portugal recognises the competence of the Committee established under Article 14 of the Convention on the Elimination of All Forms of Racial Discrimination to receive and consider communications from individuals or groups of individuals within its jurisdiction claiming to be victims of a violation by the Republic of Portugal of any of the rights set forth in that Convention.

Portugal recognises such jurisdiction provided that the Committee does not consider any communication unless it is satisfied that the matter has neither been examined nor is it subject to appreciation by any other international body with powers of inquiry or decision.

Portugal indicates the High Commissioner for Immigration and Ethnic Minorities as the body with competence to receive and consider petitions from individuals and groups of individuals that claim to be victims of violation of any of the rights set forth in the Convention".

### REPUBLIC OF KOREA

"The Government of the Republic of Korea recognizes the competence of the Committee on the Elimination of Racial Discrimination to receive and consider communications from individuals or groups of individuals within the jurisdiction of the Republic of Korea claiming to be victims of a violation by the Republic of Korea of any of the rights set forth in the said Convention."

### REPUBLIC OF MOLDOVA

“According to Article 14, paragraph 1 of the International Convention on the Elimination of All Forms of Racial Discrimination, the Republic of Moldova recognizes the competence of the Committee on the Elimination of Racial Discrimination to receive and consider communications from individuals or groups of individuals within the jurisdiction of the Republic of Moldova claiming to be victims of a violation by the Republic of Moldova of any of the rights set forth in the Convention, with the reservation that the Committee shall not consider any communication unless it has ascertained that the same matter is not being examined or has not been examined under another procedure of international investigation or settlement.”

[T]he Government decides:

1. To designate the Bureau of Inter-Ethnic Relations as the body responsible for the submission of the Moldovan Government's comments on communications from individuals and groups of individuals concerning the Republic of Moldova addressed to the United Nations Committee on the Elimination of Racial Discrimination.
2. The Bureau of Inter-Ethnic Relations shall keep official records in accordance with this decision.
3. The Ministry of Foreign Affairs and European Integration shall inform the depositary of the designation of the competent body.

### ROMANIA

"Romania declares, in accordance with article 14 paragraph 1 of the International Convention on the Elimination of All Forms of Racial Discrimination, that it recognizes the competence of the Committee on the

Elimination of Racial Discrimination to receive and consider communications from persons within its jurisdiction claiming to be victims of a violation by Romania of any of the rights set forth in the Convention, to which Romania acceded by Decree no. 345 of 1970.

Without prejudice to the article 14 paragraphs 1 and 2 of the International Convention on the Elimination of All Forms of Racial Discrimination, Romania considers that the mentioned provisions do not confer to the Committee on the Elimination of Racial Discrimination the competence of examining communications of persons invoking the existence and infringement of collective rights.

The body which is competent in Romania, according to domestic law, to receive and to examine communications in accordance with article 14 paragraph 2 of the International Convention on the Elimination of All Forms of Racial Discrimination is the National Council for Combating Discrimination established by the Government Decision no. 1194 of 2001."

### RUSSIAN FEDERATION

The Union of Soviet Socialist Republics declares that it recognizes the competence of the Committee on the Elimination of Racial Discrimination to receive and consider communications, in respect of situations and events occurring after the adoption of the present declaration, from individuals or groups of individuals within the jurisdiction of the USSR claiming to be victims of a violation by the USSR of any of the rights set forth in the Convention.

### SAN MARINO

The Republic of San Marino, in accordance with article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination, recognizes the competence of the Committee on the Elimination of Racial Discrimination to receive and consider communications from individuals or groups of individuals within its jurisdiction claiming to be victims of a violation by the Republic of San Marino of any of the rights set forth in the Convention.

### SENEGAL

In accordance with [article 14], the Government of Senegal declares that it recognizes the competence of the Committee (on the Elimination of Racial Discrimination) to receive and consider communications from individuals within its jurisdiction claiming to be victims of a violation by Senegal of any of the rights set forth in the Convention on the Elimination of All Forms of Racial Discrimination.

### SERBIA

“By affirming its commitment to establish the principles of the rule of law and promote and protect human rights, the Government of the Federal Republic of Yugoslavia recognizes the competence of the Committee on the elimination of Racial Discrimination to receive and consider complaints submitted by individuals and groups alleging violations of rights guaranteed under the International Convention on the Elimination of All Forms of Racial Discrimination.

The Government of the Federal Republic of Yugoslavia determines the competence of the Federal Constitutional Court to accept and consider, within its domestic legal system, the complaints submitted by individuals and groups under the State jurisdiction, alleging to have been victims of rights violations under the Convention, and who have exhausted all available legal means provided for by the national legislation.”

### SLOVAKIA

The Slovak Republic, pursuant to article 14 of the Convention, recognizes the competence of the Committee on the Elimination of Racial Discrimination to receive and consider communications from individuals or groups of individuals within its jurisdiction claiming to be victims of a violation of any of the rights set forth in the Convention.

### SLOVENIA

"The Republic of Slovenia recognizes to the Committee on the Elimination of Racial Discrimination competence to receive and consider communications from individuals or groups of individuals within its jurisdiction claiming to be victims of a violation by the Republic of Slovenia of any of the rights set forth in the Convention, with the reservation that the Committee shall not consider any communications unless it has ascertained that the same matter has not been, and is not being, examined under another procedure of international investigation or settlement."

### SOUTH AFRICA

"The Republic of South Africa-

(a) declares that, for the purposes of paragraph 1 of article 14 of the Convention, it recognises the competence of the Committee on the Elimination of Racial Discrimination to receive and consider communications from individuals or groups of individuals within the Republic's jurisdiction claiming to be victims of a violation by the Republic in any of the rights set forth in the Convention after having exhausted all domestic remedies

and

(b) indicates that, for the purposes of paragraph 2 of article 14 of the Convention, the South African Human Rights Commission is the body within the Republic's national legal order which shall be competent to receive and consider petitions from individuals or groups of individuals within the Republic's jurisdiction who claim to be victims of any of the rights set forth in the Convention."

### SPAIN

[The Government of Spain] recognizes the competence of the Committee on the Elimination of Racial Discrimination to receive and consider communications from individuals or groups of individuals within the jurisdiction of Spain claiming to be victims of violations by the Spanish State of any of the rights set forth in that Convention.

Such competence shall be accepted only after appeals to national jurisdiction bodies have been exhausted, and it must be exercised within three months following the date of the final judicial decision.

### STATE OF PALESTINE

“… the Government of the State of Palestine makes the following declaration in relation to article 14 and recognizes the competence of the Committee to receive and consider communications from individuals and groups of individuals within its jurisdiction claiming to be victims of violation by State of Palestine of any rights set forth in this Convention, and who have exhausted all available legal means provided for by the national legislation.

State of Palestine indicates the Independent Commission for Human Rights as the body with the competence to receive and consider complaints from

individuals and groups that claim to be victims of violations of any rights set forth in the Convention."

### SWEDEN

"Sweden recognizes the competence of the Committee on the Elimination of Racial Discrimination to receive and consider communications from individuals or groups of individuals within the jurisdiction of Sweden claiming to be victims of a violation by Sweden of any of the rights set forth in the Convention, with the reservation that the Committee shall not consider any communication from an individual or a group of individuals unless the Committee has ascertained that the same matter is not being examined or has not been examined under another procedure of international investigation or settlement."

### SWITZERLAND

... .Switzerland recognizes, pursuant to article 14, paragraph 1, of the International Convention on the Elimination of All Forms of Racial Discrimination, concluded at New York on 21 December 1965, the competence of the Committee on the Elimination of Racial Discrimination (CERD) to receive and consider communications under the above-mentioned provision, with the reservation that the Committee shall not consider any communication from an individual or group of individuals unless the Committee has ascertained that the same matter is not being examined or has not been examined under another procedure of international investigation or settlement.

### TOGO

Expressing its determination to maintain the rule of law, to defend and protect human rights and in accordance with Article 14, the Government the Republic of Togo declares that it recognizes the competence of the Committee on the Elimination of Discrimination to receive and consider communications from individuals within its jurisdiction claiming to be victims of a violation by the Republic of Togo, of any of the rights set forth in the Convention on the Elimination of All Forms of Racial Discrimination.

### UKRAINE

In accordance with the article 14 of the International Convention on the Elimination of All forms of Racial Discrimination, Ukraine declares that it recognizes the competence of the Committee on the Elimination of Racial Discrimination to receive and consider communications from individuals or groups of individuals [within its jurisdiction] claiming to be victims of a violation by [it] of any of the rights set forth in the Convention.

### URUGUAY

The Government of Uruguay recognizes the competence of the Committee on the Elimination of Racial Discrimination, under article 14 of the Convention.

### VENEZUELA (BOLIVARIAN REPUBLIC OF)

Pursuant to the provisions of article 14, paragraph 1 of the International Convention on the Elimination of All Forms of Racial Discrimination, the Government of the Bolivarian Republic of Venezuela recognizes the competence of the Committee on the Elimination of Racial Discrimination established under article 8 of the Convention to receive and consider communications from individuals or groups of individuals within its jurisdiction claiming to be victims of violations by the Bolivarian Republic of Venezuela of any of the rights set forth in the Convention.

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***Notes:***

[1] Article 19 of the Convention provides that the Convention shall enter into force on the thirtieth day after the date of deposit with the Secretary-General of the United Nations of the twenty-seventh instrument of ratification or instrument of accession. On 5 December 1968, the Government of Poland deposited the twenty-seventh instrument. However, among those instruments there were some which contained a reservation and therefore were subject to the provisions of article 20 of the Convention allowing States to notify objections within ninety days from the date of circulation by the Secretary-General of the reservations. In respect of two such instruments, namely those of Kuwait and Spain, the ninety-day period had not yet expired on the date of deposit of the twenty-seventh instrument. The reservation contained in one further instrument, that of India, had not yet been circulated on that date, and the twenty-seventh instrument itself, that of Poland, contained a reservation; in respect of these two instruments the ninety-day period would only begin to run on the date of the Secretary-General's notification of their deposit. Therefore, in that notification, which was dated 13 December 1968, the Secretary-General called the attention of the interested States to the situation and stated the following:

"It appears from the provisions of article 20 of the Convention that it would not be possible to determine the legal effect of the four instruments in question pending the expiry of the respective periods of time mentioned in the preceding paragraph.

Having regard to the above-mentioned consideration, the Secretary-General is not at the present time in a position to ascertain the date of entry into force of the Convention."

Subsequently, in a notification dated 17 March 1969, the Secretary-General informed the interested States; (a) that within the period of ninety days from the date of his previous notification he had received an objection from one State to the reservation contained in the instrument of ratification by the Government of India; and (b) that the Convention, in accordance with paragraph 1 of article 19, had entered into force on 4 January 1969, i.e., on the thirtieth day after the date of deposit of the instrument of ratification of the Convention by the Government of Poland, which was the twenty-seventh instrument of ratification or instrument of accession deposited with the Secretary-General.

[2] *Official Records of the General Assembly, Twentieth Session, Supplement No. 14* (A/6014),p. 47.

[3] The German Democratic Republic had acceded to the Convention on 23 March 1973 with a reservation and a declaration. For the text of the reservation and declaration, see United Nations, *Treaty Series* , vol. 883, p. 190.

Moreover, on 26 April 1984, the Government of the German Democratic Republic had made an objection with regard to the ratification made by the Government of the Democratic

Kampuchea. For the text of the objection, see United Nations, *Treaty Series* , vol. 1355, p. 327.

See also note 2 under “Germany” in the “Historical Information” section in the front matter of this volume.

[4] The former Yugoslavia had signed and ratified the Convention on 15 April 1966 and 2 October 1967, respectively. See also note 1 under "Bosnia and Herzegovina", "Croatia", "former Yugoslavia", "Slovenia", "The Former Yugoslav Republic of Macedonia" and "Yugoslavia" in the "Historical Information" section (click on the tab "Status of Treaties" and then on "Historical Information").

[5] On 10 June 1997, the Secretary-General received communications concerning the status of Hong Kong from the Governments of the United Kingdom and China (see also note 2 under “China” and note 2 under “United Kingdom of Great Britain and Northern Ireland” regarding Hong Kong in the “Historical Information” section (click on the tab "Status of Treaties" and then on "Historical Information"). Upon resuming the exercise of sovereignty over Hong Kong, China notified the Secretary-General that the Convention with the reservation made by China will also apply to the Hong Kong special Administrative Region.

In addition, the notification made by the Government of China contained the following declarations:

1. ...

2. The reservation of the People's Republic of China on behalf of the the Hong Kong Special Administrative Region interprets the requirement in article 6 concerning "reparation and satisfaction" as being fulfilled if one or other of these forms of redress is made available and interprets "satisfaction" as including any form of redress effective to bring the discriminatory conduct to an end.

[6] The Convention had previously been signed and ratified on behalf of the Republic of China on 31 March 1966 and 10 December 1970, respectively. See also note 1 under "China" in the "Historical Information" (click on the tab "Status of Treaties" and then on "Historical Information").

With reference to the above-mentioned signature and/or ratification, communications have been received by the Secretary-General from the Governments of Bulgaria (12 March 1971), Mongolia (11 January 1971), the Byelorussian Soviet Socialist Republic (9 June 1971), the Ukrainian Soviet Socialist Republic (21 April 1971) and the Union of Soviet Socialist Republics (18 January 1971) stating that they considered the said signature and/or ratification as null and void, since the so-called "Government of China" had no right to speak or assume obligations on behalf of China, there being only one Chinese State, the People's Republic of China, and one Government entitled to represent it, the Government of the People's Republic of China.

In letters addressed to the Secretary-General in regard to the above-mentioned communications, the Permanent Representative of China to the United Nations stated that the Republic of China, a sovereign State and Member of the United Nations, had attended the twentieth regular session of the United Nations General Assembly, contributed to the formulation of the Convention concerned, signed the Convention and duly deposited the instrument of ratification thereof, and that "any statements and reservations relating to the above-mentioned Convention that are incompatible with or derogatory to the legitimate position of the Government of the Republic of China shall in no way affect the rights and obligations of the Republic of China under this Convention".

Finally, upon depositing its instrument of accession, the Government of the People's Republic of China made the following declaration: The signing and ratification of the said Convention by the Taiwan authorities in the name of China are illegal and null and void.

[7] On 27 April 1999, the Government of Portugal informed the Secretary-General that the Convention would apply to Macao.

Subsequently, the Secretary-General received communications concerning the status of Macao from Portugal and China (see note 3 under “China” and note 1 under “Portgual” in the Historical Information section in the front matter of this volume). Upon resuming the exercise of sovereignty over Macao, China notified the Secretary-General that the Convention with the reservation made by China will also apply to the Macao Special Administrative Region.

[8] The Convention had previously been signed and ratified on behalf of the Republic of China on 31 March 1966 and 10 December 1970, respectively. See also note 1 under "China" in the "Historical Information" section in the front matter of this volume.

With reference to the above-mentioned signature and/or ratification, communications have been received by the Secretary-General from the Governments of Bulgaria (12 march 1971), Mongolia (11 January 1971), the Byelorussian Soviet Socialist Republic (9 June 1971), the Ukrainian Soviet Socialist Republic (21 April 1971) and the Union of Soviet Socialist Republics (18 January 1971) stating that they considered the said signature and/or ratification as null and void, since the so-called "Government of China" had no right to speak or assume obligations on behalf of China, there being only one Chinese State, the People's Republic of China, and one Government entitled to represent it, the Government of the People's Republic of China.

In letters addressed to teh Secretary-General in regard to the above-mentioned communications, the Permanent Representative of China to the United Nations stated that the Republic of China, a sovereign State and Member of the United Nations, had attended the twentieth regular session of hte United Nations General Assembly, contributed to the formulation of the Convention concerned, signed the Convention and duly deposited the instrument of ratification thereof, and that "any statements and reservations relating to the abocve-mentioned Convention that are incmopatible with or derogatory to the legitimate position of the Government of the Republic of China shall in no wa affect the rights and obligations of the Republic of China under this Convention".

Finally, upon depositing its instrument of accession, the Government of the People's Republic of China made the following declaration: The signing and ratification of the said Convention by the Taiwan authorities in the name of China are illegal and null and void.

[9] Czechoslovakia had signed and ratified the Convention on 7 October 1966 and 29 December 1966, respectively, with reservations. Subsequently, on 12 March 1984, the Government of Czechoslovakia made an objection to the ratification by Democratic Kampuchea. Further, by a notification received on 26 April 1991, the Government of Czechoslovakia notified the Secretary-General of its decision to withdraw the reservation to article 22 made upon signature and confirmed upon ratification. For the text of the reservations and the objection, see United Nations, *Treaty Series* , vol. 660, p. 276 and vol. 1350, p. 386, respectively. See also note 14 in this chapter and note 1 under “Czech Republic” and note 1 under “Slovakia” in the “Historical Information” section in the front matter of this volume.

[10] In a communication received on 4 October 1972, the Government of Denmark notified the Secretary-General that it withdrew the reservation made with regard to the implementation on the Faroe Islands of the Convention. For the text of the reservation see United Nations, *Treaty Series* , vol. 820, p. 457.

The legislation by which the Convention has been implemented on the Faroe Islands entered into force by 1 November 1972, from which date the withdrawal of the above reservation became effective.

[11] See note 1 under “Germany” regarding Berlin (West) in the “Historical Information” section (click on the tab "Status of Treaties" and then on "Historical Information").

[12] See note 1 under "Montenegro" in the "Historical Information" section (click on the tab "Status of Treaties" and then on "Historical Information").

[13] See note 1 under “Namibia” in the “Historical Information” section (click on the tab "Status of Treaties" and then on "Historical Information").

[14] See note 1 under "New Zealand" regarding Tokelau in the "Historical Information" section in the preliminary pages in the front matter of this volume.

[15] On 7 October 2016, the Government of Thailand notified the Secretary-General of the withdrawal of the reservation to article 4 made upon accession to the Convention. The text of the reservation read as follows:

"The Kingdom of Thailand interprets Article 4 of the Convention as requiring a party to the Convention to adopt measures in the fields covered by subparagraphs (a), (b) and (c) of that article only where it is considered that the need arises to enact such legislation."

[16] In its instrument of ratification, the Government of the United Kingdom specified that the ratification also applied to the following territories: Associated States (Antigua, Dominica, Grenada, Saint Christopher Nevis Anguilla and Saint Lucia) and Territories under the territorial sovereignty of the United Kingdom, as well as the State of Brunei, the Kingdom of Tonga and the British Solomon Islands Protectorate.

[17] The Yemen Arab Republic had acceded to the Convention on 6 April 1989 with the following reservation:

*Reservations in respect of article 5 (c) and article 5 (d) (iv), (vi) and (vii).*

In this regard, the Secretary-General received on 30 April 1990, from the Government of Czechoslovakia the following objection:

"The Czech and Slovak Federal Republic considers the reservations of the Government of Yemen with respect to article 5 (c) and articles 5 (d) (iv), (vi), and (vii) of [the Convention], as incompatible with the object and purpose of this Convention."

See also note 1 under “Yemen” in the “Historical Information” (click on the tab "Status of Treaties" and then on "Historical Information").

[18] In a communication received by the Secretary-General on 10 July 1969, the Government of Israel declared:

"[The Government of Israel] has noted the political character of the declaration made by the Government of Iraq on signing the above Convention.

In the view of the Government of Israel, the Convention is not the proper place for making such political pronouncements. The Government of Israel will, in so far as concerns the substance of the matter, adopt towards the Government of Iraq an attitude of complete reciprocity. Moreover, it is the view of the Government of Israel that no legal relevance can be attached to those Iraqi statements which purport to represent the views of the other States".

Except for the omission of the last sentence, identical communica- tions in essence, *mutatis mutandis* , were received by the Secretary-General from the Government of Israel as follows: on 29 December 1966 in respect of the declaration made by the Government of the United Arab Republic upon signature (see also note 17); on 16 August 1968 in respect of the declaration made by the Government of Libya upon accession; on 12 December 1968 in respect of the declaration made by the Government of Kuwait upon accession; on 9 July 1969 in respect of the declaration made by the Government of Syria upon accession; on 21 April 1970 made in respect of the declaration made by Government of Iraq upon ratification with the following statement: "With regard to the political declaration in the guise of a reservation made on the occasion of the ratification of the above Treaty, the Government of Israel wishes to refer to its objection circulated by the Secretary-General in his letter [. . .] and to maintain that objection."; on 12 February 1973 in respect of the declaration made by the Government of the People's Democratic Republic of Yemen upon accession; on 25 September 1974 in respect of the declaration made by the United Arab Emirates upon accession and on 25 June 1990 in rthe reservation made by Bahrain upon accession.

[19] On 8 July 2021, the Government of Bahrain notified the Secretary-General of its withdrawal of the following reservation made upon accession:

"[T]he accession by the State of Bahrain to the said Convention shall in no way constitute recognition of Israel or be a cause for the establishment of any relations of any kind therewith."

[20] In communications received on 8 March, 19 and 20 April 1989, the Governments of the Union of Soviet Socialist

Republics, the Byelorussian Soviet Socialist Republic and the Ukrainian Soviet Socialist Republic, respectively, notified the Secretary-General that they had decided to withdraw the reservations relating to article 22. For the texts of the reservations, see United Nations, *Treaty Series* , vol. 676, p. 397, vol. 81, p. 392 and vol.77, p. 435.

[21] On 24 June 1992, the Government of Bulgaria notified the Secretary-General its decision to withdraw the reservation to article 22 made upon signature and confirmed upon ratification. For the text of the reservation, see United Nations, *Treaty Series* , vol. 60, p. 270.

[22] None of the States concerned having objected to the reservation by the end of a period of ninety days after the date when it was circulated by the Secretary-General, the said reservation is deemed to have been permitted in accordance with the provisions of article 20 (1).

[23] In a notification received on 18 January 1980, the Government of Egypt informed the Secretary-General that it had decided to withdraw the declaration it had made in respect of Israel. For the text of the declaration see United Nations, *Treaty Series* , vol. 60, p. 318. The notification indicates 25 January 1980 as the effective date of the withdrawal.

[24] In a communication received in 10 August 2012, the Government of Fiji notified the Secretary-General of the withdrawal of the reservations and declarations made upon sucession to the Convention. The text of the reservations and declarations read as follows:

The reservation and declarations formulated by the Government of the United Kingdom on behalf of Fiji are affirmed but have been redrafted in the following terms:

"To the extent, if any, that any law relating to elections in Fiji may not fulfil the obligations referred to in article 5 (c), that any law relating to land in Fiji which prohibits or restricts the alienation of land by the indigenous inhabitants may not fulfil the obligations referred to in article 5 (d) (v), or that the school system of Fiji may not fulfil the obligations referred to in articles 2, 3, or 5 (e) (v), the Government of Fiji reserves the right not to implement the aforementioned provisions of the Convention.

"The Government of Fiji wishes to state its understanding of certain articles in the Convention. It interprets article 4 as requiring a party to the Convention to adopt further legislative measures in the fields covered by sub-paragraphs (a), (b) and (c) of that article only in so far as it may consider with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of the Convention (in particular the right to freedom of opinion and expression and the right to freedom of peaceful assembly and association) that some legislative addition to or variation of existing law and practice in those fields is necessary for the attainment of the end specified in the earlier part of Article 4.

Further, the Government of Fiji interprets the requirement in article 6 concerning `reparation or satisfaction' as being fulfilled if one or other of these forms of redress is made available and interprets `satisfaction' as including any form of redress effective to bring the discriminatory conduct to an and. In addition it interprets article 20 and the other related provisions of Part III of the Convention as meaning that if a reservation is not accepted the State making the reservation does not become a Party to the Convention.

"The Government of Fiji maintains the view that Article 15 is discriminatory in that it establishes a procedure for the receipt of petitions relating to dependent territories whilst making no comparable provision for States without such territories."

[25] In a communication received subsequently, the Government of France indicated that the first paragraph of the declaration did not purport to limit the obligations under the Convention in respect of the French Government, but only to record the latter's interpretation of article 4 of the Convention.

[26] The Secretary-General received on 7 August 2013 the following communication from the Government of the French Republic:

The Government of the French Republic has examined the declaration formulated by the Government of Grenada at the time of the deposit of its instrument of ratification of the International Convention on the Elimination of All Forms of Racial Discrimination of 7 March 1966. The Government of the French Republic takes note of this ratification. It regrets, however, that the declaration made by Grenada, which constitutes a reservation, gives rise to a restriction on the international obligations accepted by Grenada under the Convention and to legal uncertainty. The reservation has indeed a general and indeterminate scope, since its aim is to subordinate the implementation of Grenada’s obligations under the Convention to respect for its domestic law, with no indication of which provisions are concerned. The States Parties to the Convention cannot, therefore, assess the scope of the reservation. By the present declaration, however, the Government of the French Republic does not oppose Grenada becoming a party to the Convention.

[27] In a communication received on 13 September 1989, the Government of Hungary notified the Secretary-General that it had decided to withdraw the reservation in respect to article 22 of the Convention made upon ratification. For the text of the reservation, see United Nations, *Treaty Series* , vol. 60, p. 310.

[28] In a communication received on 24 February 1969, the Government of Pakistan notified the Secretary-General that it "has decided not to accept the reservation made by the Government of India in her instrument of ratification".

[29] In a communication received on 19 July 1990, the Government of Mongolia notified the Secretary-General of its decision to withdraw the reservation concerning article 22 made upon ratification. For the text of the reservation see United Nations, *Treaty Series* , vol. 60, p. 289.

[30] On 16 October 1997, the Government of Poland notified the Secretary-General that it had decided to withdraw its reservation with regard to article 22 of the Convention made

upon ratification. For the text of the reservation see United Nations, *Treaty Series* , vol. 660, p. 195.

[31] On 19 August 1998, the Government of Romania notified the Secretary-General that it had decided to withdraw its reservation made with regard to article 22 of the Convention made upon accession. For the text of the reservation, see United Nations, *Treaty Series* , vol. 763, p. 362.

[32] In a communication received in 15 December 2008, the Government of Rwanda notified the Secretary-General of the withdrawal of the reservation made upon accession to the Convention. The text of the reservation reads as follows:

The Rwandese Republic does not consider itself as bound by article 22 of the Convention.

[33] On 22 October 1999, the Government of Spain informed the Secretary-General that it had decided to withdraw its reservation in respect of article XXII made upon accession. For the texte of the reservation, see United Nations, *Treaty Series* , vol. 660, p. 316.

[34] By a notification received on 28 October 1977, the Government of Tonga informed the Secretary-General that it has decided to withdraw only those reservations made upon accession relating to article 5 (c) in so far as it relates to elections, and reservations relating to articles 2, 3 and 5 (e) (v), in so far as these articles relate to education and training. For the text of the original reservation see United Nations, *Treaty Series* , vol. 829, p. 371.

[35] The first ten declarations recognizing the competence of the Committee on the Elimination of Racial Discrimination took effect on 3 December 1982, date of the deposit of the tenth declaration, according to article 14, paragraph 1 of the Convention.