Annex 72

PCA Case No. 2017-06

IN THE MATTER OF AN ARBITRATION

- before -

AN ARBITRAL TRIBUNAL CONSTITUTED UNDER ANNEX VII TO THE 1982 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

- between -

UKRAINE

- and -

THE RUSSIAN FEDERATION

- in respect of -

Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait

---

AWARD CONCERNING THE PRELIMINARY OBJECTIONS OF THE RUSSIAN FEDERATION

21 February 2020

ARBITRAL TRIBUNAL:

Judge Jin-Hyun Paik (President)
Judge Boualem Bouguetaia
Judge Alonso Gómez-Robledo
Judge Vladimir Golitsyn
Professor Vaughan Lowe QC

REGISTRY:

Permanent Court of Arbitration

TABLE OF CONTENTS

I. PROCEDURAL HISTORY 1

A. INTRODUCTION 1

B. INSTITUTION OF THE PROCEEDINGS 2

C. CONSTITUTION OF THE ARBITRAL TRIBUNAL AND INITIAL PROCEDURAL DECISIONS 4

D. SUBMISSION OF UKRAINE'S MEMORIAL 5

E. SUBMISSION OF THE PRELIMINARY OBJECTIONS OF THE RUSSIAN FEDERATION AND WRITTEN PLEADINGS RELATED THERETO 7

F. HEARING CONCERNING THE RUSSIAN FEDERATION'S PRELIMINARY OBJECTIONS 8

II. THE PARTIES' SUBMISSIONS ON JURISDICTION AND ADMISSIBILITY 12

A. SUBMISSIONS OF THE RUSSIAN FEDERATION 12

B. SUBMISSIONS OF UKRAINE 13

III. BASIS OF THE ARBITRAL TRIBUNAL'S JURISDICTION 13

IV. THE RUSSIAN FEDERATION'S OBJECTION THAT THE ARBITRAL TRIBUNAL HAS NO JURISDICTION OVER UKRAINE'S SOVEREIGNTY CLAIM 15

A. CHARACTERISATION OF THE DISPUTE BEFORE THE ARBITRAL TRIBUNAL 15

1. Position of the Russian Federation 15

2. Position of Ukraine 20

B. SCOPE OF THE JURISDICTION OF THE ARBITRAL TRIBUNAL UNDER ARTICLES 286 AND 288 OF THE CONVENTION 21

1. Position of the Russian Federation 21

2. Position of Ukraine 23

C. EXISTENCE *VEL NON* OF A SOVEREIGNTY DISPUTE OVER CRIMEA 25

1. General Argument 25

(a) Position of the Russian Federation 25

(b) Position of Ukraine 26

2. Inadmissibility 27

(a) Position of the Russian Federation 27

(b) Position of Ukraine 31

3. Implausibility 34

(a) Position of the Russian Federation 34

(b) Position of Ukraine 36

4. The Relative Weight of the Dispute 39

(a) Position of the Russian Federation 39

(b) Position of Ukraine 42

D. REPLY TO THE ARBITRAL TRIBUNAL'S QUESTIONS 45

1. Reply of the Russian Federation 45

2. Reply of Ukraine 46

E. ANALYSIS OF THE ARBITRAL TRIBUNAL 47

1. Nature or Characterisation of the Dispute before the Arbitral Tribunal 47

2. Scope of the Jurisdiction of the Arbitral Tribunal under Article 288(1) of the Convention 48

3. Existence *vel non* of a Sovereignty Dispute over Crimea 50

(a) General Considerations 50

(b) Inadmissibility 51

(c) Implausibility 56

(d) Relative Weight of the Dispute 58

4. Conclusion 59

V. THE RUSSIAN FEDERATION'S OBJECTION THAT THE ARBITRAL TRIBUNAL HAS NO JURISDICTION OVER CLAIMS CONCERNING ACTIVITIES IN THE SEA OF AZOV AND IN THE KERCH STRAIT 59

A. STATUS OF THE SEA OF AZOV AND THE KERCH STRAIT BEFORE 1991 AND DEVELOPMENTS FOLLOWING THE DISSOLUTION OF THE USSR 60

1. Position of the Russian Federation 60

2. Position of Ukraine 64

B. POSITIONS AND PRACTICE OF THE PARTIES REGARDING THE STATUS OF THE SEA OF AZOV AND THE KERCH STRAIT 66

1. Position of the Russian Federation 66

2. Position of Ukraine 69

C. RIGHTS OF THIRD STATES 74

1. Position of the Russian Federation 74

2. Position of Ukraine 74

D. RELEVANCE OF THE SIZE OF THE SEA OF AZOV 76

1. Position of the Russian Federation 76

2. Position of Ukraine 77

E. HISTORIC TITLE ARGUMENT 79

1. Position of the Russian Federation 79

2. Position of Ukraine 80

F. APPLICABILITY OF UNCLOS TO THE WATERS OF THE SEA OF AZOV AND THE KERCH STRAIT 80

1. Position of the Russian Federation 80

2. Position of Ukraine 81

G. EXCLUSIVELY PRELIMINARY CHARACTER OF THE OBJECTION 82

1. Position of the Russian Federation 82

2. Position of Ukraine 83

H. ANALYSIS OF THE ARBITRAL TRIBUNAL 84

VI. THE RUSSIAN FEDERATION'S OBJECTION THAT THE ARBITRAL TRIBUNAL HAS NO JURISDICTION IN LIGHT OF THE PARTIES' DECLARATIONS UNDER ARTICLE 298(1) OF THE CONVENTION 87

A. MILITARY ACTIVITIES EXCEPTION 88

1. **Position of the Russian Federation** **88**
2. **Position of Ukraine** **91**
3. **Analysis of the Arbitral Tribunal** **95**

B. LAW ENFORCEMENT ACTIVITIES EXCEPTION **99**
1. **Position of the Russian Federation** **99**
2. **Position of Ukraine** **101**
3. **Analysis of the Arbitral Tribunal** **102**

C. DELIMITATION EXCEPTION **104**
1. **Position of the Russian Federation** **104**
2. **Position of Ukraine** **107**
3. **Analysis of the Arbitral Tribunal** **109**

D. HISTORIC BAYS OR TITLES EXCEPTION **111**
1. **Position of the Russian Federation** **111**
2. **Position of Ukraine** **112**
3. **Analysis of the Arbitral Tribunal** **112**

VII. THE RUSSIAN FEDERATION'S OBJECTION THAT THE ARBITRAL TRIBUNAL HAS NO JURISDICTION OVER FISHERIES CLAIMS IN LIGHT OF ARTICLE 297(3)(A) OF THE CONVENTION **113**

A. POSITION OF THE RUSSIAN FEDERATION **113**
B. POSITION OF UKRAINE **115**
C. ANALYSIS OF THE ARBITRAL TRIBUNAL **116**

VIII. THE RUSSIAN FEDERATION'S OBJECTION THAT THE ARBITRAL TRIBUNAL HAS NO JURISDICTION OVER FISHERIES, PROTECTION AND PRESERVATION OF THE MARINE ENVIRONMENT, AND NAVIGATION IN LIGHT OF ANNEX VIII **117**

A. POSITION OF THE RUSSIAN FEDERATION **118**
B. POSITION OF UKRAINE **121**
C. ANALYSIS OF THE ARBITRAL TRIBUNAL **125**

IX. THE RUSSIAN FEDERATION'S OBJECTION THAT THE ARBITRAL TRIBUNAL HAS NO JURISDICTION PURSUANT TO ARTICLE 281 OF THE CONVENTION **127**

A. POSITION OF THE RUSSIAN FEDERATION **128**
B. POSITION OF UKRAINE **133**
C. ANALYSIS OF THE ARBITRAL TRIBUNAL **136**

X. DISPOSITIF **142**

GLOSSARY OF DEFINED TERMS / LIST OF ABBREVIATIONS

Azov/Kerch Cooperation Treaty	Treaty between the Russian Federation and Ukraine on Cooperation in the Use of the Sea of Azov and the Kerch Strait, done at Kerch on 24 December 2003
Convention *or* **UNCLOS**	United Nations Convention on the Law of the Sea, done at Montego Bay on 10 December 1982
Four Categories	The four categories of disputes enumerated in Annex VIII, Article 1, of the Convention
Geneva Convention	Convention on the Territorial Sea and the Contiguous Zone, done at Geneva on 29 April 1958
Hearing	Hearing on preliminary objections held from 10 to 14 June 2019 at the headquarters of the PCA at the Peace Palace in The Hague, the Netherlands
ICJ	International Court of Justice
ILC Articles on State Responsibility	International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts
ITLOS	International Tribunal for the Law of the Sea
Joint Statement	Joint Statement by the President of the Russian Federation and the President of Ukraine on the Sea of Azov and the Kerch Strait, dated 24 December 2003
Notification and Statement of Claim	Notification under Article 287 and Annex VII, Article 1 of UNCLOS and Statement of Claim and Grounds on Which it is Based of Ukraine, dated 14 September 2016
PCA	Permanent Court of Arbitration
Russian Federation's Reply	Reply to the Written Observations and Submissions of Ukraine on Jurisdiction, dated 28 January 2019
Rules of Procedure	Rules of Procedure for the Arbitration adopted by the Arbitral Tribunal, dated 18 May 2017
Russian Federation's Preliminary Objections	Preliminary Objections of the Russian Federation, dated 19 May 2018
State Border Treaty	Treaty Between the Russian Federation and Ukraine on the Russian-Ukrainian State Border, done at Kiev on 28 January 2003
Ukraine's Memorial	Memorial of Ukraine, dated 19 February 2018
Ukraine's Rejoinder	Rejoinder of Ukraine on Jurisdiction, dated 28 March 2019

Ukraine's Written Observations	Written Observations and Submissions of Ukraine on Jurisdiction, dated 27 November 2018
UNGA	United Nations General Assembly
USSR	Union of Soviet Socialist Republics

Appointed Agents and Counsel
(as Notified by the Parties)

Agent of Ukraine

H.E. Ms. Olena Zerkal
Deputy Foreign Minister for Foreign Affairs of Ukraine

Co-Agent of Ukraine

H.E. Mr. Vsevolod Chentsov
(as of 7 June 2019)
Ambassador Extraordinary and Plenipotentiary of Ukraine to the Kingdom of the Netherlands

Agent of the Russian Federation

H.E. Mr. Dmitry Lobach
(as of 10 October 2017)
Ambassador-at-large, Ministry of Foreign Affairs of the Russian Federation

H.E. Mr. Roman A. Kolodkin
(until 28 September 2017)
Director, Legal Department, Ministry of Foreign Affairs of the Russian Federation

Counsel of Ukraine

Ms. Marney L. Cheek
Covington & Burling LLP; member of the Bar of the District of Columbia

Mr. Jonathan Gimblett
Covington & Burling LLP; member of the Bars of the District of Columbia and Virginia

Mr. David M. Zionts
Covington & Burling LLP; member of the Bars of the Supreme Court of the United States and the District of Columbia

Mr. Nikhil V. Gore
Covington & Burling LLP; member of the Bars of the District of Columbia, Massachusetts and New York

Professor Harold Hongju Koh
(as of 30 January 2018)
Sterling Professor of International Law, Yale Law School; member of the Bars of New York and the District of Columbia

Counsel of the Russian Federation

Professor Alain Pellet
Emeritus Professor, University of Paris Nanterre; former Chairperson, International Law Commission; member, Institut de Droit International

Professor Tullio Treves
Emeritus Professor, University of Milan; Senior International Consultant, Curtis Mallet-Prevost, Colt & Mosle LLP; member, Institut de Droit International

Mr. Sergey Usoskin
Member of the Saint Petersburg Bar

Mr. Samuel Wordsworth, QC
Essex Court Chambers; member of the English Bar, member of the Paris Bar

Mr. Vasily Torkanovsky
Partner, Ivanyan & Partners; member of the Saint Petersburg Bar

Ms. Maria Suchkova (until 18 January 2018)
Partner, Ivanyan & Partners; member of the Saint Petersburg Bar

Professor Alfred H.A. Soons
(as of 30 January 2018)
Emeritus Professor, Utrecht University School of Law; associate member, Institut de Droit International

Professor Jean-Marc Thouvenin
(as of 30 January 2018)
Professor, University of Paris Nanterre; Secretary-General, Hague Academy of International Law; Sygna Partners; member of the Paris Bar

Ms. Amy Sander (as of 10 January 2018)
Essex Court Chambers; member of the English Bar

Mr. Renato Raymundo Treves
(as of 18 January 2018)
Associate, Curtis, Mallet-Prevost, Colt & Mosle LLP; member of the New York State Bar and Milan Bar

ADVISERS OF THE RUSSIAN FEDERATION

Ms. Tessa Barsac (as of 18 January 2018)
Consultant in international law

Ms. Svetlana Shatalova (as of 18 January 2018)
First Secretary, Legal Department, Ministry of Foreign Affairs of the Russian Federation

Ms. Ksenia Galkina (as of 13 September 2018)
Third Secretary, Legal Department, Ministry of Foreign Affairs of the Russian Federation

I. PROCEDURAL HISTORY

A. INTRODUCTION

1. Ukraine and the Russian Federation are States Parties to the United Nations Convention on the Law of the Sea (hereinafter the "Convention" or "UNCLOS"), having ratified the Convention on 26 July 1999 and 12 March 1997, respectively.

2. The present case has arisen in the wake of events that occurred in 2014 in Crimea, a peninsula surrounded by the Black Sea to the west and south, and the Sea of Azov to the northeast. The Black Sea and the Sea of Azov are connected by the Kerch Strait. In their pleadings, the Parties characterise these events in different ways.

3. Ukraine takes the view that, in 2014, "the Russian Federation invaded and occupied the Crimean Peninsula, and then purported to annex it."[1]

4. The Russian Federation "categorically denies" such allegations.[2] Instead, the Russian Federation points out that a "referendum on the future of the [Crimean] peninsula"[3] was held on 16 March 2014 in response to a "*coup d'état* in Kiev in February 2014," which "provoked deep division in the Ukrainian society."[4] The Russian Federation states that since "the majority of voters [...] opted for reunification with [the Russian Federation]," "Crimea declared its independence on 17 March 2014 and on 18 March it concluded an international treaty on accession to [the Russian Federation]."[5]

5. The Russian Federation adds that following Crimea's accession, it "assumed all the rights and duties of the coastal State in relation to the waters adjacent to the peninsula" and that "[i]nternationally, Russia unconditionally affirmed its status as a coastal State in relation to waters surrounding Crimea."[6]

---

1 Memorial of Ukraine (hereinafter "Ukraine's Memorial"), 19 February 2018, para. 102.
2 Preliminary Objections of the Russian Federation (hereinafter "Russian Federation's Preliminary Objections"), 19 May 2018, para. 10.
3 Russian Federation's Preliminary Objections, para. 11.
4 Russian Federation's Preliminary Objections, paras 10-11.
5 Russian Federation's Preliminary Objections, para. 11.
6 Russian Federation's Preliminary Objections, para. 12.

6. Ukraine denies that those events have the legal character and effect attributed to them by the Russian Federation.[7] According to Ukraine, the referendum of 16 March 2014 "was held on Ukrainian territory in violation of Ukrainian law."[8] Ukraine states that it occurred in the aftermath of "Russia's unlawful use of force in Ukraine,"[9] and that the Russian Federation's actions "have been rejected as unlawful and invalid by the international community."[10] In particular, Ukraine points out that the United Nations General Assembly, on 27 March 2014, adopted a resolution in which it, *inter alia*, underscored that the above referendum had "no validity" and "cannot form the basis for any alteration of the status of the Autonomous Republic of Crimea or of the city of Sevastopol."[11]

7. In the present Arbitration, Ukraine alleges that various "unauthorized activities" of the Russian Federation occurring subsequently to these events "violate Ukraine's rights under the United Nations Convention on the Law of the Sea of 10 December 1982."[12]

B. INSTITUTION OF THE PROCEEDINGS

8. This Arbitration was instituted by Ukraine on 16 September 2016 when it served on the Russian Federation a Notification under Article 287 and Annex VII, Article 1 of UNCLOS and Statement of the Claim and Grounds on which it is Based, dated 14 September 2016 (hereinafter the "Notification and Statement of Claim"), in respect of a "Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait."

9. In its Notification and Statement of Claim, Ukraine requested the Arbitral Tribunal to adjudge and declare the following:

> a. Ukraine has the exclusive right to engage in, authorize, and regulate exploration and exploitation of natural resources, including drilling related to hydrocarbons, in the areas of the Black Sea and Sea of Azov where the Russian Federation did not challenge Ukraine's jurisdiction and rights prior to February 2014; any such activities engaged in or authorized by the Russian Federation in those areas are not compatible with the Convention and constitute internationally wrongful acts for which the Russian Federation bears international responsibility;
>
> b. The Russian Federation's Federal Law 161-FZ of 29 June 2015, and the Decree of 31 August 2015 (#916), are not compatible with the Convention and constitute

---

[7] Written Observations and Submissions of Ukraine on Jurisdiction (hereinafter "Ukraine's Written Observations"), 27 November 2018, para. 6.

[8] Ukraine's Written Observations, para. 6.

[9] Ukraine's Written Observations, para. 6.

[10] Ukraine's Memorial, para. 102.

[11] Ukraine's Written Observations, para. 27 *citing* United Nations General Assembly Resolution 68/262, U.N. Doc. No. A/RES/68/262 (27 March 2014), para. 5 (**Annex UA-129**).

[12] Notification under Article 287 and Annex VII, Article 1 of UNCLOS and Statement of Claim and Grounds on Which it is Based (hereinafter "Notification and Statement of Claim"), 14 September 2016, para. 1.

internationally wrongful acts for which the Russian Federation bears international responsibility;

c. Ukraine has the exclusive right to authorize and regulate fishing in the areas of the Black Sea and Sea of Azov where the Russian Federation did not challenge Ukraine's jurisdiction and rights prior to February 2014; any fishing activities engaged in or authorized by the Russian Federation in those areas are not compatible with the Convention and constitute internationally wrongful acts for which the Russian Federation bears international responsibility;

d. The Russian Federation shall refrain from preventing Ukrainian vessels from exploiting in a sustainable manner the living resources in the areas of the Black Sea and Sea of Azov where the Russian Federation did not challenge Ukraine's jurisdiction and rights prior to February 2014; any efforts by the Russian Federation to interfere with Ukrainian vessels in these areas are not compatible with the Convention and constitute internationally wrongful acts for which the Russian Federation bears international responsibility;

e. Order #273 of the Ministry of Agriculture of the Russian Federation is not compatible with the Convention and constitutes an internationally wrongful act for which the Russian Federation bears international responsibility;

f. Ukraine has the right to passage through the Kerch Strait; any restrictions placed by the Russian Federation on Ukrainian transit through the Kerch Strait is not compatible with the Convention and constitutes an internationally wrongful act for which the Russian Federation bears international responsibility;

g. The Russian Federation shall cooperate with Ukraine in the regulation of the Kerch Strait, including pilotage along the canal in the Kerch Strait; the Russian Federation's failure to cooperate is not compatible with the Convention and constitutes an internationally wrongful act for which the Russian Federation bears international responsibility;

h. The Russian Federation may not lay a submarine cable, construct a bridge, or construct a pipeline through and across the Kerch Strait from Russian territory to the Crimean Peninsula without Ukraine's consent; any such activities engaged in or authorized by the Russian Federation are not compatible with the Convention and constitute internationally wrongful acts for which the Russian Federation bears international responsibility;

i. The Russian Federation is required to provide all due cooperation to Ukraine in the prevention and preservation of the marine environment, including supplying information relating to any oil spill or other pollution incident in the areas of the Black Sea and Sea of Azov where the Russian Federation did not challenge Ukraine's jurisdiction and rights prior to February 2014, including the reported oil spill in the Black Sea near Sevastopol in May 2016;

j. The Russian Federation may not without Ukraine's consent and cooperation remove from the seabed or otherwise disrupt or disturb archaeological, historical, or cultural objects or heritage found in Ukraine's territorial sea and contiguous zone, including the sunken Byzantine ship located in the Black Sea near Sevastopol and any artifacts associated with it; any such activities engaged in or authorized by the Russian Federation in those areas are not compatible with the Convention and constitute internationally wrongful acts for which the Russian Federation bears international responsibility.[13]

10. Ukraine further requested the Arbitral Tribunal to "order the Russian Federation to immediately cease its internationally wrongful actions in the Black Sea, Sea of Azov, and Kerch Strait, and

[13] Ukraine's Notification and Statement of Claim, para. 50.

provide Ukraine with appropriate assurances and guarantees of non-repetition of all internationally wrongful acts found by the tribunal"[14] and to "order the Russian Federation to make full reparation to Ukraine for the injury caused by its internationally wrongful actions in the Black Sea, Sea of Azov, and Kerch Strait, including both restitution and monetary compensation in amounts to be set out in detail in Ukraine's written pleadings."[15]

C. Constitution of the Arbitral Tribunal and Initial Procedural Decisions

11. In its Notification and Statement of Claim, Ukraine appointed Professor Vaughan Lowe QC as member of the Arbitral Tribunal.

12. By *note verbale* dated 12 October 2016, the Russian Federation appointed H.E. Judge Vladimir Vladimirovich Golitsyn as member of the Arbitral Tribunal.

13. Since the Parties were unable to reach agreement within 60 days of receipt by the Russian Federation of the Notification and Statement of Claim on the appointment of the remaining members of the Arbitral Tribunal, on 29 November 2016, Ukraine requested that the Vice-President of the International Tribunal for the Law of the Sea (hereinafter "ITLOS") make the appointments pursuant to Annex VII, Article 3, subparagraph (d), of the Convention. On 22 December 2016, H.E. Judge Jin-Hyun Paik, H.E. Judge Boualem Bouguetaia, and H.E. Judge Alonso Gómez-Robledo were appointed as members of the Arbitral Tribunal, and H.E. Judge Jin-Hyun Paik was appointed as President of the Arbitral Tribunal.

14. On 12 May 2017, the first procedural meeting with the Arbitral Tribunal and the Parties was held at the headquarters of the Permanent Court of Arbitration (hereinafter the "PCA") at the Peace Palace in The Hague, the Netherlands. At that meeting, the procedure to be followed in the Arbitration was considered.

15. On 18 May 2017, the Arbitral Tribunal with the concurrence of the Parties adopted Procedural Order No. 1, setting forth the Terms of Appointment of the Arbitral Tribunal, as well as the Rules of Procedure for the Arbitration (hereinafter the "Rules of Procedure").[16] The Rules of Procedure, *inter alia*, established a timetable for written pleadings and set out the procedure for addressing any preliminary objections.

---

[14] Ukraine's Notification and Statement of Claim, para. 51.
[15] Ukraine's Notification and Statement of Claim, para. 52.
[16] Rules of Procedure adopted by the Arbitral Tribunal on 18 May 2017.

16. On 18 January 2018, the Arbitral Tribunal, having ascertained the views of the Parties, adopted Procedural Order No. 2 on Confidentiality, addressing, *inter alia*, the definition and treatment of confidential information and restricted information in the context of the present proceedings.

D. SUBMISSION OF UKRAINE'S MEMORIAL

17. On 19 February 2018, Ukraine submitted its Memorial (hereinafter "Ukraine's Memorial"), in accordance with Article 13 of the Rules of Procedure. In its Memorial, Ukraine requested the Arbitral Tribunal to adjudge and declare that:

    a. The Russian Federation has violated Article 2 of the Convention by excluding Ukraine from accessing gas fields in its territorial sea, extracting gas found in such fields, and usurping Ukraine's exclusive jurisdiction over the hydrocarbons in such fields.

    b. The Russian Federation has violated Articles 56 and 77 of the Convention by excluding Ukraine from accessing gas fields in its exclusive economic zone and continental shelf, exploring such gas fields, extracting gas found in such fields, and usurping Ukraine's exclusive jurisdiction over the hydrocarbons in such fields.

    c. The Russian Federation has violated Articles 2, 56, and 77 by causing proprietary data on the hydrocarbon resources of Ukraine's territorial sea, exclusive economic zone, and continental shelf to be transferred to Russia and to Russian entities.

    d. The Russian Federation has violated Articles 2, 56, 58, 77, and 92 of the Convention by unlawfully interfering with Ukraine's exclusive jurisdiction over, and unlawfully taking possession of, Ukrainian-flagged CNG-UA vessels, including mobile jack-up drilling rigs in Ukraine's territorial sea, exclusive economic zone, and continental shelf.

    e. The Russian Federation has violated Articles 2, 56, 60, and 77 of the Convention by unlawfully interfering with Ukraine's exclusive jurisdiction over, and unlawfully taking possession of, fixed platforms on Ukraine's territorial sea, exclusive economic zone, and continental shelf.

    f. The Russian Federation has violated Articles 2 and 21 of the Convention by excluding Ukraine from accessing fisheries within 12 miles of the Ukrainian coastline, by exploiting such fisheries, and by usurping Ukraine's exclusive jurisdiction over the living resources of its territorial sea.

    g. The Russian Federation has violated Articles 56, 58, 61, 62, 73, and 92 of the Convention by excluding Ukraine from accessing fisheries within its exclusive economic zone, by exploiting such fisheries, and by usurping Ukraine's exclusive jurisdiction over the living resources of its exclusive economic zone.

    h. The Russian Federation has violated Articles 2, 56, 58, 77, and 92 of the Convention by unlawfully interfering with Ukraine's exclusive jurisdiction over Ukrainian-flagged fishing vessels in Ukraine's territorial sea, exclusive economic zone, and continental shelf.

    i. The Russian Federation has violated Articles 2, 21, 33, 56, 58, 73, and 92 of the Convention by unlawfully interfering with the navigation of Ukrainian Sea Guard vessels through Ukraine's territorial sea and exclusive economic zone.

    j. The Russian Federation has violated Article 2 of the Convention through its unauthorized and unilateral construction of submarine power cables across the Kerch Strait.

k. The Russian Federation has violated Article 2 of the Convention through its unauthorized and unilateral construction of a submarine gas pipeline across the Kerch Strait.

l. The Russian Federation has violated Article 2 of the Convention through its unauthorized and unilateral construction of the Kerch Strait bridge.

m. The Russian Federation has violated Articles 38 and 44 of the Convention by impeding transit passage through the Kerch Strait as a result of the Kerch Strait bridge.

n. The Russian Federation has violated Articles 43 and 44 of the Convention by failing to share information with Ukraine concerning the risks and impediments to navigation presented by the Kerch Strait bridge.

o. The Russian Federation has violated Articles 123, 192, 194, 204, 205, and 206 of the Convention by failing to cooperate and share information with Ukraine concerning the environmental impact of the Kerch Strait bridge.

p. The Russian Federation has violated Articles 123, 192, 194, 198, 199, 204, 205, and 206 of the Convention by failing to cooperate with Ukraine concerning the May 2016 oil spill off the coast of Sevastopol.

q. The Russian Federation has violated Article 2 of the Convention by interfering with Ukraine's attempts to protect archaeological and historical objects in its territorial sea and by usurping Ukraine's right to regulate with regard to such archaeological and historical objects.

r. The Russian Federation has violated Article 303 of the Convention by unlawfully interfering with Ukraine's exercise of jurisdiction in its contiguous zone and preventing the removal of archaeological and historical objects from the seabed of its contiguous zone.

s. The Russian Federation has violated Article 303 of the Convention by failing to cooperate with Ukraine concerning archaeological and historical objects found at sea.

t. The Russian Federation has violated Article 279 of the Convention by aggravating and extending the dispute between the parties since the commencement of this arbitration in September 2016, including by completing construction of the Kerch Strait bridge, expanding its hydrocarbon and fisheries activities in Ukraine's territorial sea, exclusive economic zone, and continental shelf, and continuing to disturb and remove archaeological artifacts found in Ukraine's territorial sea and contiguous zone.[17]

18. On this basis, Ukraine requested the Arbitral Tribunal to order the Russian Federation to:

Cessation and Restitutio in Integrum

a. Cease each of the above violations of the Convention, including by: withdrawing its vessels and personnel from Ukraine's territorial sea, exclusive economic zone, and continental shelf; returning all seized Ukrainian vessels and platforms to Ukraine; returning all proprietary information on Ukrainian hydrocarbon reserves and destroying all copies of such information; and ending its purported exercise of prescriptive jurisdiction over the living and non-living resources found in zones within which the Convention guarantees to Ukraine exclusive jurisdiction over such resources—*i.e.*, its territorial sea, exclusive economic zone, and continental shelf.

b. Share with Ukraine information on the structure and environmental impact of the Kerch Strait bridge, cooperate in good faith with Ukraine to determine mutually agreeable modifications to the Kerch Strait bridge, and apprise the Tribunal on the progress of such cooperation six months after the date of the Tribunal's Award, so that Ukraine can request further relief as necessary to remedy Russia's violations.

[17] Ukraine's Memorial, para. 265.

c. Provide Ukraine with all information the Russian Federation possesses on the May 2016 oil spill near Sevastopol, including its cause and all steps taken to mitigate its harm to the environment

d. Share with Ukraine information on the location of all objects of an archaeological and historical nature that the Russian Federation or its licensees have discovered or surveyed in the seas within 24 nautical miles of Ukraine's declared baselines around the Crimean coast; restore to Ukraine all archaeological objects that it has removed from Ukraine's territorial sea and contiguous zone; and refrain from any future disturbance of, or licensing of third parties to disturb, any such objects found in Ukraine's territorial sea and contiguous zone.

Assurances and Guarantees of Non-Repetition

e. Provide Ukraine with appropriate public assurances and guarantees of non-repetition with respect to Russia's interference with Ukraine's sovereignty and sovereign rights over the living and non-living resources of Ukraine's territorial sea, exclusive economic zone, and continental shelf, including that Russia will not harass or interfere with individuals or entities licensed by Ukraine to fish or to explore or exploit hydrocarbon resources.

f. Provide Ukraine with appropriate public assurances and guarantees of non-repetition with respect to Russia's hindrance of transit passage through the Kerch Strait.

Compensation and Accounting

g. Provide Ukraine with a complete accounting of the non-living resources extracted from Ukraine's territorial sea, exclusive economic zone, and continental shelf.

h. Provide Ukraine with a complete accounting of the living resources taken from Ukraine's territorial sea, exclusive economic zone, and continental shelf.

i. Pay Ukraine financial compensation of US$ 1.94 billion, plus pre- and post-award interest, reflecting the value of Russia's publicly announced hydrocarbon extraction from Ukraine's territorial sea, exclusive economic zone, and continental shelf.

j. Pay Ukraine further financial compensation for all other non-living and living resources taken from Ukraine's territorial sea, exclusive economic zone, and continental shelf.

k. Pay moral damages to Ukraine in an amount deemed appropriate by the Tribunal.[18]

E. SUBMISSION OF THE PRELIMINARY OBJECTIONS OF THE RUSSIAN FEDERATION AND WRITTEN PLEADINGS RELATED THERETO

19. On 21 May 2018, the Russian Federation submitted to the Arbitral Tribunal the "Preliminary Objections of the Russian Federation" dated 19 May 2018 (hereinafter the "Russian Federation's Preliminary Objections") in accordance with Article 10, paragraph 2, of the Rules of Procedure.[19] The Russian Federation requested that its Preliminary Objections be heard in a preliminary phase of the proceedings.

[18] Ukraine's Memorial, para. 266.

[19] 19 May 2018 being a Saturday, the period for submission of the plea was extended until the first work day which followed, being Monday, 21 May 2018, in accordance with Article 2, paragraph 2, of the Rules of Procedure.

20. On 28 May 2018, the Arbitral Tribunal invited Ukraine to comment on the Russian Federation's request to address its Preliminary Objections in a preliminary phase. Ukraine provided such comments on 18 June 2018.

21. On 20 June 2018, the Arbitral Tribunal invited the Russian Federation to reply to Ukraine's comments of 18 June 2018. The Russian Federation provided such reply on 4 July 2018.

22. On 20 August 2018, the Arbitral Tribunal issued Procedural Order No. 3 Regarding Bifurcation of the Proceedings. The Arbitral Tribunal unanimously decided:

> 1. The Arbitral Tribunal considers that the Preliminary Objections of the Russian Federation appear at this stage to be of a character that requires them to be examined in a preliminary phase, and accordingly decides that the Preliminary Objections of the Russian Federation shall be addressed in a preliminary phase of these proceedings.
>
> 2. If the Arbitral Tribunal determines after the closure of the preliminary phase of the proceedings that there are Preliminary Objections that do not possess an exclusively preliminary character, then, in accordance with Article 10, paragraph 8, of the Rules of Procedure, such matters shall be reserved for consideration and decision in the context of the proceedings on the merits.
>
> [...]

The proceedings on the merits were accordingly suspended.

23. On 27 August 2018, having ascertained the views of the Parties, the Arbitral Tribunal issued Procedural Order No. 4 Regarding the Timetable for the Parties' Written Pleadings on Jurisdiction, establishing such timetable in accordance with Article 10, paragraph 5, of the Rules of Procedure.

24. With respect to the Russian Federation's Preliminary Objections, on 27 November 2018, Ukraine submitted its Written Observations and Submissions on Jurisdiction (hereinafter "Ukraine's Written Observations").

25. On 28 January 2019, the Russian Federation submitted its Reply to the Written Observations and Submissions of Ukraine on Jurisdiction (hereinafter the "Russian Federation's Reply").

26. On 28 March 2019, Ukraine submitted its Rejoinder on Jurisdiction (hereinafter "Ukraine's Rejoinder").

F. HEARING CONCERNING THE RUSSIAN FEDERATION'S PRELIMINARY OBJECTIONS

27. On 8 April 2019, the Arbitral Tribunal, having ascertained the views of the Parties, issued Procedural Order No. 5 Regarding the Schedule for the Hearing on Jurisdiction.

28. From 10 to 14 June 2019, a hearing on Preliminary Objections (hereinafter the "Hearing") was held at the headquarters of the PCA at the Peace Palace in The Hague, the Netherlands. The Hearing consisted of two rounds of oral argument, held on 10 and 11 June 2019 and 13 and 14 June 2019. The following persons were present at the Hearing:

The Arbitral Tribunal

Judge Jin-Hyun Paik, President
Judge Boualem Bouguetaia
Judge Alonso Gómez-Robledo
Judge Vladimir Golitsyn
Professor Vaughan Lowe QC

Ukraine

H.E. Ms. Olena Zerkal
Deputy Minister for Foreign Affairs of Ukraine
as Agent

H.E. Mr. Vsevolod Chentsov
Ambassador Extraordinary and Plenipotentiary of Ukraine to the Kingdom of the Netherlands
as Co-Agent

Ms. Marney L. Cheek
Covington & Burling LLP; member of the Bar of the District of Columbia
Mr. Jonathan Gimblett
Covington & Burling LLP; member of the Bars of the District of Columbia and Virginia
Mr. David M. Zionts
Covington & Burling LLP; member of the Bars of the Supreme Court of the United States and the District of Columbia
Professor Harold Hongju Koh
Sterling Professor of International Law, Yale Law School; member of the Bars of New York and the District of Columbia
Professor Alfred H. A. Soons
Emeritus Professor, Utrecht University School of Law; associate member, Institut de Droit International
Professor Jean-Marc Thouvenin
Professor, University of Paris Nanterre; Secretary-General, Hague Academy of International Law; Sygna Partners; member of the Paris Bar
Ms. Oksana Zolotaryova
Acting Director, International Law Department, Ministry of Foreign Affairs of Ukraine
Mr. Nikhil V. Gore
Covington & Burling LLP; member of the Bars of the District of Columbia, Massachusetts and New York
Ms. Clovis Trevino
Covington & Burling LLP; member of the Bars of the District of Columbia, Florida and New York
Mr. Volodymyr Shkilevych
Covington & Burling LLP; member of the Bars of Ukraine and New York
Ms. Megan O'Neill
Covington & Burling LLP; member of the Bars of the District of Columbia and Texas
Mr. George M. Mackie
Covington & Burling LLP; member of the Bars of the District of Columbia and Virginia
as Counsel

Mr. Taras Kachka
    Adviser to the Foreign Minister, Ministry of Foreign Affairs of Ukraine
as Adviser

Mr. Roman Andarak
    Deputy Head of the Mission of Ukraine to the European Union
Ms. Tamara Cherpakova
    Mission of Ukraine to the European Union
Ms. Svitlana Nizhnova
    Chornomornaftogaz
Mr. Andrii Kondratov
    Chornomornaftogaz
Mr. Ivan Ivanchyk
    Ministry of Infrastructure of Ukraine
Mr. Serhii Lopatiuk
    State Border Guard Service of Ukraine
Mr. Vladyslav Smirnov
    State Border Guard Service of Ukraine
as Observers

Ms. Kateryna Gipenko
    Ministry of Foreign Affairs of Ukraine
Ms. Valeriya Budyakova
    Ministry of Foreign Affairs of Ukraine
Ms. Olga Bondarenko
    Embassy of Ukraine to the Kingdom of the Netherlands
Ms. Sofia Shovikova
    Embassy of Ukraine to the Kingdom of the Netherlands
Ms. Angela Gasca
    Covington & Burling LLP
Ms. Rebecca Mooney
    Covington & Burling LLP
Mr. Iegor Biriukov
    Intern, Government of Ukraine
Mr. Maksym Koliada
    Intern, Government of Ukraine
Mr. Roman Koliada
    Intern, Government of Ukraine
as Assistants

The Russian Federation

H.E. Mr. Dmitry Lobach
    Ambassador-at-large, Ministry of Foreign Affairs of the Russian Federation
as Agent

Professor Alain Pellet
    Emeritus Professor, University of Paris Nanterre; former Chairperson, International Law Commission; member, Institut de Droit International
Professor Tullio Treves
    Emeritus Professor, University of Milan; Senior International Consultant, Curtis Mallet-Prevost, Colt & Mosle LLP; member, Institut de Droit International
Mr. Samuel Wordsworth, QC
    Essex Court Chambers; member of the English Bar, member of the Paris Bar
Mr. Sergey Usoskin
    Member of the Saint Petersburg Bar
Ms. Amy Sander
    Essex Court Chambers; member of the English Bar

Mr. Vasily Torkanovskiy
Partner, Ivanyan & Partners; member of the Saint Petersburg Bar
Ms. Tessa Barsac
Consultant in international law
Mr. Renato Raymundo Treves
Associate, Curtis, Mallet-Prevost, Colt & Mosle LLP; member of the New York State Bar and Milan Bar
as Counsel

Ms. Svetlana Shatalova
First Secretary, Legal Department, Ministry of Foreign Affairs of the Russian Federation
Ms. Sofia Sarenkova
Senior Associate, Ivanyan & Partners
Ms. Héloïse Bajer-Pellet
Member of the Paris Bar
Ms. Kseniia Soloveva
Associate, Ivanyan & Partners
Ms. Ksenia Galkina
Third Secretary, Legal Department, Ministry of Foreign Affairs of the Russian Federation
Ms. Viktoria Goncharova
Third Secretary, Embassy of the Russian Federation in the Kingdom of the Netherlands
Ms. Kseniia Kuritcyna
Junior Associate, Ivanyan & Partners
as Advisers

Ms. Elena Semykina
Paralegal, Ivanyan & Partners
as Assistant

Registry

Dr. Dirk Pulkowski
Senior Legal Counsel, Permanent Court of Arbitration
Ms. Ashwita Ambast
Legal Counsel, Permanent Court of Arbitration
Mr. Juan Ignacio Massun
Legal Counsel, Permanent Court of Arbitration

Court Reporting

Ms. Jade King
Mr. Wong Kwong Wai
Ms. Bridget Edwards

Interpreters

Ms. Marie Dalcq
Mr. Jean-Christophe Pierret

29. After the first round of oral argument, the Arbitral Tribunal put the following questions to the Parties:

To both Parties:

1. Which, if any, elements of the claims in this case do not depend on a prior determination by, or assumption on the part of, the Tribunal as to which State is the coastal State in Crimea?

> 2. Does UNCLOS determine the extent of the rights and duties of the States concerned in circumstances where there is disagreement as to who exercises coastal State rights in respect of a particular maritime area?
>
> To the Russian Federation:
>
> 3. Can the Russian Federation clarify its position in respect of the present status of the Kerch Strait, considering the statements that "both States shared sovereignty over the Sea of Azov" (Transcript of 10 June 2019, 20:10-11) and that, "[a]s concerns the Kerch Strait, the Russian Federation has been exercising sovereignty there since the reintegration of Crimea" (Transcript of 10 June 2019, 20:18-20)?
>
> To Ukraine:
>
> 4. Can Ukraine elaborate on its statement that "Ukraine does not accept the general position of Russia, that the internal waters regime is outside the scope of UNCLOS" (Transcript of 11 June 2019, 9:10-12)?[20]

30. The Parties responded to the questions in the course of the second round of oral argument. Their responses are reflected in paragraphs 146 to 149, 211, and 273 of the Award.

II. THE PARTIES' SUBMISSIONS ON JURISDICTION AND ADMISSIBILITY

31. At the present stage of the proceedings concerning the Russian Federation's Preliminary Objections, the Parties have made the following submissions to the Arbitral Tribunal.

A. SUBMISSIONS OF THE RUSSIAN FEDERATION

32. In its Preliminary Objections, the Russian Federation submitted:

> For the reasons set out in these Preliminary Objections the Russian Federation requests the Tribunal to adjudge and declare that it is without jurisdiction in respect of the dispute submitted to this Tribunal by Ukraine.[21]

33. In its Reply, the Russian Federation submitted:

> For the reasons set out in the Preliminary Objections of the Russian Federation and this Reply, the Russian Federation requests the Tribunal to dismiss the Submissions of Ukraine made in its Written Observations of 27 November 2018 and to adjudge and declare that it is without jurisdiction in respect of the dispute submitted to this Tribunal by Ukraine.[22]

34. At the Hearing, on 13 June 2019, the Russian Federation made the following final submission:

> Having regard to the arguments set out in the Preliminary Objections of the Russian Federation, Reply of the Russian Federation to the Written Observations and Submissions of Ukraine on Jurisdiction and during the oral proceedings, the Russian Federation requests the

---

[20] Letter to Parties, 12 June 2019, pp. 1-2 *citing* Jurisdiction Hearing, 10 June 2019, 20:10-11 (Lobach), 20:18-20 (Lobach); Jurisdiction Hearing, 11 June 2019, 9:10-12 (Zerkal).

[21] Russian Federation's Preliminary Objections, para. 265.

[22] Reply of the Russian Federation to the Written Observations and Submissions of Ukraine on Jurisdiction (hereinafter "Russian Federation's Reply"), 28 January 2019, para. 182.

> Tribunal to adjudge and declare that it lacks jurisdiction in respect of the dispute submitted to this Tribunal by Ukraine.[23]

B. SUBMISSIONS OF UKRAINE

35. In its Written Observations, Ukraine submitted:

> For the foregoing reasons, Russia's Preliminary Objections fail to show that the Tribunal lacks jurisdiction over any aspect of the submissions in Ukraine's Memorial.
>
> Ukraine accordingly:
>
> a. reiterates and renews the submissions and requests for relief contained in Chapter 7 of its Memorial;
>
> b. requests that this Tribunal adjudge and declare that its submissions fall within the jurisdiction conferred on the Tribunal pursuant to the Convention; and
>
> c. requests that the Tribunal award Ukraine its costs for the jurisdictional phase of these proceedings, pursuant to Article 25 of the Rules of Procedure.[24]

36. In its Rejoinder, Ukraine submitted:

> For the foregoing reasons, Ukraine reiterates and renews the submissions and requests for relief contained in Chapter Seven of its Memorial and Chapter Six of its Written Observations on Jurisdiction.[25]

37. At the Hearing, on 14 June 2019, Ukraine made the following final submissions:

> 1. Ukraine respectfully requests that the Tribunal:
>
> a. Reject the Preliminary Objections submitted by the Russian Federation in its submission dated 19 May 2018;
>
> b. Adjudge and declare that it has jurisdiction over each of the submissions and requests for relief contained in Chapter 7 of Ukraine's Memorial, which are hereby renewed; or
>
> c. In the alternative, adjudge and declare, in accordance with the provisions of Article 10, paragraph 4, of the Rules of Procedure that the objections submitted by the Russian Federation do not possess an exclusively preliminary character and should be ruled upon in conjunction with the merits.
>
> 2. Ukraine requests that the Tribunal award Ukraine its costs for the jurisdictional phase of these proceedings, pursuant to Article 25 of the Rules of Procedure.[26]

III. BASIS OF THE ARBITRAL TRIBUNAL'S JURISDICTION

38. Article 287, paragraph 1, of the Convention provides that, "[w]hen signing, ratifying or acceding to this Convention [...] a State shall be free to choose, by means of a written declaration, one or

---

[23] Jurisdiction Hearing, 13 June 2019, 97:25-98:16 (Lobach).
[24] Ukraine's Written Observations, paras 182-83.
[25] Rejoinder of Ukraine on Jurisdiction (hereinafter "Ukraine's Rejoinder"), 28 March 2019, para. 166.
[26] Jurisdiction Hearing, 14 June 2019, 103:4-19 (Zerkal).

more of the [subsequently enumerated] means for the settlement of disputes concerning the interpretation or application of this Convention."[27]

39. Upon ratification of the Convention on 26 July 1999, Ukraine declared that, "in accordance with article 287 of the United Nations Convention on the Law of the Sea of 1982, it chooses as the principal means for the settlement of disputes concerning the interpretation or application of this Convention an arbitral tribunal constituted in accordance with Annex VII."[28] This declaration mirrors the wording of the declaration made by the Ukrainian Soviet Socialist Republic upon signature of the Convention, on 10 December 1982.

40. The Russian Federation did not make any declaration in accordance with Article 287 of the Convention upon ratification. The Russian Federation, however, regards itself as the continuator State of the Union of Soviet Socialist Republics (hereinafter the "USSR"). Upon signature of the Convention, on 10 December 1982, the USSR declared that, "under article 287 of the United Nations Convention on the Law of the Sea, it chooses an arbitral tribunal constituted in accordance with Annex VII as the basic means for the settlement of disputes concerning the interpretation or application of the Convention."[29]

41. The Arbitral Tribunal notes that the Parties have chosen an arbitral tribunal constituted in accordance with Annex VII to the Convention as the "principal" or "basic" means for the settlement of disputes concerning the interpretation or application of the Convention. Pursuant to Article 287, paragraph 4, of the Convention, such disputes may be submitted to an arbitral tribunal constituted in accordance with Annex VII. The Arbitral Tribunal consequently finds that the dispute was submitted to it in accordance with the Convention and the declarations made by the Parties. The Arbitral Tribunal in this regard takes note of the Russian Federation's objection that certain aspects of the present dispute should have been submitted to a special arbitral tribunal constituted in accordance with Annex VIII to the Convention, which the Arbitral Tribunal addresses in detail below (*see* Chapter VIII).

42. The specific preliminary objections to aspects of the Arbitral Tribunal's jurisdiction raised by the Russian Federation will be addressed in the following chapters.

---

[27] UNCLOS, Art. 287, para. 1.

[28] Declaration by Ukraine upon Ratification of UNCLOS, 26 July 1999 in Multilateral Treaties Deposited with the Secretary-General, Ch. XXI, No. 6, p. 32 (**Annex UA-8**).

[29] Declaration by the USSR upon Signature of UNCLOS, 10 December 1982 in Multilateral Treaties Deposited with the Secretary-General, Ch. XXI, No. 6, p. 28 (**Annex UA-8**).

IV. THE RUSSIAN FEDERATION'S OBJECTION THAT THE ARBITRAL TRIBUNAL HAS NO JURISDICTION OVER UKRAINE'S SOVEREIGNTY CLAIM

43. The Russian Federation submits that the Arbitral Tribunal has no jurisdiction over Ukraine's claims because "the dispute in this case concerns Ukraine's claim to sovereignty over Crimea"[30] and a "dispute over territorial sovereignty is not a dispute concerning the 'interpretation or application of the Convention' pursuant to Article 288(1) of UNCLOS."[31]

44. For its part, Ukraine submits that the dispute before the Arbitral Tribunal concerns the interpretation or application of the Convention and the Arbitral Tribunal thus has jurisdiction over it.[32]

45. The Arbitral Tribunal notes that the Parties hold different views as to: the nature or characterisation of the dispute before the Arbitral Tribunal; the scope of the jurisdiction of the Arbitral Tribunal under Article 288 of the Convention; and the existence *vel non* of a sovereignty dispute over Crimea. The Arbitral Tribunal will examine the arguments of the Parties on these issues in turn.

A. CHARACTERISATION OF THE DISPUTE BEFORE THE ARBITRAL TRIBUNAL

1. Position of the Russian Federation

46. The Russian Federation notes that, in order to determine whether the dispute concerns the "interpretation or application of this Convention," the Arbitral Tribunal must characterise the dispute before it.[33] The Russian Federation contends that the Arbitral Tribunal is not bound in this regard by Ukraine's characterisation of this dispute.[34]

47. The Russian Federation observes that Ukraine characterises the dispute as a dispute concerning its "coastal State rights in the Black Sea, Sea of Azov and Kerch Strait."[35] The Russian Federation argues that an answer to the question whether or not Ukraine has "coastal State rights" requires a

---

30 Russian Federation's Preliminary Objections, para. 22.

31 Russian Federation's Preliminary Objections, para. 47.

32 Ukraine's Written Observations, paras 13-15.

33 Russian Federation's Preliminary Objections, paras 5, 21; Jurisdiction Hearing, 10 June 2019, 58:1-5 (Wordsworth).

34 Russian Federation's Preliminary Objections, paras 4, 24 *citing* PCA Case No. 2013-19: *The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China)* (hereinafter "*South China Sea*"), Award on Jurisdiction and Admissibility of 29 October 2015, para. 153 (**Annex UAL-3**); PCA Case No. 2011-03: *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)* (hereinafter "*Chagos*"), Award of 18 March 2015, para. 211 (**Annex UAL-18**).

35 Russian Federation's Preliminary Objections, para. 3.

prior determination by the Arbitral Tribunal of which State is in fact sovereign in the relevant maritime zones.[36] Such a determination depends entirely on whether or not Ukraine is sovereign over the land territory of Crimea.[37]

48. According to the Russian Federation, the central nature of the sovereignty issue in the current claim is reflected in Ukraine's Notification and Statement of Claim, contemporaneous statements of Ukraine, and its Memorial.[38]

49. The Russian Federation observes that Ukraine's Notification and Statement of Claim is entitled "*Coastal State Rights* in the Black Sea, Sea of Azov, and Kerch Strait" and that Ukraine asserts therein that it "institutes this arbitration under Annex VII of the Convention to vindicate *its coastal State rights* under the Convention."[39] The Russian Federation also points out that Ukraine alleges "an unlawful use of force in blatant violation of the U.N. Charter and fundamental norms of international law" and contends that "[s]ince the seizure of Crimea, the Russian Federation has persistently and flagrantly violated the Convention through its actions in areas of the Black Sea, Sea of Azov, and Kerch Strait where *Ukraine's sovereignty, sovereign rights, and right to exercise jurisdiction* are indisputable."[40] The Russian Federation notes that Ukraine asserts that "the Russian Federation's actions in the Black Sea, Sea of Azov, and Kerch Strait are inconsistent with Ukraine's rights under the Convention, including *its coastal state rights* and violate *Ukraine's sovereignty, sovereign rights, and rights to exercise jurisdiction at sea*."[41]

50. Further, the Russian Federation contends that contemporaneous statements by the President, the Foreign Minister and government officials of Ukraine in the context of the filing of Ukraine's Notification and Statement of Claim refer to a dispute concerning sovereignty over land territory.[42] According to the Russian Federation, this claim has been presented by Ukraine "as a response to alleged Russian aggression, and as aimed at securing the 'restoration' and 'return' of Crimean sovereignty to Ukraine."[43] The Russian Federation refers to a 6 December 2015 statement by the President of Ukraine that he "*will do everything to return Crimea through*

---

36 Russian Federation's Preliminary Objections, paras 4, 27; Jurisdiction Hearing, 10 June 2019, 26:18-21 (Wordsworth).

37 Russian Federation's Preliminary Objections, paras 4, 25; Jurisdiction Hearing, 10 June 2019, 9:23-10:2 (Lobach), 24:8-12 (Wordsworth).

38 Russian Federation's Preliminary Objections, para. 26.

39 Russian Federation's Preliminary Objections, para. 28 [emphasis added by the Russian Federation]; Jurisdiction Hearing, 10 June 2019, 10:4-8 (Lobach).

40 Russian Federation's Preliminary Objections, para. 28 [emphasis added by the Russian Federation].

41 Russian Federation's Preliminary Objections, para. 29 [emphasis added by the Russian Federation].

42 Russian Federation's Preliminary Objections, paras 31-36; Jurisdiction Hearing, 10 June 2019, 29:10-13 (Wordsworth).

43 Russian Federation's Preliminary Objections, para. 36.

international legal mechanisms, judicial decisions and political mechanisms and diplomatic means."[44] The Russian Federation further refers to a statement of the Foreign Ministry of Ukraine of 14 September 2016 that "Ukraine has instituted arbitration proceedings against the Russian Federation under [the Convention] to *vindicate its rights as the coastal state in maritime zones adjacent to Crimea* in the Black Sea, Sea of Azov, and Kerch Strait. *Since the Russian Federation's illegal acts of aggression in Crimea, Russia has usurped and interfered with Ukraine's maritime rights in these zones*."[45]

51. The Russian Federation also quotes the following statement delivered by Ukraine on 20 February 2018 before a United Nations Committee:

> *The armed aggression against Ukraine* was launched by one of the permanent members of the Security Council. Instead of fulfilling its obligation to maintain peace and security, *it continues to temporarily occupy the Autonomous Republic of Crimea* [...] *we are resorting to all means available to UN Members States to resolve the situation that arose as the result of the Russian military aggression against Ukraine* [...] Just yesterday, Ukraine filed its Memorial in arbitration proceedings against the Russian Federation under [the Convention]. *The Memorial establishes that Russia has violated Ukraine's sovereign rights* in the Black Sea, Sea of Azov, and Kerch Strait.[46]

52. Finally, the Russian Federation relies on a statement by the President of Ukraine of 14 September 2016, which in its view shows that the allegations of violations of Ukraine's coastal State rights are necessarily based on allegations of aggression and annexation by the Russian Federation:[47]

> [t]he *lawsuit is filed due to* the gross violation of the international law by Russia, *aggression against Ukraine, annexation of Crimea*, violation of Ukraine's right to natural resources in the Black and Azov Seas [...] *the launch of that process would facilitate the restoration of*

---

[44] Russian Federation's Preliminary Objections, para. 32 *citing* President of Ukraine Official Website, President: We Will Do Everything to Return Crimea via International Legal Mechanisms, 6 December 2015, available at <www.president.gov.ua/en/news/zrobimo-vse-dlya-togo-shob-shlyahom-mizhnarodnih-pravovih-me-36441> (**Annex RU-38**) [emphasis added by the Russian Federation]; Jurisdiction Hearing, 10 June 2019, 31:5-14 (Wordsworth).

[45] Russian Federation's Preliminary Objections, para. 33 *citing* Ministry of Foreign Affairs of Ukraine Official Website, Statement of the Ministry of Foreign Affairs of Ukraine on the Initiation of Arbitration against the Russian Federation under the United Nations Convention on the Law of the Sea, 14 September 2016, available at <www.mfa.gov.ua/en/press-center/news/50813-zajava-mzs-ukrajini-shhodo-porushennya-arbitrazhnogo-provadzhennya-proti-rosijsykoji-federaciji-vidpovidno-do-konvenciji-oon-z-morsykogo-prava> (**Annex RU-44**) [emphasis added by the Russian Federation].

[46] Russian Federation's Preliminary Objections, para. 35 *citing* Statement of the Delegation of Ukraine at the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization United Nations, 20 February 2018, available at <www.ukraineun.org/en/press-center/303-statement-of-the-delegation-of-ukraine-at-the-special-committee-on-the-charter-of-the-united-nations-and-on-the-strengt[...]> (**Annex RU-49**) [emphasis added by the Russian Federation]; Jurisdiction Hearing, 10 June 2019, 30:8-31:4 (Wordsworth).

[47] Jurisdiction Hearing, 10 June 2019, 30:4-7 (Wordsworth).

> *full control over the maritime area of Ukraine* and reimbursement of damages suffered by Ukraine as a result of the Russian armed aggression.[48]

53. Turning to Ukraine's Memorial in the present Arbitration, the Russian Federation contends that the Memorial is predicated on the argument that Ukraine is the coastal State in the relevant areas.[49] The Russian Federation notes that Ukraine asserts that "[a]s a littoral State of the Black Sea, Sea of Azov and Kerch Strait, Ukraine enjoys the rights and bears the responsibilities accorded to coastal States by [the Convention]."[50] The Russian Federation points out that Ukraine alleges that the Russian Federation (a) excluded Ukraine from accessing and using its own maritime zones; (b) explored and exploited the natural resources of Ukraine's maritime areas in violation of Ukraine's sovereign rights; and (c) usurped Ukraine's authority to regulate Ukrainian maritime entitlements.[51] The Russian Federation highlights that Ukraine devotes Chapter 3 of its Memorial to its exercise of duties and responsibilities as the coastal State,[52] and introduces Chapter 4 of its Memorial by stating:

> Across an expanse of sea extending out from Crimea west towards Odesa, east toward Mariupol, and south toward Anatolia, the Russian Federation is systematically and brazenly violating Ukraine's coastal State rights, in violation of the Convention. [...] Russia's violations of the Convention began in 2014—*i.e.* at the time that the Russian Federation invaded and occupied the Crimean peninsula, and then purported to annex it.[53]

54. The Russian Federation further highlights that Ukraine's claims with respect to hydrocarbon resources (pursuant to Articles 2, 56, 60, 77, and 92 of the Convention), to living resources (pursuant to Articles 2, 21, 33, 56, 58, 61, 62, 73, and 77 of the Convention), to the Kerch Strait (pursuant to Article 2 of the Convention), and to the underwater cultural heritage (pursuant to Articles 2 and 303 of the Convention) are based on Ukraine's alleged rights as a coastal State.[54]

---

[48] Russian Federation's Preliminary Objections, para. 34 *citing* President of Ukraine Official Website, President Instructed Foreign Ministry to File a Lawsuit Against Russia to International Arbitration, 14 September 2016, available at <www.president.gov.ua/en/news/prezident-doruchiv-mzs-podati-pozov-proti-rosiyi-do-mizhnaro-38147> (**Annex RU-45**) [emphasis added by the Russian Federation]. The President's Facebook page dated 23 December 2016 stated that "[i]n September, upon my instructions the MFA of Ukraine initiated a dispute on the violation by Russia of the UN Convention on the Law of the Sea. Ukraine is ready to prove in this arbitration that the aggressor bluntly violates the sovereign rights of Ukraine to use its guaranteed rights in its maritime areas and on the continental shelf in the maritime zones adjacent to the Autonomous Republic of Crimea" (available at <www.facebook.com/petroporoshenko/>) (**Annex RU-46**); Jurisdiction Hearing, 10 June 2019, 29:17-30:7 (Wordsworth).

[49] Russian Federation's Preliminary Objections, para. 37.

[50] Jurisdiction Hearing, 10 June 2019, 24:24-25:2 (Wordsworth).

[51] Russian Federation's Preliminary Objections, para. 38; Jurisdiction Hearing, 10 June 2019, 25:9-19 (Wordsworth).

[52] Russian Federation's Preliminary Objections, para. 39.

[53] Russian Federation's Preliminary Objections, para. 40; Jurisdiction Hearing, 10 June 2019, 25:20-23 (Wordsworth), 26:9-11 (Wordsworth).

[54] Russian Federation's Preliminary Objections, para. 42(a)-(c).

55. This is also true, in the Russian Federation's view, of the relief requested by Ukraine.[55] The Russian Federation notes that Ukraine has requested that the Arbitral Tribunal declare, *inter alia*, that "Russia is violating *Ukraine's sovereignty and sovereign rights*" and that "Russia has interfered with *Ukraine's sovereignty*," while claiming moral damages to "*vindicate Ukraine's national sovereignty*."[56] The Russian Federation notes that Ukraine has also sought from it "public assurances and guarantees of non-repetition" with respect to "Russia's interference with *Ukraine's sovereignty and sovereign rights*" and has requested the Arbitral Tribunal to require the Russian Federation to withdraw vessels and personnel from Ukraine's maritime areas and end "its purported exercise of prescriptive jurisdiction over the living and non-living resources" found in Ukraine's maritime zones.[57]

56. Citing repeated references in Ukraine's Memorial to an alleged "annexation" and "unlawful invasion," the Russian Federation "vigorously challenges and denies those accusations" and contends that the core of Ukraine's claim is rooted in "a pre-supposition of unlawful conduct by Russia in Crimea in 2014."[58] The Russian Federation stresses that the "key—indeed defining — issue of disputed land sovereignty cannot somehow be bypassed by asserting that Russia is an aggressor,"[59] and that such issue falls outside the scope of Article 288, paragraph 1, of the Convention.[60] The Russian Federation points out that, in setting out its claimed entitlement to relief, Ukraine has concluded that "*[c]ollectively*, [the alleged violations] amount to a sweeping, comprehensive displacement of *Ukraine's coastal State rights* within a majority of Ukraine's exclusive economic zone and continental shelf, as well as long stretches of its territorial sea."[61] In the view of the Russian Federation, "this only serves to reinforce Russia's position that the objective of Ukraine's claim is to secure a favourable determination on the sovereignty of Crimea."[62]

57. The Russian Federation thus submits that "the claim as advanced by Ukraine would require the [Arbitral] Tribunal first to render a decision on sovereignty over Crimea, either expressly or

---

[55] Russian Federation's Preliminary Objections, para. 43.
[56] Russian Federation's Preliminary Objections, paras 44-45 *citing* Ukraine's Memorial, paras 251, 252, 254, 264 [emphasis added by the Russian Federation].
[57] Russian Federation's Preliminary Objections, para. 46.
[58] Russian Federation's Preliminary Objections, para. 7.
[59] Russian Federation's Preliminary Objections, para. 7.
[60] Russian Federation's Preliminary Objections, para. 7.
[61] Russian Federation's Preliminary Objections, para. 45 *citing* Ukraine's Memorial, para. 254 [emphasis added by the Russian Federation].
[62] Russian Federation's Preliminary Objections, para. 45.

implicitly, while the actual objective of Ukraine's claims is in fact to advance its position in the Parties' disputes over Crimean sovereignty."[63]

2. Position of Ukraine

58. Ukraine contends that "[t]he dispute before the Tribunal is one that concerns the interpretation or application of UNCLOS."[64] According to Ukraine, its claim is that "through a campaign of exclusion, exploitation, and usurpation across the Black Sea, the Sea of Azov, and the Kerch Strait, Russia has violated rights guaranteed to Ukraine under the Convention."[65]

59. Ukraine submits that in its Memorial it presents 20 submissions that concern the legal consequences under the Convention of the Russian Federation's actions in a large and important maritime area.[66] In particular, Ukraine explains that the actions of the Russian Federation in the Black Sea, the Sea of Azov, and Kerch Strait violate Ukraine's rights as a coastal State, a flag State, and a littoral State in relation to two semi-enclosed seas and an international strait.[67]

60. Ukraine notes that the Russian Federation points to Ukraine's references to "coastal State" and "sovereignty" in its written submissions.[68] According to Ukraine, it cannot be faulted for using these terms, which appear in the provisions of the Convention.[69] In Ukraine's view, its usage of "coastal State" and "sovereignty" confirms that this dispute concerns the interpretation and application of the Convention.[70] Moreover, Ukraine argues that its references to "coastal State" do not imply that the dispute concerns the identity of the coastal State, and maintains that "here, Ukraine is undeniably the coastal State."[71]

61. In response to the Russian Federation's reference to statements of various Ukrainian officials expressing a desire to end the Russian Federation's armed aggression against Ukraine, Ukraine takes the view that it has not brought the "illegal occupation of Ukrainian territory" before the Arbitral Tribunal.[72] Rather, in the present proceedings, "the only point in discussion" is Ukraine's wish that the Russian Federation, "*inter alia* [...] stop stealing its living and non-living maritime

---

[63] Russian Federation's Preliminary Objections, para. 25.
[64] Ukraine's Written Observations, para. 17.
[65] Ukraine's Written Observations, para. 17.
[66] Ukraine's Written Observations, para. 21; Jurisdiction Hearing, 11 June 2019, 6:5-7 (Zerkal).
[67] Ukraine's Written Observations, para. 22.
[68] Ukraine's Written Observations, para. 55.
[69] Ukraine's Written Observations, para. 55.
[70] Ukraine's Written Observations, para. 55; Jurisdiction Hearing, 14 June 2019, 8:10-16 (Thouvenin).
[71] Ukraine's Written Observations, para. 55; Jurisdiction Hearing, 14 June 2019, 6:20-7:21 (Thouvenin).
[72] Ukraine's Written Observations, para. 56.

resources [...] stop disturbing its underwater cultural heritage, and [...] end its harassment of vessels *en route* to Ukrainian ports."[73]

62. Ukraine explains that the "sole actual objective" of its claims is the interpretation and application of the Convention in relation to the Russian Federation's actions in the Black Sea, Sea of Azov, and the Kerch Strait.[74] Ukraine notes that even an express ruling by this Arbitral Tribunal reaffirming Crimea's status as a part of Ukraine "would not materially improve Ukraine's legal position on that settled matter."[75]

B. SCOPE OF THE JURISDICTION OF THE ARBITRAL TRIBUNAL UNDER ARTICLES 286 AND 288 OF THE CONVENTION

63. Article 286 of the Convention provides:

> Subject to section 3, any dispute concerning the interpretation or application of this Convention shall, where no settlement has been reached by recourse to section 1, be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section.

64. Article 288, paragraph 1, of the Convention reads:

> A court or tribunal referred to in article 287 shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part.

1. Position of the Russian Federation

65. The Russian Federation notes that the jurisdiction of the Arbitral Tribunal is defined and limited by Article 288, paragraph 1, of the Convention.[76] According to the Russian Federation, "[a] dispute over territorial sovereignty is not a dispute concerning the 'interpretation or application of the Convention' pursuant to Article 288(1) of UNCLOS, the sole jurisdictional basis invoked by Ukraine."[77]

66. Interpreting the provision in accordance with Article 31, paragraph 1, of the Vienna Convention on the Law of Treaties,[78] the Russian Federation submits that the ordinary meaning of the provision restricts the jurisdiction of an arbitral tribunal to disputes "concerning the interpretation

---

[73] Ukraine's Written Observations, para. 56.
[74] Ukraine's Written Observations, para. 58; Jurisdiction Hearing, 11 June 2019, 15:20-23 (Koh), 17:12-18 (Koh).
[75] Ukraine's Written Observations, para. 58.
[76] Russian Federation's Preliminary Objections, para. 6.
[77] Russian Federation's Preliminary Objections, para. 47.
[78] Vienna Convention on the Law of Treaties, done at Vienna on 23 May 1969, 1155 U.N.T.S. 331, Art. 31 (**Annex UAL-43**).

or application of [the Convention]."[79] The Russian Federation observes that the Convention contains no provisions regarding sovereignty over land territory and that there is no *renvoi* in any provisions of the Convention that allows the application of provisions regarding sovereignty over land to be imported from other treaties or from customary international law.[80]

67. The Russian Federation rejects Ukraine's argument that the word "any" in Article 288, paragraph 1, of the Convention grants broad scope to an arbitral tribunal's jurisdiction.[81] The Russian Federation argues that the word "any" in Article 288, paragraph 1, is modified by the critical words "dispute concerning the interpretation or application of this Convention."[82]

68. The Russian Federation considers that its reading of Article 288, paragraph 1, of the Convention is supported by the context of that provision.[83] According to the Russian Federation, Article 288, paragraph 2, establishes "supplemental jurisdiction" that is "doubly limited" to disputes "concerning the interpretation or application of an international agreement," which must be "related to the purposes of the Convention."[84]

69. The Russian Federation also notes that the first preambular paragraph of the Convention states that States Parties were "prompted by the desire to settle all issues relating to the law of the sea."[85]

70. The Russian Federation further argues that the absence of an opt-out mechanism for disputes regarding sovereignty over land, equivalent to that for maritime boundary delimitations in Article 298, paragraph 1, of the Convention, confirms that jurisdiction under Part XV was never intended to extend to disputes concerning sovereignty over land territory.[86] According to the Russian Federation, it would be inconceivable that the Convention does not contain an opt-out mechanism if disputes regarding sovereignty over land could be brought within the scope of Article 288, paragraph 1.[87] The Russian Federation relies on the ruling in the *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)* (hereinafter "*Chagos*") to the same effect.[88]

---

[79] Russian Federation's Preliminary Objections, para. 50.
[80] Russian Federation's Preliminary Objections, para. 50.
[81] Jurisdiction Hearing, 13 June 2019, 8:8-13 (Wordsworth).
[82] Jurisdiction Hearing, 13 June 2019, 8:13-21 (Wordsworth).
[83] Jurisdiction Hearing, 10 June 2019, 32:14-15 (Wordsworth).
[84] Jurisdiction Hearing, 10 June 2019, 32:16-33:5 (Wordsworth).
[85] Jurisdiction Hearing, 10 June 2019, 33:6-13 (Wordsworth).
[86] Russian Federation's Preliminary Objections, para. 51.
[87] Russian Federation's Preliminary Objections, para. 51; Jurisdiction Hearing, 10 June 2019, 34:9-35:1 (Wordsworth).
[88] Russian Federation's Preliminary Objections, para. 55 *citing Chagos*, cit., n. 34, paras 216-19 (**Annex UAL-18**); Jurisdiction Hearing, 10 June 2019, 35:2-36:8 (Wordsworth).

71. The Russian Federation notes that the States Parties to the Convention, in Article 297, paragraph 1, have "expressly and materially restricted the types of disputes concerning the exercise by a coastal State of its sovereign rights or jurisdiction under the Convention."[89] It is thus "not tenable," the Russian Federation states, "to consider that State parties would agree to such a restriction on settlement of disputes concerning the exercise of coastal State rights or jurisdiction, and yet agree at the same time to jurisdiction over the anterior and more fundamental question as to whether [...] the given State asserting sovereign rights or jurisdiction was the coastal State."[90]

72. The Russian Federation asserts that the consequences of accepting Ukraine's claim would be that, whenever one of the 64 articles of the Convention that refer to the term "coastal State" is invoked by a State, a court or tribunal under Part XV would have jurisdiction to resolve all or any territorial sovereignty disputes to determine whether a State is indeed a "coastal State."[91] The Russian Federation submits that this was not the intention of the drafters of the Convention.[92]

73. The Russian Federation also argues that the object and purpose of the Convention to establish "'a legal order for the seas and oceans' (not with respect to abutting coastal territory)" supports its position that arbitral jurisdiction does not extend to sovereignty over land.[93] Addressing Ukraine's counter-argument that, according to the *Virginia Commentary*, in the view of many States, the provisions of the Convention would be acceptable only if their interpretation and application were subject to expeditious, impartial, and binding decisions, the Russian Federation points out that the provisions of the Convention "do not contain rules on matters such as use of force and the right to self-determination, which inevitably arise under Ukraine's claim."[94] In addition, the Russian Federation notes that Part XV of the Convention was a matter of intense debate and States looking for compulsory jurisdiction on key matters such as maritime delimitation were not successful.[95]

2. Position of Ukraine

74. Turning to the interpretation of Articles 286 and 288 of the Convention, Ukraine contends that these provisions contain a "broad jurisdictional grant" that is designed to establish a legal order

---

[89] Russian Federation's Preliminary Objections, para. 52.
[90] Russian Federation's Preliminary Objections, para. 52; Jurisdiction Hearing, 10 June 2019, 33:19-34:8 (Wordsworth).
[91] Russian Federation's Reply, para. 35.
[92] Russian Federation's Preliminary Objections, para. 60.
[93] Russian Federation's Preliminary Objections, para. 53.
[94] Jurisdiction Hearing, 13 June 2019, 8:1-4 (Wordsworth).
[95] Jurisdiction Hearing, 13 June 2019, 8:4-7 (Wordsworth).

capable of settling "all issues relating to the law of the sea" and ensuring that no significant problems of interpretation persist without a final ruling.[96]

75. According to Ukraine, the broad scope of the Arbitral Tribunal's jurisdiction under these provisions is clear from the phrase "any dispute" in Article 286, together with its carefully crafted restrictions.[97] Ukraine suggests that the term "'any' means any;" it reflects the Convention's object and purpose to grant broad scope to the arbitral tribunal's jurisdiction under this provision.[98]

76. Ukraine notes that compulsory jurisdiction was the "pivot upon which the delicate equilibrium of the compromise [of the Convention] must be balanced."[99] The Convention, in Ukraine's view, was intended "to settle, in the spirit of mutual understanding and cooperation, all issues relating to the law of the sea."[100] Ukraine argues that the *Virginia Commentary* recounts that the States Parties to the Convention considered that its provisions would be acceptable only if their interpretation and application were subject to expeditious, impartial, and binding decisions.[101]

77. With respect to the question whether the Arbitral Tribunal has jurisdiction to address the issue of territorial sovereignty, Ukraine draws attention to the finding of the arbitral tribunal in *Chagos* that, "where a dispute concerns the interpretation or application of the Convention, the jurisdiction of a court or tribunal pursuant to Article 288(1) extends to making such findings of fact or ancillary determinations of law as are necessary to resolve the dispute presented to it."[102] In Ukraine's view, therefore, "a respondent State's assertion of a sovereignty claim cannot automatically defeat jurisdiction under Articles 286 and 288, and that, in at least some cases, a tribunal acting pursuant to those articles may resolve a predicate sovereignty dispute."[103]

---

96 Ukraine's Written Observations, para. 14.
97 Ukraine's Written Observations, para. 14; Jurisdiction Hearing, 11 June 2019, 23:13-18 (Koh).
98 Jurisdiction Hearing, 11 June 2019, 23:19-22 (Koh).
99 Ukraine's Written Observations, para. 14 *citing South China Sea*, cit., n. 34, para. 225.
100 Jurisdiction Hearing, 11 June 2019, 23:3-8 (Koh).
101 Jurisdiction Hearing, 11 June 2019, 23:8-12 (Koh).
102 Ukraine's Rejoinder, para. 42 *citing Chagos*, cit., n. 34, para. 220.
103 Ukraine's Rejoinder, para. 42.

C. EXISTENCE *VEL NON* OF A SOVEREIGNTY DISPUTE OVER CRIMEA

1. General Argument

(a) Position of the Russian Federation

78. Applying its interpretation of Article 288, paragraph 1, of the Convention to the dispute before the Arbitral Tribunal, the Russian Federation submits that this Arbitral Tribunal lacks jurisdiction to determine "the key territorial sovereignty dispute on which Ukraine's case depends."[104] According to the Russian Federation, Ukraine cannot avoid the "basic point" that both Parties consider themselves sovereign over Crimea and are thus engaged in a dispute over this "critical issue of sovereignty."[105]

79. The Russian Federation contends that, should the Arbitral Tribunal engage in a determination of the sovereignty dispute, it would have to consider issues that fall outside the scope of Article 288, paragraph 1, such as the circumstances in which Crimea was transferred to Ukraine in 1954, Ukraine's proclamation of independence in 1991, the legitimacy of Ukraine's abolition of the Crimean constitution and abrogation of the post of President of Crimea in 1995, the scope of the right to self-determination and its application to this case, the legality of the change in government in Ukraine's capital in February 2014, the Crimean referendum in March 2014, and the alleged unlawful use of force.[106]

80. The Russian Federation also points out that Ukraine's claimed relief, including the requests for declaratory relief and moral damages to vindicate Ukraine's national sovereignty, would require the Arbitral Tribunal to first determine that Ukraine is indeed sovereign in Crimea.[107] According to the Russian Federation, they are "not the sort of consequences that follow from a dispute" concerning "the 'interpretation and application' of [the Convention]."[108]

81. The Russian Federation contests Ukraine's assertion that it was the Russian Federation that introduced the topic of sovereignty into the Arbitration. The Russian Federation underlines that it was Ukraine that framed its case with respect to coastal State rights, thus raising the issue of who

---

[104] Jurisdiction Hearing, 10 June 2019, 27:8-10 (Wordsworth).
[105] Russian Federation's Preliminary Objections, para. 61.
[106] Jurisdiction Hearing, 10 June 2019, 36:9-37:11 (Wordsworth).
[107] Russian Federation's Preliminary Objections, paras 45, 46 *citing* Ukraine's Memorial, para. 266; Jurisdiction Hearing, 10 June 2019, 26:11-17 (Wordsworth).
[108] Russian Federation's Preliminary Objections, para. 59.

is sovereign over Crimea, and that it was Ukraine that "elected to deal at the earliest possible opportunity" with the issue of sovereignty.[109]

82. In addition to these general considerations, the Russian Federation addresses Ukraine's contentions that the Russian Federation's objection premised on a dispute over territorial sovereignty over Crimea is inadmissible; that the objection is implausible; and that, even if there were a predicate territorial sovereignty dispute, the primary issue in the dispute is, and the relative weight of the dispute lies with, the interpretation or application of the Convention. These arguments are addressed in sections 2 to 4 below.

(b) Position of Ukraine

83. Ukraine emphasises that each of its submissions in this Arbitration seeks a ruling upon the interpretation or application of one or more provisions of the Convention.[110] Specifically, Ukraine notes that its submissions "implicate" Parts II, V, and VI (including in connection with the Russian Federation's violations of Ukraine's rights under Articles 2, 56, and 77), Part III (in connection with the Russian Federation's violations of Articles 38 and 44), Parts IX and XII (including in connection with the environmental dangers posed by the Russian Federation's construction activities in the Kerch Strait and its failure to appropriately respond to the oil spill off the coast of Sevastopol), and Part XVI (in connection with the Russian Federation's interference with Ukraine's attempts to preserve underwater cultural heritage pursuant to Article 303).[111]

84. Ukraine contends that a dispute concerning the interpretation or application of the Convention does not lose that character simply because the respondent State asserts a claim to land territory.[112] According to Ukraine, the Russian Federation is acting contrary to the purposes of the Convention and Articles 286 and 288 by asserting that Crimea is subject to competing claims and that this territorial dispute is the subject of the dispute before the Arbitral Tribunal.[113]

85. Ukraine notes that the Russian Federation contends that Ukraine's Memorial draws a causal link between "Russia's invasion of the Crimean Peninsula" and the Russian Federation's alleged violations of the Convention.[114] Ukraine argues, however, that the former is "simply a matter of background and context" and not a part of Ukraine's claims.[115] In Ukraine's view, its

[109] Jurisdiction Hearing, 13 June 2019, 2:14-4:7 (Wordsworth).
[110] Ukraine's Written Observations, para. 23.
[111] Ukraine's Written Observations, para. 23; Jurisdiction Hearing, 11 June 2019, 17:22-18:23 (Koh).
[112] Ukraine's Written Observations, Chapter 2(II)(B)(1).
[113] Ukraine's Written Observations, para. 39.
[114] Ukraine's Written Observations, para. 57.
[115] Ukraine's Written Observations, para. 57.

"unquestioned sovereignty over Crimea" should be regarded as an "internationally recognised background fact" that the Arbitral Tribunal may rely upon in making its determinations.[116] Ukraine also argues that the Russian Federation has offered no evidence for why the Arbitral Tribunal should treat the Russian Federation and not Ukraine as the lawful coastal State.[117] Referring to the statement of counsel for the Russian Federation that, since 2014, the Russian Federation has formally put forward its position on sovereignty in Crimea in a number of *fora*, Ukraine points out that none has accepted any alteration in Crimea's status.[118]

86. In addition to these general considerations, Ukraine maintains that the Russian Federation's objection premised on a dispute over territorial sovereignty over Crimea is inadmissible; that its objection is implausible; and that, even if there were a predicate territorial sovereignty dispute, the primary issue in dispute is, and the relative of the weight of the dispute lies with, the interpretation or application of the Convention. These arguments are addressed at sections 2 to 4 below.

2. Inadmissibility

(a) Position of the Russian Federation

87. The Russian Federation rejects Ukraine's argument that the Russian Federation's claim regarding the altered legal status of Crimea "is inadmissible and should not be entertained by the [Arbitral] Tribunal."[119] In this regard, the Russian Federation stresses that it "is making no claims of any kind before the tribunal."[120] The Russian Federation notes that Ukraine's submission on alleged inadmissibility is based on the obligation of non-recognition under customary international law, as reflected in Article 41 of the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts (hereinafter the "ILC Articles on State Responsibility").[121] Article 41 states that "[n]o state shall recognise as lawful a situation created by a serious breach within the meaning of article 40,"[122] defined as "a gross or systematic failure"

[116] Jurisdiction Hearing, 11 June 2019, 32:24-33:7 (Koh), 36:23-37:2 (Koh), 37:9-14 (Koh).
[117] Jurisdiction Hearing, 11 June 2019, 33:17-22 (Koh).
[118] Jurisdiction Hearing, 11 June 2019, 37:20-38:4 (Koh).
[119] Russian Federation's Reply, para. 22; Jurisdiction Hearing, 10 June 2019, 45:18-25 (Wordsworth).
[120] Jurisdiction Hearing, 10 June 2019, 45:24-25 (Pellet).
[121] Jurisdiction Hearing, 13 June 2019, 29:4-8 (Sander).
[122] Jurisdiction Hearing, 13 June 2019, 29:9-12 (Sander).

to fulfil an obligation "arising under a peremptory norm of general international law."[123] According to the Russian Federation, Ukraine's argument, however, suffers from "three flaws."[124]

88. First, the Russian Federation claims that the Arbitral Tribunal does not have jurisdiction to determine whether there has in fact been a "gross or systematic" breach of a *jus cogens* obligation.[125]

89. In the view of the Russian Federation, the Arbitral Tribunal cannot circumvent that conclusion by—as Ukraine argues—simply "defer[ring]" to relevant United Nations General Assembly (hereinafter "UNGA") resolutions on the basis that they present a "consensus" or "determination" on that point.[126] The Russian Federation observes that Ukraine notably relies on UNGA Resolution 68/262, which *inter alia*:

> Calls upon all States, international organizations and specialized agencies not to recognize any alteration of the status of [Crimea] [...]
>
> and to refrain from any action or dealing that might be interpreted as recognizing any such altered status.[127]

The Russian Federation notes, however, that 69 States elected not to vote in favour of UNGA Resolution 68/262, with 58 States abstaining and 11 States voting against the Resolution.[128] The Russian Federation also points to a "notable dwindling" in support for subsequent UNGA resolutions on this issue;[129] "in a recent resolution only 65 States voted in favour of the resolution and 27 States voted against it, with 70 States abstaining."[130]

90. Further, the Russian Federation states, referring to the text and drafting history of the United Nations Charter and the practice of the International Court of Justice (hereinafter the "ICJ"), that the UNGA is a political body, not entrusted with general power to make determinations binding on the Arbitral Tribunal on disputed issues of international law.[131] It underscores that UNGA

[123] Jurisdiction Hearing, 13 June 2019, 29:13-17 (Sander).
[124] Jurisdiction Hearing, 13 June 2019, 29:19 (Sander).
[125] Jurisdiction Hearing, 13 June 2019, 29:21-30:5 (Sander); Jurisdiction Hearing, 10 June 2019, 47:7-9 (Wordsworth).
[126] Jurisdiction Hearing, 13 June 2019, 30:6-10 (Sander).
[127] Jurisdiction Hearing, 10 June 2019, 47:1-5 (Wordsworth).
[128] Russian Federation's Reply, para. 26; Jurisdiction Hearing, 13 June 2019, 30:11-20 (Sander).
[129] Russian Federation's Reply, para. 26.
[130] Russian Federation's Reply, para. 26.
[131] Russian Federation's Reply, para. 24; Jurisdiction Hearing, 10 June 2019, 47:6-10 (Wordsworth), 48:2-6 (Wordsworth); Jurisdiction Hearing, 13 June 2019, 30:21-31:4 (Sander).

Resolution 68/262 is not binding,[132] and neither are the statements of third States and international organisations to which the Russian Federation is not a party.[133]

91. While the Russian Federation acknowledges that the ICJ may refer to UNGA resolutions as evidence of the existence of *opinio juris*, or as reflecting obligations arising separately under international law, it emphasises that the weight to be accorded by a given tribunal to a UNGA resolution is entirely context-dependent.[134] The Russian Federation observes that, in contrast, what Ukraine asks the Arbitral Tribunal to do in the present case is to "blindly defer" to the UNGA resolutions as "a determination on the disputed question as to whether there has in fact been a serious breach of *jus cogens* by Russia with respect to Crimea."[135] In the Russian Federation's view, the General Assembly, however, has no authority to do so.[136]

92. In any case, the Russian Federation contends that UNGA Resolution 68/262 is not framed as a requirement or a decision, as it merely "calls upon" States, international organisations, and specialised agencies to act or refrain from acting in a certain way.[137]

93. Second, the Russian Federation submits that the obligation of non-recognition is an obligation under international law of the State, not an Annex VII arbitral tribunal.[138] The Russian Federation maintains that the addressees of a non-binding UNGA resolution cannot "magically broaden" the identity of the entities bound by the obligation of non-recognition.[139] Further, according to the Russian Federation, UNGA Resolution 68/262 is directed at "States, international organisations and specialized agencies,"[140] and not at an adjudicative body such as this Arbitral Tribunal.[141] To illustrate its point, the Russian Federation explains that an international court or tribunal would not be deprived of jurisdiction by virtue of UNGA Resolution 68/262 over a dispute in which the Russian Federation was putting forth a positive case regarding its sovereignty over Crimea.[142]

94. Third, the Russian Federation underlines that, while UNGA Resolution 68/262 calls upon States, international organisations, and specialised agencies "not to recognize any alteration of the status

---

[132] Russian Federation's Reply, para. 24; Jurisdiction Hearing, 10 June 2019, 47:10-12 (Wordsworth).
[133] Russian Federation's Reply, para. 27.
[134] Jurisdiction Hearing, 10 June 2019, 47:14-25 (Wordsworth); Jurisdiction Hearing, 13 June 2019, 31:5-32:12 (Sander).
[135] Jurisdiction Hearing, 13 June 2019, 32:13-25 (Sander).
[136] Jurisdiction Hearing, 13 June 2018, 32:25-33:3 (Sander).
[137] Russian Federation's Reply, para. 24.
[138] Jurisdiction Hearing, 13 June 2019, 33:15-21 (Sander).
[139] Jurisdiction Hearing, 13 June 2019, 33:22-25 (Sander).
[140] Jurisdiction Hearing, 10 June 2019, 49:1-6 (Wordsworth).
[141] Russian Federation's Reply, para. 24; Jurisdiction Hearing, 13 June 2019, 34:1-7 (Sander).
[142] Jurisdiction Hearing, 10 June 2019, 49:7-13 (Wordsworth).

of [Crimea]," "[t]he issue of whether or not the legal status of Crimea has in fact altered is not one that Russia asks this tribunal to determine."[143] The Russian Federation contends that an acknowledgement by the Arbitral Tribunal of the "inescapable reality of the fact" of the Russian Federation's claims of sovereignty over Crimea cannot "somehow be characterised as an action that might be interpreted as recognising an 'altered status'" under the terms of UNGA Resolution 68/262.[144]

95. Specifically, the Russian Federation points out that it does not ask the Arbitral Tribunal to recognise the "altered legal status of Crimea" as sovereign territory of the Russian Federation (an issue which it considers would fall outside the jurisdiction of the Arbitral Tribunal).[145] Rather, as one aspect of its objections to jurisdiction, the Russian Federation relies on the fact of a "hotly contested dispute as to the status of Crimea," whose existence is not contested.[146]

96. The Russian Federation further underscores that the obligation of non-recognition is not concerned with the recognition of facts, but with their legitimation.[147] Recognition of the fact of a dispute between Ukraine and the Russian Federation concerning sovereignty over Crimea "is not to recognise or make a determination that either party's claim is or is not lawful."[148] The Russian Federation argues that this position is consistent with the approach of arbitral tribunals that have accepted jurisdiction in investment claims brought against the Russian Federation in relation to Crimea, who in doing so did not imply recognition that the Russian Federation's position regarding Crimea is lawful.[149]

97. The Russian Federation also contends that the obligation of non-recognition is not as "all-encompassing" as Ukraine suggests.[150] The Russian Federation notes Ukraine's point that the obligation of non-recognition may extend to acts that imply a recognition of lawfulness, but submits that this obligation has no application to the present case.[151] The Russian Federation further notes that the ICJ has drawn a distinction between the application of a procedural rule

[143] Jurisdiction Hearing, 10 June 2019, 49:14-19 (Wordsworth).
[144] Russian Federation's Reply, para. 25(b); Jurisdiction Hearing, 10 June 2019, 49:25-50:8 (Wordsworth); Jurisdiction Hearing, 13 June 2019, 35:19-22 (Sander).
[145] Russian Federation's Reply, paras 25(b), 28; Jurisdiction Hearing, 10 June 2019, 45:24-25 (Wordsworth), 49:17-24 (Wordsworth); Jurisdiction Hearing, 13 June 2019, 35:11-19 (Sander).
[146] Jurisdiction Hearing, 10 June 2019, 46:1-6 (Wordsworth); Jurisdiction Hearing, 13 June 2019, 35:20-24 (Sander), 36:9-18 (Sander).
[147] Jurisdiction Hearing, 13 June 2019, 35:25-36:8 (Sander).
[148] Jurisdiction Hearing, 13 June 2019, 36:13-16 (Sander).
[149] Jurisdiction Hearing, 13 June 2019, 38:17-39:18 (Sander).
[150] Jurisdiction Hearing, 13 June 2019, 37:17-37:19 (Sander).
[151] Jurisdiction Hearing, 13 June 2019, 36:16-37:11 (Sander).

impacting the scope of a court's jurisdiction and an act that could imply the recognition of a situation as unlawful.[152]

98. Finally, the Russian Federation contests Ukraine's argument that the Russian Federation is bound by principles of good faith and estoppel to respect Ukraine's borders as they stood at the time of its independence.[153] The Russian Federation argues that a State may take a new position in response to a new set of facts[154] and in response to evolving circumstances.[155]

(b) Position of Ukraine

99. Ukraine contends that the Russian Federation's "claim that the legal status of Crimea has been altered, and the objection that is premised on that claim, should be considered inadmissible in this proceeding."[156] Ukraine notes that the Russian Federation had formerly accepted that Crimea is part of Ukraine, but now asserts that this "settled status" has changed, and that the Russian Federation has acquired sovereignty over Crimea.[157] According to Ukraine, the "international consensus" on this point, however, "dictates that this tribunal should deny Russia's illegal 'claim' all legal effect under the principle of non-recognition."[158]

100. Specifically, Ukraine relies on UNGA Resolution 68/262, reaffirmed in subsequent UNGA Resolutions 73/263, 71/205, and 72/190, which (a) recalled specific commitments made by the Russian Federation to respect the territorial integrity of Ukraine's existing borders, including in Crimea; (b) recalled the obligations of all States to "refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state;" (c) reaffirmed the principle that the "territory of a State shall not be the object of acquisition by another State resulting from the threat or use of force, and that any attempt aimed at the partial or

---

[152] Jurisdiction Hearing, 13 June 2019, 37:17-38:16 (Sander). *See also Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening*), Judgment, I.C.J. Reports 2012, p. 99, para. 93 (**Annex RUL-86**), which reads: "The Rules of State immunity are procedural in character and are confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State[...] For the same reason, recognizing the immunity of a foreign State in accordance with customary international law does not amount to recognizing as lawful a situation created by the breach of a *jus cogens* rule, or rendering aid and assistance in maintaining that situation, and so cannot contravene the principle in Article 41 of the International Law Commission's Articles on State Responsibility."

[153] Jurisdiction Hearing, 10 June 2019, 51:3-11 (Wordsworth).

[154] Jurisdiction Hearing, 10 June 2019, 51:12-21 (Wordsworth); Jurisdiction Hearing, 13 June 2019, 40:15-41:2 (Sander).

[155] Jurisdiction Hearing, 13 June 2019, 41:3-13 (Sander).

[156] Ukraine's Written Observations, paras 18, 33; Jurisdiction Hearing, 11 June 2019, 7:10-13 (Zerkal), 24:20-25:1 (Koh); Jurisdiction Hearing, 14 June 2019, 14:8-15 (Thouvenin).

[157] Ukraine's Written Observations, para. 26; Jurisdiction Hearing, 11 June 2019, 26:22-27:3 (Koh).

[158] Jurisdiction Hearing, 11 June 2019, 24:20-25:1 (Koh); *see also* Ukraine's Rejoinder, para. 18; Jurisdiction Hearing, 11 June 2019, 7:12-17 (Zerkal).

total disruption of the national unity and territorial integrity of a State or country or at its political independence is incompatible with the purposes and principles of the Charter;" (d) noted that the referendum of 16 March 2014 was not authorised by Ukraine, had no validity, and "cannot form the basis of any alteration in the status of the Autonomous Republic of Crimea or of the city of Sevastopol;" and (e) called upon States, international organisations, and specialised agencies "not to recognize any alteration of the status of the Autonomous Republic of Crimea or of the city of Sevastopol [...] and to refrain from any action or dealing that might be interpreted as recognizing such altered status."[159] Ukraine notes that the non-recognition principle is re-affirmed by UNGA Resolution 73/194 dated 17 December 2018, "calling on the Russian Federation to take specific actions to end its temporary occupation of Ukraine's territory without delay."[160]

101. Ukraine submits that the UNGA resolutions, all of which passed with "overwhelming support," codify a "powerful consensus of the international community" regarding Ukraine's sovereignty in Crimea.[161] Ukraine notes that the number of abstentions does not affect the validity of the UNGA resolutions.[162] According to Ukraine, even those States that voted against one or more of the UNGA resolutions have explained their votes in a way that does not undermine the international consensus on the non-recognition of the Russian Federation's "attempted annexation."[163] Ukraine points out that the UNGA resolutions have been echoed by a number of States and international organisations.[164]

102. Ukraine argues that "international tribunals have consistently accorded weight to General Assembly resolutions, particularly those like the Assembly's resolutions on Crimea that expressly state and apply legal principles under the UN Charter and international law."[165] In Ukraine's view, the Convention, through its Article 293, contemplates that "this tribunal would account for such rules of international law," just as the ICJ has given weight to UNGA resolutions "in the Nuclear

[159] Ukraine's Written Observations, para. 27 *citing* United Nations General Assembly Resolution 68/262, U.N. Doc. No. A/RES/68/262 (27 March 2014) (**Annex UA-129**); United Nations General Assembly Resolution 71/205 U.N. Doc No. A/REA/71/205 (19 December 2016) (**Annex UA-464**); United Nations General Assembly Resolution 72/190, U.N. Doc. No. A/RES/72/190 (19 December 2017) (**Annex UA-465**); Ukraine's Rejoinder, para. 14; Jurisdiction Hearing, 11 June 2019, 27:12-28:3 (Koh) *citing* United Nations General Assembly Resolution 72/263, U.N. Doc. No. A/RES/73/263 (22 December 2018) (**Annex UA-550**).

[160] Jurisdiction Hearing, 11 June 2019, 28:10-14 (Koh) *citing* United Nations General Assembly Resolution 73/194, U.N. Doc. No. A/RES/73/194 (17 December 2018) (**Annex UA-549**).

[161] Ukraine's Written Observations, para. 28; Ukraine's Rejoinder, para. 16; Jurisdiction Hearing, 11 June 2019, 29:1-4 (Koh).

[162] Jurisdiction Hearing, 11 June 2019, 29:16-3 (Koh).

[163] Jurisdiction Hearing, 11 June 2019, 30:4-9 (Koh); Ukraine's Rejoinder, para. 22.

[164] Ukraine's Written Observations, para. 29; Ukraine's Rejoinder, para. 14; Jurisdiction Hearing, 11 June 2019, 29:4-15 (Koh).

[165] Jurisdiction Hearing, 11 June 2019, 30:10-14 (Koh).

Weapons, Jerusalem Wall, South West Africa, and Chagos Advisory Opinion proceedings, among others."[166]

103. Ukraine recalls that the ICJ, in *Legal Consequences of the Separation of the Chagos Archipelago*, confirmed that the resolutions of the UNGA draw weight from the UNGA's unique role in the United Nations Charter system and from the legal principles embedded in them.[167] Ukraine argues that as the ICJ, as the principal judicial organ of the United Nations, could not contradict the UNGA resolutions[168] and ITLOS would not contradict the UNGA resolutions on account of its close relations with the United Nations, evidenced in the Agreement on Cooperation and Relationship,[169] an Annex VII arbitral tribunal likewise must not ignore the UNGA resolutions because all forums available under UNCLOS are "expected to follow the same judicial approach."[170]

104. Ukraine argues that, accordingly, the Arbitral Tribunal should not "contravene a determination made five times by the [UNGA]," given the unique role that the UNGA plays in "coordinating the international law obligation of non-recognition."[171] Were the Arbitral Tribunal nonetheless to refuse to exercise jurisdiction over this dispute based on the Russian Federation's territorial claim, it would imply that the status of Crimea as being a part of Ukraine has been altered, "directly contradicting" the UNGA resolutions.[172]

105. Ukraine submits that, in rejecting the Russian Federation's preliminary objection, the Arbitral Tribunal would not decide on the merits of the Russian Federation's sovereignty claim but merely defer to the UNGA resolutions.[173] Upholding the Russian Federation's preliminary objection, on the other hand, would require the Arbitral Tribunal to recognise an alteration in Crimea's status because it would require an acknowledgement that "Crimea could be Russian."[174]

106. In response to the Russian Federation's argument that "the General Assembly's call applies only to formal recognition of [the Russian Federation] sovereignty over Crimea, something that [the Russian Federation] states it does not seek in this case,"[175] Ukraine contends that the UNGA's call for non-recognition prohibits not only formal recognition of the sovereignty of the Russian

---

[166] Jurisdiction Hearing, 11 June 2019, 30:15-21 (Koh).
[167] Ukraine's Rejoinder, para. 21.
[168] Jurisdiction Hearing, 14 June 2019, 17:10-18 (Thouvenin).
[169] Jurisdiction Hearing, 14 June 2019, 17:19-18:16 (Thouvenin).
[170] Jurisdiction Hearing, 14 June 2019, 16:17-17:9 (Thouvenin).
[171] Jurisdiction Hearing, 11 June 2019, 28:15-25 (Koh); Ukraine's Rejoinder, para. 19.
[172] Ukraine's Rejoinder, para. 17; Jurisdiction Hearing, 11 June 2019, 31:2-11 (Koh).
[173] Jurisdiction Hearing, 14 June 2019, 20:10-23 (Thouvenin).
[174] Jurisdiction Hearing, 14 June 2019, 18:21-15 (Thouvenin).
[175] Ukraine's Rejoinder, para. 16.

Federation over Crimea, but also acts which would imply such recognition.[176] Noting that the obligation of collective non-recognition applies to all States, including the responsible State, Ukraine further submits that the Russian Federation "cannot seek to consolidate" a legal position that is contrary to the obligation of collective non-recognition.[177]

107. Finally, Ukraine considers that the Russian Federation is bound by its own past commitments regarding Ukraine's borders as set out in various international instruments.[178] Ukraine notes that, after the dissolution of the USSR, the President of the Russian Federation "recognized Crimea as part of the Ukrainian territory *de facto* and *de jure*."[179] Ukraine contends that principles of good faith, *pacta sunt servanda*, and estoppel render inadmissible the Russian Federation's present claims, which are inconsistent with its past representations regarding the status of Crimea.[180]

3. Implausibility

(a) Position of the Russian Federation

108. The Russian Federation contests Ukraine's argument that the Russian Federation's claim regarding the altered status of Crimea is implausible.[181]

109. The Russian Federation submits that Ukraine introduces an unsupported and unworkable "plausibility" test by claiming that circumstances described by the Russian Federation in its preliminary objections would not produce a legally plausible claim to have acquired sovereignty over Crimea.[182] In the Russian Federation's view, Ukraine has been unable to point to any legal authority, or any basis in Part XV of or Annex VII to the Convention, for its plausibility test.[183] To support its position, the Russian Federation notes that Article 298, paragraph 1, subparagraph (a)(i), of the Convention, in permitting States to exclude any dispute that "necessarily involves the concurrent consideration of any unsettled dispute concerning sovereignty or other rights over

---

[176] Ukraine's Rejoinder, para. 16 *citing* United Nations General Assembly Resolution 68/262, U.N. Doc. No. A/RES/68/262 (27 March 2014), para. 6 (**Annex UA-129**); Jurisdiction Hearing, 11 June 2019, 31:12-16 (Koh).
[177] Ukraine's Rejoinder, para. 23.
[178] Ukraine's Rejoinder, para. 24; Jurisdiction Hearing, 11 June 2019, 26:6-21 (Koh).
[179] Jurisdiction Hearing, 11 June 2019, 26:1-5 (Koh) *citing* Address by the President of the Russian Federation (18 March 2014), p. 4 (**Annex UA-462**).
[180] Ukraine's Rejoinder, para. 25; Jurisdiction Hearing, 11 June 2019, 32:1-10 (Koh).
[181] Russian Federation's Reply, para. 19(c).
[182] Russian Federation's Reply, para. 30.
[183] Russian Federation's Reply, para. 32; Jurisdiction Hearing, 10 June 2019, 53:11-16 (Wordsworth).

continental or insular land territory" from compulsory conciliation, does not require the land sovereignty dispute to be "plausible" for it to be excluded.[184]

110. The Russian Federation points out that plausibility tests have been developed to test whether the allegations made by a claimant are plausible. The Russian Federation argues that the test is "consistent with, and indeed supports, the fundamental rule on the need for consent to jurisdiction".[185] It is the claimant State that asserts jurisdiction, and the respondent State that must be protected against jurisdiction being asserted in respect of a claim that is not within the scope of the treaty invoked by the claimant State.[186] For similar reasons, the Russian Federation finds irrelevant to the present case Ukraine's reliance on the Separate Opinions of Judge Ranjeva and Judge Shahabuddeen in *Oil Platforms (Islamic Republic of Iran v. United States of America)* (hereinafter "*Oil Platforms*").[187]

111. The Russian Federation also contests Ukraine's argument that the ICJ's decision in the *Fisheries Jurisdiction (Spain v. Canada)* (hereinafter "*Fisheries Jurisdiction*") case establishes a presumption in favour of a claimant State's characterisation of a dispute and thus supports the application of a plausibility test to preliminary objections raised by a respondent State.[188] The Russian Federation notes that the ICJ in fact stated that it was for the Court to "determine on an objective basis the dispute dividing the parties."[189]

112. The Russian Federation argues that the standard of plausibility applied by ITLOS in *M/V "Saiga" (No. 1) (St. Vincent and the Grenadines v. Guinea)* (hereinafter "*M/V Saiga*") is not relevant to the present case because the plausibility test in that case was applied in the specific context of prompt release proceedings under Article 292 of the Convention.[190]

113. In response to Ukraine's argument that if a plausibility test were not to apply, a respondent State could easily defeat jurisdiction over any claim by fabricating a baseless territorial dispute,[191] the

---

[184] Jurisdiction Hearing, 13 June 2019, 23:5-21 (Wordsworth).
[185] Russian Federation's Reply, para. 31(b); Jurisdiction Hearing, 10 June 2019, 54:16-55:2 (Wordsworth).
[186] Jurisdiction Hearing, 10 June 2019, 55:3-12 (Wordsworth).
[187] Jurisdiction Hearing, 10 June 2019, 53:18-25 (Wordsworth); Russian Federation's Reply, para. 39.
[188] Russian Federation's Reply, para. 36.
[189] Russian Federation's Reply, para. 36 *citing Fisheries Jurisdiction*, Jurisdiction of the Court, Judgment, I.C.J. Reports 1998, p. 432, pp. 448-49, paras 30-31 (**Annex RUL-22**).
[190] Russian Federation's Reply, para. 38 *referring to M/V Saiga*, Judgment, ITLOS Reports 1997, paras 30-31, 36, 60 (**Annex UAL-48**); Jurisdiction Hearing, 10 June 2019, 56:2-19 (Wordsworth).
[191] Russian Federation's Reply, para. 33; Jurisdiction Hearing, 10 June 2019, 56:20-24 (Wordsworth).

Russian Federation maintains that a State would be prevented from manufacturing a territorial dispute to defeat jurisdiction by the rules governing abuse of rights and process.[192]

114. The Russian Federation further submits that its position in this Arbitration is not abusive.[193] The Russian Federation recalls that it has, since 2014 and well before the present proceedings, put forward its position on sovereignty in Crimea in a range of *fora* and continues to exercise day-to-day sovereignty over the territory.[194] The issues of territorial sovereignty underlying this matter could not have been fabricated in order to defeat this Arbitral Tribunal's jurisdiction.[195]

(b) Position of Ukraine

115. Ukraine argues that even if the Russian Federation's claim regarding the altered status of Crimea is found to be admissible, it is not plausible and therefore should be rejected.[196]

116. Ukraine notes that the Arbitral Tribunal has been seised by Ukraine of a dispute concerning the interpretation and application of the Convention; both Parties recognise the jurisdiction of an Annex VII arbitral tribunal to resolve such a dispute; however, the Russian Federation "tries to escape its own consent to the jurisdiction of the [Arbitral Tribunal] by claiming that the legal status of the applicant's territory has been altered in Crimea."[197]

117. According to Ukraine, a respondent State's assertion of a claim over territory cannot automatically divest an arbitral tribunal of jurisdiction over a maritime dispute, unless such an assertion is at least plausible.[198] Ukraine submits that the plausibility requirement strikes an appropriate balance in the application of Articles 286 and 288 of the Convention.[199] If a respondent State could defeat the jurisdiction of an arbitral tribunal by asserting a frivolous sovereignty claim, this would render the dispute settlement provisions of the Convention illusory and without effect.[200] Ukraine argues, therefore, that the Arbitral Tribunal should undertake a plausibility analysis of the Russian Federation's assertion that the status of Crimea as a part of Ukraine has been altered.[201]

---

[192] Russian Federation's Reply, para. 34.
[193] Jurisdiction Hearing, 10 June 2019, 57:21-22 (Wordsworth).
[194] Jurisdiction Hearing, 10 June 2019, 58:23-59:11 (Wordsworth).
[195] Russian Federation's Reply, para. 34(a)-(b).
[196] Jurisdiction Hearing, 11 June 2019, 7:18-22 (Zerkal), 25:2-5 (Koh), 40:10-12 (Thouvenin).
[197] Jurisdiction Hearing, 11 June 2019, 44:23-45:25 (Thouvenin).
[198] Ukraine's Written Observations, para. 19; Ukraine's Rejoinder, para. 27; Jurisdiction Hearing, 11 June 2019, 46:1-9 (Thouvenin).
[199] Ukraine's Written Observations, para. 46.
[200] Ukraine's Rejoinder, para. 28.
[201] Ukraine's Written Observations, para. 46.

118. Ukraine acknowledges that a court or tribunal that is seised of an alleged dispute by an applicant, the existence and characterisation of which is contested by the respondent State, must exercise its jurisdiction to verify the existence of the alleged dispute, its subject matter, and whether the dispute pre-existed the seising of the court or tribunal.[202] Ukraine submits that a court or tribunal is not competent to decide "the existence or non-existence of an alleged dispute that is not brought to it by the applicant and which does not fall under the instrument that govern[s] its jurisdiction."[203]

119. Ukraine asserts that the ICJ has used the standard of plausibility to determine whether claims fall within the scope of the dispute resolution provisions of specific treaties.[204] Ukraine relies on Judge Shahabuddeen's observations in *Oil Platforms* that "as a general matter, there is no dispute within the meaning of the law where the claim lacks any reasonably arguable legal basis or where it is manifestly frivolous or unsupportable."[205] Ukraine also cites the observations of Judge Ranjeva in *Oil Platforms* that, in the event of "conflicting propositions" put forward by the Parties, the Court "must establish the plausibility of each of them in relation to the benchmark provisions which are the text of the Treaty and its Articles."[206]

120. Ukraine considers that the Russian Federation misconstrues *Chagos* and the *South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China)* (hereinafter "*South China Sea*"), which, unlike this case, involved longstanding sovereignty disputes, implicating competing claims to sovereignty that no State had suggested were inadmissible or implausible.[207] The UNGA had not in the above cases taken a view on the inadmissibility of one set of claims.[208] Unlike *Chagos*, this case does not require the Arbitral Tribunal to resolve a longstanding dispute over territorial sovereignty, and therefore, Ukraine submits, the test articulated by the majority in *Chagos* is inapplicable.[209]

---

[202] Jurisdiction Hearing, 11 June 2019, 42:21-44:6 (Thouvenin).

[203] Jurisdiction Hearing, 11 June 2019, 42:17-20, 44:10-19 (Thouvenin); Jurisdiction Hearing, 14 June 2019, 12:1-11 (Thouvenin).

[204] Ukraine's Written Observations, paras 43-44 *citing* Peter H.F. Bekker, 'Oil Platforms (Iran v. U.S.), Preliminary Objection, Judgment' (1997) 91 A.J.I.L. p. 518 at p. 521 (**Annex UAL-45**); *referring to Ambatielos case (merits: obligation to arbitrate)*, Judgment of 19 May 1953, I.C.J. Reports 1953, pp. 10, 19 (**Annex UAL-46**); *Interhandel Case*, Judgment of 21 March 1959, I.C.J. Reports, p. 6 at p. 24 (**Annex UAL-47**).

[205] Ukraine's Written Observations, para. 45 *citing Oil Platforms*, cit., n. 204, Separate Opinion of Judge Shahabuddeen, p. 822 at p. 832 (**Annex UAL-52**).

[206] Ukraine's Written Observations, para. 44 *citing Oil Platforms*, cit., n. 204, Separate Opinion of Judge Ranjeva, p. 842 at p. 844 (**Annex UAL-51**).

[207] Ukraine's Written Observations, paras 20, 51.

[208] Ukraine's Written Observations, para. 51.

[209] Ukraine's Written Observations, para. 51.

121. Ukraine recalls that, in *South China Sea*, the arbitral tribunal concluded that the Philippines' claim did not require it to resolve any disputes concerning land sovereignty, because China lacked the necessary maritime entitlements to support its actions even if all sovereignty claims were assumed in its favour.[210] Ukraine points out that if the Russian Federation were able to "escape its consent to arbitrate" by making a "bare assertion that Crimea has lost its settled status as part of Ukraine," thus creating a "dispute" over land territory, China could have altered the result of *South China Sea* by asserting invented sovereignty claims to islands in the Philippine archipelago.[211]

122. Ukraine argues that the ICJ in *Fisheries Jurisdiction* also noted that the "formulation of the dispute by the [claimant State]" would only be rebutted through objective support for a contrary characterisation.[212] Ukraine submits that, to support its alternative formulation of the claim, the Russian Federation must first establish the plausibility of its argument that the settled status of Crimea has been altered.[213]

123. Addressing the Russian Federation's proposition that the plausibility test is typically used to assess arguments of a claimant State, Ukraine underscores that ITLOS in *M/V Saiga* applied the plausibility test to claims made by the respondent State.[214] In any event, according to Ukraine, there is no principled reason why the plausibility test should only be applied to a claimant State, while a respondent State is taken at its word.[215] Instead, Ukraine argues that the plausibility test may be used to assess a legal claim introduced by either party to a dispute.[216] According to Ukraine, the plausibility test has a common rationale that is to give no legal effect to the non-plausible claims of one party that could, if taken at face value, harm the other party's rights.[217]

124. Ukraine observes that the Russian Federation agrees that there must be a limiting principle for sovereignty claims made to defeat jurisdiction but the Russian Federation suggests that it must be the lowest possible threshold.[218] Ukraine further observes that, in place of a plausibility test, the Russian Federation appears to propose an "abuse of process/rights" test under which a respondent State's territorial sovereignty claim over a relevant coastal area would always defeat an arbitral tribunal's jurisdiction unless the sovereignty claim (a) post-dates the commencement of legal

[210] Ukraine's Written Observations, para. 41 *citing South China Sea*, Award of 12 July 2016, para. 153 (**Annex UAL-11**).
[211] Ukraine's Written Observations, para. 41.
[212] Ukraine's Written Observations, para. 42 *citing Fisheries Jurisdiction*, cit., n. 189, pp. 448-49, paras 30-31 (**Annex UAL-42**).
[213] Ukraine's Written Observations, para. 42.
[214] Ukraine's Rejoinder, para. 32.
[215] Ukraine's Rejoinder, para. 32.
[216] Ukraine's Rejoinder, para. 32; Jurisdiction Hearing, 11 June 2019, 47:8-15 (Thouvenin).
[217] Jurisdiction Hearing, 11 June 2019, 47:15-19 (Thouvenin).
[218] Jurisdiction Hearing, 14 June 2019, 22:5-8 (Thouvenin).

proceedings; and (b) has never been articulated to the other party outside the context of the dispute resolution proceedings.[219] Ukraine rejects such standard because it would permit States to defeat an arbitral tribunal's jurisdiction (and therefore the object and purpose of the Convention) based on a prior sovereignty claim, irrespective of how frivolous that sovereignty claim might be.[220]

125. Applying its plausibility test set out above, Ukraine contends that the Russian Federation's claim to have acquired sovereignty over Crimea is not plausible,[221] and that there is no land sovereignty issue that precludes the jurisdiction of the Arbitral Tribunal over the present dispute.[222] First, Ukraine argues that, as described above, the consensus of the international community as reflected in the UNGA resolutions has rejected the Russian Federation's claim.[223] Second, Ukraine argues that the Russian Federation's claim contravenes a number of international agreements that bind the Russian Federation and recognise the territory of Crimea as Ukrainian.[224] Third, Ukraine contends that the Russian Federation does not put forward sufficient evidence to support its claim.[225] According to Ukraine, the Russian Federation's sole basis for claiming that Crimea's status has changed is the referendum of 16 March 2014.[226] Ukraine highlights that there is no basis in international law for the validity of a referendum held in violation of the law of the State in which it takes place.[227] Ukraine reiterates that, therefore, the circumstances described by the Russian Federation would not produce a legally plausible claim to have acquired sovereignty over Crimea.[228]

4. The Relative Weight of the Dispute

(a) Position of the Russian Federation

126. The Russian Federation rejects Ukraine's argument that, even if there exists a predicate territorial sovereignty dispute, the Arbitral Tribunal nonetheless has jurisdiction to make a determination on

[219] Ukraine's Rejoinder, para. 29.
[220] Ukraine's Rejoinder, para. 30.
[221] Jurisdiction Hearing, 11 June 2019, 52:1-2 (Thouvenin).
[222] Ukraine's Written Observations, Chapter 2(II)(B)(2); Ukraine's Rejoinder, para. 40.
[223] Ukraine's Written Observations, para. 47; Ukraine's Rejoinder, para. 38; Jurisdiction Hearing, 11 June 2019, 53:1-8 (Thouvenin).
[224] Jurisdiction Hearing, 11 June 2019, 53:9-19 (Thouvenin).
[225] Ukraine's Written Observations, para. 48; Ukraine's Rejoinder, para. 38.
[226] Ukraine's Written Observations, paras 19, 48-49; Jurisdiction Hearing, 11 June 2019, 53:20-54:1 (Thouvenin).
[227] Ukraine's Written Observations, paras 49-50 *citing* United Nations General Assembly Resolution 68/262, U.N. Doc. No. A/RES/68/262 (27 March 2014) (**Annex UA-129**); Council of Europe, European Commission for Democracy through Law (Venice Commission) Opinion No. 762/2014 (21 March 2014), paras 27-28 (**Annex UA-505**); Jurisdiction Hearing, 11 June 2019, 54:2-15 (Thouvenin).
[228] Ukraine's Written Observations, para. 49.

such predicate dispute because the primary issue in dispute is, or the relative of the weight of the dispute lies with, the interpretation or application of the Convention.[229]

127. Relying on the award in *Chagos*, the Russian Federation suggests that the Arbitral Tribunal, in characterising the dispute before it, should focus on where "the relative weight of the dispute lies" and should consider whether "the Parties' dispute primarily [is] a matter of the interpretation and application of the term 'coastal State,' with the issue of sovereignty forming one aspect of the larger question" or whether "the Parties' dispute primarily concern[s] sovereignty."[230]

128. The Russian Federation argues that Ukraine mischaracterises *Chagos* when it states that the majority in that arbitration "decided to attach jurisdictional consequences to a situation where the asserted sovereignty issue significantly outweighed, both objectively and subjectively, in view of both parties, the UNCLOS issues in dispute."[231] In the Russian Federation's view, it is an attempt to add "a series of qualifications to the test which are not to be found in the award."[232]

129. The Russian Federation also refers to the award in *South China Sea* in which the arbitral tribunal examined:

> whether (a) the resolution of the [claimant State's] claims would require the Tribunal to first render a decision on sovereignty, either expressly or implicitly; or (b) the actual objective of the [claimant State's] claims was to advance its position in the Parties' dispute over sovereignty.[233]

The Russian Federation considers that it is not necessary for both of the above conditions to be met, cumulatively, to conclude that a claim relates to land sovereignty issues.[234]

130. Applying the criteria in *Chagos* and *South China Sea* to the present Arbitration, the Russian Federation argues that territorial sovereignty lies at "the very heart of the dispute."[235] According to the Russian Federation, it is not possible to drive a "jurisdictional wedge" between the contested issue of territorial sovereignty and the sovereign rights of a coastal State claimed by Ukraine[236] because "the territorial sovereignty dispute is in no way ancillary to a law of the sea

---

[229] Russian Federation's Preliminary Objections, paras 24-25.
[230] Russian Federation's Preliminary Objections, para. 24 *citing Chagos*, cit., n. 34, para. 211 (**Annex UAL-18**); Jurisdiction Hearing, 10 June 2019, 38:23-39:3 (Wordsworth).
[231] Jurisdiction Hearing, 13 June 2019, 11:19-12:2 (Wordsworth).
[232] Jurisdiction Hearing, 13 June 2019, 11:25-12:2 (Wordsworth).
[233] Russian Federation's Preliminary Objections, para. 24 *citing South China Sea*, cit., n. 34, para. 153 (**Annex UAL-3**).
[234] Jurisdiction Hearing, 13 June 2019, 12:3-13:15 (Wordsworth).
[235] Russian Federation's Preliminary Objections, para. 56.
[236] Jurisdiction Hearing, 10 June 2019, 28:14-17 (Wordsworth).

dispute" but is "the broader dispute, which entirely subsumes the dispute as to who is and can exercise the rights of the coastal State."[237]

131. The Russian Federation notes that the meaning of the term "coastal State" is not contested by the Parties; the only issue before the Arbitral Tribunal is who can exercise the coastal State rights.[238] The Russian Federation notes that a number of Ukraine's claims and the remedies it seeks are based on its alleged rights as a coastal State.[239] Under the characterisation tests developed in *Chagos* and *South China Sea*,[240] the Russian Federation notes that although Ukraine claims that it does not to seek any ruling on territorial sovereignty, it (a) has presented its claim on the basis of an alleged infringement of its rights as a coastal State; (b) bases its claims on Ukraine being found to be the coastal State in Crimea; and (c) states that the relief would "vindicate Ukraine's national sovereignty."[241] According to the Russian Federation, the issue of whether Ukraine is the coastal State in Crimea is at "the front and centre" of the matter before this Arbitral Tribunal and "[t]he weight of the dispute thus lies squarely with territorial sovereignty."[242]

132. The Russian Federation notes that Ukraine seeks to distinguish *Chagos* and *South China Sea* from this Arbitration on the basis that the former cases involved longstanding sovereignty disputes with no question as to the plausibility of the claims on either side.[243] In the Russian Federation's view, whether the claims in *Chagos* and *South China Sea* were plausible or whether sovereignty disputes were longstanding is irrelevant because the present case unquestionably involves a sovereignty dispute of which there is a clear record and that had crystallised long before the commencement of these proceedings.[244]

133. The Russian Federation argues that Ukraine cannot distinguish *Chagos* from this Arbitration on the basis that in *Chagos*, the claimant State sought relief to change the *status quo* on land.[245] According to the Russian Federation, Ukraine also seeks to change the *status quo* on land where

---

[237] Jurisdiction Hearing, 10 June 2019, 28:5-10 (Wordsworth).
[238] Jurisdiction Hearing, 10 June 2019, 39:4-11 (Wordsworth); Jurisdiction Hearing, 13 June 2019, 15:11-18 (Wordsworth).
[239] Jurisdiction Hearing, 10 June 2019, 40:2-22 (Wordsworth).
[240] Russian Federation's Preliminary Objections, para. 24.
[241] Russian Federation's Reply, paras 46-47.
[242] Jurisdiction Hearing, 10 June 2019, 41:5-42:13 (Wordsworth).
[243] Russian Federation's Reply, para. 43.
[244] Russian Federation's Reply, para. 44; Jurisdiction Hearing, 10 June 2019, 42:24-43:6 (Wordsworth).
[245] Jurisdiction Hearing, 10 June 2019, 43:10-14 (Wordsworth).

the Russian Federation has exercised sovereignty in Crimea, including in its maritime zones, since 2014.[246]

134. Further, the Russian Federation notes that *Chagos* cannot be distinguished from this Arbitration on the basis that Mauritius had anticipated that the relief it sought from that arbitral tribunal would have consequences for the Chagos land territory.[247] The Russian Federation points out that Ukraine has sought declarations that the Russian Federation "is violating Ukraine's sovereignty and sovereign rights" and "has interfered with Ukraine's sovereignty" on the basis that Ukraine is the coastal State in Crimea and has also sought to "vindicate Ukraine's national sovereignty."[248] Accordingly, in the Russian Federation's view, the question of who is sovereign over the land territory is again central.[249]

135. Finally, the Russian Federation denies that the sovereignty dispute over Crimea is ancillary to a dispute concerning the interpretation and application of the Convention.[250] If it were, an arbitral tribunal constituted under Part XV of the Convention would have jurisdiction to resolve the territorial sovereignty dispute in any case involving the breach of coastal State rights where the identity of the coastal State was contested.[251]

(b) Position of Ukraine

136. Ukraine argues that even if there exists a predicate territorial sovereignty dispute, as the Russian Federation suggests, the Arbitral Tribunal has jurisdiction to make determinations on predicate issues of law that are necessary to perform the functions assigned to it by the Convention.[252]

137. In this regard, Ukraine recalls that the majority of the arbitral tribunal in *Chagos* found that "where a dispute concerns the interpretation or application of the Convention, the jurisdiction of a court or tribunal pursuant to Article 288(1) extends to making such findings of fact or ancillary determinations of law as are necessary to resolve the dispute presented to it," including on matters

[246] Jurisdiction Hearing, 10 June 2019, 43:15-22 (Wordsworth); Jurisdiction Hearing, 13 June 2019, 17:22-18:6 (Wordsworth).
[247] Jurisdiction Hearing, 10 June 2019, 43:23-44:2 (Wordsworth).
[248] Jurisdiction Hearing, 10 June 2019, 44:2-10 (Wordsworth).
[249] Jurisdiction Hearing, 13 June 2019, 44:11-12 (Wordsworth).
[250] Jurisdiction Hearing, 10 June 2019, 44:20-24 (Wordsworth).
[251] Jurisdiction Hearing, 10 June 2019, 45:5-13 (Wordsworth).
[252] Ukraine's Rejoinder, para. 41; Jurisdiction Hearing, 11 June 2019, 25:6-14 (Koh).

of territorial sovereignty, provided that the dispute was primarily about claims arising out of the Convention.[253]

138. According to Ukraine, the majority in *Chagos* "decided to attach jurisdictional consequences to a situation where the asserted sovereignty issue significantly outweighed, both objectively and subjectively, in the view of both parties, the [Convention] issues in dispute."[254] In order to determine whether the dispute before it concerned the Convention, Ukraine recalls that the majority of the *Chagos* arbitral tribunal examined where "the relative weight of the dispute lies," and noted that it could rule upon a dispute "primarily [concerning] a matter of the interpretation and application of the term 'coastal State', with the issue of [land] sovereignty forming one aspect of a larger question."[255] In its analysis, Ukraine underlines, the *Chagos* arbitral tribunal looked at the object of Mauritius' claims, and relied on Mauritius' submission that it sought, through the arbitration, to compel the "British [to] leave" the Chagos islands, so that "[t]he former residents of the Chagos Archipelago who wish to return finally will be free to do so and their exile will come to an end."[256]

139. Ukraine further points out that two arbitrators of the *Chagos* arbitral tribunal argued in their Dissenting Opinion that, so long as the underlying dispute concerned the interpretation or application of the Convention, it was permissible for an arbitral tribunal under the Convention to resolve a territorial sovereignty question that is necessary to resolve a question regarding the Convention.[257] Ukraine notes that the minority in *Chagos* considered that any other reading of Article 288 of the Convention would "introduce a new limitation to the jurisdiction" of "tribunals acting under Part XV" and "change the balance achieved at the Third [United Nations] Conference on the Law of the Sea."[258]

140. Ukraine submits that the *Chagos* arbitral tribunal was therefore unanimous that a respondent State's assertion of sovereignty "cannot automatically defeat jurisdiction" under Articles 286 and 288 and that an arbitral tribunal constituted under the Convention may in some cases resolve a

[253] Ukraine's Written Observations, para. 36 *citing Chagos*, cit., n. 34, paras 211, 220-21 (**Annex UAL-18**); Jurisdiction Hearing, 11 June 2019, 55:12-23 (Thouvenin); Jurisdiction Hearing, 14 June 2019, 24:15-25:19 (Thouvenin).
[254] Jurisdiction Hearing, 11 June 2019, 57:6-10 (Thouvenin).
[255] Ukraine's Written Observations, para. 52 *citing Chagos*, cit., n. 34, para. 211 (**Annex UAL-18**); Jurisdiction Hearing, 11 June 2019, 57:11-58:4 (Thouvenin).
[256] Ukraine's Written Observations, para. 52 *citing Chagos*, cit., n. 34, para. 211 (**Annex UAL-18**).
[257] Ukraine's Written Observations, para. 36 *citing Chagos*, cit., n. 34, Dissenting and Concurring Opinion of Judge James Kateka and Rüdiger Wolfrum, paras 44-45 (**Annex UAL-18**); Jurisdiction Hearing, 11 June 2019, 56:17-25 (Thouvenin).
[258] Jurisdiction Hearing, 11 June 2019, 57:1-5 (Thouvenin).

predicate sovereignty dispute.[259] According to Ukraine, the *Chagos* arbitral tribunal sought to guard against an abuse of jurisdiction in cases where a territorial sovereignty dispute is "dressed up" as one pertaining to the law of the sea.[260]

141. Ukraine notes that the arbitral tribunal in *Chagos* accorded particular weight to the fact that Mauritius had specifically anticipated that the relief it sought from the arbitral tribunal would have consequences for the Chagos land territory and had formulated its understanding of the dispute on this basis.[261]

142. Ukraine also notes that, like the *Chagos* arbitral tribunal, the *South China Sea* arbitral tribunal also recognised that there existed a dispute between the parties concerning land sovereignty.[262] According to Ukraine, however, the *South China Sea* arbitral tribunal distinguished the case before it from *Chagos* on the basis that, while the majority in *Chagos* considered that "a decision on Mauritius' [...] submissions would have required an implicit decision on sovereignty and that sovereignty was the true object of Mauritius' claims," that was not the case in *South China Sea*.[263] Consequently, Ukraine observes that the *South China Sea* arbitral tribunal could proceed to hear the case, noting that "[t]here are no grounds to 'decline to take cognizance of one aspect of a dispute merely because that dispute has other aspects, however important.'"[264]

143. Applying these findings to the present Arbitration, Ukraine submits that the relevant question is who is entitled to exercise coastal State rights under the Convention and whether this issue is ancillary to Ukraine's claims under the Convention.[265] Ukraine submits that its claim concerns a series of "serious and pervasive violations, and the corresponding damage to Ukraine and third-party rights under the Convention."[266] On the other hand, according to Ukraine, the question of who is entitled to exercise coastal State rights is "not the primary issue in dispute," given the factors presented by Ukraine in its inadmissibility and implausibility arguments.[267]

144. Distinguishing *Chagos* from the present case, Ukraine first submits that, unlike in *Chagos*, in this Arbitration the land sovereignty claim has been introduced by the respondent State, the Russian

---

[259] Ukraine's Rejoinder, para. 42; Jurisdiction Hearing, 11 June 2019, 56:12-15 (Thouvenin).
[260] Ukraine's Rejoinder, para. 43.
[261] Ukraine's Rejoinder, para. 47; Jurisdiction Hearing, 11 June 2019, 59:5-13 (Thouvenin).
[262] Jurisdiction Hearing, 11 June 2019, 59:13-25 (Thouvenin).
[263] Jurisdiction Hearing, 11 June 2019, 60:1-9 (Thouvenin).
[264] Jurisdiction Hearing, 11 June 2019, 59:13-19 (Thouvenin).
[265] Jurisdiction Hearing, 14 June 2019, 25:21-26:10 (Thouvenin).
[266] Jurisdiction Hearing, 14 June 2019, 28:14-29:2 (Thouvenin).
[267] Jurisdiction Hearing, 14 June 2019, 29:7-9, 29:16-30:23 (Thouvenin).

Federation.[268] Second, Ukraine argues that, unlike *Chagos*, the present dispute is a "well-evidenced" one that implicates several aspects of the Convention.[269] Third, Ukraine argues that, unlike in *Chagos*, there is "no serious issue of land sovereignty to be resolved" in the present case.[270] Ukraine notes that Crimea's status as a part of Ukraine is "settled" and that the Russian Federation has failed to demonstrate the existence of a competing plausible claim with *prima facie* legal seriousness.[271] Fourth, Ukraine contends that, unlike the claimant State in *Chagos*, it does not seek relief that changes the *status quo* on land.[272]

145. Therefore, Ukraine submits that sovereignty over land is not the "real dispute" in the present case, nor where the relative weight of the dispute lies.[273] Ukraine maintains that its "actual objective" in this Arbitration is to protect its maritime rights.[274]

D. REPLY TO THE ARBITRAL TRIBUNAL'S QUESTIONS

1. Reply of the Russian Federation

146. In response to the first question posed to the Parties by the Arbitral Tribunal at the Hearing (*see* paragraph 29 of this Award), the Russian Federation submits that the great majority of the claims advanced by Ukraine depend on a prior determination by, or assumption on the part of, the Arbitral Tribunal as to which State is the coastal State in Crimea.[275] The claims that do not so depend, in the Russian Federation's view, are: the submissions advanced at paragraphs 265 (m) and (n) of Ukraine's Memorial with respect to transit passage and navigation and the submissions advanced at paragraphs 265 (o) and (p) of Ukraine's Memorial with respect to a failure to cooperate concerning environmental issues, including the May 2016 oil spill.[276] The Russian Federation states that Ukraine's claim pursuant to Article 92 of the Convention is advanced on the basis that it is the coastal State.[277] Further, according to the Russian Federation, Ukraine's reliance on Article 279, to the extent that it is invoked on the basis that the relevant conduct occurred in

[268] Jurisdiction Hearing, 11 June 2019, 3:5-9, 6:23-7:3 (Zerkal), 60:10-15 (Thouvenin); Jurisdiction Hearing, 14 June 2019, 11:19-25 (Thouvenin).
[269] Ukraine's Rejoinder, para. 48; Jurisdiction Hearing, 11 June 2019, 60:16-61:4 (Thouvenin).
[270] Ukraine's Rejoinder, para. 49; Jurisdiction Hearing, 14 June 2019, 30:24-31:4 (Thouvenin).
[271] Ukraine's Written Observations, para. 53; Jurisdiction Hearing, 11 June 2019, 61:5-13 (Thouvenin).
[272] Ukraine's Rejoinder, para. 50; Jurisdiction Hearing, 11 June 2019, 61:14-22 (Thouvenin).
[273] Ukraine's Rejoinder, para. 51; Jurisdiction Hearing, 11 June 2019, 25:15-18 (Koh); Jurisdiction Hearing, 11 June 2019, 61:23-62:7 (Thouvenin).
[274] Ukraine's Written Observations, para. 54; Ukraine's Rejoinder, para. 49.
[275] Jurisdiction Hearing, 13 June 2019, 5:24-6:6 (Wordsworth).
[276] Jurisdiction Hearing, 13 June 2019, 6:5-12 (Wordsworth).
[277] Jurisdiction Hearing, 13 June 2019, 6:13-21 (Wordsworth).

maritime areas claimed to be Ukraine's, depends on a prior determination by the Arbitral Tribunal as to which State is the coastal State in Crimea.[278]

147. In response to the second question posed by the Arbitral Tribunal to the Parties,[279] the Russian Federation submits that the Convention does not determine the extent of the rights and duties of the States concerned in circumstances where there is disagreement as to who exercises coastal State rights in respect of a particular maritime area.[280] The Russian Federation maintains that the absence of legal standards in the Convention for the determination of this issue, particularly compared to the fact that the Convention does make provision for steps to be taken when States Parties cannot agree to maritime delimitation under Articles 74 and 83, highlights that disputed issues of land sovereignty do not fall within Article 288 of the Convention.[281]

2. Reply of Ukraine

148. In response to the first question posed to the Parties by the Arbitral Tribunal (*see* paragraph 29 of this Award), Ukraine submits that the Russian Federation's violations of the following articles of the Convention do not depend on a prior determination by, or assumption on the part of, the Arbitral Tribunal as to which State is sovereign over Crimea: Articles 38, 43, 44, 92 (which applies to the exclusive economic zone by way of Article 58), 123, 192, 194, 198, 199, 204, 205, 206, 279, and 303.[282] Ukraine clarifies that its argument pursuant to Article 92 is not forwarded on the basis that Ukraine is the coastal State and notes that the violations therefore do not depend on whether they occurred in Ukraine's exclusive economic zone.[283] Ukraine further clarifies that its argument regarding the aggravation of the dispute pursuant to Article 279 does not depend on Ukraine's coastal State rights.[284]

149. In response to the second question posed by the Arbitral Tribunal to the Parties, Ukraine states that the Convention governs the rights and obligations of parties that are in disagreement as to who exercises the coastal State rights in respect of a particular area.[285] If this were not the case,

[278] Jurisdiction Hearing, 13 June 2019, 6:22-7:5 (Wordsworth).
[279] *See* paragraph 29 of this Award.
[280] Jurisdiction Hearing, 13 June 2019, 9:19-10:11 (Wordsworth).
[281] Jurisdiction Hearing, 13 June 2019, 10:2-11:8 (Wordsworth).
[282] Jurisdiction Hearing, 14 June 2019, 94:12-22 (Koh).
[283] Jurisdiction Hearing, 14 June 2019, 95:4-9 (Koh).
[284] Jurisdiction Hearing, 14 June 2019, 95:10-16 (Koh).
[285] Jurisdiction Hearing, 14 June 2019, 23:22-24:14 (Thouvenin).

according to Ukraine, the mere existence of an "artificial disagreement" regarding who is entitled to exercise coastal State rights would nullify the rights and obligations under the Convention.[286]

E. ANALYSIS OF THE ARBITRAL TRIBUNAL

150. The Russian Federation's first preliminary objection that the Arbitral Tribunal lacks jurisdiction over Ukraine's sovereignty claim raises several questions. The Arbitral Tribunal will proceed to address them *seriatim*.

1. Nature or Characterisation of the Dispute before the Arbitral Tribunal

151. The first question the Arbitral Tribunal has to address is the nature or character of the dispute brought before it by the Applicant. As the arbitral tribunal in *South China Sea* stated, "[t]he nature of the dispute may have significant jurisdictional implications, including whether the dispute can fairly be said to concern the interpretation or application of the Convention."[287] In addressing this question, the Arbitral Tribunal needs to examine the positions of the Parties, while giving particular attention to the formulation of the dispute chosen by Ukraine as Applicant.[288] However, it is ultimately for the Arbitral Tribunal itself to determine on an objective basis the nature of the dispute dividing the Parties by "[isolating] the real issue in the case and [identifying] the object of the claim."[289]

152. The Arbitral Tribunal notes that, while Ukraine formulates its dispute with the Russian Federation in terms of the alleged violation of its rights under the Convention, thus as a dispute concerning the interpretation or application of the Convention, many of its claims in the Notification and Statement of Claim are based on the premise that Ukraine is sovereign over Crimea, and thus the "coastal State" within the meaning of the various provisions of the Convention it invokes. Ukraine itself acknowledges this and, as will be seen below, submits that this premise must be accepted by the Arbitral Tribunal because the Russian Federation's claim of sovereignty over Crimea is inadmissible and implausible. However, unless the premise that Crimea belongs to Ukraine is to be taken at face value, the claims as advanced by Ukraine cannot be addressed by the Arbitral Tribunal without first examining and, if necessary, rendering a decision on the question of sovereignty over Crimea.

[286] Jurisdiction Hearing, 14 June 2019, 23:25-24:9 (Thouvenin).
[287] *South China Sea*, cit., n. 34, para. 150 (**Annex UAL-3**)
[288] *Fisheries Jurisdiction*, cit., n. 189, p. 448, para. 30 (**Annex RUL-22**).
[289] *Nuclear Tests (Australia v. France)*, Judgment, I.C.J. Reports 1974, p. 253 at p. 262, para. 29 (**Annex UAL-100**).

153. The Arbitral Tribunal also notes that Ukraine emphasises that it asks for "absolutely no relief" relating to the situation in Crimea, and that the sole objective of Ukraine's claims is the interpretation and application of the Convention in relation to the Russian Federation's actions in the Black Sea, the Sea of Azov, and the Kerch Strait. In the view of the Arbitral Tribunal, however, even if that is the real objective of Ukraine's claims, the fact remains that a significant part of Ukraine's claims under consideration rests on the premise that Ukraine is sovereign over Crimea, the validity of which is challenged by the Russian Federation.

154. Consequently, if the legal status of Crimea, contrary to Ukraine's assumption, is not settled in the sense that it forms part of Ukraine's territory, but is disputed as the Russian Federation contends, the Arbitral Tribunal would not be able to decide the claims of Ukraine insofar as they are premised on the settled status of Crimea as part of Ukraine without first addressing the question of sovereignty over Crimea. The Arbitral Tribunal therefore considers that the question as to which State is sovereign over Crimea, and thus the "coastal State" within the meaning of several provisions of the Convention invoked by Ukraine, is a prerequisite to the decision of the Arbitral Tribunal on a significant part of the claims of Ukraine. For the purposes of determining the jurisdiction of the Arbitral Tribunal, this characterisation of the dispute before it raises two questions: first, the scope of the jurisdiction of the Arbitral Tribunal under Article 288, paragraph 1, of the Convention; and second, the existence *vel non* of a sovereignty dispute over Crimea. The Arbitral Tribunal will now examine these two questions in turn.

2. Scope of the Jurisdiction of the Arbitral Tribunal under Article 288(1) of the Convention

155. Article 288, paragraph 1, of the Convention reads:

> A court or tribunal referred to in article 287 shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part.

156. Thus, the jurisdiction of a court or tribunal referred to in Article 287, including this Arbitral Tribunal, is confined to "any dispute concerning the interpretation or application of this Convention." The question the Arbitral Tribunal should address is whether a dispute that involves the determination of a question of territorial sovereignty would fall within the jurisdiction of a court or tribunal under Article 288, paragraph 1, of the Convention. While the text of the Convention provides no clear answer to this question, the Arbitral Tribunal is of the view that, in light of Article 297, which carves out certain categories of disputes relating to the exercise of sovereign rights and jurisdiction in the exclusive economic zone, and Article 298, paragraph 1,

which allows States to exclude three categories of disputes, such as disputes concerning such sensitive matters as the delimitation of maritime boundaries, from compulsory dispute settlement procedures, a sovereignty dispute, which is mentioned in neither provision, may not be regarded a dispute concerning the interpretation or application of the Convention. The fact that a sovereignty dispute is not included either in the limitations on, or in the optional exceptions to, the applicability of compulsory dispute settlement procedures supports the view that the drafters of the Convention did not consider such a dispute to be "a dispute concerning the interpretation or application of the Convention."

157. The Arbitral Tribunal recalls in this regard that the question as to whether a court or tribunal referred to in Article 287 of the Convention has jurisdiction to decide upon a sovereignty dispute has been the subject of scrutiny by arbitral tribunals in previous cases. Those arbitral tribunals were circumspect and generally answered the above question in the negative, except for a situation where a sovereignty issue is "ancillary" to a dispute concerning the interpretation or application of the Convention.

158. For example, the arbitral tribunal in *Chagos* stated:

> As a general matter, the Tribunal concludes that, where a dispute concerns the interpretation or application of the Convention, the jurisdiction of a court or tribunal pursuant to Article 288(1) extends to making such findings of fact or ancillary determinations of law as are necessary to resolve the dispute presented to it [...] Where the "real issue in the case" and the "object of the claim" [...] do not relate to the interpretation or application of the Convention, however, an incidental connection between the dispute and some matter regulated by the Convention is insufficient to bring the dispute, as a whole, within the ambit of Article 288(1).[290]

159. The arbitral tribunal further stated that it "does not categorically exclude that in some instances a minor issue of territorial sovereignty could indeed be ancillary to a dispute concerning the interpretation or application of the Convention."[291]

160. In *South China Sea*, the arbitral tribunal examined whether "either (a) the resolution of the Philippines' claims would require the Tribunal to first render a decision on sovereignty, either expressly or implicitly; or (b) the actual objective of the Philippines' claim was to advance its position in the Parties' dispute over sovereignty."[292] It found that neither of these situations was present in the case at hand. The arbitral tribunal went on to state:

> The Convention, however, does not address the sovereignty of States over land territory. Accordingly, this Tribunal has not been asked to and does not purport to make any ruling as

[290] *Chagos*, cit., n. 34, para. 220 (**Annex UAL-18**).
[291] *Chagos*, cit., n. 34, para. 221 (**Annex UAL-18**).
[292] *South China Sea*, cit., n. 34, para. 153 (**Annex UAL-3**).

> to which State enjoys sovereignty over any land territory in the South China Sea, in particular with respect to the disputes concerning sovereignty over the Spratly Islands or Scarborough Shoal. None of the Tribunal's decisions in this Award are dependent on a finding of sovereignty, nor should anything this Award understood to imply a view with respect to questions of land sovereignty.[293]

161. The Arbitral Tribunal does not consider that there exists a serious disagreement between the Parties regarding the interpretation of Article 288, paragraph 1, of the Convention *per se*. While Ukraine seems to favour a broad interpretation of the jurisdiction of a court or tribunal under this provision, it does not go as far as to assert that such jurisdiction should extend to making a decision on any sovereignty dispute. As the Arbitral Tribunal sees it, the essence of the position of Ukraine is not that this Arbitral Tribunal is competent under Article 288, paragraph 1, of the Convention to decide any sovereignty dispute, but that there is no sovereignty dispute between the Parties over Crimea. In the alternative, Ukraine argues that, even if a sovereignty dispute exists over Crimea, this Arbitral Tribunal has jurisdiction to decide it because the sovereignty dispute is ancillary to the dispute concerning the interpretation or application of the Convention. On the other hand, the Russian Federation contends that a predicate dispute on sovereignty over Crimea exists and that such dispute is not ancillary to, but at the heart of, the dispute before the Arbitral Tribunal. In the view of the Arbitral Tribunal, therefore, the real issue of contention between the Parties in the present case is whether there exists a sovereignty dispute over Crimea, and if so, whether such dispute is ancillary to the determination of the maritime dispute brought before the Arbitral Tribunal by Ukraine.

3. Existence *vel non* of a Sovereignty Dispute over Crimea

162. The Arbitral Tribunal now turns to the question of whether a sovereignty dispute over Crimea exists between the Parties. The Parties disagree on whether or not such a dispute exists.

(a) General Considerations

163. The Arbitral Tribunal notes that the concept of "dispute" is well-established in the jurisprudence of international courts and tribunals. According to widely accepted jurisprudence, a dispute is "a disagreement on a point of law or fact, a conflict of legal views or of interests" between parties.[294] In order for a dispute to exist, "[i]t must be shown that the claim of one party is positively opposed

---

293 *South China Sea*, cit., n. 210, para. 5 (**Annex UAL-11**).

294 *Mavrommatis Palestine Concessions (Greece v. United Kingdom)* (hereinafter "*Mavrommatis Palestine Concessions*"), Judgment, P.C.I.J. Series A, No. 2, p. 11 (**Annex RUL-2**).

by the other and that the two sides must 'hold clearly opposite views' concerning the question of the performance or non-performance of certain international obligations."[295]

164. The Arbitral Tribunal further notes that the "determination of the existence of a dispute is a matter of substance, and not a question of form or procedure," and that whether a dispute exists is a matter for "objective determination."[296] In other words,

> It is not sufficient for one party to a contentious case to assert that a dispute exists with the other party. A mere assertion is not sufficient to prove the existence of a dispute any more than a mere denial of the existence of the dispute proves its nonexistence. Nor is it adequate to show that the interests of the two parties to such a case are in conflict. It must be shown that the claim of one party is positively opposed by the other.[297]

165. In the present proceedings, the Russian Federation submitted several documents and statements relating to its claim to sovereignty over Crimea, which it made in various *fora*, including the United Nations and the International Maritime Organization since March 2014. This claim of the Russian Federation has been positively and repeatedly opposed by Ukraine, and the Parties therefore hold clearly opposite views on the question of sovereignty over Crimea. The documents submitted by the Russian Federation to support its claim to sovereignty over Crimea are not as abundant as in *Chagos*, as the present proceedings are confined to the jurisdiction of the Arbitral Tribunal whereas in *Chagos* the question of jurisdiction was joined with that of the merits. On the record before the Arbitral Tribunal, however, it is clear that the Parties are in disagreement on various points of law and facts relating to the question as to which State is sovereign over Crimea, and thus who is the "coastal State" within the meaning of various provisions of the Convention invoked by Ukraine.

166. This finding would seem to be sufficient for a conclusion that a sovereignty dispute exists between the Parties but for Ukraine's argument that the Russian Federation's claim to sovereignty is inadmissible and implausible, to which the Arbitral Tribunal now turns.

(b) Inadmissibility

167. Ukraine contends that the Russian Federation's claim that the legal status of Crimea has been altered is inadmissible and cannot be entertained in this proceeding. The Arbitral Tribunal notes

---

[295] *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India)* (hereinafter "*Nuclear Arms and Disarmament*"), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2016, p. 255 at p. 269, para. 34 (**Annex UAL-90**).

[296] *Nuclear Arms and Disarmament*, cit., n. 295, p. 270, paras 35-36 (**Annex UAL-90**).

[297] *South West Africa Cases (Ethiopia v. South Africa; Liberia South Africa)* (hereinafter "*South West Africa Cases*"), Preliminary Objections, Judgment, I.C.J. Reports 1962, p. 319, p. 328.

that Ukraine justifies its contention by invoking the international law principle of non-recognition, the relevance of which to the situation in Crimea, according to Ukraine, has been reaffirmed by several resolutions adopted by the UNGA and other international organisations since 2014, as well as the principles of good faith and estoppel. The Russian Federation contests the applicability and implications of the principle of non-recognition to the present case. It also denies the relevance of the principles of good faith and estoppel.

168. The obligation of non-recognition is reflected in Article 41 of the ILC Articles on State Responsibility, the relevant part of which reads:

> 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.

169. Article 40, in turn, provides:

> 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.
>
> [...]

170. The obligation of non-recognition under Article 41 thus imposes upon all States an obligation not to recognise as lawful a situation created by a gross or systematic failure by the responsible State to fulfil an obligation arising under a peremptory norm of general international law.[298] According to Ukraine, UNGA resolutions, in particular Resolution 68/262 of 27 March 2014, reaffirmed this principle with respect to the situation in Crimea, by calling upon "all States, international organizations and specialized agencies not to recognize any alteration of the status of the Autonomous Republic of Crimea and the city of Sevastopol on the basis of the above-mentioned referendum and to refrain from any action or dealing that might be interpreted as recognizing any such altered status."[299] While the Russian Federation recognises the principle of non-recognition as a rule of customary international law, it contests its applicability to the present case by pointing out three "flaws" in Ukraine's argument, summarised above in paragraphs 88 to 98.

171. The Arbitral Tribunal notes that at the centre of the contention between the Parties are the legal effect and meaning of the UNGA resolutions. Ukraine contends that the UNGA resolutions to which it refers reflect the consensus of the international community regarding the territorial status

---

[298] Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001 (**Annex UAL-33**), p. 115.

[299] United Nations General Assembly Resolution 68/262, U.N. Doc. No. A/RES/68/262 (27 March 2014) (**Annex UA-129**).

of Crimea, to which the Arbitral Tribunal operating under the Convention must defer. According to Ukraine, therefore, the Arbitral Tribunal need not take any position on the "illegality of any of [the Russian Federation's] actions," and need only treat Ukraine's acknowledged sovereignty over its own territory as "just one of many internationally recognized background facts" that form the background against which the Arbitral Tribunal should conduct the present Arbitration. The Russian Federation denies that such legal effect should be accorded to the relevant UNGA resolutions. It also disagrees with Ukraine's interpretation of the UNGA resolutions.

172. Under the Charter of the United Nations, the General Assembly is empowered to take decisions with legally binding effect in certain enumerated circumstances, related to the functioning of the United Nations.[300] In other respects, the General Assembly may make "recommendations,"[301] which are not formally binding under international law. The Arbitral Tribunal recalls the statement of the ICJ in the *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)* that UNGA resolutions "are not binding, but only recommendatory in character," and that "[t]he persuasive force of Assembly resolutions can indeed be very considerable," yet "[i]t operates on the political not the legal level: it does not make these resolutions binding in law."[302]

173. The Arbitral Tribunal considers that, while UNGA resolutions are not binding *per se*, they can be relevant for ascertaining the existence and contents of a rule of customary international law. In this regard, the Arbitral Tribunal further recalls the statement of the ICJ that:

> General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether *opinio juris* exists as to its normative character.[303]

174. Thus, the effect of factual and legal determination made in UNGA resolutions depends largely on their content and the conditions and context of their adoption. So does the weight to be given to such resolutions by an international court or tribunal. In this regard, the Arbitral Tribunal draws attention to the fact that there have been cases in which the ICJ expressly found that it should not accept determinations made in UNGA resolutions. For example, in its Advisory Opinion in respect of *Kosovo*, referring to the statement of the UNGA that the unilateral declaration of

---

[300] These matters notably concern questions of membership in the United Nations (Articles 4, 5, 6), elections (Articles 23, paragraph 2, 61, 86, 97), agreements entered into by the United Nations (Articles 63 and 85), the budget of the United Nations (Article 17), and subsidiary organs (Article 22).

[301] Charter of United Nations, Art. 10.

[302] *South West Africa Cases*, Second Phase, Judgment, I.C.J. Reports 1966, p. 6 at p. 51, para. 98 (**Annex UAL-85**).

[303] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, p. 226 at p. 254, para. 70 (**Annex UAL-89**).

independence had been adopted by the Provisional Institutions of Self-Government of Kosovo, the ICJ held that "[i]t would be incompatible with the proper exercise of the judicial function for the Court to treat that matter [*i.e.*, the identity of the authors of the declaration of independence] as having been determined by the General Assembly."[304] Likewise, in the *East Timor Case (Portugal v. Australia)* (hereinafter "*East Timor*"), with respect to Portugal's argument that United Nations resolutions, which affirmed the status of East Timor as that of a non-self-governing territory and Portugal's capacity as the administering power of that territory, "can be read as imposing an obligation on States not to recognize any authority on the part of Indonesia over the Territory, and [...] to deal only with Portugal," the ICJ stated that, "[w]ithout prejudice to the question whether the resolution under discussion could be binding in nature, [...] they cannot be regarded as 'givens' which constitute a sufficient basis for determining the dispute between the Parties."[305]

175. The Arbitral Tribunal notes that the UNGA resolutions in question are framed in hortatory language. The Arbitral Tribunal further notes that they were not adopted unanimously or by consensus but with many States abstaining or voting against them.

176. Regarding the meaning of UNGA resolutions, the Arbitral Tribunal notes that it has the power to interpret the texts of documents of international organisations, including the resolutions of the UNGA. Ukraine's argument that the Arbitral Tribunal must defer to the UNGA resolutions and need only treat Ukraine's sovereignty over Crimea as an internationally recognised background fact is equivalent to asking the Arbitral Tribunal to accept the UNGA resolutions as interpreted by Ukraine. Apart from the question of the legal effect of the UNGA resolutions, if the Arbitral Tribunal were to accept Ukraine's interpretation of those UNGA resolutions as correct, it would *ipso facto* imply that the Arbitral Tribunal finds that Crimea is part of Ukraine's territory. However, it has no jurisdiction to do so.

177. Furthermore, the Arbitral Tribunal does not consider that the UNGA resolutions to which Ukraine refers can be read to go as far as prohibiting it from recognising the existence of a dispute over the territorial status of Crimea. In the Arbitral Tribunal's view, such a reading would be incompatible with the proper exercise of its judicial function. Without prejudice to the meaning of the phrase "not to recognize any alteration of the status of the Autonomous Republic of Crimea and the city of Sevastopol," the mere recognition of the objective fact of the existence of a dispute

---

[304] *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. 424, para. 52.

[305] *East Timor Case (Portugal v. Australia)*, Judgment, I.C.J. Reports 1995, p. 90 at p. 104, para. 32 (**Annex UAL-87**).

over Crimea in the sense that the claim of one party is positively opposed by the other party cannot be considered to contravene the UNGA resolutions.

178. It must be stressed that the Arbitral Tribunal's recognition of the existence of a dispute over the territorial status of Crimea in no way amounts to recognising any alteration of the status of Crimea from the territory of one Party to the other, or to "any action or dealing that might be interpreted as recognizing any such altered status." Neither would it imply that the Russian Federation's actions toward and in Crimea were lawful. In fact, the Russian Federation has not asked the Arbitral Tribunal to find that Crimea belongs to the Russian Federation, nor that it acted lawfully with respect to Crimea. On the contrary, the Russian Federation simply asks the Arbitral Tribunal to recognise the reality that it claims sovereignty over Crimea, which claim is disputed and opposed by Ukraine. The Arbitral Tribunal recognises this reality without engaging in any analysis of whether the Russian Federation's claim of sovereignty is right or wrong. In this regard, the Arbitral Tribunal recalls the statement of the ICJ in *East Timor* that Portugal, similarly to the Russian Federation in this case, "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."[306]

179. The next question the Arbitral Tribunal needs to examine concerns Ukraine's argument that the Russian Federation's claim of sovereignty is inadmissible as a consequence of the principles of good faith and estoppel because such claim contradicts the Russian Federation's own legally binding commitment to Ukraine's sovereignty over Crimea. These principles, according to Ukraine, bar the Russian Federation from now advancing claims entirely inconsistent with its prior undertakings.

180. The Arbitral Tribunal recalls the statement made by ITLOS in the *Dispute Concerning Delimitation of the Maritime Boundary in Bay of Bengal* (hereinafter "*Bay of Bengal*") that:

> In international law, a situation of estoppel exists when a State, by its conduct, has created the appearance of a particular situation and another State, relying on such conduct in good faith, has acted or abstained from an action to its detriment. The effect of the notion of estoppel is that a State is precluded, by its conduct, from asserting that it did not agree to, or recognize, a certain situation.[307]

181. The Russian Federation does not contest that before March 2014 it had recognised Ukraine's sovereignty over Crimea. However, it argues that there was a change in the situation of Crimea and that its claim of sovereignty was a response to that change. The Arbitral Tribunal considers that the principles of good faith and estoppel do not operate so as to bar the Russian Federation

---

[306] *East Timor*, cit., n. 305, p. 100, para. 22 (**Annex UAL-87**) [emphasis added by the Arbitral Tribunal].
[307] *Bay of Bengal*, Judgment, ITLOS Reports 2012, p. 4 at p. 42, para. 124 (**Annex UAL-63**).

from maintaining that a dispute concerning sovereignty over Crimea has arisen since March 2014, as the basis of the earlier statements has been substantially and materially changed by developments upon which the Arbitral Tribunal has no jurisdiction to adjudicate.

182. The Arbitral Tribunal accordingly does not accept Ukraine's argument that the Russian Federation's claim of sovereignty is inadmissible.

(c) Implausibility

183. The Arbitral Tribunal now turns to the argument advanced by Ukraine that the Russian Federation's claim of sovereignty is implausible. According to Ukraine, in order to defeat the Arbitral Tribunal's jurisdiction, it is not sufficient for the Russian Federation to put forward a claim to sovereignty, but its claim must be at least plausible. Ukraine contends that the Russian Federation's claim of sovereignty fails the plausibility test and, therefore, must be rejected.

184. While the Russian Federation acknowledges that there must be some form of threshold for accepting a party's claim in order to protect the other party from an abuse of judicial process, the Russian Federation rejects the plausibility test to this end and instead submits that the appropriate threshold should be that of abuse of process or abuse of right.

185. In exercising its jurisdiction under Article 288, paragraph 1, of the Convention, the Arbitral Tribunal needs to assess the Russian Federation's claim of sovereignty to the extent necessary to determine the existence *vel non* of a dispute over land sovereignty in Crimea, as the claims submitted by Ukraine in its Notification and Statement of Claim rest on the premise that the territorial status of Crimea is settled.

186. The power of the Arbitral Tribunal to undertake such assessment stems from the legal principle that the Arbitral Tribunal has competence to decide its own jurisdiction, as reflected in Article 288, paragraph 4, of the Convention. The Arbitral Tribunal cannot simply take the Russian Federation's assertion at face value, just as it cannot accept Ukraine's premise as "just one of many internationally recognized background facts." However, neither should the Arbitral Tribunal engage in a full evaluation of the sovereignty claims of the Parties, as it has no such competence under Article 288, paragraph 1, of the Convention. The exercise of the Arbitral Tribunal's jurisdictional power in this regard should be limited to assessing the Russian Federation's claim of sovereignty for the sole purpose of verifying whether there exists a dispute as to which State has sovereignty over Crimea.

187. The Arbitral Tribunal is not convinced by the plausibility test as advanced by Ukraine. Even if such a test exists, Ukraine has failed to state the content or standard of such a test in sufficiently clear terms. The Arbitral Tribunal also considers that the context and circumstances of the previous cases referred to by Ukraine, in which Ukraine argues that the plausibility test has been applied, differ considerably from those of the present case. On the other hand, neither does the Arbitral Tribunal find the threshold of the abuse of rights as presented by the Russian Federation relevant in this regard.

188. In the view of the Arbitral Tribunal, the key question upon which it should focus is whether a dispute as to which State has sovereignty over Crimea exists. The Arbitral Tribunal already referred in paragraphs 163 and 164 to the various formulations employed by the Permanent Court of International Justice and the ICJ for the determination of the existence of a dispute. The Arbitral Tribunal considers that those formulations are flexible enough to leave considerable room for judgment on its part in verifying the existence of a dispute. The Arbitral Tribunal further considers that the jurisprudence of international courts or tribunals also shows that the threshold for establishing the existence of a dispute is rather low. Certainly a mere assertion would be insufficient in proving the existence of a dispute. However, it does not follow that the validity or strength of the assertion should be put to a plausibility or other test in order to verify the existence of a dispute.

189. The Arbitral Tribunal does not consider that the Russian Federation's claim of sovereignty is a mere assertion or one which was fabricated solely to defeat its jurisdiction. The Arbitral Tribunal notes that since March 2014, both Parties have held opposite views on the status of Crimea, and this situation persists today. The Parties have engaged in the controversy regarding sovereignty before and outside these proceedings, including in various international *fora* such as in debates at the UNGA. Even if the Arbitral Tribunal applied an additional element—as the ICJ did in *Nuclear Arms and Disarmament* by stating that "evidence must show that [...] the respondent was aware, or could not have been unaware,"[308] of a position—the Arbitral Tribunal's finding on the existence of a sovereignty dispute over Crimea would not change.

190. For this reason, the Arbitral Tribunal does not accept Ukraine's argument that the Russian Federation's claim of sovereignty is implausible.

---

308 *Nuclear Arms and Disarmament*, cit., n. 295, p. 271, para. 38 (**Annex UAL-90**).

(d) Relative Weight of the Dispute

191. The next question the Arbitral Tribunal has to address is related to the argument advanced by Ukraine that, even if it were assumed that there is a legal dispute concerning sovereignty over Crimea that would have to be resolved before addressing Ukraine's claims under the Convention, in the circumstances of the present case the Arbitral Tribunal's jurisdiction would extend to making any determinations of law as are necessary to resolve the UNCLOS dispute presented to it. In this regard, Ukraine argues that sovereignty over land is neither the real dispute in the present case, nor where the relative weight of the dispute lies.

192. For its part, while the Russian Federation does not contest the test articulated by the arbitral tribunal in *Chagos*, it maintains that in the present case the territorial sovereignty issue is not ancillary to the law of the sea dispute but at "the front and centre" of the matter before the Arbitral Tribunal. According to the Russian Federation, the weight of the dispute lies squarely with territorial sovereignty.

193. The Arbitral Tribunal notes that the arbitral tribunal in *Chagos* implied a possibility that its jurisdiction could be extended to ruling upon an ancillary issue of territorial sovereignty, when it stated:

> As a general matter, [...] where a dispute concerns the interpretation or application of the Convention, the jurisdiction of a court or tribunal pursuant to Article 288(1) extends to making such findings of fact or ancillary determinations of law as are necessary to resolve the dispute presented to it [...] The Tribunal does not categorically exclude that in some instances a minor issue of territorial sovereignty could indeed be ancillary to a dispute concerning the interpretation or application of the Convention.[309]

194. In the view of the Arbitral Tribunal, the key question it should address, therefore, is whether a sovereignty dispute over Crimea in the present case is an issue ancillary to a dispute concerning the interpretation or application of the Convention, to which its jurisdiction could be extended. The Arbitral Tribunal considers that this question essentially touches upon that of how the dispute before it should be characterised. The Arbitral Tribunal already addressed this question above in paragraphs 151 to 154.

195. The Arbitral Tribunal is of the view that, in the present case, the Parties' dispute regarding sovereignty over Crimea is not a minor issue ancillary to the dispute concerning the interpretation or application of the Convention. On the contrary, the question of sovereignty is a prerequisite to the Arbitral Tribunal's decision on a number of claims submitted by Ukraine under the

---

[309] *Chagos*, cit., n. 34, paras 220-21 (**Annex UAL-18**).

Convention. Those claims simply cannot be addressed without deciding which State is sovereign over Crimea and thus the "coastal State" within the meaning of provisions of the Convention invoked by Ukraine.

196. The Arbitral Tribunal therefore cannot accept Ukraine's argument that even if there exists a predicate territorial sovereignty dispute, the Arbitral Tribunal has jurisdiction to address it because the relative weight of the dispute lies with the interpretation or application of the Convention.

4. Conclusion

197. In light of the foregoing, the Arbitral Tribunal concludes that pursuant to Article 288, paragraph 1, of the Convention, it lacks jurisdiction over the dispute as submitted by Ukraine to the extent that a ruling of the Arbitral Tribunal on the merits of Ukraine's claims necessarily requires it to decide, expressly or implicitly, on the sovereignty of either Party over Crimea. As a result, the Arbitral Tribunal cannot rule on any claims of Ukraine presented in its Notification and Statement of Claim and its Memorial which are dependent on the premise of Ukraine being sovereign over Crimea.

198. This conclusion affects many, but not all, of the claims articulated in different forms in Ukraine's Notification and Statement of Claim and Ukraine's Memorial. Since the Russian Federation is "entitled to know precisely the case advanced against it,"[310] it is in the interest of procedural fairness and expedition for Ukraine to revise its Memorial so as to take full account of the scope of, and limits to, the Arbitral Tribunal's jurisdiction as determined in the present Award, before the Russian Federation is called upon to respond in a Counter-Memorial.

V. THE RUSSIAN FEDERATION'S OBJECTION THAT THE ARBITRAL TRIBUNAL HAS NO JURISDICTION OVER CLAIMS CONCERNING ACTIVITIES IN THE SEA OF AZOV AND IN THE KERCH STRAIT

199. The Russian Federation submits that "[i]ndependently of the lack of jurisdiction to decide the question of sovereignty over Crimea, this Tribunal also does not have jurisdiction over any of Ukraine's claims pertaining to the Sea of Azov and the Kerch Strait."[311] The Sea of Azov and the Kerch Strait, according to the Russian Federation, were historically internal waters of the Russian Empire, and later the USSR, and, since 1991, the common internal waters of Ukraine and the

[310] *Methanex Corp. v. United States of America*, Partial Award on Jurisdiction and Admissibility of 7 August 2002, para. 162.
[311] Russian Federation's Preliminary Objections, para. 66.

Russian Federation. The Russian Federation contends that the Convention does not regulate the regime of internal waters and concludes that issues concerning the Sea of Azov and the Kerch Strait are accordingly not issues concerning the interpretation or application of the Convention pursuant to Article 288, paragraph 1, of the Convention.

200. Ukraine submits that the Arbitral Tribunal should reject the second preliminary objection of the Russian Federation. According to Ukraine, the Sea of Azov and the Kerch Strait are not internal waters; rather, the Sea of Azov is an enclosed or semi-enclosed sea within the meaning of the Convention, containing a territorial sea and exclusive economic zone, and the Kerch Strait is a strait used for international navigation. Ukraine also argues that the second objection of the Russian Federation does not have an exclusively preliminary character, and should be deferred to the merits phase.

201. The Arbitral Tribunal notes that the Parties hold different views as to the status of the Sea of Azov and the Kerch Strait; the applicability of the Convention to the waters of the Sea of Azov and the Kerch Strait; and the exclusively preliminary character of the present objection. The Arbitral Tribunal will examine the various arguments of the Parties on these issues below.

A. STATUS OF THE SEA OF AZOV AND THE KERCH STRAIT BEFORE 1991 AND DEVELOPMENTS FOLLOWING THE DISSOLUTION OF THE USSR

1. Position of the Russian Federation

202. The Russian Federation considers that the Parties agree that the Sea of Azov and the Kerch Strait had the status of internal waters prior to the dissolution of the USSR.[312] It notes that the Russian Empire exercised sovereignty over the Sea of Azov and the Kerch Strait,[313] and that the Sea of Azov was part of the Russian Empire's internal waters.[314] The Russian Federation points to legislation of the USSR treating the Sea of Azov as internal waters.[315] Such legislation was also applicable to the Soviet Socialist Republic of Ukraine, pursuant to the terms of the 1924

[312] Jurisdiction Hearing, 10 June 2019, 100:12-15 (Treves).
[313] Russian Federation's Preliminary Objections, para. 72.
[314] Russian Federation's Preliminary Objections, para. 72; Jurisdiction Hearing, 10 June 2019, 100:12-15 (Treves).
[315] Russian Federation's Preliminary Objections, para. 73 *referring to* General Instructions for Interaction of the USSR Authorities with Foreign Military and Merchant Ships at Peacetime, approved by Order of the Revolutionary Military Council of the USSR No. 641, 22 June 1925, Art. 2 (**Annex RU-2**); Act No. 431, Concerning the Use of Radio Equipment for Foreign Vessels Within the Territorial Waters of the Union, 24 July 1928 in Laws and Regulations on the Regime of the High Seas, Vol. I (1951) pp. 121-22, paras 1-14 (**Annex RU-3**); Order of the Council of People's Commissars, No. 2157, for the Regulation of Fishing and the Conservation of Fisheries Resources, 25 September 1935 in Laws and Regulations on the Regime of the High Seas, Vol. I (1951) pp. 124-28 at paras 1-26, pp. 129-30 (**Annex RU-4**).

Constitution of the USSR.[316] According to the Russian Federation, the status of the Sea of Azov as internal waters was not protested by other States and was recognised in Soviet international law doctrine.[317]

203. The Russian Federation argues that, when the USSR ratified the Geneva Convention on the Territorial Sea and the Contiguous Zone (hereinafter the "Geneva Convention"), on 22 November 1960, the Sea of Azov and the Kerch Strait satisfied the requirements of a bay set out in Article 7 given that the shape of the Sea of Azov met the description of a bay and the opening of the bay, the Kerch Strait, was less than 24 miles wide.[318] Once a closing line was drawn, according to the Russian Federation, the Sea of Azov was considered internal waters pursuant to Article 7, paragraph 4, of the Geneva Convention.[319]

204. The Russian Federation maintains that "the participation of the USSR in the Geneva Convention and the drawing of baselines across the mouth of the Kerch Strait confirmed the customary internal waters status of the Sea of Azov and the Kerch Strait and established a treaty obligation for the other parties [to that Convention] to recognise such status."[320]

205. The Russian Federation submits that the internal waters status of the Sea of Azov and the Kerch Strait remained unchanged after the dissolution of the USSR and the independence of Ukraine.[321] In the view of the Russian Federation, there is no basis to assume that the Russian Federation and Ukraine intended to change the internal waters status of the Sea of Azov and the Kerch Strait and consequently lose rights that they had formerly enjoyed in those waters.[322]

206. The Russian Federation notes that there has been no waiver on the part of the Russian Federation and Ukraine in respect of their rights.[323] It submits that any waiver or renunciation of a State's rights must either be express or unequivocally implied by the conduct of the State.[324] To the contrary, according to the Russian Federation, Ukraine and the Russian Federation "expressly confirmed that the Sea of Azov and the Kerch Strait retain their internal water status, *inter alia*,

[316] Russian Federation's Preliminary Objections, para. 75.
[317] Russian Federation's Preliminary Objections, paras 74, 76.
[318] Russian Federation's Preliminary Objections, para. 77; Jurisdiction Hearing, 10 June 2019, 100:15-20 (Treves).
[319] Russian Federation's Preliminary Objections, para. 77.
[320] Russian Federation's Preliminary Objections, para. 79.
[321] Russian Federation's Preliminary Objections, para. 84; Jurisdiction Hearing, 10 June 2019, 101:5-10 (Treves).
[322] Russian Federation's Preliminary Objections, para. 85.
[323] Russian Federation's Preliminary Objections, para. 85; Russian Federation's Reply, para. 67.
[324] Russian Federation's Preliminary Objections, para. 85; Jurisdiction Hearing, 13 June 2019, 44:25-45:2 (Treves).

in the State Border Treaty of 28 January 2003 and in the Treaty[325] and Joint Statement of 24 December 2003."[326]

207. The Russian Federation contests Ukraine's argument that a sea surrounded by more than one State generally cannot be claimed as internal waters.[327] It denies the existence of any "strong norm" to this effect.[328] Relying notably on the International Law Commission's commentary to what became Article 7, paragraph 1, of the Geneva Convention, the Russian Federation argues that "Articles 7(1) of the Geneva Convention and 10(1) of UNCLOS do not prohibit the establishment of internal waters in bays with more than one riparian State;" they simply do not address this issue.[329] Accordingly, in the Russian Federation's view, it cannot be said that the Convention "disfavours" pluri-State internal waters.[330] Furthermore, the Russian Federation asserts that it would be contrary to the spirit of the Convention as "a coastal-oriented instrument" to suggest, as Ukraine does, that upon the dissolution of the USSR, the Sea of Azov and the Kerch Strait became "free for all States" without the agreement of the coastal States.[331]

208. The Russian Federation relies on several international cases for the proposition that bays with more than one coastal State can constitute internal waters.[332] The Russian Federation refers to the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)* (hereinafter "*Gulf of Fonseca*"), in which the ICJ held that the Gulf of Fonseca, an historic bay comprising internal waters, was held in sovereignty by three riparian States.[333]

209. The Russian Federation points out that the arbitral tribunal in the *Arbitration Between the Republic of Croatia and the Republic of Slovenia (Croatia/Slovenia)* (hereinafter "*Croatia/Slovenia*") found that the Bay of Piran formerly constituted the internal waters of the Socialist Federal Republic of Yugoslavia,[334] and that it remained so after the "dissolution, and the

---

[325] Treaty Between the Russian Federation and Ukraine on Cooperation in the Use of the Sea of Azov and the Kerch Strait, done at Kerch on 24 December 2003 (**Annex RU-20**); Treaty Between the Russian Federation and Ukraine on Cooperation in the Sea of Azov and the Kerch Strait done at Kerch on 24 December 2003 (**Annex UA-19**).

[326] Russian Federation's Preliminary Objections, para. 85; Jurisdiction Hearing, 13 June 2019, 44:25-45:2 (Treves).

[327] Russian Federation's Preliminary Objections, paras 82-83; Russian Federation's Reply, para. 60.

[328] Russian Federation's Reply, para. 61; Jurisdiction Hearing, 10 June 2019, 105:10-14 (Treves).

[329] Russian Federation's Reply, paras 62-66.

[330] Jurisdiction Hearing, 13 June 2019, 43:9-17 (Treves).

[331] Jurisdiction Hearing, 10 June 2019, 110:8-15 (Treves).

[332] Russian Federation's Preliminary Objections, para. 87.

[333] Russian Federation's Preliminary Objections, para. 88 *citing Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, Judgment, I.C.J. Reports 1992, p. 351 at p. 604, para. 412, p. 616, para. 432 (**Annex RUL-19**).

[334] Russian Federation's Preliminary Objections, para. 90 *citing Croatia/Slovenia*, Award of 29 June 2017, para. 880 (**Annex RUL-41**); Jurisdiction Hearing, 10 June 2019, 111:20-112:1 (Treves).

ensuing transfer of the rights of Yugoslavia to Croatia and Slovenia as successor States."[335] The *Croatia/Slovenia* arbitral tribunal also stated, according to the Russian Federation, that Article 7, paragraph 1, of the Geneva Convention and Article 10 of UNCLOS do not exclude "the existence of bays with the character of internal waters, the coasts of which belong to more than one State."[336]

210. Similarly, the Russian Federation notes that, in 1988, Tanzania and Mozambique agreed on a line closing the Rovuma Bay such that "[a]ll waters on the landward side of this line constitute the internal waters of the two countries."[337] The Russian Federation also relies on other bilateral agreements that follow a similar approach, including the Maritime Delimitation Treaty between Brazil and France of 30 January 1981[338] and the Treaty between Uruguay and Argentina of 19 November 1973.[339]

211. As regards the present situation, the Russian Federation explains that, while it exercises sovereignty jointly with Ukraine in the Sea of Azov, it exercises exclusive sovereignty over the waters of the Kerch Strait.[340] In response to the question posed to it by the Arbitral Tribunal (*see* paragraph 29), the Russian Federation clarified its position on the Kerch Strait and stated that "it has been exercising exclusive sovereignty over the waters of the Kerch Strait since it has been exercising its sovereignty on both sides of the strait."[341] Nevertheless, the Russian Federation recognises certain rights of Ukraine related to the Kerch Strait, such as freedom of navigation for Ukrainian ships and a right to free passage for foreign non-military vessels sailing to and from Ukrainian ports, by virtue of the Treaty between the Russian Federation and Ukraine on Cooperation in the Use of the Sea of Azov and the Kerch Strait, 24 December 2003 (hereinafter the "Azov/Kerch Cooperation Treaty").[342]

---

[335] Russian Federation's Preliminary Objections, para. 92 *citing Croatia/Slovenia*, cit., n. 334, para. 883 (**Annex RUL-41**).

[336] Russian Federation's Preliminary Objections, para. 93 *citing Croatia/Slovenia*, cit., n. 334, para. 884 (**Annex RUL-41**).

[337] Russian Federation's Preliminary Objections, para. 89 *citing* Agreement between the Government of the United Republic of Tanzania and the Government of the People's Republic of Mozambique regarding the Tanzania/Mozambique Boundary, done at Maputo on 28 December 1988, Article 2, available at <www.un.org/depts/los/legislationandtreaties/pdffiles/treaties/tza-moz1988tm.pdf> (**Annex RU-13**); Russian Federation's Reply, para. 72(a).

[338] Russian Federation's Reply, para. 72(b) *citing* Maritime Delimitation Treaty Between the Federative Republic of Brazil and the French Republic (French Guyana), done at Paris on 30 January 1981, Article 1, available at <www.un.org/Depts/los/legislationandtreaties/pdffiles/treaties/bra-fra1981md.pdf> (**Annex RU-54**).

[339] Russian Federation's Reply, para. 72(c) *citing* Eduardo Jiménez de Aréchaga, 'Argentina-Uruguay, Report Number 3-2', in Jonathan Charney and Lewis Alexander (eds), *International Maritime Boundaries*, (Vol. I, Nijhoff 1993), p. 757 (**Annex RUL-57**).

[340] Jurisdiction Hearing, 13 June 2019, 58:22-59:2 (Treves).

[341] Jurisdiction Hearing, 13 June 2019, 58:22-59:2 (Treves).

[342] Jurisdiction Hearing, 10 June 2019, 20:20-21:2 (Lobach); Jurisdiction Hearing, 13 June 2019, 59:3-11 (Treves).

2. Position of Ukraine

212. Ukraine submits that prior to 1991 the USSR claimed the Sea of Azov and the Kerch Strait as internal waters on the basis that those waters were entirely surrounded by a single State.[343] According to Ukraine, since the dissolution of the USSR, however, these maritime spaces have been bordered by two States, and can no longer qualify as internal waters.[344]

213. Ukraine contends that the Sea of Azov is now an "enclosed or semi-enclosed sea" namely "a gulf, basin or sea surrounded by two or more States [the Parties] and connected to another sea or the ocean [the Black Sea] by a narrow outlet [the Kerch Strait] or consisting entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal states," within the meaning of Article 122 of the Convention.[345]

214. Ukraine notes that the "Convention distinguishes between enclosed and semi-enclosed seas surrounded by two or more States" (Article 122 of the Convention) and "bays the coasts of which belong to a single State" (Article 10 of the Convention).[346] In Ukraine's view, only the latter may classify as internal waters whereas the former remains "subject to the normal regime of the territorial sea, the exclusive economic zone, and the continental shelf."[347]

215. Ukraine maintains that the Sea of Azov "comprises the territorial seas and exclusive economic zones" of the Parties.[348] In light of the status of the Sea of Azov as an enclosed or semi-enclosed sea comprised of territorial seas and exclusive economic zones, Ukraine submits that the Kerch Strait is an international strait, pursuant to Article 37 of the Convention, connecting "one part of [...] an exclusive economic zone" in the Sea of Azov to "an exclusive economic zone" in the Black Sea.[349]

216. According to Ukraine, the Convention reflects the "strong and long-standing norm" that a sea surrounded by more than one State cannot be considered internal waters.[350] Ukraine argues that Articles 8 and 10 of the Convention, read together, only contemplate internal waters claims with respect to a single State, not shared claims among two or more States.[351] At a minimum, Ukraine contends that, in light of the way the Convention is written and structured, the notion of pluri-

---

343 Ukraine's Written Observations, para. 64.
344 Ukraine's Written Observations, para. 64.
345 Ukraine's Written Observations, para. 65; Jurisdiction Hearing, 11 June 2019, 68:25-69:6 (Soons).
346 Ukraine's Written Observations, para. 66.
347 Ukraine's Written Observations, para. 66.
348 Ukraine's Written Observations, para. 67.
349 Ukraine's Written Observations, para. 67; Jurisdiction Hearing, 11 June 2019, 69:10-13 (Soons).
350 Ukraine's Written Observations, para. 68.
351 Ukraine's Rejoinder, para. 54; Jurisdiction Hearing, 11 June 2019, 68:9-15 (Soons).

State internal waters should be regarded as "disfavoured and highly exceptional."[352] For Ukraine, the Russian Federation's claim to common internal waters is in tension with the Convention's object and purpose,[353] because pluri-State internal waters claims for which no rule exists in the Convention "may upset th[e] careful balance" established by UNCLOS and undermine the predictability and regularity that it intended to provide.[354]

217. Ukraine argues that the Russian Federation places disproportionate weight on a few rare instances in which an exception to the rule against pluri-State bays have been recognised.[355] According to Ukraine, the *Gulf of Fonseca* case predates the entry into force of the Convention.[356] Moreover, neither the ICJ in the *Gulf of Fonseca* case nor the arbitral tribunal in the *Croatia/Slovenia* case "were subject to the Article 293 rule giving priority to the Convention."[357]

218. Ukraine submits that, even if the Arbitral Tribunal could recognise that exceptions to the rule against pluri-State bays exist, the conditions for pluri-State internal waters have not been met in this case.[358] Ukraine takes the view that the exceptional status of pluri-State bays has only been recognised where: (a) the body of water is small and not large enough to contain an exclusive economic zone, (b) there is a clear agreement between all bordering States to establish a pluri-State internal waters regime, and (c) third States are not prejudiced by the claim.[359] (The Parties' positions in respect of these three criteria set forth by Ukraine will be summarised in the following sections.)

219. Finally, Ukraine argues that the Russian Federation has "contradicted its pleadings," asserting on the one hand that the Sea of Azov and the Kerch Strait constitute common internal waters and claiming on the other hand that the Kerch Strait is under the full sovereignty of the Russian

---

352 Jurisdiction Hearing, 11 June 2019, 68:20-24 (Soons).
353 Jurisdiction Hearing, 11 June 2019, 69:14-15 (Soons).
354 Jurisdiction Hearing, 11 June 2019, 70:4-8 (Soons).
355 Ukraine's Written Observations, para. 69.
356 Ukraine's Written Observations, para. 69.
357 Ukraine's Written Observations, para. 69.
358 Ukraine's Written Observations, para. 63.
359 Ukraine's Written Observations, para. 70; Ukraine's Rejoinder, para. 55; Jurisdiction Hearing, 11 June 2019, 70:19-71:2 (Soons).

Federation.[360] Ukraine notes that the Russian Federation has only recently claimed that the Kerch Strait "is a Russian strait" and is not "subject to any regulation by international law."[361]

B. POSITIONS AND PRACTICE OF THE PARTIES REGARDING THE STATUS OF THE SEA OF AZOV AND THE KERCH STRAIT

1. Position of the Russian Federation

220. The Russian Federation rejects Ukraine's argument that, following the dissolution of the USSR, the Sea of Azov and the Kerch Strait no longer constituted internal waters because there was no agreement between Ukraine and the Russian Federation to hold these waters in common.[362] The Russian Federation states that there is no need for an agreement between the States in this respect, because, upon the dissolution of the USSR, the Sea of Azov and the Kerch Strait automatically continued to be internal waters.[363] For the Russian Federation, a clear, expressed intention was only required if the Parties wished to change the internal waters status of the bodies of water.[364]

221. The Russian Federation argues that under the doctrine of State succession, when the Russian Federation and Ukraine replaced the USSR as coastal States in the Sea of Azov, "they succeeded in the [USSR]'s rights on that sea."[365] Therefore, the Russian Federation maintains that upon the dissolution of the USSR there was no need to create an internal waters regime in the Sea of Azov.[366] In effect, in the view of the Russian Federation, such an internal waters regime already existed in the Sea of Azov and was "well established."[367] The Russian Federation submits that "[t]o change [the internal waters regime] would have required, as it still requires, the agreement of both Russia and Ukraine."[368]

---

[360] Ukraine's Written Observations, para. 87 *citing Foreign Ministry: Kyiv's Draft Law on the Maritime Territory is Not Applicable to the Sea of Azov*, RIA News (15 November 2018) (**Annex UA-541**); *Russian Prevents 3 Ukrainian Naval Ships from Passing Through Kerch Strait, Sanding Civilian Bunk Carrier under Crimean Bridge*, Interfax News (25 November 2018) (**Annex UA-496**); Jurisdiction Hearing, 14 June 2019, 41:23-42:9 (Soons).

[361] Ukraine's Written Observations, para. 87 *citing* Foreign Ministry Sergey Lavrov's Remarks and Answers to Media Questions at a Joint News Conference Following Talks with Italian Minister of Foreign Affairs and International Cooperation Enzo Moavero Milanesi in Rome (23 November 2018) (**Annex UA-470**).

[362] Russian Federation's Reply, para. 80.

[363] Russian Federation's Reply, para. 82; Jurisdiction Hearing, 10 June 2019, 110:16-25 (Treves); Jurisdiction Hearing, 13 June 2019, 44:20-22 (Treves).

[364] Russian Federation's Reply, paras 83-84, 89.

[365] Jurisdiction Hearing, 10 June 2019, 110:16-21 (Treves).

[366] Russian Federation's Reply, para. 83.

[367] Jurisdiction Hearing, 10 June 2019, 112:12-13 (Treves).

[368] Jurisdiction Hearing, 10 June 2019, 112:13-15 (Treves).

222. In this regard, the Russian Federation notably points to the finding of the *Croatia/Slovenia* arbitral tribunal, in respect of the Bay of Piran, that:

> the Bay was internal waters before the dissolution of the [Socialist Federal Republic of Yugoslavia] in 1991, and it remained so after that date. The dissolution, and the ensuing legal transfer of the rights of Yugoslavia to Croatia and Slovenia as successor States, did not have the effect of altering the acquired status.
>
> [...]
>
> In any case, the effect of the dissolution of the [Socialist Federal Republic of Yugoslavia] is a question of State succession. The Tribunal thus determines that the Bay remains internal waters within the pre-existing limits.[369]

223. Together with the *Croatia/Slovenia* award, the Russian Federation relies on the *Gulf of Fonseca* judgment. According to the Russian Federation, these two cases are the only ones that dealt with the status of the waters of a bay previously held by only one riparian State and that, through State succession, became surrounded by two or more States.[370] The Russian Federation submits that in both cases the decision was "that the internal water status of the bay was maintained as common internal waters of the [S]tates replacing the former coastal [S]tate."[371]

224. Regarding Ukraine's reliance on the example of the Gulf of Riga, with respect to which Estonia and Latvia concluded an agreement delimiting their territorial seas and exclusive economic zones, the Russian Federation submits that the example does not support Ukraine's position.[372] The Russian Federation argues that Estonia's rejection of the proposal by Latvia to declare the Gulf of Riga an historic bay comprised of internal waters does not mean that an agreement between successor riparian States is necessary for the establishment of a common internal waters regime.[373] According to the Russian Federation, Estonia's rejection of the internal waters regime for the Gulf of Riga was due to the reasons connected to "its policy of not being considered a successor to the Soviet Union."[374] The Russian Federation notes that, after the dissolution of the USSR and before Estonia and Latvia agreed to delimitation, the Gulf of Riga was considered by Latvia as the "enclosed joint internal waters of Estonia and Latvia."[375]

---

[369] Russian Federation's Preliminary Objections, paras 92-93; Jurisdiction Hearing, 10 June 2019, 111:20-112:1 (Treves) *citing Croatia/Slovenia*, cit., n. 334, paras 883, 885 (**Annex RUL-41**).

[370] Jurisdiction Hearing, 10 June 2019, 103:18-22 (Treves).

[371] Jurisdiction Hearing, 10 June 2019, 103:23-104:1 (Treves).

[372] Russian Federation's Reply, para. 78.

[373] Jurisdiction Hearing, 13 June 2019, 49:20-24 (Treves).

[374] Jurisdiction Hearing, 13 June 2019, 49:24-50:2 (Treves).

[375] Jurisdiction Hearing, 13 June 2019, 50:6-18 (Treves) *citing* Alexander Lott, *The Estonian Straits: Exceptions to the Strait Regime of Innocent or Transit Passage* (Brill 2018), p. 129, n. 549 (**Annex RUL-78**).

225. In any event, the Russian Federation contends that Ukraine and the Russian Federation have agreed that the Sea of Azov and the Kerch Strait constitute internal waters.[376] According to the Russian Federation, the Parties' negotiations over years were predicated on the Sea of Azov being internal waters.[377] The Russian Federation submits that in their exchanges, negotiations, and joint statements, the Parties agreed that the Sea of Azov constitute their common internal waters.[378]

226. Specifically, the Russian Federation refers to the Minutes of the Sub-Commission on Border Issues of the Mixed Russian-Ukrainian Commission on Cooperation of 14 August 1996.[379] It also refers to the draft Treaty between Ukraine and the Russian Federation on the Legal Status of the Sea of Azov and Navigation in its Water Area,[380] which led to the Azov/Kerch Cooperation Treaty.[381]

227. The Russian Federation acknowledges that, during these negotiations, Ukraine insisted on the need "for a delimitation of the state border in the Sea of Azov."[382] However, according to the Russian Federation, Ukraine expressed its belief that such delimitation would not have impacted the internal waters status of the Sea of Azov,[383] and did not see delimitation as a condition to the existence of common internal waters.[384] The Russian Federation points out in this regard that Article 5 of the Treaty Between the Russian Federation and Ukraine on the Russian-Ukrainian State Border of 28 January 2003 (hereinafter the "State Border Treaty") states that "[n]othing in this [State Border Treaty] shall prejudice the positions of the Russian Federation and Ukraine with respect to the status of the Sea of Azov and the Kerch Strait as internal waters of the two States."[385]

228. The Russian Federation argues that the Parties agreed in the Azov/Kerch Cooperation Treaty and in the Joint Statement by the President of the Russian Federation and the President of Ukraine on

---

[376] Russian Federation's Preliminary Objections, para. 95.

[377] Russian Federation's Reply, para. 86.

[378] Russian Federation's Reply, paras 86, 90, 91.

[379] Russian Federation's Preliminary Objections, para. 98 *citing* Working Minutes of the Session of the Sub-Commission on Border Issues of the Mixed Russian-Ukrainian Commission on Cooperation, 14 August 1996, para. 4 (**Annex RU-16**); Minutes of the Second Session of the Sub-Commission on Border Issues of the Mixed Russian-Ukrainian Commission on Cooperation, 6 May 1997 (**Annex RU-17**).

[380] Russian Federation's Preliminary Objections, para. 109 *citing* Draft Treaty Between Ukraine and the Russian Federation on the Legal Status of the Sea of Azov and Navigation in its Water Area, Annex to *Note Verbale* from Ukraine to the Russian Federation No. 12/42-994, Article 1 (19 October 1995) (**Annex RU-15**).

[381] Russian Federation's Preliminary Objections, para. 109.

[382] Russian Federation's Reply, para. 87.

[383] Russian Federation's Reply, paras 88-89 *citing* Transcript of the Statements of A.A. Chaly, 42nd Plenary Session of the Verkhovnaya Rada of Ukraine (13 July 1994) (**Annex RU-61**).

[384] Russian Federation's Reply, para. 93; Jurisdiction Hearing, 10 June 2019, 117:19-23 (Treves).

[385] Russian Federation's Preliminary Objections, para. 96 *citing* Treaty Between the Russian Federation and Ukraine on the Russian-Ukrainian State Border, done at Kiev on 28 January 2003 (without Annexes), Article 5 (**Annex RU-19**); Russian Federation's Reply, para. 99.

the Sea of Azov and the Kerch Strait of 24 December 2003 (hereinafter the "Joint Statement") that "the Sea of Azov and the Kerch Strait are historically internal waters of the Russian Federation and Ukraine."[386] In the Russian Federation's view, these instruments confirm that the Parties, in the course of their negotiations, regarded the Sea of Azov and the Kerch Strait as internal waters, without prejudice to future agreements regarding delimitation.[387]

229. The Russian Federation asserts that Ukraine's practice, since independence, supports the internal waters status of the Sea of Azov and the Kerch Strait.[388]

230. The Russian Federation states that Ukraine relies on a single episode that is inconsistent with Ukraine's general conduct concerning the treatment of the Sea of Azov and the Kerch Strait as internal waters—the deposit of a list of coordinates with the United Nations to measure the width of territorial waters, exclusive economic zone, and continental shelf of the Sea of Azov[389]—and submits that this incident "could at best be seen as an anomaly in a consistent pattern."[390]

2. Position of Ukraine

231. Ukraine denies the existence of any rule of international law by which successor States automatically hold formerly internal waters of a single State unit as joint, pluri-State waters. Rather, it argues, internal waters generally lose their status following the breakup of the surrounding State.[391] Therefore, in Ukraine's view, the proper presumption to be made upon the

---

386 Russian Federation's Preliminary Objections, para. 97 *citing* Treaty Between the Russian Federation and Ukraine on Cooperation in the Use of the Sea of Azov and the Kerch Strait, done at Kerch on 24 December 2003 (**Annex RU-20**); Joint Statement by the President of Ukraine and the President of the Russian Federation on the Sea of Azov and the Strait of Kerch on 24 December 2003 in Law of the Sea Bulletin, Vol. 54, p. 131 (2004) (**Annex RU-21**); Russian Federation's Reply, paras 94, 97.

387 Russian Federation's Reply, paras 95, 103; Jurisdiction Hearing, 10 June 2019, 118:13-18 (Treves).

388 Russian Federation's Preliminary Objections, paras 106-11 *referring to* Order of the Ministry of Transport of Ukraine No. 721, Rules of Navigation by Ships Through the Kerch-Enikalskiy Channel and the Approach Channels to It, 9 October 2002 (excerpts) (**Annex RU-18**); *Note Verbale* from Ukraine to the Russian Federation, No. 610/22-110-1132 (29 July 2015) (**Annex UA-233**); Russian Federation's Reply, paras 51, 108, 112 *citing* Decree of the President of Ukraine No. 320/2018, On Urgent Measures to Protect National Interests in the South and East of Ukraine, in the Black Sea, the Sea of Azov and the Kerch Strait, 12 October 2018, para. 2(4) (**Annex RU-80**); Law of Ukraine No. 2630-VIII on Approval of the Decree of the President of Ukraine No. 393, On Imposition of Martial Law in Ukraine, 26 November 2018 (**Annex RU-82**); Russia is Opposed to the Whole World, Blocking the Freedom of Navigation in the Ukrainian Territorial Waters—President in the Interview to Fox News, President of Ukraine Official Website, 8 December 2018, available at <www.president.gov.ua/en/news/rosiya-protistoyit-vsomu-svitu-blokuyuchi-svobodu-sudnoplavs-51902> (**Annex RU-85**).

389 Russian Federation's Preliminary Objections, para. 113; Jurisdiction Hearing, 10 June 2019, 113:24-114:9 (Treves).

390 Russian Federation's Preliminary Objections, paras 114, 116; Jurisdiction Hearing, 10 June 2019, 114:12-16 (Treves).

391 Ukraine's Written Observations, para. 73; Ukraine's Rejoinder, para. 72; Jurisdiction Hearing, 11 June 2019, 74:4-8 (Soons).

dissolution of "a single State bordering a body comprised of internal waters" is that such waters are no longer internal.[392] Such presumption can only be overturned if "[a]ll interested States wishing to preserve an internal waters regime [...] manifest an express, clear, and consistent agreement on the communal nature of the regime they wish to create."[393]

232. Ukraine is of the view that it is more reasonable to assume that a State which no longer controls the entire coastline of a sea should lose some of the rights it formerly enjoyed, rather than to suppose that "a newly independent State occupying part of that coastline should be denied fundamental rights such as the ability to safeguard trade and commerce on an equal footing with other sovereign States."[394] According to Ukraine, it would be inconsistent with the principle of sovereign equality of States to require a newly independent State to seek approval of the State from which it has just separated in order to "escape a common internal waters regime."[395]

233. In support of its position, Ukraine points out that, immediately upon the dissolution of the USSR, Latvia sought Estonia's affirmative agreement to treat the Gulf of Riga as pluri-State internal waters.[396] According to Ukraine, the Russian Federation's own source for this episode recounts that Estonia rejected Latvia's endeavours, which was possible because "each of the new coastal States needs to recognise the continuous historical status of the bay."[397] Eventually, the Gulf of Riga was acknowledged by Estonia and Latvia to comprise the territorial seas and exclusive economic zones of the two States.[398]

234. Ukraine argues that the ICJ in *Gulf of Fonseca* found that the Gulf of Fonseca was internal waters by affirmative agreement of the three littoral States, with all three States "act[ing] jointly to claim historic title to a bay."[399] In Ukraine's view, the *Gulf of Fonseca* case confirms that the internal waters status of a body of water is not automatically transferred to multiple States by virtue of principles of State succession.[400]

235. Ukraine finally distinguishes the case of the Bay of Piran from the Sea of Azov and the Kerch Strait on the basis that the arbitration agreement barred the *Croatia/Slovenia* arbitral tribunal from

---

[392] Ukraine's Written Observations, para. 77.
[393] Ukraine's Written Observations, para. 77; Ukraine's Rejoinder, para. 63.
[394] Jurisdiction Hearing, 14 June 2019, 47:8-15 (Soons).
[395] Jurisdiction Hearing, 14 June 2019, 46:15-21 (Soons).
[396] Ukraine's Rejoinder, para. 68.
[397] Ukraine's Rejoinder, para. 68.
[398] Ukraine's Written Observations, para. 74; Jurisdiction Hearing, 11 June 2019, 76:14-17 (Soons).
[399] Ukraine's Rejoinder, para. 64 *citing Gulf of Fonseca*, cit., n. 333, p. 593, para. 394 (**Annex UAL-58**); Jurisdiction Hearing, 11 June 2019, 74:9-24 (Soons).
[400] Ukraine's Rejoinder, para. 66.

considering post-1991 practice as legally relevant, thus rendering the issue of post-dissolution agreement among successor States non-applicable in this case.[401]

236. Turning to the circumstances of the Sea of Azov and the Kerch Strait, Ukraine acknowledges that the Sea of Azov could formerly be classified as internal waters of the USSR as a single-State juridical bay.[402] However, Ukraine denies that this status continued after the dissolution of the USSR as it never consented to treat the Sea of Azov and the Kerch Strait as common internal waters.[403]

237. Ukraine argues that, upon its independence, the application of the Convention was the automatic consequence for all its maritime areas, including the Sea of Azov and the Kerch Strait.[404] Ukraine points out that, following "Ukraine's establishment as an independent State, [it] made clear its position that the Sea of Azov was subject to the normal rules of the international law of the sea, by depositing 'baselines for measuring the width of the territorial sea, exclusive economic zone, and continental shelf of Ukraine in the Black Sea and the Sea of Azov'" with the United Nations.[405] Ukraine also relies on a 1992 agreement between the Parties on cooperation in the fisheries sector in the Black Sea and Sea of Azov, which specifically takes into account the Convention and makes no reference to the Sea of Azov having any other status.[406]

238. Ukraine submits that, after the dissolution of the USSR, "Ukraine and Russia would be negotiating on a blank slate rather than inheriting an internal waters status from the Soviet era that could only be changed by agreements between the two successor States."[407] However, according to Ukraine, the Parties did not reach agreement on the internal waters status of the Sea of Azov and the Kerch Strait.[408]

239. Ukraine argues that, in the course of negotiations for the Azov/Kerch Cooperation Treaty between 1996 and 2002, Ukraine had considered it "imperative that the concept of an internal waters status be tied to delimitation between the States."[409] Ukraine highlights that it never agreed to a common

---

[401] Ukraine's Rejoinder, para. 69; Jurisdiction Hearing, 11 June 2019, 75:4-10 (Soons).
[402] Ukraine's Written Observations, para. 64; Ukraine's Rejoinder, para. 67.
[403] Ukraine's Written Observations, paras 72, 76; Jurisdiction Hearing, 11 June 2019, 73:21-25 (Soons).
[404] Jurisdiction Hearing, 14 June 2019, 36:22-25 (Soons).
[405] Ukraine's Written Observations, para. 78; Ukraine's Rejoinder, para. 73; Jurisdiction Hearing, 11 June 2019, 8:23-9:6 (Zerkal), 78:20-79:2 (Soons).
[406] Jurisdiction Hearing, 14 June 2019, 37:4-16 (Soons) *citing* Agreement Between the Government of Ukraine and the Government of the Russian Federation in the Fisheries Sector on 24 September 1992 (**Annex UA-70**).
[407] Jurisdiction Hearing, 14 June 2019, 46:1-6 (Soons).
[408] Ukraine's Rejoinder, para. 61; Jurisdiction Hearing, 11 June 2019, 78:17-20 (Soons).
[409] Ukraine's Written Observations, para. 79 *citing* Minutes of the Meeting of the Delegations of Ukraine and the Russian Federation to Determine the Legal Status of the Sea of Azov and the Kerch Strait and to Delimit the Continental Shelf and the Exclusive (Maritime) Economic Zone in the Black Sea, 16-17 October 1996, p. 1

internal waters status without a border;[410] and that delimitation was a condition for the treatment of the Sea of Azov and the Kerch Strait as internal waters.[411] This position is underscored, according to Ukraine, by Article 5 of the State Border Treaty, which, by indicating that the treaty shall not prejudice the Parties' "positions" regarding the legal status of the Sea of Azov and the Kerch Strait, reflect the two States' conflicting "positions"—in the plural—on the future legal status of those areas.[412]

240. Ukraine further explains that the Azov/Kerch Cooperation Treaty was concluded against the background of the Russian Federation's "unilateral construction in the Kerch Strait of a dam in an attempt to connect Tuzla Island—part of Ukraine's territory—to [the Russia Federation's] Taman Peninsula."[413] Ukraine points out that the preamble of that treaty states (in Ukraine's translation) that the Sea of Azov and the Kerch Strait "*historically* constitute internal waters of the Russian Federation and Ukraine," that the "Sea of Azov *shall be delimited*," and that the "[i]ssues concerning the water area of the Kerch Strait *shall be resolved* by agreement between the Parties."[414] Ukraine therefore considers that the Azov/Kerch Cooperation Treaty supports the view that the Parties had not reached a final agreement regarding the status of the Sea of Azov, and that any final agreement would be contingent on delimitation.[415]

241. Ukraine points out that the Parties continued to negotiate the status of the Sea of Azov and the Kerch Strait following the Azov/Kerch Cooperation Treaty.[416] According to Ukraine, this suggests that the Azov/Kerch Cooperation Treaty was not regarded by the Parties as a final

(**Annex UA-517**); Minutes of the Fifteenth Meeting of the Delegations of Ukraine and the Russian Federation on the Issues of Delimitation and Determination of Legal Status of the Sea of Azov and the Kerch Strait, 16-17 December 2002, p. 1 (**Annex UA-514**); Ukraine's Rejoinder, paras 61, 74; Jurisdiction Hearing, 11 June 2019, 79:19-23 (Soons).

[410] Ukraine's Written Observations, para. 79; Jurisdiction Hearing, 11 June 2019, 80:13-14 (Soons).

[411] Ukraine's Rejoinder, para. 75.

[412] Jurisdiction Hearing, 14 June 2019, 40:13-41:4 (Soons).

[413] Ukraine's Written Observations, para. 80; Ukraine's Rejoinder, para. 79.

[414] Ukraine's Written Observations, para. 80 *citing* Treaty Between the Russian Federation and Ukraine on Cooperation in the Sea of Azov and the Kerch Strait, done at Kerch on 24 December 2003 (**Annex UA-19**) [emphases added by Ukraine]; Jurisdiction Hearing, 11 June 2019, 82:5-18 (Soons).

[415] Ukraine's Written Observations, para. 81; Ukraine's Rejoinder, para. 79; Jurisdiction Hearing, 11 June 2019, 81:14-17 (Soons).

[416] Minutes of the Seventeenth Meeting of the Delegations of the Russian Federation and Ukraine to Discuss Issues Pertaining to the Sea of Azov and Kerch Strait, 29-30 January 2004, p. 1 (**Annex UA-531**); Minutes of the Seventeenth Meeting of the Delegations of the Russian Federation and Ukraine to Discuss Issues Pertaining to the Sea of Azov and Kerch Strait, 29-30 January 2004, p. 1 (**Annex UA-531**), Minutes of a Meeting of the Working Group on the Issues of Environmental Protection in the Framework of the 18th Round of the Ukrainian-Russian Negotiations on the Issues of Determination of the Legal Status of the Azov Sea and the Kerch Strait, 25-26 March 2004, p. 1 (**Annex UA-532**).

resolution of the matter.[417] Indeed, for Ukraine, what was accomplished by the Azov/Kerch Cooperation Treaty was "only limited and only provisional."[418]

242. Ukraine denies that it in practice treated the Sea of Azov and the Kerch Strait as "common internal waters" either before or after the execution of the Azov/Kerch Cooperation Treaty.[419] Ukraine contends that not only has it invoked the regime of transit passage in the Kerch Strait, as clearly reflected in the *note verbale* of its Ministry of Foreign Affairs in 2001 and 2002, but "even where it has consented to describe the Sea of Azov and the Kerch Strait as 'internal waters', it has claimed a 'part' or 'sector' of the Sea of Azov and Kerch Strait in which its rights trump Russia's."[420]

243. Ukraine recalls in this regard that it protested a Russian decree extending patrols to the entire Sea of Azov, and that it detained fishing vessels of the Russian Federation in its "sector" of the Sea of Azov.[421] Ukraine also recalls that it protested dredging by the Russian Federation in the Ukrainian side of the Kerch Strait.[422]

244. Ukraine contends that the Russian Federation's practice since 2014 has not been consistent with a common internal waters regime. According to Ukraine, the Russian Federation has seized Ukrainian gas fields in the Sea of Azov, purported to unilaterally nullify Ukrainian licenses for such gas fields, unilaterally built a bridge, cables, and a pipeline across the Kerch Strait, and imposed unilateral limits on the dimensions of vessels that might pass thought the strait.[423] Ukraine also contends that the Russian Federation has only recently stopped vessels transiting the Kerch Strait to and from Ukraine's Sea of Azov ports, on the basis that the Kerch Strait is "under the full sovereignty of [the Russian Federation]."[424]

---

417 Ukraine's Written Observations, para. 84; Ukraine's Rejoinder, para. 84.
418 Jurisdiction Hearing, 14 June 2019, 43:15-17 (Soons).
419 Ukraine's Written Observations, para. 86.
420 Ukraine's Written Observations, paras 78, n. 124, 86.
421 Ukraine's Written Observations, para. 86.
422 Ukraine's Written Observations, para. 86.
423 Ukraine's Written Observations, para. 87; Ukraine's Rejoinder, para. 88; Jurisdiction Hearing, 11 June 2019, 67:14-19 (Soons).
424 Ukraine's Rejoinder, para. 88.

C. RIGHTS OF THIRD STATES

1. Position of the Russian Federation

245. The Russian Federation denies that any further criteria must be met for the Sea of Azov to be considered pluri-State internal waters.[425] Such further conditions, in the Russian Federation's view, have no basis in the Convention or judicial decisions.[426]

246. The Russian Federation disagrees with Ukraine's proposition that, for the establishment of a pluri-State bay, third States must not be prejudiced.[427] In any case, the Russian Federation argues that this alleged criterion is met in the present case.[428]

247. According to the Russian Federation, third States are subject to the regime inherent in the internal waters status of the Sea of Azov, and "to nothing more."[429] The Russian Federation asserts that third States "never had, and do not have now, navigational rights" in the Sea of Azov and the Kerch Strait, other than those granted to them by the Parties in the Azov/Kerch Cooperation Treaty.[430]

248. The Russian Federation contends that third States have not protested the internal waters status of the Sea of Azov and the Kerch Strait.[431] The Russian Federation regards recent statements by some entities as "politically inspired" and based on the misapprehension that freedom of transit and navigation under the Convention existed in the Sea of Azov and the Kerch Strait, whereas, in reality, these waters were always considered to be internal.[432]

2. Position of Ukraine

249. Ukraine argues that the Russian Federation's vision of the Sea of Azov and the Kerch Strait as "common internal waters" would prejudice third States, and would result in harm to international

---

[425] Russian Federation's Reply, para. 75.
[426] Russian Federation's Reply, para. 75; Jurisdiction Hearing, 10 June 2019, 106:5-13 (Treves).
[427] Russian Federation's Reply, paras 75(c).
[428] Russian Federation's Reply, paras 75(c), 114.
[429] Russian Federation's Reply, para. 114.
[430] Jurisdiction Hearing, 13 June 2019, 55:4-9 (Treves); Jurisdiction Hearing, 10 June 2019, 129:5-130:4 (Treves).
[431] Russian Federation's Reply, para. 115; Jurisdiction Hearing, 10 June 2019, 20:15-17 (Lobach).
[432] Russian Federation's Reply, paras 116-17; Jurisdiction Hearing, 10 June 2019, 130:13-14 (Treves).

navigation.[433] Ukraine points out that the ICJ in *Gulf of Fonseca* ensured that third States retained the right of innocent passage in the internal waters of the gulf.[434]

250. Ukraine notes that, since April 2018, the Russian Federation has impeded Ukrainian and third-State vessels in the Sea of Azov and the Kerch Strait and obstructed their access to the Ukrainian ports located there.[435] According to Ukraine, by November 2018, the Russian Federation had completely closed the Kerch Strait to navigation, stating that the Kerch Strait is a Russian strait and is not subject to regulation by international law.[436] Ukraine highlights that third States and members of the international community, including Bulgaria, the European Union, Romania, Turkey, and the United States, have protested the Russian Federation's recent actions in the Kerch Strait as an interference with their navigational rights.[437]

251. Ukraine emphasises that third States continue to assert their navigational rights in the Sea of Azov, and the international community has not consented to any common internal waters status.[438] In this regard, Ukraine refers to a UN General Assembly resolution that calls upon the Russian Federation "to refrain from impeding the lawful exercise of navigational rights and freedoms in the Black Sea, the Sea of Azov and the Kerch Strait in accordance with applicable international law, in particular provisions of the [Convention]."[439]

---

[433] Ukraine's Written Observations, paras 72, 89.

[434] Ukraine's Written Observations, para. 89 *citing Gulf of Fonseca*, cit., n. 333, p. 604, para. 412 (**Annex UAL-58**); Jurisdiction Hearing, 11 June 2019, 88:21-89:2 (Soons).

[435] Ukraine's Written Observations, paras 90-92 *citing* United States Department of State, Press Statement, Russia's Harassment of International Shipping Transiting the Kerch Strait and Sea of Azov, 30 August 2018 (**Annex UA-543**); European Parliament, Resolution of 25 October 2018 on the Situation in the Sea of Azov (2018/2870(RSP)) (**Annex UA-544**); *Note Verbale* from Ukraine to the Russian Federation, No. 72/23-194/601-2350 (30 August 2018), p. 1 (**Annex UA-545**); Jurisdiction Hearing, 11 June 2019, 5:15-18 (Zerkal), 87:8-11 (Soons).

[436] Ukraine's Rejoinder, para. 90.

[437] Ukraine's Written Observations, paras 91-92 *citing* European Union Statement by the Spokesperson on the Escalating Tension in the Azov Sea, 25 November 2018 (**Annex UA-486**); Republic of Turkey, Ministry of Foreign Affairs, Press Release Regarding the Tension in the Azov Sea and Kerch Strait, No. 321, 26 November 2018 (**Annex UA-477**); European Parliament, Resolution of 25 November 2018 on the Situation in the Sea of Azov (2018/2870(RSP)), para. G(1) (**Annex UA-544**); Press Statement of the United States Department of Trade, Russia's Harassment of International Shipping Transiting the Kerch Strait and Sea of Azov, 30 August 2018 (**Annex UA-543**); Jurisdiction Hearing, 11 June 2019, 88:1-3 (Soons).

[438] Ukraine's Written Observations, para. 93; Jurisdiction Hearing, 11 June 2019, 87:10-14 (Soons).

[439] Ukraine's Rejoinder, para. 91 *citing* UN General Assembly Resolution 73/194, U.N. Doc. No. A/RES/73/194 (17 December 2018) (**Annex UA-549**); Jurisdiction Hearing, 11 June 2019, 87:15-25 (Soons).

D. RELEVANCE OF THE SIZE OF THE SEA OF AZOV

1. Position of the Russian Federation

252. The Russian Federation objects to Ukraine's position in favour of limiting the possibility of internal waters in pluri-State bays to bays not large enough to contain an exclusive economic zone or high seas.[440] Referring to the Gulf of Riga (formerly the internal waters of the USSR) invoked by Ukraine, in which Latvia and Estonia concluded an agreement delimiting their territorial sea and exclusive economic zone after the dissolution of the USSR, the Russian Federation notes that this precedent does not establish that such course of action was required by the size of the Gulf of Riga.[441] Moreover, it adds that there is nothing to suggest that the Gulf of Riga was not pluri-State internal waters between the dissolution of the USSR and the delimitation agreement.[442] The Russian Federation also denies the relevance of the Arab States' claim to the Gulf of Aqaba as common internal waters.[443] According to the Russian Federation, such claim was based on religious grounds, was not made by all the riparian States, and lacked evidence of peaceful and continuous use by the Ottoman Empire of the Gulf of Aqaba to the exclusion of other nations.[444]

253. The Russian Federation argues that, regardless of the specificities of those disputes, both the *Gulf of Fonseca* judgment and the *Croatia/Slovenia* award "accepted without difficulty that there could be internal waters common to two or more States."[445] The Russian Federation points out that the international agreements concerning the Rovuma Bay, the Bay of Oyapock, and the Rio de la Plata established common internal waters of each pair of riparian States, when they drew closing lines.[446] It further notes that no judicial decision states that internal waters established in a bay within one riparian State cannot continue to exist where there is later more than one such State.[447]

254. The Russian Federation rejects Ukraine's assertion that the admission of internal waters large enough to contain an exclusive economic zone would conflict with the text and object and purpose of the Convention.[448] It argues that, under the Convention, only new claims to sovereignty over areas of the high seas and exclusive economic zones would be invalid.[449] By contrast, in the Russian Federation's view, the Convention, as "a consecration of coastal States' claims" and "a

---

[440] Russian Federation's Reply, para. 76.
[441] Russian Federation's Reply, para. 78.
[442] Russian Federation's Reply, para. 78; Jurisdiction Hearing, 13 June 2019, 50:6-18 (Treves).
[443] Russian Federation's Reply, para. 79.
[444] Russian Federation's Reply, para. 79.
[445] Jurisdiction Hearing, 10 June 2019, 102:24-103:4 (Treves).
[446] Russian Federation's Reply, para. 72; Jurisdiction Hearing, 10 June 2019, 103:5-8 (Treves).
[447] Russian Federation's Reply, para. 72.
[448] Jurisdiction Hearing, 10 June 2019, 108:1-4 (Treves).
[449] Jurisdiction Hearing, 10 June 2019, 107:1-4 (Treves).

victory of coastal States' interests," does not prevent the maintenance of State sovereignty in areas that were never part of the high seas or exclusive economic zones.[450]

255. The Russian Federation further notes that, while the Convention regulates and endorses the expansion of coastal States' jurisdiction to areas belonging to the high seas, it does not provide for a process through which areas formerly under the sovereignty of a riparian State would become high seas or exclusive economic zones.[451]

2. Position of Ukraine

256. Ukraine notes that the Sea of Azov is large enough to contain an exclusive economic zone.[452] In Ukraine's view, the creation of a *sui generis* regime of common internal waters in an area as significant as the Sea of Azov and the Kerch Strait cannot be easily presumed.[453]

257. Ukraine submits that pluri-State internal waters have only been recognised in bodies of water covering smaller geographical areas than the Sea of Azov.[454] Specifically, Ukraine notes that the Gulf of Fonseca is 21 times, and the Bay of Piran is 2,000 times smaller than the Sea of Azov, and both the Gulf of Fonseca and the Bay of Piran are too small to contain an exclusive economic zone or high seas.[455]

258. According to Ukraine, the ICJ found in the *Gulf of Fonseca* case that a small gulf was comprised of pluri-State internal waters, based on hundreds of years of consistent practice demonstrating agreement among the States as to that regime and the acquiescence of third States and navigational protections for those States.[456] Even so, Ukraine notes, the existence of a pluri-State bay was controversial in that case, with Judge Oda dissenting on the basis that "there did not and still does not (or, even, cannot) exist any such legal concept as a 'pluri-State bay' the waters of which are internal waters."[457]

---

[450] Jurisdiction Hearing, 10 June 2019, 107:4-7 (Treves), 108:9-11 (Treves).
[451] Jurisdiction Hearing, 10 June 2019, 109:2-7 (Treves).
[452] Ukraine's Written Observations, paras 72-73; Jurisdiction Hearing, 11 June 2019, 71:21-23 (Soons).
[453] Ukraine's Written Observations, para. 77 *citing Bay of Bengal*, cit., n. 307, p. 36, para. 95 (**Annex UAL-63**).
[454] Ukraine's Written Observations, para. 73; Ukraine's Rejoinder, para. 57.
[455] Ukraine's Written Observations, para. 73, Figure 1.
[456] Ukraine's Written Observations, para. 71 *citing Gulf of Fonseca*, cit., n. 333, p. 599, para. 401, p. 601, para. 405, p. 604, para. 412 (**Annex UAL-58**).
[457] Ukraine's Written Observations, para. 71 *citing Gulf of Fonseca*, cit., n. 333, Dissenting Opinion of Judge Oda, p. 732 at p. 745, para. 24 (**Annex UAL-59**).

259. Turning to the example of the Gulf of Aqaba, Ukraine notes that many States objected to the claim of Egypt, Jordan, and Saudi Arabia that its waters were Arab internal waters "by reason *partly of its breadth* and partly of the fact that its shores belong to four different States."[458]

260. Ukraine notes that the Russian Federation has not to date identified any claim to pluri-State internal waters in a sea as large as the Sea of Azov.[459] Ukraine highlights that the Rovuma Bay and the Bay of Oyapuck, examples of pluri-State internal waters referred to by the Russian Federation, are small enough to be covered by the territorial seas of the coastal States.[460] According to Ukraine, the Rio de la Plata estuary was claimed as a river estuary pursuant to Article 9 of the Convention, and unlike Articles 8 and 10, the drawing of a baseline across river mouths is not limited to bodies of water bordered by a single State.[461] Moreover, Ukraine points out that third States have protested the internal waters status of the Rio de la Plata estuary.[462]

261. Ukraine argues that extending the internal waters regime to larger water bodies would conflict with the text of the Convention, "which renders invalid any claim to sovereignty over areas that would otherwise be subject to the regime of the exclusive economic zone and/or the high seas."[463] Ukraine adds that the Russian Federation's attempts to apply the internal waters regime to bodies of water large enough to contain an exclusive economic zone would also contravene the purpose of the Convention, which aims to strike a balance between the jurisdiction of coastal States and those of third States in maritime areas.[464] In Ukraine's view, permitting such claims would "disturb the careful balance that the Convention strikes between coastal State jurisdiction and third-State rights" and "deprive third States of navigational rights that they would otherwise enjoy, as well as rights to harvest any surplus of the coastal State's allowable catch."[465]

---

[458] Ukraine's Written Observations, para. 74 *citing* UNGAOR, 11th Sess., 666th Plenary Meeting, U.N. Doc. No. A/PV.666 (1 March 1957), para. 58 (**Annex UA-512**) [emphasis added by Ukraine].
[459] Ukraine's Written Observations, para. 75; Jurisdiction Hearing, 11 June 2019, 72:9-12 (Soons).
[460] Ukraine's Rejoinder, para. 57.
[461] Ukraine's Rejoinder, para. 57, n. 124; Jurisdiction Hearing, 11 June 2019, 71:24-72:6 (Soons).
[462] Ukraine's Rejoinder, para. 57.
[463] Ukraine's Rejoinder, para. 58; Jurisdiction Hearing, 11 June 2019, 73:1-3 (Soons).
[464] Ukraine's Rejoinder, para. 59; Jurisdiction Hearing, 11 June 2019, 69:20-24 (Soons).
[465] Ukraine's Rejoinder, para. 59; Jurisdiction Hearing, 11 June 2019, 70:8-9 (Soons), 70:15-18 (Soons).

E. Historic Title Argument

1. Position of the Russian Federation

262. The Russian Federation notes that the Azov/Kerch Cooperation Treaty and Joint Statement recognise the Sea of Azov and the Kerch Strait as "*historically* internal" waters.[466] According to the Russian Federation, the claim of historically internal waters should be interpreted also as claims that the rights exercised in the Sea of Azov and the Kerch Strait are based on historic title.[467] The Russian Federation observes that these claims to historic bay status, when published in the Law of the Sea Bulletin, did not receive any objections from third States, while the United States elected to protest the Russian Federation's claim to the Peter the Great Bay.[468]

263. The Russian Federation argues that the concept of historic title is used specifically to refer to historic sovereignty over land or maritime areas. The Russian Federation refers to the United Nations Memorandum on Historic Bays, which states:

> [h]istoric rights are claimed not only in respect of bays, but also in respect of maritime areas which do not constitute bays, such as the waters of archipelagos and the water area lying between an archipelago and the neighbouring mainland; historic rights are also claimed in respect of *straits*, estuaries and other similar bodies of waters.[469]

264. Therefore, according to the Russian Federation, rights over the Kerch Strait can be based on historic title "if the Kerch Strait were not to be seen as included in the mouth of the historic bay of the Sea of Azov."[470] The Russian Federation argues that there is no reason why a bay that qualifies as a juridical bay, meeting the requirements set out in the Convention, should not also qualify as an historic bay if it has been recognised as comprising internal waters for a long time without meeting objections from third States.[471]

265. The Russian Federation also argues that Ukraine has implicitly acknowledged historic title over the Sea of Azov by making a declaration under Article 298, paragraph 1, subparagraph (a), of the Convention, excluding "disputes involving historic bays or titles" from the compulsory procedure.[472] According to the Russian Federation, there would be no purpose to this declaration

---

[466] Russian Federation's Preliminary Objections, para. 99; Russian Federation's Reply, para. 121 [emphasis added by the Russian Federation].
[467] Russian Federation's Preliminary Objections, para. 102.
[468] Russian Federation's Preliminary Objections, para. 100; Jurisdiction Hearing, 13 June 2019, 56:18-23 (Treves).
[469] Russian Federation's Preliminary Objections, para. 103 [emphasis added by the Russian Federation].
[470] Russian Federation's Preliminary Objections, para. 104.
[471] Jurisdiction Hearing, 13 June 2019, 56:5-14 (Treves).
[472] Russian Federation's Reply, para. 120.

unless Ukraine, which has no other historic bay, considered that the Sea of Azov and the Kerch Strait were subject to rights of historic title.[473]

2. Position of Ukraine

266. Ukraine rejects the Russian Federation's argument that the Sea of Azov and the Kerch Strait are internal waters by reason of their history.[474]

267. For Ukraine, the fact that the Sea of Azov and the Kerch Strait may have been a juridical bay, and thus subject to the regime of internal waters, does not turn those waters into an historic bay, since such qualification is meant for areas that would not qualify as juridical bays due to their dimensions.[475] Ukraine contends that it cannot be inferred from the lack of objections from third States with respect to a juridical bay that they have acquiesced to such bay obtaining historical title status.[476]

268. Ukraine argues that its declaration pursuant to Article 298, paragraph 1, subparagraph (a)(i), of the Convention cannot be taken as an acknowledgement that the Sea of Azov and the Kerch Strait are subject to rights of historic title because the declaration merely paraphrases the content of Article 298, paragraph 1, subparagraph (a)(i).[477]

F. APPLICABILITY OF UNCLOS TO THE WATERS OF THE SEA OF AZOV AND THE KERCH STRAIT

1. Position of the Russian Federation

269. The Russian Federation argues that, as internal waters, the Sea of Azov and the Kerch Strait are not regulated by the Convention.[478]

270. Specifically, the Russian Federation recalls that Article 8 of the Convention provides that internal waters fall within the landward side of the baseline, and Article 2, paragraph 1, of the Convention provides that "[t]he sovereignty of a coastal State extends, *beyond its land territory and internal waters* [...] to an adjacent belt of sea, described as the territorial sea."[479] Article 2, paragraph 2,

---

[473] Jurisdiction Hearing, 13 June 2019, 56:5-14 (Treves).
[474] Ukraine's Written Observations, para. 94; Jurisdiction Hearing, 14 June 2019, 58:14-18 (Soons).
[475] Jurisdiction Hearing, 11 June 2019, 90:20-25 (Soons).
[476] Jurisdiction Hearing, 14 June 2019, 58:9-13 (Soons).
[477] Ukraine's Written Observations, para. 96; Ukraine's Rejoinder, para. 97; Jurisdiction Hearing, 11 June 2019, 90:4-8 (Soons).
[478] Russian Federation's Preliminary Objections, paras 117-18.
[479] Russian Federation's Preliminary Objections, paras 119-20 [emphasis added by the Russian Federation].

of the Convention extends the sovereignty to the airspace above and the bed and sub-soil of the territorial sea, while not addressing sovereignty over internal waters.[480] Furthermore, the Russian Federation points out that the Convention does not regulate the delimitation of internal waters of States whose coasts are opposite or adjacent to each other.[481]

271. The Russian Federation also relies on the Separate Opinion of Judges Cot and Wolfrum in the *ARA Libertad (Argentina v. Ghana)* (hereinafter "*ARA Libertad*") case, which suggests that internal waters should be equated with land territory, and no limitations can be assumed on the sovereignty of the coastal State over internal waters.[482]

272. The Russian Federation further submits that the Kerch Strait is not a strait "between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone," as defined by Article 37 of the Convention, and is therefore not regulated by the Convention.[483] Accordingly, the Russian Federation argues that disputes concerning activities in the Kerch Strait do not concern the interpretation or application of the Convention.[484]

2. Position of Ukraine

273. Ukraine contests the Russian Federation's allegation that the internal waters regime is outside of the scope of the Convention.[485] In response to the question posed to it by the Arbitral Tribunal (*see* paragraph 29), Ukraine submits that "[q]uestions concerning internal waters regulated by provisions of UNCLOS unquestionably are within the scope of UNCLOS and would also come within the scope of the dispute settlement mechanisms of Part XV of the Convention."[486]

274. Ukraine notes that the provisions of UNCLOS determine the existence and extent of internal waters.[487] In this regard, Ukraine refers to Article 8, paragraph 1, of the Convention and also to Article 7 of the Convention on straight baselines.[488]

---

[480] Russian Federation's Preliminary Objections, para. 121.
[481] Russian Federation's Preliminary Objections, para. 121.
[482] Russian Federation's Preliminary Objections, para. 120 *citing ARA Libertad*, Provisional Measures, Order of 15 December 2012, Separate Opinion of Judges Jean-Pierre Cot and Rüdiger Wolfrum, ITLOS Reports 2012, p. 332 at p. 363, para. 25 (**Annex RUL-34**).
[483] Russian Federation's Preliminary Objections, paras 129-30.
[484] Russian Federation's Preliminary Objections, para. 131.
[485] Jurisdiction Hearing, 11 June 2019, 9:10-12 (Zerkal), 89:21-25 (Soons); Jurisdiction Hearing, 14 June 2019, 61:18-25 (Soons).
[486] Jurisdiction Hearing, 14 June 2019, 61:18-25 (Soons).
[487] Jurisdiction Hearing, 14 June 2019, 62:1-2 (Soons).
[488] Jurisdiction Hearing, 14 June 2019, 62:1-2 (Soons).

275. Referring to Article 8, paragraph 2, of the Convention, Ukraine argues that the right of innocent passage applies to those internal waters created by the establishment of a straight baseline in accordance with Article 7.[489]

276. Ukraine further notes that Article 2 of the Convention confirms that the sovereignty of the coastal State extends to the internal waters as defined by UNCLOS, but that sovereignty must necessarily be exercised subject to the Convention.[490]

277. Ukraine adds that other provisions of the Convention entail the rights and obligations of States with regard to internal waters.[491]

G. Exclusively Preliminary Character of the Objection

1. Position of the Russian Federation

278. The Russian Federation disagrees with Ukraine's argument that consideration of this preliminary objection should be deferred to the merits phase.[492]

279. According to the Russian Federation, the purpose of the Preliminary Objections phase is to determine the jurisdiction of the Arbitral Tribunal, and, more specifically, the scope of the Russian Federation's consent to jurisdiction. The Russian Federation contends that, in order to ascertain to which disputes the Russian Federation's consent to jurisdiction under UNCLOS extends, it is necessary to determine whether any dispute concerns the interpretation and application of the Convention. In making this determination, in the Russian Federation's view, the Arbitral Tribunal would not apply the Convention to any set of facts, and thus enter into the merits, but simply determine its scope in order to "avoid that a Party should have to 'give an account of itself on issues of merits before a tribunal which lacks jurisdiction in the matter, or whose jurisdiction has not yet been established'."[493]

---

[489] Jurisdiction Hearing, 14 June 2019, 62:9-17 (Soons).
[490] Jurisdiction Hearing, 14 June 2019, 63:5-9 (Soons).
[491] Jurisdiction Hearing, 14 June 2019, 62:21-63:9 (Soons) *citing* Marcelo Kohen, 'Is the Internal Waters Regime Excluded from the United Nations Convention on the Law of the Sea?' in Lilian Del Castillo (ed), *Law of the Sea, from Grotius to the International Tribunal for the Law of the Sea*, (Brill 2015) p. 123 (**Annex UAL-67**).
[492] Russian Federation's Reply, para. 122.
[493] Russian Federation's Reply, para. 127.

280. The Russian Federation contends that the Arbitral Tribunal, after reviewing an abundance of material decided in Procedural Order No. 3 that its Preliminary Objections are "of a character that requires them to be examined in a preliminary phase."[494]

281. The Russian Federation considers that there is nothing that requires the Arbitral Tribunal to reserve this preliminary objection for consideration in the merits phase in accordance with the terms of the operative paragraph 2 of Procedural Order No. 3.[495]

2. Position of Ukraine

282. Ukraine contends that, if the Russian Federation's objection based on the internal waters status of the Sea of Azov and the Kerch Strait is not rejected, it should be deferred to the merits phase[496] in accordance with Article 10, paragraph 4, of the Rules of Procedure[497] and consistently with Procedural Order No. 3.[498]

283. Ukraine recalls its position on the merits that the Sea of Azov is a semi-enclosed sea that includes maritime zones belonging to Ukraine, that the Kerch Strait includes territorial sea belonging to Ukraine and is a strait used for international navigation, and that the Russian Federation's actions in both areas have breached the terms of the Convention.[499] Ukraine maintains that the Russian Federation's assertion of internal waters status goes to the merits of the dispute because it requires the Arbitral Tribunal to make a determination on the merits as to whether Ukraine has rights in the Sea of Azov and the Kerch Strait recognised by the relevant provisions of the Convention, which the Russian Federation has breached.[500]

284. Ukraine adds that the fact that the Russian Federation has behaved entirely inconsistently with its claimed common internal waters status in the Sea of Azov and the Kerch Strait provides yet another reason that its objection cannot be accepted at this stage of the proceedings. In Ukraine's view, the Arbitral Tribunal cannot uphold the Russian Federation's claim of common internal waters without first ascertaining whether, as a factual matter, the Russian Federation's actual

[494] Russian Federation's Reply, para. 123.
[495] Russian Federation's Reply, paras 124, 126; Jurisdiction Hearing, 13 June 2019, 57:14-21 (Treves).
[496] Ukraine's Written Observations, para. 97; Ukraine's Rejoinder, para. 98; Jurisdiction Hearing, 14 June 2019, 58:19-24 (Soons).
[497] Ukraine's Written Observations, para. 100.
[498] Ukraine's Rejoinder, para. 100.
[499] Ukraine's Written Observations, para. 98.
[500] Ukraine's Written Observations, para. 98.

conduct is consistent with that claim.[501] Ukraine thus submits that this determination is properly made in the merits phase of these proceedings.[502]

285. Ukraine notes that the *South China Sea* arbitral tribunal found that the nature and validity of any historic rights claimed by China in the South China Sea was a determination on the merits.[503] Ukraine considers that the Russian Federation has made a "comparable claim" in this Arbitration.[504]

H. ANALYSIS OF THE ARBITRAL TRIBUNAL

286. Having reviewed the positions of the Parties, the Arbitral Tribunal has to consider whether it has jurisdiction to decide the dispute brought by Ukraine insofar as it extends to events in the Sea of Azov and the Kerch Strait.

287. The Arbitral Tribunal recalls Article 10, paragraph 8, of the Rules of Procedure, which provides:

> The Arbitral Tribunal shall give its decision in the form of an award, by which it shall uphold the objection or reject it or declare that the objection does not possess, in the circumstances of the case, an exclusively preliminary character. If the Arbitral Tribunal rejects the objection or declares that it does not possess an exclusively preliminary character, it shall fix time-limits for the further proceedings.

288. Pursuant to this provision, the Arbitral Tribunal, in Procedural Order No. 3, decided:

> If the Arbitral Tribunal determines after the closure of the preliminary phase of the proceedings that there are Preliminary Objections that do not possess an exclusively preliminary character, then, in accordance Article 10, paragraph 8, of the Rules of Procedure, such matters shall be reserved for consideration and decision in the context of the proceedings on the merits.

289. The Arbitral Tribunal further recalls that the criteria for ascertaining whether a preliminary objection possesses an exclusively preliminary character were discussed in detail by the Parties in their written pleadings of 18 June 2018 and 4 July 2018 in respect of the Russian Federation's request to address its preliminary objections in a preliminary phase. Such criteria notably include the risk of the arbitral tribunal prejudging in an award on jurisdiction questions of the merits that, by definition, have not been fully pleaded by the parties at that stage, as well as the related risk of

[501] Ukraine's Rejoinder, para. 101; Jurisdiction Hearing, 14 June 2019, 60:11-17 (Soons).
[502] Ukraine's Rejoinder, para. 101; Jurisdiction Hearing, 11 June 2019, 92:3-10 (Soons).
[503] Ukraine's Written Observations, para. 99 *citing South China Sea*, cit., n. 34, para. 398 (**Annex UAL-3**); Ukraine's Rejoinder, para. 99; Jurisdiction Hearing, 14 June 2019, 59:4-9 (Soons).
[504] Ukraine's Written Observations, para. 100.

the arbitral tribunal considering, and forming a potentially incomplete view of, evidence that is common to jurisdictional and merits questions.

290. The Arbitral Tribunal notes that the Parties do not disagree as to the legal status of the Sea of Azov and the Kerch Strait prior to the dissolution of the USSR, being internal waters of the USSR. However, they disagree as to whether such status has continued after the dissolution of the USSR and Ukraine becoming an independent State.

291. In the view of the Arbitral Tribunal, the legal regime governing the Sea of Azov and the Kerch Strait depends, to a large extent, on how the Parties have treated them in the period following the independence of Ukraine. The positions of the Parties in respect of this question can be found or inferred from the subsequent agreements between them, including the Azov/Kerch Cooperation Treaty and the State Border Treaty, as well as their actual practice in those maritime areas. In order to determine whether the Sea of Azov and the Kerch Strait constitute internal waters, therefore, the Arbitral Tribunal must examine not only the subsequent agreements between the Parties but also how the Parties have acted vis-à-vis each other or vis-à-vis third States in the above areas. In particular, this would require the Arbitral Tribunal to scrutinize the conduct of the Parties with respect to such matters as navigation, exploitation of natural resources, and protection of the marine environment in the Sea of Azov and the Kerch Strait.

292. The Arbitral Tribunal further notes that the Russian Federation invokes the concept of historical title as an alternative basis for excluding the application of the Convention to the Sea of Azov and the Kerch Strait. Pursuant to that alternative argument, the Arbitral Tribunal must ascertain whether historic title to the waters in question existed, whether such title continued after 1991, and, if so, what the contents of the regime applicable to such waters has been.

293. The Arbitral Tribunal thus considers that the Russian Federation's objection based on the Sea of Azov and the Kerch Strait having the legal status of internal waters is interwoven with the merits of the present dispute, which have yet to be pleaded by the Parties. In the Arbitral Tribunal's view, this objection may not adequately be addressed without touching upon the questions of the merits, which it should not do at this stage of the proceedings.

294. Furthermore, without prejudice to whether the Sea of Azov and the Kerch Strait are internal waters, the Arbitral Tribunal is not entirely convinced by the rather sweeping premise of the Russian Federation's objection that the Convention does not regulate a regime of internal waters and, therefore, a dispute relating to events that occurred in internal waters cannot concern the interpretation or application of the Convention. The Arbitral Tribunal notes in this regard that

what constitutes internal waters is governed by the Convention. In addition, Article 8, paragraph 2, provides that a right of innocent passage shall exist in internal waters where the establishment of a straight baseline has the effect of enclosing as internal waters areas which had not previously been considered as such.

295. The Arbitral Tribunal also recalls the statement of ITLOS in *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission* that the obligation to protect and preserve the marine environment under Article 192 applies to "all maritime areas."[505] Such areas, in the Arbitral Tribunal's view, undoubtedly include internal waters. The Arbitral Tribunal further recalls the observation made by ITLOS in the *ARA Libertad* case that "although article 32 [Immunities of warships and other government ships operated for non-commercial purposes] is included in Part II of the Convention entitled 'Territorial Sea and Contiguous Zone', and most of the provisions in this Part relate to the territorial sea, some of the provisions in this Part may be applicable to all maritime areas, as in the case of the definition of warships provided for in article 29 of the Convention."[506] ITLOS went on to state that "a difference of opinions exists between [the Parties] as to the applicability of article 32 and thus [...] a dispute appears to exist between the Parties concerning the interpretation or application of the Convention."[507]

296. Accordingly, the Arbitral Tribunal is not inclined to accept the proposition that a dispute falls entirely outside the scope of the Convention simply because the underlying events occurred in internal waters. Rather, the relevant question for the Arbitral Tribunal appears to be whether a particular issue raised by the Parties' dispute is regulated by the Convention or whether the particular conduct complained of implicates, or raises questions of the interpretation or application of the Convention.

297. For the above reasons, the Arbitral Tribunal finds that this objection of the Russian Federation relating to Ukraine's claim concerning activities in the Sea of Azov and the Kerch Strait does not possess an exclusively preliminary character. The Arbitral Tribunal accordingly decides to reserve the above matter for consideration and decision in the context of the proceedings on the merits.

---

[505] *Request for Advisory Opinion Submitted by the Sub-Regional Fisheries Commission*, Advisory Opinion of 2 April 2015, ITLOS Reports 2015, p. 4, at p. 37, para. 120 (**Annex UAL-12**).
[506] *ARA Libertad*, cit., n. 482, p. 341, para. 64 (**Annex RUL-34**).
[507] *ARA Libertad*, cit., n. 482, p. 344, para. 65 (**Annex RUL-34**).

VI. THE RUSSIAN FEDERATION'S OBJECTION THAT THE ARBITRAL TRIBUNAL HAS NO JURISDICTION IN LIGHT OF THE PARTIES' DECLARATIONS UNDER ARTICLE 298(1) OF THE CONVENTION

298. Upon ratification of the Convention on 12 March 1997, the Russian Federation made a declaration pursuant to Article 298, paragraph 1, which reads:

> The Russian Federation declares that, in accordance with article 298 of the United Nations Convention on the Law of the Sea, it does not accept the procedures, provided for in section 2 of Part XV of the Convention, entailing binding decisions with respect to disputes concerning the interpretation or application of articles 15, 74 and 83 of the Convention, relating to sea boundary delimitations, or those involving historic bays or titles; disputes concerning military activities, including military activities by government vessels and aircraft, and disputes concerning law-enforcement activities in regard to the exercise of sovereign rights or jurisdiction; and disputes in respect of which the Security Council of the United Nations is exercising the functions assigned to it by the Charter of the United Nations.[508]

This declaration mirrors in substance an earlier declaration made by the USSR upon signature of the Convention, on 10 December 1982.[509]

299. Upon ratification of the Convention on 26 July 1999, Ukraine made a declaration pursuant to Article 298, paragraph 1, which reads:

> Ukraine declares, in accordance with article 298 of the Convention, that it does not accept, unless otherwise provided by specific international treaties of Ukraine with relevant States, the compulsory procedures entailing binding decisions for the consideration of disputes relating to sea boundary delimitations, disputes involving historic bays or titles, and disputes concerning military activities.[510]

This declaration mirrors in substance an earlier declaration made by the Ukrainian Soviet Socialist Republic upon signature of the Convention, on 10 December 1982.[511]

300. The Russian Federation argues that, if there was a dispute regarding the interpretation or application of the Convention, the Arbitral Tribunal would be faced with the exceptions to its jurisdiction set out in Article 298, paragraph 1, of the Convention. The Russian Federation submits that the Arbitral Tribunal lacks jurisdiction because the present dispute concerns (a) military activities, (b) law enforcement activities, (c) issues of sea boundary delimitations, and

---

[508] Declaration by the Russian Federation upon Ratification of UNCLOS, 12 March 1997 in Multilateral Treaties Deposited with the Secretary-General, Ch. XXI, No. 6, p. 28 (**Annex UA-8**).

[509] Declaration by the Russian Federation upon Ratification of UNCLOS, 12 March 1997 in Multilateral Treaties Deposited with the Secretary-General, Ch. XXI, No. 6, p. 28 (**Annex UA-8**).

[510] Declaration by Ukraine upon Ratification of UNCLOS, 26 July 1999 in Multilateral Treaties Deposited with the Secretary-General, Ch. XXI, No. 6, p. 32 (**Annex UA-8**).

[511] Declaration by Ukraine upon Ratification of UNCLOS, 26 July 1999 in Multilateral Treaties Deposited with the Secretary-General, Ch. XXI, No. 6, p. 32 (**Annex UA-8**).

(d) historic bays or titles, in respect of which the Russian Federation has made declarations in accordance with Article 298 of the Convention.

301. Ukraine rejects the Russian Federation's argument that the Arbitral Tribunal's jurisdiction is precluded by the declarations made by the Parties under Article 298, paragraph 1, of the Convention.

302. The Arbitral Tribunal will examine the arguments of the Parties as to the military activities exception, law enforcement activities exception, delimitation exception, and historic bay or title exception below.

A. MILITARY ACTIVITIES EXCEPTION

1. Position of the Russian Federation

303. According to the Russian Federation, if the Arbitral Tribunal were to dismiss the Russian Federation's first preliminary objection[512] on the basis that the Russian Federation "unlawfully used force (*quod non*), [the Arbitral Tribunal] would then necessarily have to admit that the case involves military activities and is thus outside its jurisdiction pursuant to the declarations made under Article 298(1)(b)."[513] The Russian Federation states that "it is because Ukraine has made express and specific allegations of acts of military aggression and unlawful use of force that Russia has raised a jurisdictional objection with respect to the Parties' declarations pursuant to Article 298(1)."[514]

304. While "categorically reject[ing] any allegation that it has engaged in unlawful military activities,"[515] the Russian Federation submits that "the central thrust of Ukraine's claim is the alleged involvement of the Russian military forces in Crimea and all the specific claims concern, whether directly or implicitly, military activities."[516]

305. The Russian Federation maintains that Ukraine cannot, on the one hand, argue that the Russian Federation's "claim to sovereignty over Crimea is in breach of the prohibition on the use of force"

[512] Chapter IV of this Award.
[513] Russian Federation's Reply, para. 139; Jurisdiction Hearing, 10 June 2019, 71:25-72:8 (Pellet); Jurisdiction Hearing, 13 June 2019, 65:13-19 (Pellet).
[514] Russian Federation's Reply, para. 138.
[515] Russian Federation's Reply, para. 137.
[516] Russian Federation's Preliminary Objections, para. 148.

and, on the other hand, affirm that "the dispute is 'not about any instance in which [the Russian Federation] has used force' but that its allegations are purely on civilian matters."[517]

306. The Russian Federation argues that, in accordance with the ordinary meaning of those terms, "military activities are simply any activity conducted by the armed forces of a State or paramilitary forces."[518] The Russian Federation contends that this "interpretation is not 'overly broad'," noting that there is "widespread agreement that issues concerning military activities must not be interpreted restrictively."[519]

307. The Russian Federation maintains that the "minimal substantive regulations under [the Convention], along with the optional exclusion covering military activities, are indicative of an intention 'to retain considerable flexibility in the military uses of the oceans and thereby allow States to pursue their assorted strategic objectives'."[520]

308. The Russian Federation contends that the *South China Sea* arbitral tribunal adopted a low threshold for the application of Article 298, paragraph 1, subparagraph (b), of the Convention that "can be triggered by the mere involvement of the military forces."[521] The Russian Federation recalls that the arbitral tribunal applied the military activities exception to the Philippines' submission concerning Chinese non-military ships preventing the resupply and rotation of the Philippines troops at Second Thomas Shoal, while China's military vessels were reported to have been in the vicinity.[522] The Russian Federation submits that, according to *South China Sea*, the mere presence of military vessels in the vicinity of the Chinese conduct complained of by the Philippines, which was not military in nature, was enough to make such conduct fall "well within the exception."[523]

309. The Russian Federation notes that the *South China Sea* arbitral tribunal, on the other hand, found that construction activities at Spratly Islands were not military activities because China had opposed such classification.[524] The Russian Federation points out that "[t]his is the only reason

---

[517] Russian Federation's Reply, para. 139 *citing* Ukraine's Written Observations, para. 122.
[518] Russian Federation's Reply, para. 140.
[519] Russian Federation's Reply, para. 142.
[520] Russian Federation's Reply, para. 142 *citing* Natalie Klein, *Dispute Settlement in the UN Convention on the Law of the Sea* (Cambridge University Press 2005), p. 286 (**Exhibit RUL-65**).
[521] Russian Federation's Preliminary Objections, paras 138-39 *citing South China Sea*, cit., n. 210, paras 1158, 1161 (**Annex UAL-11**).
[522] Russian Federation's Reply, para. 144 *citing South China Sea*, cit., n. 210, para. 1161 (**Annex UAL-11**).
[523] Jurisdiction Hearing, 10 June 2019, 74:10-16 (Pellet) *citing South China Sea*, cit., n. 210, para. 1161 (**Annex UAL-11**).
[524] Russian Federation's Reply, para. 145.

leading to the rejection of the 298(1)(b) jurisdictional exception."[525] According to the Russian Federation, however, Ukraine wrongly relies on this finding to establish that the involvement of military forces is insufficient to trigger the military activities exception.[526]

310. The Russian Federation argues that it "did not consent to the mandatory dispute settlement under the Convention with respect to disputes concerning military activities,"[527] "[y]et [...] Ukraine's claim is ultimately based on the premise that [the Russian Federation] cannot be sovereign over Crimea because it unlawfully annexed the Peninsula by alleged use of force."[528] Therefore, the Russian Federation contends that "the dispute is excluded from the [Arbitral] Tribunal's jurisdiction by Article 298(1)(b)."[529]

311. In addition to its "general military activities objection,"[530] the Russian Federation argues that the specific conduct complained of by Ukraine is military in nature. The Russian Federation submits that the following claims made in Ukraine's Memorial "directly rely on alleged unlawful uses of force" by the Russian Federation:[531] submissions (a), (b), (f), and (g) are based on the Russian Federation's alleged usurpation through "physical force" of gas fields and fisheries allegedly appertaining to Ukraine;[532] submissions (d), (e), (h), and (i) concern alleged unlawful interferences with Ukrainian-flagged vessels and fixed platforms "by armed Russian [Federation] FSB guards" that were allegedly issuing threats to Ukrainian vessels, and the alleged seizure and occupation by the Russian Federation military of Ukrainian offshore platforms;[533] submission (m) concerns the Russian Federation's alleged obstruction of passage through the Kerch Strait, "thus presumably implying that it did this by force";[534] and submissions (q) and (r) concern the Russian Federation military's alleged interference with Ukraine's attempts to protect archaeological and historical objects in Ukraine's maritime areas.[535]

312. As regards the construction of the Kerch Strait bridge, the Russian Federation accepts, in response to Ukraine's argument, that the mere construction of that bridge may not be specifically military

---

[525] Russian Federation's Reply, para. 145.
[526] Russian Federation's Reply, para. 145.
[527] Jurisdiction Hearing, 10 June 2019, 18:14-16 (Lobach).
[528] Jurisdiction Hearing, 10 June 2019, 18:18-23 (Lobach).
[529] Russian Federation's Reply, para. 137.
[530] Jurisdiction Hearing, 13 June 2019, 68:1-2 (Pellet).
[531] Russian Federation's Preliminary Objections, para. 147; Jurisdiction Hearing, 10 June 2019, 72:9-14 (Pellet).
[532] Russian Federation's Preliminary Objections, para. 147 *citing* Ukraine's Memorial, paras 9, 120; Jurisdiction Hearing, 10 June 2019, 72:15-18 (Pellet).
[533] Russian Federation's Preliminary Objections, para. 147 *citing* Ukraine's Memorial, paras 120-23, 159; Jurisdiction Hearing, 10 June 2019, 72:19-73:1 (Pellet).
[534] Russian Federation's Preliminary Objections, para. 147 *citing* Ukraine's Memorial, paras 227, 229; Jurisdiction Hearing, 10 June 2019, 73:1-2 (Pellet).
[535] Russian Federation's Preliminary Objections, para. 147; Jurisdiction Hearing, 10 June 2019, 73:2-5 (Pellet).

in nature.[536] The Russian Federation maintains that the Arbitral Tribunal would nevertheless be prevented from deciding the dispute regarding its construction pursuant to the general context of the dispute, related to allegations on the use of armed force, as described above.[537]

313. The Russian Federation argues that the applicability of the declarations made under Article 298, paragraph 1, subparagraph (b), can be assessed by the Arbitral Tribunal at this jurisdictional phase and need not be deferred to the merits phase.[538] The Russian Federation points out that, unlike China in *South China Sea*, the Russian Federation has specifically availed itself of the Article 298, paragraph 1, subparagraph (b), exception in this Arbitration and has placed sufficient material on the record to enable to Arbitral Tribunal to make its decision.[539]

2. Position of Ukraine

314. Ukraine submits that the present dispute does not concern military activities under Article 298, paragraph 1, subparagraph (b), of the Convention.[540]

315. Ukraine considers that the Russian Federation misrepresents its argument that the Russian Federation's infringement of Ukraine's maritime rights occurred "*in the period following* [the Russian Federation's] unlawful acts of aggression and purported annexation of the Crimean Peninsula" to be that the infringement of the Convention "happened *because* of the invasion."[541] Ukraine further notes that the Russian Federation then argues that the "the alleged 'causal link' between Russia's invasion of Crimea and Russia's subsequent violations of [the Convention] implicates Article 298(1)(b) and defeats this [Arbitral] Tribunal's jurisdiction."[542] According to Ukraine, however, this is an "unprecedented and incorrect reading of Article 298(1)(b)."[543]

316. Ukraine contends that the ordinary meaning of the term "concerning" in Article 298, paragraph 1, subparagraph (b), of the Convention is "about" or "in reference to" and, therefore, the military activities exception should only apply where the specific conduct complained of is military in

[536] Jurisdiction Hearing, 13 June 2019, 67:20-23 (Pellet).
[537] Jurisdiction Hearing, 13 June 2019, 67:24-68:2 (Pellet).
[538] Russian Federation's Reply, para. 147; Jurisdiction Hearing, 13 June 2019, 63:13-17 (Pellet).
[539] Russian Federation's Reply, para. 147.
[540] Ukraine's Written Observations, para. 120; Jurisdiction Hearing, 11 June 2019, 11:12-20 (Zerkal), 95:7-11 (Cheek).
[541] Ukraine's Written Observations, para. 124 [emphasis added by Ukraine].
[542] Ukraine's Written Observations, para. 124.
[543] Ukraine's Written Observations, para. 125.

nature.[544] Ukraine contends that this reading of Article 298, paragraph 1, subparagraph (b), is also supported by *South China Sea*.[545]

317. Ukraine submits that, had the States Parties to the Convention intended that the military activities exception extend to any dispute having a causal link to a military activity, they would have drafted Article 298, paragraph 1, subparagraph (b), so that it covers all disputes "arising out of" or "in connection with" military activities.[546] Ukraine notes that the States Parties have throughout the Convention precisely and intentionally used either broader language, such as "arising from or in connection with," "arising from" and "arising out of," or the narrower term "concerning," to define the scope and extent of a provision.[547]

318. Ukraine maintains that the Russian Federation's broad reading of Article 298, paragraph 1, subparagraph (b), conflicts with the object and purpose of the Convention to establish a legal order for the seas based on "the settlement of disputes [as] [...] an essential element of the Convention."[548] Ukraine cautions that the Russian Federation's "unprecedented" interpretation of Article 298, paragraph 1, subparagraph (b), would make the Convention inapplicable to a broad range of "potentially important" disputes that take place against the backdrop of armed conflict, but of which armed conflict is not the actual subject.[549] According to Ukraine, if the Russian Federation's line of argument were to be followed, once a State unlawfully uses force against another, "all subsequent violations of [the Convention] by that aggressor would be immunised."[550]

319. Turning to the specific conduct of the Russian Federation in dispute, Ukraine asks the Arbitral Tribunal to follow the approach in *South China Sea*, wherein the arbitral tribunal declined to characterise activities as military when China had consistently resisted such classification.[551] Ukraine notes that the Russian Federation has denied that it has engaged in military activities.[552] If the Russian Federation denies that its military personnel were involved in the activities that

---

[544] Ukraine's Written Observations, para. 125; Ukraine's Rejoinder, paras 117, 120; Jurisdiction Hearing, 11 June 2019, 104:8-15 (Cheek).
[545] Ukraine's Rejoinder, para. 120.
[546] Ukraine's Written Observations, para. 125; Jurisdiction Hearing, 11 June 2019, 104:15-17 (Cheek).
[547] Ukraine's Written Observations, para. 126; Ukraine's Rejoinder, para. 120; Jurisdiction Hearing, 11 June 2019, 104:17-105:3 (Cheek), 105:12-13 (Cheek).
[548] Ukraine's Written Observations, para. 127; Jurisdiction Hearing, 11 June 2019, 105:14-18 (Cheek).
[549] Ukraine's Written Observations, paras 121, 127.
[550] Jurisdiction Hearing, 11 June 2019, 98:1-4 (Cheek).
[551] Ukraine's Written Observations, para. 137 *citing South China Sea*, cit., n. 210, paras 1027-28 (**Annex UAL-11**).
[552] Jurisdiction Hearing, 11 June 2019, 95:15-20 (Cheek).

Ukraine complains of, Ukraine argues that the military activities exception cannot be invoked by the Russian Federation.[553]

320. Ukraine acknowledges that the Russian Federation has "deployed armed men and vessels to protect its civilian activities in the Sea of Azov, Black Sea, and Kerch Strait and to prevent Ukraine from accessing these areas."[554] However, in Ukraine's view, the mere presence of armed Russian personnel and governmental vessels does not imply that the present dispute concerns "military activities."[555] Ukraine recalls in this regard that the *South China Sea* arbitral tribunal found that construction activities carried out by Chinese military forces on a reef were not military activities.[556] Ukraine further relies on a recent ITLOS order,[557] in which, Ukraine submits, ITLOS looked to "the immediate context in the circumstances of that case and concluded that the activity was not military, despite some involvement of military vessels."[558]

321. Ukraine argues that it is the object of the activities in dispute that must be considered.[559] Thus, Ukraine submits, "[t]o the extent that there was any alleged military involvement, it was used to further civilian ends."[560] By way of example, Ukraine points to (a) the extraction by a Russian State-owned corporation of fuel allegedly worth nearly USD 2 billion from Ukrainian waters; (b) the increase of fish production in these areas (including for sale into the Russian market); and (c) the construction activities of the Kerch Strait bridge.[561]

322. Ukraine notes that the Russian Federation has (a) purported to license hydrocarbon blocks to profit-seeking private entities, pursuant to laws administered by civilian authorities; (b) extended to Crimea the same civilian legal framework for the exploitation of fisheries as is applicable in the Russian Federation's legitimate maritime areas; and (c) described its Kerch Strait construction activity as part of a long-term policy of ensuring the sustainable socio-economic development of Crimea, rather than as military activity.[562] Ukraine argues that through such conduct the Russian

---

[553] Jurisdiction Hearing, 11 June 2019, 95:21-24 (Cheek).
[554] Ukraine's Written Observations, para. 135.
[555] Ukraine's Written Observations, para. 135; Jurisdiction Hearing, 11 June 2019, 96:15-17 (Cheek), 103:7-12 (Cheek).
[556] Ukraine's Written Observations, para. 135 *citing South China Sea*, cit., n. 210, para. 938 (**Annex UAL-11**); Jurisdiction Hearing, 14 June 2019, 67:9-18 (Zionts).
[557] Jurisdiction Hearing, 14 June 2019, 67:19-22 (Zionts) *referring to Case Concerning the Detention of Three Ukrainian Naval Vessels (Ukraine v. the Russian Federation)* (hereinafter "*Detention of Ukrainian Naval Vessels*"), Provisional Measures, International Tribunal for the Law of the Sea, Order of 25 May 2019 (**Annex UAL-120**).
[558] Jurisdiction Hearing, 14 June 2019, 68:1-4 (Zionts).
[559] Jurisdiction Hearing, 14 June 2019, 67:6-8 (Zionts).
[560] Ukraine's Written Observations, para. 138; Jurisdiction Hearing, 11 June 2019, 99:7-13 (Cheek).
[561] Ukraine's Written Observations, para. 138; Jurisdiction Hearing, 11 June 2019, 100:4-102:3 (Cheek).
[562] Ukraine's Written Observations, paras 137-38.

Federation has confirmed the civilian nature of its activities.[563] Specifically with regard to the Kerch Strait bridge, Ukraine contends that "Russia has now withdrawn, quite correctly, its suggestion that interference with navigation in the Kerch Strait by the construction of a bridge is a military activity."[564]

323. Ukraine contends that the *South China Sea* arbitral tribunal held that certain naval activities by China could be adjudicated as part of a claim dependent on a dispute primarily regarding non-military matters.[565] For the same reason, Ukraine submits that its own case concerning archaeological objects at sea does not fall outside the Arbitral Tribunal's jurisdiction merely because such actions were carried out by the Russian Federation's navy personnel.[566]

324. Ukraine recalls that the *South China Sea* arbitral tribunal considered that the application of Article 298, paragraph 1, subparagraph (b), of the Convention depends on whether "the dispute itself concerns military activities, rather than whether a party has employed its military in some manner in relation to the dispute."[567] Ukraine submits that its submissions (a), (b), (d), (e), (f), (g), (h), (i), (m), (q), and (r), consistently with the findings of the *South China Sea* arbitral tribunal, do not seek adjudication of military issues.[568]

325. Ukraine argues that the Russian Federation misreads the findings in *South China Sea*.[569] For Ukraine, the *South China Sea* arbitral tribunal identified a military activity as one involving a military interaction between the military forces of one side and those of the other.[570] However, in the present case, none of the events described involve "military forces arrayed against one another"[571] nor does any Party allege that a military confrontation occurred in the waters at issue.[572]

326. Finally, Ukraine considers that, to determine the alleged military nature of the Russian Federation's activities underpinning Ukraine's claims, the Arbitral Tribunal may have to engage with facts that are "interlinked with the merits and cannot be determined conclusively at this preliminary stage,"[573] insofar as the Arbitral Tribunal would have to assess whether each of the

---

[563] Ukraine's Written Observations, para. 137; Jurisdiction Hearing, 14 June 2019, 68:5-69:5 (Zionts).
[564] Jurisdiction Hearing, 14 June 2019, 65:21-24 (Zionts).
[565] Ukraine's Written Observations, para. 135.
[566] Ukraine's Written Observations, para. 136; Jurisdiction Hearing, 11 June 2019, 102:4-11 (Cheek).
[567] Ukraine's Written Observations, para. 132 *citing South China Sea*, cit., n. 210, para. 1158 (**Annex UAL-11**).
[568] Ukraine's Written Observations, para. 134; Jurisdiction Hearing, 11 June 2019, 96:23-97:14 (Cheek).
[569] Ukraine's Written Observations, para. 133.
[570] Jurisdiction Hearing, 11 June 2019, 98:24-99:4 (Cheek).
[571] Ukraine's Written Observations, para. 134.
[572] Jurisdiction Hearing, 11 June 2019, 99:4-6 (Cheek).
[573] Ukraine's Written Observations, para. 139; Jurisdiction Hearing, 11 June 2019, 106:14-22 (Cheek).

alleged activities is a military activity based on the evidence submitted by Ukraine.[574] For Ukraine, such assessment could be appropriately deferred to the merits phase.[575]

3. Analysis of the Arbitral Tribunal

327. Pursuant to Article 298, paragraph 1, subparagraph (b), of the Convention, a State may choose not to accept the compulsory procedures entailing binding decisions provided for in section 2 of Part XV with respect to "disputes concerning military activities, including military activities by government vessels and aircraft engaged in non-commercial service."

328. The Russian Federation first raises the military activities exception as "a global objection, establishing the impossibility for this Tribunal to decide globally on the Ukrainian submissions, because to do this, the Tribunal would have to decide on [...] the alleged use of force initially vitiating [...] Crimea's reunification with [the Russian Federation]."[576]

329. The Arbitral Tribunal notes that it is common ground between the Parties that the events occurring in Crimea in 2014 do not as such form part of the dispute submitted to it. The Arbitral Tribunal further notes that it has upheld the Russian Federation's first preliminary objection to the extent that its ruling on Ukraine's claims necessarily requires it to decide, expressly or implicitly, on the sovereignty of either Party over Crimea.[577] The Arbitral Tribunal accordingly finds that the Russian Federation's global objection has no basis as its premise has not been met.

330. Article 298, paragraph 1, subparagraph (b), of the Convention allows States Parties to exclude from the compulsory jurisdiction of the Convention "disputes concerning military activities." The Arbitral Tribunal notes that the Convention employs the term "concerning," in contrast to other terms, such as "arising out of," "arising from," or "involving," used elsewhere in the Convention to characterise disputes.[578] Compared to such other terms, which are open to a more expansive interpretation, the term "concerning" circumscribes the military activities exception by limiting it to those disputes whose subject matter is military activities. In the Arbitral Tribunal's view, a mere "causal" or historical link between certain alleged military activities and the activities in dispute cannot be sufficient to bar an arbitral tribunal's jurisdiction under Article 298, paragraph 1, subparagraph (b), of the Convention.

---

[574] Ukraine's Written Observations, paras 140-41.
[575] Ukraine's Written Observations, para. 139 *citing South China Sea*, cit., n. 34, paras 395-96 (**Annex UAL-3**).
[576] Jurisdiction Hearing, 13 June 2019, 70:12-17 (Pellet).
[577] *See* paragraphs 197-198 of this Award.
[578] *See* UNCLOS, Arts 151(8), 289, 297(1), 297(2)(a), 297(2)(b).

331. The Arbitral Tribunal considers that the military activities exception is not triggered in the present case simply because the conduct of the Russian Federation complained of by Ukraine has its origins in, or occurred against the background of, a broader alleged armed conflict. Rather, in the Arbitral Tribunal's view, the relevant question is whether "certain specific acts subject of Ukraine's complaints" constitute military activities.[579]

332. The Arbitral Tribunal will now examine the specific aspects of the dispute that the Russian Federation contends are precluded by the Parties' declarations pursuant to Article 298, paragraph 1, subparagraph (b), of the Convention on the basis that they concern military activities.[580]

333. The Arbitral Tribunal notes that Article 298, paragraph 1, subparagraph (b), of the Convention refers to "disputes concerning military activities, including military activities by government vessels and aircraft engaged in non-commercial service." This indicates that, in order to qualify as "military activities" within the meaning of the above provision, activities need not necessarily be carried out by military vessels and aircraft but, instead, can equally be performed by "government vessels and aircraft engaged in non-commercial service."

334. The Arbitral Tribunal does not consider, however, that mere involvement or presence of military vessels is in and by itself sufficient to trigger the military activities exception. While such factor may be relevant in assessing whether a dispute concerns military activities, it is not conclusive. As the arbitral tribunal in *South China Sea* stated:

> Article 298(1)(b) applies to "*disputes concerning* military activities" and not to "military activities" as such. Accordingly, the Tribunal considers the relevant question to be whether the dispute itself concerns military activities, rather than whether a party has employed its military in some manner in relation to the dispute.[581]

335. The Arbitral Tribunal would add that there is no consistent State practice as to the scope of activities that are to be regarded as being exercised by "military" vessels, aircraft, and personnel. Forces that some governments treat as civilian or law enforcement forces may be designated as military by others, even though they may undertake comparable tasks.[582] In addition, many States rely on their military forces for non-military functions, such as disaster relief, evacuations, or the reestablishment of public order.

---

[579] Jurisdiction Hearing, 10 June 2019, 67:24-25 (Pellet).
[580] *See* Russian Federation's Preliminary Objections, para. 147; Jurisdiction Hearing, 10 June 2019, 72:9-73:5 (Pellet).
[581] *South China Sea*, cit., n. 210, para. 1158 (**Annex UAL-11**).
[582] *See also Detention of Ukrainian Naval Vessels*, cit., n. 557, para. 64 (**Annex UAL-120**).

336. Insofar as Ukraine maintains that the Russian Federation has excluded Ukraine from access to and exploitation of hydrocarbon fields and fisheries,[583] the Arbitral Tribunal notes that the Russian Federation argues that the Parties' dispute concerns military activities because Ukraine alleges it has been excluded through "physical force."[584] In the view of the Arbitral Tribunal, however, the alleged use of physical force is insufficient to conclude that an activity is military in nature. Law enforcement forces, for example, are generally authorised to use physical force without their activities being considered military for that reason.[585] Having examined the broader context in which the alleged events took place, the Arbitral Tribunal notes that in the maritime areas in dispute the Russian Federation has granted offshore hydrocarbon licenses to civilian commercial companies,[586] and regulates under a civilian legal framework the exploitation of fisheries resources.[587] Taking into account this larger context, the Arbitral Tribunal finds that the use of physical force alleged by Ukraine does not turn the dispute into one concerning military activities; rather such alleged force appears to have been directed towards maintaining civilian activities such as the exploitation of hydrocarbons and fisheries.

337. Insofar as Ukraine contends that the Russian Federation has unlawfully interfered with Ukrainian-flagged vessels and fixed platforms,[588] the Arbitral Tribunal notes that the Russian Federation claims that the Parties' dispute concerns military activities because of the supposed involvement

---

[583] Ukraine's Memorial, paras 265(a), 265(b), 265(f), 265(g).

[584] Russian Federation's Preliminary Objections, para. 147(a).

[585] *Detention of Ukrainian Naval Vessels*, cit., n. 557, para. 73 (**Annex UAL-120**).

[586] *See* License No. 15924 for Golitsynskoye Field (12 November 2015) (**Annex UA-158**); License No. 15929 for Arkhangelskoye Field (12 November 2015) (**Annex UA-165**); License No. 15928 for Odesskoye Field (12 November 2015) (**Annex UA-166**); License No. 15926 for North-Bulganakskoye Field (12 November 2015) (**Annex UA-167**); License No. 15927 for Shtormovye Field (12 November 2015) (**Annex UA-168**); Order of the Russian Federation No. 1320-r, 27 June 2016 (**Annex UA-160**).

[587] *See* Order No. 224 of the Russian Federal Fisheries Agency, On Approving the Regulations on the Crimean Territorial Administration of the Federal Fisheries Agency, 31 March 2014 (**Annex UA-171**); Order No. 637 of the Russian Ministry of Agriculture, On Amendments to the Regulations on Territorial Administrations of the Federal Fisheries Agency, 7 October 2016 (**Annex UA-179**); Order No. 273 of the Ministry of Agriculture of the Russian Federation, On Amendments to the Fishing Rules for the Azov-Black Sea Fishing Basin, 14 July 2014 (**Annex UA-180**); Order No. 293 of the Ministry of Agriculture of the Russian Federation, On Approving the Fishing Rules for the Azov-Black Sea Fishery Basin, 1 August 2013 (**Annex UA-181**); Order No. 445 of the Ministry of Agriculture of the Russian Federation, On Approving the Total Permissible Catch of Aquatic Biological Resources in Internal Waters of the Russian Federation, in the Territorial Sea of the Russian Federation, on the Continental Shelf of the Russian Federation, and in the Exclusive Economic Zone of the Russian Federation in the Sea of Azov and the Caspian Sea for 2017, 10 October 2016 (**Annex UA-182**); Order No. 465 of the Ministry of Agriculture of the Russian Federation, On Approving the Total Permissible Catch of Aquatic Biological Resources in Internal Waters of the Russian Federation, in the Territorial Sea of the Russian Federation, on the Continental Shelf of the Russian Federation, and in the Exclusive Economic Zone of the Russian Federation in the Sea of Azov and the Caspian Sea for 2016, 7 October 2015 (**Annex UA-183**); Report by Ministry of Agriculture of the Russian Federation, 1 December 2016 (**Annex UA-184**); Order No. 184 of the Russian Federation, 5 March 2013, amended on 11 January 2017, Clause 1 (**Annex UA-185**).

[588] Ukraine's Memorial, paras 265(d), 265(e), 265(h), 265(i).

of Russian military vessels, aircraft, and personnel.[589] At issue is notably the detention of the captain of a Ukrainian fishing boat by Russian military personnel,[590] the deployment of armed men to oversee the work carried out on an oil platform,[591] and the alleged harassment of Ukrainian vessels by Russian military vessels and aircraft.[592]

338. While it is not clear whether the forces involved in these activities belong to the armed forces, in any case the activities themselves cannot be objectively classified as military in nature. The Arbitral Tribunal considers that the detention, and subsequent release following the payment of a fine,[593] of a captain of a civilian boat may appropriately be classified as a law enforcement activity, rather than a "military activity"; and standing guard and supervising works on oil platforms are not inherently military activities but activities that may be, and frequently are, undertaken by private security contractors. The alleged harassment of Ukrainian vessels appears to have mainly consisted of dangerously close approaches, failures to establish radio communication, and general violations of the rules of safe navigation and seamanship. In the Arbitral Tribunal's view, the fact that some of the Ukrainian vessels whose navigation was impeded belonged to Ukraine's navy does not cause the dispute to concern military activities.

339. Insofar as Ukraine challenges the construction of the Kerch Strait bridge and the resulting impediment to navigation through the Kerch Strait,[594] the Arbitral Tribunal takes note of the Russian Federation's acknowledgement at the Hearing that this aspect of the dispute does not specifically concern military activities.[595]

340. Lastly, insofar as Ukraine contends that the Russian Federation has prevented Ukraine from accessing, and has failed to protect, archaeological and historical objects located in the disputed maritime areas,[596] the Arbitral Tribunal notes that Russian Federation argues that the Parties' dispute concerns military activities due to the participation of the Russian Federation's military in the archaeological expeditions in question.[597] However, as noted above, the mere involvement of military vessels or personnel in an activity does not *ipso facto* render the activity military in

---

[589] Russian Federation's Preliminary Objections, para. 147(b).
[590] Complaint of Andrei Aleksandrovich Poprotsky, Administrative Case No. 9930-S/321-17, 20 July 2017, p. 1 (**Annex UA-169**).
[591] Witness Statement of Svetlana Volodymyrivna Nezhnova, 16 February 2018, para. 11.
[592] Witness Statement of Captain Oleksandr Penskyi, 2 November 2018, paras 13-16, 19-20, 33; Witness Statement of Captain Iaroslav Grabovskyi, 15 February 2018, paras 8-10, 12-14.
[593] Complaint of Andrei Aleksandrovich Poprotsky, Administrative Case No. 9930-S/321-1, 20 July 2017, p. 1 (**Annex UA-169**).
[594] Ukraine's Memorial, para. 265(m).
[595] Jurisdiction Hearing, 13 June 2019, 67:19-68:2 (Pellet).
[596] Ukraine's Memorial, paras 265(q), 265(r).
[597] Russian Federation's Preliminary Objections, para. 147(d).

nature. The Arbitral Tribunal considers that the undertaking of archaeological expeditions by the Russian Federation's military (at least in some instances in cooperation with civilians)[598] does not allow the Arbitral Tribunal to find that the dispute between the Parties regarding underwater cultural heritage concerns military activities.

341. For the above reasons, the Arbitral Tribunal rejects the Russian Federation's objection based on the military activities exception under Article 298, paragraph 1, subparagraph (b), of the Convention.

B. LAW ENFORCEMENT ACTIVITIES EXCEPTION

1. Position of the Russian Federation

342. The Russian Federation submits that the Arbitral Tribunal has no jurisdiction over the dispute insofar as it concerns law enforcement activities.[599] The Russian Federation recalls that Article 298, paragraph 1, subparagraph (b), of the Convention exempts from an arbitral tribunal's jurisdiction "disputes concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction" that are "excluded from the jurisdiction of a court or tribunal under article 297, paragraph 2 or 3."[600] Article 297, paragraph 3, subparagraph (a) provides, in relevant part, that "the coastal State shall not be obliged to accept the submission to such settlement of any dispute relating to its sovereign rights with respect to the living resources in the exclusive economic zone or their exercise."

343. According to the Russian Federation, in *South China Sea*, the arbitral tribunal found that Article 298, paragraph 1, subparagraph (b), of the Convention would "restrict the Tribunal's jurisdiction over fishing and fisheries-related law enforcement in the event that the relevant areas formed part of China's exclusive economic zone" or "the activities took place [...] in an area in which the Parties possess overlapping entitlements to an exclusive economic zone."[601] Referring to *South China Sea*, the Russian Federation submits that the coasts of the Russian Federation and Ukraine can generate maritime entitlements, and that the alleged law enforcement activities took place either in the Russian Federation's exclusive economic zone or in an area in which the

---

[598] *Find of the Millennium: Huge Antique Ship Discovered at the Bottom of the Sea in Crimea*, TV Zvezda (26 May 2015) (**Annex UA-228**); Oleg Goryunov, *Discovery of the Millennium: Russian Military to Recover Ancient Ship from Seafloor*, TV Zvezda (7 June 2015) (**Annex UA-231**).

[599] Russian Federation's Preliminary Objections, para. 149; Jurisdiction Hearing, 10 June 2019, 18:14-18 (Lobach), 74:17-18 (Pellet).

[600] Russian Federation's Preliminary Objections, para. 149.

[601] Russian Federation's Preliminary Objections, para. 150 *citing South China Sea*, cit., n. 34, paras 395, 406 (**Annex UAL-3**); Jurisdiction Hearing, 13 June 2019, 77:18-78:3 (Pellet).

Parties' entitlements overlap.[602] The Russian Federation argues that it is the enforcement of rights that the Russian Federation considers to belong to it in its exclusive economic zone of which Ukraine is complaining.[603] Therefore, in the Russian Federation's view, the Arbitral Tribunal is precluded from exercising jurisdiction in relation to its fisheries enforcement measures and the operation of its law enforcement vessels in the Black Sea and Sea of Azov.[604]

344. The Russian Federation submits that the Arbitral Tribunal cannot rule on Ukraine's allegations that the Russian border and fisheries patrols have taken action against Ukrainian-flagged vessels in the territorial sea around Crimea and parts of its exclusive economic zone.[605] In the Russian Federation's view, nor can the Arbitral Tribunal rule on Ukraine's related allegations, regarding the Russian Federation (a) excluding Ukraine from accessing fisheries (in violation of Articles 56, 58, 61, 62, 73, and 92 of the Convention); (b) interfering with Ukraine's exclusive jurisdiction over Ukrainian-flagged vessels in Ukraine's exclusive economic zone (in violation of Articles 56, 58 and 92 of the Convention); and (c) interfering with the navigation of Ukrainian Sea Guard vessels through Ukraine's exclusive economic zone (in violation of Articles 56, 58, 73, and 92 of the Convention).[606]

345. The Russian Federation notes that the law enforcement activities exception is less broad in scope than the one concerning military activities.[607] The Russian Federation also acknowledges that Article 298, paragraph 1, subparagraph (b), of the Convention, read literally with Article 297, paragraph 3, subparagraph (a), only restricts the Arbitral Tribunal's jurisdiction with respect to law enforcement activities in the exclusive economic zone.[608] Even so, the Russian Federation submits that the Arbitral Tribunal's jurisdiction is also precluded insofar as the dispute concerns events in the territorial sea or on the continental shelf because "it would be paradoxical that activities taking place in areas over which the coastal State possesses more (or at least equal) rights as those it has in the [exclusive economic zone], would be submitted to the jurisdiction of the [Arbitral] Tribunal while they are exempted from its jurisdiction when exercised in the [exclusive economic zone]."[609]

---

602 Russian Federation's Preliminary Objections, para. 151.
603 Jurisdiction Hearing, 10 June 2019, 77:10-12 (Pellet).
604 Russian Federation's Preliminary Objections, para. 151.
605 Russian Federation's Preliminary Objections, para. 152.
606 Russian Federation's Preliminary Objections, para. 152.
607 Jurisdiction Hearing, 10 June 2019, 74:18-25 (Pellet).
608 Russian Federation's Preliminary Objections, para. 153; Jurisdiction Hearing, 10 June 2019, 78:4-5 (Pellet).
609 Russian Federation's Preliminary Objections, para. 153; Jurisdiction Hearing, 10 June 2019, 78:5-11 (Pellet); Jurisdiction Hearing, 13 June 2019, 78:25-79:10 (Pellet).

346. The Russian Federation rejects Ukraine's argument that the law enforcement exception is dependent upon the Arbitral Tribunal acceding to the Russian Federations' first preliminary objection.[610] For the Russian Federation, even if the Arbitral Tribunal were to reject the first preliminary objection, it would have to rule that the law enforcement activities took place either within the Russian Federation's exclusive economic zone, or in an area in which the Parties possess overlapping entitlements.[611]

2. Position of Ukraine

347. Ukraine submits that the Russian Federation's objection that the present dispute falls within the optional exception to jurisdiction which covers disputes concerning coastal State law enforcement activities with regard to the exercise of sovereign rights or jurisdiction pursuant to Article 298, paragraph 1, subparagraph (b), of the Convention must fail because it rests on the Russian Federation's "claim" that it is the coastal State in the waters adjacent to Crimea and thus, ultimately, on the Russian Federation's claim that the status of Crimea has been altered.[612] Ukraine reiterates that it regards this claim as inadmissible and implausible.[613]

348. Ukraine submits that if the Russian Federation's objections are based on any maritime entitlements emanating from its own coastline rather than from the Crimean coastline, it is incumbent upon the Russian Federation to articulate this claim and to establish that the conduct underlying Ukraine's claims took place in the Russian Federation's maritime zones.[614]

349. Ukraine states that the Russian Federation cannot raise "Article 297(3) and Article 298(1)(b) law enforcement objections in areas where it enjoys overlapping entitlements with Ukraine" because those exceptions apply only in areas which form part of the exclusive economic zone of the respondent State.[615] Relying on *South China Sea* and *The Arctic Sunrise Arbitration (The Netherlands v. The Russian Federation)*, Ukraine submits that the exception in Article 298, paragraph 1, subparagraph (b), does not apply where a State is alleged to have violated the Convention in respect of another State's exclusive economic zone.[616] Nor, according to Ukraine,

[610] Jurisdiction Hearing, 13 June 2019, 77:3-6 (Pellet).
[611] Jurisdiction Hearing, 13 June 2019, 78:6-12 (Pellet).
[612] Ukraine's Written Observations, para. 102; Ukraine's Rejoinder, paras 103-04; Jurisdiction Hearing, 11 June 2019, 107:17-21 (Gore).
[613] Ukraine's Written Observations, paras 102, 108; Jurisdiction Hearing, 11 June 2019, 107:21-24 (Gore), 115:25-116:3 (Gore).
[614] Ukraine's Written Observations, paras 108-09; Jurisdiction Hearing, 11 June 2019, 115:10-15 (Gore).
[615] Ukraine's Rejoinder, para. 104; Jurisdiction Hearing, 14 June 2019, 78:13-79:5 (Zionts).
[616] Ukraine's Written Observations, para. 107 *citing South China Sea*, cit., n. 210, para. 695 (**Annex UAL-11**); PCA Case No. 2014-02: *The Arctic Sunrise Arbitration (The Netherlands v. The Russian Federation)*, Award

is it sufficient for a respondent State to refer to possible rights, claimed rights, or disputed rights.[617]

350. In any event, Ukraine asserts that the only entitlements that the Russian Federation has asserted in this Arbitration extend from Crimea, and therefore the Russian Federation's law enforcement objection should be rejected on the same grounds as its first preliminary objection.[618]

351. Ukraine submits that, even if the Russian Federation's conduct had taken place within areas determined to be a part of its exclusive economic zone, Article 297, paragraph 3, and Article 298, paragraph 1, of the Convention would only apply to the Russian Federation's exercise of "sovereign rights with respect to [...] living resources" of the exclusive economic zone and to its enforcement of its fisheries law.[619] Ukraine rejects the Russian Federation's application of its law enforcement objections to matters outside the narrow scope of the relevant articles.[620] In Ukraine's view, those provisions do not shield from scrutiny the Russian Federation's "harassment of civilian and governmental navigation," nor its "violation of the Convention's environmental provisions."[621]

352. Further, Ukraine denies that Article 297, paragraph 3, and Article 298, paragraph 1, subparagraph (b), of the Convention apply in the territorial sea, noting that these provisions make no express reference to the territorial sea.[622] Therefore, according to Ukraine, the Arbitral Tribunal has jurisdiction to consider the Russian Federation's conduct in the Kerch Strait and within 12 nautical miles of the baselines in the Black Sea or the Sea of Azov.[623]

3. Analysis of the Arbitral Tribunal

353. Article 298, paragraph 1, subparagraph (b), of the Convention provides, in relevant parts:

> a State may [...] declare in writing that it does not accept any one or more of procedures provided for in section 2 with respect to one or more of the following categories of disputes [...] disputes concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction excluded from the jurisdiction of a court or tribunal under article 297, paragraph 2 or 3.

---

on Jurisdiction of 26 November 2014, para. 75 (**Annex UAL-69**); Jurisdiction Hearing, 11 June 2019, 115:17-23 (Gore).

[617] Jurisdiction Hearing, 11 June 2019, 117:2-11 (Gore).

[618] Ukraine's Rejoinder, para. 104.

[619] Ukraine's Rejoinder, para. 106.

[620] Jurisdiction Hearing, 11 June 2019, 118:3-5 (Gore).

[621] Ukraine's Rejoinder, para. 106; Jurisdiction Hearing, 11 June 2019, 118:13-22 (Gore).

[622] Ukraine's Rejoinder, para. 107; Jurisdiction Hearing, 11 June 2019, 117:17-118:2 (Gore); Jurisdiction Hearing, 14 June 2019, 80:13-81:1 (Zionts).

[623] Ukraine's Rejoinder, para. 107.

354. Pursuant to Article 297 of the Convention, in turn, "the coastal State shall not be obliged to accept the submission" to binding settlement of certain, enumerated categories of disputes, of which only the category of "disputes related to [a coastal State's] sovereign rights with respect to living resources in the exclusive economic zone" or the exercise of such rights in Article 297, paragraph 3, subparagraph (a), is relevant here.

355. In its declaration pursuant to Article 298, paragraph 1, made upon ratification of the Convention, the Russian Federation stated that "it does not accept the procedures, provided for in section 2 of Part XV of the Convention, entailing binding decisions with respect to [...] disputes concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction."

356. The Arbitral Tribunal notes that, in accordance with the ordinary meaning of the terms[624] of Article 298, paragraph 1, subparagraph (b), second alternative, and Article 297, paragraph 3, subparagraph (a), of the Convention, a court or tribunal pursuant to Part XV of the Convention has no jurisdiction pursuant to section 2 of Part XV over disputes concerning law enforcement activities related to the exercise of sovereign rights of the declaring State in its own exclusive economic zone. The Arbitral Tribunal considers that both the sovereign character of the rights allegedly exercised by the declaring State and the entitlement of the declaring State to the area in question as that State's exclusive economic zone must be objectively established for the optional exception to apply.

357. In the present case, the Arbitral Tribunal has already found that there objectively exists a dispute between the Parties regarding sovereignty over Crimea. The Arbitral Tribunal has decided that it has no jurisdiction to make a determination in respect of that dispute, or the consequential question of who is the coastal State with respect to the waters adjacent to Crimea. It follows that entitlements to adjacent maritime zones generated by the coast of Crimea, including any exclusive economic zones, cannot be determined. Nor can any claims which depend upon the premise that one or other Party is sovereign over Crimea. The question is whether in these circumstances Article 298, paragraph 1, subparagraph (b), operates to exclude any further categories of claim in this case.

358. The Arbitral Tribunal is of the view that the law enforcement activities alleged by the Russian Federation occurred within an area that cannot be determined to constitute the exclusive economic zone of either the Russian Federation or Ukraine. In the face of such uncertainty, the Arbitral Tribunal considers that the conditions for application of Article 298, paragraph 1,

[624] Vienna Convention on the Law of Treaties, done at Vienna on 23 May 1969, 1155 U.N.T.S. 331, Art. 31 (**Annex UAL-43**).

subparagraph (b), second alternative, have not been met and thus rejects the Russian Federation's objection based on the law enforcement exception under that provision.

C. DELIMITATION EXCEPTION

1. Position of the Russian Federation

359. Without prejudice to its first preliminary objection, related to sovereignty, and to its second preliminary objection, based on the alleged internal waters status of the Sea of Azov and the Kerch Strait, the Russian Federation submits that the Arbitral Tribunal has no jurisdiction over aspects of the present dispute related to delimitation.[625]

360. The Russian Federation considers that Article 298, paragraph 1, subparagraph (a)(i), of the Convention excludes from an arbitral tribunal's jurisdiction disputes whose immediate subject matter concerns Articles 15, 74, or 83 of the Convention as well as any dispute having a bearing on the delimitation of the territorial sea, exclusive economic zone, and continental shelf.[626] The Russian Federation argues that the phrases, "concerning" and "related to" in Article 298, paragraph 1, subparagraph (a)(i),[627] mean "in connection with" and cover both the immediate subject of a dispute and connected matters.[628] On that basis, the Russian Federation submits that the phrase "relating to sea boundary delimitations" thus covers "not only disputes involving the determination of sea boundaries but all matters connected with the entire delimitation *process*, including issues of overlapping entitlements."[629]

361. The Russian Federation submits that "[t]he law of the sea envisages delimitation not as an isolated and instantaneous operation but as an integral and systemic process" that "begins with identifying the basis, nature and maximum extent of an entitlement, focuses on weighing the overlapping entitlements, and ends by granting them actual effect."[630] For the Russian Federation, any decision regarding the entitlement of a coastal State is part of the delimitation process and will inevitably affect the results of the delimitation.[631] Therefore, disputes regarding overlapping

[625] Russian Federation's Preliminary Objections, para. 155; Russian Federation's Reply, para. 130; Jurisdiction Hearing, 10 June 2019, 19:8-13 (Lobach), 64:19-23 (Pellet).
[626] Russian Federation's Preliminary Objections, para. 161; Jurisdiction Hearing, 10 June 2019, 89:10-16 (Pellet).
[627] UNCLOS, Art. 298(1)(a)(i) ("disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations").
[628] Russian Federation's Preliminary Objections, para. 157.
[629] Russian Federation's Preliminary Objections, para. 161 [emphasis added by the Russian Federation].
[630] Russian Federation's Preliminary Objections, para. 162.
[631] Russian Federation's Preliminary Objections, para. 162.

entitlements generally fall within the delimitation process in application of Articles 15, 74, and 83 of the Convention.[632]

362. The Russian Federation relies on the decision in the *Conciliation Between the Democratic Republic of Timor-Leste and the Commonwealth of Australia* (hereinafter the "*Timor Sea Conciliation*"), in which the Conciliation Commission interpreted the phrase "disputes concerning the interpretation or application of articles 15, 74, and 83" in Article 298, paragraph 1, subparagraph (a)(i), of the Convention as not being confined to disputes over the actual maritime boundary delimitation but also covering "questions implying a determination based on these Articles."[633]

363. The Russian Federation argues that, if only disputes that turn on the interpretation or application of Articles 15, 74, and 83 can fall within the scope of the Article 298, paragraph 1, subparagraph (a)(i) exclusion, the phrase "relating to sea boundary delimitation" would only state the obvious and be left without any *effet utile*.[634] According to the principle of effectiveness of interpretation, this phrase must add something.[635] The Russian Federation states that "[a]n interpretation of [Article 298, paragraph 1, subparagraph (a)(i)] that fails to give full effect to its language and to a State's declaration thereof defeats their object and purpose as well as the careful and well-designed balance struck by the Convention between States' sovereignty and compulsory procedures."[636]

364. The Russian Federation submits that, in the present case, whilst "[o]stensibly, Ukraine is not requesting the Tribunal to delimit a maritime boundary but to adjudge that Russia has unlawfully interfered with the enjoyment and exercise of its allegedly sovereign rights in the Black Sea, Sea of Azov and Kerch Strait,"[637] such claims presume that Ukraine has entitlements therein that do not overlap with the Russian Federation's claims.[638] The Russian Federation argues that "the question of Ukraine's entitlements and related rights is not a settled issue since the delimitation of the territorial sea, the EEZ, and the continental shelf between the Parties, has not been effected by agreement in accordance with the Article 15, 74, 83 of UNCLOS."[639] The Russian Federation

---

[632] Russian Federation's Preliminary Objections, para. 164; Jurisdiction Hearing, 10 June 2019, 89:19-22 (Pellet).
[633] Russian Federation's Reply, para. 133 *citing* PCA Case No. 2016-10: *Conciliation Between the Democratic Republic of Timor-Leste and the Commonwealth of Australia*, Decision on Australia's Objections to Competence, 19 September 2016, para. 93 (**Annex RUL-76**).
[634] Russian Federation's Reply, para. 134.
[635] Russian Federation's Reply, para. 134.
[636] Russian Federation's Reply, para. 135.
[637] Russian Federation's Preliminary Objections, para. 165.
[638] Russian Federation's Preliminary Objections, para. 166.
[639] Russian Federation's Preliminary Objections, para. 167.

points out that in the present case it is "unavoidable" that the Parties' respective entitlements overlap, and that these overlaps "necessarily call for the impossibility of carrying out the delimitation."[640]

365. The Russian Federation notes that Ukraine has presented itself as "the coastal State for purposes of determining maritime entitlements appertaining to the Crimean Peninsula"[641] and seeks to affirm its "entitlements" in the Black Sea, Sea of Azov, and Kerch Strait.[642] According to the Russian Federation, the Arbitral Tribunal would have to apply Article 298, paragraph 1, subparagraph (a), of the Convention to determine "whether Ukraine effectively enjoys the rights which it claims to possess."[643] Yet, even if the Arbitral Tribunal were to construe Article 298, paragraph 1, subparagraph (a), in the "strictest sense," it would be forbidden to apply Articles 15, 74, and 83.[644]

366. The Russian Federation submits that the Arbitral Tribunal would have to identify and resolve the Parties' overlapping entitlements by delimiting the maritime zones belonging to each Party in order then to rule on Ukraine's claims as to its rights relating to hydrocarbons, fisheries, and other natural resources, protection of the marine environment, and preservation of maritime archaeological objects and sites.[645] The Russian Federation points out that these rights claimed by Ukraine are "inextricably linked to delimitation."[646]

367. The Russian Federation considers that Ukraine's claims in many respects are similar to the Philippines' claims in *South China Sea*, where the arbitral tribunal found that because it

> has not been requested to—and will not—delimit a maritime boundary between the Parties, the Tribunal will be able [to] address those of the Philippines' Submissions based on the premise that certain areas of the South China Sea form part of the Philippines' exclusive economic zone or continental shelf *only if the Tribunal determines that China could not possess any potentially overlapping entitlement in that area.*[647]

368. The Russian Federation notes that the arbitral tribunal in *South China Sea* found that the premise of the Philippines' submissions was that no overlapping entitlements existed because only the

---

[640] Jurisdiction Hearing, 13 June 2019, 75:10-13 (Pellet).
[641] Russian Federation's Preliminary Objections, para. 166 *citing* Ukraine's Notification and Statement of Claim, para. 3.
[642] Russian Federation's Preliminary Objections, para. 166.
[643] Jurisdiction Hearing, 10 June 2019, 89:23-90:4 (Pellet).
[644] Jurisdiction Hearing, 10 June 2019, 89:23-25 (Pellet).
[645] Russian Federation's Preliminary Objections, para. 168; Russian Federation's Reply, para. 131.
[646] Russian Federation's Preliminary Objections, para. 168.
[647] Russian Federation's Preliminary Objections, para. 170 *citing South China Sea*, cit., n. 34, para. 157 (**Annex UAL-3**) [emphasis added by the Russian Federation]; Jurisdiction Hearing, 10 June 2019, 83:17-23 (Pellet); Jurisdiction Hearing, 13 June 2019, 75:5-9 (Pellet).

Philippines possesses an entitlement to an exclusive economic zone in the relevant area.[648] However, had there been any resulting overlaps of entitlements between China and the Philippines, the arbitral tribunal would have been prevented from assessing the submission.[649] The Russian Federation highlights in this regard the position of the *South China Sea* arbitral tribunal that

> the Tribunal could only address this Submission if the respective maritime entitlements of the Parties could be established and if no overlap requiring delimitation were found to exist. [...] The relevant areas can *only* constitute the exclusive economic zone and continental shelf of the Philippines. Accordingly, the Philippines—and not China—possesses sovereign rights with respect to resources in these areas.[650]

369. The Russian Federation argues that, in the present case, the relevant areas cannot only constitute the exclusive economic zone and continental shelf of Ukraine; the Russian Federation does possess entitlements in the Black Sea overlapping with those of Ukraine.[651] The Russian Federation submits that the determination of the Parties' respective rights and obligations would unequivocally involve, as an indispensable prerequisite, the delimitation of their maritime boundaries.[652] In order to determine the content and potential violations of the Parties' respective rights and obligations regarding hydrocarbons and living resources, archaeological and historical objects, as well as freedom of navigation, the Arbitral Tribunal will be required to define and delimit the maritime zones at stake, which is outside the Arbitral Tribunal's jurisdiction as a result of the Parties' declarations under Article 298, paragraph 1, subparagraph (a)(i), of the Convention.[653]

2. Position of Ukraine

370. Ukraine contests the Russian Federation's argument that Article 298, paragraph 1, subparagraph (a)(i), of the Convention excludes not only disputes whose immediate subject matter is Articles 15, 74, or 83 of the Convention, but also any dispute having a "bearing on the delimitation" and "all matters connected" with the delimitation process.[654]

---

[648] Russian Federation's Preliminary Objections, para. 171.

[649] Russian Federation's Preliminary Objections, para. 171 *citing South China Sea*, cit., n. 34, paras 402, 405, 406 (**Annex UAL-3**).

[650] Russian Federation's Preliminary Objections, para. 172 *citing South China Sea*, cit., n. 210, para. 697 (**Annex UAL-11**) [emphasis added by the Russian Federation]; Jurisdiction Hearing, 10 June 2019, 84:2-14 (Pellet).

[651] Russian Federation's Preliminary Objections, para. 173; Jurisdiction Hearing, 10 June 2019, 84:21-24 (Pellet); Jurisdiction Hearing, 13 June 2019, 75:3-4 (Pellet).

[652] Russian Federation's Preliminary Objections, para. 173.

[653] Russian Federation's Preliminary Objections, paras 174-75; Jurisdiction Hearing, 10 June 2019, 82:9-19 (Pellet), 84:24-85:2 (Pellet).

[654] Ukraine's Written Observations, para. 112.

371. Ukraine argues that, while overlapping entitlements are a precondition for the existence of a delimitation dispute, they are not sufficient to engage the jurisdictional exception in Article 298, paragraph 1, subparagraph (a)(i), of the Convention. Ukraine points out in this regard that the arbitral tribunal in *South China Sea* distinguished "a dispute concerning the existence of an entitlement to maritime zones" from "a dispute concerning the delimitation of those zones in an area where the entitlements of Parties overlap."[655] Only the latter type of dispute, Ukraine contends, is excluded by Article 298, paragraph 1, subparagraph (a).[656] Ukraine recalls in this respect that, according to the award in *South China Sea*, although delimitation "may entail consideration of a wide variety of potential issues [...] [i]t does not follow [...] that a dispute over an issue that may be considered in the course of a maritime boundary delimitation constitutes a dispute over maritime boundary delimitation itself."[657]

372. Ukraine denies that the decision of the *Timor Sea Conciliation* Commission supports the Russian Federation's "expansive reading" of Article 298, paragraph 1, subparagraph (a)(i), of the Convention.[658] According to Ukraine, the Conciliation Commission only indicated that the phrase "disputes concerning the interpretation or application of articles 15, 74, and 83" covers disputes concerning the interpretation and application of Article 74, paragraph 3, and Article 83, paragraph 3, which provides for the establishment of provisional arrangements of a practical nature pending delimitation.[659] Ukraine maintains that this is consistent with its view that Article 298, paragraph 1, subparagraph (a)(i), applies to disputes that require the interpretation or application of these three articles.[660]

373. Ukraine denies that its interpretation renders the phrase "relating to" in Article 298, paragraph 1, subparagraph (a)(i), of the Convention without effect.[661] Ukraine states that, in its reading, the phrase "relating to" excludes from the exception, *inter alia*, disputes as to whether the preconditions to a delimitation exercise are met.[662]

374. Turning to the present case, Ukraine takes the view that Article 298, paragraph 1, subparagraph (a)(i), of the Convention only applies if the Russian Federation can establish that

---

655 Ukraine's Written Observations, para. 114.
656 Ukraine's Written Observations, para. 114 *citing South China Sea*, cit., n. 34, para. 156 (**Annex UAL-3**); *Bay of Bengal*, Judgment, cit., n. 307, p. 105, para. 397 (**Annex UAL-63**); Ukraine's Rejoinder, para. 109; Jurisdiction Hearing, 11 June 2019, 111:21-24 (Gore); Jurisdiction Hearing, 14 June 2019, 77:6-13 (Zionts).
657 Ukraine's Written Observations, para. 114 *citing South China Sea*, cit., n. 34, para. 155 (**Annex UAL-3**).
658 Ukraine's Rejoinder, para. 113.
659 Ukraine's Rejoinder, para. 113.
660 Ukraine's Rejoinder, para. 113.
661 Ukraine's Rejoinder, para. 114.
662 Ukraine's Rejoinder, para. 114.

the Arbitral Tribunal is required to interpret or apply Articles 15, 74, or 83 in connection with the delimitation of overlapping areas of entitlement.[663] Ukraine contends that the Russian Federation has failed to establish that this is the case.[664] Ukraine recalls that it has not asked the Arbitral Tribunal to delimit its territorial sea, exclusive economic zone, or continental shelf pursuant to Articles 15, 74, or 83,[665] nor would the Arbitral Tribunal be required to do so to decide on Ukraine's submissions.[666]

375. Ukraine further argues that the Russian Federation could not have any legal entitlement to most of the areas at issue in this dispute, which lie to the west or immediate south of Crimea and are not within 200 nautical miles of the Caucasus region of the Russian Federation.[667] In fact, according to Ukraine, the existence of overlapping entitlements in these areas is conceivable only if the Russian Federation could claim entitlements extending from the coast of Crimea.[668] Ukraine points out that the Russian Federation's assertion of coastal State entitlements extending from Crimea, in turn, depends on the Russian Federation's view that "it has a claim to Crimea capable of having legal effects at the international level."[669]

3. Analysis of the Arbitral Tribunal

376. Pursuant to Article 298, paragraph 1, subparagraph (a), of the Convention, a State may choose not to accept the procedures provided for in section 2 of Part XV with respect to "disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations."

377. The Arbitral Tribunal notes that it is common ground between the Parties that the dispute between them is not explicitly a delimitation dispute. Ukraine has not requested the Tribunal to delimit the Parties' maritime areas, and none of Ukraine's submissions refer to Articles 15, 74, or 83 of the Convention.[670] Rather, in the view of the Arbitral Tribunal, the question is whether, in the course of deciding the dispute before it, the Arbitral Tribunal would implicitly have to delimit maritime

---

[663] Ukraine's Written Observations, para. 115; Jurisdiction Hearing, 11 June 2019, 109:12-16 (Gore).
[664] Ukraine's Written Observations, para. 115.
[665] Ukraine's Written Observations, para. 116; Jurisdiction Hearing, 11 June 2019, 109:17-21 (Gore).
[666] Jurisdiction Hearing, 11 June 2019, 109:21-22 (Gore).
[667] Ukraine's Written Observations, para. 118.
[668] Ukraine's Written Observations, para. 118.
[669] Jurisdiction Hearing, 11 June 2019, 110:3-21 (Gore).
[670] Ukraine's Written Observations, para. 111; Russian Federation's Reply, para. 131; Jurisdiction Hearing, 10 June 2019, 81:17-18 (Pellet); Jurisdiction Hearing, 11 June 2019, 109:17-21 (Gore).

areas over which the Parties' entitlements overlap; and whether in such event the optional exception from arbitral jurisdiction is triggered.

378. Article 298, paragraph 1, subparagraph (a)(i), of the Convention refers to "disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitation." Articles 15, 74 and 83, in turn, respectively address the delimitation of the territorial sea, the exclusive economic zone, and the continental shelf between States with opposite or adjacent coasts. The Arbitral Tribunal notes that the Parties have extensively engaged with the question of the scope of the delimitation exception under Article 298, paragraph 1, subparagraph (a)(i), of the Convention, in particular how the terms "concerning" and "relating to" should be interpreted in this regard. However, in the Arbitral Tribunal's view, the interpretation of the terms "concerning" and "relating to" does not necessarily clarify the question whether the optional exception is triggered only by a dispute directly implicating the three enumerated articles and involving a delimitation exercise or, alternatively, also by a dispute that necessarily implies a delimitation, partial or full, of maritime areas, or a finding that a specific location belongs to one or other Party.

379. The Arbitral Tribunal notes that the determination of the existence and extent of maritime entitlements is one of the first matters to be addressed in the delimitation of a maritime boundary. If there exists an area where the entitlements of parties overlap, the question of delimitation arises. On the other hand, if there exists no such area, no question of delimitation ensues.

380. In this regard, the Arbitral Tribunal recalls the statement of ITLOS in the *Bay of Bengal* judgment:

> Delimitation presupposes an area of overlapping entitlements. Therefore, the first step in any delimitation is to determine whether there are entitlements and whether they overlap.
>
> While entitlements and delimitation are two distinct concepts addressed respectively in articles 76 and 83 of the Convention, they are interrelated.[671]

381. The Arbitral Tribunal considers that for the purpose of determining the applicability of the delimitation exception under Article 298, paragraph 1, subparagraph (a), of the Convention, one of the key questions is whether there are entitlements and whether there is an area of overlapping maritime entitlements. If such area exists, the question of delimitation inevitably arises and the delimitation exception may be triggered.

382. In the present case, the Arbitral Tribunal has decided that it cannot rule on any claims of Ukraine which would require it to decide, expressly or implicitly, on the sovereignty of either Party over Crimea. The Arbitral Tribunal therefore cannot determine whether there are entitlements of either

[671] *Bay of Bengal*, cit., n. 307, p. 105, paras 397-98 (**Annex UAL-63**).

Party to the maritime areas around Crimea, let alone whether such entitlements overlap. Such determinations are not within the jurisdiction of the Arbitral Tribunal in any event, and there is accordingly no jurisdiction in relation to which the exception under Article 298, paragraph 1, subparagraph (a), could be established. With respect to Ukraine's claim concerning activities in the Sea of Azov and the Kerch Strait, the Arbitral Tribunal has decided to reserve the Russian Federation's objection to its jurisdiction for consideration and decision in the context of the proceedings on the merits.

383. In light of these decisions, and taking into account the location of the maritime areas Ukraine's claims relate to, the Arbitral Tribunal does not consider that the delimitation exception under Article 298, paragraph 1, subparagraph (a), of the Convention is applicable in the present case and accordingly rejects the objection of the Russian Federation based on this provision.

D. HISTORIC BAYS OR TITLES EXCEPTION

1. Position of the Russian Federation

384. Separately, and in addition to its internal waters objection,[672] the Russian Federation submits that this Arbitral Tribunal "cannot exercise jurisdiction over the submissions of Ukraine relating to the Sea of Azov and Kerch Strait" as a consequence of the Parties' declarations upon ratification of the Convention pursuant to Article 298, paragraph 1, subparagraph (a), of the Convention, which exclude disputes "involving historic bays or titles" from binding dispute settlement.[673]

385. In response to Ukraine's argument that the Russian Federation's historic bays or titles objection overlaps completely with its internal waters objection, the Russian Federation argues that even though it may have the same consequences as the internal waters objection, this objection is separate and intended to apply if, *quod non*, the Arbitral Tribunal were to dismiss the internal waters objection. In the Russian Federation's view, there is no reason why a bay that qualifies as a juridical bay (meeting the requirements of the Geneva Convention and UNCLOS) cannot also qualify as "historic" because it has been recognised as including internal waters for a long time without meeting any objections from third States.[674]

---

[672] Jurisdiction Hearing, 10 June 2019, 56:3-7 (Treves).
[673] Russian Federation's Preliminary Objections, paras 178-79; Jurisdiction Hearing, 10 June 2019, 90:5-11 (Pellet).
[674] Jurisdiction Hearing, 13 June 2019, 56:3-14 (Treves).

2. Position of Ukraine

386. Ukraine rejects the Russian Federation's argument that the Sea of Azov and the Kerch Strait should be considered an historic bay and an area subject to historic title pursuant to Article 298, paragraph 1, subparagraph (a)(i), of the Convention.[675]

387. Ukraine submits that the Russian Federation's historic bays or titles objection overlaps completely with its internal waters objection and must fail because the Sea of Azov and the Kerch Strait do not in fact have the status of internal waters, as a matter of historic title or otherwise.[676] Ukraine submits that the Russian Federation's historical bays or titles objection only differs from its internal waters objection insofar as, to prevail on the former objection, the Russian Federation must prove not only that the Sea of Azov and the Kerch Strait are internal waters, but also that the Sea of Azov and the Kerch Strait are internal waters by virtue of having the status of an historic bay or title.[677]

3. Analysis of the Arbitral Tribunal

388. The Arbitral Tribunal considers that the Russian Federation's objection that the Arbitral Tribunal has no jurisdiction over disputes involving historic bays or titles is closely intertwined with the Russian Federation's arguments concerning historical title in support of its internal waters objection. As explained at Chapter V of this Award, in order to assess the Russian Federation's arguments regarding historic bays or titles, the Arbitral Tribunal must ascertain, *inter alia*, whether historic title to the waters in question existed, whether such title continued after 1991, and, if so, what the contents of the regime applicable to such waters has been.

389. The Arbitral Tribunal thus considers that the Russian Federation's objection that the Arbitral Tribunal has no jurisdiction over disputes involving historic bays or titles is interwoven with the merits of the present dispute and does not possess an exclusively preliminary character. The Arbitral Tribunal accordingly decides to reserve the objection for consideration and decision in the context of the proceedings on the merits.

---

[675] Ukraine's Written Observations, para. 94; Jurisdiction Hearing, 14 June 2019, 58:14-18 (Soons).
[676] Ukraine's Rejoinder, para. 96; Jurisdiction Hearing, 11 June 2019, 90:10-14 (Soons). *See* paragraphs 266-268 of this Award.
[677] Jurisdiction Hearing, 14 June 2019, 58:5-9 (Soons).

VII. THE RUSSIAN FEDERATION'S OBJECTION THAT THE ARBITRAL TRIBUNAL HAS NO JURISDICTION OVER FISHERIES CLAIMS IN LIGHT OF ARTICLE 297(3)(A) OF THE CONVENTION

390. Article 297, paragraph 3, subparagraph (a), of the Convention reads:

> Disputes concerning the interpretation or application of the provisions of this Convention with regard to fisheries shall be settled in accordance with section 2, except that the coastal State shall not be obliged to accept the submission to such settlement of any dispute relating to its sovereign rights with respect to the living resources in the exclusive economic zone or their exercise, including its discretionary powers for determining the allowable catch, its harvesting capacity, the allocation of surpluses to other States and the terms and conditions established in its conservation and management laws and regulations.

A. Position of the Russian Federation

391. The Russian Federation argues that, if the Arbitral Tribunal were to hold that there exists a dispute concerning the interpretation or application of the Convention under Article 288, paragraph 1, of the Convention, it would be faced with the limitation to dispute settlement set out in Article 297, paragraph 3, subparagraph (a).[678]

392. The Russian Federation submits that disputes concerning living resources within 200 nautical miles of the coastline are excluded from the jurisdiction of an arbitral tribunal.[679] According to the Russian Federation, during the negotiations for the Convention, disputes over fisheries were excluded from binding dispute settlement in the interest of reaching agreement among negotiating States.[680] The Russian Federation explains that the arbitral tribunal in *South China Sea* only found that Article 297, paragraph 3, of the Convention posed no obstacle to its jurisdiction because the relevant areas of the South China Sea could only constitute the exclusive economic zone of the Philippines.[681] According to the Russian Federation, "a straightforward answer is not possible in the present case," because the areas in issue do not constitute the exclusive economic zone of only Ukraine but appertain to the Russian Federation as a coastal State as well.[682]

393. The Russian Federation further submits that a dispute can be said to "relate to" sovereign rights when "there is a connection between the dispute and the existence, scope, or exercise of the sovereign rights in question."[683] The Russian Federation notes that the present dispute exists

---

[678] Russian Federation's Preliminary Objections, para. 180.

[679] Russian Federation's Preliminary Objections, paras 182-83 *citing Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan)* (hereinafter "*Southern Bluefin Tuna*"), Award on Jurisdiction and Admissibility of 4 August 2000, RIAA Vol. XXIII, p. 45 at paras 61-62 (**Annex RUL-24**).

[680] Russian Federation's Preliminary Objections, para. 183.

[681] Russian Federation's Preliminary Objections, para. 184.

[682] Russian Federation's Preliminary Objections, para. 185; Russian Federation's Reply, para. 129.

[683] Russian Federation's Preliminary Objections, para. 186.

because the Russian Federation's conception of its sovereign rights conflicts with Ukraine's understanding of its own rights.[684] Therefore, according to the Russian Federation, "[t]he two are intertwined and are excluded from compulsory settlement."[685]

394. In order to support its view, the Russian Federation relies on the award in *Chagos*, in which the arbitral tribunal declined to draw a distinction between:

> disputes regarding the sovereign rights of the coastal State with respect to living resources, and disputes regarding the rights of other States in the exclusive economic zone (with only the former excluded from compulsory settlement). In nearly any imaginable situation, a dispute will exist precisely because the coastal State's conception of its sovereign rights conflicts with the other party's understanding of its own rights.[686]

395. The Russian Federation also cites the following observations of the arbitral tribunal in *Barbados v. The Republic of Trinidad and Tobago*:[687]

> Taking fishing activity into account in order to determine the course of the boundary is [...] not at all the same thing as considering fishing activity in order to *rule upon the rights and duties of the Parties in relation to fisheries within waters that fall*, as a result of the drawing of that boundary, *into the* [exclusive economic zone] *of one or other Party.* Disputes over such rights and duties *fall outside the jurisdiction of this Tribunal* because Article 297(3)(a) stipulates that a coastal State is not obliged to submit to the jurisdiction of an Annex VII Tribunal 'any dispute relating to [the coastal State's] sovereign rights with respect to the living resources in the exclusive economic zone' [...].[688]

396. The Russian Federation notes that the provisions invoked by Ukraine concern the existence and exercise of sovereign rights of the coastal State with respect to the living resources in the exclusive economic zone. In particular, Article 56, paragraph 1, subparagraph (a), provides for the right to explore, exploit, conserve and manage the living resources; Article 58, paragraph 3, stipulates the obligation of other States to have due regard to the rights and duties of the coastal State and to comply with the laws and regulations adopted by the coastal State; Article 61, paragraph 1, concerns the determination of the allowable catch; and Article 62 deals with the harvesting capacity and allocation of surpluses to other States.[689] The Russian Federation points out that all these rights are precisely the rights excluded from compulsory jurisdiction by Article 297, paragraph 3, subparagraph (a), of the Convention.[690]

---

[684] Russian Federation's Preliminary Objections, para. 186.
[685] Russian Federation's Preliminary Objections, para. 186.
[686] Russian Federation's Preliminary Objections, para. 186 *citing Chagos*, cit., n. 34, para. 297 (**Annex UAL-18**).
[687] Russian Federation's Preliminary Objections, para. 187.
[688] Russian Federation's Preliminary Objections, para. 187 *citing* PCA Case No. 2004-02: *Barbados v. The Republic of Trinidad and Tobago*, Award of 11 April 2006, RIAA Vol. XXVII, p. 147, at p. 224, para. 276 (**Annex RUL-28**) [emphases added by the Russian Federation].
[689] Russian Federation's Preliminary Objections, para. 190.
[690] Russian Federation's Preliminary Objections, para. 191.

397. The Russian Federation notes that, as to the alleged violation of Articles 73 and 92 of the Convention, Ukraine's allegations fall "both within the law enforcement exception under Article 298(1)(b), and within Article 297(3)(a) which covers 'the terms and conditions established [by the coastal State] in its conservation and management laws and regulations', including the determination of sanctions in cases of non-compliance."[691] The Russian Federation states that "[t]his notably excludes the [Arbitral] Tribunal's jurisdiction as regards Russia's extension of its laws and regulations on fisheries to the maritime areas around Crimea and their enforcement in said zones."[692] The Russian Federation states that, although Article 297, paragraph 3, of the Convention only excludes the jurisdiction of an arbitral tribunal over claims concerning living resources in the exclusive economic zone, this exclusion should equally apply to claims concerning the territorial sea.[693] In support of this argument, the Russian Federation notes that the Convention reaffirms the sovereignty of the coastal State over its internal waters and the territorial sea, and consequently its absolute right to control fishing therein.[694] In addition, the States Parties to the Convention could not have intended to allow the "complex and balanced fisheries regime" negotiated for the exclusive economic zone to be "undermined from within" by claims to fish in internal waters and the territorial sea.[695] On this basis, the Russian Federation submits that the Arbitral Tribunal lacks jurisdiction to decide on submissions of Ukraine concerning the alleged violation of the Convention as a result of the exercise by the Russian Federation of its sovereign rights with respect to the living resources in the Black Sea.[696]

B. POSITION OF UKRAINE

398. Ukraine submits that the Russian Federation's objection should be dismissed.[697] Ukraine argues that the plain language of Article 297, paragraph 3, subparagraph (a), of the Convention makes it clear that it only applies with respect to "any dispute relating to its sovereign rights with respect to the living resources in the exclusive economic zone," *i.e.*, disputes concerning rights or discretion granted by the Convention to the coastal State within its own coastal zones.[698]

399. Ukraine highlights that the arbitral tribunal in *South China Sea* found that the provision did not affect its jurisdiction over Chinese interference with petroleum exploration, seismic surveys, and

---

691 Russian Federation's Preliminary Objections, para. 192.
692 Russian Federation's Preliminary Objections, para. 192.
693 Russian Federation's Preliminary Objections, para. 195.
694 Russian Federation's Preliminary Objections, para. 196.
695 Russian Federation's Preliminary Objections, para. 196.
696 Russian Federation's Preliminary Objections, para. 197.
697 Ukraine's Written Observations, para. 102.
698 Ukraine's Written Observations, paras 103-04; Jurisdiction Hearing, 11 June 2019, 104:5-12 (Gore).

fishing activities in the Philippines' exclusive economic zone because it only serves to limit an arbitral tribunal's jurisdiction "where a claim is brought against a State's exercise of its sovereign rights in respect of living resources in its *own* exclusive economic zone" and not "where a State is alleged to have violated the Convention in respect of the exclusive economic zone of another State."[699] Ukraine recalls that it claims that the Russian Federation has violated Ukraine's sovereign rights in respect of living resources in Ukraine's exclusive economic zone.[700]

400. Ukraine submits that, to be successful, it is incumbent upon the Russian Federation to show that it is entitled to an exclusive economic zone in the waters in issue.[701] Ukraine asserts that this objection must fail because the Russian Federation's claim that the status of Crimea has been altered is inadmissible and implausible.[702] In Ukraine's view, it is the Russian Federation's obligation to show that its objections are based on any maritime entitlements emanating from its own coastline rather than from the Crimean coastline.[703]

C. ANALYSIS OF THE ARBITRAL TRIBUNAL

401. The Arbitral Tribunal considers that the limitations on the applicability of section 2 provided for in the above provision apply to "any dispute relating to [...] sovereign rights [of the coastal State] with respect to the living resources in [its] exclusive economic zone or their exercise [...]."

402. As noted by the Arbitral Tribunal in the context of the analysis of the Russian Federation's preliminary objection pursuant to Article 298, paragraph 1, subparagraph (b), second alternative, of the Convention,[704] however, the interference by the Russian Federation with fisheries activities alleged by Ukraine occurred within an area that cannot be determined to constitute the exclusive economic zone of the Russian Federation or Ukraine. In light of such uncertainty, the Arbitral Tribunal considers that the conditions for the application of Article 297, paragraph 3, subparagraph (a), of the Convention have not been met in the present case. The Arbitral Tribunal accordingly rejects the Russian Federation's objection based on that provision.

---

[699] Ukraine's Written Observations, para. 105 *citing South China Sea*, cit., n. 210, para. 695 (**Annex UAL-11**).
[700] Ukraine's Written Observations, para. 105.
[701] Ukraine's Written Observations, para. 102; Jurisdiction Hearing, 11 June 2019, 110:13-19 (Gore).
[702] Ukraine's Written Observations, paras 102, 108.
[703] Ukraine's Written Observations, para. 109.
[704] See paragraphs 353-357 of this Award.

VIII. THE RUSSIAN FEDERATION'S OBJECTION THAT THE ARBITRAL TRIBUNAL HAS NO JURISDICTION OVER FISHERIES, PROTECTION AND PRESERVATION OF THE MARINE ENVIRONMENT, AND NAVIGATION IN LIGHT OF ANNEX VIII

403. The Russian Federation contends that the present Arbitral Tribunal, constituted under Annex VII to the Convention, lacks jurisdiction over Ukraine's claims concerning fisheries, protection and preservation of the marine environment, and navigation on the ground that such claims are to be addressed by an Annex VIII special arbitral tribunal. The Russian Federation refers in this regard to the Parties' declarations made in accordance with Article 287 of the Convention.

404. The declaration made by the USSR upon signature of the Convention on 10 December 1982 reads:

> The Union of Soviet Socialist Republics declares that, under article 287 of the United Nations Convention on the Law of the Sea, it chooses an arbitral tribunal constituted in accordance with Annex VII as the basic means for the settlement of disputes concerning the interpretation or application of the Convention. It opts for a special arbitral tribunal constituted in accordance with Annex VIII for the consideration of matters relating to fisheries, the protection and preservation of the marine environment, marine scientific research, and navigation, including pollution from vessels and dumping. It recognizes the competence of the International Tribunal for the Law of the Sea, as provided for in article 292, in matters relating to the prompt release of detained vessels and crews.[705]

As noted above, the Russian Federation, which regards itself as the continuator State of the USSR, did not make any declaration pursuant to Article 287 of the Convention upon ratification of the Convention.

405. The declaration made by the Ukrainian Soviet Socialist Republic upon signature of the Convention on 10 December 1982 reads:

> The Ukrainian Soviet Socialist Republic declares that, in accordance with article 287 of the United Nations Convention on the Law of the Sea, it chooses as the principal means for the settlement of disputes concerning the interpretation or application of this Convention an arbitral tribunal constituted in accordance with Annex VII. For the consideration of questions relating to fisheries, protection and preservation of the marine environment, marine scientific research and navigation, including pollution from vessels and by dumping, the Ukrainian SSR chooses a special arbitral tribunal constituted in accordance with Annex VIII. The Ukrainian SSR recognizes the competence, as stipulated in article 292, of the International Tribunal for the Law of the Sea in respect of questions relating to the prompt release of detained vessels or their crews.[706]

406. The declaration made by Ukraine upon ratification of the Convention on 26 July 1999 reads:

> Ukraine declares that, in accordance with article 287 of the United Nations Convention on the Law of the Sea of 1982, it chooses as the principal means for the settlement of disputes concerning the interpretation or application of this Convention an arbitral tribunal constituted

---

[705] Declaration by the USSR upon Signature of UNCLOS, 10 December 1982 in Law of the Sea Bulletin, Vol. 5, p. 23 (1985) (**Annex RU-11**).

[706] Declaration by the USSR upon Signature of UNCLOS, 10 December 1982 in Law of the Sea Bulletin, Vol. 5, p. 23 (1985) (**Annex RU-11**).

> in accordance with Annex VII. For the consideration of disputes concerning the interpretation or application of the Convention in respect of questions relating to fisheries, protection and preservation of the marine environment, marine scientific research and navigation, including pollution from vessels and by dumping, Ukraine chooses a special arbitral tribunal constituted in accordance with Annex VIII.[707]

407. Ukraine contests the Russian Federation's argument that Ukraine's claims regarding fisheries, protection and preservation of the marine environment, and navigation are outside the jurisdiction of the Arbitral Tribunal. Ukraine submits that the Arbitral Tribunal has competence to hear the present dispute in its entirety.

A. POSITION OF THE RUSSIAN FEDERATION

408. The Russian Federation submits that even if the Arbitral Tribunal were to find that the present dispute concerned the interpretation or application of the Convention, and that its jurisdiction was not precluded pursuant to Articles 298, paragraph 1, of the Convention and not limited under Article 297, paragraph 3, subparagraph (a), the Arbitral Tribunal nonetheless could not rule on Ukraine's claims related to fisheries, protection and preservation of the marine environment, or navigation since such claims belong to the jurisdictional domain of Annex VIII special arbitral tribunals.[708] Specifically, the Russian Federation argues that this Arbitral Tribunal has no jurisdiction over the dispute insofar as Ukraine's submissions (f), (g), (m), (n), (o), and (p) are concerned.[709] The Russian Federation points out that this objection is additional and complementary to its other objections.[710]

409. The Russian Federation considers that Article 287 of the Convention presents States Parties with a "menu" of dispute settlement options.[711] Under Article 287, paragraph 4, if the States Parties have accepted the same procedure for the settlement of disputes, a dispute may only be submitted to that agreed procedure unless otherwise agreed by the parties to the dispute.[712]

410. The Russian Federation notes that the Parties have both chosen as the "basic" or "principal" means for the settlement of disputes concerning the interpretation or application of the Convention an Annex VII arbitral tribunal; however, they have also both opted for a special arbitral tribunal constituted in accordance with Annex VIII to the Convention for the consideration of specific

---

[707] Declaration by Ukraine upon Ratification of UNCLOS, 26 July 1999 in Multilateral Treaties Deposited with the Secretary-General, Ch. XXI, No. 6, p. 32 (**Annex UA-8**).
[708] Russian Federation's Preliminary Objections, para. 198; Russian Federation's Reply, para. 150.
[709] Jurisdiction Hearing, 10 June 2019, 97:17-98:1 (Pellet).
[710] Jurisdiction Hearing, 10 June 2019, 63:24-64:4 (Pellet).
[711] Russian Federation's Preliminary Objections, para. 206.
[712] Russian Federation's Preliminary Objections, para. 206; *see also* Jurisdiction Hearing, 10 June 2019, 96:17-97:5 (Pellet).

categories of disputes.[713] The Russian Federation further notes that "no order of preference has explicitly been given by either [the Russian Federation] or Ukraine."[714] In the Russian Federation's view, "[t]he general procedure provided for in Annex VII will apply only to disputes that do not fall under the jurisdiction of Annex VIII tribunals."[715] The Russian Federation maintains that the use of the Annex VIII procedure for disputes concerning the four categories enumerated in Annex VIII, Article 1, of the Convention is a condition that forms an integral part of the Russian Federation's expressed consent to arbitration.[716]

411. The Russian Federation submits that the Parties' declarations pursuant to Article 287 of the Convention do not limit the jurisdiction of an Annex VIII special arbitral tribunal.[717] While the Russian Federation recognises that Ukraine's declaration under Article 287 upon ratification of the Convention does not track the language of Article 1 of Annex VIII but uses the additional phrase "in respect of questions," which is not found in the text of Article 1, it argues that this phrase does not make the scope of Ukraine's declaration more restrictive than the wording of Article 1 of Annex VIII.[718] On the contrary, according to the Russian Federation, the term "questions" is broader than the notion of "dispute" and includes issues on which States Parties have not yet formulated opposing positions, and which therefore do not rise to the level of a "dispute."[719]

412. With respect to its own declaration under Article 287 of the Convention, the Russian Federation recalls the statement made by the delegate of the USSR at the Third United Nations Conference on the Law of the Sea that "[t]he nature of the procedure [...] should be determined by the nature of the dispute."[720] In the Russian Federation's view, it is clear from its choice that "what matters is the nature of the dispute, and that 'the consideration of matters relating to fisheries, the protection and preservation of the marine environment, marine scientific research, and navigation, including pollution from vessels and dumping' is reserved for Annex VIII arbitration."[721]

413. Turning to the negotiating history of the Convention, the Russian Federation also recalls that several delegations at the Third United Nations Conference on Law of the Sea shared the view that disputes of widely differing range and character as may arise under the Convention could not

---

[713] Russian Federation's Preliminary Objections, para. 203.
[714] Russian Federation's Preliminary Objections, para. 205.
[715] Russian Federation's Preliminary Objections, para. 205.
[716] Jurisdiction Hearing, 10 June 2019, 93:4-7 (Pellet).
[717] Russian Federation's Reply, para. 155.
[718] Russian Federation's Reply, para. 156.
[719] Russian Federation's Reply, para. 156.
[720] Russian Federation's Reply, para. 159.
[721] Russian Federation's Reply, para. 160.

all be accommodated satisfactorily by a single mode of dispute settlement.[722] Such delegations considered recourse to qualified experts to be most effective for disputes involving technical matters such as fisheries, marine pollution, scientific research, and navigation.[723]

414. The Russian Federation submits that the doctrine of *lex specialis* dictates that precedence be given to special arbitral tribunals constituted in accordance with Annex VIII to the Convention over the general jurisdiction conferred upon Annex VII arbitral tribunals.[724] In addition, the Russian Federation contends that the special expertise that can be provided by an Annex VIII special arbitral tribunal may be relevant or required to address, for example, the alleged adverse impact of the construction of the bridge in the Kerch Strait on the marine environment and to rule on Ukraine's claims with regard to the Russian Federation's exploitation of living resources and the alleged impact of the construction of the bridge on navigation in the Kerch Strait.[725]

415. The Russian Federation denies that Annex VIII special arbitration is an "exceptional" method of dispute resolution with a strictly limited role.[726] The Russian Federation also rejects Ukraine's distinction between "limited categories of disputes" and "complex and multi-faceted disputes," stating that an Annex VIII special arbitral tribunal may decide only matters that the Parties have specifically agreed to refer to it.[727] The Russian Federation submits that difficulties with respect to fitting a particular dispute within a particular category should not result in the vitiation of the Parties' consent to the jurisdiction of an Annex VIII special arbitral tribunal and in depriving the provisions of Annex VIII of any effect.[728]

416. According to the Russian Federation, the Convention necessitates the "dissect[ion]" of issues and the "categorisation of different kinds of dispute[s]" in order to determine the proper mode of dispute settlement.[729] The Russian Federation argues that the drafters of the Convention were aware of the practical disadvantages that could result from the fragmentation of disputes caused by the use of the special procedures in Annex VIII, but nevertheless included Annex VIII in the Convention.[730]

---

[722] Russian Federation's Preliminary Objections, para. 207.
[723] Russian Federation's Preliminary Objections, para. 207.
[724] Russian Federation's Preliminary Objections, para. 211 *citing Mavrommatis Palestine Concessions*, cit., n. 294, p. 32 (**Annex RUL-2**); Jurisdiction Hearing, 10 June 2019, 96:10-96:16 (Pellet).
[725] Russian Federation's Preliminary Objections, para. 212.
[726] Russian Federation's Reply, para. 152; Jurisdiction Hearing, 10 June 2019, 97:6-14 (Pellet).
[727] Russian Federation's Reply, para. 151.
[728] Russian Federation's Reply, para. 153.
[729] Russian Federation's Reply, para. 153.
[730] Jurisdiction Hearing, 10 June 2019, 94:14-95:10 (Pellet).

417. In any event, the Russian Federation notes that in the present case the only issue closely interlinked with Ukraine's claims related to fisheries, protection and conservation of the marine environment, and navigation is the Parties' sovereignty dispute, which the Russian Federation considers is outside the jurisdiction of any arbitral mechanism.[731]

418. The Russian Federation rejects Ukraine's argument that this objection should be dismissed because it was raised only after the Russian Federation had already participated in the constitution of this Arbitral Tribunal under Annex VII to the Convention.[732] According to the Russian Federation, it is the essence of preliminary objections that they are to be raised after the constitution of the Arbitral Tribunal which is to rule on them.[733]

419. The Russian Federation denies that it has waived recourse to Annex VIII to the Convention in the context of the Parties' August 2016 meeting because, as Ukraine concedes, the Russian Federation had not agreed to submission of any dispute to any form of third-party dispute settlement and instead proposed negotiation at the time.[734]

B. Position of Ukraine

420. Ukraine denies that the present dispute falls within the competence of an Annex VIII special arbitral tribunal. In Ukraine's view, it should be heard in its totality by an Annex VII arbitral tribunal.[735]

421. Ukraine argues that in accordance with the ordinary meaning of the terms of Article 287 and Annex VIII, Article 1, of the Convention, Annex VIII special arbitral tribunals only have jurisdiction over disputes that fall entirely within one or more of four enumerated categories, namely, (a) fisheries, (b) the marine environment, (c) marine scientific research, or (d) navigation. Conversely, Annex VIII special arbitral tribunals are not competent to hear disputes that extend beyond these categories.[736] According to Ukraine, Annex VII arbitral tribunals have jurisdiction over disputes concerning any part of the Convention, including multi-faceted disputes implicating multiple parts of the Convention.[737]

---

[731] Russian Federation's Reply, para. 162.

[732] Jurisdiction Hearing, 13 June 2019, 81:5-18 (Usoskin).

[733] Jurisdiction Hearing, 10 June 2019, 93:17-94:13 (Pellet); Jurisdiction Hearing, 13 June 2019, 81:19-82:2 (Usoskin).

[734] Jurisdiction Hearing, 13 June 2019, 82:24-83:12 (Usoskin).

[735] Ukraine's Written Observations, paras 164, 181.

[736] Ukraine's Written Observations, paras 165-66.

[737] Ukraine's Written Observations, para. 167.

422. Ukraine underlines that Annex VII arbitration is the default method of dispute settlement in Part XV of the Convention, and the Parties in their respective declarations have selected it as the "principal" or "basic" means for the resolution of all but a limited set of disputes under the Convention.[738] Ukraine contends that, while Annex VIII special arbitral tribunals are selected for their special expertise, Annex VII arbitral tribunals are selected for their expertise in all areas of maritime affairs.[739] Ukraine notes that Annex VIII, Article 2, directs the four named organisations to maintain separate lists of experts relating to each of the categories of disputes enumerated in Annex VIII, and Annex VIII, Article 3, permits each party to an Annex VIII dispute to appoint two members of the special arbitral tribunal preferably from these lists of experts.[740] Ukraine highlights that Annex VIII, however, provides no direction regarding the expertise of arbitrators for disputes implicating issues that lie outside the categories enumerated in Annex VIII.[741] Therefore, in Ukraine's view, the Convention did not intend that Annex VIII special arbitral tribunals would handle disputes extending beyond the four categories enumerated in Annex VIII.[742]

423. Ukraine submits that the *travaux préparatoires* of the Convention support its argument that Annex VIII to the Convention was adopted by negotiating States on the basis that it was optional and strictly limited to four discrete categories of disputes where technical expertise was expected to be particularly relevant.[743] Notwithstanding the USSR's comments at the Third United Nations Conference on Law of the Sea, Ukraine suggests that the Russian Federation's acceptance of Annex VII arbitration as the "basic means" for the settlement of disputes under the Convention and its subsequent practice reflect the view that Annex VIII is a mechanism for the resolution of disputes primarily concerning technical and scientific issues.[744]

424. Further, Ukraine refers to academic commentary on the Convention that confirms that Annex VIII special arbitration cannot be invoked in connection with disputes that are not strictly confined to the issues specified in Annex VIII to the Convention.[745]

425. Ukraine further submits that, even if Annex VIII to the Convention were to be read as broadly as the Russian Federation suggests, Ukraine did not consent in its declaration under Article 287 to

---

[738] Ukraine's Rejoinder, para. 161.
[739] Ukraine's Written Observations, para. 168.
[740] Ukraine's Written Observations, para. 168.
[741] Ukraine's Written Observations, para. 168.
[742] Ukraine's Written Observations, para. 168.
[743] Ukraine's Written Observations, para. 169.
[744] Ukraine's Rejoinder, para. 164.
[745] Ukraine's Rejoinder, para. 157.

the resolution of complex and multi-faceted disputes through Annex VIII proceedings.[746] Ukraine notes that, in its declarations, it selected Annex VII arbitration as the "principal" method of dispute resolution and consented to Annex VIII proceedings only for "disputes concerning the interpretation or application of the Convention in respect of questions relating to fisheries, protection and preservation of the marine environment, marine scientific research and navigation."[747] Ukraine submits that Annex VIII jurisdiction is an exception to Ukraine's general selection of Annex VII arbitration and that its declarations must be interpreted in accordance with the principle *exceptio est strictissimae applicationis*.[748]

426. Ukraine argues that, unlike the text of Annex VIII to the Convention, "Ukraine's declaration requires a link between the 'dispute' [...] and 'questions relating to' one of the four enumerated categories."[749] In Ukraine's view, a complex dispute that raises overarching questions, and which is not narrowly focused on fisheries, the environment, marine scientific research, and navigation, cannot fairly be characterised as being a dispute "in respect of questions relating to" those subjects.[750]

427. Ukraine notes that under Article 287, paragraph 4, of the Convention, when assessing the scope of an arbitral tribunal's jurisdiction, the more restrictive of the parties' jurisdictional declarations will prevail.[751] Thus, since Ukraine's declaration is more restrictive than the Russian Federation's, Ukraine contends that the Arbitral Tribunal need only interpret Ukraine's Article 287 declaration.[752]

428. Ukraine argues that all claims to which the Russian Federation has objected on the ground that they fall within the jurisdiction of an Annex VIII special arbitral tribunal are factually and legally intertwined with Ukraine's broader case[753] and cannot be artificially separated from it.[754] Ukraine considers that it has presented a "single, integrated dispute" that touches upon a wide array of legal rights, only some of which intersect with the categories enumerated in Annex VIII.[755]

---

[746] Ukraine's Written Observations, para. 170; Ukraine's Rejoinder, para. 162.
[747] Ukraine's Written Observations, para. 171.
[748] Ukraine's Written Observations, para. 172.
[749] Ukraine's Written Observations, para. 173.
[750] Ukraine's Written Observations, para. 173.
[751] Ukraine's Written Observations, para. 174.
[752] Ukraine's Written Observations, para. 174.
[753] Ukraine's Written Observations, para. 177; Ukraine's Rejoinder, para. 153.
[754] Ukraine's Written Observations, paras 177-78.
[755] Ukraine's Written Observations, para. 176; Jurisdiction Hearing, 11 June 2019, 132:19-21(Gimblett), 136:6-9 (Gimblett).

429. By way of example, Ukraine notes that its submissions (f) and (g) require a determination of whether the Russian Federation has violated Ukraine's rights in the territorial sea and exclusive economic zone under Articles 2 and 56 of the Convention.[756] This inquiry, according to Ukraine, has implications well beyond the subjects enumerated in Annex VIII.[757] Ukraine argues that its submissions (m), (n), (o), and (p) also call for non-technical, legal determinations that flow directly from the Arbitral Tribunal's assessment of the overall course of conduct by the Russian Federation described in Ukraine's Memorial.[758] Ukraine submits that any attempt to segregate the above six submissions from the remainder of this dispute would violate the boundary of its consent to the jurisdiction of an Annex VIII special arbitral tribunal.[759]

430. Ukraine maintains that the purpose of Part XV of the Convention is the "fair and efficient resolution of disputes."[760] For Ukraine, segregating the submissions identified by the Russian Federation from the larger context of this case and submitting them to one or more Annex VIII special arbitral tribunals, while a separate Annex VII arbitral tribunal addresses the rest of the dispute, would be "inefficient and expensive" and would pose a significant risk of an Annex VIII special arbitral tribunal ruling on matters outside its competence.[761] Such a segregation could also result in "unjust or inconsistent decisions" in cases such as this one that, in Ukraine's view, requires a holistic approach.[762] Ukraine submits that it cannot be presumed to have consented to forfeiting the possibility of submitting one integrated dispute under the Convention to a competent arbitral tribunal.[763]

431. Moreover, Ukraine maintains that its submissions do not present technical questions and therefore would not benefit from the specialised, non-legal considerations of an Annex VIII special arbitral tribunal.[764]

432. Ukraine asserts that, if the Russian Federation believed that this dispute or parts of it were better suited for an Annex VIII special arbitral tribunal, Article 283 of the Convention requires the Russian Federation to have expressed such a view at the Parties' meeting in August 2016,[765] upon

---

[756] Ukraine's Written Observations, para. 177; Jurisdiction Hearing, 11 June 2019, 135:7-19 (Gimblett).
[757] Ukraine's Written Observations, para. 177; Jurisdiction Hearing, 11 June 2019, 135:20-136:5 (Gimblett).
[758] Ukraine's Written Observations, para. 177.
[759] Ukraine's Written Observations, para. 178.
[760] Ukraine's Written Observations, para. 179; Jurisdiction Hearing, 11 June 2019, 134:9-12 (Gimblett).
[761] Ukraine's Written Observations, para. 179; Ukraine's Rejoinder, para. 151; Jurisdiction Hearing, 11 June 2019, 132:21-25 (Gimblett).
[762] Ukraine's Written Observations, para. 179; Ukraine's Rejoinder, para. 149; Jurisdiction Hearing, 11 June 2019, 134:16-19 (Gimblett).
[763] Jurisdiction Hearing, 14 June 2019, 83:19-25 (Zionts).
[764] Ukraine's Written Observations, para. 180.
[765] Jurisdiction Hearing, 11 June 2019, 131:8-17 (Gimblett).

receipt of the Notification and Statement of Claim in September 2016, or during its participation in the process of constituting this Arbitral Tribunal in December 2016.[766] However, according to Ukraine, it did not do that.[767] Ukraine submits that the Russian Federation, by its conduct, has agreed to Annex VII arbitration rather than Annex VIII special arbitration.[768]

C. Analysis of the Arbitral Tribunal

433. Pursuant to Article 287, paragraph 1, of the Convention, a State shall be free to choose, for the settlement of disputes concerning the interpretation or application of the Convention, "a special arbitral tribunal constituted in accordance with Annex VIII for one or more of the categories of disputes specified therein."

434. Annex VIII, Article 1, of the Convention provides, in relevant part:

> [...] any party to a dispute concerning the interpretation or application of the articles of this Convention relating to (1) fisheries, (2) protection and preservation of the marine environment, (3) marine scientific research, or (4) navigation, including pollution from vessels and by dumping, may submit the dispute to the special arbitral procedure provided for in this Annex.

435. The Arbitral Tribunal first considers that this preliminary objection has been brought by the Russian Federation in a timely fashion and in accordance with Article 10, paragraph 2, of the Rules of Procedure. In the Arbitral Tribunal's view, a respondent State cannot be expected to raise an objection prior to the institution of proceedings against it, as it is only with the application, or in the case of an Annex VII arbitral tribunal, the notification pursuant to Annex VII, Article 1, of the Convention that the subject matter of the proceedings is circumscribed and a procedure for the settlement of the dispute selected.

436. Article 287, paragraph 1, of the Convention, read together with Annex VIII, Article 1, indicates that the jurisdiction of an Annex VIII special arbitral tribunal is confined to one or more of the four categories enumerated in Annex VIII, Article 1 (hereinafter the "Four Categories"), of the Convention.

437. This is also apparent from the context of Annex VIII, Article 1, of the Convention. Annex VIII, Article 2, paragraph 1, stipulates that "[a] list of experts shall be established and maintained in respect of each of the fields of [the Four Categories]." Paragraph 2 provides that the lists of experts for each of the Four Categories are to be drawn up and maintained by four specialised international

[766] Jurisdiction Hearing, 14 June 2019, 82:13-24 (Zionts).
[767] Jurisdiction Hearing, 11 June 2019, 131:17 (Gimblett).
[768] Jurisdiction Hearing, 11 June 2019, 132:6-16 (Gimblett).

organisations, each of which is recognised as a repository of expertise in its field. Moreover, paragraph 3 spells out that "[e]very State Party shall be entitled to nominate two experts in each field whose competence [...] is established and generally recognized and who enjoy the highest reputation for fairness and integrity." These provisions support the view that experts to be appointed to an Annex VIII special arbitral tribunal were not intended to adjudicate matters going beyond or falling outside their particular area of expertise.

438. The Parties' declarations pursuant to Article 287 of the Convention likewise indicate an intention to limit the jurisdiction of an Annex VIII special arbitral tribunal to matters or questions that exclusively relate to the Four Categories. The Arbitral Tribunal notes, in particular, that the declaration made by Ukraine upon ratification of the Convention requires a link between "disputes concerning the interpretation or application of the Convention" and "questions relating to" one of the Four Categories. The Arbitral Tribunal, therefore, considers that Ukraine's declaration would not cover a dispute implicating aspects of the Convention that lie beyond the Four Categories.

439. The Arbitral Tribunal notes that the Parties are in agreement that Annex VIII special arbitral tribunals may only hear limited categories of disputes.[769] The Arbitral Tribunal further notes that there is no disagreement between the Parties that the present dispute encompasses wide-ranging issues and is by no means limited to the Four Categories.[770] The key question for the Arbitral Tribunal to address is whether it may exercise jurisdiction over that dispute as a whole (to the extent that none of the Russian Federation's other objections have been upheld), or whether it must decline to deal with aspects of that dispute that may fall within the Four Categories and leave them to be pursued separately before one or more Annex VIII special arbitral tribunals.

440. The Arbitral Tribunal observes that the dispute before it concerns the maritime rights and obligations of the Parties in the Black Sea, Sea of Azov, and the Kerch Strait. The dispute has many facets, as is evidenced by the claims made by Ukraine in the Notification and Statement of Claim and the Memorial. Ukraine has made allegations regarding *inter alia* Ukraine's exclusion from access to and use of its fisheries by the Russian Federation,[771] impediments to navigation introduced by the Russian Federation in the Kerch Strait,[772] and the Russian Federation's failure to cooperate regarding the protection and preservation of the marine environment.[773]

---

[769] Russian Federation's Reply, paras 150-51; Ukraine's Rejoinder, para. 147.

[770] Russian Federation's Preliminary Objections, paras 213-14 (specifying only some of Ukraine's submissions as relating to the Four Categories); Ukraine's Written Observations, para. 175.

[771] Notification and Statement of Claim, para. 50 (c) and (d); Ukraine's Memorial, para. 265 (f) and (g).

[772] Notification and Statement of Claim, para. 50 (f) and (g); Ukraine's Memorial, para. 265 (m) and (n).

[773] Notification and Statement of Claim, para. 50 (i); Ukraine's Memorial, para. 265 (o) and (p).

441. The Arbitral Tribunal does not consider each of Ukraine's submissions made in the Notification and Statement of Claim and the Memorial to constitute a distinct and separate dispute, but rather to be part of a single, unified dispute that Ukraine has brought before this Arbitral Tribunal. All aspects of Ukraine's case are, as it were, manifestations of a broader disagreement between the Parties, rather than isolated occurrences that happen to be submitted to arbitration in the same instrument. The fact that the Arbitral Tribunal has decided, above, that it does not have jurisdiction over certain aspects of that dispute does not mean that the remaining aspects should be considered in a piecemeal fashion.

442. Accordingly, in the Arbitral Tribunal's view, it is not possible in the present case to isolate from the broader dispute before it those elements that fall exclusively within the jurisdiction of one or more Annex VIII special arbitral tribunals. Nor would it be in the interest of justice for this Arbitral Tribunal to decline jurisdiction over certain aspects of the dispute before it, as requested by the Russian Federation. The fragmentation of the dispute before the Arbitral Tribunal would risk there being inconsistent outcomes from the various arbitral tribunals that are seised of different aspects of the same dispute. It would also increase the costs and time spent on litigation by the Parties.

443. Having found that the dispute before it cannot and should not be split or fragmented, the Arbitral Tribunal rejects the Russian Federation's objection that it has no jurisdiction over the dispute relating to fisheries, protection and preservation of the marine environment, and navigation in light of Annex VIII to the Convention.

IX. THE RUSSIAN FEDERATION'S OBJECTION THAT THE ARBITRAL TRIBUNAL HAS NO JURISDICTION PURSUANT TO ARTICLE 281 OF THE CONVENTION

444. Article 281, paragraph 1, of the Convention provides:

> If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed to seek settlement of the dispute by a peaceful means of their own choice, the procedures provided for in this Part apply only where no settlement has been reached by recourse to such means and the agreement between the parties does not exclude any further procedure.

445. The Russian Federation submits that the Arbitral Tribunal lacks jurisdiction with respect to the greater part of Ukraine's claims as a result of Article 281 of the Convention.[774]

[774] Russian Federation's Preliminary Objections, para. 215.

446. According to the Russian Federation, the relevant agreement of the Parties is contained in the State Border Treaty and the Azov/Kerch Cooperation Treaty.[775]

447. Article 5 of the State Border Treaty provides:

> Settlement of questions relating to the adjacent sea areas shall be effected by agreement between the Contracting Parties in accordance with international law.

448. Article 1 of the Azov/Kerch Cooperation Treaty provides:

> Settlement of questions relating to the Kerch Strait area shall be effected by agreement between the Parties.

449. For its part, Ukraine submits that Article 281 of the Convention is not relevant to the present dispute and the Russian Federation's objection therefore should be rejected.[776]

A. POSITION OF THE RUSSIAN FEDERATION

450. The Russian Federation submits that, "[e]ven leaving to one side all the other objections that [the Russian Federation] has raised, the [Arbitral] Tribunal would still lack jurisdiction with respect to the greater part of Ukraine's claims as a result of Article 281" of the Convention.[777] Specifically, it objects to the jurisdiction of the Arbitral Tribunal over "any claims relating to the Sea of Azov, the Kerch Strait or any other adjacent sea areas in the Black Sea or any activities or events in these areas."[778]

451. The Russian Federation maintains that Article 281 of the Convention "imposes conditions to, and limitations on, the jurisdiction of Annex VII tribunals where parties have agreed to resolve disputes by recourse to other means of peaceful dispute settlement."[779] In the present case, according to the Russian Federation, the relevant agreements between the Parties are contained in Article 5 of the State Border Treaty and Article 1 of the Azov/Kerch Cooperation Treaty.[780]

452. The Russian Federation contends that the agreement reflected in the above provisions "defines very broadly the scope of 'questions' that shall be settled by agreement of the Parties," covering disputes relating to Sea of Azov and adjacent sea areas of the Black Sea and questions relating to the Kerch Strait.[781] These provisions, according to the Russian Federation, encompass any

[775] Russian Federation's Preliminary Objections, para. 217.
[776] Ukraine's Rejoinder, para. 127.
[777] Russian Federation's Preliminary Objections, paras 215-16, 220; Russian Federation's Reply, para. 163.
[778] Russian Federation's Preliminary Objections, para. 264.
[779] Russian Federation's Preliminary Objections, para. 219.
[780] Russian Federation's Preliminary Objections, para. 219.
[781] Russian Federation's Preliminary Objections, para. 225.

dispute concerning, for example, navigation or exploitation of living and non-living resources in the Sea of Azov and Kerch Strait, including any disputes that could have fallen under the Convention were it to be applicable.[782] In particular, the Russian Federation points out that neither the State Border Treaty nor the Azov/Kerch Cooperation Treaty "restrict[s] the scope of questions they encompass to questions under the specific treaty."[783]

453. The Russian Federation contends that "though both provisions refer to 'questions' rather than 'disputes', the term used is broader than and encompasses disputes."[784] The Russian Federation considers that, in Russian and in English, the term "questions" encompasses "not only matters that have already given rise to a 'dispute'—a disagreement between the parties—but other matters where the parties have not yet formulated opposing positions so as to constitute a dispute, but which they may need to resolve."[785] In support of this assertion, the Russian Federation points out that Ukraine's declaration upon its signature of the Convention refers to an Annex VIII special arbitral tribunal for the "*consideration of questions*"—not disputes—"relating to fisheries protection and preservation of the marine environment, marine scientific research and navigation."[786] Referring to several titles of contentious cases before the ICJ, the Russian Federation notes that the term "questions" is used to refer to "disputes."[787]

454. The Russian Federation states that the context of negotiations of the State Border Treaty and Azov/Kerch Cooperation Treaty concerning the status of, and border delimitation in, the Sea of Azov and Kerch Strait, goes against Ukraine's case. If the Parties had wanted to limit the scope of Article 5 of the State Border Treaty and Article 1 of the Azov-Kerch Cooperation Treaty, the Russian Federation argues, they would have referred to "border" or "status" in those provisions. Instead, the provisions refer more broadly to "questions."[788]

455. The Russian Federation rejects Ukraine's argument that the provisions relied on by the Russian Federation contain an agreement to negotiate future treaties with respect to their adjacent sea areas and the Kerch Strait.[789] In particular, the Russian Federation denies that the use of the Ukrainian term "угода" ("*ugoda*") for "agreement" in the relevant provisions implies that Article 5 of the

---

782 Russian Federation's Preliminary Objections, para. 225.
783 Russian Federation's Preliminary Objections, para. 226.
784 Russian Federation's Preliminary Objections, para. 227.
785 Russian Federation's Preliminary Objections, para. 227; Russian Federation's Reply, para. 167; Jurisdiction Hearing, 10 June 2019, 139:14-21 (Usoskin).
786 Russian Federation's Reply, para. 167 *citing* Declaration by the USSR upon Signature of UNCLOS, 10 December 1982 in Law of the Sea Bulletin, Vol. 5, p. 23 (1985) (**Annex RU-11**) [emphasis added by the Russian Federation].
787 Jurisdiction Hearing, 10 June 2019, 140:9-20 (Usoskin).
788 Jurisdiction Hearing, 13 June 2019, 88:2-11 (Usoskin).
789 Russian Federation's Reply, paras 165-66.

State Border Treaty is limited to the conclusion of international treaties.[790] The Russian Federation states that "угода" ("*ugoda*") properly translates into "agreement," not "treaty,"[791] and that the "agreement" contemplated in Article 5 would be the result of negotiations that the Parties would undertake to resolve a question.[792] The Russian Federation argues that if the Parties had intended the term "agreement" to cover only future maritime boundary agreements, they would have said so.[793]

456. The Russian Federation asserts that the existence of a separate dispute resolution clause in Article 4 of the Azov/Kerch Cooperation Treaty does not mean that Article 1 of that treaty cannot contain any rules on dispute settlement.[794] In this regard, the Russian Federation considers that Article 4 applies to "disputes only and only to disputes concerning the Azov/Kerch Cooperation Treaty" and not the broader category of "questions" referred to in Article 1.[795] Further, the Russian Federation notes that there is no contradiction between the two provisions because Article 4 provides for the "settlement of disputes by 'negotiations' and other means of dispute settlement chosen by the Parties—the same means encompassed by the provision of Article 1."[796]

457. In response to Ukraine's argument that the provisions in the State Border Treaty and the Azov/Kerch Cooperation Treaty fail to specify any alternate procedure that would apply in place of Part XV, the Russian Federation argues that "consent to settle disputes 'by agreement' necessarily requires settlement of disputes by negotiations."[797] In the Russian Federation's view, "[w]here a dispute between States is to be resolved by agreement the natural consequence is that the States should engage in negotiations to resolve the dispute."[798]

458. The Russian Federation also contends that Article 5 of the State Border Treaty and Article 1 of the Azov/Kerch Cooperation Treaty cover disputes concerning the interpretation or application of the Convention.[799] In response to Ukraine's argument that the State Border Treaty and the Azov/Kerch Cooperation Treaty do not trigger Article 281 of the Convention because they do not specifically refer to the resolution of disputes under the Convention, the Russian Federation notes

---

[790] Russian Federation's Reply, para. 168; Jurisdiction Hearing, 10 June 2019, 141:15-142:2 (Usoskin).
[791] Jurisdiction Hearing, 10 June 2019, 142:3-14 (Usoskin).
[792] Russian Federation's Reply, para. 168.
[793] Jurisdiction Hearing, 10 June 2019, 141:4-14 (Usoskin).
[794] Russian Federation's Reply, para. 169.
[795] Russian Federation's Reply, para. 169.
[796] Russian Federation's Reply, para. 169.
[797] Russian Federation's Reply, para. 175.
[798] Russian Federation's Preliminary Objections, para. 229; Jurisdiction Hearing, 10 June 2019, 135:5-14 (Usoskin).
[799] Russian Federation's Reply, para. 171.

that Article 281 does not require any such express reference to be made,[800] and that requiring such a reference would be contrary to the intentions of the States Parties to the Convention.[801] The Russian Federation submits that ITLOS and the arbitral tribunals in *The MOX Plant Case (Ireland v. United Kingdom)* and *Southern Bluefin Tuna (Australia and New Zealand v. Japan)* (hereinafter "*Southern Bluefin Tuna*") considered only whether the respective disputes under the Convention fell within the scope of the dispute settlement clauses in the applicable treaties, not whether those clauses contained express references to disputes under the Convention.[802]

459. The Russian Federation notes that Article 281 provides that recourse to Part XV of the Convention is possible if "the agreement between the parties does not exclude any further procedure."[803] However, the agreement between the parties does not need "expressly" to exclude such recourse.[804] Rather, the Russian Federation points out, "the intention of the States should be established by interpreting the provisions of relevant treaty or treaties."[805]

460. According to the Russian Federation, the agreement in the State Border Treaty and the Azov/Kerch Cooperation Treaty reflects the Parties' intention to exclude recourse to further procedures.[806] The Russian Federation argues that the exclusion in the present case is even clearer than that in *Southern Bluefin Tuna* because the treaties in question in the present dispute require any dispute to be settled by agreement—they do not even contemplate the submission of disputes to third-party dispute settlement.[807] The Russian Federation distinguishes *South China Sea*, where the arbitral tribunal found that a reference to dispute settlement by negotiations in a non-binding agreement was insufficient to exclude compulsory dispute settlement under Part XV of the Convention,[808] from the present case, in which the intention to exclude recourse to compulsory dispute resolution is contained in a binding agreement.[809]

[800] Russian Federation's Preliminary Objections, para. 253; Russian Federation's Reply, para. 171; Jurisdiction Hearing, 10 June 2019, 142:15-22 (Usoskin).
[801] Russian Federation's Preliminary Objections, para. 262; Jurisdiction Hearing, 10 June 2019, 142:23-143:2 (Usoskin).
[802] Russian Federation's Reply, para. 172 *referring to The MOX Plant Case (Ireland v. United Kingdom)*, Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001, p. 95 at p. 106, paras 48-52 (**Annex UAL-17**); *Southern Bluefin Tuna*, cit., n. 679, paras 53-54. (**Annex RUL-24**); Jurisdiction Hearing, 10 June 2019, 143:10-16 (Usoskin).
[803] Russian Federation's Preliminary Objections, para. 253.
[804] Russian Federation's Preliminary Objections, para. 253.
[805] Russian Federation's Preliminary Objections, para. 253
[806] Russian Federation's Preliminary Objections, para. 255.
[807] Jurisdiction Hearing, 10 June 2019, 146:10-14 (Usoskin); Russian Federation's Preliminary Objections, para. 256.
[808] Russian Federation's Preliminary Objections, para. 259.
[809] Russian Federation's Preliminary Objections, para. 259.

461. The Russian Federation argues that Ukraine has failed to engage in genuine negotiations to settle the dispute.[810] The Russian Federation acknowledges that Ukraine has protested against the actions of the Russian Federation by *notes verbales* and statements in international *fora*.[811] However, the Russian Federation contends that Ukraine at no point solicited the Russian Federation's views or sought to engage it in negotiations concerning the respective maritime areas.[812] The Russian Federation points out that the evidence presented by Ukraine in support of the contention that it sought to resolve the dispute with the Russian Federation only concerns the Russian Federation's actions "in connection with the unification of Crimea with Russia" and does not relate to the Convention.[813]

462. The Russian Federation further argues that Ukraine's *notes verbales* rely on Ukraine's alleged sovereign rights as the coastal State in Crimea and its submissions "were made in completely generic terms making it impossible for [the Russian Federation] to investigate and respond to these allegations."[814] The Russian Federation notes that it had proposed a meeting to discuss with Ukraine the "protection of the marine environment" and "utilization of bioresources" and other law of the sea issues, and that proposing such a meeting was a reasonable response from a State facing "abstract allegations."[815]

463. The Russian Federation argues that, at the meeting on 11 August 2016, it was prepared to discuss and address Ukraine's concerns relating to the Sea of Azov, the Kerch Strait, and the Black Sea and that "it was Ukraine that terminated the meeting and refused to continue the discussions further,"[816] which "does not evidence that Ukraine engaged in good faith negotiations."[817] The Russian Federation denies that it failed to articulate a position during the meeting on "whether or not a dispute exists."[818] The Russian Federation explains that it said that the information provided

---

[810] Russian Federation's Preliminary Objections, para. 233; Russian Federation's Reply, para. 176.
[811] Russian Federation's Preliminary Objections, para. 233.
[812] Russian Federation's Preliminary Objections, paras 232-33; Jurisdiction Hearing, 10 June 2019, 136:3-9 (Usoskin).
[813] Russian Federation's Preliminary Objections, paras 234-36; Jurisdiction Hearing, 10 June 2019, 136:11-16 (Usoskin).
[814] Russian Federation's Preliminary Objections, paras 237-40 *citing Note Verbale* of the Ministry of Foreign Affairs of Ukraine No. 72/22-620-518, 10 March 2015 (**Annex UA-9**); *Note Verbale* of the Ministry of Foreign Affairs of Ukraine No. 72/22-620-2276, 9 October 2015 (**Annex UA-10**); Jurisdiction Hearing, 10 June 2019, 136:17-137:8 (Usoskin).
[815] Russian Federation's Preliminary Objections, para. 241; Jurisdiction Hearing, 10 June 2019, 137:9-12 (Usoskin).
[816] Russian Federation's Preliminary Objections, para. 244.
[817] Russian Federation's Preliminary Objections, paras 242-43; Jurisdiction Hearing, 10 June 2019, 137:12-20 (Usoskin).
[818] Russian Federation's Preliminary Objections, para. 243.

by Ukraine would require "thorough analysis" before the Russian Federation could formulate a view on whether a dispute existed and whether such a dispute fell under the Convention.[819]

B. POSITION OF UKRAINE

464. Ukraine argues that the Russian Federation's objection under Article 281 of the Convention, based on the Azov/Kerch Cooperation Treaty and the State Border Treaty, is directed to only a limited portion of Ukraine's claims.[820] While the Russian Federation has not identified what portion of the Black Sea it considers to be "adjacent sea areas,"[821] Ukraine submits that "in the context of the State Border Treaty (in which the term appears) 'adjacent' can only mean adjacent to the State border codified in the treaty."[822] In this regard, Ukraine contends that its claims related to bodies of water in the Black Sea lying to the south and west of Crimea are not adjacent to any State border established in the State Border Treaty, and therefore are not implicated by the Russian Federation's Article 281 objection.[823]

465. Ukraine submits that Article 281 of the Convention gives effect to alternative dispute resolution procedures only if States Parties have agreed to settle UNCLOS disputes through means other than those set out in Part XV of the Convention.[824] According to Ukraine, the State Border Treaty and the Azov/Kerch Cooperation Treaty do not reflect such an agreement between the Parties—the treaties do not purport to "disrupt the operation of [...] Part XV of [the Convention]," nor do they impose a separate negotiation procedure that would serve as a pre-condition to UNCLOS dispute settlement.[825]

466. Ukraine maintains that the State Border Treaty and the Azov/Kerch Cooperation Treaty should be read in line with the context in which they were concluded, which was to narrow the Parties' differences regarding the Sea of Azov and Kerch Strait.[826] According to Ukraine, Article 5 of the State Border Treaty and Article 1 of the Azov/Kerch Cooperation Treaty are not dispute resolution

---

[819] Russian Federation's Preliminary Objections, para. 243 *citing* Consultations Between Ukraine and Russia on the Interpretation and Application of UNCLOS in Minsk, Belarus, p. 30 (11 July 2016) (**Annex UA-14**).
[820] Ukraine's Written Observations, para. 144.
[821] See paragraph 450 of the Award.
[822] Ukraine's Written Observations, para. 144.
[823] Ukraine's Written Observations, para. 144.
[824] Ukraine's Written Observations, para. 147.
[825] Ukraine's Written Observations, paras 148, 151.
[826] Ukraine's Rejoinder, paras 132-33; Jurisdiction Hearing, 11 June 2019, 121:7-22 (Gimblett), 125:17-23 (Gimblett), 126:17-22 (Gimblett).

procedures, but reflect the Parties' agreement to negotiate further treaties pertaining to the "adjacent sea areas" and the Kerch Strait.[827]

467. Ukraine argues that Article 5 of the State Border Treaty does not refer to disputes or dispute resolution procedures and was merely intended to indicate that the Parties had not agreed on maritime boundaries and that the questions relating to these boundaries were to be the subject of a subsequent agreement.[828] Ukraine argues that it is unlikely that the State Border Treaty would provide for the resolution of maritime disputes that are outside the substantive scope of the treaty (as the Russian Federation suggests), while not making equivalent provision for the resolution of land boundary disputes.[829]

468. Similarly, Ukraine denies that Article 1 of the Azov/Kerch Cooperation Treaty is a dispute resolution provision relating to the Kerch Strait.[830] It notes that the dispute resolution procedure in the Azov/Kerch Cooperation Treaty is set out in Article 4, which addresses "disputes" as opposed to "questions."[831] For Ukraine, Article 4 would have been unnecessary if Article 1 were indeed a dispute resolution provision, as the Russian Federation claims.[832] Ukraine submits that the Russian Federation's reading of Article 1 as being a more all-encompassing dispute resolution provision than Article 4 deprives Article 4 of its legal effect.[833] Moreover, if Article 1 were indeed a dispute resolution provision, Ukraine questions why the Parties referred specifically to "disputes" in Article 4, but to "questions" in Article 1.[834]

469. Ukraine contests the Russian Federation's argument that the term "вопросы" ("questions"), found in the Azov/Kerch Cooperation Treaty and State Border Treaty, according to its ordinary meaning in Russian, includes disputes.[835] Ukraine argues that, in its context, the term refers to the conclusion of a future agreement between the Parties.[836] For Ukraine, the conclusion of such future agreement would be, using the definition relied upon by the Russian Federation, the "situation [...] to be examined" or the "task [...] to be completed."[837] For this reason, Ukraine

[827] Ukraine's Written Observations, para. 148; Jurisdiction Hearing, 11 June 2019, 120:22-25 (Gimblett), 123:15-21 (Gimblett).
[828] Ukraine's Written Observations, para. 149; Ukraine's Rejoinder, para. 129; Jurisdiction Hearing, 11 June 2019, 121:7-22 (Gimblett).
[829] Jurisdiction Hearing, 11 June 2019, 124:17-22 (Gimblett).
[830] Ukraine's Written Observations, para. 150; Jurisdiction Hearing, 11 June 2019, 125:9-17 (Gimblett).
[831] Ukraine's Written Observations, para. 152.
[832] Ukraine's Written Observations, para. 152; Jurisdiction Hearing, 11 June 2019, 125:24-126:11 (Gimblett).
[833] Ukraine's Rejoinder, para. 133.
[834] Ukraine's Rejoinder, para. 133; Jurisdiction Hearing, 11 June 2019, 126:11-16 (Gimblett).
[835] Ukraine's Written Observations, para. 152.
[836] Ukraine's Written Observations, para. 152.
[837] Ukraine's Written Observations, para. 152; Ukraine's Rejoinder, para. 134.

submits that the ordinary meaning of the word "question," in the Ukrainian and Russian texts, does not encompass the concept of disputes.[838]

470. Ukraine argues that the equally authentic Ukrainian text of Article 1 of the Azov/Kerch Cooperation Treaty, employing the specific Ukrainian word for "treaty," demonstrates that the Parties contemplated a future treaty rather than dispute settlement by negotiations.[839] Ukraine rejects the Russian Federation's argument that the word "угода" means any kind of agreement.[840] In any event, even if "угода" meant "agreement," Article 1 would be concerned with future agreements and would not be converted into a dispute resolution provision.[841]

471. Even assuming that Article 1 of the Azov/Kerch Cooperation Treaty and Article 5 of the State Border Treaty were dispute resolution provisions, Ukraine submits that these provisions would not have the effect of depriving the Arbitral Tribunal of jurisdiction.[842] Ukraine argues that Article 281 of the Convention is only engaged by dispute resolution clauses that "extend to the resolution of UNCLOS disputes" and that "specify a particular procedure to be followed in addition to, or in lieu of, [...] Part XV [of the Convention]."[843] Ukraine notes that Article 5 of the State Border Treaty and Article 1 of the Azov/Kerch Cooperation Treaty make no reference to disputes under the Convention but rather refer to "'questions' relating to large, imprecisely-defined maritime areas," nor do they clearly specify an alternative procedure that would apply in place of Part XV of the Convention.[844]

472. Ukraine points to several authorities that suggest that, to engage Article 281 of the Convention, a dispute resolution clause must prescribe alternative dispute resolution mechanisms.[845] In Ukraine's view, Article 1 of the Azov/Kerch Cooperation Treaty and Article 5 of the State Border Treaty do not meet this threshold, making only "bare references" to a future agreement.[846] Ukraine argues that the arbitral tribunal in *Southern Bluefin Tuna* found that Part XV of the Convention was excluded because the relevant treaty in that case permitted mandatory dispute resolution only by agreement of the parties and stated that, in the absence of such agreement, parties should continue to seek to resolve their dispute using the means set out in that treaty.[847]

---

[838] Ukraine's Rejoinder, para. 130.
[839] Ukraine's Written Observations, para. 153.
[840] Ukraine's Rejoinder, para. 131.
[841] Ukraine's Rejoinder, para. 131.
[842] Ukraine's Written Observations, paras 155, 159-60.
[843] Ukraine's Written Observations, paras 155-56; Ukraine's Rejoinder, para. 136.
[844] Ukraine's Written Observations, paras 156-57.
[845] Ukraine's Rejoinder, para. 140.
[846] Ukraine's Rejoinder, para. 140.
[847] Ukraine's Rejoinder, para. 141.

Ukraine notes that the Azov/Kerch Cooperation Treaty and the State Border Treaty contain no comparable language.[848]

473. In addition, in Ukraine's view, the exclusion of Part XV dispute resolution procedures must be express.[849] Ukraine argues that Article 5 of the State Border Treaty and Article 1 of the Azov/Kerch Cooperation Treaty lack the specificity to "exclude [...] further procedure" within the meaning of Article 281 of the Convention.[850]

474. Finally, Ukraine objects to the Russian Federation's characterisation of the negotiations between the Parties that took place before the commencement of this Arbitration.[851] According to Ukraine, it sought in good faith to negotiate with the Russian Federation and resolve the dispute, but that the Russian Federation "failed to provide a meaningful reply to" and "consistently ignored" Ukraine's concerns.[852] Ukraine notes that the Parties did exchange views regarding the settlement of the present dispute, but were unable to reach a common view on the procedure to be followed.[853]

C. ANALYSIS OF THE ARBITRAL TRIBUNAL

475. The question the Arbitral Tribunal needs to address is whether its jurisdiction over those claims relating to the Sea of Azov, Kerch Strait, or any adjacent sea areas, is excluded by the two treaties in light of Article 281 of the Convention. The Arbitral Tribunal notes in this regard that the Parties hold different views as to: whether Article 5 of the State Border Treaty and Article 1 of the Azov/Kerch Cooperation Treaty represent an agreement by the Parties "to seek settlement of the dispute by a peaceful means of their own choice," within the meaning of Article 281 of the Convention; whether Article 5 of the State Border Treaty and Article 1 of the Azov/Kerch Cooperation Treaty cover disputes concerning the interpretation or application of the Convention and exclude recourse to any further procedure; and whether the Parties have engaged in good faith negotiations to settle the disputes.

476. The Arbitral Tribunal first turns to the question whether Article 5 of the State Border Treaty and Article 1 of the Azov/Kerch Cooperation Treaty constitute dispute settlement clauses within the meaning of Article 281 of the Convention.

[848] Ukraine's Rejoinder, para. 141.
[849] Ukraine's Rejoinder, para. 136.
[850] Ukraine's Written Observations, para. 158.
[851] Ukraine's Written Observations, para. 162; Ukraine's Rejoinder, para. 143.
[852] Ukraine's Written Observations, para. 162; Ukraine's Rejoinder, para. 144.
[853] Jurisdiction Hearing, 11 June 2019, 130:13-22 (Gimblett).

477. The Arbitral Tribunal observes that both Parties, basing themselves on the Ukrainian and Russian language versions, respectively, have translated Article 5 of the State Border Treaty into English as "*[s]ettlement of questions* relating to the adjacent sea areas shall be effected by *agreement* between the Contracting Parties in accordance with international law."[854]

478. On the other hand, the Parties have provided slightly different English translations of Article 1 of the Azov/Kerch Cooperation Treaty. According to the Russian Federation, this provision states that the "*[s]ettlement of questions* relating to the Kerch Strait area shall be effected by *agreement* between the parties."[855] According to Ukraine, Article 1 of the Azov/Kerch Cooperation Treaty provides that "*[i]ssues* concerning the water area of the Kerch Strait shall be resolved by *agreement* between the Parties."[856]

479. The Arbitral Tribunal notes that the terms "questions" or "issues" in English, in accordance with their ordinary meaning, are not necessarily synonyms of the term "disputes." The notions of "questions" or "issues" refer, more generally, to open points of discussion regarding which there may or may not exist different views, whereas the notion of "disputes" is more specific and refers to a difference of views regarding a particular question or issue in which one or more persons or entities with opposing views on particular questions are engaged with one another. Should the Parties have intended Article 1 of the Azov/Kerch Cooperation Treaty and Article 5 of the State Border Treaty to apply to "disputes" between them, they would have used that term, as they have done in Article 4 of the Azov/Kerch Cooperation Treaty.[857]

480. Turning to the term "agreement," the Tribunal notes that the Parties have presented different views as to the precise import of the terms in the Azov/Kerch Cooperation Treaty and State Border Treaty translated as "agreement." While the Russian Federation has emphasised that the terms in the original languages may denote an agreement in the general sense of a common understanding reached, Ukraine has stressed that they may refer to a treaty in the specific sense of a formalised

---

[854] Treaty Between the Russian Federation and Ukraine on the Russian-Ukrainian State Border, done at Kiev on 28 January 2003 (without Annexes), Art. 5 (**Annex RU-19**) [emphasis added by the Arbitral Tribunal]; Treaty Between the Russian Federation and Ukraine on the Russian-Ukrainian State Border, done at Kiev on 28 January 2003 (**Annex UA-529**) [emphasis added by the Arbitral Tribunal].

[855] Treaty Between the Russian Federation and Ukraine on Cooperation in the Use of the Sea of Azov and the Kerch Strait, done at Kerch on 24 December 2003, Art. 1 (**Annex RU-20**) [emphasis added by the Arbitral Tribunal].

[856] Treaty Between the Russian Federation and Ukraine on Cooperation in the Sea of Azov and the Kerch Strait done at Kerch on 24 December 2003, Art. 1 (**Annex UA-19**) [emphasis added by the Arbitral Tribunal].

[857] *See* Treaty Between the Russian Federation and Ukraine on Cooperation in the Use of the Sea of Azov and the Kerch Strait, done at Kerch on 24 December 2003, Art. 4 (**Annex RU-20**); Treaty Between the Russian Federation and Ukraine on Cooperation in the Sea of Azov and the Kerch Strait done at Kerch on 24 December 2003, Art. 4 (**Annex UA-19**).

international agreement. Although the Parties have focused their arguments on the term "угода" in the Ukrainian version, in the Arbitral Tribunal's view, comparable considerations apply to the corresponding term "соглашение" in the Russian version.

481. As far as the Arbitral Tribunal can judge, the terms of Article 5 of the State Border Treaty and Article 1 of the Azov/Kerch Cooperation Treaty are, from a linguistic point of view, capable of sustaining both interpretations proposed by the Parties that questions/issues shall be settled by mutual agreement or through the conclusion of a treaty. In the view of the Arbitral Tribunal, however, there is no need for it to take any definitive view as to the meaning of "угода"/"соглашение" here.

482. The Arbitral Tribunal considers that the notions of "agreement" in the general sense or "treaty" in the sense of a binding instrument under international law are possible "outcomes" of negotiations or any other means of dispute settlement, such as mediation or conciliation. By contrast, dispute settlement provisions would be expected to refer to a "method" or "means" of dispute settlement. Consistently with this distinction, neither the reaching of agreement nor the conclusion of treaties is identified as a means of dispute settlement in Article 33, paragraph 1, of the Charter of the United Nations, whereas "negotiation" is specifically listed in that provision (as are mediation and conciliation).

483. Given that agreement or the conclusion of treaties cannot be regarded as a means of dispute settlement, the Arbitral Tribunal is not convinced by the argument that Article 5 of the State Border Treaty and Article 1 of the Azov/Kerch Cooperation Treaty were meant to be dispute settlement clauses. In this regard, the Arbitral Tribunal draws attention to Article 4 of the Azov/Kerch Cooperation Treaty, which the Parties agree is a dispute settlement clause.[858] The Russian Federation translates Article 4 as follows:

> Disputes between the Parties related to the interpretation and implementation of this Treaty shall be settled through consultations and negotiations, as well as other peaceful means as may be selected by the Parties.[859]

484. Ukraine's translation is broadly in line with that of the Russian Federation:

> Disputes between the Parties associated with the interpretation and application of this Treaty shall be resolved by means of consultations and negotiations, as well as other amicable means as may be selected by the Parties.[860]

---

[858] Russian Federation's Reply, para. 169; Ukraine's Rejoinder, para. 133.

[859] Treaty Between the Russian Federation and Ukraine on Cooperation in the Use of the Sea of Azov and the Kerch Strait, done at Kerch on 24 December 2003, Art. 4 (**Annex RU-20**).

[860] Treaty Between the Russian Federation and Ukraine on Cooperation in the Sea of Azov and the Kerch Strait done at Kerch on 24 December 2003, Art. 4 (**Annex UA-19**).

485. The text of this provision, employing the terms "disputes" and "consultations and negotiations," stands in stark contrast with those of Article 1 of the Azov/Kerch Cooperation Treaty and Article 5 of the State Border Treaty. Indeed, had the Parties intended Article 1 of the Azov/Kerch Cooperation Treaty and Article 5 of the State Border Treaty to be dispute settlement clauses, they would have employed the clear terms such as "disputes" or "negotiations" in the relevant provisions, as they have done in Article 4 of the Azov/Kerch Cooperation Treaty.[861]

486. In the view of the Arbitral Tribunal, the fact that Article 1 of the Azov/Kerch Cooperation Treaty is not a dispute settlement clause is also supported by the context of the provision. The existence of a dispute resolution clause in Article 4 suggests that Article 1 of the Azov/Kerch Cooperation Treaty was not intended by the Parties also to be a dispute resolution clause. Reading Article 1 as a dispute resolution provision would deprive Article 4 of the Azov/Kerch Cooperation Treaty of any meaningful legal effect.

487. Further, the negotiating history of the conclusion of the Azov/Kerch Cooperation Treaty and the State Border Treaty does not support the view that Article 1 and Article 5, respectively, of those treaties are dispute settlement clauses. The record before the Arbitral Tribunal suggests that, since Ukraine's independence, the Parties have been engaged in a long-standing discussion regarding the treatment of the Sea of Azov, the Kerch Strait and adjacent waters, and the activities within those waters.[862] The Parties held a number of meetings to discuss the content and language of

[861] Treaty Between the Russian Federation and Ukraine on Cooperation in the Use of the Sea of Azov and the Kerch Strait, done at Kerch on 24 December 2003, Art. 4 (**Annex RU-20**); Treaty Between the Russian Federation and Ukraine on Cooperation in the Sea of Azov and the Kerch Strait done at Kerch on 24 December 2003, Art. 4 (**Annex UA-19**).

[862] Draft Treaty Between Ukraine and the Russian Federation on the Legal Status of the Sea of Azov and Navigation in its Water Area, Annex to *Note Verbale* of the Ministry of Foreign Affairs of Ukraine to the Ministry of Foreign Affairs of the Russian Federation No. 12/42-994, 19 October 1995 (**Annex RU-15**).

agreements that concern the Sea of Azov and the Kerch Strait, both before[863] and after[864] the conclusion of the two treaties. Against this backdrop, the Arbitral Tribunal considers that the Parties, through Article 5 of the State Border Treaty and Article 1 of the Azov/Kerch Cooperation Treaty, sought to stipulate that a similar approach, of discussion and agreement on outstanding issues relating to the Sea of Azov, the Kerch Strait, and adjacent waters, would be taken by them in the future.

488. In the Arbitral Tribunal's view, to regard Article 1 of the Azov/Kerch Cooperation Treaty and Article 5 of the State Border Treaty as agreements to continue discussions in respect of future issues is consistent with the Joint Statement by the President of Ukraine and the President of the Russian Federation on the Sea of Azov and the Strait of Kerch, issued on 24 December 2003 (the same date as that of the Azov/Kerch Cooperation Treaty), to the effect that:

> [...] Ukrainian-Russian cooperation, including their common activity in the sphere of navigation, including its regulation and navigation and hydrographical provision, fishing, protection of the maritime environment, environmental safety, search and rescue operations

---

[863] Minutes of the Meeting of the Delegations of Ukraine and the Russian Federation to Determine the Legal Status of the Sea of Azov and the Kerch Strait and to Delimit the Continental Shelf and the Exclusive (Maritime) Economic Zone in the Black Sea, 14 August 1996 (**Annex UA-517**); Minutes of the 2nd Session of the Sub-Commission on Border Issues of the Mixed Russian-Ukrainian Commission on Cooperation, 6 May 1997 (**Annex RU-17**); Minutes of the 3rd Meeting of the Delegations of Ukraine and the Russian Federation to Determine the Legal Status of the Sea of Azov and the Kerch Strait and to Delimit the Maritime Spaces in the Black Sea, 27 April 1998 (**Annex UA-520**); Minutes of the 4th Meeting of the Delegations of Ukraine and the Russian Federation to Determine the Legal Status of the Sea of Azov and the Kerch Strait and to Delimit the Maritime Spaces in the Black Sea, 23 September 1998, p. 1 (**Annex UA-521**); Minutes of the 5th Meeting of the Delegations of Ukraine and the Russian Federation to Determine the Legal Status of the Sea of Azov and the Kerch Strait and to Delimit the Maritime Spaces in the Black Sea, 26 March 1999, p. 2 (**Annex UA-522**); Minutes of the 6th Meeting of the Delegations of the Russian Federation and Ukraine to Determine the Legal Status of the Sea of Azov and the Kerch Strait and to Delimit the Maritime Areas in the Black Sea, 28 January 2000 (**Annex RU-63**); Minutes of the 7th Meeting of the Delegations of the Russian Federation and Ukraine to Determine the Legal Status of the Sea of Azov and the Kerch Strait and to Delimit the Maritime Areas in the Black Sea, 12 May 2000 (**Annex RU-65**); Minutes of the 12th Meeting of the Delegations of the Russian Federation and Ukraine to Determine the Legal Status of the Sea of Azov and the Kerch Strait and to Delimit the Maritime Areas in the Black Sea, 19 April 2001 (**Annex RU-67**); Minutes of the 13th Meeting of the Delegations of the Russian Federation and Ukraine to Determine the Legal Status of the Sea of Azov and the Kerch Strait and to Delimit the Maritime Areas in the Black Sea, 9 October 2001 (**Annex RU-73**); Minutes of the 15th Meeting of the Delegations of Ukraine and the Russian Federation on the Issues of Delimitation (the Position of the Ukrainian Side) and Determination of Legal Status (the Position of the Russian Side) of the Sea of Azov and the Kerch Strait, 16-17 December 2002, pp. 1-2, 16-17 (**Annex UA-514**).

[864] Minutes of the 17th Meeting of the Delegations of the Russian Federation and Ukraine to Discuss Issues Pertaining to the Sea of Azov and Kerch Strait, 29-30 January 2004 (**Annex UA-531**); Minutes of a Meeting of the Working Group on the Issues of Environmental Protection in the Framework of the 18th Round of the Ukrainian-Russian Negotiations on the Issues of Determination of the Legal Status of the Azov Sea and the Kerch Strait, 25-26 March 2004 (**Annex UA-532**); Minutes of the 5th Meeting of the Sub-Commission on the Issues of the Azov-Kerch Settlement of the Sub-Committee for International Cooperation of the Ukrainian-Russian Interstate Commission and the Thirty-Sixth Meeting of the Delegation of Ukraine on Delimitation of the Azov and Black Seas, as well as the Kerch Strait, and the Delegation of the Russian Federation on Delimitation of the Azov and Black Seas, as well as Settlement of Issues Related to the Kerch Strait, 2-3 March 2011 (**Annex UA-533**).

> in the Sea of Azov and the Strait of Kerch are guaranteed by *the implementation of existing agreements and the signing of new agreements in the relevant cases*.[865]

489. The Arbitral Tribunal accordingly considers that Article 5 of the State Border Treaty and Article 1 of the Azov/Kerch Cooperation Treaty do not constitute dispute settlement clauses. In light of this finding, it is not necessary for the Arbitral Tribunal, in assessing whether its jurisdiction is excluded pursuant to Article 281 of the Convention, to examine the further questions of whether Article 5 of the State Border Treaty and Article 1 of the Azov/Kerch Cooperation Treaty cover disputes concerning the interpretation or application of the Convention and exclude recourse to dispute settlement under Part XV of the Convention or whether the Parties in good faith pursued negotiations.

490. For the sake of completeness, the Arbitral Tribunal would merely add that its jurisdiction is not excluded by the dispute resolution provision in Article 4 of the Azov/Kerch Cooperation Treaty. The scope of Article 4 is limited to disputes that arise under the Azov/Kerch Cooperation Treaty. In any event, Article 4 states that any dispute associated with the interpretation and application of the Azov/Kerch Cooperation Treaty may be settled by "any other peaceful/amicable means as may be selected by the Parties" and, therefore, does not preclude the settlement of a dispute concerning the Azov/Kerch Cooperation Treaty by different means, such as arbitration pursuant to Annex VII to the Convention.

491. For these reasons, the Arbitral Tribunal rejects the Russian Federation's objection that it has no jurisdiction pursuant to Article 281 of the Convention.

---

[865] Joint Statement by the President of Ukraine and the President of the Russian Federation on the Sea of Azov and the Strait of Kerch on 24 December 2003 in Law of the Sea Bulletin, Vol. 54 p. 131 (2004) (**Annex UA-530**) [emphasis added by the Arbitral Tribunal].

X. DISPOSITIF

492. For these reasons, the Arbitral Tribunal unanimously

a) *Upholds* the Russian Federation's objection that the Arbitral Tribunal has no jurisdiction over Ukraine's claims, to the extent that a ruling of the Arbitral Tribunal on the merits of Ukraine's claims necessarily requires it to decide, directly or implicitly, on the sovereignty of either Party over Crimea;

b) *Finds* that the Russian Federation's objection that the Arbitral Tribunal has no jurisdiction over Ukraine's claims concerning activities in the Sea of Azov and in the Kerch Strait does not possess an exclusively preliminary character, and accordingly *decides* to reserve this matter for consideration and decision in the proceedings on the merits;

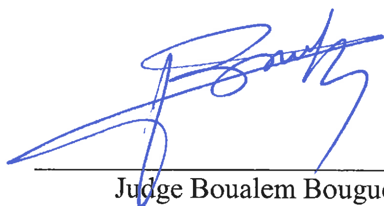
c) *Rejects* the other objections of the Russian Federation to its jurisdiction;

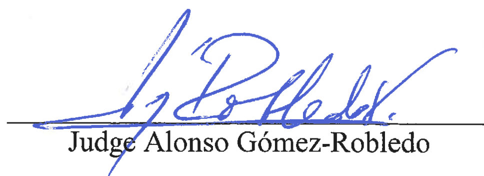
d) *Requests* Ukraine to file a revised version of its Memorial, which shall take full account of the scope of, and limits to, the Arbitral Tribunal's jurisdiction as determined in the present Award;

e) *Decides* that each Party shall bear its own costs.

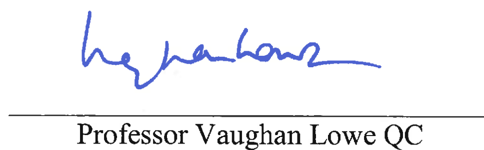
Done at the Peace Palace, The Hague, the Netherlands, this twenty-first day of February, two thousand and twenty:

For the Arbitral Tribunal:


Judge Boualem Bouguetaia

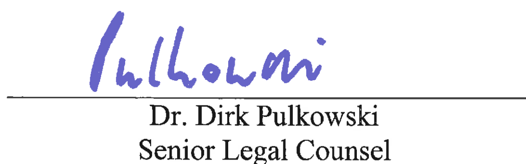

Judge Alonso Gómez-Robledo

Judge Vladimir Golitsyn


Professor Vaughan Lowe QC

Judge Jin-Hyun Paik
President

For the Registry:


Dr. Dirk Pulkowski
Senior Legal Counsel

Annex 73

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

ALLEGED VIOLATIONS OF SOVEREIGN RIGHTS AND MARITIME SPACES IN THE CARIBBEAN SEA

(NICARAGUA *v.* COLOMBIA)

JUDGMENT OF 21 APRIL 2022

2022

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

VIOLATIONS ALLÉGUÉES DE DROITS SOUVERAINS ET D'ESPACES MARITIMES DANS LA MER DES CARAÏBES

(NICARAGUA c. COLOMBIE)

ARRÊT DU 21 AVRIL 2022

Official citation:
Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. *Colombia), Judgment, I.C.J. Reports 2022*, p. 266

Mode officiel de citation :
Violations alléguées de droits souverains et d'espaces maritimes dans la mer des Caraïbes (Nicaragua c. Colombie), arrêt, C.I.J. Recueil 2022, p. 266

ISSN 0074-4441
ISBN 978-92-1-003906-2
e-ISBN 978-92-1-002567-6

Sales number
N° de vente : **1243**

© 2023 ICJ/CIJ, United Nations/Nations Unies
All rights reserved/Tous droits réservés

PRINTED IN FRANCE/IMPRIMÉ EN FRANCE

21 APRIL 2022

JUDGMENT

ALLEGED VIOLATIONS OF SOVEREIGN RIGHTS AND MARITIME SPACES IN THE CARIBBEAN SEA

(NICARAGUA *v.* COLOMBIA)

VIOLATIONS ALLÉGUÉES DE DROITS SOUVERAINS ET D'ESPACES MARITIMES DANS LA MER DES CARAÏBES

(NICARAGUA c. COLOMBIE)

21 AVRIL 2022

ARRÊT

TABLE OF CONTENTS

	Paragraphs
Chronology of the Procedure	1-24
I. General Background	25-32
II. Scope of the Jurisdiction *Ratione Temporis* of the Court	33-47
III. Alleged Violations by Colombia of Nicaragua's Rights in Its Maritime Zones	48-199
A. Colombia's contested activities in Nicaragua's maritime zone	49-144
1. Incidents alleged by Nicaragua in the south-western Caribbean Sea	49-101
2. Colombia's alleged authorization of fishing activities and marine scientific research in Nicaragua's exclusive economic zone	102-134
3. Colombia's alleged oil exploration licensing	135-143
4. Conclusions	144
B. Colombia's "integral contiguous zone"	145-194
1. The applicable rules on the contiguous zone	147-155
2. Effect of the 2012 Judgment and Colombia's right to establish a contiguous zone	156-163
3. The compatibility of Colombia's "integral contiguous zone" with customary international law	164-186
4. Conclusion	187-194
C. Conclusions and remedies	195-199
IV. Counter-Claims Made by Colombia	200-260
A. Nicaragua's alleged infringement of the artisanal fishing rights of the inhabitants of the San Andrés Archipelago to access and exploit the traditional banks	201-233
B. Alleged violation of Colombia's sovereign rights and maritime spaces by Nicaragua's use of straight baseline	234-260
Operative Clause	261

INTERNATIONAL COURT OF JUSTICE

YEAR 2022

2022
21 April
General List
No. 155

21 April 2022

ALLEGED VIOLATIONS OF SOVEREIGN RIGHTS AND MARITIME SPACES IN THE CARIBBEAN SEA

(NICARAGUA *v.* COLOMBIA)

General background — Geography — The Court's 2012 Judgment in Territorial and Maritime Dispute (Nicaragua *v.* Colombia) *case delimited the Parties' continental shelf and exclusive economic zone up to 200-nautical-mile limit — Eastern endpoints could not be determined as Nicaragua had not notified location of baselines — Composition of San Andrés Archipelago.*

*

Scope of jurisdiction ratione temporis *of the Court — Whether jurisdiction of the Court extends to claims based on incidents allegedly occurring after 27 November 2013, when Pact of Bogotá ceased to be in force for Colombia — Claims relating to incidents allegedly occurring after 27 November 2013 arose directly out of the question which is the subject-matter of Application — Alleged incidents on which these claims are based connected to those already found to fall within the Court's jurisdiction — Nature of dispute between the Parties not transformed — The Court has jurisdiction* ratione temporis *over Nicaragua's claims relating to those events.*

* *

Alleged violations by Colombia of Nicaragua's rights in its maritime zones as delimited by the Court in its 2012 Judgment.

Nicaragua's claims — Colombia's alleged breach of its international obligation to respect Nicaragua's zones as delimited in 2012 Judgment — Colombia allegedly engaged in acts violating Nicaragua's sovereign rights and jurisdiction in its exclusive economic zone — Alleged interference by Colombia with Nicaraguan-flagged or Nicaraguan-licensed fishing and marine scientific research vessels — Alleged obstruction by Colombia of Nicaraguan Navy in exercise of its mission — Colom-

bia's alleged authorization of fishing activities and marine scientific research in Nicaragua's exclusive economic zone — Alleged offering and awarding by Colombia of hydrocarbon blocks — Colombian Presidential Decree 1946 of 9 September 2013 establishing "integral contiguous zone" allegedly not in conformity with customary international law.

Nicaragua is a party to UNCLOS and Colombia is not — Applicable law is customary international law — Customary rules on rights and duties in exclusive economic zone of coastal States and other States reflected in Articles 56, 58, 61, 62 and 73 of UNCLOS.

Questions of proof — Party alleging a fact in support of its claims must prove existence of that fact — Evidentiary materials prepared for purposes of a case and evidence from secondary sources to be treated with caution — Evidence from contemporaneous and direct sources more probative — Particular attention to evidence acknowledging facts or conduct unfavourable to the State represented by person making them.

Incidents alleged by Nicaragua in south-western Caribbean Sea — Assessment of evidence presented by the Parties.

Failure of Nicaragua to discharge its burden of proof with respect to certain alleged incidents — Examination of rest of alleged incidents — Colombian naval vessels purported to exercise enforcement jurisdiction in Nicaragua's exclusive economic zone — Conduct of those vessels carried out to give effect to a policy whereby Colombia sought to continue to control fishing activities and conservation of resources in areas within Nicaragua's exclusive economic zone — Contention by Colombia that its actions were justified as an exercise of its freedoms of navigation and overflight, and on basis of its alleged international obligation to protect and preserve marine environment of south-western Caribbean Sea — Freedoms of navigation and overflight do not include rights relating to exploration, exploitation, conservation and management of the natural resources of the maritime zone, nor jurisdiction to enforce conservation measures — In the exclusive economic zone, such rights and jurisdiction are reserved for coastal State — Coastal State has jurisdiction in its exclusive economic zone to conserve living resources and protect and preserve marine environment — Colombia's conduct in contravention of customary rules of international law as reflected in Articles 56, 58 and 73 of UNCLOS — Finding that Colombia has violated its international obligation to respect Nicaragua's sovereign rights and jurisdiction in the latter's exclusive economic zone.

Alleged authorization by Colombia of fishing activities and marine scientific research in Nicaragua's exclusive economic zone — Resolutions of General Maritime Directorate of Ministry of National Defence of Colombia related to industrial fishing in the San Andrés Archipelago — Not possible to determine geographical scope of these resolutions — Two resolutions by Governor of San Andrés Archipelago define fishing zone as including areas within Nicaragua's exclusive economic zone — Colombia continues to assert right to authorize fishing activities in Nicaragua's exclusive economic zone — Examination of alleged incidents at sea — Fishing vessels allegedly authorized by Colombia engaged in fishing activities in Nicaragua's exclusive economic zone — Fishing activities conducted under protection of Colombian frigates — Insufficient evidence that Colombia authorized marine scientific research in Nicaragua's exclusive economic zone — Finding

that Colombia has violated Nicaragua's sovereign rights and jurisdiction in its exclusive economic zone by authorizing fishing activities in that zone.

Claim made by Nicaragua that Colombia offered and awarded hydrocarbon blocks encompassing parts of Nicaragua's exclusive economic zone — Admissibility of claim — Hydrocarbon blocks offered and awarded by Colombia before maritime boundary between the Parties delimited — Contracts in question not signed — Allegation that Colombia violated Nicaragua's sovereign rights by issuing oil exploration licences rejected.

Colombia's Presidential Decree 1946 establishing "integral contiguous zone" around Colombian islands in western Caribbean Sea — Article 33 of UNCLOS reflects customary international law on contiguous zone — Powers in contiguous zone confined to customs, fiscal, immigration and sanitary matters — Maximum breadth of contiguous zone limited to 24 nautical miles — 2012 Judgment does not delimit contiguous zone of either Party — Contiguous zone and exclusive economic zone governed by two distinct régimes — Establishment by one State of contiguous zone not incompatible with existence of exclusive economic zone of another State in same area — Powers that State may exercise in contiguous zone are different from rights and duties that coastal State has in exclusive economic zone — Colombia has right to establish contiguous zone around San Andrés Archipelago in accordance with customary international law.

Question whether Colombia's "integral contiguous zone" is compatible with customary international law — Breadth of "integral contiguous zone" exceeds 24-nautical-mile limit — Powers asserted by Colombia in "integral contiguous zone", such as those concerning security, "national maritime interests" and preservation of the environment, exceed those permitted under customary international law — Reference to power to preserve cultural heritage in Article 5 of Presidential Decree 1946 — Article 303, paragraph 2, of UNCLOS reflects customary international law — Article 5 of Presidential Decree 1946 does not violate customary international law in so far as it relates to objects of archaeological and historical nature.

*

Conclusions and remedies.

Breach by Colombia of its international obligation to respect Nicaragua's sovereign rights and jurisdiction in its exclusive economic zone — Colombia's international responsibility engaged — Colombia to immediately cease its wrongful conduct.

"Integral contiguous zone" established by Colombia's Presidential Decree 1946 not in conformity with customary international law with respect to its breadth and powers asserted therein — In maritime areas where it overlaps with Nicaragua's exclusive economic zone, "integral contiguous zone" infringes upon Nicaragua's sovereign rights and jurisdiction in exclusive economic zone — Colombia under obligation, by means of its own choosing, to bring provisions of Presidential Decree 1946 into conformity with customary international law in so far as they relate to Nicaragua's maritime areas.

Nicaragua's request to order Colombia to pay compensation rejected.

No legal basis to grant Nicaragua's request that the Court remain seised of the case.

* *

Counter-claims made by Colombia.

Alleged infringement by Nicaragua of artisanal fishing rights of inhabitants of San Andrés Archipelago, in particular the Raizales — Applicable law is customary international law as reflected in relevant provisions of Part V of UNCLOS — Question whether inhabitants of San Andrés Archipelago have historically enjoyed artisanal fishing rights in areas now falling within Nicaragua's exclusive economic zone — Affidavits from fishermen from San Andrés Archipelago — Indications that some fishing activities have taken place in areas that now fall within Nicaragua's exclusive economic zone — Period during which such activities took place and whether there was a constant practice not established with certainty — Colombia's claim regarding long-standing practice of artisanal fishing not sufficiently established — Previous positions adopted by or on behalf of Colombia undermine Colombia's claim — Statements of President of Nicaragua do not establish acceptance or recognition by Nicaragua that artisanal fishermen of San Andrés Archipelago have right to fish in Nicaragua's maritime zones without prior authorization.

Colombia has failed to establish that inhabitants of the San Andrés Archipelago enjoy artisanal fishing rights in waters now located in Nicaragua's exclusive economic zone — Counter-claim dismissed.

*

Alleged violation of Colombia's sovereign rights and maritime spaces by Nicaragua's use of straight baselines — Nicaragua's Decree No. 33-2013 establishing a system of straight baselines along Caribbean coast — Article 7 of UNCLOS reflects customary international law — Establishment of straight baselines by coastal State falls to be assessed by international rules, to be applied restrictively.

Two alternative geographical preconditions for establishment of straight baselines: coastline "deeply indented and cut into" or existence of "fringe of islands" along coast in its immediate vicinity — Straight baselines drawn in southernmost part of Nicaragua's coast — Coastline not "deeply indented and cut into" — Straight baselines drawn from Cabo Gracias a Dios on mainland to Great Corn Island — Question whether Nicaragua's offshore islands constitute fringe of islands along coast in its immediate vicinity — Number of Nicaragua's islands relative to length of coast not sufficient to constitute fringe of islands — Nicaraguan islands not sufficiently close to each other to form "cluster" along coast — Islands do not have masking effect on mainland coast — Straight baselines convert into internal waters certain areas which otherwise would have been part of Nicaragua's territorial sea or exclusive economic zone and convert into territorial sea certain areas which would have been part of Nicaragua's exclusive economic zone — Straight baselines established by Decree No. 33-2013 do not conform with

customary international law — Declaratory judgment to that effect is appropriate remedy.

JUDGMENT

Present: *President* DONOGHUE; *Vice-President* GEVORGIAN; *Judges* TOMKA, ABRAHAM, BENNOUNA, YUSUF, XUE, SEBUTINDE, BHANDARI, ROBINSON, SALAM, IWASAWA, NOLTE; *Judges* ad hoc DAUDET, MCRAE; *Registrar* GAUTIER.

In the case concerning alleged violations of sovereign rights and maritime spaces in the Caribbean Sea,

between

the Republic of Nicaragua,

represented by

H.E. Mr. Carlos José Argüello Gómez, Ambassador of the Republic of Nicaragua to the Kingdom of the Netherlands,

as Agent and Counsel;

Mr. Alex Oude Elferink, Director, Netherlands Institute for the Law of the Sea, Professor of International Law of the Sea at Utrecht University,
Mr. Vaughan Lowe, QC, Emeritus Chichele Professor of Public International Law, University of Oxford, member of the Institut de droit international, member of the Bar of England and Wales,
Mr. Lawrence H. Martin, Attorney at Law, Foley Hoag LLP, member of the Bars of the United States Supreme Court, the District of Columbia and the Commonwealth of Massachusetts,
Mr. Alain Pellet, Emeritus Professor of the University Paris Nanterre, former Chairman of the International Law Commission, President of the Institut de droit international,
Mr. Paul S. Reichler, Attorney at Law, Foley Hoag LLP, member of the Bars of the United States Supreme Court and the District of Columbia,

as Counsel and Advocates;

Ms Claudia Loza Obregon, Legal Adviser, Ministry of Foreign Affairs of Nicaragua,
Ms Tessa Barsac, Consultant in International Law, Master (University Paris Nanterre), LLM (Leiden University),

as Assistant Counsel;

Mr. Robin Cleverly, MA, DPhil, CGeol, FGS, Law of the Sea Consultant, Marbdy Consulting Ltd,

as Scientific and Technical Adviser;

Ms Sherly Noguera de Argüello, MBA,

as Administrator,

and

the Republic of Colombia,

represented by

H.E. Mr. Carlos Gustavo Arrieta Padilla, former Judge of the Council of State of Colombia, former Attorney General of Colombia and former Ambassador of Colombia to the Kingdom of the Netherlands,

as Agent;

H.E. Mr. Manuel José Cepeda Espinosa, former President of the Constitutional Court of Colombia, former Permanent Delegate of Colombia to UNESCO and former Ambassador of Colombia to the Swiss Confederation,

as Co-Agent;

H.E. Ms Marta Lucía Ramírez Blanco, Vice-President and Minister for Foreign Affairs of the Republic of Colombia,

H.E. Mr. Everth Hawkins Sjogreen, Governor of San Andrés, Providencia and Santa Catalina, Colombia,

as National Authorities;

Mr. W. Michael Reisman, McDougal Professor of International Law at Yale University, member of the Institut de droit international,

Mr. Rodman R. Bundy, former avocat à la cour d'appel de Paris, member of the Bar of the State of New York, partner at Squire Patton Boggs LLP,

Sir Michael Wood, KCMG, member of the International Law Commission, member of the Bar of England and Wales,

Mr. Eduardo Valencia-Ospina, former Registrar and Deputy-Registrar of the International Court of Justice, member and former Special Rapporteur and Chairman of the International Law Commission, former President of the Latin American Society of International Law,

Mr. Jean-Marc Thouvenin, Professor at the University Paris Nanterre, Secretary-General of the Hague Academy of International Law, associate member of the Institut de droit international, member of the Paris Bar, Sygna Partners,

Ms Laurence Boisson de Chazournes, Professor of International Law and International Organization at the University of Geneva, member of the Institut de droit international,

H.E. Mr. Kent Francis James, former Ambassador of Colombia to Belize, former Ambassador of Colombia to Jamaica,

as Counsel and Advocates;

Mr. Andrés Villegas Jaramillo, LLM, Co-ordinator, Group of Affairs before the International Court of Justice at the Ministry of Foreign Affairs of Colombia, member of the Legal Sub-Commission of the Caribbean Sea Commission, Association of Caribbean States,

Mr. Makane Moïse Mbengue, Professor at the University of Geneva, Director of the Department of Public International Law and International Organization, associate member of the Institut de droit international,

Mr. Luke Vidal, member of the Paris Bar, Sygna Partners,
Mr. Eran Sthoeger, Esq., member of the Bar of the State of New York, Adjunct Professor of International Law at Brooklyn Law School and Seton Hall Law School,
Mr. Alvin Yap, Advocate and Solicitor of the Supreme Court of Singapore, Squire Patton Boggs LLP,
Mr. Lorenzo Palestini, PhD, Lecturer at the Graduate Institute of International and Development Studies and at the University of Geneva,

as Counsel;

H.E. Mr. Juan José Quintana Aranguren, Head of Multilateral Affairs, former Ambassador of Colombia to the Kingdom of the Netherlands,
H.E. Mr. Fernando Antonio Grillo Rubiano, Ambassador of the Republic of Colombia to the Kingdom of the Netherlands and Permanent Representative of Colombia to the Organisation for the Prohibition of Chemical Weapons,
Ms Jenny Sharyne Bowie Wilches, Second Secretary, Embassy of Colombia in the Netherlands,
Ms Viviana Andrea Medina Cruz, Second Secretary, Embassy of Colombia in the Netherlands,
Mr. Sebastián Correa Cruz, Third Secretary, Embassy of Colombia in the Netherlands,
Mr. Raúl Alfonso Simancas Gómez, Third Secretary, Group of Affairs before the International Court of Justice,

as representatives of the Ministry of Foreign Affairs of Colombia;

Rear Admiral Ernesto Segovia Forero, Chief of Naval Operations,
CN Hermann León, Delegate of Colombia to the International Maritime Organization,
CN William Pedroza, National Navy of Colombia, Director of Maritime and Fluvial Interests Office,

as representatives of the Navy of Colombia;

Mr. Scott Edmonds, Cartographer, Director of International Mapping,
Ms Victoria Taylor, Cartographer, International Mapping,

as Technical Advisers;

Mr. Gershon Hasin, LLM, JSD, Yale Law School,

as Legal Assistant;

Mr. Mark Taylor Archbold, Consultant for the National Unit of Disaster Risk Management,
Mr. Joseph Richard Jessie Martinez, Consultant for the National Unit of Disaster Risk Management,

as Advisers,

THE COURT,

composed as above,

after deliberation,

delivers the following Judgment:

1. On 26 November 2013, the Government of the Republic of Nicaragua (hereinafter "Nicaragua") filed in the Registry of the Court an Application insti-

tuting proceedings against the Republic of Colombia (hereinafter "Colombia") concerning a dispute in relation to "the violations of Nicaragua's sovereign rights and maritime zones declared by the Court's Judgment of 19 November 2012 [in the case concerning *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*] and the threat of the use of force by Colombia in order to implement these violations".

2. In its Application, Nicaragua sought to found the jurisdiction of the Court on Article XXXI of the American Treaty on Pacific Settlement signed on 30 April 1948, officially designated, according to Article LX thereof, as the "Pact of Bogotá" (hereinafter referred to as such).

3. The Registrar immediately communicated the Application to the Colombian Government, in accordance with Article 40, paragraph 2, of the Statute of the Court. He also notified the Secretary-General of the United Nations of the filing of the Application by Nicaragua.

4. Pursuant to Article 40, paragraph 3, of the Statute of the Court, the Registrar subsequently notified the Members of the United Nations, through the Secretary-General, of the filing of the Application, by transmission of the printed bilingual text.

5. Since the Court included upon the Bench no judge of the nationality of either Party, each Party proceeded to exercise the right conferred upon it by Article 31, paragraph 3, of the Statute of the Court to choose a judge *ad hoc* to sit in the case. Nicaragua first chose Mr. Gilbert Guillaume, who resigned on 8 September 2015, and subsequently Mr. Yves Daudet. Colombia first chose Mr. David Caron and subsequently, following the death of Mr. Caron, Mr. Donald McRae.

6. By an Order of 3 February 2014, the Court fixed 3 October 2014 and 3 June 2015 as the respective time-limits for the filing of a Memorial by Nicaragua and a Counter-Memorial by Colombia. Nicaragua filed its Memorial within the time-limit thus fixed.

7. On 19 December 2014, within the time-limit prescribed by Article 79, paragraph 1, of the Rules of Court of 14 April 1978 as amended on 1 February 2001, Colombia raised preliminary objections to the jurisdiction of the Court. Consequently, by an Order of 19 December 2014, the President noted that, by virtue of Article 79, paragraph 5, of the Rules of Court of 14 April 1978 as amended on 1 February 2001, the proceedings on the merits were suspended and, taking account of Practice Direction V, fixed 20 April 2015 as the time-limit for the presentation by Nicaragua of a written statement of its observations and submissions on the preliminary objections raised by Colombia. Nicaragua filed its statement within the prescribed time-limit.

8. Pursuant to the instructions of the Court under Article 43, paragraph 1, of the Rules of Court, the Registrar addressed to States parties to the Pact of Bogotá the notification provided for in Article 63, paragraph 1, of the Statute of the Court. In accordance with the provisions of Article 69, paragraph 3, of the Rules of Court, the Registrar also addressed to the Organization of American States (hereinafter the "OAS") the notification provided for in Article 34, paragraph 3, of the Statute of the Court and, as provided for in Article 69, paragraph 3, of the Rules of Court, asked that Organization whether or not it intended to furnish observations in writing. The Registrar further stated that, in view of the fact that the current phase of the proceedings related solely to the question of jurisdiction, any written observations should be limited to that question. By letter dated 16 June 2015, the Secretary-General of the OAS indicated that the Organization did not intend to submit any such observations.

9. Referring to Article 53, paragraph 1, of the Rules of Court, the Government of the Republic of Chile (hereinafter "Chile") asked to be furnished with copies of the pleadings and documents annexed in the case. Having ascertained the views of the Parties in accordance with that same provision, the President of the Court decided to grant that request. The Registrar duly communicated that decision to the Government of Chile and to the Parties. Copies of Nicaragua's Application and Memorial and of Colombia's preliminary objections were therefore communicated to Chile. A copy of Nicaragua's written statement of its observations and submissions on the said preliminary objections was also subsequently transmitted to Chile.

10. Pursuant to the same provision of the Rules, the Government of the Republic of Panama (hereinafter "Panama") also asked to be furnished with copies of the pleadings and documents annexed in the case. Taking into account the views of the Parties, the Court decided that copies of the preliminary objections raised by Colombia and of Nicaragua's written statement of its observations and submissions on those objections would be made available to the Government of Panama. The Court decided, however, that it would not be appropriate to furnish Panama with a copy of Nicaragua's Memorial. The Registrar duly communicated that decision to the Government of Panama and to the Parties.

11. Public hearings on the preliminary objections raised by Colombia were held from 28 September to 2 October 2015. In its Judgment of 17 March 2016 (hereinafter the "2016 Judgment"), the Court found that it had jurisdiction, on the basis of Article XXXI of the Pact of Bogotá, to entertain the dispute between Nicaragua and Colombia regarding the alleged violations by Colombia of Nicaragua's rights in the maritime zones which, according to Nicaragua, the Court declared in its aforementioned Judgment of 19 November 2012 appertain to Nicaragua. The Court upheld a preliminary objection raised by Colombia in so far as it concerned the existence of a dispute regarding alleged violations by Colombia of its obligation not to use force or threaten to use force.

12. By an Order of 17 March 2016, the Court fixed 17 November 2016 as the new time-limit for the filing of the Counter-Memorial of Colombia; that pleading was filed within the time-limit thus prescribed. In Part III of its Counter-Memorial, Colombia, making reference to Article 80 of the Rules of Court, submitted four counter-claims.

13. Referring to Article 53, paragraph 1, of the Rules of Court, the Government of Panama asked to be furnished with copies of the pleadings and documents annexed in the case on the merits. Having ascertained the views of the Parties in accordance with the same provision, the President of the Court granted that request. However, further to a specific request received from the Agent of Colombia, the President decided that the copies of the Counter-Memorial being furnished would not include Annexes 28 to 61, which Colombia claimed were "classified as reserved for reasons of national security" under its domestic legislation. The Registrar duly communicated these decisions to the Government of Panama and to the Parties. A copy of Colombia's Counter-Memorial, not including Annexes 28 to 61, was also made available to the Government of Chile (see paragraph 9 above).

14. At a meeting held by the President of the Court with the representatives of the Parties on 19 January 2017, Nicaragua indicated that it considered the counter-claims contained in the Counter-Memorial of Colombia to be inadmissible. By letters dated 20 January 2017, the Registrar informed the Parties that

the Court had decided that the Government of Nicaragua should specify in writing, by 20 April 2017 at the latest, the legal grounds on which it relied in maintaining that the Respondent's counter-claims were inadmissible, and that the Government of Colombia should present its own views on the question in writing, by 20 July 2017 at the latest. Nicaragua and Colombia submitted their written observations on the admissibility of Colombia's counter-claims within the time-limits thus fixed.

15. In its Order of 15 November 2017, the Court found that the first two counter-claims submitted by Colombia were inadmissible as such and did not form part of the current proceedings, and that the third and fourth counter-claims submitted by Colombia were admissible as such and did form part of the current proceedings. In its third counter-claim, Colombia asserts that Nicaragua has "failed to respect the traditional and historic fishing rights of the inhabitants of the San Andrés Archipelago, including the indigenous Raizal people, in the waters to which they are entitled to said rights". The fourth counter-claim relates to the adoption by Nicaragua of Decree No. 33-2013 of 19 August 2013 (hereinafter "Decree 33"), which, according to Colombia, established straight baselines that are contrary to international law and violate Colombia's maritime rights and spaces. By the same Order, the Court directed Nicaragua to submit a Reply and Colombia to submit a Rejoinder relating to the claims of both Parties in the current proceedings, and fixed 15 May and 15 November 2018 as the respective time-limits for the filing of those pleadings. The Reply of Nicaragua and the Rejoinder of Colombia were filed within the time-limits thus fixed.

16. By an Order dated 4 December 2018, the Court authorized the submission by Nicaragua of an additional pleading relating solely to the counter-claims submitted by Colombia and fixed 4 March 2019 as the time-limit for the filing of that written pleading. The additional pleading was filed by Nicaragua within the prescribed time-limit.

17. By letter (with 19 annexes) dated 23 September 2019, the Agent of Nicaragua, alleging various "incidents involving the Colombian navy that took place in Nicaraguan waters", requested, on behalf of his Government, the authorization of the Court, pursuant to Article 56 of its Rules, for the annexed documentation to "be included in the formal record of the case". In accordance with Article 56, paragraph 1, of the Rules of Court, copies of the above-mentioned documents were communicated to the other Party, which was requested to inform the Court of any observations that it might wish to make with regard to the production of those documents. By letter dated 3 October 2019, the Agent of Colombia informed the Court that his Government "d[id] not consent to the request by Nicaragua" to produce 19 new documents, and provided the reasons why his Government considered that the request did not meet the requirements under either Article 56 of the Rules of Court or Practice Direction IX, paragraph 3. On 15 October 2019, the Court authorized the production of the above-mentioned documents by Nicaragua and gave Colombia the opportunity to comment, by 16 December 2019, on the documents thus produced by Nicaragua and to submit documents in support of its comments. Colombia transmitted to the Court its comments on the new documents produced by Nicaragua, as well as documents and audio-visual material in support of those comments, within the time-limit thus fixed.

18. By letter (with four annexes) dated 30 July 2021, the Agent of Nicaragua requested, on behalf of his Government, the authorization of the Court, pursu-

ant to Article 56 of its Rules, for the annexed documentation to "be added to the formal record of the case". In accordance with Article 56, paragraph 1, of the Rules of Court, copies of the above-mentioned documents were communicated to the other Party, which was requested to inform the Court of any observations that it might wish to make with regard to the production of those documents. By letter dated 16 August 2021, the Co-Agent of Colombia stated that his Government "object[ed] to their production and request[ed] the Court to deny Nicaragua's request", and provided the reasons why his Government considered that the request did not meet the requirements under either Article 56 of the Rules of Court or Practice Direction IX, paragraphs 1, 2 and 3. By a letter dated 17 August 2021, the Agent of Nicaragua submitted comments of his Government on Colombia's observations. By letter dated 18 August 2021, the Co-Agent of Colombia provided further observations of his Government on Nicaragua's request. On 1 September 2021, the Court authorized the production of two of the four new documents and gave Colombia the opportunity to comment, by 9 September 2021, on the documents thus produced by Nicaragua and to submit documents in support of its comments. Colombia transmitted to the Court its comments on the new documents produced by Nicaragua, as well as documents in support of those comments, within the time-limit thus fixed.

19. Pursuant to Article 53, paragraph 2, of its Rules, the Court, after ascertaining the views of the Parties, decided that copies of the written pleadings and documents annexed would be made accessible to the public, with the exception of certain annexes to, and figures included in, Colombia's written pleadings. In particular, the Court acceded to Colombia's request that these materials not be made accessible to the public on the basis that, under Colombian legislation, they are classified as secret or reserved for reasons of national security. The Parties were informed that, while, during the hearings, they were free to refer to the titles of these confidential documents as they appeared in the list of annexes, they were not to read out quotations from them nor display slides showing all or part of them. With the exception of the above-mentioned confidential materials, and in accordance with the Court's practice, all pleadings and documents annexed were placed on the Court's website.

20. Public hearings were held on 20, 22, 24, 27 and 29 September and on 1 October 2021. The oral proceedings were conducted in a hybrid format, in accordance with Article 59, paragraph 2, of the Rules of Court and on the basis of the Court's Guidelines for the parties on the organization of hearings by video link, adopted on 13 July 2020 and communicated to the Parties on 21 July 2021. During the oral proceedings, a number of judges were present in the Great Hall of Justice, while others joined the proceedings via video link, allowing them to view and hear the speaker and see any demonstrative exhibits displayed. Each Party was permitted to have up to four representatives present in the Great Hall of Justice and up to five other representatives in an additional room in the Peace Palace equipped with the necessary facilities to follow the proceedings remotely. The remaining members of each Party's delegation were given the opportunity to participate via video link from other locations of their choice.

21. During the above-mentioned hearings, the Court heard the oral arguments and replies of:

For Nicaragua: H.E. Mr. Carlos José Argüello Gómez,
Mr. Alain Pellet,
Mr. Paul Reichler,
Mr. Vaughan Lowe,
Mr. Lawrence Martin,
Mr. Alex Oude Elferink.

For Colombia: H.E. Mr. Manuel José Cepeda Espinosa,
H.E. Mr. Kent Francis James,
Sir Michael Wood,
Ms Laurence Boisson de Chazournes,
Mr. Rodman Bundy,
Mr. Michael Reisman,
Mr. Eduardo Valencia-Ospina,
Mr. Jean-Marc Thouvenin,
H.E. Mr. Carlos Gustavo Arrieta Padilla.

*

22. In the Application, the following claims were made by Nicaragua:

"On the basis of the foregoing statement of facts and law, Nicaragua, while reserving the right to supplement, amend or modify this Application, requests the Court to adjudge and declare that Colombia is in breach of:

— its obligation not to use or threaten to use force under Article 2 (4) of the UN Charter and international customary law;

— its obligation not to violate Nicaragua's maritime zones as delimited in paragraph 251 of the ICJ Judgment of 19 November 2012 as well as Nicaragua's sovereign rights and jurisdiction in these zones;

— its obligation not to violate Nicaragua's rights under customary international law as reflected in Parts V and VI of UNCLOS;

— and that, consequently, Colombia is bound to comply with the Judgment of 19 November 2012, wipe out the legal and material consequences of its internationally wrongful acts, and make full reparation for the harm caused by those acts."

23. In the written proceedings, the following submissions were presented by the Parties:

On behalf of the Government of Nicaragua,

in the Memorial:

"1. For the reasons given in the present Memorial, the Republic of Nicaragua requests the Court to adjudge and declare that, by its conduct, the Republic of Colombia has breached:

(a) its obligation not to violate Nicaragua's maritime zones as delimited in paragraph 251 of the Court Judgment of 19 November 2012 as well as Nicaragua's sovereign rights and jurisdiction in these zones;

(b) its obligation not to use or threaten to use force under Article 2 (4) of the UN Charter and international customary law;

(c) and that, consequently, Colombia has the obligation to wipe out the legal and material consequences of its internationally wrongful acts, and make full reparation for the harm caused by those acts.

2. Nicaragua also requests the Court to adjudge and declare that Colombia must:

(a) Cease all its continuing internationally wrongful acts that affect or are likely to affect the rights of Nicaragua.

(b) Inasmuch as possible, restore the situation to the *status quo ante*, in

(i) revoking laws and regulations enacted by Colombia, which are incompatible with the Court's Judgment of 19 November 2012 including the provisions in the Decrees 1946 of 9 September 2013 and 1119 of 17 June 2014 to maritime areas which have been recognized as being under the jurisdiction or sovereign rights of Nicaragua;

(ii) revoking permits granted to fishing vessels operating in Nicaraguan waters; and

(iii) ensuring that the decision of the Constitutional Court of Colombia of 2 May 2014 or of any other National Authority will not bar compliance with the 19 November 2012 Judgment of the Court.

(c) Compensate for all damages caused insofar as they are not made good by restitution, including loss of profits resulting from the loss of investment caused by the threatening statements of Colombia's highest authorities, including the threat or use of force by the Colombian Navy against Nicaraguan fishing boats [or ships exploring and exploiting the soil and subsoil of Nicaragua's continental shelf] and third state fishing boats licensed by Nicaragua as well as from the exploitation of Nicaraguan waters by fishing vessels unlawfully 'authorized' by Colombia, with the amount of the compensation to be determined in a subsequent phase of the case.

(d) Give appropriate guarantees of non-repetition of its internationally wrongful acts."

in the Reply:

"1. For the reasons given in Chapters II to V of the present Reply, the Republic of Nicaragua requests the Court to adjudge and declare that:

(a) By its conduct, the Republic of Colombia has breached its international obligation to respect Nicaragua's maritime zones as delimited in paragraph 251 of the Court Judgment of 19 November 2012 as well as Nicaragua's sovereign rights and jurisdiction in these zones; and that, in consequence

(b) Colombia must immediately cease its internationally wrongful conduct in Nicaragua's maritime zones, as delimited by the Court in its Judgment of 19 November 2012, including its violations of Nicaragua's sovereign rights and jurisdiction in those maritime zones;

(c) Colombia must revoke, by means of its choice, all laws and regulations which are incompatible with the Court's Judgment of 19 November

2012, including the provisions in Decrees 1946 of 9 September 2013 and 1119 of 17 June 2014 on maritime areas which have been recognized as under the jurisdiction or sovereign rights of Nicaragua;

(d) Colombia must revoke permits granted to fishing vessels operating in Nicaragua's exclusive economic zone, as delimited in the Court's Judgment of 19 November 2012;

(e) Colombia must ensure that the decision of the Constitutional Court of Colombia of 2 May 2014 or of any other National Authority will not bar compliance with the 19 November 2012 Judgment of the Court;

(f) Colombia must compensate Nicaragua for all damages caused by its violations of its international legal obligations, including but not limited to damages caused by the exploitation of the living resources of the Nicaraguan exclusive economic zone by fishing vessels unlawfully 'authorized' by Colombia to operate in that zone, and the loss of revenue caused by Colombia's refusal to allow, or by its deterrence of, fishing by Nicaraguan vessels or third State vessels authorized by Nicaragua and, generally, for the damages caused by its actions and declarations to the proper exploitation of the resources in Nicaragua's exclusive economic zone, with the amount of the compensation to be determined in a subsequent phase of the case; and

(g) Colombia must give appropriate guarantees of non-repetition of its internationally wrongful acts.

2. For the reasons given in Chapters VI and VII of this Reply, the Republic of Nicaragua requests the Court to adjudge and declare that the Counter-Claims of Colombia are rejected."

On behalf of the Government of Colombia,

in the Counter-Memorial:

"I. For the reasons stated in this Counter-Memorial, the Republic of Colombia respectfully requests the Court to reject the submissions of the Republic of Nicaragua in its Memorial of 3 October 2014 and to adjudge and declare that

1. Nicaragua has failed to prove that any Colombian naval or coast guard vessel has violated Nicaragua's sovereign rights and maritime spaces in the Caribbean Sea;
2. Colombia has not, otherwise, violated Nicaragua's sovereign rights and maritime spaces in the Caribbean Sea;
3. Colombia's Decree 1946 of 9 September 2013 establishing an Integral Contiguous Zone is lawful under international law and does not constitute a violation of any of Nicaragua's sovereign rights and maritime spaces, considering that:

   (a) The Integral Contiguous Zone produced by the naturally overlapping concentric circles forming the contiguous zones of the islands of San Andrés, Providencia, Santa Catalina, Alburquerque Cays, East-Southeast Cays, Roncador, Serrana, Quitasueño and Serranilla and joined by geodetic lines connecting the outermost points of the overlapping concentric circles is, in the circumstances, lawful under international law;

(b) The powers enumerated in the Decree are consistent with international law; and

4. No Colombian action in its Integral Contiguous Zone of which Nicaragua complains is a violation of international law or of Nicaragua's sovereign rights and maritime spaces.

II. Further, the Republic of Colombia respectfully requests the Court to adjudge and declare that

5. Nicaragua has infringed Colombia's sovereign rights and maritime spaces in the Caribbean Sea by failing to prevent its flag or licensed vessels from fishing in Colombia's waters;

6. Nicaragua has infringed Colombia's sovereign rights and maritime spaces in the Caribbean Sea by failing to prevent its flag or licensed vessels from engaging in predatory and unlawful fishing methods in violation of its international obligations;

7. Nicaragua has infringed Colombia's sovereign rights and maritime spaces by failing to fulfil its international legal obligations with respect to the environment in areas of the Caribbean Sea to which said obligations apply;
8. Nicaragua has failed to respect the traditional and historic fishing rights of the inhabitants of the San Andrés Archipelago, including the indigenous Raizal people, in the waters to which they are entitled to said rights; and
9. Nicaragua's Decree No. 33-2013 of 19 August 2013 establishing straight baselines violates international law and Colombia's maritime rights and spaces.

III. The Court is further requested to order Nicaragua

10. With regard to submissions 5 to 8:
    (a) To desist promptly from its violations of international law;
    (b) To compensate Colombia for all damages caused, including loss of profits, resulting from Nicaragua's violations of its international obligations, with the amount and form of compensation to be determined at a subsequent phase of the proceedings; and
    (c) To give Colombia appropriate guarantees of non-repetition.
11. With regard to submission 8, in particular, to ensure that the inhabitants of the San Andrés Archipelago enjoy unfettered access to the waters to which their traditional and historic fishing rights pertain; and
12. With regard to submission 9, to adjust its Decree No. 33-2013 of 19 August 2013 in order that it complies with the rules of international law concerning the drawing of the baselines from which the breadth of the territorial sea is measured.

IV. Colombia reserves its right to supplement or amend these submissions."

in the Rejoinder:

"I. For the reasons stated in its Counter-Memorial and Rejoinder, the Republic of Colombia respectfully requests the Court to reject each of the submissions of the Republic of Nicaragua, and to adjudge and declare that

1. Colombia has not in any manner violated Nicaragua's sovereign rights or maritime spaces in the Southwestern Caribbean Sea.
2. Colombia's Decree No. 1946 of 9 September 2013 (as amended by Decree No. 1119 of 17 June 2014) has not given rise to any violation of Nicaragua's sovereign rights or maritime spaces.
   (a) There is nothing in international law that precludes the contiguous zone of one State from overlapping with the exclusive economic zone of another State;
   (b) The geodetic lines established in the Decree connecting the outermost points of Colombia's contiguous zone do not violate international law;
   (c) The specific powers concerning the contiguous zone enumerated in the Decree do not violate international law;
   (d) No Colombian action in the contiguous zone has given rise to any violation of Nicaragua's sovereign rights or maritime spaces.

II. Further, the Republic of Colombia respectfully requests the Court to adjudge and declare that

3. The inhabitants of the San Andrés Archipelago, in particular the Raizales, enjoy traditional fishing rights in maritime areas adjudicated to appertain to Nicaragua.
4. Nicaragua has violated the traditional fishing rights of the inhabitants of the San Andrés Archipelago.
5. Nicaragua's straight baselines established in Decree No. 33-2013 of 19 August 2013 are contrary to international law and violate Colombia's sovereign rights and maritime spaces.

III. The Court is further requested to order Nicaragua

6. With regard to submissions 3 and 4, to ensure that the inhabitants of the San Andrés Archipelago engaged in traditional fishing enjoy unfettered access to:
   (a) Their traditional fishing banks located in the maritime areas adjudicated to appertain to Nicaragua;
   (b) The banks located in Colombian maritime areas, access to which requires navigating through the maritime areas adjudicated to appertain to Nicaragua.
7. To compensate Colombia for all damages caused, including loss of profits, resulting from Nicaragua's violations of its international obligations, with the amount and form of compensation to be determined at a subsequent phase of the proceedings.
8. To give Colombia appropriate guarantees of non-repetition."

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

On behalf of the Government of Nicaragua,

at the hearing of 27 September 2021, on the claims of Nicaragua:

"In the case concerning *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia)*, for the reasons explained in the Written and Oral phase, Nicaragua respectfully requests the Court to adjudge and declare that:

(a) By its conduct, the Republic of Colombia has breached its international obligation to respect Nicaragua's maritime zones as delimited in paragraph 251 of the Court Judgment of 19 November 2012, as well as Nicaragua's sovereign rights and jurisdiction in these zones; and that, in consequence

(b) Colombia must immediately cease its internationally wrongful conduct in Nicaragua's maritime zones, as delimited by the Court in its Judgment of 19 November 2012, including its violations of Nicaragua's sovereign rights and jurisdiction in those maritime zones and take all necessary measures effectively to respect Nicaragua's sovereign rights and jurisdiction; these measures include but are not limited to revoking, by means of its choice:

(i) all laws and regulations, permits, licences, and other legal instruments which are incompatible with the Court's Judgment of 19 November 2012, including those related to marine protected areas;

(ii) the provisions of Decrees 1946 of 9 September 2013 and 1119 of 17 June 2014 in so far as they relate to maritime areas which have been recognized as under the jurisdiction or sovereign rights of Nicaragua; and

(iii) permits granted to fishing vessels to operate in Nicaragua's exclusive economic zone, as delimited in the Court's Judgment of 19 November 2012;

(c) Colombia must ensure that the decision of the Constitutional Court of Colombia of 2 May 2014 or of any other National Authority will not bar compliance with the 19 November 2012 Judgment of the Court;

(d) Colombia must compensate Nicaragua for all damage caused by its violations of its international legal obligations, including but not limited to damages caused by the exploitation of the living resources of the Nicaraguan exclusive economic zone by fishing vessels unlawfully 'authorized' by Colombia to operate in that zone, and the loss of revenue caused by Colombia's refusal to allow, or by its deterrence of, fishing by Nicaraguan vessels or third State vessels authorized by Nicaragua and, generally, for the damages caused by its actions and declarations to the proper exploitation of the resources in Nicaragua's exclusive economic zone, with the amount of the compensation to be determined in a subsequent phase of the case; and

(e) Colombia must give appropriate guarantees of non-repetition of its internationally wrongful acts, including by formally acknowledging that the boundary as delimited by the Court in its Judgment of 19 November 2012 will be respected as the international maritime boundary between Colombia and Nicaragua.

(f) Nicaragua also requests that the Court adjudge and declare that it will remain seised of the case until Colombia recognizes and respects Nicaragua's rights in the Caribbean Sea as attributed by the Judgment of the Court of 19 November 2012."

at the hearing of 1 October 2021, on the counter-claims of Colombia:

"In the case concerning *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia)*, for the reasons explained in the Written and Oral phase, Nicaragua respectfully requests the Court to adjudge and declare that the counter-claims of the Republic of Colombia are rejected with all legal consequences."

On behalf of the Government of Colombia,

at the hearing of 29 September 2021, on the claims of Nicaragua and the counter-claims of Colombia:

"I. For the reasons stated in its written and oral pleadings, the Republic of Colombia respectfully requests the Court to reject each of the Submissions of the Republic of Nicaragua, and to adjudge and declare that

1. Colombia has not in any manner violated Nicaragua's sovereign rights or maritime spaces in the Southwestern Caribbean Sea.
2. Colombia's Decree No. 1946 of 9 September 2013 (as amended by Decree No. 1119 of 17 June 2014) has not given rise to any violation of Nicaragua's sovereign rights or maritime spaces.
   (a) There is nothing in international law that precludes the contiguous zone of one State from overlapping with the exclusive economic zone of another State;
   (b) The geodetic lines established in the Decree connecting the outermost points of Colombia's contiguous zone do not violate international law;
   (c) The specific powers concerning the contiguous zone enumerated in the Decree do not violate international law;
   (d) No Colombian action in the contiguous zone has given rise to any violation of Nicaragua's sovereign rights or maritime spaces.

II. Further, the Republic of Colombia respectfully requests the Court to adjudge and declare that

3. The inhabitants of the San Andrés Archipelago, in particular the Raizales, enjoy artisanal fishing rights in the traditional fishing grounds located beyond the territorial sea of the islands of the San Andrés Archipelago.
4. Nicaragua has violated the traditional fishing rights of the inhabitants of the San Andrés Archipelago.
5. Nicaragua's straight baselines established in Decree No. 33-2013 of 19 August 2013 are contrary to international law and violate Colombia's rights and maritime spaces.

III. The Court is further requested to order Nicaragua

6. With regard to submissions 3 and 4, to ensure that the inhabitants of the San Andrés Archipelago engaged in traditional fishing enjoy unfettered access to:
   (a) Their traditional fishing banks located in the maritime areas beyond the territorial sea of the islands of the San Andrés Archipelago; and,

(b) The banks located in Colombian maritime areas when access to them requires navigating outside the territorial sea of the islands of the San Andrés Archipelago.

7. To compensate Colombia for all damages caused, including loss of profits, resulting from Nicaragua's violations of its international obligations.
8. To give Colombia appropriate guarantees of non-repetition."

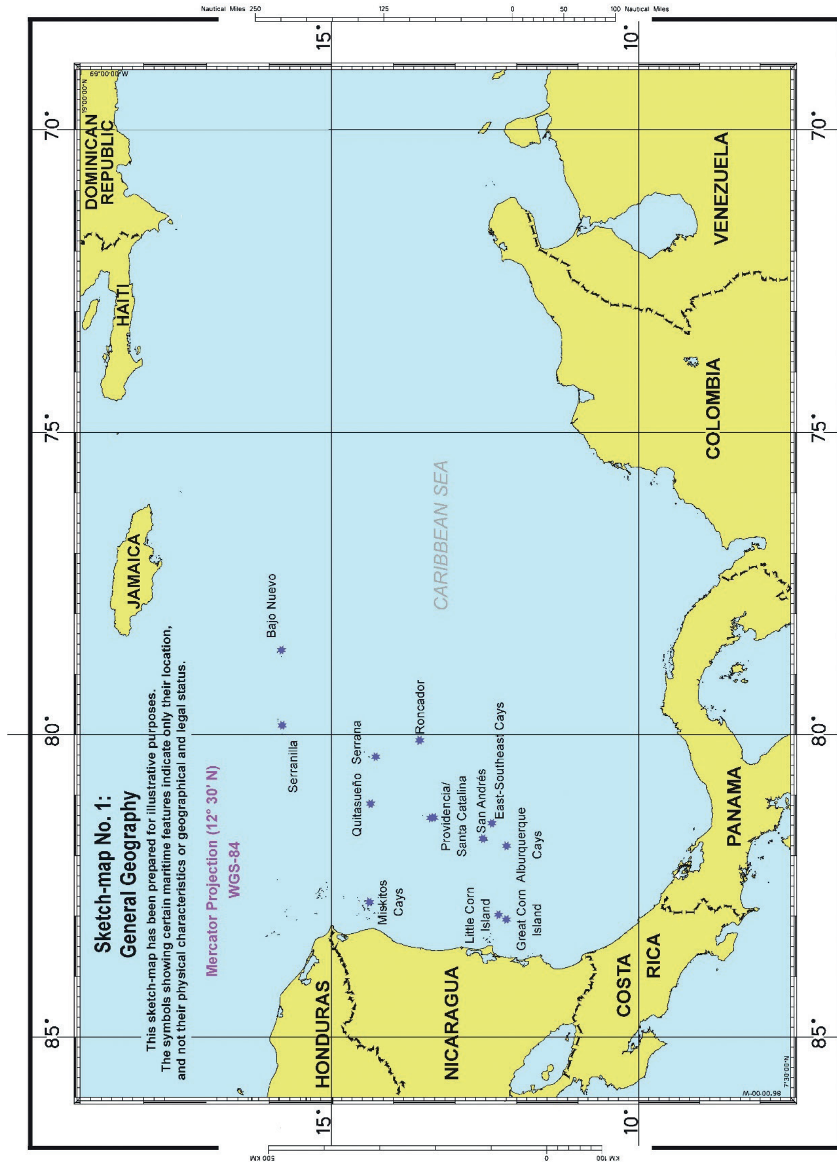
* * *

I. General Background

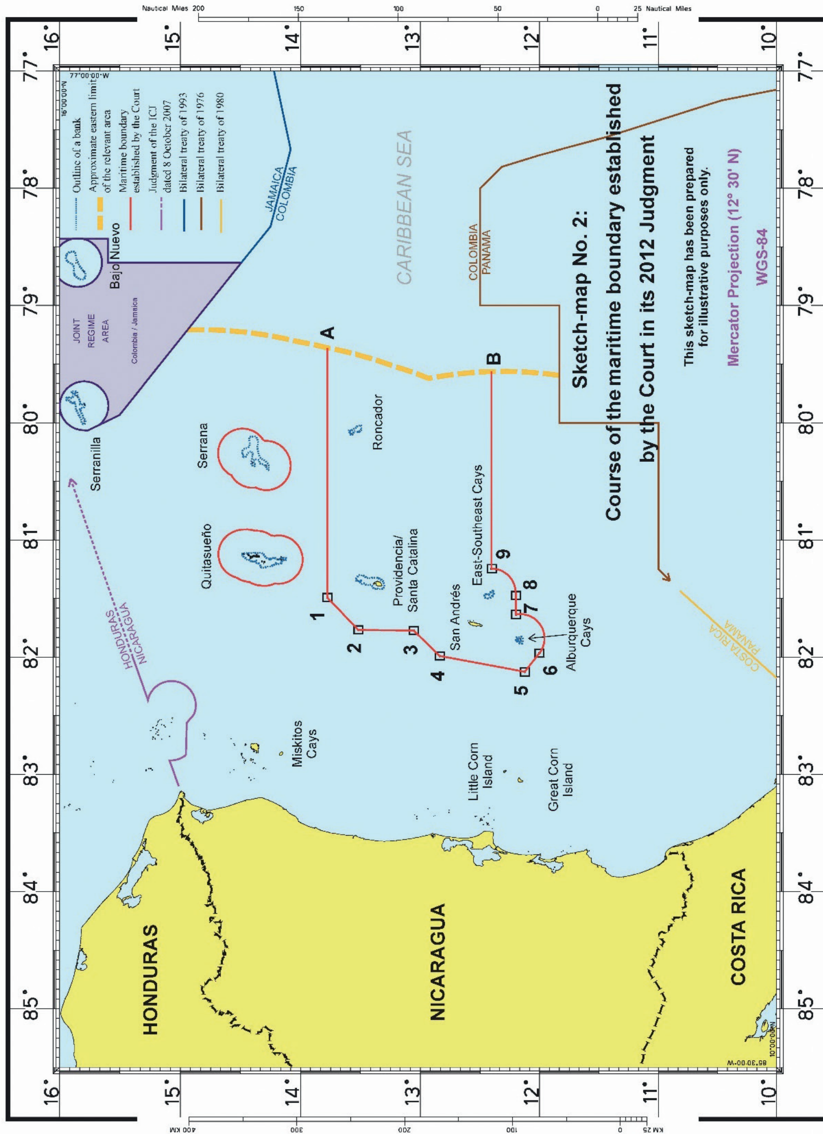
25. The maritime areas with which the present proceedings are concerned are located in the Caribbean Sea, an arm of the Atlantic Ocean partially enclosed to the north and east by a number of islands, and bounded to the south and west by South and Central America. Nicaragua's eastern coast faces the south-western part of the Caribbean Sea. To the north of Nicaragua lies Honduras and to the south lie Costa Rica and Panama. To the north-east, Nicaragua faces Jamaica, and to the east, it faces the mainland coast of Colombia. Colombia is situated to the south of the Caribbean Sea. In terms of its Caribbean front, Colombia is bordered to the west by Panama and to the east by Venezuela. The Colombian islands of San Andrés, Providencia and Santa Catalina lie in the south-west of the Caribbean Sea, approximately 100 to 150 nautical miles to the east of the Nicaraguan coast. (For the general geography of the area, see sketch-map No. 1, p. 286.)

26. In the Judgment rendered by the Court on 19 November 2012 in the case concerning *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)* (hereinafter the "2012 Judgment"), the Court decided that Colombia had sovereignty over the islands at Alburquerque, Bajo Nuevo, East-Southeast Cays, Quitasueño, Roncador, Serrana and Serranilla (*I.C.J. Reports 2012 (II)*, p. 718, para. 251, subpara. 1). The Court also established a single maritime boundary delimiting the continental shelf and the exclusive economic zones of Nicaragua and Colombia up to the 200-nautical-mile limit from the baselines from which the territorial sea of Nicaragua is measured (*ibid.*, pp. 719-720, para. 251, subpara. 4). The Court, however, noted in its reasoning that, since Nicaragua had not yet notified the Secretary-General of the United Nations of the location of those baselines under Article 16, paragraph 2, of the 1982 United Nations Convention on the Law of the Sea (hereinafter "UNCLOS" or the "Convention"), the precise location of the eastern endpoints of the maritime boundary could not be determined and was therefore depicted on the sketch-map only approximately (*ibid.*, p. 713, para. 237). (For the course of the maritime boundary established by the Court in its 2012 Judgment, see sketch-map No. 2, p. 287.)

Sketch-Map No. 1: General Geography



SKETCH-MAP NO. 2: COURSE OF THE MARITIME BOUNDARY ESTABLISHED BY THE COURT IN ITS 2012 JUDGMENT



27. The Court notes that, in the present case, the Parties refer to the "San Andrés Archipelago". In this regard, the Court recalls that it addressed the question of the composition of the Archipelago in its 2012 Judgment but left open the question whether certain features are part of the Archipelago, a matter on which the Parties disagreed. In particular, the Court observed that the Treaty concerning Territorial Questions at Issue between Colombia and Nicaragua, signed at Managua on 24 March 1928 (hereinafter the "1928 Treaty"), had not specified the composition of the San Andrés Archipelago and noted that the question about the composition of the Archipelago could not be definitively answered solely on the basis of the geographical location of the maritime features in dispute or of historical records. However, the Court acknowledged that the 1928 Treaty could be understood as including at least the maritime features closest to San Andrés, Providencia and Santa Catalina. The Court held that "[a]ccordingly, the Alburquerque Cays and East-Southeast Cays, given their geographical location (lying 20 and 16 nautical miles, respectively, from San Andrés island) could be seen as forming part of the Archipelago". By contrast, in view of considerations of distance, the Court considered that it was less likely that Serranilla and Bajo Nuevo could form part of the Archipelago. The Court further stated that it did not consider that "the express exclusion of Roncador, Quitasueño and Serrana from the scope of the 1928 Treaty [was] in itself sufficient to determine whether these features were considered by Nicaragua and Colombia to be part of the San Andrés Archipelago" (see *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012 (II)*, pp. 648-649, paras. 52-56).

28. In the present case, Nicaragua alleges that Colombia has violated Nicaragua's sovereign rights and jurisdiction in Nicaragua's exclusive economic zone in various ways. First, it contends that Colombia has interfered with Nicaraguan-flagged or Nicaraguan-licensed fishing and marine scientific research vessels in this maritime zone in a series of incidents involving Colombian naval vessels and aircraft. Nicaragua also claims that Colombia repeatedly directed its naval frigates and military aircraft to obstruct the Nicaraguan Navy in the exercise of its mission in Nicaraguan waters. Secondly, Nicaragua states that Colombia has granted permits for fishing and authorizations for marine scientific research in Nicaragua's exclusive economic zone to Colombians and nationals of third States. Thirdly, Nicaragua alleges that Colombia has violated its exclusive sovereign right to explore and exploit natural resources by offering and awarding hydrocarbon blocks encompassing parts of Nicaragua's exclusive economic zone.

29. Nicaragua further objects to Presidential Decree No. 1946 of 9 September 2013, as amended by Decree No. 1119 of 17 June 2014 (hereinafter "Presidential Decree 1946"), whereby Colombia established an "integral contiguous zone", which "ostensibly unified the maritime 'con-

tiguous zones' of all of Colombia's islands, keys and other maritime features in the area". Nicaragua claims that the "integral contiguous zone" overlaps with waters attributed by the Court to Nicaragua as its exclusive economic zone and therefore "substantially transgresses areas subject to Nicaragua's exclusive sovereign rights and jurisdiction". Nicaragua further claims that the Decree violates customary international law and that its mere enactment engages Colombia's international responsibility.

30. In its counter-claims, Colombia first asserts that the inhabitants of the San Andrés Archipelago, in particular the Raizales, enjoy artisanal fishing rights in the traditional fishing banks located beyond the territorial sea of the islands of the San Andrés Archipelago. It contends that Nicaragua has infringed the traditional fishing rights of the inhabitants of the San Andrés Archipelago to access their traditional fishing banks located in the maritime areas beyond the territorial sea of the islands of the San Andrés Archipelago and those banks located in the Colombian maritime areas, access to which requires navigating outside the territorial sea of the islands of the San Andrés Archipelago.

31. Secondly, Colombia challenges the lawfulness of Nicaragua's straight baselines established by Decree 33 (see paragraph 15 above). More specifically, Colombia contends that the straight baselines, which connect a series of maritime features appertaining to Nicaragua east of its continental coast in the Caribbean Sea, have the effect of pushing the external limit of its territorial sea far east of the 12-nautical-mile limit permitted by international law, expanding Nicaragua's internal waters, territorial sea, exclusive economic zone and continental shelf. According to Colombia, Nicaragua's straight baselines thus directly impede the rights and jurisdiction to which Colombia is entitled in the Caribbean Sea.

32. Before examining Nicaragua's claims and Colombia's counter-claims, the Court will address the scope of its jurisdiction *ratione temporis*, an issue raised by Colombia in its Counter-Memorial.

II. Scope of the Jurisdiction *Ratione Temporis* of the Court

33. In its 2016 Judgment, the Court concluded that it had jurisdiction, on the basis of Article XXXI of the Pact of Bogotá, to entertain the dispute concerning the alleged violations by Colombia of Nicaragua's rights in the maritime zones which, according to Nicaragua, the Court declared in its 2012 Judgment appertain to Nicaragua (*Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 43, para. 111 (2)).

34. Colombia, while accepting that the Court otherwise has jurisdiction in the case, contends that "the Court lacks jurisdiction *ratione tempo-*

ris to consider any claims that are based on events that are alleged to have transpired after Colombia ceased to be bound by the provisions of the Pact". It argues that, by virtue of Article XXXI of the Pact of Bogotá, the Parties recognized as compulsory the jurisdiction of the Court in all disputes of a juridical nature that arise among them concerning "[a]ny question of international law" (Article XXXI, subparagraph *(b)*) or "[t]he existence of any fact which, if established, would constitute the breach of an international obligation" (Article XXXI, subparagraph *(c)*), but only "so long as the present Treaty is in force".

35. Colombia maintains that this view is reinforced by the 2016 Judgment, in which, according to Colombia, the Court stated that the dispute was limited to those events which allegedly occurred before the critical date. Colombia is of the view that, for the Court to have jurisdiction to consider whether facts alleged by a party in support of its claim constitute a breach of an international obligation by the other party, "those facts must have occurred during a period when a jurisdictional basis exists between the parties". In this regard, it argues that

> "[j]urisdiction to deal with a dispute over the legal consequences of facts that are in existence during the period when a jurisdictional title exists is not the same thing as ruling on the legal consequences of facts that occur *after* a compromissory clause has lapsed" (emphasis in the original).

36. Moreover, Colombia argues that the alleged events in the present case do not amount to a continuing pattern of illegal conduct on the part of Colombia and that they do not constitute a "composite act" within the meaning of Article 15 of the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts (hereinafter the "ILC Articles on State Responsibility"). It considers that the Court should adopt an "event-by-event" analysis rather than the "pattern of conduct" approach advanced by Nicaragua. Colombia argues that Nicaragua's contentions, if upheld, would lead to a "perverse effect" and would run counter to the Court's jurisprudence.

*

37. Nicaragua, for its part, claims that Colombia's interpretation of Article XXXI of the Pact of Bogotá is incompatible with the text and context of that provision. Nicaragua maintains, moreover, that the effect of Colombia's denunciation of the Pact of Bogotá under Article LVI is to prevent the Court from pronouncing on acts occurring after the termination of the treaty that would form the subject of a new dispute, distinct from the present one before the Court in respect of which it has found that it has jurisdiction.

38. Nicaragua maintains that "[t]he appropriate test for determining the existence of jurisdiction over facts occurring after the filing of an application is . . . whether the facts 'aris[e] directly out of the question

which is the subject-matter of [the] Application'". Nicaragua argues that the events which occurred after 27 November 2013, like those which occurred before that date, arose directly out of the question which is the subject-matter of the Application. According to Nicaragua, those subsequent events, which are both composite and continuing in character, do not form a new dispute, but are manifestations of the same dispute that is presently before the Court. Moreover, Nicaragua contends that Colombia itself refers to events that occurred after the institution of the proceedings in order to support its counter-claims.

* *

39. The Court recalls that, at the preliminary objection stage, Colombia's first preliminary objection was that the Court lacked jurisdiction because Colombia had given its notice of denunciation of the Pact of Bogotá on 27 November 2012, before Nicaragua filed its Application in the present case. The Court rejected Colombia's objection on the ground that, by virtue of Article LVI, paragraph 1, of the Pact, Article XXXI thereof, which conferred jurisdiction on the Court, remained in force between the Parties on the date that the Application in the present case was filed. The subsequent termination of the Pact of Bogotá as between Nicaragua and Colombia did not affect the jurisdiction which existed on the date when the proceedings were instituted.

The question raised by Colombia in the present context concerns the interpretation of Articles XXXI and LVI of the Pact of Bogotá, which was addressed by the Court at length in the 2016 Judgment.

Article XXXI states:

> "In conformity with Article 36, paragraph 2, of the Statute of the International Court of Justice, the High Contracting Parties declare that they recognize in relation to any other American State, the jurisdiction of the Court as compulsory *ipso facto*, without the necessity of any special agreement so long as the present Treaty is in force, in all disputes of a juridical nature that arise among them concerning: *(a)* The interpretation of a treaty; *(b)* Any question of international law; *(c)* The existence of any fact which, if established, would constitute the breach of an international obligation; *(d)* The nature or extent of the reparation to be made for the breach of an international obligation."

According to Colombia, the phrase "so long as the present Treaty is in force" in Article XXXI provides a temporal limitation to Colombia's consent to the Court's jurisdiction over disputes as described in subparagraphs *(b)* and *(c)*. It argues that the Court does not have jurisdiction over the claims based on the events that allegedly occurred after the Pact of Bogotá ceased to be in force for Colombia.

40. The Court does not consider that Colombia's argument correctly reflects the meaning of Article XXXI. Subparagraphs *(b)* and *(c)* of that

Article refer to the subject-matter of a dispute over which the Court may exercise jurisdiction (see *Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 84, para. 34). The phrase "so long as the present Treaty is in force" limits the period within which such a dispute must have arisen. Since the Court has already decided in its 2016 Judgment that there existed a dispute between the Parties that fell within the scope of Article XXXI at the time Nicaragua filed its Application, the question of consent under Article XXXI with regard to that dispute does not arise at the present stage of the proceedings. The question now before the Court is whether its jurisdiction over that dispute extends to facts or events that allegedly occurred after the lapse of the title of jurisdiction.

41. Colombia maintains that its view on the Court's jurisdiction *ratione temporis* is reinforced by the 2016 Judgment, in which, according to Colombia, the Court stated that the dispute was limited to the facts that occurred before the filing of the Application. However, Colombia mischaracterizes the 2016 Judgment, in which the Court, applying its settled jurisprudence, recalled that the date at which its jurisdiction has to be established is the date on which the application is filed with the Court (*Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 18, para. 33, citing *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, pp. 437-438, paras. 79-80, and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 613, para. 26). In order to determine whether the Court has jurisdiction in a particular case, it has to ascertain whether there existed a dispute between the parties on the date on which the application was filed. For that purpose, the Court's decision must be based on the acts which allegedly occurred before that date. Contrary to what Colombia claims, the 2016 Judgment does not preclude the Court from entertaining those incidents that allegedly occurred after the filing of the application.

42. With regard to the lapse of the jurisdictional title, the Court has stated in a number of cases that, "according to its established jurisprudence, if a title of jurisdiction is shown to have existed at the date of the institution of proceedings, any subsequent lapse or withdrawal of the jurisdictional instrument is without effect on the jurisdiction of the Court" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, p. 445, para. 95; see also *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 18, para. 33; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J.*

Reports 1986, p. 28, para. 36; *Nottebohm (Liechtenstein* v. *Guatemala), Preliminary Objection, Judgment, I.C.J. Reports 1953*, p. 123). There is nothing in the Court's jurisprudence to suggest that the lapse of the jurisdictional title after the institution of proceedings has the effect of limiting the Court's jurisdiction *ratione temporis* to facts which allegedly occurred before that lapse.

43. Although the question posed by Colombia has not previously been presented to the Court, considerations that have been brought to bear on the adjudication of a claim or submission made after the filing of an application can be instructive in the present case. In the view of the Court, the criteria that it has considered relevant in its jurisprudence to determine the limits *ratione temporis* of its jurisdiction with respect to such a claim or submission, or the admissibility thereof, should apply to the Court's examination of the scope of its jurisdiction *ratione temporis* in the present case.

44. In cases involving the adjudication of a claim or submission made after the filing of the application, the question has in some cases been addressed as one of jurisdiction and, in others, as one of admissibility. The Court has in such instances considered whether such a claim or submission arose directly out of the question which is the subject-matter of the application or whether entertaining such a claim or submission would transform the subject of the dispute originally submitted to the Court (see *Fisheries Jurisdiction (Federal Republic of Germany* v. *Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 203, para. 72; *LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001*, p. 484, para. 45; *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, pp. 266-267, paras. 67 and 69-70; and *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, p. 16, para. 36). With regard to facts or events subsequent to the filing of the application, in *Certain Questions of Mutual Assistance in Criminal Matters*, the Court referred to the above jurisprudence and stated the following:

> "When the Court has examined its jurisdiction over facts or events subsequent to the filing of the application, it has emphasized the need to determine whether those facts or events were connected to the facts or events already falling within the Court's jurisdiction and whether consideration of those later facts or events would transform the 'nature of the dispute'" (*Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France), Judgment, I.C.J. Reports 2008*, pp. 211-212, para. 87).

Although the Court did not find the above criteria applicable to that case, since the matter before it concerned jurisdiction *ratione materiae* and not jurisdiction *ratione temporis*, it affirmed the relevance of criteria relating to "continuity" and "connexity" for "determining limits *ratione temporis* to its jurisdiction" (*ibid.*, p. 212, para. 88).

45. In the 2016 Judgment, the Court did not address the question of jurisdiction *ratione temporis* with regard to those alleged incidents that occurred after the denunciation of the Pact of Bogotá came into effect. However, its Judgment implies that the Court has jurisdiction to examine every aspect of the dispute that the Court found to have existed at the time of the filing of the Application. As the Court has pointed out,

> "it has become an established practice for States submitting an application to the Court to reserve the right to present additional facts and legal considerations. The limit of the freedom to present such facts and considerations is 'that the result is not to transform the dispute brought before the Court by the application into another dispute which is different in character' (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 427, para. 80)" (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, pp. 318-319, para. 99). See also *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Judgment, I.C.J. Reports 2003*, pp. 213-214, paras. 116-118).

It follows that the task of the Court is to decide whether the incidents alleged to have occurred after the lapse of the jurisdictional title meet the aforementioned criteria drawn from the Court's jurisprudence.

46. The incidents said to have occurred after 27 November 2013 generally concern Colombian naval vessels and aircraft allegedly interfering with Nicaraguan fishing activities and marine scientific research in Nicaragua's maritime zones, Colombia's alleged policing operations and interference with Nicaragua's naval vessels in Nicaragua's maritime waters and Colombia's alleged authorization of fishing activities and marine scientific research in Nicaragua's exclusive economic zone. These alleged incidents are of the same nature as those that allegedly occurred before 26 November 2013. They all give rise to the question whether Colombia has breached its international obligations under customary international law to respect Nicaragua's rights in the latter's exclusive economic zone, a question which concerns precisely the dispute over which the Court found it had jurisdiction in the 2016 Judgment.

47. In light of the foregoing considerations, the Court concludes that the claims and submissions made by Nicaragua in relation to incidents that allegedly occurred after 27 November 2013 arose directly out of the question which is the subject-matter of the Application, that those alleged incidents are connected to the alleged incidents that have already been found to fall within the Court's jurisdiction, and that consideration of those alleged incidents does not transform the nature of the dispute between the Parties in the present case. The Court therefore has jurisdiction *ratione temporis* over Nicaragua's claims relating to those alleged incidents.

III. Alleged Violations by Colombia of Nicaragua's Rights in Its Maritime Zones

48. The dispute between the Parties in the present case raises questions concerning the rights and duties of the coastal State and the rights and duties of other States in the exclusive economic zone. The Applicant and the Respondent agree that the applicable law between them is customary international law. Nicaragua is a party to UNCLOS and Colombia is not; consequently, UNCLOS is not applicable between them. The Court notes that both Parties acknowledge that a number of the provisions of UNCLOS that they refer to reflect customary international law. They disagree, however, about whether that is true of other provisions that are at issue in the present case. The Court will consider whether the particular provisions of the Convention relevant to the present case reflect customary international law when addressing Nicaragua's claims and Colombia's counter-claims.

A. Colombia's Contested Activities in Nicaragua's Maritime Zones

1. Incidents alleged by Nicaragua in the south-western Caribbean Sea

49. In its submissions, Nicaragua requests the Court to adjudge and declare that, by its conduct, Colombia has breached its international obligation to respect Nicaragua's maritime zones as delimited by the Court in its 2012 Judgment. Nicaragua claims that, after the Court delivered its Judgment on maritime delimitation, Colombia engaged in a series of acts that violated Nicaragua's sovereign rights and jurisdiction in Nicaragua's exclusive economic zone. Nicaragua maintains that Colombia attempted to enforce its own jurisdiction in Nicaragua's maritime zones, including by obstructing, through both naval and aerial means, Nicaragua's exercise of its own jurisdiction; by harassing and intimidating Nicaraguan-flagged and Nicaraguan-licensed fishing vessels; and by authorizing Colombians and nationals of third States to operate in those zones. Nicaragua also refers to instances in which it alleges that Colombia asserted its sovereignty over Nicaragua's exclusive economic zone or otherwise rejected the 2012 Judgment.

50. Nicaragua contends that Colombia must establish that the rights it claims in Nicaragua's exclusive economic zone are "attributed" to it, and not to Nicaragua, under customary international law. According to Nicaragua, the set of sovereign rights of the coastal State for the purpose of exploring and exploiting, conserving and managing natural resources in the exclusive economic zone "contains no exception or qualification that would give or preserve traditional fishing rights of artisanal fishermen".

51. The Applicant recognizes that the Respondent enjoys, in Nicaragua's exclusive economic zone, freedoms of navigation and overflight and other internationally lawful uses of the sea related to these freedoms. It does not question Colombia's right to take action against Colombian-flagged vessels or against a vessel suspected of drug-trafficking that a Colombian naval vessel may happen to encounter in Nicaragua's exclusive economic zone. The Applicant argues, however, that in light of the ordinary meaning of the word "navigation", the scope of the Respondent's freedom of navigation is limited to the passage of ships or the movement of ships on water and does not include systematic acts of "monitoring" and "tracking".

52. The Applicant complains that the Respondent has erected and implemented a régime of surveillance and enforcement that treats Nicaragua's exclusive economic zone as if it were Colombian "national waters". Nicaragua further argues that Colombia has no right to enforce or police environmental standards in Nicaragua's exclusive economic zone, because UNCLOS is clear in allocating jurisdiction to coastal and flag States in relation to the protection and preservation of the marine environment.

*

53. For its part, Colombia contends that in the exclusive economic zone, States other than the coastal State enjoy freedoms of navigation and overflight as well as other internationally lawful uses of the sea. According to Colombia, in assessing the lawfulness of a State's conduct in another State's exclusive economic zone, regard needs to be had to the customary international law of the sea, which may be identified by reference to both the text of UNCLOS and to State practice; to other rules of customary international law, including local custom; to commitments undertaken in unilateral declarations; and to rules reflected in other applicable treaties. It is not the case, in the Respondent's view, that a right not specifically attributed to third States necessarily vests with the coastal State.

54. In support of the legality of its actions, the Respondent claims that it has acted in accordance with three types of rights and duties recognized by international law: (i) the right and duty to protect and preserve the environment of the south-western Caribbean Sea; (ii) the due diligence duty within the relevant maritime area; and (iii) the right and duty to protect the habitat of the Raizales and other local communities inhabiting the Archipelago. Colombia asserts that, in view of the fragility of the Caribbean ecosystem resulting from threats such as marine-based pollution, overfishing and other predatory practices, it has adopted a series of protective measures and become a party to bilateral and regional agreements to protect and preserve the area, among which the most important are the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, done at Cartagena de Indias on

24 March 1983 (hereinafter the "Cartagena Convention") and the Protocol Concerning Specially Protected Areas and Wildlife to the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, done at Kingston on 18 January 1990 (hereinafter the "SPAW Protocol"). In addition, Colombia established two special reserve areas for marine environmental protection in 2000 and 2005, the Seaflower Biosphere Reserve and the Seaflower Marine Protected Area, with the respective aims of protecting the marine environment in the south-western Caribbean Sea and the habitat of the Raizales community.

55. The Respondent claims that it therefore has the right and duty to protect and preserve the environment of the south-western Caribbean Sea and the duty to exercise due diligence within the relevant marine area. It states that "[e]nvironmental concerns within the Southwestern Caribbean Sea need to be fully taken into account regardless of considerations of sovereignty or sovereign rights". According to Colombia, it has the right to monitor and track any practices that endanger the marine environment and urge them to cease. The Respondent maintains that to find unlawful under customary international law an activity of Colombia that is not specifically recognized as encompassed by its freedoms of navigation and overflight, or other permissible uses of the sea, it must be proved that "Colombia's actions impeded, or materially prejudiced, Nicaragua's ability to exercise its sovereign rights".

* *

56. The Court recalls that the applicable law between the Parties is customary international law. The Court notes that, by the time UNCLOS was concluded, the concept of the exclusive economic zone had already received widespread acceptance by States. In 1985, the Court found it incontestable that the institution of the exclusive economic zone had become a part of customary law (*Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 33, para. 34). To date, around 130 States, including both parties and non-parties to the Convention, have adopted national legislation or administrative decrees declaring an exclusive economic zone.

57. Customary rules on the rights and duties in the exclusive economic zone of coastal States and other States are reflected in several articles of UNCLOS, including Articles 56, 58, 61, 62 and 73. Article 56 reads as follows:

"Article 56

Rights, jurisdiction and duties of the coastal State in the exclusive economic zone

1. In the exclusive economic zone, the coastal State has:

(a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or

non-living, of the waters superjacent to the sea-bed and of the sea-bed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds;

(b) jurisdiction as provided for in the relevant provisions of this Convention with regard to:

(i) the establishment and use of artificial islands, installations and structures;
(ii) marine scientific research;
(iii) the protection and preservation of the marine environment;

(c) other rights and duties provided for in this Convention.

2. In exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention.

3. The rights set out in this article with respect to the sea-bed and subsoil shall be exercised in accordance with Part VI."

58. Articles 61 and 62 address the conservation and utilization of the living resources in the exclusive economic zone. Under Article 61, the coastal State has the responsibility to conserve the living resources in that maritime zone. For that purpose, it shall determine the allowable catch of the living resources in the exclusive economic zone and ensure, through proper conservation and management measures, taking into account the best scientific evidence available to it, that the living resources in that zone are not endangered by over-exploitation. The coastal State shall take measures to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield, as qualified by relevant environmental and economic factors, including the economic needs of the coastal fishing communities and the special requirements of developing States. Article 62 provides that in order to achieve an optimum utilization of the living resources in the exclusive economic zone, the coastal State shall determine its capacity to harvest the living resources of the zone, and, where it does not have the capacity to harvest the entire allowable catch, it shall, through agreements or other arrangements, give other States access to the surplus of the allowable catch, with particular attention paid to the rights of landlocked States and geographically disadvantaged States. Article 62 also provides that nationals of other States fishing in a coastal State's exclusive economic zone shall comply with the conservation measures established in the laws and regulations adopted by the coastal State in conformity with the Convention.

59. Moreover, under Article 73 of UNCLOS, the coastal State, in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone, has the power to take such measures, including boarding, inspection, arrest and judicial pro-

ceedings, as may be necessary to ensure compliance with the laws and regulations it has adopted in conformity with UNCLOS.

60. In exercising its sovereign rights and jurisdiction in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States and shall observe its other obligations under the law of the sea.

61. Customary international law also attributes rights and duties to other States in the exclusive economic zone, as reflected in Article 58 of UNCLOS, which states:

> "Article 58
>
> *Rights and duties of other States in the exclusive economic zone*
>
> 1. In the exclusive economic zone, all States, whether coastal or land-locked, enjoy, subject to the relevant provisions of this Convention, the freedoms referred to in article 87 of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention.
>
> 2. Articles 88 to 115 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part.
>
> 3. In exercising their rights and performing their duties under this Convention in the exclusive economic zone, States shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention and other rules of international law in so far as they are not incompatible with this Part."

62. Thus, under customary international law, all States enjoy the freedoms of navigation and overflight, as well as other internationally lawful uses related to such freedoms, in another State's exclusive economic zone. Moreover, the customary rules as reflected in Articles 88 to 115 of UNCLOS and other pertinent rules of international law are applicable to the exclusive economic zone in so far as they are not incompatible with the régime of that zone.

63. In exercising their rights and performing their duties in the exclusive economic zone, other States shall have due regard to the sovereign rights and jurisdiction of the coastal State in that zone.

*

64. In considering whether the evidence establishes the violations of customary international law alleged by Nicaragua, the Court will be guided by its jurisprudence on questions of proof. The Court recalls that, "as a general rule, it is for the party which alleges a particular fact in support of its claims to prove the existence of that fact" (*Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Compensation, Judgment, I.C.J. Reports 2018 (I)*, p. 26, para. 33; see also *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010 (II)*, p. 660, para. 54). The Court will treat with caution evidentiary materials prepared for the purposes of a case, as well as evidence from secondary sources (*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007 (II)*, p. 731, para. 244; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, pp. 201, 204 and 225, paras. 61, 68 and 159; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 41, para. 65). It will consider evidence that comes from contemporaneous and direct sources to be more probative and credible. The Court will also "give particular attention to reliable evidence acknowledging facts or conduct unfavourable to the State represented by the person making them" (*Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, p. 201, para. 61, citing *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 41, para. 64). Finally, while press articles and documentary evidence of a similar secondary nature are not capable of proving facts, they can corroborate, in some circumstances, the existence of facts established by other evidence (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment, I.C.J. Reports 2015 (I)*, p. 87, para. 239, citing *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 40, para. 62).

65. In the present case, Nicaragua refers to over 50 alleged incidents at sea. The Court observes that, for most of these events, Nicaragua mainly relies on the following materials as evidence: a letter from the Nicaraguan Naval Force to the Ministry of Foreign Affairs of Nicaragua dated 26 August 2014, which contains a report of alleged incidents produced pursuant to a request for information from the Ministry of Foreign Affairs and which is accompanied by daily reports from the Navy and, in respect of some of the alleged incidents, audio recordings of exchanges between the vessels involved. According to Nicaragua, these daily reports in map format were prepared contemporaneously with the incidents and maintained in the logs of the Nicaraguan armed forces. The abovementioned report listing alleged incidents was also annexed to a diplomatic Note sent by Nicaragua to Colombia, dated 13 September 2014.

Moreover, Nicaragua adduces three letters from the President of the Nicaraguan Chamber of Fisheries to the Executive Director of the Nicaraguan Institute of Fisheries and Aquaculture (hereinafter "INPESCA"), dated, respectively, 6 January 2014, 1 July 2014, and 24 July 2014, each of which refers to certain incidents allegedly reported by captains or crew-members of fishing vessels to their vessel owners. For alleged incidents between 2015 and 2017, Nicaragua also produces daily reports from its Navy, some with audio recordings attached. In addition to these letters and materials, Nicaragua refers to diplomatic Notes, affidavits, photographic and audio-visual materials, and media reports.

66. In considering the evidentiary weight of the reports from the Nicaraguan Navy, some of which are accompanied by audio recordings, the Court takes into account Nicaragua's assertion that these reports were prepared contemporaneously with alleged events, while also bearing in mind that they appear to have been prepared for the purposes of the current proceedings and that, in many instances, they do not contain first-hand evidence. The Court approaches with some caution the letters from the President of the Nicaraguan Chamber of Fisheries to the Executive Director of INPESCA, which do not contain first-hand accounts of events and at least some of which appear to have been specially prepared for the purposes of the case.

67. In response, Colombia presents, for certain incidents, its naval maritime travel reports and navigation logs to prove that its naval frigates did not have encounters with Nicaraguan vessels at the times and the places alleged by Nicaragua, or that the naval frigates concerned were recorded docking at the port or elsewhere at the relevant time. In respect of some incidents, Colombia also provides communications from officers of the Colombian Navy, audio recordings, photographic evidence, and video footage of its own, as well as affidavits. In addition, in respect of incidents which allegedly occurred before 18 March 2014, Colombia refers to the statement made on that date by the Chief of Nicaragua's Army that there had been "no incidents" involving Colombia or its Navy.

68. With regard to Colombia's evidence, the Court considers that the Colombian Navy's maritime travel reports and navigation logs have probative value, as they mostly provide information from contemporaneous and direct sources. The Court will attach particular significance to reliable evidence that admits or establishes facts unfavourable to Colombia. In the same way as with the evidence adduced by Nicaragua, the Court will treat with caution reports and affidavits adduced by Colombia which appear to have been prepared specially for the purposes of the case.

69. Upon examination of the evidence submitted by Nicaragua, the Court finds that for many alleged incidents, Nicaragua seeks to establish that Colombian naval vessels violated Nicaragua's rights in its maritime

zones; yet its evidence does not prove, to the satisfaction of the Court, that Colombia's conduct in Nicaragua's exclusive economic zone went beyond what is permitted under customary international law as reflected in Article 58 of UNCLOS. In relation to a number of other alleged incidents, Nicaragua's evidence is primarily based on what fishermen reported to the owners of their vessels, on materials that were apparently prepared for the purposes of the present case without other corroborating evidence, on audio recordings that are not sufficiently clear, or on media reports that either do not indicate the source of their information or are otherwise uncorroborated. The Court does not consider that such evidence suffices to establish Nicaragua's allegations against Colombia.

The Court considers that, with regard to the alleged incidents referred to above, Nicaragua has failed to discharge its burden of proof to establish a breach by Colombia of its international obligations. The Court will therefore dismiss those allegations for lack of proof.

70. With regard to the rest of the alleged incidents, the Court will examine in detail the evidence adduced by Nicaragua, together with Colombia's responses to each of the alleged incidents.

* *

The alleged incidents of 17 November 2013

71. Nicaragua claims that in the morning of 17 November 2013 the ARC *Almirante Padilla*, a Colombian frigate, ordered the *Miss Sofia*, a Nicaraguan lobster ship, to move from its position at 14° 50′ 00″ N and 81° 45′ 00″ W because the lobster ship was in "Colombian waters". According to Nicaragua, when the *Miss Sofia* refused to leave, the Colombian frigate sent a speedboat to chase the lobster ship away. Nicaragua bases these allegations on the report of incidents attached to the letter from the Nicaraguan Naval Force to the Ministry of Foreign Affairs of Nicaragua, dated 26 August 2014 and the letter from the President of the Nicaraguan Chamber of Fisheries to the Executive Director of INPESCA, dated 6 January 2014. On the basis of the same evidence, Nicaragua claims that, later that day at around 3 p.m., after one of its coast guard vessels, the *Río Escondido*, informed the ARC *Almirante Padilla* that it was in Nicaraguan waters, the Colombian frigate refused to leave, stating that the Government of Colombia did not recognize the 2012 Judgment. Nicaragua argues that the different narrative of the alleged incident provided by Colombia (see paragraph 72 below) is not inconsistent with its own allegations, as the two accounts pertain to events that occurred at different times of the day.

72. With regard to these events, Colombia acknowledges that the ARC *Almirante Padilla* and the *Miss Sofia* were in the Luna Verde area

on 17 November 2013. Colombia claims, however, that on that day the ARC *Almirante Padilla* unsuccessfully tried to contact the *Miss Sofia* in order to return two fishermen whom it had rescued in the late afternoon and who appeared to have been abandoned by the *Miss Sofia*. Colombia asserts that, due to its inability to establish contact with the fishing vessel, its frigate contacted the Nicaraguan patrol boat. Colombia claims that it acted in accordance with its obligation under customary international law to assist any person found at sea in the exclusive economic zone in danger of being lost. In relation to these events, Colombia refers to signed declarations by two fishermen, dated 17 November 2013, attesting to their good treatment by the crew of the Colombian frigate, to audio-visual material, and to a communication from the Commander of the ARC *Almirante Padilla* to the Commander of the Specific Command of San Andrés and Providencia dated 20 November 2013. Colombia did not provide any information or evidence concerning the location and activities of the ARC *Almirante Padilla* before 5.10 p.m. that day.

The alleged incidents of 27 January 2014

73. Nicaragua claims that, on 27 January 2014, the Colombian frigate ARC *Independiente* informed the *Caribbean Star*, a Nicaraguan lobster ship, located at 14° 47′ 00″ N and 81° 52′ 00″ W, that it was fishing illegally in the Seaflower Biosphere Reserve. In support of this claim, Nicaragua relies on an audio recording, the letter from the President of the Nicaraguan Chamber of Fisheries to the Executive Director of INPESCA dated 1 July 2014, and the report of incidents attached to the letter from the Nicaraguan Naval Force to the Ministry of Foreign Affairs dated 26 August 2014. According to the audio recording submitted by Nicaragua, the Colombian frigate stated "the Colombian [S]tate has determined that the judgment of the International Court of Justice is not applicable, therefore the units of the [Colombian Navy] will continue exercising sovereignty and control over these waters". Also on the basis of the report attached to the letter dated 26 August 2014, Nicaragua alleges that, on the same day, the ARC *Independiente* harassed the *Al John*, another lobster ship, operating with a Nicaraguan fishing licence at 14° 44′ 00″ N and 81° 47′ 00″ W.

74. For its part, Colombia states that it cannot confirm the authenticity of the audio recording. It denies, by reference to the maritime travel report of the ARC *Independiente* for 27 January 2014, that the *Independiente* encountered the *Caribbean Star* on that day, but concedes that the ARC *Independiente* was in Nicaragua's exclusive economic zone and that it interacted with the *Al John*. Colombia refers to a communication from the Commander of the Colombian Naval Force of the Caribbean, dated 28 January 2014, in support of its claim that the ARC *Independiente* did not harass the *Al John* as Nicaragua asserts but rather informed it that its

practices in the Seaflower Biosphere Reserve were illegal. According to the communication on which Colombia relies, the captain of the *Al John* asked the Colombian frigate to allow his crew to continue to work "in these Nicaraguan waters". Colombia claims that this was the end of the communication, indicating that the fishermen were neither intimidated nor prevented from carrying out their activities.

The alleged incidents of 5 February 2014

75. According to Nicaragua, on 5 February 2014, the ARC *20 de Julio*, a Colombian frigate, informed the Nicaraguan Navy vessel *Tayacán* and 12 Nicaraguan fishing boats operating in the vicinity of 14° 44′ 01″ N and 81° 39′ 08″ W to withdraw from Colombia's contiguous zone and territorial sea. Nicaragua relies, in this regard, on the report of incidents and an audio recording attached to the letter dated 26 August 2014. In the audio recording submitted by Nicaragua, the speaker identifies himself as representing the "[Navy] of the Republic of Colombia, ARC '20 de Julio'" and informs "Nicaraguan units" that "you are in Colombia jurisdictional waters — the Colombian State has determined that the ruling by The Hague is not applicable; therefore, the units of the [Navy] of the Republic of Colombia will continue to exercise sovereignty over these waters". The speaker also notes the specific co-ordinates at which the Nicaraguan units are located as 14° 44′ 02″ N and 81° 39′ 06″ W. By reference to the letter from the President of the Nicaraguan Chamber of Fisheries to the Executive Director of INPESCA dated 1 July 2014, as well as the above-mentioned report, Nicaragua also claims that, later that day, the ARC *20 de Julio* intercepted the *Nica Fish*, a Nicaraguan fishing boat, located at 14° 44′ 00″ N and 81° 39′ 00″ W, and urged it to withdraw from "Colombian waters".

76. Colombia does not challenge the authenticity of the audio recording submitted by Nicaragua, nor does it deny that its vessel interacted with the *Tayacán*, which the ARC *20 de Julio* identified as being located at 14° 44′ N and 81° 36' W. Colombia, however, asserts that the mere reading of a statement concerning the 2012 Judgment, without any evidence of interference with Nicaragua's sovereign rights, does not amount to a violation of international law. Colombia also refers to the maritime travel report of the ARC *20 de Julio*, which it argues supports its claim that on 5 February 2014 the frigate identified only one fishing vessel, the *Nica Fish*, with which it did not interact.

The alleged incidents of 12 and 13 March 2014

77. Nicaragua claims that on 12 March 2014 the Colombian frigate ARC *20 de Julio* harassed the Nicaraguan lobster ship *Al John*, which was

located at approximately 14° 44′ 00″ N and 81° 50′ 00″ W, by ordering it to withdraw from the area in which it was fishing and by sending a speedboat to chase it away. Nicaragua also alleges that the Colombian frigate and speedboat had a "hostile attitude". In respect of this alleged incident, Nicaragua relies on the letter from the President of the Nicaraguan Chamber of Fisheries to the Executive Director of INPESCA dated 1 July 2014 and the report attached to the letter from the Nicaraguan Naval Force to the Ministry of Foreign Affairs of Nicaragua dated 26 August 2014. Moreover, Nicaragua claims, on the basis of the same evidence, that, the following day, the same Colombian frigate ordered the *Marco Polo*, a Nicaraguan fishing boat in the vicinity of 14° 43′ 00″ N and 81° 45′ 00″ W, to leave the area in which it was fishing.

78. In response, Colombia accepts that the ARC *20 de Julio* interacted with the *Al John* and the *Marco Polo* on 12 and 13 March 2014, respectively. Colombia claims that its frigate simply informed each of the fishing vessels that they were operating "in a UNESCO specially-protected area" and invited them to suspend their environmentally harmful practices and to change them for other methods. The Respondent submits a communication from the Commander of the ARC *20 de Julio* to the Colombian Navy's Specific Command of San Andrés and Providencia dated 13 March 2014 to which photographic evidence and the transcription of communications with the two fishing vessels were attached, which indicates that the ARC *20 de Julio*, reading from a proclamation, informed the *Al John* and the *Marco Polo* that they were engaged in predatory fishing practices in a protected area. Colombia notes that, according to its transcription of those communications, the captain of the *Al John* said that it would move when it was "done fishing" and the *Marco Polo* replied that it would continue "exercising legal fishing". Colombia claims that these responses support its contention that there was no harassment or violation of Nicaragua's sovereign rights.

The alleged incident of 3 April 2014

79. Nicaragua alleges that on 3 April 2014 a Colombian Navy ocean patrol ship, the ARC *San Andrés*, harassed the *Mister Jim*, a Nicaraguan fishing boat, located at 14° 44′ 00″ N and 82° 00′ 00″ W, and advised it by radio that it should not continue to fish for lobster and should withdraw from the area. In relation to this allegation, Nicaragua relies on the report attached to the letter from the Nicaraguan Naval Force to the Ministry of Foreign Affairs of Nicaragua dated 26 August 2014 and the letter from the President of the Nicaraguan Chamber of Fisheries to the Executive Director of INPESCA dated 1 July 2014.

80. While conceding that an interaction did occur between the ARC *San Andrés* and the *Mister Jim*, Colombia claims that the ARC *San Andrés* invited the *Mister Jim* to suspend its environmentally harmful

fishing practices and to make use of authorized fishing methods instead. The communication from the Commander of the Specific Command of San Andrés and Providencia to the Commander of the Naval Force of the Caribbean dated 7 April 2014 and submitted by Colombia with respect to this incident confirms that the interaction indeed took place. Colombia introduces evidence that indicates that, as part of the exchange, the ARC *San Andrés*, reading from a proclamation, "invited the *Mister Jim* to suspend its predatory fishing practices, which are harmful to the marine environment, and change its methods to authorized ones".

The alleged incident of 28 July 2014

81. Nicaragua alleges that on 28 July 2014 the captain of the Nicaraguan-flagged fishing vessel *Doña Emilia* informed a Nicaraguan Navy vessel that "a few days earlier", while at 14° 29′ 00″ N and 81° 53′ 00″ W, a Colombian Navy vessel advised the *Doña Emilia* that it could not operate in that area. Nicaragua supports this allegation by reference to the report and an audio recording attached to the letter from the Nicaraguan Naval Force to the Ministry of Foreign Affairs, dated 26 August 2014.

82. Colombia accepts that one of its naval vessels, the ARC *7 de Agosto*, interacted with the *Doña Emilia* on 22 July 2014. It presents a communication from the Commander of the Specific Command of San Andrés and Providencia to the Commander of Colombia's Naval Force of the Caribbean dated 22 July 2014. According to this communication, the ARC *7 de Agosto* informed the *Doña Emilia* that it had been found carrying out predatory fishing in a UNESCO-protected environmentally sensitive area, and invited it "to suspend such harmful practice for the marine environment and change it for authorized methods". In support of its assertion that Nicaragua was not impeded from exercising its sovereign rights in the area, Colombia also refers to the transcript of the audio recording provided by Nicaragua, according to which the captain of the *Doña Emilia* stated that the fishing vessel ignored the Colombian naval vessel and continued with its fishing activities.

The alleged incidents of 26 March 2015

83. Nicaragua claims that on 26 March 2015 the ARC *11 de Noviembre*, located at 14° 50′ 00″ N and 81° 41′ 00″ W, stated to Nicaraguan coast guard vessel GC-401 *José Santos Zelaya* that, "according to the Colombian government, the ruling of The Hague [was] inapplicable, which is why [it was] in the Colombian Archipelago of San Andrés [and] Providencia". According to Nicaragua, later that day, the ARC *11 de Noviembre* informed the Nicaraguan-flagged fishing vessel *Doña Emilia*

that it was engaging in predatory fishing at co-ordinates 14° 50′ 2.98″ N and 81° 47′ 3.62″ W and asked it to suspend this practice. In respect of these alleged events, Nicaragua relies on daily reports of its Navy and audio recordings. According to Nicaragua's transcript of one of these recordings, the captain of the ARC *11 de Noviembre* told the *Doña Emilia* that its fishing technique was "totally prohibited anywhere . . . regardless of the fishing license that a boat has" and asked the fishing vessel whether the "instructions" were clear.

84. For its part, Colombia claims that, even if true, Nicaragua's audio recording relating to GC-401 *José Santos Zelaya* shows no violation of Nicaragua's sovereign rights, and that Nicaragua is seeking to negate Colombia's rights in the south-western Caribbean Sea. As for the alleged interaction between the ARC *11 de Noviembre* and the *Doña Emilia*, Colombia claims to have no record of this encounter. It further claims that, if Nicaragua's audio recording is authentic, Nicaragua has distorted the alleged interaction. Colombia asserts that, in the recording, the Colombian officer informed the fishing vessel that "it was in a UNESCO specially-protected area, where predatory fishing was not permitted" and the officer "merely invited the vessel to suspend this harmful fishing practice and change it for authorized methods". According to Colombia, this alleged incident does not constitute a violation of Nicaragua's sovereign rights.

The alleged incident of 21 August 2016

85. Nicaragua further claims that on 21 August 2016 the captain of the *Marco Polo* reported that, while fishing at 14° 51′ 00″ N and 81° 41′ 00″ W, the Colombian frigate ARC *Almirante Padilla* informed the vessel that its fishing activities were illegal and "proceeded to emit an acute sound in the water, which obstructed the *Marco Polo*'s fishing for lobster, thereby forcing it to leave the area". In respect of this incident, Nicaragua relies on the letter from the Navy to the Commander in Chief of the Army, dated 20 August 2016, accompanied by a signed complaint from the captain of the Nicaraguan fishing vessel *Marco Polo*, as well as a daily report of its Navy.

86. Regarding the encounter with the *Marco Polo*, Colombia accepts that the ARC *Almirante Padilla* had an encounter with the Nicaraguan fishing vessel in question, but argues that the Colombian frigate, after finding the *Marco Polo* to be undertaking predatory fishing, merely read a proclamation used to address Nicaraguan fishing vessels engaging in what Colombia regarded as predatory practices and invited the crew to suspend its environmentally harmful fishing practices. Colombia relies on the maritime travel report of the ARC *Almirante Padilla* in claiming that the fishing vessel ignored this invitation, which, in Colombia's view, implies that the *Marco Polo* did not leave the area and was not precluded from carrying out its fishing activities.

The alleged incidents of 6 and 8 October 2018

87. Nicaragua alleges that, on 6 October 2018, the ARC *Almirante Padilla*, a Colombian naval vessel, intercepted the *Dr Jorge Carranza Fraser*, a Mexican-flagged vessel conducting marine scientific research activities with Nicaragua's authorization in waters south of Alburquerque Cay. Nicaragua claims that the Mexican-flagged vessel was located at 13° 51′ 50.79″ N and 81° 27′ 18.066″ W when the Colombian vessel "ordered it to stop its activities and prevented it from continuing [its marine scientific research activities], claiming that it was operating in Colombian waters". Nicaragua further alleges that, two days later, the ARC *Almirante Padilla* again intercepted the Mexican-flagged vessel while operating at 11° 51′ 39.798″ N and 80° 58′ 9.998″ W and ordered it to leave. Nicaragua bases its claim on evidence that includes diplomatic Notes, a letter from the Mexican National Institute of Fisheries and Aquaculture (hereinafter "INAPESCA"), dated 16 April 2019, and affidavits provided by two Mexican crew members accompanied by contemporaneous radar screen photographs. In respect of its allegations concerning the Mexican-flagged vessel, Nicaragua also refers to the original and modified navigation course and sampling stations of that vessel.

88. Colombia argues that the alleged incident "was a non-event". By reference to a communiqué by INAPESCA dated 8 October 2018, which indicates that on 5 October 2018 the Mexican-flagged vessel had already transited the area in which the alleged incident took place, Colombia claims that the Mexican-flagged vessel "could not have been where Nicaragua claims it was on 6 October 2018". Colombia further states that contemporaneous materials emanating from INAPESCA do not mention the alleged interference by Colombia and that neither Mexico nor INAPESCA protested the alleged event. While Colombia accepts that the INAPESCA letter dated 16 April 2019 refers to an encounter the Mexican-flagged vessel had with a marine patrol vessel from a third State, it notes that the letter "did not mention Colombia". Additionally, Colombia questions the veracity of the affidavits submitted by Nicaragua on the grounds that "[t]he individual who served as the notary public in both of them is . . . a recently retired member of Nicaragua's military as well as legal counsel in the current proceedings".

The alleged incident of 11 December 2018

89. Nicaragua claims that in the late evening of 10 December 2018 the Nicaraguan Navy vessel *Tayacán* boarded the *Observer*, a Honduran-flagged fishing boat, and found it to be conducting illegal fishing for lobster at 14° 58′ 00″ N and 81° 00′ 00″ W. According to Nicaragua, while escorting the *Observer* to a Nicaraguan port early in the morning of

11 December 2018, its naval vessel detected the presence of the ARC *Antioquia*, a Colombian Navy frigate, which established communication, demanding that the Nicaraguan Navy release the *Observer*. Nicaragua alleges that its naval vessel was harassed first by a low-flying plane and then by a fast boat dispatched by the ARC *Antioquia*, forcing the *Tayacán* to change course. According to Nicaragua, the ARC *Antioquia* followed the *Tayacán* for hours and then took hostile actions with the aim of impeding the transfer of the *Observer*, culminating in the *Antioquia* bumping several times into both the *Observer* and the *Tayacán.* Nicaragua further alleges that the crew of the *Antioquia* pointed guns at Nicaraguan naval personnel aboard the *Observer*, demanding that they surrender. In respect of these allegations, Nicaragua relies on, among other things, an affidavit from the Commander and Second Commander of the *Tayacán*; signed and notarized interviews with the captain, second captain, and two crew members of the *Observer*; audio-visual material; photographs; and audio recordings.

90. With respect to the alleged events of 10-11 December 2018, Colombia argues that the *Observer* was not fishing in Nicaragua's exclusive economic zone but was in transit between Colombia's islands. In this regard, Colombia refers to, among other things, how lobster fishing is carried out, the timing of the alleged events, and data from the vessel monitoring system of the *Observer*. Colombia also relies on these data in support of its claim that the ARC *Antioquia* was in the area in response to a distress call from the *Observer*. Colombia denies that it deployed either a low-flying plane or a fast boat to harass the Nicaraguan vessel and refers, in support of its position, to a communication from the Commander of Colombia's Air Force dated 23 October 2019, which states that on 11 December 2018 there were no flights by the Colombian Air Force in the area, as well as to an affidavit by the captain of the ARC *Antioquia* and the maritime travel report of the ARC *Antioquia*. Moreover, relying on audio-visual material, audio recordings, and the affidavit from the captain of the ARC *Antioquia*, Colombia claims that Nicaraguan officials tried to ram the ARC *Antioquia* and deliberately manoeuvred the *Tayacán* in order to have the *Observer* and the ARC *Antioquia* bump into each other. Colombia also questions the credibility of the affidavits produced by Nicaragua, since the notary public for those affidavits is a recently retired member of Nicaragua's military who has served as legal counsel for Nicaragua in the present case. Referring to an affidavit from a crew member of the *Observer*, Colombia considers, moreover, that the interviews on which Nicaragua relies were taken under duress and that the Court should thus not take them into consideration.

* *

91. The Court considers that, based upon the above-mentioned evidentiary material, a number of facts on which Nicaragua's claim rests are established. First of all, as to many of the alleged incidents, the evidence supports Nicaragua's allegations regarding the location of Colombian frigates (see the alleged incidents of 17 November 2013; 27 January 2014; 12 and 13 March 2014; 3 April 2014; 28 July 2014; 21 August 2016; as well as 6 and 8 October 2018). Colombia's own naval reports and navigation logs, as contemporaneous documents, also corroborate the specific geographic co-ordinates presented by Nicaragua, which lie within the area east of the 82° meridian, often in the fishing ground at or around Luna Verde, located within the maritime area that was declared by the Court to appertain to Nicaragua.

92. Moreover, the Colombian naval vessels purported to exercise enforcement jurisdiction in Nicaragua's exclusive economic zone (see the alleged incidents of 27 January 2014; 13 March 2014; 3 April 2014; 28 July 2014; 26 March 2015; 21 August 2016). In communications with Nicaraguan naval vessels and fishing vessels operating in Nicaragua's exclusive economic zone, Colombian naval officers, at times reading from a government proclamation, requested Nicaraguan fishing vessels to discontinue their fishing activities, alleging that those activities were environmentally harmful and were illegal or not authorized. These officials also stated to the Nicaraguan vessels that the maritime spaces concerned were "Colombian jurisdictional waters" over which Colombia would "continue to exercise sovereignty" on the basis of the determination by the Colombian Government that the 2012 Judgment "is not applicable". The evidence sufficiently proves that the conduct of Colombian naval vessels was carried out to give effect to a policy whereby Colombia sought to continue to control fishing activities and the conservation of resources in the area that lies within Nicaragua's exclusive economic zone.

93. Colombia relies on two legal grounds to justify its conduct at sea. First, Colombia claims that its actions, even if proved, are permitted as an exercise of its freedoms of navigation and overflight. Secondly, Colombia asserts that it has an international obligation to protect and preserve the marine environment of the south-western Caribbean Sea and the habitat of the Raizales and other inhabitants of the Archipelago. It argues that environmental concerns need to be fully taken into account regardless of considerations of sovereignty or sovereign rights.

94. With regard to the Respondent's first assertion, the Court considers that, in accordance with the customary rules on the exclusive economic zone, freedoms of navigation and overflight enjoyed by other States in the exclusive economic zone of the coastal State, as reflected in Article 58 of UNCLOS, do not include rights relating to the exploration,

exploitation, conservation and management of the natural resources of the maritime zone, nor do they give other States jurisdiction to enforce conservation measures in the exclusive economic zone of the coastal State. Such rights and jurisdiction are specifically reserved for the coastal State under customary international law, as reflected in Articles 56 and 73 of UNCLOS.

95. With regard to Colombia's assertion relating to its international obligation to preserve the marine environment of the south-western Caribbean Sea, it is not contested between the Parties that all States have the obligation under customary international law to protect and preserve the marine environment. In the exclusive economic zone, however, it is the coastal State that has jurisdiction to discharge that obligation. As stated by the International Tribunal for the Law of the Sea (hereinafter "ITLOS"), "the conservation of the living resources of the sea is an element in the protection and preservation of the marine environment" (*Southern Bluefin Tuna Cases (New Zealand* v. *Japan; Australia* v. *Japan), Provisional Measures, Order of 27 August 1999, ITLOS Reports 1999*, p. 295, para. 70). In this respect, the coastal State bears the responsibility within its exclusive economic zone to take legislative, administrative and enforcement measures in accordance with customary international law, as reflected in the relevant provisions of UNCLOS, for the purpose of conserving the living resources and protecting and preserving the marine environment. A third State, in the capacity of a flag State, also has "an obligation to ensure compliance by vessels flying its flag with relevant conservation measures concerning living resources enacted by the coastal State for its exclusive economic zone" (*Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015, ITLOS Reports 2015*, p. 37, para. 120). However, a third State has no jurisdiction to enforce conservation standards on fishing vessels of other States in the exclusive economic zone.

96. The Court observes that great emphasis has been placed by the Respondent on its obligations to protect the marine environment of the south-western Caribbean Sea and the habitat of the Raizales and other inhabitants of the Archipelago under the Cartagena Convention and the SPAW Protocol (hereinafter referred to as the "Cartagena régime"). The Cartagena Convention was concluded with the objective of enhancing international co-operation to prevent, reduce and control pollution from various sources in the wider Caribbean region and to ensure sound environmental management. The SPAW Protocol is one of the three protocols to the Cartagena Convention, under which the States parties undertake to establish protected areas and take measures for the preservation of endangered species and marine areas. Colombia became a party to the Cartagena Convention on 2 April 1988 and Nicaragua became a party on 24 September 2005. Both Colombia and Nicaragua are parties to the SPAW Protocol, which entered into force on 17 June 2000. Colombia deposited its instrument of ratification on 5 January 1998; Nicaragua deposited its instrument of ratification on 4 May 2021.

97. In implementing the Cartagena régime, Colombia established the Seaflower Biosphere Reserve and the Seaflower Marine Protected Area. The Court observes that Colombia's two marine natural reserves were established in the south-western Caribbean Sea at the time when there were overlapping maritime claims between Colombia and Nicaragua in the area. As a result of the maritime delimitation in the 2012 Judgment, these two marine natural reserves now partly overlap with Nicaragua's exclusive economic zone. (For illustrative purposes, the Court includes on page 313 the map produced by Colombia in its Counter-Memorial.) The question in the present case concerns the extent to which Colombia may exercise its rights and discharge its obligations under the Cartagena régime in an area that presently falls within the exclusive economic zone of Nicaragua. In Colombia's view, should Nicaragua fail to control and police predatory or other illegal fishing activities carried out by Nicaraguan nationals or by nationals of third States in that area, Colombia has the right and duty under the Cartagena régime to exercise due diligence to control such activities.

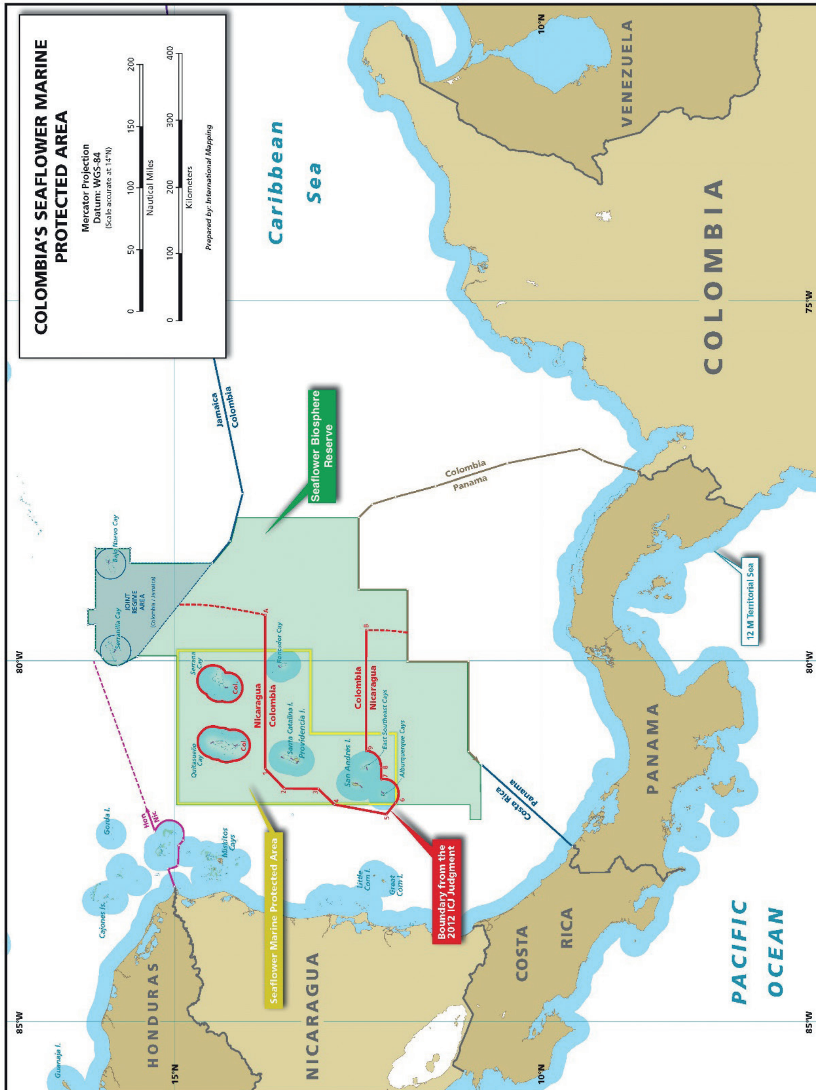
98. The maritime delimitation between the Parties directly affects the rights and duties of Colombia in the parts of the Seaflower Marine Protected Area and the Seaflower Biosphere Reserve that overlap with Nicaragua's exclusive economic zone. Colombia is under an international obligation to respect Nicaragua's sovereign rights and jurisdiction in those areas, not only on the basis of customary international law on the exclusive economic zone, but also on the basis of the Cartagena Convention and the SPAW Protocol. Article 10 of the Cartagena Convention states:

> "The Contracting Parties shall, individually or jointly, take all appropriate measures to protect and preserve rare or fragile ecosystems, as well as the habitat of depleted, threatened or endangered species in the Convention area. To this end, the Contracting Parties shall endeavour to establish protected areas. The establishment of such areas shall not affect the rights of other Contracting Parties and third States. In addition, the Contracting Parties shall exchange information concerning the administration and management of such areas."

The provision stating that "[t]he establishment of such areas shall not affect the rights of other Contracting Parties and third States" means that in discharging its obligations under the Cartagena Convention, Colombia must respect the sovereign rights and jurisdiction of Nicaragua in its exclusive economic zone. It may not, therefore, enforce conservation standards and protection measures in the area that is within Nicaragua's exclusive economic zone.

99. A similar provision is contained in the SPAW Protocol. Article 3, paragraph 1, of the Protocol states that each party

MAP SHOWING THE SEAFLOWER MARINE PROTECTED AREA AND THE SEAFLOWER BIOSPHERE RESERVE ACCORDING TO COLOMBIA



(*Source:* Colombia's Counter-Memorial, Figure 2.3, p. 51)

> "shall . . . take the necessary measures to protect, preserve and manage [certain areas and species of flora and fauna] in a sustainable way, within areas of the Wider Caribbean Region in which it exercises sovereignty, or sovereign rights or jurisdiction".

Paragraph 2 of Article 3 further states that

> "[e]ach Party shall endeavour to co-operate in the enforcement of these measures, without prejudice to the sovereignty, or sovereign rights or jurisdiction of other Parties. Any measures taken by such Party to enforce or to attempt to enforce the measures agreed pursuant to this Protocol shall be limited to those within the competence of such Party and shall be in accordance with international law."

Contrary to Colombia's claim, therefore, under the SPAW Protocol the power of the States parties to adopt and enforce conservation measures is limited to the maritime areas in which they exercise sovereignty, or sovereign rights or jurisdiction. The fragility of the ecological environment of a protected area established by a State party does not provide a legal basis for it to take measures in areas that are subject to the sovereignty, sovereign rights or jurisdiction of another State party.

100. According to customary international law on the exclusive economic zone, Nicaragua, as the coastal State, enjoys sovereign rights to manage fishing activities and jurisdiction to take measures to protect and preserve the maritime environment in its exclusive economic zone. The evidence before the Court shows that the conduct of Colombian naval frigates in Nicaraguan maritime zones was not limited to "observing" predatory or illegal fishing activities or "informing" fishing vessels of such activities, as claimed by Colombia. This conduct often amounted to exercising control over fishing activities in Nicaragua's exclusive economic zone, implementing conservation measures on Nicaraguan-flagged or Nicaraguan-licensed ships, and hindering the operations of Nicaragua's naval vessels (see paragraph 92 above). The Court considers that Colombia's legal arguments do not justify its conduct within Nicaragua's exclusive economic zone. Colombia's conduct is in contravention of customary rules of international law as reflected in Articles 56, 58 and 73 of UNCLOS.

101. In light of the foregoing considerations, the Court finds that Colombia has violated its international obligation to respect Nicaragua's sovereign rights and jurisdiction in the latter's exclusive economic zone by interfering with fishing activities and marine scientific research by Nicaraguan-flagged or Nicaraguan-licensed vessels and with the operations of Nicaragua's naval vessels, and by purporting to enforce conservation measures in that zone.

2. Colombia's alleged authorization of fishing activities and marine scientific research in Nicaragua's exclusive economic zone

102. Nicaragua also claims that Colombia authorized fishing activities and marine scientific research in Nicaragua's exclusive economic zone. In support of these contentions, it refers to legal measures adopted by Colombia, as well as alleged incidents at sea. Nicaragua argues that, by these actions, Colombia violated its sovereign rights and jurisdiction in its exclusive economic zone.

103. According to Nicaragua, Colombia issued permits to Colombians and nationals of third States to fish in Nicaragua's exclusive economic zone. In this regard, Nicaragua refers to resolutions issued annually by the General Maritime Directorate of the Ministry of National Defence of Colombia (hereinafter "DIMAR"), starting with a resolution dated 26 June 2013 (Resolution No. 0311 of 26 June 2013; Resolution No. 305 of 25 June 2014; Resolution No. 0437 of 27 July 2015; Resolution No. 0459 of 27 July 2016; and Resolution No. 550 of 15 August 2017), each of which lists anywhere from six to nineteen foreign-flagged industrial fishing vessels which "shall automatically be granted a permit to stay and operate in the jurisdiction of the San Andrés and Providencia Harbour Master's Offices for the term of one year". In Nicaragua's view, the jurisdiction defined in these resolutions extends to maritime areas within Nicaragua's exclusive economic zone. Additionally, Nicaragua alleges that these resolutions encourage such fishing through financial incentives.

104. Nicaragua claims, moreover, that the Governor of the Department of the Archipelago of San Andrés, Providencia and Santa Catalina (hereinafter the "Governor of the San Andrés Archipelago") issued resolutions concerning the applicability of Colombian fishing permits to Nicaragua's exclusive economic zone. In this regard, Nicaragua specifies that Resolution No. 5081 of 22 October 2013 authorized the use by the Honduran-flagged vessel *Captain KD* of an existing industrial and commercial fishing permit to fish in "[a]ll banks (Roncador, Serrana and Quitasueño, Serranilla) and Shallows (Alicia and Nuevo), and the area known as *La Esquina* or *Luna Verde*", this latter area being "plainly under the jurisdiction of Nicaragua". Nicaragua also refers to Resolution No. 4780 of 2015 as recognizing the applicability of an "Industrial Commercial Fishing Permit" in "the area known as . . . *'La Esquina'* or *'Luna Verde'*". In addition, Nicaragua claims that Resolution No. 2465 of 2016 grants "'Traditional Commercial Fisherm[e]n' the right to engage in traditional fishing 'within the maritime jurisdiction of the Department of the Archipelago of San Andrés, Providencia and Santa Catalina', which includes maritime areas within Nicaragua's EEZ".

105. Further, Nicaragua refers to alleged incidents at sea in support of its claim that Colombia authorized and protected fishing and marine sci-

entific research activities in Nicaragua's exclusive economic zone. Nicaragua emphasizes that the alleged fishing-related incidents all occurred "in or near the *Luna Verde* area".

*

106. Colombia contends that Nicaragua's allegation that it authorized Colombians and nationals of other States to fish and conduct marine scientific research activities in Nicaraguan waters is without merit. Regarding the resolutions issued by DIMAR, Colombia claims that the entity concerned does not possess the competence to grant fishing licences and that the resolutions do not grant economic incentives to promote fishing in Nicaragua's exclusive economic zone. In Colombia's view, the financial exemptions it granted comprise only financial relief without authorizing or encouraging industrial fishing and make no reference to Nicaragua's maritime zones.

107. Moreover, Colombia claims that the resolutions issued by the Governor of the San Andrés Archipelago do not authorize fishing activities in Nicaragua's exclusive economic zone; they expressly indicate that the only areas where fishing activities are authorized are Roncador, Serrana, Quitasueño, Serranilla, Bajo Alicia and Bajo Nuevo, areas which, according to Colombia, the Court has recognized as lying within Colombia's territorial sea and exclusive economic zone. The resolutions do not, in Colombia's view, authorize fishing activities in the Luna Verde bank or in other maritime spaces situated within Nicaragua's exclusive economic zone. As regards Nicaragua's reliance on Resolution No. 4780, Colombia contends that this resolution is not a fishing permit, that it does not concern the vessel to which Nicaragua refers, and that the reference in its preamble to Luna Verde does not purport to grant a licence to fish there. Colombia further claims that Resolution No. 2465 of 2016 is completely irrelevant, since it has "nothing to do with the granting of fishing permits or any Nicaraguan maritime spaces".

108. In respect of Nicaragua's claim concerning the *Captain KD*, Colombia argues that the authorization for an "integrated commercial industrial fishing permit" was granted in September 2012, before the maritime boundary was delimited by the Court, and that Resolution No. 5081 of 22 October 2013 referred to by Nicaragua does not grant authorization to fish at the Luna Verde bank.

109. As regards the incidents alleged by Nicaragua to demonstrate that Colombia authorized fishing and marine scientific research in Nicaragua's exclusive economic zone, Colombia claims that Nicaragua offers no direct evidence, or at least no direct evidence whose authenticity Colombia can confirm. It claims that Colombian vessels that were present at the location and time that some of the incidents alleged by Nicaragua occurred

were there in exercise of Colombia's freedoms of navigation and overflight, or other internationally lawful uses of the sea.

* *

110. Before turning to the evidence relating to the incidents at sea alleged by Nicaragua, the Court will first consider the resolutions under which Nicaragua claims Colombia authorized fishing by Colombian-flagged and foreign vessels in Nicaragua's exclusive economic zone.

111. The resolutions in question were issued by two Colombian governmental authorities: DIMAR and the Governor of the San Andrés Archipelago. According to its resolutions, DIMAR has been conferred the "function of authorizing the operation of ships and naval craft in Colombian waters". While the permits granted by DIMAR to foreign vessels to stay and operate in the San Andrés Archipelago are subject to the authorization of the Governor of the San Andrés Archipelago, they nonetheless constitute an exercise of DIMAR's function of authorizing the operation of fishing vessels. The Court cannot dismiss Nicaragua's allegation simply on the basis of Colombia's statement that DIMAR is not the competent authority to grant such permits without further examining the evidence before it.

112. The case file shows that since the Court delivered its 2012 Judgment, DIMAR has annually issued resolutions relating to industrial fishing in the San Andrés Archipelago. Nicaragua refers to five resolutions: Resolution No. 0311 of 2013, Resolution No. 305 of 2014, Resolution No. 0437 of 2015, Resolution No. 0459 of 2016 and Resolution No. 550 of 2017.

113. The preamble of the first resolution states that, given the "negative economic and social effects" caused by the 2012 Judgment, "it was deemed necessary to implement special transitory measures applicable to national and foreign ships that have been engaged in industrial fishing in said area of the national territory". On its scope of application, Article 2 of the resolution states: "The provisions of this resolution shall be applicable exclusively to the following ships dedicated to industrial fishing in the jurisdiction of the San Andrés and Providencia Harbour Master's Offices".

On the granting of fishing permits for foreign ships, the resolution provides:

> "Article 4. *Stay-and-operation permit for foreign ships*. The foreign-flag motor ships listed in Section 2 of Article 2 of this resolution shall automatically be granted a permit to stay and operate in the jurisdiction of the San Andrés and Providencia Harbour Master's Offices for the term of one year from the entry into force of this resolution, upon authorization of the office of Secretary of Agriculture and

Fishing of the Government of San Andrés, Providencia and Santa Ca[ta]lina."

114. Among the "special transitory measures" provided for by the resolution are payment exemptions granted to the national and foreign ships listed therein (Art. 3). The content of Article 2 and Article 4 of Resolution No. 0311 of 2013, and an exemption from payment of certain fees, were consistently reaffirmed in subsequent resolutions.

115. With regard to the financial exemptions, the Court considers that, for the purposes of the present case, it is unnecessary to determine whether such measures granted by the Colombian Government "authorize" or "encourage" industrial fishing, as alleged by Nicaragua, or whether they comprise only financial relief to serve the objectives of the resolution, as claimed by Colombia. Insomuch as the jurisdiction of the San Andrés and Providencia Harbour Master's Offices accords with the maritime boundary between the Parties, measures taken under the resolution are matters that rest within the jurisdiction of Colombia. The critical issue for the Court to determine is the geographical scope of the fishing authorizations granted by the Colombian Government.

116. The Court observes that neither of the above-mentioned articles nor any other provisions contained in the DIMAR resolutions specify the extent of "the jurisdiction of the San Andrés and Providencia Harbour Master's Offices", a crucial issue for the purposes of the present case. On the basis of the resolutions themselves, the Court cannot determine whether the geographical scope of the area in which the listed fishing vessels were authorized to operate extends into Nicaragua's maritime area. Therefore, the Court must examine other evidence before it, including the resolutions issued by the Governor of the San Andrés Archipelago.

117. The documents submitted by Nicaragua include five resolutions issued by the Governor of the San Andrés Archipelago: Resolution No. 5081 of 22 October 2013, Resolution No. 4997 of 10 November 2014, Resolution No. 4356 of 1 September 2015, Resolution No. 4780 of 24 September 2015, and Resolution No. 2465 of 30 June 2016, each of which specifies the fishing zones for the fishing operations. In Resolution No. 4356 of 2015, the relevant fishing zone is described as comprising "all of the banks (Roncador, Serrana and Quitasueño, and Serranilla) and Shoals (Alicia and Nuevo), and the zone where fishing is permitted by the laws, which includes our [Colombia's] island territory and authorized fishing zones". Resolution No. 4997 of 2014 provides the same, with the addition of "zones where [activities for extraction of Fishery Resources are] permitted by . . . fishing regulations, and system *[sic]* of Protected Marine Areas that apply in the Department for Industrial Fishing". The fishing zone in Resolution No. 2465 of 2016 is described as "the territory that is within the jurisdiction of the Department of the Archipelago of San Andrés, Providencia and Santa Catalina". The scope of jurisdiction is not defined more clearly in these three resolutions than it is in the afore-

mentioned DIMAR resolutions. In Resolution No. 5081 of 22 October 2013 and Resolution No. 4780 of 24 September 2015, however, the fishing zone is described more precisely.

118. In Resolution No. 5081 of 22 October 2013, the fishing zone is defined as follows:

> "All banks (Roncador, Serrana y Quitasue[ñ]o, Serranilla) and Shallows (Alicia and Nuevo), and the area known as *La Esquina* or *Luna Verde*, which encompasses our insular territory and fishing zones; nonetheless, protected areas and fisheries regulations of the department and fisheries legislation must be respected."

The fishing zone in Resolution No. 4780 contains the same reference to "the area known as . . . *La Esquina* or *Luna Verde*, which includes our [Colombia's] island territory and fishing zones".

119. As previously noted, the fishing ground at La Esquina or Luna Verde is located in Nicaragua's exclusive economic zone as delimited by the 2012 Judgment. The express inclusion of "*La Esquina* or *Luna Verde*" in the fishing zone described in resolutions issued by the Governor of the San Andrés Archipelago after the 2012 Judgment suggests that Colombia continues to assert the right to authorize fishing activities in parts of Nicaragua's exclusive economic zone.

*

120. In light of the above consideration of Colombia's relevant resolutions, the Court will now examine the alleged incidents at sea to determine whether Colombia authorized fishing activities and marine scientific research in Nicaragua's exclusive economic zone.

The alleged incident of 13-14 February 2014

121. Nicaragua claims that, on 13 February 2014, the Nicaraguan vessel *Tayacán*, while on patrol at 14° 48′ 00″ N and 81° 36′ 00″ W, saw personnel from the Colombian frigate ARC *Almirante Padilla* board the *Blu Sky*, a Honduran-flagged fishing vessel. According to Nicaragua, when the *Tayacán* communicated with the *Blu Sky* on the next day in the vicinity of 14° 56′ 00″ N and 81° 35′ 00″ W, the captain of the *Blu Sky* informed the *Tayacán* that he had received authorization by Colombia to fish there. In respect of these allegations, Nicaragua relies on the report attached to the letter from the Nicaraguan Naval Force to the Ministry of Foreign Affairs dated 26 August 2014.

122. In response, Colombia asserts that Nicaragua was unaffected by the boarding of the fishing vessel, since Nicaragua is not the flag State of the vessel and since Nicaragua did not license it. By reference to two reso-

lutions issued by the Governor of the San Andrés Archipelago, the Respondent claims that the alleged "fishing permits granted by Colombia" do not in fact grant fishing rights in Luna Verde or in any other area of Nicaragua's exclusive economic zone and that, therefore, the contention that Colombia authorized the *Blu Sky* to fish in that zone is false.

The alleged incident of 23 March 2015

123. Nicaragua claims that, on 23 March 2015, when one of its coast guard vessels, located at 14° 40′ 00″ N and 81° 45′ 00″ W, observed the Honduran-flagged fishing vessel *Lucky Lady* and asked it under whose authority it was fishing, the Colombian frigate ARC *Independiente* intervened, stating that "[the] *Lucky Lady* is under the protection of the government of Colombia" and that Colombia does not abide by the Court's 2012 Judgment. In relation to this alleged incident, Nicaragua relies on an audio recording and the daily reports of its Navy.

124. For its part, Colombia claims that the timing and location of this alleged incident cannot be established from Nicaragua's audio recording. Moreover, in denying that it granted any official authorization to fish in Nicaragua's exclusive economic zone, Colombia refers to a sailing record in which it granted the *Lucky Lady*, destined for the Northern Islands, permission to leave a Colombian port.

The alleged incident of 12 September 2015

125. Referring to audio recordings and the daily reports of its Navy, Nicaragua further claims that, on 12 September 2015, when Nicaragua's Navy vessel the *Tayacán* encountered the Tanzanian-flagged industrial fishing vessel *Miss Dolores* at 14° 54′ 00″ N and 81° 28′ 00″ W, a nearby Colombian frigate asked the *Tayacán* to stay away from the *Miss Dolores*, stating that the *Tayacán* had not been authorized by Colombia "to exercise visitation rights on the *Miss Dolores* flagship of Tanzania, which is fishing for the Colombian government".

126. Regarding this alleged incident, Colombia asserts that its circumstances, date and location cannot be ascertained from Nicaragua's audio recordings. Colombia also claims that, even if the audio recordings submitted by Nicaragua were authentic, they would confirm Nicaragua's attempt to claim sovereignty over maritime spaces in which international law only grants it limited sovereign rights, since they suggest that a Nicaraguan officer claimed to be "exercising sovereignty" in the waters in question.

The alleged incidents of 12 and 13 January 2016

127. Relying on audio recordings and the daily reports of its Navy, Nicaragua makes allegations concerning incidents involving the Honduran-flagged fishing vessel the *Observer* on 12 and 13 January 2016. More specifically, Nicaragua claims that, on 12 January 2016, the commander of one of its coast guard vessels, located at 14° 41′ 00″ N and 81° 41′ 00″ W, ordered the *Observer* to stop fishing there, to which the *Observer* replied that the Colombian authorities allowed it to fish in that area and indeed "ordered [it] to come and work here". Nicaragua claims that, later that day, its coast guard vessel attempted to hail the *Observer* after seeing it fish in the same area with the protection of a Colombian frigate, and that the Colombian frigate intervened, stating that the *Observer* was authorized by the Colombian maritime authority to fish in the area. Nicaragua alleges that the Colombian frigate gave a similar response the next day, when the Nicaraguan vessel informed the frigate that the *Observer*, located at 14° 42′ 27″ N and 81° 42′ 39″ W, had to leave the area.

128. With respect to these alleged events, Colombia claims, on the basis of a Note Verbale from the Ministry of Foreign Affairs of Colombia to the Ministry of Foreign Affairs of Nicaragua dated 1 February 2016, that Nicaraguan patrol boats were observed "on 11 and 12 January 2016 — . . . not on 12 and 13 January" and that "communications between the vessels were conducted in an amicable and professional manner". Colombia refers also to the fact that, if authentic, the audio recordings would confirm Nicaragua's attempt to claim sovereignty over maritime spaces in which international law only grants it limited sovereign rights, given the latter's reported reference to "Nicaraguan territorial waters", among other similar statements.

The alleged incidents of 6 January 2017

129. On the basis of an audio recording and the daily reports of its Navy, Nicaragua claims that, on 6 January 2017, the Honduran-flagged fishing vessel *Capitán Geovanie* refused to follow an order by the Nicaraguan Navy vessel *Tayacán* to leave Nicaragua's exclusive economic zone and that a Colombian frigate then announced that it was in the Archipelago of San Andrés and Providencia to guarantee the security of all vessels present in the area, before asking the *Capitán Geovanie* whether the *Tayacán* was interfering with its work and telling the *Capitán Geovanie* to continue its fishing in "historically Colombian waters". Nicaragua further alleges that the Colombian frigate told the Nicaraguan vessel not to attempt to board or prevent the fishing activities of the *Capitán Geovanie*, adding that the fishing vessel "is authorized by the Colombian maritime authority". Nicaragua claims, also on the basis of an audio

recording and the daily reports of its Navy, that the Colombian frigate informed two other Honduran-flagged and Colombian-authorized fishing vessels, the *Observer* and the *Amex*, located at 14° 43′ 00″ N and 81° 45′ 00″ W and 14° 48′ 00″ N and 81° 42′ 00″ W respectively, that it would remain in the area for their safety.

130. In response, Colombia claims that some of the audio recordings submitted by Nicaragua contain no indication as to when or where the alleged incidents occurred. Moreover, Colombia claims that the audio recordings do not support Nicaragua's allegation that Colombia authorized those fishing vessels to fish in Nicaragua's exclusive economic zone. As regards the *Capitán Geovanie*, Colombia refers to the audio recording submitted by Nicaragua in support of its claim that the *Capitán Geovanie* left San Andrés with a specific sailing record, which, according to Colombia, indicates that authorization was given for fishing only in the Northern Islands, not in Nicaragua's exclusive economic zone. As regards Nicaragua's allegations concerning the other two vessels, Colombia claims that the alleged Colombian officer merely stated that they were watching over the safety of the vessels and that, in exercising its internationally lawful uses of the sea, Colombia "provides security to vessels of *all* nationalities" (emphasis in the original). Colombia further contends that Nicaragua's assertions concerning the alleged incidents on that day are implausible. Colombia states that given the meteorological conditions at the time it is difficult to believe that there were several vessels fishing so far from land.

* *

131. The evidence presented by the Parties is largely based on the same type of materials as described above (paras. 65-68). The Court considers that the evidence reveals at least three facts. First, the fishing vessels allegedly authorized by Colombia did engage in fishing activities in Nicaragua's exclusive economic zone during the relevant time. In this regard, the Court notes that the six foreign fishing vessels involved in the alleged incidents summarized above were identified by name in some of the resolutions of DIMAR and of the Governor of the San Andrés Archipelago. Secondly, such fishing activities were often conducted under the protection of Colombian frigates, a fact that Colombia does not deny. Thirdly, Colombia recognizes that the Luna Verde area is in Nicaragua's exclusive economic zone.

132. The Court considers that Colombia's responses to Nicaragua's allegations are not entirely convincing. Colombia's response that Nicara-

gua attempted to claim sovereignty over maritime spaces does not provide a legal basis for Colombia to claim a right to authorize fishing in Nicaragua's exclusive economic zone (see Colombia's responses to the alleged incidents of 12 September 2015 and of 12 and 13 January 2016). Nicaragua's efforts to prevent and stop fishing activities authorized by Colombia in Nicaragua's exclusive economic zone are a legitimate exercise of its sovereign rights and jurisdiction, to which it is entitled under customary international law. Moreover, the evidence demonstrates that Colombian frigates not only explicitly stated that the fishing vessels were authorized by the Colombian maritime authority to fish in the area but they also, in unequivocal terms, informed Nicaraguan naval vessels that those fishing ships were "under the protection of the government of Colombia". Colombia, in its responses to Nicaragua's allegations, denies that it authorized fishing activities in Nicaragua's exclusive economic zone. It does not, however, explain why its naval frigates constantly asserted their authority to protect those fishing activities purportedly unauthorized in Nicaragua's exclusive economic zone when Nicaraguan naval vessels intervened as to such fishing activities on the basis that they were not authorized by Nicaragua. The conduct of Colombian naval frigates, which is attributable to Colombia, confirms that Colombian authorization of fishing activities extended to the maritime area that now appertains to Nicaragua.

133. As regards Colombia's alleged authorization of marine scientific research in Nicaragua's exclusive economic zone, the Court cannot find in the resolutions before it any express reference to authorization of marine scientific research operations. Without other credible evidence to corroborate Nicaragua's claim in this regard, the Court cannot draw a conclusion from the available evidence that Colombia also authorized marine scientific research in Nicaragua's exclusive economic zone.

134. On the basis of the above considerations, the Court concludes that Colombia has violated Nicaragua's sovereign rights and jurisdiction in its exclusive economic zone by authorizing vessels to conduct fishing activities in Nicaragua's exclusive economic zone.

3. Colombia's alleged oil exploration licensing

135. In its Reply, Nicaragua claims that Colombia, through its National Hydrocarbon Agency (hereinafter the "ANH"), offered and awarded "hydrocarbon blocks encompassing parts of Nicaragua's [exclusive economic zone]", thereby violating Nicaragua's sovereign rights. Nicaragua asserts in particular that, according to an ANH list and a map of hydrocarbon blocks, in 2010 the ANH offered 11 blocks in areas that at least in part encroach on Nicaragua's exclusive economic zone (blocks

Nos. 3050 to 3057 and 3059 to 3061, named CAYOS 1, 2, 3, 5, 6, 7, 10, 11, 12, 13, and 14), and awarded two blocks (Nos. 3050 and 3059) to a consortium made up of Ecopetrol (Colombia), Repsol (Spain) and YPF (Argentina), although the relevant contracts have yet to be signed. As for the remaining nine blocks, Nicaragua contends that the ANH's list and its map of hydrocarbon blocks in 2017 continue to indicate that those blocks are "available" for licensing.

136. Nicaragua admits that an additional submission modifying substantially the requests in the Application would be inadmissible, but maintains that facts and legal considerations on the petroleum blocks are used to give detail to Nicaragua's initial requests. In its view, they constitute an "argument" rather than a "new claim".

*

137. With regard to Nicaragua's claim relating to oil exploration licensing, Colombia first raises the question of admissibility. It maintains that, as Nicaragua has submitted the issue concerning petroleum blocks for the first time in the Reply, this claim is inadmissible. According to Colombia, the claim is neither implicit in Nicaragua's Application or Memorial, nor does it "arise directly out of the question that is the subject-matter of the Application". Colombia also contends that the claim was submitted "at a time when the Respondent is no longer able to assert preliminary objections".

138. Colombia argues that even if the claim were admissible, it has no merit. Colombia asserts that in 2011 it suspended all offshore petroleum blocks that were licensed before the Court's 2012 Judgment and has not signed or pursued any new contracts. According to Colombia, its courts have prohibited all petroleum activities within the Seaflower Biosphere Reserve. With regard to the remaining blocks referred to by Nicaragua based on a map from the ANH dated 17 February 2017, Colombia argues that the evidence is inadmissible, because it concerns a subject-matter different from the claims contained in the Application and falls outside the temporal jurisdiction of the Court. Colombia contends that even if the Court were to take account of the map in question, it does not show any violation of Nicaragua's sovereign rights. Colombia asserts that none of those blocks have been the object of any implementation process, and that, accordingly, there is no existing contract or proposal for the blocks in question, nor could there be. Colombia also alleges that Nicaragua itself has admitted that no such contracts have been issued.

* *

139. The Court will first address the admissibility of Nicaragua's claim concerning Colombia's alleged oil exploration licensing.

140. The Court has discussed its jurisprudence on a claim made after the filing of the application in paragraph 44 above. Nicaragua's allegation regarding Colombia's oil exploration licensing concerns the question whether Colombia has violated Nicaragua's sovereign rights in the exclusive economic zone. Although a different kind of activity is involved, Nicaragua's claim does not transform the subject-matter of the dispute as stated in the Application, since the dispute between the Parties involves the rights of the Parties in all maritime zones as delimited by the 2012 Judgment. Nicaragua's claim arises directly out of the question which is the subject-matter of the Application. The Court is therefore of the view that Nicaragua's claim is admissible.

141. Regarding the merits of the claim, the evidence shows, including by Nicaragua's own account, that Colombia offered 11 oil concession blocks for licensing and awarded two blocks in 2011, at a time when the maritime boundary between the Parties had not yet been delimited. The documents before the Court also demonstrate that signature of the contracts for the said petroleum blocks was first suspended by the parties concerned in 2011 and later by a decision of the administrative tribunal of San Andrés, Providencia and Santa Catalina in 2012. Nicaragua also concedes that, to date, the contracts in question have not been signed.

142. As regards the facts since then, Nicaragua has only produced as evidence a "Map of Lands" taken from the ANH's website dated 17 February 2017, which shows a number of "available" blocks in the areas that partially overlap with Nicaragua's exclusive economic zone. The map is not corroborated by any other credible evidence that the ANH still intends to offer and award those blocks. The Court notes in this regard that Nicaragua did not pursue its claim during the oral proceedings and that it acknowledged Colombia's statement that no concessions had been awarded in the areas concerned. Colombia, for its part, reiterated that the blocks in question "[had] not been implemented and [would] not be pursued, and [would] not be offered".

143. In light of the foregoing, the Court finds that Nicaragua has failed to prove that Colombia continues to offer petroleum blocks situated in Nicaragua's exclusive economic zone. The allegation that Colombia violated Nicaragua's sovereign rights by issuing oil exploration licences must therefore be rejected.

4. Conclusions

144. In light of the foregoing considerations, the Court finds that Colombia has breached its international obligation to respect Nicaragua's sovereign rights and jurisdiction in its exclusive economic zone (i) by interfering with fishing and marine scientific research activities of Nicaraguan-flagged or Nicaraguan-licensed vessels and with the operations of Nicaraguan naval vessels in Nicaragua's exclusive economic zone; (ii) by purporting to enforce conservation measures in Nicaragua's exclusive economic zone; and (iii) by authorizing fishing activities in

Nicaragua's exclusive economic zone. Colombia's wrongful conduct engages its responsibility under international law.

B. Colombia's "Integral Contiguous Zone"

145. Among its allegations of Colombia's violations of Nicaragua's rights in its maritime zones, Nicaragua refers to Colombia's Presidential Decree 1946, which establishes an "integral contiguous zone" around Colombian islands in the western Caribbean Sea. Nicaragua does not deny Colombia's entitlement to a contiguous zone, but it maintains that both the geographical extent of the "integral contiguous zone" and the material scope of the powers which Colombia claims it may exercise therein exceed the limits permitted under customary international rules on the contiguous zone. In Nicaragua's view, by establishing the "integral contiguous zone", Colombia violated Nicaragua's rights in the latter's exclusive economic zone.

146. The Parties disagree as to whether Article 33 of UNCLOS on the contiguous zone reflects customary international law. Before examining Presidential Decree 1946, the Court will first consider the customary rules applicable to the contiguous zone.

1. The applicable rules on the contiguous zone

147. Nicaragua claims that the provisions of Article 33 of UNCLOS reflect customary international law and that the 24-nautical-mile limit prescribed therein is supported by "practically unanimous" State practice. With regard to the powers that the coastal State may exercise in the contiguous zone, Nicaragua maintains that Article 33, paragraph 1, reflects customary international law. It further contends that Colombia has not been able to establish that State practice points to an evolution in customary international law such that it now authorizes States to exercise control in their contiguous zone over matters other than those listed in Article 33 of UNCLOS.

*

148. For its part, Colombia takes the view that Article 33 of UNCLOS "does not reflect present-day customary international law on the contiguous zone". It maintains that "under existing customary international law, a coastal State is permitted to establish zones contiguous to its territorial sea, of varying breadth and for a range of purposes, going in some respects beyond those expressly envisaged in Article 33 of UNCLOS". In this regard, according to Colombia,

> "the coastal State may exercise the control necessary to protect and safeguard its essential interests, including but not limited to those

> relating to customs, fiscal, immigration or sanitary laws and regulations enacted to protect its interests in its territory and territorial sea".

In Colombia's view, this right enables the coastal State to safeguard essential interests in matters such as security, drug trafficking, pollution, and cultural heritage within its contiguous zone.

* *

149. As demonstrated by the general practice of States and as accepted by both Parties, the concept of the contiguous zone is well established in international law. The establishment by States of contiguous zones preceded the adoption in 1958 of the Convention on the Territorial Sea and the Contiguous Zone (hereinafter the "1958 Convention") and of UNCLOS. To date, about 100 States, including States that are not parties to UNCLOS, have established contiguous zones.

150. The Parties hold divergent views as to whether Article 33 of UNCLOS reflects the contemporary customary rules on the contiguous zone. Article 33 reads as follows:

> "1. In a zone contiguous to its territorial sea, described as the contiguous zone, the coastal State may exercise the control necessary to:
>
> *(a)* prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea;
>
> *(b)* punish infringement of the above laws and regulations committed within its territory or territorial sea.
>
> 2. The contiguous zone may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured."

151. With regard to the régime governing the contiguous zone, the Court first notes that under the law of the sea the contiguous zone is distinct from other maritime zones in the sense that the establishment of a contiguous zone does not confer upon the coastal State sovereignty or sovereign rights over this zone or its resources. The drafting history of Article 24 of the 1958 Convention and that of Article 33 of UNCLOS demonstrate that States have generally accepted that the powers in the contiguous zone are confined to customs, fiscal, immigration and sanitary matters as stated in Article 33, paragraph 1. With regard to the breadth of the contiguous zone, most States that have established such zones have set the breadth thereof within a 24-nautical-mile limit consistent with Article 33, paragraph 2, of UNCLOS. Some States have even reduced the breadth of previously established contiguous zones to conform to that limit.

152. In the development of the contiguous zone régime, the question whether the coastal State may include "security" in the list of matters

over which it may exercise control in the contiguous zone was extensively considered by States. For its part, the International Law Commission (hereinafter the "ILC") in its Commentary on Article 66 of the draft Articles concerning the law of the sea, which subsequently became Article 24 of the 1958 Convention, gave the following reason for not including security among the matters in respect of which the coastal State may exercise control in its contiguous zone:

> "The Commission did not recognize special security rights in the contiguous zone. It considered that the extreme vagueness of the term 'security' would open the way for abuses and that the granting of such rights was not necessary. The enforcement of customs and sanitary regulations will be sufficient in most cases to safeguard the security of the State. In so far as measures of self-defence against an imminent and direct threat to the security of the State are concerned, the Commission refers to the general principles of international law and the Charter of the United Nations." (Commentary to the articles concerning the law of the sea, *Yearbook of the International Law Commission*, 1956, Vol. II, p. 295, Art. 66, Comment (4).)

153. At the First United Nations Conference on the Law of the Sea in 1958, a Polish proposal to add "security" to the list of matters under the contiguous zone régime was adopted by a narrow majority in the First Committee, but it did not obtain the required majority for adoption by the plenary (*Official Records of the First United Nations Conference on the Law of the Sea* (1958), Vol. II, UN doc. A/CONF.13/38, p. 40, para. 63). Instead, the Conference accepted, by an overwhelming majority, a proposal submitted by the United States which incorporated Ceylon's proposal to add "immigration" to the article (*ibid.*, para. 64). During the negotiations at the Third United Nations Conference on the Law of the Sea, the wording of Article 24, paragraph 1, of the 1958 Convention was adopted in Article 33, paragraph 1, of UNCLOS without any change as regards the matters in respect of which the coastal State may exercise control.

154. Although there are a few States that maintain in their national laws the power to exercise control with respect to security in the contiguous zone, their practice has been opposed by other States. The materials adduced by Colombia with regard to national legislation on the contiguous zone do not support Colombia's claim that the customary rules on the contiguous zone have evolved since the adoption of UNCLOS such that they allow a coastal State to extend the maximum breadth of the contiguous zone beyond 24 nautical miles or expand the powers it may exercise therein.

155. In conclusion, the Court considers that Article 33 of UNCLOS reflects contemporary customary international law on the contiguous zone, both in respect of the powers that a coastal State may exercise there and the limitation of the breadth of the contiguous zone to 24 nautical miles (hereinafter "the 24-nautical-mile rule").

2. Effect of the 2012 Judgment and Colombia's right to establish a contiguous zone

156. Nicaragua maintains that the Parties' entitlements should be limited by the maritime boundary established by the Court in its 2012 Judgment. In Nicaragua's view, the rights of Colombia as a third State in Nicaragua's exclusive economic zone are governed by Article 58 of UNCLOS, which reflects customary international law and which does not encompass contiguous zone rights. The delimitation of the exclusive economic zone includes the delimitation of the contiguous zone, "if only implicitly". Nicaragua argues that the fact that the 2012 Judgment makes no express mention of the contiguous zone is not decisive.

157. Colombia argues that it is entitled under international law to establish a contiguous zone around the San Andrés Archipelago and that the 2012 Judgment does not provide a legal basis to deny such a right. It claims that the exercise of "contingent powers" by a coastal State with respect to "specified categories of events" within its contiguous zone neither negates nor otherwise infringes a neighbouring State's exercise of its sovereign rights within its overlapping exclusive economic zone. The right of the coastal State to establish a contiguous zone is independent of, and not incompatible with, any resource-oriented exclusive economic zone rights of another State in the same space.

* *

158. The Court notes that in the proceedings leading to the 2012 Judgment, the Parties discussed the contiguous zone but did not request the Court to delimit it in drawing a single maritime boundary, nor did the Court address the contiguous zone, as the issue did not arise during the delimitation. In this regard, the Court recalls that, in the operative paragraph of that Judgment, it found that Colombia "has sovereignty over the islands at Alburquerque, Bajo Nuevo, East-Southeast Cays, Quitasueño, Roncador, Serrana and Serranilla" and that it decided on both "the single maritime boundary delimiting the continental shelf and the exclusive economic zones" of the two Parties and "the single maritime boundary around Quitasueño and Serrana" (*Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012 (II)*, pp. 718-720, para. 251, subparas. 1, 4 and 5). The Court considers that, in the absence of any reference to the contiguous zone, the 2012 Judgment cannot be taken to imply that the delimitation of the exclusive economic zone includes the delimitation of the contiguous zone, as claimed by Nicaragua. The 2012 Judgment does not delimit, expressly or otherwise, the contiguous zone of either Party.

159. With regard to maritime areas in which Colombia's "integral contiguous zone" overlaps with Nicaragua's exclusive economic zone, the

Court observes that Nicaragua contends that Colombia is not entitled to establish a contiguous zone that overlaps with Nicaragua's exclusive economic zone following the maritime delimitation between them. Nicaragua further maintains that the rights of Colombia in Nicaragua's exclusive economic zone are limited to the rights set forth in Article 58 of UNCLOS, which does not encompass contiguous zone rights.

160. In the first place, the Court notes that the contiguous zone and the exclusive economic zone are governed by two distinct régimes. It considers that the establishment by one State of a contiguous zone in a specific area is not, as a general matter, incompatible with the existence of the exclusive economic zone of another State in the same area. In principle, the maritime delimitation between Nicaragua and Colombia does not abrogate Colombia's right to establish a contiguous zone around the San Andrés Archipelago.

161. Under the law of the sea, the powers that a State may exercise in the contiguous zone are different from the rights and duties that a coastal State has in the exclusive economic zone. The two zones may overlap, but the powers that may be exercised therein and the geographical extent are not the same. The contiguous zone is based on an extension of control by the coastal State for the purposes of prevention and punishment of certain conduct that is illegal under its national laws and regulations, while the exclusive economic zone, on the other hand, is established to safeguard the coastal State's sovereign rights over natural resources and jurisdiction with regard to the protection of the marine environment. This distinction between the two régimes was recognized during the negotiations of UNCLOS (*Official Records of the Third United Nations Conference on the Law of the Sea*, Vol. II, Summary records of the 31st Meeting of the Second Committee, 7 August 1974, UN doc. A/CONF.62/C.2/SR.31, pp. 233-234). In exercising the rights and duties under either régime, each State must have due regard to the rights and duties of the other State.

162. The Court does not accept Nicaragua's assertion that Article 58 of UNCLOS encompasses all the rights that Colombia has within its contiguous zone. In the parts of the "integral contiguous zone" which overlap with Nicaragua's exclusive economic zone, Colombia may exercise its powers of control in accordance with customary rules on the contiguous zone as reflected in Article 33, paragraph 1, of UNCLOS and it has the rights and duties under customary law as reflected in Article 58 of UNCLOS. In the Court's view, in exercising its powers in the parts of its "integral contiguous zone" which overlap with Nicaragua's exclusive economic zone, Colombia is under an obligation to have due regard to the sovereign rights and jurisdiction which Nicaragua enjoys in its exclusive economic zone under customary law as reflected in Articles 56 and 73 of UNCLOS.

163. Given the above considerations, the Court concludes that Colombia has the right to establish a contiguous zone around the San Andrés Archipelago in accordance with customary international law.

3. The compatibility of Colombia's "integral contiguous zone" with customary international law

164. Having concluded that the provisions of Article 33 of UNCLOS reflect customary international law and that a coastal State is entitled to a contiguous zone which may overlap with the exclusive economic zone of another State, the Court will next consider the compatibility of Colombia's "integral contiguous zone" established under Presidential Decree 1946 with customary international law and Nicaragua's claims in that regard.

*

165. Regarding Presidential Decree 1946, Nicaragua claims that, according to the maps issued by Colombia, parts of the "integral contiguous zone" reach into Nicaragua's exclusive economic zone and extend beyond 24 nautical miles from the baselines from which Colombia's territorial sea is measured. In its view, Colombia's justification for using geodetic lines to draw the "integral contiguous zone" by reference to the special geographical situation of the San Andrés Archipelago has no legal basis in international law.

166. As for the powers to be exercised in the "integral contiguous zone" under Article 5 (2) and Article 5 (3) of Colombia's Presidential Decree 1946, Nicaragua contends that some of the powers contained therein, including those concerning the protection of security, national maritime interests and cultural heritage, are not listed in Article 33, paragraph 1, of UNCLOS and are unsupported by general State practice. It argues that Colombia has not been able to establish that State practice has evolved into a rule of customary international law authorizing States to exercise control in their contiguous zone over matters other than those listed in Article 33 of UNCLOS. Nicaragua claims that the powers claimed by Colombia conflict with Nicaragua's powers in its exclusive economic zone. According to Nicaragua, Colombia wrongfully stretches the phrase "sanitary laws and regulations" in Article 33, paragraph 1, of UNCLOS to encompass laws and regulations relating to environmental protection.

167. With respect to cultural heritage in the contiguous zone, Nicaragua maintains that only a State party to UNCLOS may claim the right referred to in Article 303 and that Colombia has not demonstrated that that provision reflects customary international law. Nicaragua further complains that the power to protect cultural heritage in the "integral contiguous zone" is contradictory to Colombia's own domestic law, which reserves to Colombia itself the sole control over cultural heritage in its exclusive economic zone.

*

168. In response to Nicaragua's arguments against the establishment of the "integral contiguous zone", Colombia denies that it acted wrongfully under international law. Colombia argues that the spatial construction of the "integral contiguous zone" is dictated by the natural and special configuration of the San Andrés Archipelago and that its use of geodetic lines is consistent with the established jurisprudence in this regard and serves solely to define a "functional" area within which Colombia may execute the powers granted by international law. It argues that even if the Court were to find that the 24-nautical-mile limit of the contiguous zone reflects customary international law, the geographical configuration of the "integral contiguous zone" is justified by a "customary exemption" to this rule. In its view, "in unique geographical circumstances, the techniques according to which the external limit of a maritime zone is determined, if reasonable in context, may depart from the general rules in order to create a viable contiguous zone that enables the achievement of its purposes" where "the application of the general rule would create an impracticable contiguous zone".

169. Colombia argues that the powers prescribed under Presidential Decree 1946 are based on "context, function and policy considerations", which are permitted under customary international law. According to Colombia, even if the Court were to proclaim that Article 33, paragraph 1, reflects customary law, the powers to be exercised in the "integral contiguous zone" still fall within the scope of that provision. In particular, Colombia argues that protection of the marine environment is consistent with a contemporary interpretation of the term "sanitary", and protection of security and national maritime interests can also fall into the "customs", "fiscal", "immigration" and "sanitary" generic categories. With respect to the power to preserve cultural heritage, Colombia argues that it is explicitly permitted by Article 303 of UNCLOS.

* *

170. The Parties are divided over the conformity with customary international law of the provisions of Article 5 of Presidential Decree 1946, which set out the geographical extent of the "integral contiguous zone" and the material scope of the powers that may be exercised therein. Article 5 reads as follows:

> "Contiguous zone of the island territories in the western Caribbean Sea
>
> 1. Without prejudice to the terms of Section 2 of this Article, the Contiguous Zone of the island territories of Colombia in the Western Caribbean Sea extends up to a distance of 24 nautical miles measured from the baselines referred to in Article 3 above.

2. The Contiguous Zones adjacent to the territorial sea of the islands which form the island territories of Colombia in the Western Caribbean Sea, except for the islands Serranilla and Bajo Nuevo, where they intersect, generate a continuous and uninterrupted Contiguous Zone, across the whole of the Department of the Archipelago of San Andrés, Providencia and Santa Catalina, over which the competent national authorities will exercise the powers recognized by international law and Colombian laws mentioned in Section 3 of this Article.

In order to secure the proper administration and orderly management of the entire Archipelago of San Andrés, Providencia and Santa Catalina, and of their islands, cays and other formations and their maritime areas and resources, and in order to avoid the existence of irregular figures or contours which would make practical application difficult, the lines indicated for the outer limits of the contiguous zones will be joined to each other through geodetic lines. In the same fashion, these will be linked to the contiguous zone of the island of Serranilla by geodetic lines which maintain the direction of parallel 14° 59′ 08″ N, and to Meridian 79° 56′ 00″ W, and thence to the North, thus forming an Integral Contiguous Zone of the Department Archipelago of San Andrés, Providencia and Santa Catalina.

3. *Modified by Decree 1119 of 2014, Art. 2.* In developing what has been provided for in the previous numeral, with the purpose of protecting the sovereignty in its territory and territorial sea, in the integral contiguous zone established in this Article, Colombia exercises the faculties of enforcement and control necessary to:

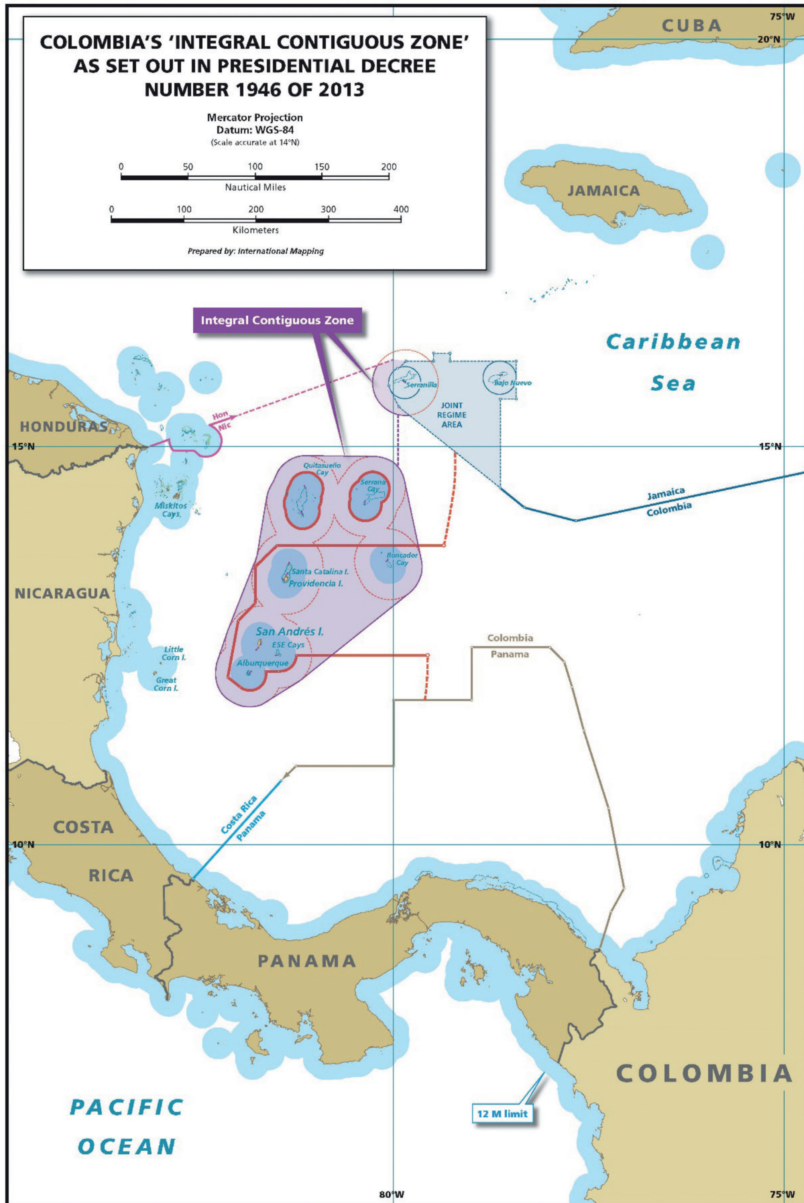
(a) *Modified by Decree 1119 of 2014, Art. 2.* Prevent and control the infractions of the laws and regulations related with the integral security of the State, including piracy and trafficking of drugs and psychotropic substances, as well as conduct contrary to security in the sea and the national maritime interests, the customs, fiscal, migration and sanitary matters which take place in its insular territories or in their territorial sea. In the same manner, violations against the laws and regulations related with the preservation of the environment and the cultural heritage will be prevented and controlled.

(b) Punish violations of laws and regulations related to the matters indicated in section *(a)* above, committed in its island territories or in their territorial sea.

Paragraph *added by Decree 1119 of 2014, Art. 3*. The application of this Article will be carried out in conformity with international law and Article 7 of the Present Decree."

171. Colombia produces an illustrative map depicting the "integral contiguous zone", which it claims is an accurate depiction of how the Decree should apply in practice. Nicaragua also produces a map that it claims was presented by the Colombian President on the day Presidential

MAP SHOWING COLOMBIA'S "INTEGRAL CONTIGUOUS ZONE" ACCORDING TO COLOMBIA



(*Source:* Colombia's Counter-Memorial, Figure 5.1, p. 204)

Decree 1946 was issued. The two maps do not coincide in their depiction of the "integral contiguous zone", but both of them show that some parts of the "integral contiguous zone" extend more than 24 nautical miles from Colombia's baselines and overlap with Nicaragua's exclusive economic zone. (For illustrative purposes, the Court includes on page 334 the map produced by Colombia in its Counter-Memorial.)

172. Colombia does not deny that the "integral contiguous zone", in various parts, extends beyond 24 nautical miles, but claims its position to be justified on the basis of customary international law. According to Colombia, a coastal State is permitted under customary international law to establish contiguous zones "of varying breadth", going beyond those expressly envisaged in Article 33 of UNCLOS.

173. As is stated above, the 24-nautical-mile rule provided for in Article 33, paragraph 2, is an established customary rule. The coastal State does not have the right to extend the breadth of its contiguous zone as it sees fit. The Court notes that the simplification of boundary lines is not uncommon in maritime delimitation between two States, but in such cases a simplified boundary is achieved by mutual agreement or through a third-party settlement. By contrast, in the present case, the establishment of the outer limit of the "integral contiguous zone" is a unilateral act of Colombia that directly affects the rights and interests of Nicaragua.

174. Colombia refers to the *Fisheries* case between the United Kingdom and Norway and the 2012 Judgment as a jurisprudential basis for the simplified configuration of the "integral contiguous zone". Neither of the Judgments invoked by Colombia, however, is applicable to the present case. Any consideration of the geographical circumstances by Colombia must respect the 24-nautical-mile rule, as required by customary international law reflected in Article 33, paragraph 2, of UNCLOS. Colombia may choose to reduce the breadth of the "integral contiguous zone" if it wishes to simplify the configuration of the zone, but it has no right to expand it beyond the 24-nautical-mile limit to the detriment of the exercise by Nicaragua of its sovereign rights and jurisdiction in its exclusive economic zone.

175. In sum, Colombia is under an international obligation to observe the 24-nautical-mile rule. The geographical extent of the "integral contiguous zone" is not in conformity with customary international law, as reflected in Article 33, paragraph 2, of UNCLOS.

176. With regard to the material scope of Colombia's powers within the "integral contiguous zone", Article 5 (3) *(a)* of Presidential Decree 1946 provides that Colombia shall exercise powers in the "integral contiguous zone" to prevent and control infringements of laws and regulations regarding

> "the integral security of the State, including piracy, trafficking of drugs and psychotropic substances, as well as conduct contrary to the security in the sea and the national maritime interests, the customs,

> fiscal, migration and sanitary matters which take place in its insular territories or in their territorial sea. In the same manner, violations against the laws and regulations related with the preservation of the maritime environment and the cultural heritage will be prevented and controlled."

Under this provision, the scope of the powers under which the Colombian authorities may exercise control in the contiguous zone is much broader than the material scope of the powers enumerated in Article 33, paragraph 1, of UNCLOS (see paragraph 150 above).

177. The Court notes that, in terms of security, Article 5 (3) refers to the "integral security of the State", which, according to Colombia, includes suppressing piracy and drug-trafficking, as well as conduct contrary to security at sea. As the Court has previously found, security was not a matter that States agreed to include in the list of matters over which a coastal State may exercise control in the contiguous zone; nor has there been any evolution of customary international law in this regard since the adoption of UNCLOS (see paragraph 154 above). The inclusion of security in the material scope of Colombia's powers within the "integral contiguous zone" is therefore not in conformity with the relevant customary rule.

178. In respect of the power to protect "national maritime interests", Article 5 (3) of Presidential Decree 1946, through its broad wording alone, appears to encroach on the sovereign rights and jurisdiction of Nicaragua as set forth in Article 56, paragraph 1, of UNCLOS. This is also true with regard to violations of "laws and regulations related with the preservation of the environment". As the "laws and regulations" are adopted by Colombia, the power thus conferred on the Colombian authorities to ensure their implementation in part of Nicaragua's exclusive economic zone is contrary to Article 56, paragraph 1 *(b)* (iii), of UNCLOS, which grants the coastal State, Nicaragua in the present case, jurisdiction in its exclusive economic zone over the "protection and preservation of the marine environment".

179. Although under UNCLOS, as stated above, all States parties have an obligation to preserve the marine environment in the exclusive economic zone, other States must observe the laws and regulations adopted by the coastal State for the conservation of the living resources and for the preservation of the marine environment. A flag State may enforce such conservation measures adopted by the coastal State with regard to its national vessels operating in the exclusive economic zone (see *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015, ITLOS Reports 2015*, p. 37, para. 120). This is not the situation in the present case with regard to the powers authorized under Presidential Decree 1946. Article 5 (3) confers on the Colombian authorities powers that, if exercised in the area overlapping with Nicaragua's exclusive economic zone, would encroach on the sovereign rights and jurisdiction of Nicaragua.

180. With regard to Colombia's argument that the word "sanitary" can now be taken to include the protection of the marine environment, the Court is not convinced that the meaning of that word, as used in Article 33, paragraph 1, of UNCLOS, has evolved to extend to the protection of the marine environment, a matter that is separately governed by customary international law on the environment. The term "sanitary" was originally included in the provisions on the contiguous zone because of its connection with customs regulations (Commentary to the articles concerning the law of the sea, *Yearbook of the International Law Commission*, 1956, Vol. II, p. 295, Article 66, Comment (3)). There is no basis, either in law or in State practice, to give this term the expansive interpretation proposed by Colombia.

181. Article 5 (3) *(a)* of Presidential Decree 1946 also refers to cultural heritage. In support of its position, Colombia invokes Article 303, paragraph 2, of UNCLOS. Nicaragua challenges Colombia's claim on the basis that Colombia, as a non-party to UNCLOS, may not claim the right set out in Article 303 and that Colombia has not demonstrated that Article 303, paragraph 2, reflects customary international law.

182. The Court recalls that paragraphs 1 and 2 of Article 303, entitled "Archaeological and historical objects found at sea", provide as follows:

> "1. States have the duty to protect objects of an archaeological and historical nature found at sea and shall co-operate for this purpose.
> 2. In order to control traffic in such objects, the coastal State may, in applying article 33, presume that their removal from the sea-bed in the zone referred to in that article without its approval would result in an infringement within its territory or territorial sea of the laws and regulations referred to in that article."

183. The Court notes that in Article 5 (3) *(a)*, of Presidential Decree 1946, the phrase "cultural heritage" is used. Since Colombia relies on Article 303, paragraph 2, the Court takes it that Colombia uses this phrase to mean objects of an archaeological and historical nature.

184. Article 303 is included in the general provisions of Part XVI of UNCLOS. The *travaux préparatoires* and the ILC's Commentary to the articles concerning the law of the sea indicate that the negotiating States did not wish to include objects of cultural heritage found on the sea-bed as part of the natural resources of the continental shelf and, therefore, did not include cultural heritage in the continental shelf régime (*Yearbook of the International Law Commission*, 1956, Vol. II, p. 298). During the negotiations at the Third United Nations Conference on the Law of the Sea, the negotiating States agreed to give the coastal State the power to exercise control over objects of an archaeological and historical nature found in its contiguous zone and that the removal of such objects can be regarded as an infringement of its laws and regulations on customs, fiscal, immigration or sanitary matters. Such extended power is strictly confined

to the limit of 24 nautical miles under Article 303, paragraph 2, which was accepted by the plenary of the Third United Nations Conference on the Law of the Sea (UN doc. A.CONF.62/L.58, para. 15).

185. Following the conclusion of UNCLOS, a growing number of States have extended the application of their cultural heritage legislation over the contiguous zone, and multilateral treaties have been concluded to protect underwater cultural heritage.

186. Taking into account State practice and other legal developments in this field, the Court is of the view that Article 303, paragraph 2, of UNCLOS reflects customary international law. It follows that Article 5 (3) of Presidential Decree 1946, in so far as it includes the power of control with respect to archaeological and historical objects found within the contiguous zone, does not violate customary international law.

4. Conclusion

187. In light of the foregoing, the Court finds that the "integral contiguous zone" established by Colombia's Presidential Decree 1946 is not in conformity with customary international law in two respects. First, the geographical extent of the "integral contiguous zone" contravenes the 24-nautical-mile rule for the establishment of the contiguous zone. Secondly, Article 5 (3) of Presidential Decree 1946 confers certain powers on Colombia to exercise control over infringements of its laws and regulations in the "integral contiguous zone" that extend to matters that are not permitted by customary rules as reflected in Article 33, paragraph 1, of UNCLOS.

188. Having reached this conclusion, the Court will consider the question whether the establishment of the "integral contiguous zone" by enactment of Presidential Decree 1946 constitutes, in and of itself, a breach by Colombia of its international obligations owed to Nicaragua, which engages its international responsibility.

* *

189. Nicaragua claims that Colombia's enactment of Presidential Decree 1946, even if not implemented, is sufficient to constitute an internationally wrongful act engaging Colombia's responsibility. Nicaragua adds that, in any event, the incidents at sea have shown that, in implementing Presidential Decree 1946, Colombia infringed and continues to infringe Nicaragua's sovereign rights and jurisdiction in its exclusive economic zone.

*

190. In rejecting Nicaragua's claim, Colombia maintains, even assuming — *"quod non"* — that the "integral contiguous zone" established in Presidential Decree 1946 were found to be inconsistent with customary international law, the enactment of the Decree would not *ipso facto* constitute an internationally wrongful act. It argues that the lawfulness of Presidential Decree 1946 must be evaluated on the basis of whether its "application" has failed to comply with the "due regard" obligation owed to Nicaragua. It argues that Nicaragua has failed to show a single instance where Colombia impeded Nicaragua from exercising its exclusive economic zone rights within the "integral contiguous zone".

* *

191. The Court recalls the ILC's observation that there is no general rule applicable to the question whether a State engages its international responsibility by the enactment of national legislation. The question depends on the specific terms of the obligation concerned and the circumstances of the case. The ILC's Commentary explains:

> "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. Certain obligations may be breached by the mere passage of incompatible legislation. 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. In other circumstances, the enactment of legislation may not in and of itself amount to a breach, 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." (Commentary to Article 12 of the ILC Articles on State Responsibility, *Yearbook of the International Law Commission*, 2001, Vol. II, Part Two, p. 57, para. 12.)

192. The Court will decide the question for the purposes of the present case in light of the obligations of which Colombia is allegedly in breach and the specific context of the case.

193. Colombia's Presidential Decree 1946 was initially issued not long after the delivery of the 2012 Judgment. Coupled with the official statements made at the highest level of the Colombian Government with regard to the 2012 Judgment and the events at sea, the enactment of Presidential Decree 1946 contributed to the dispute between the Parties, which eventu-

ally led to the institution of the present proceedings by Nicaragua. As the Court has found that Colombia's "integral contiguous zone" established under Presidential Decree 1946 is, in two respects, incompatible with the rules of customary international law on the contiguous zone and infringes upon Nicaragua's rights in its exclusive economic zone (see paragraph 187 above), the Court must address the request made by Nicaragua in its final submissions with regard to Presidential Decree 1946. The Court is mindful that Colombia amended Presidential Decree 1946 in 2014 to provide that the Decree will be applied in compliance with international law. Given the finding of the Court and the circumstances of the case, however, the Court does not consider that this additional provision is sufficient to address the concern raised by Nicaragua with respect to Presidential Decree 1946. Colombia is under an international obligation to remedy the situation.

194. On the basis of the above considerations, the Court concludes that, in respect of the maritime areas in which Colombia's "integral contiguous zone" overlaps with Nicaragua's exclusive economic zone, Colombia's "integral contiguous zone", which the Court has found to be incompatible with customary international law as reflected in Article 33 of UNCLOS, infringes upon Nicaragua's sovereign rights and jurisdiction in the exclusive economic zone. Colombia's responsibility is thereby engaged. Colombia has the obligation, by means of its own choosing, to bring the provisions of Presidential Decree 1946 into conformity with customary international law in so far as they relate to maritime areas declared by the Court in its 2012 Judgment to appertain to Nicaragua.

C. Conclusions and Remedies

195. The Court has concluded (see paragraph 144 above) that Colombia breached its international obligation to respect Nicaragua's sovereign rights and jurisdiction in its exclusive economic zone (i) by interfering with fishing activities and marine scientific research activities of Nicaraguan-flagged or Nicaraguan-licensed vessels and with the operations of Nicaraguan naval vessels in Nicaragua's exclusive economic zone; (ii) by purporting to enforce conservation measures in Nicaragua's exclusive economic zone; and (iii) by authorizing fishing activities in Nicaragua's exclusive economic zone. This wrongful conduct engages Colombia's responsibility under international law. Colombia must therefore immediately cease its wrongful conduct.

196. The Court has also found (see paragraphs 187 and 194 above) that the "integral contiguous zone" established by Colombia's Presidential Decree 1946 is not in conformity with customary international law, both because its breadth exceeds 24 nautical miles from the baselines from which Colombia's territorial sea is measured and because the powers that Colombia asserts within the "integral contiguous zone" exceed those that are permitted under customary international law. In the maritime areas where the "integral contiguous zone" overlaps with Nicaragua's exclusive economic zone, the "integral contiguous zone" infringes

upon Nicaragua's sovereign rights and jurisdiction in the exclusive economic zone. Colombia's responsibility is thereby engaged. Colombia has the obligation, by means of its own choosing, to bring the provisions of Presidential Decree 1946 into conformity with customary international law in so far as they relate to maritime areas declared by the Court in its 2012 Judgment to appertain to Nicaragua.

197. In its final submissions, Nicaragua made a number of requests for additional remedies (see paragraph 24 above). Considering the nature of Colombia's internationally wrongful acts, the Court considers that the remedies stated above suffice to redress the injury that Colombia's internationally wrongful acts have inflicted on Nicaragua.

198. As regards the request by Nicaragua to order Colombia to pay compensation, the Court considers that in the course of the proceedings Nicaragua did not offer evidence demonstrating that Nicaraguan-flagged or Nicaraguan-licensed vessels or their fishermen suffered material damage or were effectively prevented from fishing as a result of Colombia's acts of interference by its naval frigates in Nicaragua's exclusive economic zone. Nicaragua's claim that fishing activities authorized by Colombia, in Nicaragua's exclusive economic zone, have caused "a substantial loss of profits for Nicaragua and its licensed fishermen" is not substantiated. In the absence of "any evidence capable of demonstrating . . . financially assessable injury", the Court will not uphold a claim for compensation (*Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua), Judgment, I.C.J. Reports 2009*, p. 267, para. 149). Therefore, Nicaragua's request for compensation must be rejected. Accordingly, there is no basis for the Court to defer the question of compensation to a further stage.

199. Finally, Nicaragua requests that the Court remain seised of the case until Colombia recognizes and respects Nicaragua's rights in the Caribbean Sea as attributed by the 2012 Judgment. The Court considers that there is no legal basis for the Court to accept such a request. Nicaragua's request must therefore be rejected.

IV. Counter-Claims Made by Colombia

200. The Court recalls, as outlined in paragraph 15 of the present Judgment, that in its Order dated 15 November 2017 it ruled pursuant to Article 80 of the Rules of Court that "there is no direct connection, either in fact or in law, between Colombia's first and second counter-claims and Nicaragua's principal claims", and that those counter-claims are inadmissible as such and do not form part of the present proceedings (*Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Counter-Claims, Order of 15 November 2017, I.C.J. Reports 2017*, p. 314, para. 82 (A) (1) and (2)). The Court found,

however, that there is a direct connection between Colombia's third and fourth counter-claims and Nicaragua's principal claims and that therefore those counter-claims are admissible and do form part of the present proceedings (*I.C.J. Reports 2017*, p. 314, para. 82 (A) (3) and (4)). The Court will next examine the merits of Colombia's third and fourth counter-claims in turn.

A. Nicaragua's Alleged Infringement of the Artisanal Fishing Rights of the Inhabitants of the San Andrés Archipelago to Access and Exploit the Traditional Banks

201. In its third counter-claim Colombia asserts that the ancestral inhabitants of the San Andrés Archipelago, including the Raizales, have for more than three centuries engaged in navigating, fishing and turtling throughout the south-western Caribbean Sea in the maritime areas adjudged in the 2012 Judgment to appertain to Nicaragua, as well as in Colombian waters, access to which requires navigating through a part of Nicaragua's exclusive economic zone. It contends that the Raizales have traditionally fished between the Mosquito Coast and the San Andrés Archipelago, including in "[t]he shallow grounds of Cape Bank and, in particular, along La Esquina, that is to say on both sides of the 82° West Meridian, and the area known as Luna Verde"; and "[t]he deep-sea banks situated North of Quitasueño, East of the 82° West Meridian and West and North-West of Providencia, and between, respectively, Providencia and Quitasueño, Quitasueño and Serrana and Serrana and Roncador". Colombia further contends that while long fishing expeditions to Cape Bank and the Northern Banks have always taken place, artisanal fishermen started sailing to these banks much more frequently in the second half of the twentieth century, due to the decrease in production around San Andrés and Providencia. Colombia asserts that, as a result of the 2012 Judgment, many traditional fishing banks of the inhabitants of the Archipelago are now located in the maritime zones under the jurisdiction of Nicaragua, while certain other fishing grounds located in Colombia's maritime areas can only be accessed by navigating through Nicaragua's exclusive economic zone.

202. In support of its third counter-claim, Colombia asserts, first, that the traditional fishing rights of the Raizales arise out of an uncontested local customary norm or practice spanning centuries, as evidenced through various historical documents and affidavits annexed to the Counter-Memorial. It describes those fishing rights as "limited . . . customary rights of access and exploitation" whose exercise does not negate the exclusive character of the sovereign rights of Nicaragua as the coastal State. Secondly, Colombia argues that, "in the immediate aftermath of the 2012 Judgment, Colombia and Nicaragua recognized, both tacitly

and explicitly, that such a . . . long-established practice [of artisanal fishing] had taken the shape of a local customary norm that survived the maritime delimitation". Thirdly, Colombia asserts that Nicaragua has, through the statements of its Head of State, accepted that the artisanal fishermen of the Archipelago have a right to fish in Nicaragua's own maritime zones without the need for bilateral fishing agreements or other mechanisms to preserve these rights and without the fishermen having to request authorization from INPESCA. Colombia argues, in the alternative, that these statements must be viewed as constituting a binding unilateral undertaking by Nicaragua to respect the traditional fishing rights of the Raizales. Finally, Colombia asserts that,

> "[i]t matters little whether the formal source is a local customary norm, a tacit agreement, an act of acquiescence, a unilateral understanding or even a rule of international law on the treatment of vested rights of foreign nationals. The result is the same. The inhabitants of the Archipelago and, in particular, the Raizales have the right to fish in the banks located in the maritime zones found to appertain to Nicaragua . . . without having to request an authorization."

203. In this regard, Colombia refers, *inter alia*, to the following statements by Nicaragua's Head of State:

(i) a statement of 26 November 2012 in which President Ortega allegedly stressed Nicaragua's respect for the rights of the inhabitants of the Archipelago "to fish and navigate in those waters, which they ha[d] historically navigated", while also stating that "artisanal fishermen would require an authorization from the relevant Nicaraguan authorities";

(ii) a statement of 1 December 2012 in which President Ortega allegedly declared that "Nicaragua will respect the ancestral rights of the Raizales" and that "mechanisms for dialogue" would have to be established in order to "ensure the right of the Raizal people to fish";

(iii) a statement of 21 February 2013 in which President Ortega allegedly stated that "the Raizal community, living in San Andrés can continue fishing in the Caribbean waters now belonging to Nicaragua and that their rights as native people will not be affected" but that it was "necessary to work on an agreement between Colombia and Nicaragua to regulate this situation, because right now there is no way to know how many vessels belong to the Raizal community and which are related by industrial fishing";

(iv) a statement of 18 November 2014 in which President Ortega asserted that, while the President of Colombia was prepared to work on an agreement or treaty with Nicaragua to implement the 2012 Judgment, the Parties "agreed that it was necessary to work on reaching

an Agreement where the [r]ights of the Raizal Community [would] be guaranteed"; and

(v) a statement by President Ortega, of 5 November 2015 which contains a reference to "engagements . . . with the Raizales Brothers regarding their [f]ishing [r]ights, which will have to be arranged later".

204. Colombia claims that in the aftermath of the 2012 Judgment and, notwithstanding President Ortega's support of the rights of the inhabitants of the San Andrés Archipelago, Nicaragua's Naval Force has followed an active strategy of intimidation, including through threats and pillaging, thereby

> "preventing on a recurring basis, or at the very least, seriously discouraging the artisanal fishermen of the Archipelago from reaching their traditional banks located in the maritime zones adjudicated to appertain to Nicaragua and the Northern Banks of Quitasueño, Serrana, Serranilla and Bajo Nuevo",

as evidenced in 11 affidavits annexed to the Counter-Memorial. Colombia further asserts that the Nicaraguan industrial fishermen operating in the relevant areas are involved in "predatory practices as well as acts of piracy" and that, by the Nicaraguan Naval Force "tolerating these predatory fishing practices and criminal activities", Nicaragua is in further violation of the customary right of the artisanal fishermen in the Archipelago to access and exploit the traditional banks.

205. Colombia considers that Nicaragua

> "is under an obligation to cease and desist from preventing Colombian artisanal fishermen from accessing their traditional fishing grounds, and to fully respect the traditional, historic fishing rights of the Raizales and other fishermen of the Archipelago to such grounds".

Colombia is also of the view that Nicaragua should pay compensation for damage caused, including loss of profits resulting from Nicaragua's alleged violations, and give appropriate guarantees of non-repetition.

*

206. In response to Colombia's third counter-claim, Nicaragua argues that "there are absolutely no legal rights, residual or otherwise, of the Raizal population of the small islands of San Andrés, Providencia and Santa Catalina to any purported fishing in the Nicaraguan [exclusive economic zone]" and that the claimed rights are incompatible with the régime of the exclusive economic zone. In Nicaragua's view, "the text and context of the relevant provisions of UNCLOS, the preparatory works, and the jurisprudence all make clear that historic fishing rights, including artisanal fishing rights, did not survive the creation of the [exclusive

economic zone] régime". Furthermore, Nicaragua asserts that, in any event, Colombia has failed to establish that the artisanal fishermen of the San Andrés Archipelago have such rights or that Nicaragua has infringed them.

207. First, Nicaragua argues that, in accordance with the Court's jurisprudence, "the régime [of the exclusive economic zone], as codified in Part V of UNCLOS is fully applicable between the Parties as customary international law". For Nicaragua, an examination of the text, context and preparatory work of Part V of the Convention clearly indicates that the exploitation of the living resources of the exclusive economic zone is reserved for the coastal State. The Applicant relies on the text of Article 56, paragraph 1 *(a)*, which provides for the coastal State's "sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the sea-bed and of the sea-bed and its subsoil". Nicaragua also notes that Article 61, paragraph 1, of the Convention gives to the coastal State the exclusive right to establish allowable catch limits in its exclusive economic zone; while Article 62, paragraph 2, empowers the same State to establish its own harvesting capacity, with the possibility, under Article 62, paragraph 3, of giving access to other States to the surplus stocks, taking into account, *inter alia*, "the need to minimize economic dislocation in States whose nationals have habitually fished in the zone or which have made substantial efforts in research and identification of stocks". Nicaragua argues that some provisions of UNCLOS concerning other maritime areas, such as Article 51 on archipelagic waters, "contain express carve-outs for traditional fishing rights or the application of other rules of international law". Thus, according to Nicaragua, the absence of a provision in Part V of UNCLOS preserving traditional fishing rights in the exclusive economic zone indicates the intention of the drafters of the Convention to relegate these rights to a "relevant factor" in the allocation of the surplus resources.

208. Nicaragua further asserts that during the negotiation of UNCLOS at the Third United Nations Conference on the Law of the Sea, proposals concerning the protection of historic fishing practices in the exclusive economic zone were discussed and rejected and that a large number of States objected to this protection in the waters adjacent to their coasts, a fact which supports the recognition of exclusive sovereign rights and jurisdiction of the coastal State over the natural resources of the exclusive economic zone. Finally, Nicaragua argues that the jurisprudence, as evidenced by the Court's ruling in the case concerning *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)* (*Judgment, I.C.J. Reports 1984*, p. 246), also supports its argument that, under customary international law, traditional fishing rights have been extinguished by the establishment of the exclusive economic zone, and that coastal States now enjoy

a "legal monopoly" over the living resources of the exclusive economic zone.

209. In the alternative, Nicaragua contends that, should the Court find that traditional fishing rights have survived the establishment of the exclusive economic zone, Colombia has, in any event, not discharged its burden of proving either that its fishermen actually had such rights or that Nicaragua has infringed them. Nicaragua argues further that Colombia's claim of traditional fishing rights is inconsistent with the latter's own prior admissions during the proceedings before the Court in the case concerning *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*, where Colombia did not make any reference to the existence of ancestral fishing rights of the Raizales. Nicaragua also refers to a passage of Colombia's Counter-Memorial submitted in the above-mentioned case, where the Respondent indicated that the population of the Archipelago has relied for subsistence on the fisheries and other resources located in "Roncador, Quitasueño, Serrana, Serranilla and Bajo Nuevo", features which are not located in the area the Court declared in its 2012 Judgment to appertain to Nicaragua's exclusive economic zone. Nicaragua also invites the Court to take into account Colombia's statement to the International Labour Organization's Committee of Experts on the Application of Conventions and Recommendations that the fishing areas used by the inhabitants of San Andrés "were not affected by the ICJ ruling, as they consisted of territorial waters awarded to Colombia". Finally, Nicaragua argues that, through official acts, such as Colombia's DIMAR Resolution No. 0121 of 28 April 2004, Colombia itself placed tight limits on the areas where artisanal fishermen were allowed to fish, restricting their area of operation to a distance of 12 nautical miles from the islands of San Andrés and Providencia.

210. Nicaragua also submits that Colombia's own evidence, in the form of the 11 affidavits from artisanal fishermen referenced above, disproves Colombia's claim and demonstrates that fishing did not historically occur in the area the Court declared in its 2012 Judgment to constitute Nicaragua's exclusive economic zone. Nicaragua, moreover, questions the probative value of this type of evidence, arguing that the affidavits were sworn by private persons interested in the outcome of the proceedings, and prepared less than a month before the filing of Colombia's Counter-Memorial, for the purposes of litigation. Nicaragua asserts that, in any event, the affidavits prove that "historic fishing took place largely in the vicinity of Colombia's islands, and not in waters that the Court determined to be part of Nicaragua's [exclusive economic zone]".

211. Nicaragua further asserts that none of the statements in which President Ortega expressed his openness to address Colombia's concerns about the fishing practices of the Raizales, amount to an explicit recognition or acceptance of the alleged traditional fishing rights. In Nicaragua's

view, those statements, which must be understood in the particularly delicate context in which they were made, were intended to be conciliatory and to diffuse the political tension created by Colombia's rejection of the Court's 2012 Judgment. Nicaragua emphasizes that, in the statements, President Ortega expressly called for the establishment of appropriate mechanisms to accommodate the activities of the artisanal fishermen, including a bilateral agreement with Colombia. Nicaragua also makes it clear that, while it denies that the inhabitants of the San Andrés Archipelago have a

> "vested 'right' to conduct artisanal fishing in Nicaragua's exclusive economic zone as a matter of law, it remains open, in the spirit of brotherhood and good neighbourly relations, to work with Colombia to reach a bilateral agreement that takes account of . . . the fishing needs of the Raizales".

212. Nicaragua further argues that Colombia has failed to produce any contemporaneous evidence of the alleged incidents of interference by the Nicaraguan Navy. Nicaragua states that the declaration of President Santos of 18 February 2013 and the affidavits on which Colombia relies do not provide any details of the incidents of harassment or pillaging that is alleged to have occurred.

* *

213. The Court observes that Colombia's third counter-claim is premised on two main contentions: first, Colombia asserts that the inhabitants of the San Andrés Archipelago, in particular the Raizales, have for centuries practised traditional or artisanal fishing in locations now falling in Nicaragua's exclusive economic zone. The alleged long-standing practices amongst those communities are said to have given rise to an uncontested "local customary norm" between the Parties or to customary rights of access and exploitation that survived the establishment of Nicaragua's exclusive economic zone. Additionally, Colombia points to statements of President Ortega, the Head of State of Nicaragua, which it characterizes both as accepting or recognizing the existence of those rights and as unilateral statements that are capable of producing "legal effects" in the sense that they amounted to "granting rights to the artisanal fishermen". The Court will examine the merits of each of those arguments before determining whether Colombia has proven Nicaragua's alleged violations.

214. As to Colombia's first main contention, the onus is on Colombia to prove that the inhabitants of the San Andrés Archipelago, in particular the Raizales, have historically practised artisanal fishing in areas that now fall within Nicaragua's exclusive economic zone, giving rise (according to Colombia) to an "uncontested local customary norm" or to "customary rights of access and exploitation" that survived the establishment of Nicaragua's exclusive economic zone.

215. The Court begins by recalling that the Parties' relations in respect of the exclusive economic zone are governed by customary international law (see paragraph 48 above). Accordingly, in order to determine the rights and obligations of the Parties specifically in Nicaragua's exclusive economic zone, the Court will apply the relevant rules of customary international law, as reflected in the relevant provisions of Part V including Article 56 and Article 58 of UNCLOS (see paragraphs 57 and 61 above).

216. Under customary international law, as reflected in Article 56 of UNCLOS, Nicaragua, as the coastal State, enjoys sovereign rights in its exclusive economic zone including "for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the sea-bed and of the sea-bed and its subsoil". Furthermore, customary international law as reflected in Articles 61 and 62 of UNCLOS grants to Nicaragua, as the coastal State, the right to "determine the allowable catch of the living resources in its exclusive economic zone" (Art. 61, para. 1); to determine its capacity to harvest the living resources of the exclusive economic zone and where it does not have the capacity to harvest the entire allowable catch, give access to the surplus of the allowable catch to other States, through agreements or other arrangements, and pursuant to its terms, conditions and laws (Art. 62, para. 2). Furthermore, customary international law requires that, in giving access to other States to its exclusive economic zone for the purpose of accessing the surplus of Nicaragua's allowable catch, Nicaragua

> "shall take into account all relevant factors, including, *inter alia*, . . . the requirements of developing States in the subregion or region in harvesting part of the surplus and the need to minimize economic dislocation in States whose nationals have habitually fished in the zone" (Art. 62, para. 3).

217. Under customary international law, as reflected in Article 58 of UNCLOS, other States, including Colombia, enjoy in Nicaragua's exclusive economic zone, high seas freedoms of navigation and overflight and other internationally lawful uses of the sea related to these freedoms which must, however, be exercised with due regard to Nicaragua's rights as the coastal State.

218. The Court now turns to the question whether Colombia has proved that the inhabitants of the San Andrés Archipelago, in particular the Raizales, have historically enjoyed "artisanal fishing rights" in areas that now fall within Nicaragua's exclusive economic zone and that those "rights" survived the establishment of Nicaragua's exclusive economic zone. Colombia relies on 11 affidavits annexed to its Counter-Memorial to prove the existence of a long-standing practice of artisanal

fishing by the inhabitants of the San Andrés Archipelago, in particular the Raizales. The Court recalls that it must exercise caution in giving weight to affidavit evidence especially prepared by a party for the purposes of a case:

> "[W]itness statements produced in the form of affidavits should be treated with caution. In assessing such affidavits the Court must take into account a number of factors. These would include whether they were made by State officials or by private persons not interested in the outcome of the proceedings and whether a particular affidavit attests to the existence of facts or represents only an opinion as regards certain events." (*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007 (II)*, p. 731, para. 244.)

219. In the present case, the 11 affidavits annexed to Colombia's Counter-Memorial appear to have been sworn specifically for the purposes of this case and are signed by fishermen who may be considered as particularly interested in the outcome of these proceedings, factors that have a bearing on the weight and probative value of that evidence. The Court must nonetheless analyse the affidavits "for the utility of what is said" and to determine whether they support Colombia's contention *(ibid.)*.

220. Having reviewed the affidavits on which Colombia relies, the Court observes that they contain indications that some fishing activities have in the past taken place in certain areas that had once been part of the high seas but now fall within Nicaragua's exclusive economic zone. However, the Court also notes that the affidavits do not establish with certainty the periods during which such activities took place, or whether there was in fact a constant practice of artisanal fishing spanning many decades or centuries, as claimed by Colombia. Some affiants refer to fishing expeditions beyond the Colombian islands being limited to "a few times a year", while others claim to have carried out fishing in those areas since the 1980s and 1990s, a time span which the Court does not consider, in the circumstances of the present case, long enough to qualify such fishing as "a long-standing practice" or to support Colombia's claim concerning the existence of a local custom or of "a local customary right to artisanal fishing". The Court also notes in this regard that most of the affiants speak of having conducted their activities in waters surrounding the Colombian features or in fishing grounds located within Colombia's territorial sea, rather than Nicaraguan maritime areas. The evidence also suggests that the fishing expeditions within the areas now falling within Nicaragua's exclusive economic zone increased in frequency in recent decades as a result of technological developments enabling artisanal fishermen to venture further out to sea, and as a result of the depletion of fish stocks around the Colombian islands, a fact that Colombia itself concedes in its written pleadings and oral arguments. Finally, the Court

observes that certain affidavits do not address the alleged historical nature of the fishing conducted in waters now falling in Nicaragua's exclusive economic zone, so that a conclusion in that regard cannot be derived from their reading.

221. The Court is mindful that traditional fishing practices alleged to have taken place over many decades may not have been documented in any formal or official record (cf. *Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua), Judgment, I.C.J. Reports 2009*, pp. 265-266, para. 141), which calls for some flexibility in considering the probative value of the affidavits submitted by Colombia. Nonetheless, the Court is of the view that the 11 affidavits submitted by Colombia do not sufficiently establish its claim that the inhabitants of the San Andrés Archipelago, in particular the Raizales, have been engaged in a long-standing practice of artisanal fishing in "traditional fishing banks" located in waters now falling within Nicaragua's exclusive economic zone.

222. The Court also considers that the positions adopted by Colombia, *inter alia*, its statement before the International Labour Organization's Committee of Experts on the Application of Conventions and Recommendations, and Resolution No. 0121 of Colombia's General Maritime Directorate of 28 April 2004 (see paragraph 209 above), are inconsistent with Colombia's assertion concerning the existence of such a traditional practice of artisanal fishing in Nicaragua's exclusive economic zone. For example, on two occasions (August 2013 and February-March 2014), the Colombian General Confederation of Labour (hereinafter the "CGT") submitted information on behalf of the Raizal Small-Scale Fishers' Associations and Groups of the Department Archipelago of San Andrés, Providencia and Santa Catalina to the International Labour Organization's Committee of Experts on the Application of Conventions and Recommendations concerning the application by Colombia of the International Labour Organization's Indigenous and Tribal Peoples Convention of 1989. In these communications, the CGT asserted that the 2012 Judgment had negative implications for traditional fishing, as "Raizal fishers have no longer been able to fish with the tranquillity that they did ancestrally" and that "[they] have to cross Nicaraguan maritime territory, which is reported to give rise to difficulties and the payment of fines". The Committee summarized the responses sent by the Government of Colombia refuting the submissions of the CGT as follows:

> "[T]he Government explains that traditional fishing sites are precisely located in the vicinity of areas not affected by the ICJ judgment since it is a question of territorial sea and in this respect the ICJ ruled in favour of Colombia. The Government states that fishers from the

islands of San Andrés, Providencia and Santa Catalina can continue fishing in the traditional way." (International Labour Organization, Committee of Experts on the Application of Conventions and Recommendations, Observation (CEACR) — adopted 2013, published at the 103rd ILC session (2014).)

"The Government adds that the waters in which the small-scale fishers of the Raizal community traditionally fished continue to belong to Colombia and the fishers can continue their work as they did before the ruling of the ICJ of November 2012. With regard to the right of the inhabitants of San Andrés to have access to traditional fishing areas, the Government specifies that such fishing areas are located precisely around the keys and that these areas were not affected by the ICJ ruling, as they consisted of territorial waters awarded to Colombia, together with the sovereignty of the islands and the seven keys." (International Labour Organization, Committee of Experts on the Application of Conventions and Recommendations, Observation (CEACR) — adopted 2014, published at the 104th ILC session (2015).)

223. Colombia responds to the above observation by claiming that the Colombian Ministry of Labour "cavalierly concluded . . . that the artisanal fishermen of the San Andrés Archipelago could not have been impacted by the 2012 line" while "fail[ing] to provide even a shred of evidence to support its assertion that the traditional fishing sites were precisely located in the vicinity of areas not affected by the decision". It further points to the plan established by the Colombian Government to alleviate the adverse effects of the 2012 Judgment on the artisanal fishermen and considers that the communications from the fishermen prove its claim in the present proceedings. However, the Court has previously held that "statements emanating from high-ranking official[s] . . . are of particular probative value when they acknowledge facts or conduct unfavourable to the State represented by the person who made them" (*Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, p. 206, para. 78. See also *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 41, para. 64). The Court has further observed in the past that

"persons representing a State in specific fields may be authorized by that State to bind it by their statements in respect of matters falling within their purview. This may be true, for example, of holders of technical ministerial portfolios exercising powers in their field of competence in the area of foreign relations, and even of certain

> officials." (*Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 27, para. 47.)

The Court must consider therefore that the statements noted above, emanating from the Head of the Office of Co-operation and International Relations of Colombia's Ministry of Labour, further undermine Colombia's assertion of the existence of such a traditional practice of artisanal fishing in Nicaragua's exclusive economic zone.

224. The Court also takes note of a report issued by the Comptroller General's Office of the Department Archipelago of San Andrés, Providencia and Santa Catalina. In his 2013 Report on the "Status of Natural Resources and the Environment", the Comptroller of the Archipelago presented the new maritime boundary determined by the Court and the effects of the 2012 Judgment, asserting that the ruling of the Court translated into a substantial reduction of the marine territory of the Archipelago. With regard to the impact of the 2012 Judgment on fisheries, the Comptroller's report alludes to the reduction of fisheries activities, and links it to the concerns expressed by fishermen over "conflicts arising from [the ruling of the Court]". However, the Court observes that, in presenting "a detailed description of each impact on fisheries [of the 2012 Judgment]", the report only refers to the effects of the 2012 Judgment on industrial fishing without any specific mention of detrimental impacts in respect of artisanal fishermen. In addition, the report lists the "Traditional Fishing Location[s]" as follows:

> "San Andrés Island artisanal fishermen distribute themselves throughout the entire shelf, using points of reference for fishing grounds such as: Outside Bank (Northern San Andrés Island), Under the Lee (Western side of San Andrés Island), Southend Bank (Southern San Andrés Island), Alburquerque Cays (50 km to the SSW of San Andrés Island), and Meridian 82 on the boundary with Nicaragua.
>
> In Providencia and Santa Catalina, fishing takes place in the interior and the exterior of the barrier reef, close to the reef terrace, respecting the park area and the protected marine area . . . [T]he specific work areas are El Faro, Taylor Reef, Morning Star, Northeast Bank, South Banks, and North Banks."

The report also seems to confirm that the artisanal fishermen usually remained close to the Colombian islands and found themselves in Nicaragua's exclusive economic zone only infrequently, a fact supported by the aforesaid affidavits. In view of the foregoing, the Court concludes that previous positions adopted by or on behalf of Colombia further undermine Colombia's assertion concerning the existence of a traditional practice of artisanal fishing in Nicaragua's exclusive economic zone.

225. The Court turns to several statements of Nicaragua's Head of State, which, according to Colombia, either illustrate Nicaragua's acceptance or recognition that the artisanal fishermen of the Archipelago have the right to fish in Nicaragua's maritime zones without having to request prior authorization or alternatively create a legal obligation on the part of Nicaragua to respect those fishing rights.

226. First, the Court observes that, in certain statements, President Ortega refers to the need to "respect the ancestral rights of the Raizales over those waters now fully belonging to [his] country" or to "respect the historical rights of the Raizal people . . . over the region". In other instances, the President affirms that "the [R]aizal community, living in San Andrés can continue fishing in the Caribbean waters now belonging to Nicaragua and that their rights as native people will not be affected".

227. Bearing in mind these observations, the Court begins by considering whether a recognition by Nicaragua of the alleged artisanal fishing rights may be inferred from the above statements. In this context, the Court will examine carefully the words used in those statements in order to ascertain whether such a recognition emerges therefrom. The Court observes that, in several of President Ortega's statements, reference is made to the need for the Raizal community or the inhabitants of the Archipelago to obtain fishing permits or authorizations from Nicaragua to carry on artisanal or industrial fishing. In addition, President Ortega made references to mechanisms that needed to be established between Nicaragua and Colombia before the artisanal fishermen could operate in waters falling in Nicaragua's exclusive economic zone by virtue of the 2012 Judgment. In this regard, President Ortega proposed, *inter alia*, the creation of a commission "to work [to delimit] where the Raizal people can fish in [the] exercise of their historic rights"; the elaboration of "an agreement between Colombia and Nicaragua to regulate [the] situation"; or the establishment of "a Nicaraguan consular section" on the San Andrés island "to solve the issue of the fishing permits for the [R]aizal community". In the Court's view, the statements by President Ortega do not establish that Nicaragua has recognized that the inhabitants of the San Andrés Archipelago, in particular the Raizales, have the right to fish in Nicaragua's maritime zones without having to request prior authorization. It follows that the Court cannot uphold Colombia's contention that Nicaragua, through the statements of its Head of State, accepted or recognized the rights of the Raizales to fish in Nicaragua's exclusive economic zone without requiring authorization from Nicaragua.

228. The Court will now consider whether the statements of President Ortega constitute a legal undertaking "granting rights to the artisanal fishermen". In determining whether a unilateral declaration by a State official entails the creation of legal obligations, the Court has stated:

> "It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of

creating legal obligations. Declarations of this kind may be, and often are, very specific. When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration. An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding.

. . . .

With regard to the question of form, it should be observed that this is not a domain in which international law imposes any special or strict requirements. Whether a statement is made orally or in writing makes no essential difference, for such statements made in particular circumstances may create commitments in international law, which does not require that they should be couched in written form. Thus the question of form is not decisive." (*Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, pp. 267-268, paras. 43 and 45; *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, pp. 472-473, paras. 46 and 48.)

229. The Court has also emphasized the need to consider the factual circumstances in which the unilateral statement was made and the need to consider carefully whether the State issuing the declaration intended to be bound by it (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment. I.C.J. Reports 1986*, p. 43, para. 71; *Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986*, p. 573, para. 39; *Obligation to Negotiate Access to the Pacific Ocean (Bolivia* v. *Chile), Judgment, I.C.J. Reports 2018 (II)*, p. 555, para. 146). In this regard, the Court is mindful that certain declarations may express a State's willingness to adopt a particular course of conduct, without being expressed in terms of undertaking a legal obligation (*ibid.*, para. 147). The Court has also held that "[w]hen States make statements by which their freedom of action is to be limited, a restrictive interpretation is called for" (*Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 267, para. 44; *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 473, para. 47). It also falls to the Court to "form its own view of the meaning and scope intended by the author of a unilateral declaration which may create a legal obligation" (*Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986*, p. 573, para. 39, citing *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 269, para. 48; *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 474, para. 50).

230. In the Court's view, the statements of Nicaragua's Head of State indicate that the Nicaraguan authorities were aware of the issues that arose in respect of the fishing activities of the inhabitants of the Archi-

pelago and the challenges that Colombia faced in implementing the 2012 Judgment. In that regard, it appears that Nicaragua expressed an openness to concluding an agreement with Colombia regarding appropriate mechanisms and solutions to overcome those challenges. The Court notes that, in some statements adduced by the Respondent, the Nicaraguan Head of State expressed concerns regarding the rejection by Colombia of the delimitation effected by the Court and affirmed the need to work with Colombia on reaching an agreement to ensure compliance with the 2012 Judgment. President Ortega further alluded to the need to understand the inner workings of domestic politics and to give due time to Colombia to bring its national legislation into compliance with the Court's Judgment. The Court further observes that both Parties agree that the statements were made in the context of political protests in the aftermath of the 2012 Judgment and against the backdrop of the ongoing negotiations with Colombia with the view of achieving an agreement on the implementation of the 2012 Judgment. Bearing in mind the above context and adopting a restrictive interpretation (*Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 267, para. 44; *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 473, para. 47), the Court cannot accept Colombia's alternative argument that the statements of President Ortega, referred to above, constitute a legal undertaking on the part of Nicaragua to respect the rights of the artisanal fishermen of the San Andrés Archipelago to fish in Nicaragua's maritime zones without requiring prior authorization from Nicaragua.

231. For these reasons, the Court concludes that Colombia has failed to establish that the inhabitants of the San Andrés Archipelago, in particular the Raizales, enjoy artisanal fishing rights in waters now located in Nicaragua's exclusive economic zone, or that Nicaragua has, through the unilateral statements of its Head of State, accepted or recognized their traditional fishing rights, or legally undertaken to respect them. In view of this conclusion, the Court need not examine the Parties' arguments in respect of whether or in which circumstances the traditional fishing rights of a particular community can survive the establishment of the exclusive economic zone of another State, or Colombia's contentions concerning Nicaragua's alleged infringement of said rights through the conduct of its Naval Force. In light of all the above considerations, the Court dismisses Colombia's third counter-claim.

232. Notwithstanding the above conclusion, the Court takes note of Nicaragua's willingness, as expressed through statements of its Head of State, to negotiate with Colombia an agreement regarding access by members of the Raizales community to fisheries located within Nicaragua's exclusive economic zone. The Court considers that the most appropriate solution to address the concerns expressed by Colombia and its nationals in respect of access to fisheries located within Nicaragua's exclusive economic zone would be the negotiation of a bilateral agreement between the Parties.

233. The Court also emphasizes that, under customary international law applicable to the exclusive economic zone, as reflected in Article 58 of UNCLOS, third States possess freedom of navigation in this area. It follows that the inhabitants of the Archipelago, including the Raizales, may freely navigate within Nicaragua's exclusive economic zone, including in the course of their travel between the inhabited islands and the fishing areas located on Colombia's side of the maritime boundary.

B. Alleged Violation of Colombia's Sovereign Rights and Maritime Spaces by Nicaragua's Use of Straight Baselines

234. The Court now turns to Colombia's fourth counter-claim. On 27 August 2013, Nicaragua enacted Decree 33 through which it established a system of straight baselines along its Caribbean coast, from which the breadth of its territorial sea is measured. In the preamble to the Decree, Nicaragua purports to have acted in accordance with the provisions of UNCLOS in establishing those baselines. The Decree identifies nine base points — two are located on the low-water line along Nicaragua's mainland coast and the remaining seven are located on the low-water line along islands seaward of Nicaragua's mainland coast — and eight straight baseline segments. (In the 2018 amendment to Decree 33, Nicaragua made a small adjustment to the location of base point 9, located on its southern coast, to take into account the Court's Judgment of 2 February 2018 in the cases concerning *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica* v. *Nicaragua)* and *Land Boundary in the Northern Part of Isla Portillos (Costa Rica* v. *Nicaragua)*, a change that neither Party considers material to the present case.)

235. In its fourth counter-claim, Colombia raises three objections to Nicaragua's use of straight baselines. First, the Respondent argues that Nicaragua has not met the necessary geographical preconditions required under Article 7 of UNCLOS, which reflects the customary international law on the use of straight baselines, in that there is no "fringe of islands along the Nicaraguan coast in its immediate vicinity", and the coastline is not "deeply indented and cut into". Colombia also advocates for a strictly frontal projection in determining the extent to which the coast is masked or guarded by the islands and finds that the concerned features "mask no more than 5 to 6 percent of the coast". Secondly, Colombia argues that even if those geographical preconditions were met, the manner in which Nicaragua drew those baselines contravenes the provisions of Article 7, paragraph 3, since the baselines depart significantly from the general direction of Nicaragua's coast and enclose sea areas that are not sufficiently closely linked to the land domain to be subject to the régime of internal waters. Thirdly, Colombia argues that by employing straight baselines, Nicaragua is attempting to misappropriate significant maritime

areas as its internal waters and is artificially expanding its territorial sea, exclusive economic zone and continental shelf, in a manner that not only infringes upon Colombia's rights and maritime spaces, but also limits the rights of third States in the Caribbean Sea. Colombia accordingly maintains that Nicaragua's straight baselines established in Decree 33, as amended, are contrary to international law and violate Colombia's rights and maritime spaces.

*

236. For its part, Nicaragua asserts that its straight baselines were drawn in accordance with customary international law and the relevant provisions of UNCLOS, and that the Applicant is therefore entitled to determine the status of the waters landward and seaward of those baselines in accordance with international law. Nicaragua also disagrees with Colombia's contention that Decree 33 produces an artificial overlap of Nicaragua's exclusive economic zone with Colombia's entitlement to its own exclusive economic zone and continental shelf. According to Nicaragua, the outer limit of its exclusive economic zone is unaltered by the use of straight baselines, because the outer limit of that zone is controlled by base points on the low-water line along its coast that are seaward of the straight baselines.

237. Nicaragua maintains that the geographical configuration of its coast permits the use of straight baselines, in that the coastline is deeply indented and cut into and there is a fringe of islands along the coast in its immediate vicinity, as required by Article 7, paragraph 1, of UNCLOS. Nicaragua further argues that the Court's 2012 Judgment in two instances refers respectively to the "Nicaraguan fringing islands" and the "islands fringing the Nicaraguan coast". Moreover, base points on Nicaragua's fringing islands were used in the construction of a provisional median line. In its view, these islands form a fringe in the immediate vicinity of the coast of Nicaragua. It also disputes Colombia's assertion that the islands do not form a unity with the mainland given the distance between the main features — the Miskitos Cays and the Corn Islands — and the Nicaraguan coast. Nicaragua observes in this respect that Colombia's claim does not take account of the fact that these main features are located in an area in which there are numerous other islands. Nicaragua argues that the Court should be informed by its own approach to determining the seaward projection of relevant coasts in connection with the delimitation of maritime boundaries. In light of the Court's jurisprudence, Nicaragua submits, it would be reasonable to look at a projection of all relevant islands and features between a perpendicular to the general direction of the mainland coast and an angle of 20 degrees to that perpendicular, an approach which allegedly yields a masking effect of 46 per cent.

238. Nicaragua further contends that the course of its baselines does "not depart to any appreciable extent from the general direction of the coast", in accordance with Article 7, paragraph 3, of the Convention. It considers that, as indicated by the Court, in applying the principle of the general direction of the coast, the focus should be on the overall direction of the coast under consideration, not that of specific localities. Second, it asserts that "the sea areas lying within the lines [are] sufficiently closely linked to the land domain to be subject to the régime of internal waters", in accordance with the same provision.

239. Finally, Nicaragua argues that Colombia's rights have not been infringed by Nicaragua's straight baselines. It states that its straight baselines are in conformity with Article 7 of the Convention and, as a consequence, Nicaragua is entitled to apply the régime for internal waters, as defined by the Convention and customary international law, landward of these straight baselines. It adds that the outer limit of Nicaragua's exclusive economic zone has not shifted seaward following the establishment of its straight baselines through Decree 33, since the outer limit of Nicaragua's exclusive economic zone is determined from base points located on the low-water line along Nee Reef and London Reef (low-tide elevations that are located within 12 nautical miles of the Miskitos Cays), Blowing Rock and Little Corn Island, all of which are seaward of those straight baselines.

* *

240. The Court recalls that when it delimited the maritime boundary between the Parties in the 2012 Judgment, the location of Nicaragua's baselines was unsettled, given that "Nicaragua ha[d] not yet notified the Secretary-General [of the United Nations] of the location of those baselines under Article 16, paragraph 2, of UNCLOS". Accordingly, the location of the eastern endpoints of the maritime boundary was determined only on an approximate basis (*Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012 (II)*, p. 683, para. 159, and p. 713, para. 237).

241. The Parties agree on the principles governing the determination of appropriate baselines. They consider that Article 5 of UNCLOS sets out the criteria that govern the establishment of normal baselines, namely "the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State". The Parties also agree that customary international law permits a deviation from normal baselines where "the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity". They accept that Article 7 of UNCLOS reflects customary international law on the drawing of straight baselines.

242. The Court recalls that in its Judgment in the *Fisheries* case, it recognized the employment of straight baselines as the "application of

general international law to a specific case" given the geographic characteristics of Norway's coast (*Fisheries (United Kingdom* v. *Norway), Judgment, I.C.J. Reports 1951*, p. 131). In assessing the validity of Norway's baselines under international law, the Court indeed identified certain criteria which were codified in Article 4 of the 1958 Convention. This provision corresponds, almost verbatim, to Article 7 of UNCLOS on "Straight baselines", paragraphs 1, 3 and 4 of which provide that:

> "1. In localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines joining appropriate points may be employed in drawing the baseline from which the breadth of the territorial sea is measured.
>
> . . . .
>
> 3. The drawing of straight baselines must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the régime of internal waters.
>
> 4. Straight baselines shall not be drawn to and from low-tide elevations, unless lighthouses or similar installations which are permanently above sea level have been built on them or except in instances where the drawing of baselines to and from such elevations has received general international recognition."

The Court considers that Article 7 of UNCLOS reflects customary international law.

243. The Court recalls that it is for the coastal State to determine its baselines for the purposes of measuring the breadth of its maritime zones, in conformity with international law. However, as the Court has stated in the past, the determination of baselines is "an exercise which has always an international aspect" and falls to be assessed by reference to international rules (*Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009*, p. 108, para. 137; see also *Fisheries (United Kingdom* v. *Norway), Judgment, I.C.J. Reports 1951*, p. 132). Moreover, the Court would recall, in relation to the use of straight baselines and the applicable rules, that "the method of straight baselines, which is an exception to the normal rules for the determination of baselines, may only be applied if a number of conditions are met. This method must be applied restrictively." (*Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain), Merits, Judgment, I.C.J. Reports 2001*, p. 103, para. 212.)

244. Customary international law as reflected in Article 7, paragraph 1, of UNCLOS provides for two geographical preconditions for the establishment of straight baselines. The preconditions are alternative and not cumulative. With respect to the straight baselines drawn from Cabo Gracias a Dios on the mainland to Great Corn Island along the coast

(points 1-8), Nicaragua asserts that there is "a fringe of islands along the coast in its immediate vicinity" that entitles it to use straight rather than normal baselines. As to the southernmost part of its mainland coast, Nicaragua claims instead that the indentation of the coast from Monkey Point to the land boundary terminus with Costa Rica justifies Nicaragua's straight baselines drawn from point 8 (Great Corn Island) to point 9 (Barra Indio Maíz).

245. The Court notes that there appears to be no single test for identifying a coastline that is "deeply indented and cut into". Since Nicaragua concedes that it is only the southernmost portion of its Caribbean coast between Monkey Point and Barra Indio Maíz that falls to be considered under the second geographic option, the Court must determine whether the straight baseline segment between base points 8 and 9 defined by Decree 33, as amended, is justified on the basis that the corresponding coast is "deeply indented and cut into". An examination of the relevant maps reveals that Nicaragua's southernmost coast does, in fact, curve inward. Under the conditions reflected in Article 7, paragraph 1, of UNCLOS, however, it is not sufficient for the coast to have slight indentations and concavities; the coast must be "deeply indented and cut into". From the Isla del Venado (facing the bay of Bluefields) to Monkey Point, Nicaragua's mainland coast has a smooth configuration. A broad concavity is observable from Punta Grindston Bay to Isla Portillos, at the land boundary terminus with Costa Rica. The indentations along the relevant portion of Nicaragua's coast do not penetrate sufficiently inland or present characteristics sufficient for the Court to consider the said portion as "deeply indented and cut into". The relevant portion is not "of a very distinctive configuration", nor "broken along its whole length" or "constantly open[ing] out into indentations often penetrating for great distances inland" (*Fisheries (United Kingdom* v. *Norway), Judgment, I.C.J. Reports 1951*, p. 127). Thus, recalling that the straight baselines method "must be applied restrictively", the Court finds that the straight baseline segment between base points 8 and 9 defined by Decree 33, as amended, does not conform with customary international law on the drawing of straight baselines as reflected in Article 7, paragraph 1, of UNCLOS.

246. The Court now turns to the remainder of Nicaragua's straight baselines running from point 1 to point 8, where some base points are located on features such as Edinburgh Cay, the Miskitos Cays, Ned Thomas Cay, the Man of War Cays and the Corn Islands. It recalls that base points used to construct straight baselines may be placed on islands, but may not be placed on features that are below water at high tide (low-tide elevations) except in certain situations which are not present in this case. Article 121, paragraph 1, of UNCLOS, defines an "island" as "a naturally formed area of land, surrounded by water, which is above water

at high tide". In the case concerning *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, the Court viewed the legal definition of an island embodied in Article 121, paragraph 1, as part of customary international law (*Maritime Delimitation and Territorial Questions between Qatar and Bahrain, (Qatar* v. *Bahrain), Merits, Judgment, I.C.J. Reports 2001*, p. 91, para. 167, and p. 99, para. 195) and it reaffirmed the same in its 2012 Judgment (*Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012 (II)*, p. 674, para. 139).

247. In this regard, the Court notes that the Parties are divided on the question whether Nicaragua's offshore islands constitute a "fringe of islands along the coast in its immediate vicinity" within the meaning of Article 7, paragraph 1, of UNCLOS. First, the Parties disagree as to whether certain features are islands and whether there is a sufficient number of islands for drawing straight baselines. They also disagree on whether the islands in question "form a unity with the mainland" or have a "masking effect" on Nicaragua's coastline. Lastly, the Parties disagree about the size of the islands and whether their distance from each other and from the mainland justifies the drawing of straight baselines.

248. The Court must begin by ascertaining whether Nicaragua has demonstrated the presence of "islands" and, if so, whether those islands amount to "a fringe . . . along the coast in its immediate vicinity" as required by customary international law. Nicaragua asserts that there are 95 "islands" along its coast and provides a list of these as an annex to its written pleadings. Colombia adopts the view that Nicaragua has failed to prove the existence of the "islands", noting that Nicaragua does not adduce evidence concerning the insular nature or characteristics of these features. Colombia further considers that the feature called Edinburgh Cay, on which Nicaragua has placed a base point, is not an "island" for the purposes of Article 7, paragraph 1, and is shown as a simple "low-tide elevation" on Nautical Chart 28130.

249. As noted by the Parties, the 2012 Judgment contains references to "islands fringing the Nicaraguan coast" and to "the Nicaraguan mainland and fringing islands". While the Parties reach different conclusions on the legal significance of such references by the Court, they agree that the Court did not qualify the said islands as "a fringe of islands" within the meaning of Article 7, paragraph 1, of UNCLOS, nor that the Court was dealing with Nicaragua's claim to straight baselines. Furthermore, the Court clearly indicated that Nicaragua was yet to notify its baselines from which the breadth of its territorial sea would be measured, in accordance with Article 16, paragraph 2, of UNCLOS (*Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012 (II)*, p. 683, para. 159). Notwithstanding these clarifications, the Court is satisfied, in general terms, on the basis of the above references and noting its

findings in its 2012 Judgment according to which "[t]here are a number of Nicaraguan islands located off the mainland coast of Nicaragua" (*Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012 (II)*, p. 638, para. 21), that some of the 95 features listed by Nicaragua are islands, as opposed to low-tide elevations. The Court must emphasize, nonetheless, that it does not automatically follow that all the features listed by Nicaragua are "islands" or that they constitute "a fringe" within the meaning of Article 7, paragraph 1, of UNCLOS. It remains for Nicaragua to prove that there is indeed "a fringe of islands along the coast in its immediate vicinity" within the meaning of that provision.

250. The Parties are divided concerning the insular nature of "Edinburgh Cay" and about whether this feature may be considered an island for the purpose of drawing straight baselines under Article 7 of UNCLOS. The Court notes that, in plotting a provisional equidistance line, the 2012 Judgment refers to "Edinburgh Reef" as part of the islands located off the coast of Nicaragua *(ibid.)* and that the Court placed a base point on this feature for the construction of the provisional equidistance line (*ibid.*, pp. 698-700, paras. 201 and 204). However, the Court did not at that time consider the appropriateness of this feature for the purpose of drawing straight baselines, nor did the Court qualify it as an "island" within the meaning of Article 7, paragraph 1, of UNCLOS. The Court has underlined in the past that

> "the issue of determining the baseline for the purpose of measuring the breadth of the continental shelf and the exclusive economic zone and the issue of identifying base points for drawing an equidistance/median line for the purpose of delimiting the continental shelf and the exclusive economic zone between adjacent/opposite States are two different issues" (*Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009*, p. 108, para. 137).

251. The Court notes the contradictory data put forward by the Applicant concerning the nature of Edinburgh Cay. Nautical Chart NGA 28130, annexed to the Applicant's written pleadings, indicates that Edinburgh Cay, based on charted data, is not an island. Nicaragua explains that a different chart (British Admiralty Chart 1218), which was part of Nicaragua's pleadings in the case concerning *Territorial and Maritime Dispute*, shows the presence of "several islands on Edinburgh Cay or Reef". In these circumstances, the Court considers that there are serious reasons to question the nature of Edinburgh Cay as an island for the purpose of Article 7, paragraph 1, of UNCLOS. Thus, significant questions arise as to its appropriateness as the location for a base point for the drawing of straight baselines under the same provision. The Court adopts the view that Nicaragua has not demonstrated the insular nature of this feature.

252. In respect of the existence of a fringe of islands, the Court notes that there are no specific rules regarding the minimum number of islands, although the phrase "fringe of islands" implies that there should not be too small a number of such islands relative to the length of the coast (*Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain), Merits, Judgment, I.C.J. Reports 2001*, p. 103, para. 214). Given the uncertainty about which of the 95 features are islands, the Court is not satisfied, on the basis of the maps and figures submitted by the Parties, that the number of Nicaragua's islands relative to the length of the coast is sufficient to constitute "a fringe of islands" along Nicaragua's coast.

253. The maritime features shown on the maps may be divided into two groups on the basis of their geographic proximity: one group, located off the northernmost part of Nicaragua's mainland coast, extends from Edinburgh Cay to Ned Thomas Cay, including the Miskitos Cays; the second group, located off the central part of Nicaragua's mainland coast, extends from Man of War Cays to the Corn Islands, including the Tyra Cays and Pearl Point (Punta de Perlas).

254. The Parties have alluded in their pleadings to several factors they consider as relevant to determine whether a given group of islands amounts to "a fringe". The Court has equated in the past the term "fringe of islands" to a "cluster of islands" or an "island system" *(ibid.).* The arbitral tribunal in the proceedings between Eritrea and Yemen referred to "[a] tightly knit group of islands and islets, or 'carpet' of islands and islets" or to "an intricate system of islands, islets and reefs which guard this part of the coast" (*Award of the Arbitral Tribunal in the second stage of the proceedings between Eritrea and Yemen (Maritime Delimitation) (Second stage of the proceedings between Eritrea and Yemen, (Maritime Delimitation), Decision of 17 December 1999 Reports of International Arbitral Awards (RIAA)*, Vol. XXII (2001), p. 369, para. 151). Also, it emerges from these considerations that a certain continuity must be observed in respect of the islands in question for them to form a "fringe of islands" within the meaning of Article 7, paragraph 1, of UNCLOS. This conclusion is reinforced by the ordinary meaning of the words "fringe of islands" in other authentic languages of UNCLOS, such as in French, which refers to "un chapelet d'îles", a term which implies a certain succession or continuity. In the Court's view, a "fringe" must enclose a set, or a cluster of islands which present an interconnected system with some consistency or continuity. In certain instances, a fringe of islands "guard[ing] [a] part of the coast" may have a masking effect on a large proportion of the coast from the sea, a criterion which has been used and discussed by the Parties in the present proceedings to demonstrate or refute the existence of a fringe of islands along the Nicaraguan coastline *(ibid.)*.

255. In determining whether the features identified by the Applicant can be considered a "fringe of islands", the Court observes that custom-

ary international law, as reflected in Article 7, paragraph 1, of UNCLOS, requires this fringe to be located "along the coast" and in its "immediate vicinity". Read together with the additional requirements of Article 7, paragraph 3, according to which the drawing of straight baselines "must not depart to any appreciable extent from the general direction of the coast" and "the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the régime of internal waters", the specific requirements of Article 7, paragraph 1, indicate that a "fringe of islands" must be sufficiently close to the mainland so as to warrant its consideration as the outer edge or extremity of that coast (*Fisheries (United Kingdom* v. *Norway), Judgment, I.C.J. Reports 1951*, p. 128). It is not sufficient that the concerned maritime features be part, in general terms, of the overall geographical configuration of the State. They need to be an integral part of its coastal configuration (*Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain), Merits, Judgment, I.C.J. Reports 2001*, p. 103, para. 214; *Award of the Arbitral Tribunal in the second stage of the proceedings between Eritrea and Yemen (Maritime Delimitation), Decision of 17 December 1999, RIAA*, Vol. XXII (2001), p. 338, para. 14).

256. Bearing in mind these considerations, the Court is of the opinion that the Nicaraguan "islands" are not sufficiently close to each other to form a coherent "cluster" or a "chapelet" along the coast and are not sufficiently linked to the land domain to be considered as the outer edge of the coast. Nicaragua asserts that "there are numerous small cays between the mainland and the Corn Islands and that as a consequence the territorial seas of the two merge and overlap" in order to illustrate the relationship between the "islands" and the mainland. However, the Court notes that Nicaragua's straight baselines enclose large maritime areas where no maritime feature entitled to a territorial sea has been shown to exist. These areas are between Ned Thomas Cay and the Man of War Cays, between East of Great Tyra Cay and the Corn Islands, and from the Corn Islands to the land boundary terminus with Costa Rica. The Court further notes that the features and islands located towards the south of Nicaragua's mainland coast — the Man of War and East of Great Tyra Cay and the Little Corn and Great Corn Islands — appear to be significantly detached from the islands grouped in the north. Furthermore, a notable break in continuity of over 75 nautical miles can be observed between Ned Thomas Cay, on which Nicaragua has plotted base point 4, and Man of War Cays where base point 5 is located. Nicaragua concedes that the groups of islands along its coast are "separate".

257. Furthermore, the Court is not convinced that Nicaragua's islands "guard . . . part of the coast" in such a way that they have a masking effect on a large portion of the mainland coast (*Award of the Arbitral Tribunal in the second stage of the proceedings between Eritrea and Yemen (Maritime Delimitation), Decision of 17 December 1999, RIAA*, Vol. XXII

(2001), p. 369, para. 151). The segments of Nicaragua's mainland coast facing the areas lying between Ned Thomas Cay and the Man of War Cays and south of the Corn Islands do not seem to be masked by islands. The Court notes that the Parties disagree about the approach to be adopted to assess the extent of the masking effect of the islands and propose different methods by way of different projections. Without adopting a view concerning the relevance of the projections suggested by the Parties in assessing the masking effect of islands for the purpose of Article 7, paragraph 1, of UNCLOS, the Court considers that, even if it were to accept Nicaragua's approach, the masking effect of the maritime features that the Applicant identifies as "islands" is not significant enough for them to be considered as masking a large proportion of the coast from the sea.

258. In light of the above findings, the Court cannot accept Nicaragua's contention that there exists a continuous fringe or an "intricate system of islands, islets and reefs which guard this part of the coast" of Nicaragua (*Award of the Arbitral Tribunal in the second stage of the proceedings between Eritrea and Yemen (Maritime Delimitation), Decision of 17 December 1999, RIAA*, Vol. XXII (2001), p. 369, para. 151). It follows that Nicaragua's straight baselines do not meet the requirements of customary international law reflected in Article 7, paragraph 1, of UNCLOS. Having reached this conclusion, the Court need not consider whether the Applicant's straight baselines meet the additional requirements reflected in Article 7, paragraph 3, of UNCLOS.

259. Nicaragua's own evidence establishes that the straight baselines convert into internal waters certain areas which otherwise would have been part of Nicaragua's territorial sea or exclusive economic zone and convert into territorial sea certain areas which would have been part of Nicaragua's exclusive economic zone. The establishment of Nicaragua's straight baselines limits the rights that Colombian vessels would have had in those areas. The availability of the right of innocent passage in areas landward of straight baselines, consistent with Article 8, paragraph 2, of UNCLOS, does not fully address the implications for Colombia of Nicaragua's straight baselines. The Court notes in particular that by converting certain areas of its exclusive economic zone into internal waters or into territorial sea, Nicaragua's straight baselines deny to Colombia the rights to which it is entitled in the exclusive economic zone, including the freedoms of navigation and overflight and of the laying of submarine cables and pipelines, as provided under customary international law as reflected in Article 58, paragraph 1, of UNCLOS.

260. For the reasons set out above, the Court concludes that the straight baselines established by Decree 33, as amended, do not conform with customary international law. The Court considers that a declaratory judgment to that effect is an appropriate remedy.

* * *

261. For these reasons,

THE COURT,

(1) By ten votes to five,

Finds that its jurisdiction, based on Article XXXI of the Pact of Bogotá, to adjudicate upon the dispute regarding the alleged violations by the Republic of Colombia of the Republic of Nicaragua's rights in the maritime zones which the Court declared in its 2012 Judgment to appertain to the Republic of Nicaragua, covers the claims based on those events referred to by the Republic of Nicaragua that occurred after 27 November 2013, the date on which the Pact of Bogotá ceased to be in force for the Republic of Colombia;

IN FAVOUR: *President* Donoghue; *Vice-President* Gevorgian; *Judges* Tomka, Xue, Sebutinde, Bhandari, Robinson, Salam, Iwasawa; *Judge* ad hoc Daudet;

AGAINST: *Judges* Abraham, Bennouna, Yusuf, Nolte; *Judge* ad hoc McRae;

(2) By ten votes to five,

Finds that, by interfering with fishing and marine scientific research activities of Nicaraguan-flagged or Nicaraguan-licensed vessels and with the operations of Nicaraguan naval vessels in the Republic of Nicaragua's exclusive economic zone and by purporting to enforce conservation measures in that zone, the Republic of Colombia has violated the Republic of Nicaragua's sovereign rights and jurisdiction in this maritime zone;

IN FAVOUR: *President* Donoghue; *Vice-President* Gevorgian; *Judges* Tomka, Xue, Sebutinde, Bhandari, Robinson, Salam, Iwasawa; *Judge* ad hoc Daudet;

AGAINST: *Judges* Abraham, Bennouna, Yusuf, Nolte; *Judge* ad hoc McRae;

(3) By nine votes to six,

Finds that, by authorizing fishing activities in the Republic of Nicaragua's exclusive economic zone, the Republic of Colombia has violated the Republic of Nicaragua's sovereign rights and jurisdiction in this maritime zone;

IN FAVOUR: *President* Donoghue; *Judges* Tomka, Xue, Sebutinde, Bhandari, Robinson, Salam, Iwasawa; *Judge* ad hoc Daudet;

AGAINST: *Vice-President* Gevorgian; *Judges* Abraham, Bennouna, Yusuf, Nolte; *Judge* ad hoc McRae;

(4) By nine votes to six,

Finds that the Republic of Colombia must immediately cease the conduct referred to in points 2 and 3 above;

IN FAVOUR: *President* Donoghue; *Judges* Tomka, Xue, Sebutinde, Bhandari, Robinson, Salam, Iwasawa; *Judge* ad hoc Daudet;

AGAINST: *Vice-President* Gevorgian; *Judges* Abraham, Bennouna, Yusuf, Nolte; *Judge* ad hoc McRae;

(5) By thirteen votes to two,

Finds that the "integral contiguous zone" established by the Republic of Colombia by Presidential Decree 1946 of 9 September 2013, as amended by Decree 1119 of 17 June 2014, is not in conformity with customary international law, as set out in paragraphs 170 to 187 above;

IN FAVOUR: *President* Donoghue; *Vice-President* Gevorgian; *Judges* Tomka, Bennouna, Yusuf, Xue, Sebutinde, Bhandari, Robinson, Salam, Iwasawa, Nolte; *Judge* ad hoc Daudet;

AGAINST: *Judge* Abraham; *Judge* ad hoc McRae;

(6) By twelve votes to three,

Finds that the Republic of Colombia must, by means of its own choosing, bring into conformity with customary international law the provisions of Presidential Decree 1946 of 9 September 2013, as amended by Decree 1119 of 17 June 2014, in so far as they relate to maritime areas declared by the Court in its 2012 Judgment to appertain to the Republic of Nicaragua;

IN FAVOUR: *President* Donoghue; *Vice-President* Gevorgian; *Judges* Tomka, Bennouna, Xue, Sebutinde, Bhandari, Robinson, Salam, Iwasawa, Nolte; *Judge* ad hoc Daudet;

AGAINST: *Judges* Abraham, Yusuf; *Judge* ad hoc McRae;

(7) By twelve votes to three,

Finds that the Republic of Nicaragua's straight baselines established by Decree No. 33-2013 of 19 August 2013, as amended by Decree No. 17-2018 of 10 October 2018, are not in conformity with customary international law;

IN FAVOUR: *President* Donoghue; *Vice-President* Gevorgian; *Judges* Tomka, Abraham, Yusuf, Sebutinde, Bhandari, Robinson, Salam, Iwasawa, Nolte; *Judge* ad hoc Daudet;

AGAINST: *Judges* Bennouna, Xue; *Judge* ad hoc McRae;

(8) By fourteen votes to one,

Rejects all other submissions made by the Parties.

IN FAVOUR: *President* Donoghue; *Vice-President* Gevorgian; *Judges* Tomka, Abraham, Bennouna, Yusuf, Xue, Sebutinde, Bhandari, Robinson, Salam, Iwasawa, Nolte; *Judge* ad hoc Daudet;

AGAINST: *Judge* ad hoc McRae.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this twenty-first day of April, two thousand

and twenty-two, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Republic of Nicaragua and the Government of the Republic of Colombia, respectively.

(Signed) Joan E. Donoghue,
President.

(Signed) Philippe Gautier,
Registrar.

Vice-President Gevorgian appends a declaration to the Judgment of the Court; Judge Tomka appends a separate opinion to the Judgment of the Court; Judge Abraham appends a dissenting opinion to the Judgment of the Court; Judge Bennouna appends a declaration to the Judgment of the Court; Judge Yusuf appends a separate opinion to the Judgment of the Court; Judge Xue appends a declaration to the Judgment of the Court; Judge Robinson appends a separate opinion to the Judgment of the Court; Judge Iwasawa appends a declaration to the Judgment of the Court; Judge Nolte appends a dissenting opinion to the Judgment of the Court; Judge *ad hoc* McRae appends a dissenting opinion to the Judgment of the Court.

(Initialled) J.E.D.

(Initialled) Ph.G.

___

Annex 74

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

SOUTHERN BLUEFIN TUNA CASES
(NEW ZEALAND *v.* JAPAN; AUSTRALIA *v.* JAPAN)
List of cases: Nos. 3 and 4

PROVISIONAL MEASURES

ORDER OF 27 AUGUST 1999

1999

TRIBUNAL INTERNATIONAL DU DROIT DE LA MER

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRES DU THON À NAGEOIRE BLEUE
(NOUVELLE-ZÉLANDE c. JAPON; AUSTRALIE c. JAPON)
Rôle des affaires : Nos. 3 et 4

MESURES CONSERVATOIRES

ORDONNANCE DU 27 AOÛT 1999

Official citation:

Southern Bluefin Tuna (New Zealand v. *Japan; Australia* v. *Japan), Provisional Measures, Order of 27 August 1999, ITLOS Reports 1999,* p. 280

Mode officiel de citation :

Thon à nageoire bleue (Nouvelle-Zélande c. Japon; Australie c. Japon), mesures conservatoires, ordonnance du 27 août 1999, TIDM Recueil 1999, p. 280

27 AUGUST 1999
ORDER

SOUTHERN BLUEFIN TUNA CASES
(NEW ZEALAND *v*. JAPAN; AUSTRALIA *v*. JAPAN)

PROVISIONAL MEASURES

AFFAIRES DU THON À NAGEOIRE BLEUE
(NOUVELLE-ZÉLANDE c. JAPON; AUSTRALIE c. JAPON)

MESURES CONSERVATOIRES

27 AOÛT 1999
ORDONNANCE

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

YEAR 1999

27 August 1999

List of cases:
Nos. 3 and 4

SOUTHERN BLUEFIN TUNA CASES

(NEW ZEALAND *v.* JAPAN; AUSTRALIA *v.* JAPAN)

Requests for provisional measures

ORDER

Present: *President* MENSAH; *Vice-President* WOLFRUM; *Judges* ZHAO, CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, BAMELA ENGO, NELSON, CHANDRASEKHARA RAO, AKL, ANDERSON, VUKAS, WARIOBA, LAING, TREVES, MARSIT, EIRIKSSON, NDIAYE; *Judge* ad hoc SHEARER; *Registrar* CHITTY.

THE TRIBUNAL,

composed as above,

after deliberation,

Having regard to article 287, paragraph 5, and article 290 of the United Nations Convention on the Law of the Sea (hereinafter "the Convention" or "the Convention on the Law of the Sea") and articles 21 and 25 of the Statute of the Tribunal (hereinafter "the Statute"),

Having regard to articles 89 and 90 of the Rules of the Tribunal (hereinafter "the Rules"),

Having regard to the facts that Australia became a State Party to the Convention on 16 November 1994, that Japan became a State Party to the Convention on 20 July 1996 and that New Zealand became a State Party to the Convention on 18 August 1996,

Having regard to the fact that Australia, Japan and New Zealand have not chosen a means for the settlement of disputes in accordance with article 287 of the Convention and are therefore deemed to have accepted arbitration in accordance with Annex VII to the Convention,

Having regard to the Notification submitted by New Zealand to Japan on 15 July 1999 instituting arbitral proceedings as provided for in Annex VII to the Convention in a dispute concerning southern bluefin tuna,

Having regard to the Notification submitted by Australia to Japan on 15 July 1999 instituting arbitral proceedings as provided for in Annex VII to the Convention in a dispute concerning southern bluefin tuna,

Having regard to the Request submitted by New Zealand to the Tribunal on 30 July 1999 for the prescription of provisional measures by the Tribunal in accordance with article 290, paragraph 5, of the Convention,

Having regard to the Request submitted by Australia to the Tribunal on 30 July 1999 for the prescription of provisional measures by the Tribunal in accordance with article 290, paragraph 5, of the Convention,

Having regard to the fact that the Request of New Zealand was entered in the List of cases under No. 3 and named Southern Bluefin Tuna Case (New Zealand *v.* Japan), Request for provisional measures,

Having regard to the fact that the Request of Australia was entered in the List of cases under No. 4 and named Southern Bluefin Tuna Case (Australia *v.* Japan), Request for provisional measures,

Having regard to the Order of 16 August 1999 by which the Tribunal joined the proceedings in the cases concerning the Requests for the prescription of provisional measures,

Makes the following Order:

1. *Whereas* Australia, Japan and New Zealand are States Parties to the Convention;

2. *Whereas*, on 30 July 1999 at 8:38 a.m., New Zealand filed with the Registry of the Tribunal by facsimile a Request for the prescription of provisional measures under article 290, paragraph 5, of the Convention in the dispute between New Zealand and Japan concerning southern bluefin tuna;

3. *Whereas* a certified copy of the Request was sent the same day by the Registrar of the Tribunal to the Minister for Foreign Affairs of Japan, Tokyo, and also in care of the Ambassador of Japan to Germany;

4. *Whereas* the original of the Request and documents in support were filed on 4 August 1999;

5. *Whereas*, on 30 July 1999 at 2:30 p.m., Australia filed with the Registry by facsimile a Request for the prescription of provisional measures under article 290, paragraph 5, of the Convention in the dispute between Australia and Japan concerning southern bluefin tuna;

6. *Whereas* a certified copy of the Request was sent the same day by the Registrar to the Minister for Foreign Affairs of Japan, Tokyo, and also in care of the Ambassador of Japan to Germany;

7. *Whereas* the original of the Request and documents in support were filed on 5 August 1999;

8. *Whereas*, on 30 July 1999, the Registrar was informed of the appointment of Mr. Timothy Bruce Caughley, International Legal Adviser and Director of the Legal Division of the Ministry of Foreign Affairs and Trade, as Agent for New Zealand, and Mr. William McFadyen Campbell, First Assistant Secretary, Office of International Law, Attorney-General's Department, as Agent for Australia; and of the appointment of Mr. Kazuhiko Togo, Director General of the Treaties Bureau, Ministry of Foreign Affairs of Japan, as Agent for Japan on 2 August 1999;

9. *Whereas* the Tribunal does not include upon the bench a judge of the nationality of Australia or of New Zealand;

10. *Whereas*, pursuant to article 17 of the Statute, Australia and New Zealand are each entitled to choose a judge *ad hoc* to participate as a member of the Tribunal in the proceedings in the respective cases;

11. *Whereas* Australia and New Zealand in their Requests informed the Tribunal that, as parties in the same interest, they had jointly nominated Mr. Ivan Shearer AM, Challis Professor of International Law, University of Sydney, Australia, as judge *ad hoc*;

12. *Whereas*, by a letter dated 6 August 1999, the Agent for Japan was informed, in accordance with article 19 of the Rules, of the intention of Australia and New Zealand to choose Mr. Shearer as judge *ad hoc* and was invited to furnish any observations by 10 August 1999;

13. *Whereas*, since no objection to the choice of Mr. Shearer as judge *ad hoc* was raised by Japan and none appeared to the Tribunal itself, Mr. Shearer was admitted to participate in the proceedings after having made the solemn declaration required under article 9 of the Rules in relation to each of the two cases at a public sitting of the Tribunal held on 16 August 1999;

14. *Whereas*, after having ascertained the views of the parties, the President of the Tribunal, by separate Orders of 3 August 1999 with respect to each Request, fixed 18 August 1999 as the date for the opening of the hearing, notice of which was communicated forthwith to the parties;

15. *Whereas* the Secretary-General of the United Nations was notified of the Requests by a letter dated 30 July 1999, and States Parties to the Convention were notified, in accordance with article 24, paragraph 3, of the Statute, by a note verbale from the Registrar dated 4 August 1999;

16. *Whereas* additional documents were submitted on 5, 12 and 17 August 1999 by Australia, copies of which were transmitted in each case to the other parties;

17. *Whereas,* by a letter dated 6 August 1999, the parties were informed that the President, acting in accordance with article 47 of the Rules and with the consent of Australia and New Zealand, had directed that Japan might file a single Statement in Response by 9 August 1999;

18. *Whereas*, on 9 August 1999, Japan filed with the Registry its Statement in Response, which was transmitted via electronic mail to the Agent for Australia on the same date and on 10 August 1999 to the Agent for New Zealand; certified copies of the Statement in Response were transmitted by courier to the Agents for Australia and New Zealand on 10 August 1999;

19. *Whereas*, in accordance with article 68 of the Rules, the Tribunal held initial deliberations on 16 and 17 August 1999 and noted the points and issues it wished the parties specially to address;

20. *Whereas*, at a meeting with the representatives of the parties on 17 August 1999, the President ascertained the views of the parties regarding

the procedure for the hearing and, in accordance with article 76 of the Rules, informed them of the points and issues which the Tribunal wished the parties specially to address;

21. *Whereas*, prior to the opening of the hearing, the parties submitted documents pursuant to paragraph 14 of the Guidelines concerning the Preparation and Presentation of Cases before the Tribunal; and information regarding an expert to be called by Australia before the Tribunal pursuant to article 72 of the Rules;

22. *Whereas*, pursuant to article 67, paragraph 2, of the Rules, copies of the Requests and the Statement in Response and the documents annexed thereto were made accessible to the public on the date of the opening of the oral proceedings;

23. *Whereas* oral statements were presented at five public sittings held on 18, 19 and 20 August 1999 by the following:

On behalf of Australia and New Zealand	:	Mr. Timothy Caughley, Agent and Counsel for New Zealand, Mr. William Campbell, Agent and Counsel for Australia, Mr. Daryl Williams AM QC MP, Attorney-General of the Commonwealth of Australia, Counsel for Australia, Mr. Bill Mansfield, Counsel and Advocate for New Zealand, Mr. James Crawford SC, Counsel for Australia, Mr. Henry Burmester QC, Counsel for Australia;
On behalf of Japan	:	Mr. Kazuhiko Togo, Agent, Mr. Robert T. Greig, Counsel, Mr. Nisuke Ando, Counsel;

24. *Whereas* in the course of the oral statements a number of maps, charts, tables, graphs and extracts from documents were presented, including displays on computer monitors;

25. *Whereas*, on 18 August 1999, Mr. John Beddington BSc (Econ) MSc PhD, Director, T.H. Huxley School of Environment, Earth Sciences and Engineering, Imperial College of Science, Technology and Medicine, London, United Kingdom, was called as expert by New Zealand and Australia (examined on the *voir dire* by Mr. Matthew Slater, Advocate for Japan), examined by Mr. Crawford and cross-examined by Mr. Slater;

26. *Whereas*, on 19 and 20 August 1999, the parties submitted written responses to certain points and issues which the Tribunal wished them specially to address;

27. *Whereas*, during the hearing on 20 August 1999, the Tribunal addressed questions to the parties, responses to which were provided in writing on the same date;

28. *Whereas*, in the Notification of 15 July 1999 and the attached Statement of Claim, New Zealand alleged that Japan had failed to comply with its obligation to cooperate in the conservation of the southern bluefin tuna stock by, *inter alia*, undertaking unilateral experimental fishing for southern bluefin tuna in 1998 and 1999 and, accordingly, had requested the arbitral tribunal to be constituted under Annex VII (hereinafter "the arbitral tribunal") to adjudge and declare:

> 1. That Japan has breached its obligations under Articles 64 and 116 to 119 of UNCLOS [*United Nations Convention on the Law of the Sea*] in relation to the conservation and management of the SBT [*southern bluefin tuna*] stock, including by:
>   (a) failing to adopt necessary conservation measures for its nationals fishing on the high seas so as to maintain or restore the SBT stock to levels which can produce the maximum sustainable yield, as required by Article 119 and contrary to the obligation in Article 117 to take necessary conservation measures for its nationals;
>   (b) carrying out unilateral experimental fishing in 1998 and 1999 which has or will result in SBT being taken by Japan over and above previously agreed Commission [*Commission for the Conservation of Southern Bluefin Tuna*] national allocations;
>   (c) taking unilateral action contrary to the rights and interests of New Zealand as a coastal State as recognised in Article 116(b) and allowing its nationals to catch additional SBT in the course of experimental fishing in a way which discriminates against New Zealand fishermen contrary to Article 119 (3);

(d) failing in good faith to co-operate with New Zealand with a view to ensuring the conservation of SBT, as required by Article 64 of UNCLOS;

(e) otherwise failing in its obligations under UNCLOS in respect of the conservation and management of SBT, having regard to the requirements of the precautionary principle.

2. That, as a consequence of the aforesaid breaches of UNCLOS, Japan shall:

(a) refrain from authorising or conducting any further experimental fishing for SBT without the agreement of New Zealand and Australia;

(b) negotiate and co-operate in good faith with New Zealand, including through the Commission, with a view to agreeing future conservation measures and TAC [*total allowable catch*] for SBT necessary for maintaining and restoring the SBT stock to levels which can produce the maximum sustainable yield;

(c) ensure that its nationals and persons subject to its jurisdiction do not take any SBT which would lead to a total annual catch of SBT above the amount of the previous national allocations agreed with New Zealand and Australia until such time as agreement is reached with those States on an alternative level of catch; and

(d) restrict its catch in any given fishing year to its national allocation as last agreed in the Commission subject to the reduction of such catch by the amount of SBT taken by Japan in the course of its unilateral experimental fishing in 1998 and 1999.

3. That Japan pay New Zealand's costs of the proceedings;

29. *Whereas*, in the Notification of 15 July 1999 and the attached Statement of Claim, Australia alleged that Japan had failed to comply with its obligation to cooperate in the conservation of the southern bluefin tuna stock by, *inter alia*, undertaking unilateral experimental fishing for southern bluefin tuna in 1998 and 1999 and, accordingly, had requested the arbitral tribunal to adjudge and declare:

1. That Japan has breached its obligations under Articles 64 and 116 to 119 of UNCLOS in relation to the conservation and management of the SBT stock, including by:
   (a) failing to adopt necessary conservation measures for its nationals fishing on the high seas so as to maintain or restore the SBT stock to levels which can produce the maximum sustainable yield, as required by Article 119 of UNCLOS and contrary to the obligation in Article 117 to take necessary conservation measures for its nationals;
   (b) carrying out unilateral experimental fishing in 1998 and 1999 which has or will result in SBT being taken by Japan over and above previously agreed Commission national allocations;
   (c) taking unilateral action contrary to the rights and interests of Australia as a coastal state as recognised in Article 116(b) and allowing its nationals to catch additional SBT in the course of experimental fishing in a way which discriminates against Australian fishermen contrary to Article 119 (3);
   (d) failing in good faith to co-operate with Australia with a view to ensuring the conservation of SBT, as required by Article 64 of UNCLOS; and
   (e) otherwise failing in its obligations under UNCLOS in respect of the conservation and management of SBT, having regard to the requirements of the precautionary principle.
2. That, as a consequence of the aforesaid breaches of UNCLOS, Japan shall:
   (a) refrain from authorising or conducting any further experimental fishing for SBT without the agreement of Australia and New Zealand;
   (b) negotiate and co-operate in good faith with Australia, including through the Commission, with a view to agreeing future conservation measures and TAC for SBT necessary for maintaining and restoring the SBT stock to levels which can produce the maximum sustainable yield;

(c) ensure that its nationals and persons subject to its jurisdiction do not take any SBT which would lead to a total annual catch of SBT by Japan above the amount of the previous national allocation for Japan agreed with Australia and New Zealand until such time as agreement is reached with those States on an alternative level of catch; and

(d) restrict its catch in any given fishing year to its national allocation as last agreed in the Commission, subject to the reduction of such catch for the current year by the amount of SBT taken by Japan in the course of its unilateral experimental fishing in 1998 and 1999.

3. That Japan pay Australia's costs of the proceedings;

30. *Whereas*, in their Notifications of 15 July 1999, Australia and New Zealand requested that Japan agree to certain provisional measures with respect to the disputes pending the constitution of the arbitral tribunal or agree that the question of provisional measures be forthwith submitted to the Tribunal and furthermore reserved the right, if Japan did not so agree within two weeks, immediately on the expiry of the two-week period and without further notice to request the Tribunal to prescribe the provisional measures;

31. *Whereas* the provisional measures requested by New Zealand in the Request to the Tribunal dated 30 July 1999 are as follows:

(1) that Japan immediately cease unilateral experimental fishing for SBT;

(2) that Japan restrict its catch in any given fishing year to its national allocation as last agreed in the Commission for the Conservation of Southern Bluefin Tuna ("the Commission"), subject to the reduction of such catch by the amount of SBT taken by Japan in the course of its unilateral experimental fishing in 1998 and 1999;

(3) that the parties act consistently with the precautionary principle in fishing for SBT pending a final settlement of the dispute;

(4) that the parties ensure that no action of any kind is taken which might aggravate, extend or render more difficult of solution the dispute submitted to the Annex VII Arbitral Tribunal; and
(5) that the parties ensure that no action is taken which might prejudice their respective rights in respect of the carrying out of any decision on the merits that the Annex VII Arbitral Tribunal may render;

32. *Whereas* the provisional measures requested by Australia in the Request to the Tribunal dated 30 July 1999 are as follows:

(1) that Japan immediately cease unilateral experimental fishing for SBT;
(2) that Japan restrict its catch in any given fishing year to its national allocation as last agreed in the Commission for the Conservation of Southern Bluefin Tuna ("the Commission"), subject to the reduction of such catch by the amount of SBT taken by Japan in the course of its unilateral experimental fishing in 1998 and 1999;
(3) that the parties act consistently with the precautionary principle in fishing for SBT pending a final settlement of the dispute;
(4) that the parties ensure that no action of any kind is taken which might aggravate, extend or render more difficult of solution the dispute submitted to the Annex VII Arbitral Tribunal; and
(5) that the parties ensure that no action is taken which might prejudice their respective rights in respect of the carrying out of any decision on the merits that the Annex VII Arbitral Tribunal may render;

33. *Whereas* submissions and arguments presented by Japan in its Statement in Response include the following:

Australia and New Zealand must satisfy two conditions before a tribunal constituted pursuant to Annex VII would have jurisdiction over this dispute such that this Tribunal may entertain a request for provisional measures pursuant to Article 290(5) of UNCLOS pending

constitution of such an Annex VII tribunal. First, the Annex VII tribunal must have *prima facie* jurisdiction. This means among other things that the dispute must concern the interpretation or application of UNCLOS and not some other international agreement. Second, Australia and New Zealand must have attempted in good faith to reach a settlement in accordance with the provisions of UNCLOS Part XV, Section 1. Since Australia and New Zealand have satisfied neither condition, an Annex VII tribunal would not have *prima facie* jurisdiction and accordingly this Tribunal is without authority to prescribe any provisional measures.

. . .

In the event that the Tribunal determines that this matter is properly before it and an Annex VII tribunal would have *prima facie* jurisdiction, then, pursuant to ITLOS [*International Tribunal for the Law of the Sea*] Rules Article 89(5), Japan respectfully requests that the Tribunal grant Japan provisional relief in the form of prescribing that Australia and New Zealand urgently and in good faith recommence negotiations with Japan for a period of six months to reach a consensus on the outstanding issues between them, including a protocol for a continued EFP [*experimental fishing programme*] and the determination of a TAC and national allocations for the year 2000. Should the parties not reach a consensus within six months following the resumption of these negotiations, the Tribunal should prescribe that any remaining disagreements would be, consistent with Parties' December 1998 agreement and subsequent Terms of Reference to the EFPWG [*experimental fishing programme working group*] ..., referred to the panel of independent scientists for their resolution.

The ... Statement of Facts and the history of negotiations between Australia, New Zealand and Japan concerning conservation of SBT, chronicles the bad faith exhibited by Australia and New Zealand in terminating consultations and negotiations over the terms of a joint experimental fishing program and their rash resort to proceedings under UNCLOS despite the absence of any controversy thereunder and the failure to exhaust the amicable provisions for dispute

resolution that Part XV mandates be fully utilized. Accordingly, this Tribunal should require Australia and New Zealand to fulfil their obligations to continue negotiations over this scientific dispute.
... Submissions
Upon the foregoing Response and the Annexes hereto, the Government of Japan submits that the Request for provisional measures by Australia and New Zealand should be denied and Japan's counter-request for provisional measures should be granted;

34. *Whereas* Australia and New Zealand, in their final submissions at the public sitting held on 20 August 1999, requested the prescription by the Tribunal of the following provisional measures:

(1) that Japan immediately cease unilateral experimental fishing for SBT;
(2) that Japan restrict its catch in any given fishing year to its national allocation as last agreed in the Commission for the Conservation of Southern Bluefin Tuna ("the Commission"), subject to the reduction of such catch by the amount of SBT taken by Japan in the course of its unilateral experimental fishing in 1998 and 1999;
(3) that the parties act consistently with the precautionary principle in fishing for SBT pending a final settlement of the dispute;
(4) that the parties ensure that no action of any kind is taken which might aggravate, extend or render more difficult of solution the dispute submitted to the Annex VII Arbitral Tribunal; and
(5) that the parties ensure that no action is taken which might prejudice their respective rights in respect of the carrying out of any decision on the merits that the Annex VII Arbitral Tribunal may render;

35. *Whereas*, at the public sitting held on 20 August 1999, Japan presented its final submissions as follows:

First, the request of Australia and New Zealand for the prescription of provisional measures should be denied.

Second, despite all the submissions made by Japan, in the event that the Tribunal were to determine that this matter is properly before it and an Annex VII tribunal would have prima facie jurisdiction and that the Tribunal were to determine that it could and should prescribe provisional measures, then, pursuant to ITLOS Rules Article 89(5), the International Tribunal should grant provisional measures in the form of prescribing that Australia and New Zealand urgently and in good faith recommence negotiations with Japan for a period of six months to reach a consensus on the outstanding issues between them, including a protocol for a continued EFP and the determination of a TAC and national allocations for the year 2000. The Tribunal should prescribe that any remaining disagreements would be, consistent with the Parties' December 1998 agreement and subsequent Terms of Reference to the EFP Working Group, referred to the panel of independent scientists for their resolution, should the parties not reach consensus within six months following the resumption of these negotiations;

36. *Considering* that, pursuant to articles 286 and 287 of the Convention, Australia and New Zealand have both instituted proceedings before the arbitral tribunal against Japan in their disputes concerning southern bluefin tuna;

37. *Considering* that Australia and New Zealand on 15 July 1999 notified Japan of the submission of the disputes to the arbitral tribunal and of the Requests for provisional measures;

38. *Considering* that on 30 July 1999, after the expiry of the time-limit of two weeks provided for in article 290, paragraph 5, of the Convention, Australia and New Zealand submitted to the Tribunal Requests for provisional measures;

39. *Considering* that article 290, paragraph 5, of the Convention provides in the relevant part that:

> Pending the constitution of an arbitral tribunal to which a dispute is being submitted under this section, any court or tribunal agreed upon by the parties or, failing such agreement within two weeks from the date of the request for provisional measures, the International

> Tribunal for the Law of the Sea ... may prescribe, modify or revoke provisional measures in accordance with this article if it considers that *prima facie* the tribunal which is to be constituted would have jurisdiction and that the urgency of the situation so requires;

40. *Considering* that, before prescribing provisional measures under article 290, paragraph 5, of the Convention, the Tribunal must satisfy itself that *prima facie* the arbitral tribunal would have jurisdiction;

41. *Considering* that Australia and New Zealand have invoked as the basis of jurisdiction of the arbitral tribunal article 288, paragraph 1, of the Convention which reads as follows:

> A court or tribunal referred to in article 287 shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part;

42. *Considering* that Japan maintains that the disputes are scientific rather than legal;

43. *Considering* that, in the view of the Tribunal, the differences between the parties also concern points of law;

44. *Considering* that, in the view of the Tribunal, a dispute is a "disagreement on a point of law or fact, a conflict of legal views or of interests" (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 11), and "[i]t 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);

45. *Considering* that Australia and New Zealand allege that Japan, by unilaterally designing and undertaking an experimental fishing programme, has failed to comply with obligations under articles 64 and 116 to 119 of the Convention on the Law of the Sea, with provisions of the Convention for the Conservation of Southern Bluefin Tuna of 1993 (hereinafter "the Convention of 1993") and with rules of customary international law;

46. *Considering* that Japan maintains that the dispute concerns the interpretation or implementation of the Convention of 1993 and does not concern the interpretation or application of the Convention on the Law of the Sea;

47. *Considering* that Japan denies that it has failed to comply with any of the provisions of the Convention on the Law of the Sea referred to by Australia and New Zealand;

48. *Considering* that, under article 64, read together with articles 116 to 119, of the Convention, States Parties to the Convention have the duty to cooperate directly or through appropriate international organizations with a

view to ensuring conservation and promoting the objective of optimum utilization of highly migratory species;

49. *Considering* that the list of highly migratory species contained in Annex I to the Convention includes southern bluefin tuna: *thunnus maccoyii*;

50. *Considering* that the conduct of the parties within the Commission for the Conservation of Southern Bluefin Tuna established in accordance with the Convention of 1993, and in their relations with non-parties to that Convention, is relevant to an evaluation of the extent to which the parties are in compliance with their obligations under the Convention on the Law of the Sea;

51. *Considering* that the fact that the Convention of 1993 applies between the parties does not exclude their right to invoke the provisions of the Convention on the Law of the Sea in regard to the conservation and management of southern bluefin tuna;

52. *Considering* that, in the view of the Tribunal, the provisions of the Convention on the Law of the Sea invoked by Australia and New Zealand appear to afford a basis on which the jurisdiction of the arbitral tribunal might be founded;

53. *Considering* that Japan argues that recourse to the arbitral tribunal is excluded because the Convention of 1993 provides for a dispute settlement procedure;

54. *Considering* that Australia and New Zealand maintain that they are not precluded from having recourse to the arbitral tribunal since the Convention of 1993 does not provide for a compulsory dispute settlement procedure entailing a binding decision as required under article 282 of the Convention on the Law of the Sea;

55. *Considering* that, in the view of the Tribunal, the fact that the Convention of 1993 applies between the parties does not preclude recourse to the procedures in Part XV, section 2, of the Convention on the Law of the Sea;

56. *Considering* that Japan contends that Australia and New Zealand have not exhausted the procedures for amicable dispute settlement under Part XV, section 1, of the Convention, in particular article 281, through negotiations or other agreed peaceful means, before submitting the disputes to a procedure under Part XV, section 2, of the Convention;

57. *Considering* that negotiations and consultations have taken place between the parties and that the records show that these negotiations were considered by Australia and New Zealand as being under the Convention of 1993 and also under the Convention on the Law of the Sea;

58. *Considering* that Australia and New Zealand have invoked the provisions of the Convention in diplomatic notes addressed to Japan in respect of those negotiations;

59. *Considering* that Australia and New Zealand have stated that the negotiations had terminated;

60. *Considering* that, in the view of the Tribunal, a State Party is not obliged to pursue procedures under Part XV, section 1, of the Convention when it concludes that the possibilities of settlement have been exhausted;

61. *Considering* that, in the view of the Tribunal, the requirements for invoking the procedures under Part XV, section 2, of the Convention have been fulfilled;

62. *Considering* that, for the above reasons, the Tribunal finds that the arbitral tribunal would *prima facie* have jurisdiction over the disputes;

63. *Considering* that, according to article 290, paragraph 5, of the Convention, provisional measures may be prescribed pending the constitution of the arbitral tribunal if the Tribunal considers that the urgency of the situation so requires;

64. *Considering*, therefore, that the Tribunal must decide whether provisional measures are required pending the constitution of the arbitral tribunal;

65. *Considering* that, in accordance with article 290, paragraph 5, of the Convention, the arbitral tribunal, once constituted, may modify, revoke or affirm any provisional measures prescribed by the Tribunal;

66. *Considering* that Japan contends that there is no urgency for the prescription of provisional measures in the circumstances of this case;

67. *Considering* that, in accordance with article 290 of the Convention, the Tribunal may prescribe provisional measures to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment;

68. *Considering* that Australia and New Zealand contend that by unilaterally implementing an experimental fishing programme Japan has violated the rights of Australia and New Zealand under articles 64 and 116 to 119 of the Convention;

69. *Considering* that Australia and New Zealand contend that further catches of southern bluefin tuna, pending the hearing of the matter by an arbitral tribunal, would cause immediate harm to their rights;

70. *Considering that the conservation of the living resources of the sea is an element in* the protection and preservation of the marine environment;

71. *Considering* that there is no disagreement between the parties that the stock of southern bluefin tuna is severely depleted and is at its historically lowest levels and that this is a cause for serious biological concern;

72. *Considering* that Australia and New Zealand contend that, by unilaterally implementing an experimental fishing programme, Japan has failed to comply with its obligations under articles 64 and 118 of the Convention, which require the parties to cooperate in the conservation and management of the southern bluefin tuna stock, and that the actions of Japan have resulted in a threat to the stock;

73. *Considering* that Japan contends that the scientific evidence available shows that the implementation of its experimental fishing programme will cause no further threat to the southern bluefin tuna stock and that the experimental fishing programme remains necessary to reach a more reliable assessment of the potential of the stock to recover;

74. *Considering* that Australia and New Zealand maintain that the scientific evidence available shows that the amount of southern bluefin tuna taken under the experimental fishing programme could endanger the existence of the stock;

75. *Considering* that the Tribunal has been informed by the parties that commercial fishing for southern bluefin tuna is expected to continue throughout the remainder of 1999 and beyond;

76. *Considering* that the catches of non-parties to the Convention of 1993 have increased considerably since 1996;

77. *Considering* that, in the view of the Tribunal, the parties should in the circumstances act with prudence and caution to ensure that effective conservation measures are taken to prevent serious harm to the stock of southern bluefin tuna;

78. *Considering* that the parties should intensify their efforts to cooperate with other participants in the fishery for southern bluefin tuna with a view to ensuring conservation and promoting the objective of optimum utilization of the stock;

79. *Considering* that there is scientific uncertainty regarding measures to be taken to conserve the stock of southern bluefin tuna and that there is no agreement among the parties as to whether the conservation measures taken so far have led to the improvement in the stock of southern bluefin tuna;

80. *Considering* that, although the Tribunal cannot conclusively assess the scientific evidence presented by the parties, it finds that measures should be taken as a matter of urgency to preserve the rights of the parties and to avert further deterioration of the southern bluefin tuna stock;

81. *Considering* that, in the view of the Tribunal, catches taken within the framework of any experimental fishing programme should not result in total

catches which exceed the levels last set by the parties for each of them, except under agreed criteria;

82. *Considering* that, following the pilot programme which took place in 1998, Japan's experimental fishing as currently designed consists of three annual programmes in 1999, 2000 and 2001;

83. *Considering* that the Tribunal has taken note that, by the statement of its Agent before the Tribunal on 19 August 1999, Japan made a "clear commitment that the 1999 experimental fishing programme will end by 31 August";

84. *Considering*, however, that Japan has made no commitment regarding any experimental fishing programmes after 1999;

85. *Considering* that, for the above reasons, in the view of the Tribunal, provisional measures are appropriate under the circumstances;

86. *Considering* that, in accordance with article 89, paragraph 5, of the Rules, the Tribunal may prescribe measures different in whole or in part from those requested;

87. *Considering* the binding force of the measures prescribed and the requirement under article 290, paragraph 6, of the Convention that compliance with such measures be prompt;

88. *Considering* that, pursuant to article 95, paragraph 1, of the Rules, each party is required to submit to the Tribunal a report and information on compliance with any provisional measures prescribed;

89. *Considering* that it may be necessary for the Tribunal to request further information from the parties on the implementation of provisional measures and that it is appropriate that the President be authorized to request such information in accordance with article 95, paragraph 2, of the Rules;

90. *For these reasons*,

THE TRIBUNAL,

1. *Prescribes*, pending a decision of the arbitral tribunal, the following measures:

By 20 votes to 2,

(a) Australia, Japan and New Zealand shall each ensure that no action is taken which might aggravate or extend the disputes submitted to the arbitral tribunal;

IN FAVOUR: *President* MENSAH; *Vice-President* WOLFRUM; *Judges* ZHAO, CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, BAMELA ENGO, NELSON, CHANDRASEKHARA RAO, AKL, ANDERSON, WARIOBA, LAING, TREVES, MARSIT, NDIAYE; *Judge* ad hoc SHEARER;

AGAINST: *Judges* VUKAS, EIRIKSSON.

By 20 votes to 2,

(b) Australia, Japan and New Zealand shall each ensure that no action is taken which might prejudice the carrying out of any decision on the merits which the arbitral tribunal may render;

IN FAVOUR: *President* MENSAH; *Vice-President* WOLFRUM; *Judges* ZHAO, CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, BAMELA ENGO, NELSON, CHANDRASEKHARA RAO, AKL, ANDERSON, WARIOBA, LAING, TREVES, MARSIT, NDIAYE; *Judge* ad hoc SHEARER;

AGAINST: *Judges* VUKAS, EIRIKSSON.

By 18 votes to 4,

(c) Australia, Japan and New Zealand shall ensure, unless they agree otherwise, that their annual catches do not exceed the annual national allocations at the levels last agreed by the parties of 5,265 tonnes, 6,065 tonnes and 420 tonnes, respectively; in calculating the annual catches for 1999 and 2000, and without prejudice to any decision of the arbitral tribunal, account shall be taken of the catch during 1999 as part of an experimental fishing programme;

IN FAVOUR: *President* MENSAH; *Vice-President* WOLFRUM; *Judges* CAMINOS, MAROTTA RANGEL, YANKOV, KOLODKIN, PARK, BAMELA ENGO, NELSON, CHANDRASEKHARA RAO, AKL, ANDERSON, LAING, TREVES, MARSIT, EIRIKSSON, NDIAYE; *Judge* ad hoc SHEARER;

AGAINST: *Judges* ZHAO, YAMAMOTO, VUKAS, WARIOBA.

By 20 votes to 2,

(d) Australia, Japan and New Zealand shall each refrain from conducting an experimental fishing programme involving the taking of a catch of southern bluefin tuna, except with the agreement of the other parties or unless the experimental catch is counted against its annual national allocation as prescribed in subparagraph (c);

IN FAVOUR: *President* MENSAH; *Vice-President* WOLFRUM; *Judges* ZHAO, CAMINOS, MAROTTA RANGEL, YANKOV, KOLODKIN, PARK, BAMELA ENGO, NELSON, CHANDRASEKHARA RAO, AKL, ANDERSON, WARIOBA, LAING, TREVES, MARSIT, EIRIKSSON, NDIAYE; *Judge* ad hoc SHEARER;

AGAINST: *Judges* YAMAMOTO, VUKAS.

By 21 votes to 1,

(e) Australia, Japan and New Zealand should resume negotiations without delay with a view to reaching agreement on measures for the conservation and management of southern bluefin tuna;

IN FAVOUR: *President* MENSAH; *Vice-President* WOLFRUM; *Judges* ZHAO, CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, BAMELA ENGO, NELSON, CHANDRASEKHARA RAO, AKL, ANDERSON, WARIOBA, LAING, TREVES, MARSIT, EIRIKSSON, NDIAYE; *Judge* ad hoc SHEARER;

AGAINST: *Judge* VUKAS.

By 20 votes to 2,

(f) Australia, Japan and New Zealand should make further efforts to reach agreement with other States and fishing entities engaged in fishing for southern bluefin tuna, with a view to ensuring conservation and promoting the objective of optimum utilization of the stock;

IN FAVOUR: *President* MENSAH; *Vice-President* WOLFRUM; *Judges* ZHAO, CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, BAMELA ENGO, NELSON, CHANDRASEKHARA RAO, AKL, ANDERSON, LAING, TREVES, MARSIT, EIRIKSSON, NDIAYE; *Judge* ad hoc SHEARER;

AGAINST: *Judges* VUKAS, WARIOBA.

By 21 votes to 1,

2. *Decides* that each party shall submit the initial report referred to in article 95, paragraph 1, of the Rules not later than 6 October 1999, and *authorizes* the President of the Tribunal to request such further reports and information as he may consider appropriate after that date;

IN FAVOUR: *President* MENSAH; *Vice-President* WOLFRUM; *Judges* ZHAO, CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, BAMELA ENGO, NELSON, CHANDRASEKHARA RAO, AKL, ANDERSON, WARIOBA, LAING, TREVES, MARSIT, EIRIKSSON, NDIAYE; *Judge* ad hoc SHEARER;

AGAINST: *Judge* VUKAS.

By 21 votes to 1,

3. *Decides*, in accordance with article 290, paragraph 4, of the Convention and article 94 of the Rules, that the provisional measures prescribed in this Order shall forthwith be notified by the Registrar through appropriate means to all States Parties to the Convention participating in the fishery for southern bluefin tuna;

IN FAVOUR: *President* MENSAH; *Vice-President* WOLFRUM; *Judges* ZHAO, CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, BAMELA ENGO, NELSON, CHANDRASEKHARA RAO, AKL, ANDERSON, WARIOBA, LAING, TREVES, MARSIT, EIRIKSSON, NDIAYE; *Judge* ad hoc SHEARER;

AGAINST: *Judge* VUKAS.

Done in English and in French, the English text being authoritative, in the Free and Hanseatic City of Hamburg, this twenty-seventh day of August, one thousand nine hundred and ninety-nine, in four copies, one of which will be placed in the archives of the Tribunal and the others transmitted to the Government of Australia, the Government of Japan and the Government of New Zealand, respectively.

(*Signed*) Thomas A. MENSAH,
President.

(*Signed*) Gritakumar E. CHITTY,
Registrar.

Vice-President WOLFRUM, Judges CAMINOS, MAROTTA RANGEL, YANKOV, ANDERSON and EIRIKSSON append a joint declaration to the Order of the Tribunal.

Judge WARIOBA appends a declaration to the Order of the Tribunal.

Judges YAMAMOTO and PARK append a joint separate opinion to the Order of the Tribunal.

Judges LAING and TREVES append separate opinions to the Order of the Tribunal.

Judge *ad hoc* SHEARER appends a separate opinion to the Order of the Tribunal.

Judges VUKAS and EIRIKSSON append dissenting opinions to the Order of the Tribunal.

(*Initialled*) T.A.M.
(*Initialled*) G.E.C.

Annex 75

Universal Declaration of Human Rights

Preamble

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people,

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law,

Whereas it is essential to promote the development of friendly relations between nations,

Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom,

Whereas Member States have pledged themselves to achieve, in cooperation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms,

Whereas a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge,

Now, therefore,

The General Assembly,

Proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by

teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

Article I

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Article 2

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

Article 3

Everyone has the right to life, liberty and the security of person.

Article 4

No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.

Article 5

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Article 6

Everyone has the right to recognition everywhere as a person before the law.

Article 7

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Article 8

Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

Article 9

No one shall be subjected to arbitrary arrest, detention or exile.

Article 10

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Article 11

1. Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.
2. No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier

penalty be imposed than the one that was applicable at the time the penal offence was committed.

Article 12

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

Article 13

1. Everyone has the right to freedom of movement and residence within the borders of each State.
2. Everyone has the right to leave any country, including his own, and to return to his country.

Article 14

1. Everyone has the right to seek and to enjoy in other countries asylum from persecution.
2. This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

Article 15

1. Everyone has the right to a nationality.
2. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

Article 16

1. Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.
2. Marriage shall be entered into only with the free and full consent of the intending spouses.
3. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

Article 17

1. Everyone has the right to own property alone as well as in association with others.
2. No one shall be arbitrarily deprived of his property.

Article 18

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

Article 19

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Article 20

1. Everyone has the right to freedom of peaceful assembly and association.
2. No one may be compelled to belong to an association.

Article 21

1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
2. Everyone has the right to equal access to public service in his country.
3. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

Article 22

Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

Article 23

1. Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.
2. Everyone, without any discrimination, has the right to equal pay for equal work.
3. Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.
4. Everyone has the right to form and to join trade unions for the protection of his interests.

Article 24

Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.

Article 25

1. Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.
2. Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

Article 26

1. Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.
2. Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.
3. Parents have a prior right to choose the kind of education that shall be given to their children.

Article 27

1. Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

2. Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

Article 28

Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.

Article 29

1. Everyone has duties to the community in which alone the free and full development of his personality is possible.
2. 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.
3. These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

Article 30

Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.

Annex 76

Registration Number	14668
Title	International Covenant on Civil and Political Rights
Participant(s)	
Submitter	ex officio
Places/dates of conclusion	**Place** New York **Date** 16/12/1966
EIF information	23 March 1976 , in accordance with article 49 , for all provisions except those of article 41; 28 March 1979 for the provisions of article 41 (Human Rights Committee), in accordance with paragraph 2 of the said article 41
Authentic texts	Spanish Russian French English Chinese
Attachments	
ICJ information	
Depositary	Secretary-General of the United Nations
Registration Date	ex officio 23 March 1976
Subject terms	ICCPR (civil and political rights) Human rights
Agreement type	Multilateral
UNTS Volume Number	999 (p.171)
Publication format	Full
Certificate Of Registration	
Text document(s)	volume-999-I-14668-English.pdf volume-999-I-14668-French.pdf volume-999-I-14668-Other.pdf
Volume In PDF	v999.pdf
Map(s)	
Corrigendum/Addendum/Note	

Participant	Action	Date of Notification/Deposit	Date of Effect
Afghanistan	Accession	24/01/1983	24/04/1983
Albania	Accession	04/10/1991	04/01/1992
Algeria	Notification	14/02/1992	
Algeria	Notification	19/06/1991	
Algeria	Signature	10/12/1968	
Algeria	Notification	25/02/2011	
Algeria	Ratification	12/09/1989	12/12/1989
Andorra	Signature	05/08/2002	
Andorra	Ratification	22/09/2006	22/12/2006
Angola	Accession	10/01/1992	10/04/1992
Antigua and Barbuda	Accession	03/07/2019	03/10/2019
Argentina	Objection	03/10/1983	
Argentina	Notification	01/06/2020	
Argentina	Notification	10/09/2021	
Argentina	Notification	12/07/1989	
Argentina	Notification	07/06/1989	
Argentina	Notification	26/12/2001	
Argentina	Notification	04/01/2002	
Argentina	Notification	26/12/2001	
Argentina	Communication	21/01/2002	
Argentina	Communication	05/10/2000	
Argentina	Signature	19/02/1968	
Argentina	Ratification	08/08/1986	08/11/1986
Armenia	Notification	11/03/2008	
Armenia	Notification	06/03/2008	
Armenia	Notification	05/10/2020	
Armenia	Notification	16/09/2020	
Armenia	Notification	14/07/2020	
Armenia	Notification	12/06/2020	
Armenia	Notification	15/05/2020	

Armenia	Notification	17/04/2020	
Armenia	Notification	20/03/2020	
Armenia	Accession	23/06/1993	23/09/1993
Australia	Declaration	28/01/1993	
Australia	Signature	18/12/1972	
Australia	Objection	28/06/2011	
Australia	Objection	18/09/2007	
Australia	Objection	18/09/2007	
Australia	Declaration	06/11/1984	
Australia	Withdrawal of reservation	06/11/1984	06/11/1984
Australia	Ratification	13/08/1980	13/11/1980
Austria	Communication	17/10/2001	
Austria	Signature	10/12/1973	
Austria	Objection	13/10/2010	
Austria	Objection	24/06/2011	
Austria	Objection	16/05/2019	
Austria	Objection	18/09/2007	
Austria	Ratification	10/09/1978	10/12/1978
Austria	Declaration	10/09/1978	28/03/1979
Azerbaijan	Notification	16/04/1993	
Azerbaijan	Notification	27/09/1993	
Azerbaijan	Notification	07/10/1994	
Azerbaijan	Notification	27/10/1994	
Azerbaijan	Notification	23/02/1995	
Azerbaijan	Notification	17/04/1995	
Azerbaijan	Notification	21/04/1995	
Azerbaijan	Notification	29/09/2020	
Azerbaijan	Notification	16/12/2020	
Azerbaijan	Accession	13/08/1992	13/11/1992
Bahamas	Signature	04/12/2008	
Bahamas	Ratification	23/12/2008	23/03/2009
Bahrain	Notification	12/05/2011	
Bahrain	Reservation	04/12/2006	

Bahrain	Notification	28/04/2011	
Bahrain	Notification	13/06/2011	
Bahrain	Accession	20/09/2006	20/12/2006
Bangladesh	Accession	06/09/2000	06/12/2000
Barbados	Accession	05/01/1973	23/03/1976
Belarus	Signature	19/03/1968	
Belarus	Declaration	30/09/1992	30/09/1992
Belarus	Withdrawal of declaration	30/09/1992	30/09/1992
Belgium	Signature	10/12/1968	
Belgium	Objection	28/06/2011	
Belgium	Objection	21/05/2019	
Belgium	Objection	05/10/1993	
Belgium	Objection	07/11/1984	
Belgium	Withdrawal of reservation	14/09/1998	
Belgium	Declaration	18/06/1987	
Belgium	Declaration	05/03/1987	
Belgium	Ratification	21/04/1983	21/07/1983
Belize	Accession	10/06/1996	10/09/1996
Benin	Accession	12/03/1992	12/06/1992
Bolivia	Notification	19/04/1996	
Bolivia	Notification	22/03/1990	
Bolivia	Notification	17/11/1989	
Bolivia	Notification	28/11/1986	
Bolivia	Notification	29/08/1986	
Bolivia	Notification	09/01/1986	
Bolivia	Notification	01/10/1985	
Bolivia	Notification	26/07/1995	
Bolivia	Accession	12/08/1982	12/11/1982
Bolivia	Notification	25/10/1995	25/10/1995
Bolivia (Plurinational State of)	Notification	08/03/2010	
Bolivia (Plurinational State of)	Notification	08/03/2010	
Bosnia and Herzegovina	Succession	01/09/1993	06/03/1992

Botswana	Signature	08/09/2000	
Botswana	Ratification	08/09/2000	08/12/2000
Brazil	Accession	24/01/1992	24/04/1992
Bulgaria	Signature	08/10/1968	
Bulgaria	Objection	29/01/1981	
Bulgaria	Declaration	12/05/1993	
Bulgaria	Ratification	21/09/1970	23/03/1976
Burkina Faso	Notification	18/04/2019	
Burkina Faso	Accession	04/01/1999	04/04/1999
Burundi	Accession	09/05/1990	09/08/1990
Byelorussian Soviet Socialist Republic	Objection	18/02/1981	
Byelorussian Soviet Socialist Republic	Ratification	12/11/1973	23/03/1976
Cambodia	Signature	17/10/1980	
Cambodia	Accession	26/05/1992	26/08/1992
Cameroon	Accession	27/06/1984	27/09/1984
Canada	Objection	18/09/2007	
Canada	Declaration	29/10/1979	
Canada	Objection	21/05/2019	
Canada	Objection	27/06/2011	
Canada	Communication	14/05/2014	
Canada	Objection	18/09/2007	
Canada	Accession	19/05/1976	19/08/1976
Cape Verde	Accession	06/08/1993	06/11/1993
Central African Republic	Accession	08/05/1981	08/08/1981
Chad	Accession	09/06/1995	09/09/1995
Chile	Notification	18/06/2020	
Chile	Notification	25/03/2020	
Chile	Notification	01/03/2024	
Chile	Notification	06/02/2024	
Chile	Notification	28/12/2023	
Chile	Notification	14/08/2023	
Chile	Notification	13/10/2023	

Chile	Signature	16/09/1969	
Chile	Notification	23/03/2010	
Chile	Notification	07/09/1976	
Chile	Notification	23/09/1986	
Chile	Notification	29/10/1986	
Chile	Notification	20/11/1986	
Chile	Notification	29/01/1987	
Chile	Notification	31/08/1988	
Chile	Notification	15/12/2020	
Chile	Notification	17/09/2020	
Chile	Declaration	07/09/1990	07/09/1990
Chile	Ratification	10/02/1972	23/03/1976
China	Signature	05/10/1998	
China	Communication	03/12/1999	
Colombia	Notification	07/05/1996	
Colombia	Notification	25/03/1996	
Colombia	Notification	08/06/1994	
Colombia	Notification	27/05/1994	
Colombia	Notification	21/07/1992	
Colombia	Notification	20/11/1992	
Colombia	Notification	29/03/1993	
Colombia	Notification	25/02/2003	
Colombia	Notification	19/11/2002	
Colombia	Notification	13/08/2002	
Colombia	Communication	20/11/2008	
Colombia	Signature	21/12/1966	
Colombia	Notification	31/08/2010	
Colombia	Notification	25/03/2020	
Colombia	Notification	20/04/2020	
Colombia	Notification	07/05/2020	
Colombia	Notification	05/06/2020	
Colombia	Notification	11/10/1982	
Colombia	Notification	18/07/1980	

Colombia	Notification	07/11/1995	
Colombia	Notification	31/07/1996	
Colombia	Notification	21/06/1996	
Colombia	Notification	16/10/2008	16/10/2008
Colombia	Ratification	29/10/1969	23/03/1976
Comoros	Signature	25/09/2008	
Congo	Declaration	07/07/1989	
Congo	Accession	05/10/1983	05/01/1984
Costa Rica	Signature	19/12/1966	
Costa Rica	Ratification	29/11/1968	23/03/1976
Côte d'Ivoire	Accession	26/03/1992	26/06/1992
Croatia	Succession	12/10/1992	08/10/1991
Croatia	Declaration	12/10/1995	12/10/1995
Cuba	Signature	28/02/2008	
Cyprus	Signature	19/12/1966	
Cyprus	Objection	26/11/2003	
Cyprus	Ratification	02/04/1969	23/03/1976
Czech Republic	Objection	20/06/2011	
Czech Republic	Objection	12/09/2007	
Czech Republic	Objection	12/09/2007	
Czech Republic	Objection	12/09/2007	
Czech Republic	Objection	20/05/2019	
Czech Republic	Succession	22/02/1993	01/01/1993
Czechoslovakia	Objection	10/03/1981	
Czechoslovakia	Objection	07/06/1991	
Czechoslovakia	Signature	07/10/1968	
Czechoslovakia	Communication	07/11/1968	
Czechoslovakia	Declaration	12/03/1991	
Czechoslovakia	Ratification	23/12/1975	23/03/1976
Democratic People's Republic of Korea	Notification	25/08/1997	
Democratic People's Republic of Korea	Accession	14/09/1981	14/12/1981
Democratic Yemen	Accession	09/02/1987	09/05/1987

Denmark	Declaration	19/04/1983	
Denmark	Signature	20/03/1968	
Denmark	Objection	28/06/2011	
Denmark	Objection	04/10/2001	
Denmark	Objection	01/10/1993	
Denmark	Modification of reservation	02/04/2014	
Denmark	Ratification	06/01/1972	23/03/1976
Denmark	Declaration	06/04/1978	28/03/1979
Djibouti	Accession	05/11/2002	05/02/2003
Dominica	Accession	17/06/1993	17/09/1993
Dominican Republic	Notification	10/05/2021	
Dominican Republic	Notification	09/06/2021	
Dominican Republic	Notification	25/06/2020	
Dominican Republic	Notification	31/07/2020	
Dominican Republic	Notification	08/09/2020	
Dominican Republic	Notification	05/02/2021	
Dominican Republic	Accession	04/01/1978	04/04/1978
Ecuador	Notification	23/09/2022	
Ecuador	Notification	17/08/2022	
Ecuador	Notification	05/07/2022	
Ecuador	Notification	30/06/2022	
Ecuador	Notification	27/06/2022	
Ecuador	Notification	21/06/2022	
Ecuador	Notification	18/06/2022	
Ecuador	Notification	19/01/2021	
Ecuador	Notification	23/12/2020	
Ecuador	Notification	19/10/2020	
Ecuador	Notification	19/08/2020	
Ecuador	Notification	17/06/2020	
Ecuador	Notification	24/03/2020	
Ecuador	Notification	10/10/2019	
Ecuador	Notification	04/10/2019	
Ecuador	Notification	26/07/2019	

Ecuador	Notification	26/07/2019	
Ecuador	Notification	05/07/2019	
Ecuador	Notification	30/04/2018	
Ecuador	Notification	03/04/2018	
Ecuador	Notification	07/02/2018	
Ecuador	Notification	03/01/2018	
Ecuador	Notification	01/06/2017	
Ecuador	Notification	01/06/2017	
Ecuador	Notification	15/03/2017	
Ecuador	Notification	03/02/2017	
Ecuador	Notification	03/02/2017	
Ecuador	Notification	07/12/2016	
Ecuador	Notification	25/07/2016	
Ecuador	Notification	18/07/2016	
Ecuador	Notification	01/06/2017	
Ecuador	Notification	06/06/2016	
Ecuador	Notification	11/03/2024	
Ecuador	Notification	09/01/2024	
Ecuador	Notification	15/08/2023	
Ecuador	Notification	10/08/2023	
Ecuador	Notification	27/07/2023	
Ecuador	Notification	27/07/2023	
Ecuador	Notification	11/04/2023	
Ecuador	Notification	18/08/2005	
Ecuador	Notification	22/08/2005	
Ecuador	Notification	14/01/1999	
Ecuador	Notification	16/03/1999	
Ecuador	Notification	12/04/1999	
Ecuador	Notification	10/09/1999	
Ecuador	Notification	28/12/1999	
Ecuador	Notification	01/02/2000	
Ecuador	Notification	21/02/2001	
Ecuador	Notification	21/02/2001	

Ecuador	Notification	20/03/1984	
Ecuador	Notification	29/03/1984	
Ecuador	Notification	17/03/1986	
Ecuador	Notification	19/03/1986	
Ecuador	Declaration	06/08/1984	
Ecuador	Notification	18/04/2006	
Ecuador	Notification	17/07/2002	
Ecuador	Notification	09/03/2023	
Ecuador	Notification	08/11/2022	
Ecuador	Notification	03/11/2022	
Ecuador	Notification	05/04/2021	
Ecuador	Notification	23/04/2021	
Ecuador	Notification	29/07/2021	
Ecuador	Notification	30/10/1987	
Ecuador	Notification	29/10/1987	
Ecuador	Notification	03/06/1988	
Ecuador	Signature	04/04/1968	
Ecuador	Ratification	06/03/1969	23/03/1976
Egypt	Signature	04/08/1967	
Egypt	Declaration	14/01/1982	
Egypt	Ratification	14/01/1982	14/04/1982
El Salvador	Notification	17/04/2020	
El Salvador	Notification	16/04/2020	
El Salvador	Notification	14/04/2020	
El Salvador	Notification	19/05/2023	
El Salvador	Notification	23/11/2022	
El Salvador	Notification	22/07/2022	
El Salvador	Notification	22/07/2022	
El Salvador	Notification	07/05/2020	
El Salvador	Notification	21/05/2020	
El Salvador	Notification	24/05/2020	
El Salvador	Notification	19/12/1989	
El Salvador	Notification	02/08/1985	

El Salvador	Notification	14/11/1983	
El Salvador	Notification	18/06/1984	
El Salvador	Notification	24/01/1984	
El Salvador	Notification	11/01/1990	
El Salvador	Signature	21/09/1967	
El Salvador	Notification	27/03/2022	
El Salvador	Notification	29/04/2022	
El Salvador	Notification	13/06/2022	
El Salvador	Ratification	30/11/1979	29/02/1980
Equatorial Guinea	Accession	25/09/1987	25/12/1987
Eritrea	Accession	22/01/2002	22/04/2002
Estonia	Objection	12/09/2007	
Estonia	Notification	20/03/2020	
Estonia	Notification	18/05/2020	
Estonia	Objection	21/06/2011	
Estonia	Objection	08/05/2019	
Estonia	Objection	12/09/2007	
Estonia	Accession	21/10/1991	21/01/1992
Ethiopia	Notification	09/06/2020	
Ethiopia	Accession	11/06/1993	11/09/1993
Federal Republic of Germany	Declaration	15/08/1980	
Federal Republic of Germany	Signature	09/10/1968	
Federal Republic of Germany	Objection	21/04/1982	
Federal Republic of Germany	Declaration	24/03/1986	
Federal Republic of Germany	Declaration	23/04/1982	
Federal Republic of Germany	Declaration	28/03/1981	
Federal Republic of Germany	Ratification	17/12/1973	23/03/1976
Federal Republic of Germany	Declaration	22/04/1976	28/03/1979
Fiji	Accession	16/08/2018	16/11/2018
Finland	Objection	25/07/1997	
Finland	Objection	28/09/1993	
Finland	Objection	14/09/2007	
Finland	Signature	11/10/1967	

Finland	Withdrawal of reservation	26/07/1990	
Finland	Objection	05/10/2010	
Finland	Objection	28/06/2011	
Finland	Objection	16/05/2019	
Finland	Objection	15/11/2005	
Finland	Objection	13/10/2004	
Finland	Ratification	19/08/1975	23/03/1976
Finland	Declaration	19/08/1975	28/03/1979
Finland	Withdrawal of reservation	29/03/1985	29/03/1985
France	Notification	25/11/2015	
France	Notification	26/02/2016	
France	Notification	22/07/2016	
France	Notification	21/12/2016	
France	Notification	14/07/2017	
France	Notification	20/07/2018	
France	Notification	15/11/2005	
France	Notification	12/01/2006	
France	Objection	04/11/1980	
France	Partial withdrawal of reservation	26/07/2012	
France	Objection	24/06/2011	
France	Objection	15/10/2001	
France	Objection	04/10/1993	
France	Objection	18/11/2005	
France	Objection	19/09/2007	
France	Accession	04/11/1980	04/02/1981
France	Withdrawal of reservation	22/03/1988	22/03/1988
Gabon	Accession	21/01/1983	21/04/1983
Gambia	Declaration	09/06/1988	
Gambia	Accession	22/03/1979	22/06/1979
Georgia	Notification	30/12/2021	

Georgia	Notification	21/03/2020	
Georgia	Notification	22/04/2020	
Georgia	Notification	23/05/2020	
Georgia	Notification	15/07/2020	
Georgia	Notification	31/12/2020	
Georgia	Notification	07/03/2006	
Georgia	Notification	23/03/2006	
Georgia	Notification	08/11/2007	
Georgia	Notification	30/06/2021	
Georgia	Accession	03/05/1994	03/08/1994
German Democratic Republic	Objection	11/12/1980	
German Democratic Republic	Ratification	08/11/1973	23/03/1976
Germany	Objection	15/11/2005	
Germany	Objection	13/10/2004	
Germany	Objection	10/07/1997	
Germany	Objection	29/09/1993	
Germany	Objection	12/09/2007	
Germany	Declaration	24/05/1991	
Germany	Declaration	10/05/1991	
Germany	Declaration	25/10/1990	
Germany	Declaration	27/12/2001	
Germany	Declaration	22/01/1997	
Germany	Objection	28/06/2011	
Germany	Objection	25/01/2019	
Ghana	Declaration	07/09/2000	
Ghana	Signature	07/09/2000	
Ghana	Ratification	07/09/2000	07/12/2000
Greece	Objection	24/10/2005	
Greece	Objection	11/10/2004	
Greece	Objection	22/06/2011	
Greece	Objection	21/05/2019	
Greece	Accession	05/05/1997	05/08/1997
Grenada	Accession	06/09/1991	06/12/1991

Guatemala	Notification	21/07/2011	
Guatemala	Notification	21/06/2011	
Guatemala	Notification	28/12/2010	
Guatemala	Notification	03/08/2010	
Guatemala	Notification	20/07/2010	
Guatemala	Notification	18/12/2006	
Guatemala	Notification	20/10/2011	
Guatemala	Notification	14/10/2011	
Guatemala	Notification	13/06/2012	
Guatemala	Notification	23/11/2012	
Guatemala	Notification	15/01/2013	
Guatemala	Notification	27/02/2013	
Guatemala	Notification	28/01/2011	
Guatemala	Notification	25/05/2011	
Guatemala	Notification	06/09/2011	
Guatemala	Notification	01/10/2014	
Guatemala	Notification	14/10/2014	
Guatemala	Notification	10/11/2014	
Guatemala	Notification	27/10/2021	
Guatemala	Notification	02/08/2016	
Guatemala	Notification	28/07/2016	
Guatemala	Notification	28/09/2016	
Guatemala	Notification	03/10/2016	
Guatemala	Notification	19/05/2017	
Guatemala	Notification	12/06/2017	
Guatemala	Notification	06/09/2019	
Guatemala	Notification	21/01/2020	
Guatemala	Notification	29/01/2020	
Guatemala	Notification	07/02/2020	
Guatemala	Notification	17/02/2020	
Guatemala	Notification	09/03/2020	
Guatemala	Notification	23/03/2020	
Guatemala	Notification	26/03/2020	

Guatemala	Notification	30/04/2020	
Guatemala	Notification	17/05/2020	
Guatemala	Notification	29/05/2020	
Guatemala	Notification	02/06/2020	
Guatemala	Notification	03/06/2020	
Guatemala	Notification	06/07/2020	
Guatemala	Notification	06/07/2020	
Guatemala	Notification	24/07/2020	
Guatemala	Notification	03/08/2020	
Guatemala	Notification	20/08/2020	
Guatemala	Notification	29/11/2021	
Guatemala	Notification	30/12/2021	
Guatemala	Notification	26/01/2022	
Guatemala	Notification	09/06/2022	
Guatemala	Notification	24/06/2022	
Guatemala	Notification	11/07/2022	
Guatemala	Notification	13/10/2022	
Guatemala	Notification	28/06/2010	
Guatemala	Notification	28/06/2010	
Guatemala	Notification	28/06/2010	
Guatemala	Notification	28/06/2010	
Guatemala	Notification	28/06/2010	
Guatemala	Notification	15/07/2010	
Guatemala	Notification	25/08/2011	
Guatemala	Notification	12/10/2011	
Guatemala	Notification	30/03/2010	
Guatemala	Notification	26/07/2001	
Guatemala	Notification	23/11/1998	
Guatemala	Notification	14/10/2005	
Guatemala	Notification	18/09/2006	
Guatemala	Notification	05/09/2006	
Guatemala	Notification	03/09/2020	
Guatemala	Notification	17/11/2020	

Guatemala	Notification	04/12/2020	
Guatemala	Notification	19/01/2021	
Guatemala	Notification	07/04/2021	
Guatemala	Notification	09/05/2008	
Guatemala	Notification	12/05/2008	
Guatemala	Notification	27/05/2008	
Guatemala	Notification	24/06/2008	
Guatemala	Notification	27/04/2009	
Guatemala	Notification	07/05/2009	
Guatemala	Notification	20/05/2009	
Guatemala	Notification	20/05/2009	
Guatemala	Notification	08/02/2010	
Guatemala	Notification	08/02/2010	
Guatemala	Accession	05/05/1992	05/08/1992
Guatemala	Notification	14/10/2008	14/10/2008
Guatemala	Notification	18/12/2012	18/12/2012
Guinea	Signature	28/02/1967	
Guinea	Ratification	24/01/1978	24/04/1978
Guinea-Bissau	Signature	12/09/2000	
Guinea-Bissau	Declaration	24/09/2013	
Guinea-Bissau	Ratification	01/11/2010	01/02/2011
Guyana	Declaration	10/05/1993	
Guyana	Signature	22/08/1968	
Guyana	Ratification	15/02/1977	15/05/1977
Haiti	Accession	06/02/1991	06/05/1991
Honduras	Signature	19/12/1966	
Honduras	Ratification	25/08/1997	25/11/1997
Hungary	Declaration	07/09/1988	
Hungary	Signature	25/03/1969	
Hungary	Objection	19/01/1981	
Hungary	Objection	04/12/2007	
Hungary	Objection	28/06/2011	
Hungary	Objection	17/05/2019	

Hungary	Objection	18/09/2007	
Hungary	Ratification	17/01/1974	23/03/1976
Iceland	Declaration	22/08/1979	
Iceland	Signature	30/12/1968	
Iceland	Withdrawal of reservation	18/10/1993	18/10/1993
Iceland	Withdrawal of reservation	19/10/2009	19/10/2009
Iceland	Ratification	22/08/1979	22/11/1979
India	Accession	10/04/1979	10/07/1979
Indonesia	Accession	23/02/2006	23/05/2006
Iran	Ratification	24/06/1975	23/03/1976
Iran (Islamic Republic of)	Signature	04/04/1968	
Iraq	Signature	18/02/1969	
Iraq	Ratification	25/01/1971	23/03/1976
Ireland	Objection	13/10/2010	
Ireland	Objection	23/06/2011	
Ireland	Objection	20/05/2019	
Ireland	Objection	11/10/2001	
Ireland	Objection	27/09/2007	
Ireland	Objection	19/09/2007	
Ireland	Withdrawal of reservation	26/01/2009	
Ireland	Withdrawal of reservation	24/08/1998	
Ireland	Declaration	08/12/1989	
Ireland	Withdrawal of declaration	12/04/1994	
Ireland	Signature	01/10/1973	
Ireland	Ratification	08/12/1989	08/03/1990
Ireland	Withdrawal of reservation	15/12/2011	15/12/2011
Israel	Signature	19/12/1966	
Israel	Communication	16/05/2014	
Israel	Ratification	03/10/1991	03/01/1992

Italy	Signature	18/01/1967	
Italy	Objection	28/06/2011	
Italy	Objection	21/05/2019	
Italy	Objection	05/10/1993	
Italy	Objection	01/11/2007	
Italy	Withdrawal of reservation	20/12/2005	
Italy	Communication	01/11/2007	
Italy	Communication	20/12/2001	
Italy	Ratification	15/09/1978	15/12/1978
Italy	Declaration	15/09/1978	28/03/1979
Jamaica	Notification	27/08/2007	
Jamaica	Notification	24/08/2007	
Jamaica	Notification	28/09/2004	
Jamaica	Notification	27/10/2004	
Jamaica	Notification	30/06/2010	
Jamaica	Notification	01/06/2010	
Jamaica	Notification	23/01/2018	
Jamaica	Signature	19/12/1966	
Jamaica	Ratification	03/10/1975	23/03/1976
Japan	Signature	30/05/1978	
Japan	Ratification	21/06/1979	21/09/1979
Jordan	Signature	30/06/1972	
Jordan	Ratification	28/05/1975	23/03/1976
Kazakhstan	Signature	02/12/2003	
Kazakhstan	Ratification	24/01/2006	24/04/2006
Kenya	Accession	01/05/1972	23/03/1976
Kuwait	Partial withdrawal of reservations	20/05/2016	
Kuwait	Accession	21/05/1996	21/08/1996
Kyrgyzstan	Notification	30/04/2020	
Kyrgyzstan	Notification	31/03/2020	
Kyrgyzstan	Accession	07/10/1994	07/01/1995

Lao People's Democratic Republic	Signature	07/12/2000	
Lao People's Democratic Republic	Ratification	25/09/2009	25/12/2009
Latvia	Objection	13/08/2007	
Latvia	Objection	04/09/2007	
Latvia	Objection	15/11/2005	
Latvia	Objection	15/05/2019	
Latvia	Objection	29/06/2011	
Latvia	Notification	21/10/2021	
Latvia	Notification	06/04/2021	
Latvia	Notification	08/02/2021	
Latvia	Notification	30/12/2020	
Latvia	Notification	09/06/2020	
Latvia	Notification	13/05/2020	
Latvia	Notification	16/04/2020	
Latvia	Notification	16/03/2020	
Latvia	Notification	15/11/2021	
Latvia	Accession	14/04/1992	14/07/1992
Lebanon	Accession	03/11/1972	23/03/1976
Lesotho	Accession	09/09/1992	09/12/1992
Liberia	Signature	18/04/1967	
Liberia	Ratification	22/09/2004	22/12/2004
Libyan Arab Republic	Accession	15/05/1970	23/03/1976
Liechtenstein	Withdrawal of reservation	28/04/2000	
Liechtenstein	Declaration	10/12/1998	10/03/1999
Liechtenstein	Accession	10/12/1998	10/03/1999
Liechtenstein	Withdrawal of reservation	13/10/2009	13/10/2009
Lithuania	Accession	20/11/1991	20/02/1992
Luxembourg	Modification of reservation	01/12/2004	
Luxembourg	Signature	26/11/1974	
Luxembourg	Modification	06/11/2003	

Luxembourg	Ratification	18/08/1983	18/11/1983
Madagascar	Signature	17/09/1969	
Madagascar	Ratification	21/06/1971	23/03/1976
Malawi	Accession	22/12/1993	22/03/1994
Maldives	Accession	19/09/2006	19/12/2006
Mali	Accession	16/07/1974	23/03/1976
Malta	Accession	13/09/1990	13/12/1990
Marshall Islands	Accession	12/03/2018	12/06/2018
Mauritania	Accession	17/11/2004	17/02/2005
Mauritius	Accession	12/12/1973	23/03/1976
Mexico	Partial withdrawal of reservation	11/07/2014	
Mexico	Partial withdrawal	15/03/2002	
Mexico	Objection	13/12/2007	
Mexico	Accession	23/03/1981	23/06/1981
Monaco	Signature	26/06/1997	
Monaco	Ratification	28/08/1997	28/11/1997
Mongolia	Objection	05/11/1980	
Mongolia	Signature	05/06/1968	
Mongolia	Ratification	18/11/1974	23/03/1976
Montenegro	Succession	23/10/2006	03/06/2006
Morocco	Signature	19/01/1977	
Morocco	Ratification	03/05/1979	03/08/1979
Mozambique	Accession	21/07/1993	21/10/1993
Namibia	Notification	06/08/1999	
Namibia	Notification	14/09/1999	
Namibia	Notification	06/07/2020	
Namibia	Accession	28/11/1994	28/02/1995
Nauru	Signature	12/11/2001	
Nepal	Notification	05/05/2005	
Nepal	Notification	31/05/2002	
Nepal	Notification	08/03/2002	

Nepal	Notification	16/02/2005	
Nepal	Notification	29/03/2005	
Nepal	Accession	14/05/1991	14/08/1991
Nepal	Notification	21/11/2002	20/08/2002
Netherlands	Communication	26/10/1981	
Netherlands	Signature	25/06/1969	
Netherlands	Objection	12/01/1981	
Netherlands	Objection	12/06/1980	
Netherlands	Objection	26/12/1997	
Netherlands	Objection	08/10/2010	
Netherlands	Objection	15/05/2019	
Netherlands	Objection	31/05/2005	
Netherlands	Objection	09/10/2001	
Netherlands	Objection	22/07/1997	
Netherlands	Objection	28/09/1993	
Netherlands	Objection	10/06/1991	
Netherlands	Objection	18/03/1991	
Netherlands	Objection	27/07/2007	
Netherlands	Objection	27/07/2007	
Netherlands	Declaration	11/12/1978	
Netherlands	Declaration	11/10/2010	
Netherlands	Declaration	17/09/1981	
Netherlands	Communication	30/06/2011	
Netherlands	Territorial application	11/12/1978	
Netherlands	Objection	06/11/1984	
Netherlands	Ratification	11/12/1978	11/03/1979
Netherlands	Withdrawal of reservation	20/12/1983	20/12/1983
Netherlands	Declaration	11/12/1978	28/03/1979
New Zealand	Declaration	28/12/1978	
New Zealand	Signature	12/11/1968	
New Zealand	Ratification	28/12/1978	28/03/1979
New Zealand	Declaration	28/12/1978	28/03/1979

Nicaragua	Notification	01/08/1984	
Nicaragua	Notification	13/11/1985	
Nicaragua	Notification	30/01/1987	
Nicaragua	Notification	13/05/1987	
Nicaragua	Notification	08/02/1988	
Nicaragua	Derogation	05/04/1982	
Nicaragua	Extension of derogation	23/04/1982	
Nicaragua	Notification	01/06/2005	
Nicaragua	Notification	03/06/2005	
Nicaragua	Notification	20/05/1993	
Nicaragua	Notification	13/08/1993	
Nicaragua	Notification	04/06/1980	
Nicaragua	Notification	26/08/1982	
Nicaragua	Notification	14/12/1982	
Nicaragua	Notification	14/05/1982	
Nicaragua	Notification	08/06/1984	
Nicaragua	Notification	22/08/1984	
Nicaragua	Accession	12/03/1980	12/06/1980
Nicaragua	Extension	08/06/1982	15/05/1982
Niger	Accession	07/03/1986	07/06/1986
Nigeria	Accession	29/07/1993	29/10/1993
None	Communication	18/09/2007	
None	Rectification	25/10/1977	27/07/1977
None	Definitive entry into force	28/03/1979	28/03/1979
Norway	Objection	29/06/2011	
Norway	Objection	20/05/2019	
Norway	Objection	11/10/2001	
Norway	Signature	20/03/1968	
Norway	Objection	22/07/1997	
Norway	Objection	04/10/1993	
Norway	Withdrawal of reservation	21/11/1979	

Norway	Partial withdrawal of reservation and declaration	19/09/1995	19/09/1995
Norway	Ratification	13/09/1972	23/03/1976
Norway	Declaration	31/08/1972	28/03/1979
Pakistan	Signature	17/04/2008	
Pakistan	Objection	17/04/2008	
Pakistan	Partial withdrawal of reservations	20/09/2011	
Pakistan	Withdrawal of reservation	20/09/2011	20/09/2011
Pakistan	Ratification	23/06/2010	23/09/2010
Palau	Signature	20/09/2011	
Panama	Signature	27/07/1976	
Panama	Notification	01/07/1987	
Panama	Notification	12/06/1987	
Panama	Ratification	08/03/1977	08/06/1977
Papua New Guinea	Accession	21/07/2008	21/10/2008
Paraguay	Notification	21/10/2021	
Paraguay	Notification	21/10/2021	
Paraguay	Notification	21/10/2021	
Paraguay	Notification	27/04/2010	
Paraguay	Notification	04/02/2021	
Paraguay	Notification	27/10/2020	
Paraguay	Notification	07/09/2020	
Paraguay	Notification	06/08/2020	
Paraguay	Notification	15/07/2020	
Paraguay	Notification	12/07/2022	
Paraguay	Accession	10/06/1992	10/09/1992
Peru	Notification	08/03/2024	
Peru	Notification	08/03/2024	
Peru	Notification	11/08/2010	
Peru	Notification	31/08/2010	

Peru	Notification	17/09/2010	
Peru	Notification	01/11/2010	
Peru	Notification	23/12/2011	
Peru	Notification	24/05/2012	
Peru	Notification	24/05/2012	
Peru	Notification	24/05/2012	
Peru	Notification	01/06/2012	
Peru	Notification	01/06/2012	
Peru	Notification	10/07/2012	
Peru	Notification	17/07/2012	
Peru	Notification	07/08/2012	
Peru	Notification	07/08/2012	
Peru	Notification	07/08/2012	
Peru	Notification	04/10/2012	
Peru	Notification	04/10/2012	
Peru	Notification	12/12/2012	
Peru	Notification	12/12/2012	
Peru	Notification	23/01/2013	
Peru	Notification	13/03/2013	
Peru	Notification	13/03/2013	
Peru	Notification	13/03/2013	
Peru	Notification	28/03/2013	
Peru	Notification	28/03/2013	
Peru	Notification	09/05/2013	
Peru	Notification	30/05/2013	
Peru	Notification	30/05/2013	
Peru	Notification	31/07/2013	
Peru	Notification	31/07/2013	
Peru	Notification	11/10/2013	
Peru	Notification	11/10/2013	
Peru	Notification	05/12/2013	
Peru	Notification	05/12/2013	
Peru	Notification	28/01/2014	

Peru	Notification	28/01/2014	
Peru	Notification	02/04/2014	
Peru	Notification	27/06/2014	
Peru	Notification	27/06/2014	
Peru	Notification	27/06/2014	
Peru	Notification	11/08/2014	
Peru	Notification	11/08/2014	
Peru	Notification	11/08/2014	
Peru	Notification	27/04/1983	
Peru	Notification	18/03/1983	
Peru	Notification	11/10/2013	
Peru	Notification	02/04/2014	
Peru	Notification	02/04/2014	
Peru	Notification	01/12/2014	
Peru	Notification	01/12/2014	
Peru	Notification	17/04/2023	
Peru	Notification	14/04/2023	
Peru	Notification	25/04/2023	
Peru	Notification	25/04/2023	
Peru	Notification	02/05/2023	
Peru	Notification	17/05/2023	
Peru	Notification	25/05/2023	
Peru	Notification	08/06/2023	
Peru	Notification	08/06/2023	
Peru	Notification	08/06/2023	
Peru	Notification	19/06/2023	
Peru	Notification	17/07/2023	
Peru	Notification	17/07/2023	
Peru	Notification	17/07/2023	
Peru	Notification	21/07/2023	
Peru	Notification	21/07/2023	
Peru	Notification	09/08/2023	
Peru	Notification	09/08/2023	

Peru	Notification	10/08/2023	
Peru	Notification	29/08/2023	
Peru	Notification	29/08/2023	
Peru	Notification	29/08/2023	
Peru	Notification	26/09/2023	
Peru	Notification	26/09/2023	
Peru	Notification	26/09/2023	
Peru	Notification	10/10/2023	
Peru	Notification	10/10/2023	
Peru	Notification	10/10/2023	
Peru	Notification	10/10/2023	
Peru	Notification	08/11/2023	
Peru	Notification	08/11/2023	
Peru	Notification	08/11/2023	
Peru	Notification	08/11/2023	
Peru	Notification	01/12/2023	
Peru	Notification	01/12/2023	
Peru	Notification	05/12/2023	
Peru	Notification	05/12/2023	
Peru	Notification	12/12/2023	
Peru	Notification	12/12/2023	
Peru	Notification	19/12/2023	
Peru	Notification	20/12/2023	
Peru	Notification	20/12/2023	
Peru	Notification	08/01/2024	
Peru	Notification	08/01/2024	
Peru	Notification	11/01/2024	
Peru	Notification	15/01/2024	
Peru	Notification	07/02/2024	
Peru	Notification	07/02/2024	
Peru	Notification	07/02/2024	
Peru	Notification	07/02/2024	
Peru	Notification	19/02/2024	

Peru	Notification	19/02/2024	
Peru	Notification	13/05/2004	
Peru	Notification	02/06/2004	
Peru	Notification	05/08/2004	
Peru	Notification	28/10/2004	
Peru	Notification	16/11/2004	
Peru	Notification	23/11/2004	
Peru	Notification	02/12/2004	
Peru	Notification	26/01/2005	
Peru	Notification	27/01/2005	
Peru	Notification	31/03/2005	
Peru	Notification	08/04/2005	
Peru	Notification	24/05/2005	
Peru	Notification	21/07/2005	
Peru	Notification	20/09/2005	
Peru	Notification	01/12/2005	
Peru	Notification	23/12/2005	
Peru	Notification	07/06/1990	
Peru	Notification	09/02/1995	
Peru	Notification	22/05/1995	
Peru	Notification	08/02/1996	
Peru	Notification	29/08/1996	
Peru	Notification	05/11/1996	
Peru	Notification	04/12/1996	
Peru	Notification	30/12/1996	
Peru	Notification	06/02/1997	
Peru	Notification	18/08/1997	
Peru	Notification	11/11/1997	
Peru	Notification	28/04/1998	
Peru	Notification	05/05/1998	
Peru	Notification	13/09/2007	
Peru	Notification	18/01/2006	
Peru	Notification	22/02/2006	

Peru	Notification	17/03/2006	
Peru	Notification	26/04/2006	
Peru	Notification	05/07/2006	
Peru	Notification	27/09/2006	
Peru	Notification	20/10/2006	
Peru	Notification	25/10/2006	
Peru	Notification	26/10/2006	
Peru	Notification	01/12/2006	
Peru	Notification	12/12/2006	
Peru	Notification	24/01/2007	
Peru	Notification	21/02/2007	
Peru	Notification	30/03/2007	
Peru	Notification	30/03/2007	
Peru	Notification	18/06/2002	
Peru	Declaration	09/04/1984	
Peru	Notification	05/04/2007	
Peru	Notification	06/06/2007	
Peru	Notification	11/06/2007	
Peru	Notification	11/07/2007	
Peru	Notification	26/07/2007	
Peru	Notification	01/12/2014	
Peru	Notification	18/02/2015	
Peru	Notification	18/02/2015	
Peru	Notification	18/02/2015	
Peru	Notification	04/04/1983	
Peru	Notification	02/06/1983	
Peru	Notification	09/08/1983	
Peru	Notification	29/09/1983	
Peru	Notification	20/12/1983	
Peru	Notification	13/02/1984	
Peru	Notification	28/03/1984	
Peru	Notification	14/05/1984	
Peru	Notification	18/06/1984	

Peru	Notification	09/08/1984	
Peru	Notification	14/08/1984	
Peru	Notification	25/10/1984	
Peru	Notification	21/12/1984	
Peru	Notification	08/02/1985	
Peru	Notification	09/11/1983	
Peru	Notification	12/04/1985	
Peru	Notification	18/06/1985	
Peru	Notification	24/07/1985	
Peru	Notification	06/08/1985	
Peru	Notification	12/08/1985	
Peru	Notification	13/12/1985	
Peru	Notification	21/02/1986	
Peru	Notification	24/04/1986	
Peru	Notification	05/06/1986	
Peru	Notification	09/06/1986	
Peru	Notification	23/06/1986	
Peru	Notification	06/08/1986	
Peru	Notification	08/08/1986	
Peru	Notification	25/08/1986	
Peru	Notification	05/09/1986	
Peru	Notification	08/10/1986	
Peru	Notification	22/10/1986	
Peru	Notification	05/11/1986	
Peru	Notification	18/12/1986	
Peru	Notification	02/02/1987	
Peru	Notification	04/03/1987	
Peru	Notification	03/04/1987	
Peru	Notification	01/06/1987	
Peru	Notification	08/06/1987	
Peru	Notification	18/06/1987	
Peru	Notification	23/07/1987	
Peru	Notification	25/06/2002	

Peru	Notification	30/05/2003	
Peru	Notification	27/06/2003	
Peru	Notification	10/09/2003	
Peru	Notification	30/09/2003	
Peru	Notification	01/12/2003	
Peru	Notification	27/01/2004	
Peru	Notification	30/03/2004	
Peru	Notification	28/06/2016	
Peru	Notification	28/06/2016	
Peru	Notification	30/06/2016	
Peru	Notification	30/06/2016	
Peru	Notification	30/06/2016	
Peru	Notification	30/06/2016	
Peru	Notification	27/07/2016	
Peru	Notification	27/07/2016	
Peru	Notification	03/08/2016	
Peru	Notification	03/08/2016	
Peru	Notification	03/08/2016	
Peru	Notification	11/08/2016	
Peru	Notification	14/09/2016	
Peru	Notification	14/09/2016	
Peru	Notification	31/10/2016	
Peru	Notification	31/10/2016	
Peru	Notification	31/10/2016	
Peru	Notification	31/10/2016	
Peru	Notification	14/11/2016	
Peru	Notification	21/12/2016	
Peru	Notification	27/12/2016	
Peru	Notification	27/12/2016	
Peru	Notification	22/02/2017	
Peru	Notification	26/04/2017	
Peru	Notification	26/04/2017	
Peru	Notification	30/06/2017	

Peru	Notification	30/06/2017	
Peru	Notification	30/06/2017	
Peru	Notification	05/09/2017	
Peru	Notification	05/09/2017	
Peru	Notification	11/01/2018	
Peru	Notification	11/01/2018	
Peru	Notification	16/01/2018	
Peru	Notification	16/01/2018	
Peru	Notification	16/01/2018	
Peru	Notification	16/01/2018	
Peru	Notification	16/01/2018	
Peru	Notification	16/01/2018	
Peru	Notification	16/01/2018	
Peru	Notification	16/01/2018	
Peru	Notification	16/01/2018	
Peru	Notification	16/01/2018	
Peru	Notification	16/01/2018	
Peru	Notification	16/01/2018	
Peru	Notification	16/01/2018	
Peru	Notification	20/06/2018	
Peru	Notification	11/05/2020	
Peru	Notification	05/07/2018	
Peru	Notification	20/06/2018	
Peru	Notification	20/06/2018	
Peru	Notification	20/06/2018	
Peru	Notification	20/06/2018	
Peru	Notification	05/07/2018	
Peru	Notification	05/07/2018	
Peru	Notification	20/08/2018	
Peru	Notification	01/02/2019	
Peru	Notification	01/02/2019	
Peru	Notification	01/02/2019	
Peru	Notification	01/02/2019	

Peru	Notification	01/02/2019	
Peru	Notification	01/02/2019	
Peru	Notification	01/02/2019	
Peru	Notification	01/02/2019	
Peru	Notification	08/05/2019	
Peru	Notification	08/05/2019	
Peru	Notification	12/02/2008	
Peru	Notification	21/02/2008	
Peru	Notification	12/03/2008	
Peru	Notification	08/05/2008	
Peru	Notification	08/08/2008	
Peru	Notification	08/08/2008	
Peru	Notification	22/08/2008	
Peru	Notification	02/09/2008	
Peru	Notification	02/09/2008	
Peru	Notification	18/09/2008	
Peru	Notification	21/07/2008	
Peru	Notification	12/11/2008	
Peru	Notification	18/11/2008	
Peru	Notification	16/12/2008	
Peru	Notification	30/03/2009	
Peru	Notification	27/04/2009	
Peru	Notification	15/05/2009	
Peru	Notification	09/06/2009	
Peru	Notification	30/06/2009	
Peru	Notification	29/06/2009	
Peru	Notification	29/06/2009	
Peru	Notification	20/07/2009	
Peru	Notification	20/07/2009	
Peru	Notification	10/09/2009	
Peru	Notification	16/09/2009	
Peru	Notification	23/11/2009	
Peru	Notification	23/11/2009	

Peru	Notification	06/01/2010	
Peru	Notification	09/04/2010	
Peru	Notification	25/04/2007	
Peru	Notification	06/05/2010	
Peru	Notification	21/05/2010	
Peru	Notification	21/05/2010	
Peru	Notification	26/07/2000	
Peru	Notification	02/03/2000	
Peru	Notification	04/01/2000	
Peru	Notification	07/08/1998	
Peru	Notification	18/02/2015	
Peru	Notification	18/02/2015	
Peru	Notification	18/02/2015	
Peru	Notification	04/03/2015	
Peru	Notification	07/07/2015	
Peru	Notification	07/07/2015	
Peru	Notification	07/07/2015	
Peru	Notification	07/07/2015	
Peru	Notification	07/07/2015	
Peru	Notification	07/07/2015	
Peru	Notification	07/07/2015	
Peru	Notification	07/07/2015	
Peru	Notification	07/07/2015	
Peru	Notification	02/10/2015	
Peru	Notification	09/11/2015	
Peru	Notification	09/11/2015	
Peru	Notification	09/11/2015	
Peru	Notification	11/12/2015	
Peru	Notification	11/12/2015	
Peru	Notification	11/12/2015	
Peru	Notification	11/12/2015	
Peru	Notification	11/12/2015	
Peru	Notification	11/12/2015	

Peru	Notification	11/12/2015	
Peru	Notification	17/03/2016	
Peru	Notification	17/03/2016	
Peru	Notification	21/03/2016	
Peru	Notification	28/06/2016	
Peru	Notification	28/06/2016	
Peru	Notification	19/04/1988	
Peru	Notification	02/05/1988	
Peru	Notification	23/05/1988	
Peru	Notification	08/02/1988	
Peru	Notification	27/06/1988	
Peru	Notification	22/07/1988	
Peru	Notification	15/09/1988	
Peru	Notification	21/12/1988	
Peru	Notification	09/01/1989	
Peru	Notification	08/03/1989	
Peru	Notification	04/08/1989	
Peru	Notification	15/08/1989	
Peru	Notification	06/10/2021	
Peru	Notification	25/08/2021	
Peru	Notification	04/08/2021	
Peru	Notification	02/07/2021	
Peru	Notification	04/06/2021	
Peru	Notification	05/05/2021	
Peru	Notification	01/04/2021	
Peru	Notification	04/03/2021	
Peru	Notification	01/02/2021	
Peru	Notification	18/01/2021	
Peru	Notification	03/12/2020	
Peru	Notification	09/11/2020	
Peru	Notification	06/10/2020	
Peru	Notification	02/09/2020	
Peru	Notification	05/08/2020	

Peru	Notification	30/06/2020	
Peru	Notification	25/05/2020	
Peru	Notification	27/04/2020	
Peru	Notification	11/04/2020	
Peru	Notification	30/03/2020	
Peru	Notification	20/03/2020	
Peru	Notification	20/12/2019	
Peru	Notification	20/12/2019	
Peru	Notification	20/12/2019	
Peru	Notification	14/11/2019	
Peru	Notification	14/11/2019	
Peru	Notification	14/11/2019	
Peru	Notification	14/11/2019	
Peru	Notification	14/11/2019	
Peru	Notification	27/08/2019	
Peru	Notification	27/08/2019	
Peru	Notification	13/11/2019	
Peru	Notification	27/08/2019	
Peru	Notification	27/08/2019	
Peru	Notification	27/08/2019	
Peru	Notification	27/08/2019	
Peru	Notification	27/08/2019	
Peru	Notification	27/08/2019	
Peru	Notification	27/08/2019	
Peru	Notification	27/08/2019	
Peru	Notification	27/08/2019	
Peru	Notification	08/05/2019	
Peru	Notification	08/05/2019	
Peru	Notification	08/05/2019	
Peru	Notification	08/05/2019	
Peru	Notification	17/04/2023	
Peru	Notification	17/04/2023	
Peru	Notification	17/04/2023	

Peru	Notification	17/04/2023	
Peru	Notification	30/03/2023	
Peru	Notification	15/03/2023	
Peru	Notification	15/03/2023	
Peru	Notification	27/02/2023	
Peru	Notification	20/02/2023	
Peru	Notification	20/02/2023	
Peru	Notification	17/02/2023	
Peru	Notification	10/02/2023	
Peru	Notification	06/02/2023	
Peru	Notification	06/02/2023	
Peru	Notification	06/02/2023	
Peru	Notification	26/01/2023	
Peru	Notification	19/01/2023	
Peru	Notification	16/12/2022	
Peru	Notification	16/12/2022	
Peru	Notification	16/12/2022	
Peru	Notification	16/12/2022	
Peru	Notification	16/12/2022	
Peru	Notification	10/10/2022	
Peru	Notification	27/09/2022	
Peru	Notification	08/08/2022	
Peru	Notification	13/07/2022	
Peru	Notification	11/07/2022	
Peru	Notification	13/07/2022	
Peru	Notification	03/06/2022	
Peru	Notification	09/05/2022	
Peru	Notification	11/04/2022	
Peru	Notification	11/04/2022	
Peru	Notification	08/04/2022	
Peru	Notification	06/04/2022	
Peru	Notification	06/01/2022	
Peru	Notification	02/12/2021	

Peru	Notification	15/11/2021	
Peru	Signature	11/08/1977	
Peru	Notification	24/06/1987	
Peru	Notification	04/08/1987	
Peru	Notification	13/08/1987	
Peru	Notification	27/08/1987	
Peru	Notification	23/09/1987	
Peru	Notification	09/10/1987	
Peru	Notification	04/11/1987	
Peru	Notification	23/12/1987	
Peru	Notification	22/01/1988	
Peru	Notification	01/02/1988	
Peru	Notification	11/03/1988	
Peru	Notification	08/04/1988	
Peru	Notification	29/03/1988	
Peru	Notification	07/01/2008	07/01/2008
Peru	Notification	07/12/2011	07/12/2011
Peru	Notification	14/01/2009	14/01/2009
Peru	Notification	23/10/1995	23/10/1995
Peru	Ratification	28/04/1978	28/07/1978
Philippines	Signature	19/12/1966	
Philippines	Ratification	23/10/1986	23/01/1987
Poland	Objection	03/12/2007	
Poland	Objection	20/06/2011	
Poland	Objection	22/03/2019	
Poland	Objection	22/11/2005	
Poland	Notification	25/07/1983	
Poland	Notification	22/12/1982	
Poland	Notification	01/02/1982	
Poland	Signature	02/03/1967	
Poland	Ratification	18/03/1977	18/06/1977
Poland	Declaration	25/09/1990	25/09/1990
Portugal	Objection	28/06/2011	

Portugal	Objection	20/05/2019	
Portugal	Objection	13/10/2004	
Portugal	Objection	26/07/2001	
Portugal	Objection	05/10/1993	
Portugal	Objection	26/10/1990	
Portugal	Objection	29/08/2007	
Portugal	Objection	29/08/2007	
Portugal	Objection	21/11/2005	
Portugal	Territorial application	27/04/1993	
Portugal	Communication	21/10/1999	
Portugal	Signature	07/10/1976	
Portugal	Ratification	15/06/1978	15/09/1978
Qatar	Accession	21/05/2018	21/08/2018
Republic of Korea	Declaration	04/06/1990	
Republic of Korea	Withdrawal of reservation	02/04/2007	
Republic of Korea	Accession	10/04/1990	10/07/1990
Republic of Korea	Withdrawal of reservation	15/03/1991	15/03/1991
Republic of Korea	Withdrawal of reservation	19/01/1993	21/01/1993
Republic of Moldova	Notification	18/05/2020	
Republic of Moldova	Notification	02/04/2021	
Republic of Moldova	Notification	29/04/2021	
Republic of Moldova	Objection	21/05/2019	
Republic of Moldova	Notification	04/05/2020	
Republic of Moldova	Accession	26/01/1993	26/04/1993
Romania	Objection	20/05/2019	
Romania	Signature	27/06/1968	
Romania	Communication	28/02/1968	
Romania	Notification	14/05/2020	
Romania	Notification	21/04/2020	
Romania	Notification	20/03/2020	
Romania	Ratification	09/12/1974	23/03/1976

Russian Federation	Notification	21/06/1994	
Russian Federation	Notification	12/08/1994	
Russian Federation	Notification	21/10/1994	
Russian Federation	Notification	05/01/1995	
Russian Federation	Notification	05/11/1992	
Russian Federation	Notification	07/04/1993	
Russian Federation	Notification	10/08/1993	
Russian Federation	Notification	05/10/1993	
Russian Federation	Notification	22/10/1993	
Russian Federation	Notification	27/10/1993	
Russian Federation	Notification	28/10/1993	
Russian Federation	Notification	29/12/1993	
Russian Federation	Notification	18/02/1994	
Russian Federation	Notification	25/04/1994	
Russian Federation	Notification	23/05/1994	
Rwanda	Accession	16/04/1975	23/03/1976
Samoa	Accession	15/02/2008	15/05/2008
San Marino	Notification	11/05/2020	
San Marino	Notification	23/04/2020	
San Marino	Declaration	04/08/2015	
San Marino	Notification	07/07/2020	
San Marino	Accession	18/10/1985	18/01/1986
Sao Tome and Principe	Signature	31/10/1995	
Sao Tome and Principe	Ratification	10/01/2017	10/04/2017
Senegal	Signature	06/07/1970	
Senegal	Declaration	05/01/1981	
Senegal	Notification	06/07/2020	
Senegal	Ratification	13/02/1978	13/05/1978
Serbia and Montenegro	Communication	24/04/2003	
Serbia and Montenegro	Notification	13/03/2003	
Seychelles	Accession	05/05/1992	05/08/1992
Sierra Leone	Accession	23/08/1996	23/11/1996
Slovakia	Communication	21/12/2007	

Slovakia	Objection	18/12/2007	
Slovakia	Objection	23/06/2011	
Slovakia	Succession	28/05/1993	01/01/1993
Slovenia	Succession	06/07/1992	25/06/1991
Somalia	Accession	24/01/1990	24/04/1990
South Africa	Signature	03/10/1994	
South Africa	Declaration	10/12/1998	
South Africa	Ratification	10/12/1998	10/03/1999
South Sudan	Accession	05/02/2024	05/05/2024
Spain	Declaration	25/01/1985	
Spain	Notification	21/12/1988	
Spain	Objection	17/09/2007	
Spain	Objection	05/10/1993	
Spain	Objection	09/10/2001	
Spain	Signature	28/09/1976	
Spain	Objection	09/06/2011	
Spain	Declaration	11/03/1998	11/03/1998
Spain	Ratification	27/04/1977	27/07/1977
Sri Lanka	Declaration	11/06/1980	
Sri Lanka	Notification	23/11/2015	
Sri Lanka	Notification	29/08/1989	
Sri Lanka	Notification	16/01/1989	
Sri Lanka	Notification	21/05/1984	
Sri Lanka	Notification	09/06/2010	
Sri Lanka	Notification	30/05/2000	
Sri Lanka	Notification	04/10/1994	
Sri Lanka	Accession	11/06/1980	11/09/1980
St. Lucia	Signature	22/09/2011	
St. Vincent and the Grenadines	Accession	09/11/1981	09/02/1981
State of Palestine	Communication	06/06/2014	
State of Palestine	Communication	06/06/2014	
State of Palestine	Notification	30/03/2020	
State of Palestine	Communication	06/06/2014	

State of Palestine	Accession	02/04/2014	02/07/2014
Sudan	Notification	08/03/2019	
Sudan	Notification	17/08/2001	
Sudan	Notification	20/12/2001	
Sudan	Notification	08/03/2019	
Sudan	Accession	18/03/1986	18/06/1986
Suriname	Accession	28/12/1976	28/03/1977
Swaziland	Accession	26/03/2004	26/06/2004
Sweden	Signature	29/09/1967	
Sweden	Objection	03/12/2007	
Sweden	Objection	22/06/2011	
Sweden	Objection	05/10/2005	
Sweden	Objection	30/06/2004	
Sweden	Objection	25/07/2001	
Sweden	Objection	23/07/1997	
Sweden	Objection	18/06/1993	
Sweden	Objection	18/09/2007	
Sweden	Communication	22/05/2019	
Sweden	Communication	18/10/2010	
Sweden	Ratification	06/12/1971	23/03/1976
Sweden	Declaration	26/11/1971	28/03/1979
Switzerland	Declaration	25/04/1997	
Switzerland	Declaration	24/01/2022	
Switzerland	Declaration	27/03/2017	
Switzerland	Declaration	11/05/2010	
Switzerland	Withdrawal of reservation	12/01/2004	
Switzerland	Withdrawal of reservation	01/05/2007	
Switzerland	Objection	17/05/2019	
Switzerland	Objection	28/06/2011	
Switzerland	Withdrawal of reservation	16/10/1995	16/10/1995
Switzerland	Accession	18/06/1992	18/09/1992

Syrian Arab Republic	Accession	21/04/1969	23/03/1976
Tajikistan	Accession	04/01/1999	04/04/1999
Thailand	Notification	03/04/2023	
Thailand	Notification	09/02/2011	
Thailand	Notification	28/01/2014	
Thailand	Notification	20/03/2014	
Thailand	Notification	08/07/2014	
Thailand	Withdrawal of declaration	06/07/2012	
Thailand	Notification	24/12/2019	
Thailand	Notification	05/06/2020	
Thailand	Notification	14/04/2010	
Thailand	Accession	29/10/1996	29/01/1997
The former Yugoslav Republic of Macedonia	Succession	18/01/1994	17/11/1991
Timor-Leste	Accession	18/09/2003	18/12/2003
Togo	Notification	17/05/2021	
Togo	Accession	24/05/1984	24/08/1984
Trinidad and Tobago	Notification	18/08/1995	
Trinidad and Tobago	Notification	06/11/1990	
Trinidad and Tobago	Notification	29/09/2011	
Trinidad and Tobago	Notification	22/12/2011	
Trinidad and Tobago	Notification	30/06/2021	
Trinidad and Tobago	Accession	21/12/1978	21/03/1979
Tunisia	Signature	30/04/1968	
Tunisia	Declaration	24/06/1993	
Tunisia	Ratification	18/03/1969	23/03/1976
Turkey	Notification	19/10/2017	
Turkey	Notification	19/01/2018	
Turkey	Notification	20/04/2018	
Turkey	Notification	09/08/2018	
Turkey	Signature	15/08/2000	
Turkey	Notification	02/08/2016	
Turkey	Notification	14/10/2016	

Turkey	Notification	09/01/2017	
Turkey	Notification	19/04/2017	
Turkey	Notification	25/07/2017	
Turkey	Ratification	23/09/2003	23/12/2003
Türkiye	Notification	15/02/2023	
Türkiye	Notification	22/02/2023	
Türkiye	Notification	12/05/2023	
Türkiye	Notification	10/02/2023	
Turkmenistan	Accession	01/05/1997	01/08/1997
Tuvalu	Territorial application	20/05/1976	20/08/1976
Uganda	Accession	21/06/1995	21/09/1995
Ukraine	Notification	25/05/2023	
Ukraine	Notification	14/02/2023	
Ukraine	Notification	16/12/2022	
Ukraine	Notification	19/08/2022	
Ukraine	Notification	20/06/2022	
Ukraine	Notification	09/06/2022	
Ukraine	Notification	29/04/2022	
Ukraine	Notification	28/03/2022	
Ukraine	Notification	16/03/2022	
Ukraine	Notification	01/03/2022	
Ukraine	Notification	01/03/2022	
Ukraine	Notification	26/11/2019	
Ukraine	Notification	23/01/2017	
Ukraine	Notification	06/07/2016	
Ukraine	Notification	27/11/2015	
Ukraine	Notification	05/06/2015	
Ukraine	Notification	16/02/2024	
Ukraine	Notification	02/01/2024	
Ukraine	Notification	17/11/2023	
Ukraine	Notification	30/08/2023	
Ukraine	Declaration	28/07/1992	28/07/1992

Ukrainian Soviet Socialist Republic	Signature	20/03/1968	
Ukrainian Soviet Socialist Republic	Ratification	12/11/1973	23/03/1976
Union of Soviet Socialist Republics	Notification	18/10/1988	
Union of Soviet Socialist Republics	Signature	18/03/1968	
Union of Soviet Socialist Republics	Objection	13/02/1981	
Union of Soviet Socialist Republics	Notification	26/03/1990	
Union of Soviet Socialist Republics	Notification	25/01/1990	
Union of Soviet Socialist Republics	Notification	17/01/1990	
Union of Soviet Socialist Republics	Declaration	01/10/1991	01/10/1991
Union of Soviet Socialist Republics	Ratification	16/10/1973	23/03/1976
United Kingdom of Great Britain and Northern Ireland	Withdrawal of reservation	02/02/1993	
United Kingdom of Great Britain and Northern Ireland	Declaration	13/01/1988	
United Kingdom of Great Britain and Northern Ireland	Declaration	28/02/1985	
United Kingdom of Great Britain and Northern Ireland	Declaration	25/05/1991	
United Kingdom of Great Britain and Northern Ireland	Declaration	18/12/1989	
United Kingdom of Great Britain and Northern Ireland	Communication	20/12/2000	
United Kingdom of Great Britain and Northern Ireland	Signature	16/09/1968	
United Kingdom of Great Britain and Northern Ireland	Objection	27/12/2007	
United Kingdom of Great Britain and Northern Ireland	Objection	28/06/2011	
United Kingdom of Great Britain and Northern Ireland	Objection	21/05/2019	

United Kingdom of Great Britain and Northern Ireland	Objection	17/08/2005	
United Kingdom of Great Britain and Northern Ireland	Objection	06/09/2007	
United Kingdom of Great Britain and Northern Ireland	Communication	21/10/2010	
United Kingdom of Great Britain and Northern Ireland	Notification	31/03/1989	
United Kingdom of Great Britain and Northern Ireland	Notification	23/12/1988	
United Kingdom of Great Britain and Northern Ireland	Notification	22/08/1984	
United Kingdom of Great Britain and Northern Ireland	Notification	18/12/2001	
United Kingdom of Great Britain and Northern Ireland	Notification	21/02/2001	
United Kingdom of Great Britain and Northern Ireland	Notification	19/05/2006	
United Kingdom of Great Britain and Northern Ireland	Notification	10/06/1997	
United Kingdom of Great Britain and Northern Ireland	Withdrawal of reservation	04/02/2015	
United Kingdom of Great Britain and Northern Ireland	Notification	15/03/2005	14/03/2005
United Kingdom of Great Britain and Northern Ireland	Ratification	20/05/1976	20/08/1976
United Kingdom of Great Britain and Northern Ireland	Declaration	20/05/1976	28/03/1979
United Republic of Tanzania	Accession	11/06/1976	11/09/1976
United States of America	Signature	05/10/1977	
United States of America	Objection	29/06/2011	
United States of America	Communication	13/05/2014	
United States of America	Ratification	08/06/1992	08/09/1992
Uruguay	Signature	21/02/1967	
Uruguay	Objection	23/06/2011	
Uruguay	Notification	30/07/1979	
Uruguay	Ratification	01/04/1970	23/03/1976
Uzbekistan	Accession	28/09/1995	28/12/1995

Vanuatu	Signature	29/11/2007	
Vanuatu	Ratification	21/11/2008	21/02/2009
Venezuela	Signature	24/06/1969	
Venezuela	Notification	06/05/1992	
Venezuela	Notification	02/12/1992	
Venezuela	Notification	05/02/1992	
Venezuela	Notification	24/02/1992	
Venezuela	Notification	05/03/1993	
Venezuela	Notification	07/07/1994	
Venezuela	Notification	01/09/1995	
Venezuela	Notification	22/03/1999	
Venezuela	Notification	12/04/1989	
Venezuela	Ratification	10/05/1978	10/08/1978
Venezuela (Bolivarian Republic of)	Withdrawal of reservation	29/04/2022	
Viet Nam	Accession	24/09/1982	24/12/1982
Yugoslavia (Federal Republic of)	Succession	12/03/2001	27/04/1992
Yugoslavia (former)	Notification	14/04/2008	
Yugoslavia (Socialist Federal Republic of)	Notification	17/04/1989	
Yugoslavia (Socialist Federal Republic of)	Signature	08/08/1967	
Yugoslavia (Socialist Federal Republic of)	Notification	26/04/1990	
Yugoslavia (Socialist Federal Republic of)	Notification	30/05/1989	
Yugoslavia (Socialist Federal Republic of)	Notification	20/03/1990	
Yugoslavia (Socialist Federal Republic of)	Ratification	02/06/1971	23/03/1976
Zaire	Accession	01/11/1976	01/02/1977
Zambia	Accession	10/04/1984	10/07/1984
Zimbabwe	Declaration	20/08/1991	
Zimbabwe	Declaration	27/01/1993	
Zimbabwe	Accession	13/05/1991	13/08/1991

Annex 77

3. International Covenant on Economic, Social and Cultural Rights

New York, 16 December 1966

ENTRY INTO FORCE: 3 January 1976, in accordance with article 27.[1]

REGISTRATION: 3 January 1976, No. 14531.[1]

STATUS: Signatories: 71. Parties: 172.

TEXT: United Nations, *Treaty Series*, vol. 993, p. 3; depositary notification C.N.781.2001.TREATIES-6 of 5 October 2001 [Proposal of correction to the original of the Covenant (Chinese authentic text) and C.N.7.2002.TREATIES-1 of 3 January 2002 [Rectification of the original of the Covenant (Chinese authentic text)].

Note: The Covenant was opened for signature at New York on 19 December 1966.

Participant[2]	*Signature*	*Ratification, Accession(a), Succession(d)*
Afghanistan		24 Jan 1983 a
Albania		4 Oct 1991 a
Algeria	10 Dec 1968	12 Sep 1989
Angola		10 Jan 1992 a
Antigua and Barbuda		3 Jul 2019 a
Argentina	19 Feb 1968	8 Aug 1986
Armenia		13 Sep 1993 a
Australia	18 Dec 1972	10 Dec 1975
Austria	10 Dec 1973	10 Sep 1978
Azerbaijan		13 Aug 1992 a
Bahamas	4 Dec 2008	23 Dec 2008
Bahrain		27 Sep 2007 a
Bangladesh		5 Oct 1998 a
Barbados		5 Jan 1973 a
Belarus	19 Mar 1968	12 Nov 1973
Belgium	10 Dec 1968	21 Apr 1983
Belize	6 Sep 2000	9 Mar 2015
Benin		12 Mar 1992 a
Bolivia (Plurinational State of)		12 Aug 1982 a
Bosnia and Herzegovina[3]		1 Sep 1993 d
Brazil		24 Jan 1992 a
Bulgaria	8 Oct 1968	21 Sep 1970
Burkina Faso		4 Jan 1999 a
Burundi		9 May 1990 a
Cabo Verde		6 Aug 1993 a
Cambodia[4,5]	17 Oct 1980	26 May 1992 a
Cameroon		27 Jun 1984 a
Canada		19 May 1976 a
Central African Republic		8 May 1981 a
Chad		9 Jun 1995 a
Chile	16 Sep 1969	10 Feb 1972
China[6,7,8]	27 Oct 1997	27 Mar 2001
Colombia	21 Dec 1966	29 Oct 1969
Comoros	25 Sep 2008	
Congo		5 Oct 1983 a
Costa Rica	19 Dec 1966	29 Nov 1968
Côte d'Ivoire		26 Mar 1992 a
Croatia[3]		12 Oct 1992 d
Cuba	28 Feb 2008	
Cyprus	9 Jan 1967	2 Apr 1969
Czech Republic[9]		22 Feb 1993 d
Democratic People's Republic of Korea		14 Sep 1981 a
Democratic Republic of the Congo		1 Nov 1976 a
Denmark	20 Mar 1968	6 Jan 1972
Djibouti		5 Nov 2002 a
Dominica		17 Jun 1993 a
Dominican Republic		4 Jan 1978 a
Ecuador	29 Sep 1967	6 Mar 1969
Egypt	4 Aug 1967	14 Jan 1982
El Salvador	21 Sep 1967	30 Nov 1979
Equatorial Guinea		25 Sep 1987 a
Eritrea		17 Apr 2001 a
Estonia		21 Oct 1991 a
Eswatini		26 Mar 2004 a
Ethiopia		11 Jun 1993 a
Fiji		16 Aug 2018 a

Participant[2]	Signature		Ratification, Accession(a), Succession(d)	
Finland	11 Oct	1967	19 Aug	1975
France			4 Nov	1980 a
Gabon			21 Jan	1983 a
Gambia			29 Dec	1978 a
Georgia			3 May	1994 a
Germany[2,10]	9 Oct	1968	17 Dec	1973
Ghana	7 Sep	2000	7 Sep	2000
Greece			16 May	1985 a
Grenada			6 Sep	1991 a
Guatemala			19 May	1988 a
Guinea	28 Feb	1967	24 Jan	1978
Guinea-Bissau			2 Jul	1992 a
Guyana	22 Aug	1968	15 Feb	1977
Haiti			8 Oct	2013 a
Honduras	19 Dec	1966	17 Feb	1981
Hungary	25 Mar	1969	17 Jan	1974
Iceland	30 Dec	1968	22 Aug	1979
India			10 Apr	1979 a
Indonesia			23 Feb	2006 a
Iran (Islamic Republic of)	4 Apr	1968	24 Jun	1975
Iraq	18 Feb	1969	25 Jan	1971
Ireland	1 Oct	1973	8 Dec	1989
Israel	19 Dec	1966	3 Oct	1991
Italy	18 Jan	1967	15 Sep	1978
Jamaica	19 Dec	1966	3 Oct	1975
Japan	30 May	1978	21 Jun	1979
Jordan	30 Jun	1972	28 May	1975
Kazakhstan	2 Dec	2003	24 Jan	2006
Kenya			1 May	1972 a
Kuwait			21 May	1996 a
Kyrgyzstan			7 Oct	1994 a
Lao People's Democratic Republic	7 Dec	2000	13 Feb	2007
Latvia			14 Apr	1992 a
Lebanon			3 Nov	1972 a
Lesotho			9 Sep	1992 a
Liberia	18 Apr	1967	22 Sep	2004
Libya			15 May	1970 a
Liechtenstein			10 Dec	1998 a
Lithuania			20 Nov	1991 a
Luxembourg	26 Nov	1974	18 Aug	1983
Madagascar	14 Apr	1970	22 Sep	1971
Malawi			22 Dec	1993 a
Maldives			19 Sep	2006 a
Mali			16 Jul	1974 a
Malta	22 Oct	1968	13 Sep	1990
Marshall Islands			12 Mar	2018 a
Mauritania			17 Nov	2004 a
Mauritius			12 Dec	1973 a
Mexico			23 Mar	1981 a
Monaco	26 Jun	1997	28 Aug	1997
Mongolia	5 Jun	1968	18 Nov	1974
Montenegro[11]			23 Oct	2006 d
Morocco	19 Jan	1977	3 May	1979
Myanmar	16 Jul	2015	6 Oct	2017
Namibia			28 Nov	1994 a
Nepal			14 May	1991 a
Netherlands (Kingdom of the)[12]	25 Jun	1969	11 Dec	1978
New Zealand[13]	12 Nov	1968	28 Dec	1978
Nicaragua			12 Mar	1980 a
Niger			7 Mar	1986 a
Nigeria			29 Jul	1993 a
North Macedonia[3]			18 Jan	1994 d
Norway	20 Mar	1968	13 Sep	1972
Oman			9 Jun	2020 a
Pakistan	3 Nov	2004	17 Apr	2008
Palau	20 Sep	2011		
Panama	27 Jul	1976	8 Mar	1977
Papua New Guinea			21 Jul	2008 a
Paraguay			10 Jun	1992 a
Peru	11 Aug	1977	28 Apr	1978
Philippines	19 Dec	1966	7 Jun	1974
Poland	2 Mar	1967	18 Mar	1977
Portugal[6]	7 Oct	1976	31 Jul	1978
Qatar			21 May	2018 a
Republic of Korea			10 Apr	1990 a
Republic of Moldova			26 Jan	1993 a
Romania	27 Jun	1968	9 Dec	1974
Russian Federation	18 Mar	1968	16 Oct	1973
Rwanda			16 Apr	1975 a
San Marino			18 Oct	1985 a
Sao Tome and Principe	31 Oct	1995	10 Jan	2017
Senegal	6 Jul	1970	13 Feb	1978
Serbia[3]			12 Mar	2001 d
Seychelles			5 May	1992 a
Sierra Leone			23 Aug	1996 a

Participant[2]	Signature		Ratification, Accession(a), Succession(d)	
Slovakia[9]			28 May	1993 d
Slovenia[3]			6 Jul	1992 d
Solomon Islands[14]			17 Mar	1982 d
Somalia			24 Jan	1990 a
South Africa	3 Oct	1994	12 Jan	2015
South Sudan			5 Feb	2024 a
Spain	28 Sep	1976	27 Apr	1977
Sri Lanka			11 Jun	1980 a
St. Vincent and the Grenadines			9 Nov	1981 a
State of Palestine			2 Apr	2014 a
Sudan			18 Mar	1986 a
Suriname			28 Dec	1976 a
Sweden	29 Sep	1967	6 Dec	1971
Switzerland			18 Jun	1992 a
Syrian Arab Republic			21 Apr	1969 a
Tajikistan			4 Jan	1999 a
Thailand			5 Sep	1999 a
Timor-Leste			16 Apr	2003 a
Togo			24 May	1984 a
Trinidad and Tobago			8 Dec	1978 a
Tunisia	30 Apr	1968	18 Mar	1969
Türkiye	15 Aug	2000	23 Sep	2003
Turkmenistan			1 May	1997 a
Uganda			21 Jan	1987 a
Ukraine	20 Mar	1968	12 Nov	1973
United Kingdom of Great Britain and Northern Ireland[8,15]	16 Sep	1968	20 May	1976
United Republic of Tanzania			11 Jun	1976 a
United States of America	5 Oct	1977		
Uruguay	21 Feb	1967	1 Apr	1970
Uzbekistan			28 Sep	1995 a
Venezuela (Bolivarian Republic of)	24 Jun	1969	10 May	1978
Viet Nam			24 Sep	1982 a
Yemen[16]			9 Feb	1987 a
Zambia			10 Apr	1984 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.)

AFGHANISTAN

The presiding body of the Revolutionary Council of the Democratic Republic of Afghanistan declares that the provisions of paragraphs 1 and 3 of article 48 of the International Covenant on Civil and Political Rights and provisions of paragraphs 1 and 3 of article 26 of the International Covenant on Economic, Social and Cultural Rights, according to which some countries cannot join the aforesaid Covenants, contradicts the International character of the aforesaid Treaties. Therefore, according to the equal rights of all States to sovereignty, both Covenants should be left open for the purpose of the participation of all States.

ALGERIA[17]

1. The Algerian Government interprets article 1, which is common to the two Covenants, as in no case impairing the inalienable right of all peoples to self-determination and to control over their natural wealth and resources.

It further considers that the maintenance of the State of dependence of certain territories referred to in article 1, paragraph 3, of the two Covenants and in article 14 of the Covenant on Economic, Social and Cultural Rights is contrary to the purposes and principles of the United Nations, to the Charter of the Organization and to the Declaration on the Granting of Independence to Colonial Countries and Peoples [General Assembly resolution 1514 (XV)].

2. The Algerian Government interprets the provisions of article 8 of the Covenant on Economic, Social and Cultural Rights and article 22 of the Covenant on Civil and Political Rights as making the law the framework for action by the State with respect to the organization and exercise of the right to organize.

3. The Algerian Government considers that the provisions of article 13, paragraphs 3 and 4, of the Covenant on Economic, Social and Cultural Rights can in no case impair its right freely to organize its educational system.

4. The Algerian Government interprets the provisions of article 23, paragraph 4, of the Covenant on Civil and Political Rights regarding the rights and responsibilities of spouses as to marriage, during marriage and at its dissolution as in no way impairing the essential foundations of the Algerian legal system.

BAHAMAS

"The Government of the Bahamas interprets non-discrimination as to national origin as not necessarily implying an obligation on States automatically to guarantee to foreigners the same rights as to their nationals. The term should be understood to refer to the elimination of any arbitrary behavior but not of differences in treatment based on objective and reasonable considerations, in conformity with principles prevailing in democratic societies."

BAHRAIN

The obligation of the Kingdom of Bahrain to implement article 8, paragraph 1 (d), of the Covenant shall not prejudice its right to prohibit strikes at essential utilities.

BANGLADESH[18]

It is the understanding of the Government of the People's Republic of Bangladesh that the words "the right of self-determination of Peoples" appearing in this article apply in the historical context of colonial rule, administration, foreign domination, occupation and similar situations.

The Government of the People's Republic of Bangladesh will implement articles 2 and 3 in so far as they relate to equality between man and woman, in accordance with the relevant provisions of its Constitution and in particular, in respect to certain aspects of economic rights viz. law of inheritance.

The Government of the People's Republic of Bangladesh will apply articles 7 and 8 under the conditions and in conformity with the procedures established in the Constitution and the relevant legislation of Bangladesh.

While the Government of the People's Republic of Bangladesh accepts the provisions embodied in articles 10 and 13 of the Covenant in principle, it will implement the said provisions in a progressive manner, in keeping with the existing economic conditions and the development plans of the country."

BARBADOS

"The Government of Barbados states that it reserves the right to postpone-

"(a) The application of sub-paragraph (a) (1) of article 7 of the Covenant in so far as it concerns the provision of equal pay to men and women for equal work;

"(b) The application of article 10 (2) in so far as it relates to the special protection to be accorded mothers during a reasonable period during and after childbirth; and

"(c) The application of article 13 (2) (a) of the Covenant, in so far as it relates to primary education; since, while the Barbados Government fully accepts the principles embodied in the same articles and undertakes to take the necessary steps to apply them in their entirety, the problems of implementation are such that full application of the principles in question cannot be guaranteed at this stage."

BELARUS[19]

BELGIUM

1. With respect to article 2, paragraph 2, the Belgian Government interprets non-discrimination as to national origin as not necessarily implying an obligation on States automatically to guarantee to foreigners the same rights as to their nationals. The term should be understood to refer to the elimination of any arbitrary behaviour but not of differences in treatment based on objective and reasonable considerations, in conformity with the principles prevailing in democratic societies.

2. With respect to article 2, paragraph 3, the Belgian Government understands that this provision cannot infringe the principle of fair compensation in the event of expropriation or nationalization.

BULGARIA

"The People's Republic of Bulgaria deems it necessary to underline that the provisions of article 48, paragraphs 1 and 3, of the International Covenant on Civil and Political Rights, and article 26, paragraphs 1 and 3, of the International Covenant on Economic, Social and Cultural Rights, under which a number of States are deprived of the opportunity to become parties to the Covenants, are of a discriminatory nature. These provisions are inconsistent with the very nature of the Covenants, which are universal in character and should be open for accession by all States. In accordance with the principle of sovereign equality, no State has the right to bar other States from becoming parties to a covenant of this kind."

CHINA

The signature that the Taiwan authorities affixed, by usurping the name of "China", to the [said Covenant] on 5 October 1967, is illegal and null and void.

In accordance with the Decision made by the Standing Committee of the Ninth National People's Congress of the People's Republic of China at its Twentieth Session, the President of the People's Republic of China hereby ratifies *The International Covenant on Economic, Social and Cultural Rights* , which was signed by Mr. Qin Huasun on behalf of the People's Republic of China on 27 October 1997, and declares the following:

1. The application of Article 8.1 (a) of the Covenant to the People's Republic of China shall be consistent with the relevant provisions of the *Constitution of the People's Republic of China, Trade Union Law of the People's Republic of China* and *Labor Law of the People's Republic of China* ;

2. In accordance with the official notes addressed to the Secretary-General of the United Nations by the Permanent Representative of the People's Republic of China to the United Nations on 20 June 1997 and 2 December 1999 respectively, the *International Covenant on Economic, Social and Cultural Rights* shall be applicable to the Hong Kong Special Administrative Region of the People's Republic of China and the Macao Special Administrative Region of the People's Republic of China and shall, pursuant to the provisions of the *Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China* and *the Basic Law of the Macao Special Administrative Region of the People's Republic of China* , be implemented through the respective laws of the two special administrative regions.

CONGO[20]

CUBA

Declaration:

The Republic of Cuba hereby declares that it was the Revolution that enabled its people to enjoy the rights set out in the International Covenant on Economic, Social and Cultural Rights.

The economic, commercial and financial embargo imposed by the United States of America and its policy of hostility and aggression against Cuba constitute the most serious obstacle to the Cuban people's enjoyment of the rights set out in the Covenant.

The rights protected under this Covenant are enshrined in the Constitution of the Republic and in national legislation.

The State's policies and programmes guarantee the effective exercise and protection of these rights for all Cubans.

With respect to the scope and implementation of some of the provisions of this international instrument, Cuba will make such reservations or interpretative declarations as it may deem appropriate.

CZECH REPUBLIC[9]

DENMARK[21]

"The Government of Denmark cannot, for the time being, undertake to comply entirely with the provisions of article 7 (d) on remuneration for public holidays."

EGYPT

... Taking into consideration the provisions of the Islamic Sharia and the fact that they do not conflict with the text annexed to the instrument, we accept, support and ratifiy it ... .

FRANCE

(1) The Government of the Republic considers that, in accordance with Article 103 of the Charter of the United Nations, in case of conflict between its obligations under the Covenant and its obligations under the Charter (especially Articles 1 and 2 thereof), its obligations under the Charter will prevail.

(2) The Government of the Republic declares that articles 6, 9, 11 and 13 are not to be interpreted as derogating from provisions governing the access of aliens to employment or as establishing residence requirements for the allocation of certain social benefits.

(3) The Government of the Republic declares that it will implement the provisions of article 8 in respect of the right to strike in conformity with article 6, paragraph 4, of the European Social Charter according to the interpretation thereof given in the annex to that Charter.

GUINEA

In accordance with the principle whereby all States whose policies are guided by the purposes and principles of the Charter of the United Nations are entitled to become parties to covenants affecting the interests of the international community, the Government of the Republic of Guinea considers that the provisions of article 26, paragraph 1, of the International Covenant on Economic, Social and Cultural Rights are contrary to the principle of the universality of international treaties and the democratization of international relations.

The Government of the Republic of Guinea likewise considers that article 1, paragraph 3, and the provisions of article 14 of that instrument are contrary to the provisions of the Charter of the United Nations, in general, and United Nations resolutions on the granting of independence to colonial countries and peoples, in particular.

The above provisions are contrary to the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States contained in General Assembly resolution 2625 (XXV), pursuant to which every State has the duty to promote realization of the principle of equal rights and self-determination of peoples in order to put an end to colonialism.

HUNGARY

"The Government of the Hungarian People's Republic declares that paragraph 1 of article 26 of the International Covenant on Economic, Social and Cultural Rights and paragraph 1 of article 48 of the International Covenant on Civil and Political Rights according to which certain States may not become signatories to the said Covenants are of a discriminatory nature and are contrary to the basic principle of international law that all States are entitled to become signatories to general multilateral treaties. These discriminatory provisions are incompatible with the objectives and purposes of the Covenants."

"The Presidential Council of the Hungarian People's Republic declares that the provisions of article 48, paragraphs 1 and 3, of [...] the International Covenant on Civil and Political Rights, and article 26, paragraphs 1 and 3, of the International Covenant on Economic, Social and Cultural Rights are inconsistent with the universal character of the Covenants. It follows from the principle of sovereign equality of States that the Covenants should be open for participation by all States without any discrimination or limitation."

INDIA

"I. With reference to article 1 of the International Covenant on Economic, Social and Cultural Rights and article 1 of the International Covenant on Civil and Political Rights, the Government of the Republic of India declares that the words `the right of self-determination' appearing in [this article] apply only to the peoples under foreign domination and that these words do not apply to sovereign independent States or to a section of a people or nation--which is the essence of national integrity.

"II. With reference to article 9 of the International Covenant on Civil and Political Rights, the Government of the Republic of India takes the position that the provisions of the article shall be so applied as to be in consonance with the provisions of clauses (3) to (7) of article 22 of the Constitution of India. Further under the Indian Legal System, there is no enforceable right to compensation for persons claiming to be victims of unlawful arrest or detention against the State.

"III. With respect to article 13 of the International Covenant on Civil and Political Rights, the Government of the Republic of India reserves its right to apply its law relating to foreigners.

"IV. With reference to articles 4 and 8 of the International Covenant on Economic, Social and Cultural Rights, and articles 12, 19 (3), 21 and 22 of the International Covenant on Civil and Political Rights the Government of the Republic of India declares that the provisions of the said [article] shall be so applied as to be in conformity with the provisions of article 19 of the Constitution of India.

"V. With reference to article 7 (c) of the International Covenant on Economic, Social and Cultural Rights, the Government of the Republic of India declares that the provisions of the said article shall be so applied as to be in conformity with the provisions of article 16(4) of the Constitution of India."

INDONESIA

"With reference to Article 1 of the International Covenant on Economic, Social and Cultural Rights, the Government of [the] Republic of Indonesia declares that, consistent with the Declaration on the Granting of Independence to Colonial Countries and Peoples, and the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States, and the relevant paragraph of the Vienna Declaration and Program of Action of 1993, the words "the right of self-determination" appearing in this article do not apply to a section of people within a sovereign independent state and can not be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states."

IRAQ[22]

"The entry of the Republic of Iraq as a party to the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights shall in no way signify recognition of Israel nor shall it entail any obligation towards Israel under the said two Covenants."

"The entry of the Republic of Iraq as a party to the above two Covenants shall not constitute entry by it as a party to the Optional Protocol to the International Covenant on Civil and Political Rights."

"Ratification by Iraq ... shall in no way signify recognition of Israel nor shall it be conducive to entry

with her into such dealings as are regulated by the said [Covenant]."

IRELAND

"Article 2, paragraph 2

In the context of Government policy to foster, promote and encourage the use of the Irish language by all appropriate means, Ireland reserves the right to require, or give favourable consideration to, a knowledge of the Irish language for certain occupations.

Ireland recognises the inalienable right and duty of parents to provide for the education of children, and, while recognising the State's obligations to provide for free primary education and requiring that children receive a certain minimum education, nevertheless reserves the right to allow parents to provide for the education of their children in their homes provided that these minimum standards are observed."

JAPAN[23]

"1. In applying the provisions of paragraph (d) of article 7 of the International Covenant on Economic, Social and Cultural Rights, Japan reserves the right not be bound by 'remuneration for public holidays' referred to in the said provisions.

"2. Japan reserves the right not to be bound by the provisions of sub-paragraph (d) of paragraph 1 of article 8 of the International Covenant on Economic, Social and Cultural Rights, except in relation to the sectors in which the right referred to in the said provisions is accorded in accordance with the laws and regulations of Japan at the time of ratification of the Covenant by the Government of Japan.

[...]

"4. Recalling the position taken by the Government of Japan, when ratifying the Convention (No. 87) concerning Freedom of Association and Protection of the Right to Organise, that `the police' referred to in article 9 of the said Convention be interpreted to include the fire service of Japan, the Government of Japan declares that `members of the police' referred to in paragraph 2 of article 8 of the International Covenant on Economic, Social and Cultural Rights as well as in paragraph 2 of article 22 of the International Covenant on Civil and Political Rights be interpreted to include fire service personnel of Japan."

KENYA

"While the Kenya Government recognizes and endorses the principles laid down in paragraph 2 of article 10 of the Covenant, the present circumstances obtaining in Kenya do not render necessary or expedient the imposition of those principles by legislation."

KUWAIT

Although the Government of Kuwait endorses the worthy principles embodied in article 2, paragraph 2, and article 3 as consistent with the provisions of the Kuwait Constitution in general and of its article 29 in particular, it declares that the rights to which the articles refer must be exercised within the limits set by Kuwaiti law.

The Government of Kuwait declares that while Kuwaiti legislation safeguards the rights of all Kuwaiti and non-Kuwaiti workers, social security provisions apply only to Kuwaitis.

The Government of Kuwait reserves the right not to apply the provisions of article 8, paragraph 1 (d).

LIBYA[22]

"The acceptance and the accession to this Covenant by the Libyan Arab Republic shall in no way signify a recognition of Israel or be conducive to entry by the Libyan Arab Republic into such dealings with Israel as are regulated by the Covenant."

MADAGASCAR

The Government of Madagascar states that it reserves the right to postpone the application of article 13, paragraph 2, of the Covenant, more particularly in so far as relates to primary education, since, while the Malagasy Government fully accepts the principles embodied in the said paragraph and undertakes to take the necessary steps to apply them in their entirety at the earliest possible date, the problems of implementation, and particularly the financial implications, are such that full application of the principles in question cannot be guaranteed at this stage.

MALTA[24]

"Article 13 - The Government of Malta declares that it is in favour of upholding the principle affirmed in the words" and to ensure the religious and moral education of their children in conformity with their own convictions". However, having regard to the fact that the population of Malta is overwhelmingly Roman Catholic, it is difficult also in view of limited financial and human resources, to provide such education in accordance with a particular religious or moral belief in cases of small groups, which cases are very exceptional in Malta."

MEXICO

The Government of Mexico accedes to the International Covenant on Economic, Social and Cultural Rights with the understanding that article 8 of the Covenant shall be applied in the Mexican Republic under the conditions and in conformity with the procedure established in the applicable provisions of the Political Constitution of the United Mexican States and the relevant implementing legislation.

MONACO

The Princely Government declares that it interprets the principle of non-discrimination on the grounds of national origin, embodied in article 2, paragraph 2, as not necessarily implying an automatic obligation on the part of States to guarantee foreigners the same rights as their nationals.

The Princely Government declares that articles 6, 9, 11 and 13 should not be constituting an impediment to provisions governing access to work by foreigners or fixing conditions of residence for the granting of certain social benefits.

The Princely Government declares that it considers article 8, paragraph 1, subparagraphs (a), (b) and (c) on the exercise of trade union rights to be compatible with the appropriate legislative provisions regarding the formalities, conditions and procedures designed to ensure effective trade union representation and to promote harmonious labour relations.

The Princely Government declares that in implementing the provisions of article 8 relating to the exercise of the right to strike, it will take into account the requirements, conditions, limitations and restrictions which are prescribed by law and which are necessary in a democratic society in order to guarantee the rights and freedoms of others or to protect public order (*ordre public*), national security, public health or morals.

Article 8, paragraph 2, should be interpreted as applying to the members of the police force and agents of the State, the Commune and public enterprises.

Mongolia

The Mongolian People's Republic declares that the provisions of paragraph 1 of article 26 of the International Covenant on Economic, Social and Cultural Rights and of paragraph 1 of article 48 of the International Covenant on Civil and Political Rights, under which a number of States cannot become parties to these Covenants, are of a discriminatory nature and considers that the Covenants, in accordance with the principle of sovereign equality of States, should be open for participation by all States concerned without any discrimination or limitation.

Myanmar

"With reference to article 1 of the International Covenant on Economic, Social and Cultural Rights, the Government of the Republic of the Union of Myanmar declares that, in consistence with the Vienna Declaration and Programme of Action of 1993, the term "the right of self-determination" appearing in this article does not apply to any section of people within a sovereign independent state and cannot be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of a sovereign and independent state. In addition, the term shall not be applied to undermine Section 10 of the Constitution of the Republic of the Union of Myanmar, 2008."

Netherlands (Kingdom of the)[25]

New Zealand[26]

"The Government of New Zealand reserves the right not [to] apply article 8 to the extent that existing legislative measures, enacted to ensure effective trade union representation and encourage orderly industrial relations, may not be fully compatible with that article.

...

Norway

Subject to reservations to article 8, paragraph 1 (d) "to the effect that the current Norwegian practice of referring labour conflicts to the State Wages Board (a permanent tripartite arbitral commission in matters of wages) by Act of Parliament for the particular conflict, shall not be considered incompatible with the right to strike, this right being fully recognised in Norway."

Oman

… [the Government of Oman makes] a reservation in respect of article 8, paragraph 1,

subparagraphs (a) and (d) of that Covenant, regarding the right to form trade unions and the right to

strike, in so far as the employees of government units are concerned.

Pakistan[27,28,29]

"Pakistan, with a view to achieving progressively the full realization of the rights recognized in the present Covenant, shall use all appropriate means to the maximum of its available resources."

Qatar[30]

The State of Qatar does not consider itself bound by the provisions of Article 3 of the International Covenant on Economic, Social and Cultural Rights, for they contravene the Islamic Sharia with regard to questions of inheritance and birth.

The State of Qatar shall interpret that what is meant by "trade unions" and their related issues stated in Article 8 of the International Covenant on Economic, Social and Cultural Right[s], is in line with the provisions of the Labor Law and national legislation. The State of Qatar reserves the right to implement that article in accordance with such understanding.

Romania

The Government of the Socialist Republic of Romania declares that the provisions of article 26, paragraph 1, of the International Covenant on Economic, Social and Cultural Rights are at variance with the principle that all States have the right to become parties to multilateral treaties governing matters of general interest.

(a) The State Council of the Socialist Republic of Romania considers that the provisions of article 26 (1) of the International Covenant on Economic, Social and Cultural Rights are inconsistent with the principle that multilateral international treaties whose purposes concern the international community as a whole must be open to universal participation.

(b) The State Council of the Socialist Republic of Romania considers that the maintenance in a state of dependence of certain territories referred to in articles 1 (3) and 14 of the International Covenant on Economic, Social and Cultural Rights is inconsistent with the Charter of the United Nations and the instruments adopted by the Organization on the granting of independence to colonial countries and peoples, including the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, adopted unanimously by the United Nations General Assembly in its resolution 2625 (XXV) of 1970, which solemnly proclaims the duty of States to promote the realization of the principle of equal rights and self-determination of peoples in order to bring a speedy end to colonialism.

Russian Federation

The Union of Soviet Socialist Republics declares that the provisions of paragraph 1 of article 26 of the International Covenant on Economic, Social and Cultural Rights and of paragraph 1 of article 48 of the International Covenant on Civil and Political Rights, under which a number of States cannot become parties to these Covenants, are of a discriminatory nature and considers that the Covenants, in accordance with the principle of sovereign equality of States, should be open for participation by all States concerned without any discrimination or limitation.

Rwanda[31]

Slovakia[9]

South Africa

"The Government of the Republic of South Africa will give progressive effect to the right to education, as provided for in Article 13 (2) (a) and Article 14, within the framework of its National Education Policy and available resources."

Sweden

Sweden enters a reservation in connexion with article 7 (d) of the Covenant in the matter of the right to remuneration for public holidays.

Syrian Arab Republic[22]

1. The accession of the Syrian Arab Republic to these two Covenants shall in no way signify recognition of Israel or entry into a relationship with it regarding any matter regulated by the said two Covenants.

2. The Syrian Arab Republic considers that paragraph 1 of article 26 of the Covenant on Economic,

Social and Cultural Rights and paragraph 1 of article 48 of the Covenant on Civil and Political Rights are incompatible with the purposes and objectives of the said Covenants, inasmuch as they do not allow all States, without distinction or discrimination, the opportunity to become parties to the said Covenants.

THAILAND

"The Government of the Kingdom of Thailand declares that the term "self-determination"as appears in Article 1 Paragraph 1 of the Covenant shall be interpreted as being compatible with that expressed in the Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights on 25 June 1993."

TRINIDAD AND TOBAGO

"The Government of Trinidad and Tobago reserves the right to impose lawful and or reasonable restrictions on the exercise of the aforementioned rights by personnel engaged in essential services under the Industrial Relations Act or under any Statute replacing same which has been passed in accordance with the provisions of the Trinidad and Tobago Constitution.

TÜRKIYE

The Republic of Turkey declares that; it will implement its obligations under the Covenant in accordance to the obligations under the Charter of the United Nations (especially Article 1 and 2 thereof).

The Republic of Turkey declares that it will implement the provisions of this Covenant only to the States 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 Repubic of Turkey are applied.

The Republic of Turkey reserves the right to interpret and apply the provisions of the paragraph (3) and (4) of the Article 13 of the Covenant on Economic, Social and Cultural Rights in accordance to the provisions under the Article 3, 14 and 42 of the Constitution of the Republic of Turkey.

UKRAINE

The Ukrainian Soviet Socialist Republic declares that the provisions of paragraph 1 of article 26 of the International Covenant on Economic, Social and Cultural Rights and of paragraph 1 of article 48 of the International Covenant on Civil and Political Rights, under which a number of States cannot become parties to these Covenants, are of a discriminatory nature and considers that the Covenants, in accordance with the principle of sovereign equality of States, should be open for participation by all States concerned without any discrimination or limitation.

UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

"First, the Government of the United Kingdom declare their understanding that, by virtue of article 103 of the Charter of the United Nations, in the event of any conflict between their obligations under article 1 of the Covenant and their obligations under the Charter (in particular, under articles 1, 2 and 73 thereof) their obligations under the Charter shall prevail.

"Secondly, the Government of the United Kingdom declare that they must reserve the right to postpone the application of sub-paragraph (a) (i) of article 7 of the Covenant in so far as it concerns the provision of equal pay to men and women for equal work, since, while they fully accept this principle and are pledged to work towards its complete application at the earliest possible time, the problems of implementation are such that complete application cannot be guaranteed at present.

"Thirdly, the Government of the United Kingdom declare that, in relation to article 8 of the Covenant, they must reserve the right not to apply sub-paragraph (b) of paragraph 1 in Hong Kong, in so far as it may involve the right of trade unions not engaged in the same trade or industry to establish federations or confederations.

"Lastly, the Government of the United Kingdom declare that the provisions of the Covenant shall not apply to Southern Rhodesia unless and until they inform the Secretary-General of the United Nations that they are in a position to ensure that the obligations imposed by the Covenant in respect of that territory can be fully implemented."

"Firstly, the Government of the United Kingdom maintain their declaration in respect of article 1 made at the time of signature of the Covenant.

"The Government of the United Kingdom declare that for the purposes of article 2 (3) the British Virgin Islands, the Cayman Islands, the Gilbert Islands, the Pitcairn Islands Group, St. Helena and Dependencies, the Turks and Caicos Islands and Tuvalu are deloping countries.

"The Government of the United Kingdom reserve the right to interpret article 6 as not precluding the imposition of restrictions, based on place of birth or residence qualifications, on the taking of employment in any particular region or territory for the purpose of safeguarding the employment opportunities of workers in that region or territory.

"The Government of the United Kingdom reserve the right to postpone the application of sub-paragraph (i) of paragraph (a) of article 7, in so far as it concerns the provision of equal pay to men and women for equal work in the private sector in Jersey, Guernsey, the Isle of Man, Bermuda, Hong Kong and the Solomon Islands.

"The Government of the United Kingdom reserve the right not to apply sub-paragraph 1(b) of article 8 in Hong Kong.

"The Government of the United Kingdom while recognising the right of everyone to social security in accordance with article 9 reserve the right to postpone implementation of the right in the Cayman Islands and the Falkland Islands because of shortage of resources in these territories.

"The Government of the United Kingdom reserve the right to postpone the application of paragraph 1 of article 10 in regard to a small number of customary marriages in the Solomon Islands and the application of paragraph 2 of article 10 in so far as it concerns paid maternity leave in Bermuda and the Falkland Islands.

"The Government of the United Kingdom maintain the right to postpone the application of sub-paragraph (a) of paragraph 2 of article 13, and article 14, in so far as they requirecompulsory primary education, in the Gilbert Islands, the Solomon Islands and Tuvalu.

"Lastly the Government of the United Kingdom declare that the provisions of the Covenant shall not apply to Southern Rhodesia unless and until they inform the Secretary-General of the United Nations that they are in a position to ensure that the obligations imposed by the Covenant in respect of that territory can be fully implemented."

VIET NAM

That the provisions of article 48, paragraph 1, of the International Covenant on Civil and Political Rights, and article 26, paragraph 1, of the International Covenant on Economic, Social and Cultural Rights, under which a number of States are deprived of the opportunity to become parties to the Covenants, are of a discriminatory nature. The Government of the Socialist Republic of Viet Nam considers that the Covenants, in accordance with the

principle of sovereign equality of States, should be open for participation by all States without any discrimination or limitation.

Yemen[16]

The accession of the People's Democratic Republic of Yemen to this Covenant shall in no way signify recognition of Israel or serve as grounds for the establishment of relations of any sort with Israel.

Zambia

The Government of the Republic of Zambia states that it reserves the right to postpone the application of article 13 (2) (a) of the Covenant, in so far as it relates to primary education; since, while the Government of the Republic of Zambia fully accepts the principles embodied in the same article and undertakes to take the necessary steps to apply them in their entirety, the problems of implementation, and particularly the financial implications, are such that full application of the principles in question cannot be guaranteed at this stage.

Objections
(Unless otherwise indicated, the objections were made upon ratification, accession or succession.)

Austria

"The Government of Austria has carefully examined the declaration made by the Republic of the Union of Myanmar upon ratification of the International Covenant on Economic, Social and Cultural Rights of 16 December 1966. It considers this declaration to amount to a reservation of a general and indeterminate scope, as it aims at applying a provision of the Covenant only in conformity with the Constitution of Myanmar. However, the Covenant is to be applied in accordance with international law, not in accordance with the legislation of a particular state.

For this reason, Austria considers the reservation to be incompatible with the object and purpose of the Covenant and objects to it. This objection shall however not preclude the entry into force of the Covenant between the Republic of Austria and the Republic of the Union of Myanmar. The Covenant will thus become operative between the two states without Myanmar benefitting from the aforementioned reservation.

Finally, Austria wishes to point out that it does not share the narrow interpretation of the right of self-determination expressed by Myanmar, i.e. that it were excluded that this right 'apply to any section of people within a sovereign independent state'. At the same time, Austria also underlines the fundamental difference between the right of self-determination and a claim to secession, taking into account the various ways of exercising the right of self-determination including by way of autonomy within a sovereign state."

"The Government of Austria has carefully examined the reservation and statement made by the State of Qatar upon accession to the International Covenant on Economic, Social and Cultural Rights.

Austria considers the statement concerning Article 8 to amount to a reservation as it aims at applying a provision of the Covenant only in conformity with national legislation. However, the Covenant is to be applied in accordance with international law, not only in accordance with the legislation of a particular state.

By referring to its national legislation or to the Islamic sharia, Qatar's reservations to Article 3 and Article 8 of the Covenant are of a general and indeterminate scope. These reservations do not clearly define for the other States Parties the extent to which the reserving state has accepted the obligations of the Covenant. Furthermore, the reservation to Article 3 seeks to exclude, at least partly, the application of one of the most central provisions which is related to all rights set forth in the Covenant.

Austria therefore considers both reservations to be incompatible with the object and purpose of the Covenant and objects to them. This objection shall not preclude the entry into force of the Covenant between the Republic of Austria and the State of Qatar. The Covenant will thus become operative between the two states without Qatar benefitting from the aforementioned reservations."

Belgium

The Kingdom of Belgium has carefully examined the reservation and statement made by the State of Qatar upon its accession, on 21 May 2018, to the International Covenant on Economic, Social and Cultural Rights.

The reservation to article 3 and the statement concerning article 8 make the provisions of the Covenant subject to their compatibility with the Sharia or national legislation. The Kingdom of Belgium considers that this reservation and this declaration tend to limit the responsibility of the State of Qatar under the Covenant by means of a general reference to the rules of national law and Sharia. This creates uncertainty as to the extent to which the State of Qatar intends to fulfil its obligations under the Covenant and raises doubts about the State of Qatar's compliance with the object and purpose of the Covenant.

The Kingdom of Belgium recalls that under article 19 of the Vienna Convention on the law of treaties, a State cannot make a reservation incompatible with the object and purpose of a treaty. Moreover, article 27 of the Vienna Convention on the law of treaties stipulates that a party may not invoke the provisions of its national law as justifying the non-fulfilment of a treaty.

Accordingly, the Kingdom of Belgium objects to the reservation made by the State of Qatar with respect to article 3 and to its statement in respect of article 8 of the International Covenant on Economic, Social and Cultural Rights.

The Kingdom of Belgium specifies that this objection does not preclude the entry into force of the International Covenant on Economic, Social and Cultural Rights between the Kingdom of Belgium and the State of Qatar.

Canada

"The Government of Canada has carefully examined the reservation and statement made by the Government of Qatar upon ratification of the International Covenant on Economic, Social and Cultural Rights.

The Government of Canada notes that the reservation made by the Government of Qatar, addressing an essential provision of the Covenant and aiming to exclude the obligations under that provision, is incompatible with the object and purpose of the Covenant, and thus inadmissible

under article 19 (c) of the Vienna Convention on the Law of Treaties.

The Government of Canada notes that the statement made by the Government of Qatar aims at applying a provision of the Covenant only in conformity with domestic law or Islamic Sharia. However, the Covenant is to be applied in accordance with international law. The Government of Canada considers that this statement is a reservation in disguise, incompatible with the object and purpose of the Covenant, and thus inadmissible under article 19 (c) of the Vienna Convention on the Law of Treaties.

The Government of Canada considers that a reservation consisting of a general reference to national law or Islamic Sharia makes it impossible to identify the modifications to obligations under the Covenant, which it purports to introduce. With this reservation, the other States Parties do not know the extent to which Qatar has accepted the obligations to ensure the equal rights of men and women. This uncertainty is unacceptable, especially in the context of a human rights treaty.

It is in the common interest of States that treaties to which they have chosen to become Party 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 Canada therefore objects to the reservation and statement made by the Government of Qatar. This objection does not preclude the entry into force in its entirety of the Covenant between Canada and Qatar."

CYPRUS

".....the Government of the Republic of Cyprus wishes to express its objection with respect to the declarations entered by the Republic of Turkey upon ratification on 23 September 2003, of the International Covenant on Economic, Social and Cultural Rights, New York, 16 December 1966.

The Government of the Republic of Cyprus considers that the declaration relating to the implementation of the provisions of the Covenant only to the States with which the Republic of Turkey has diplomatic relations, and the declaration that the 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" amount to reservations. These reservations create uncertainty as to the States Parties in respect of which Turkey is undertaking the obligations in the Covenant, and raise doubt as to the commitment of Turkey to the object and purpose of the said Covenant.

The Government of the Republic of Cyprus objects to the said reservations entered by the Republic of Turkey and states that these reservations or the objection to them shall not preclude the entry into force of the Covenant between the Republic of Cyprus and the Republic of Turkey."

CZECH REPUBLIC

"The Government of the Czech Republic has examined the reservation and statement formulated by the State of Qatar upon its accession to the International Covenant· on Economic, Social and Cultural Rights.

The Government of the Czech Republic is of the view that both the reservation formulated by the State of Qatar with respect to Article 3 of the Covenant and the statement with respect to Article 8 of the Covenant amount to reservations of general and vague nature, since they make the application of specific provisions of the Covenant subject to the Islamic Sharia and national law and their character and scope cannot be properly assessed.

The Government of the Czech Republic wishes to recall that the reservations may not be general or vague and that the Covenant is to be applied and interpreted in accordance with international law.

The Government of the Czech Republic therefore considers the aforementioned reservations to be incompatible with the object and purpose of the Covenant and objects to them. This objection shall not preclude the entry into force of the Covenant between the Czech Republic and the State of Qatar, without the State of Qatar benefitting from the reservations."

DENMARK

"The Government of Denmark has examined the declaration made by the Islamic Republic of Pakistan upon [signing] the 1966 International Covenant on Economic, Social and Cultural Rights.

The application of the provisions of the said Covenant has been made subject to the provisions of the constitution of the Islamic Republic of Pakistan. This general formulation makes it unclear to what extent the Islamic Republic of Pakistan considers itself bound by the obligations of the Covenant and therefore raises doubt as to the commitment of the Islamic Republic of Pakistan to the object and purpose of the Covenant.

The Government of Denmark considers that the declaration made by the Islamic Republic of Pakistan to the international Covenant on Economic, Social and Cultural Rights in substance constitutes a reservation and that this reservation is incompatible with the object and purpose of the Covenant.

For the above-mentioned reasons, the Government of Denmark objects to this declaration made by the Islamic Republic of Pakistan. This objection does not preclude the entry into force of the Covenant between the Islamic Republic of Pakistan and Denmark without Pakistan benefiting from her declaration."

ESTONIA

"The Government of Estonia has carefully examined the reservation made by the State of Qatar to Article 3 and the statement concerning Article 8 of the International Covenant on Economic, Social and Cultural Rights.

Estonia considers that the reservation as well as the statement make the application of these provisions of the Covenant subject to the Islamic Sharia or national legislation. The statement concerning Article 8 is thus of its nature also a reservation. Estonia is of the opinion that by making Article 3 and Article 8 of the Covenant subject to the Islamic Sharia or national law, the State of Qatar has submitted reservations which raise doubts concerning the extent to which it intends to fulfil its obligations under the Covenant. Thus, Estonia considers the reservation and the statement to be incompatible with the object and purpose of the Covenant and objects to them.

This objection shall not preclude the entry into force of the Covenant between the Republic of Estonia and the State of Qatar."

FINLAND

"The Government of Finland notes that according to the interpretative declaration regarding article 2, paragraph 2, and article 3 the application of these articles of the Covenant is in a general way subjected to national law. The Government of Finland considers this interpretative declaration as a reservation of a general kind. The Government of Finland is of the view that such a general reservation raises doubts as to the commitment of Kuwait to the object and purpose of the Covenant and would recall that a reservation incompatible with the object and purpose of the Covenant shall not be permitted.

The Government of Finland also considers the interpretative declaration to article 9 as a reservation and regards this reservation as well as the reservation to article 8, paragraph 1(d), as problematic in view of the object and purpose of the Covenant.

It is in the common interests 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 the Government of Kuwait, which do not clearly specify the extent of the derogation from the provisions of the Covenant, contribute to undermining the basis of international treaty law.

The Government of Finland therefore objects to the aforesaid reservations made by the Government of Kuwait to the [said Covenant].

This objection does not preclude the entry into force of the Covenant between Kuwait and Finland."

"The Government of Finland has examined the contents of the declarations made by the Government of Bangladesh to Articles 2, 3, 7, 8, 10 and 13 and notes that the declarations constitute reservations as they seem to modify the obligations of Bangladesh under the said articles.

A reservation which consists of a general reference to national law without specifying its contents does not clearly define for the other Parties of the Convention the extent to which the reserving state commits itself to the Convention and therefore may raise doubts as to the commitment of the reserving state to fulfil its obligations under the Convention. Such a reservation is also, in the view of the Government of Finland, subject to the general principle of treaty interpretation according to which a party may not invoke the provisions of its domestic law as justification for a failure to perform its treaty obligations.

Therefore the Government of Finland objects to the aforesaid reservations made by the Government of Bangladesh. This objection does not preclude the entry into force of the Convention between Bangladesh and Finland. The Convention will thus become operative between the two States without Bangladesh benefitting from these reservations".

"The Government of Finland has examined the declarations and reservation made by the Republic of Turkey to the International Covenant on Economic, Social and Cultural Rights. The Government of Finland notes that the Republic of Turkey reserves the right to interpret and apply the provisions of the paragraphs 3 and 4 of Article 13 of the Covenant in accordance with the provisions under articles 3, 14 and 42 of the Constitution of the Republic of Turkey.

The Government of Finland emphasises the great importance of the rights provided for in paragraphs 3 and 4 of Article 13 of the International Covenant on Economic, Social and Cultural Rights. The reference to certain proisions of the Constitution of the Republic of Turkey is of a general nature and does not clearly specify the content of the reservation. The Government of Finland therefore wishes to declare that it assumes that the Government of the Republic of Turkey will ensure the implementation of the rights recognised in the Covenant and will do its utmost to bring its national legislation into compliance with the obligations under the Covenant with a view to withdrawing the reservation. This declaration does not preclude the entry into force of the Covenant between the Republic of Turkey and Finland."

"The Government of Finland has carefully examined the declaration made by the Government of the Islamic Republic of Pakistan regarding the International Covenant on Economic, Social and Cultural Rights. The Government of Finland takes note that the provisions of the Covenant shall, according to the Government of the Islamic Republic of Pakistan, be subject to the provisions of the constitution of the Islamic Republic of Pakistan.

The Government of Finland notes that a reservation which consists of a general reference to national law without specifying the contents does not clearly define to other Parties to the Convention the extent to which the reserving State commits itself to the Convention and creates serious doubts as to the commitment of the receiving State to fulfil its obligations under the Convention. Such reservations are, furthermore, subject to the general principle of treaty interpretation according to which a party may not invoke the provisions of its domestic law as justification for a failure to perform its treaty obligations.

The Government of Finland therefore objects to the above-mentioned declaration made by the Government of the Islamic Republic of Pakistan to the Covenant. This objection does not preclude the entry into force of the Covenant between the Islamic Republic of Pakistan and Finland. The Covenant will thus become operative between the two states without the Islamic Republic of Pakistan benefiting from its declaration."

“The Government of Finland is pleased to learn that the Republic of Myanmar has become party to the International Covenant on Economic, Social and Cultural Rights. However, the Government of Finland has carefully examined the declaration made by the Republic of the Union of Myanmar upon ratification, and is of the view that it raises certain concerns. In fact, the declaration amounts to a reservation that purports to subject the application of one of the core articles of the Covenant to the Constitution of Myanmar.

Reservation of such an indeterminate and general scope as that made by Myanmar is incompatible with the object and purpose of the Covenant and as such one that is not permitted. Therefore Finland objects to it. This objection shall not preclude the continued validity of the Covenant between the Republic of Finland and the Republic of the Union of Myanmar. The Covenant will thus continue to operate between the two states without Myanmar benefitting from the aforementioned reservation.”

“The Government of Finland is pleased to learn that the State of Qatar has become party to the International Covenant on Economic, Social and Cultural Rights. However, the Government of Finland has carefully examined the reservation to Article 3 and the statement concerning Article 8 made by the State of Qatar upon accession, and is of the view that they raise certain concerns. In fact, also the statement amounts to a reservation that purports to subject the application of one of the Covenant’s provisions to national legislation.

Both reservations make the application of these provisions of the Covenant subject to the Islamic Sharia or national legislation. Thus, the Government of Finland is of the opinion that the State of Qatar has submitted reservations which cast doubts on the commitment of Qatar to the object and purpose of the Covenant. Such reservations are, furthermore, subject to the general principle of treaty interpretation according to which a party may not invoke the provisions of its domestic law as justification for a failure to perform its treaty obligations.

The above-mentioned reservations are incompatible with the object and purpose of the Covenant and are accordingly not permitted under Article 19 sub-paragraph (c) of the Vienna Convention on the Law of Treaties. Therefore, the Government of Finland objects to these reservations. This objection shall not preclude the entry into force of the Covenant between the Republic of Finland and the State of Qatar. The Covenant will thus

enter into force between the two states without Qatar benefitting from the aforementioned reservation."

FRANCE

The Government of the Republic takes objection to the reservation entered by the Government of India to article 1 of the International Covenant on Economic, Social and Cultural Rights, as this reservation attaches conditions not provided for by the Charter of the United Nations to the exercise of the right of self-determination. The present declaration will not be deemed to be an obstacle to the entry into force of the Covenant between the French Republic and the Republic of India.

The Government of France notes that the 'declarations' made by Bangladesh in fact constitute reservations since they are aimed at precluding or modifying the legal effect of certain provisions of the treaty. With regard to the declaration concerning article 1, the reservation places on the exercise of the right of peoples to self-determination conditions not provided for in the Charter of the United Nations. The declarations concerning articles 2 and 3 and articles 7 and 8, which render the rights recognized by the Covenant in respect of individuals subordinate to domestic law, are of a general nature and undermine the objective and purpose of the treaty. In particular, the country's economic conditions and development prospects should not affect the freedom of consent of intended spouses to enter into marriage, non-discrimination for reasons of parentage or other conditions in the implementation of special measures of protection and assistance on behalf of children and young persons, or the freedom of parents or legal guardians to choose schools for their children. Economic difficulties or problems of development cannot free a State party entirely from its obligations under the Covenant. In this regard, in compliance with article 10, paragraph 3, of the Covenant, Bangladesh must adopt special measures to protect children and young persons from economic and social expltation, and the law must punish their employment in work harmful to their morals or health and should also set age limits below which the paid employment of child labour should be prohibited. Consequently, the Government of France lodges an objection to the reservations of a general scope mentioned above. This objection does not prevent the entry into force of the Covenant between Bangladesh and France.

The Government of the French Republic has examined the declaration made by the Government of the Islamic Republic of Pakistan upon signing the International Covenant on Economic, Social and Cultural Rights, adopted on 16 December 1966, according to which 'The provisions of the Covenant shall be subject to the provisions of the constitution of the Islamic Republic of Pakistan'. Such a declaration is general in scope and unclear and could render the provisions of the Covenant null and void. The Government of the French Republic considers that the said declaration constitutes a reservation which is incompatible with the object and purpose of the Covenant and it therefore objects to that declaration. This objection does not preclude the entry into force of the Covenant between France and Pakistan.

GERMANY[9]

"The Government of the Federal Republic of Germany strongly objects, ... to the declaration made by the Republic of India in respect of article 1 of the International Covenant on Economic, Social and Cultural Rights and of article 1 of the International Covenant on Civil and Political Rights.

"The right of self-determination as enshrined in the Charter of the United Nations and as embodied in the Covenants applies to all peoples and not only to those under foreign domination. All peoples, therefore, have the inalienable right freely to determine their political status and freely to pursue their economic, social and cultural development. The Federal Government cannot consider as valid any interpretation of the right of self-determination which is contrary to the clear language of the provisions in question. It moreover considers that any limitation of their applicability to all nations is incompatible with the object and purpose of the Covenants."

"The Government of the Federal Republic of Germany notes that article 2 (2) and article 3 have been made subject to the general reservation of national law. It is of the view that these general reservations may raise doubts as to the commitment of Kuwait to the object and purpose of the Covenant.

The Government of the Federal Republic of Germany regards the reservation concerning article 8 (1) (d), in which the Government of Kuwait reserves the right not to apply the right to strike expressly stated in the Covenant, as well as the interpretative declaration regarding article 9, according to which the right to social security would only apply to Kuwaitis, as being problematic in view of the object and purpose of the Covenant. It particularly feels that the declaration regarding article 9, as a result of which the many foreigners working on Kuwaiti territory would, on principle, be totally excluded from social security protection, cannot be based on article 2 (3) of the Covenant.

It is in the common interest of all parties that a treaty should be respected, as to its object and purpose, by all parties.

The Government of the Federal Republic of Germany therefore objects to the [said] general reservations and interpretative declarations.

This objection does not preclude the entry into force of the Covenant between Kuwait and the Federal Republic of Germany."

The Government of the Republic of Turkey has declared that it will implement the provisions of the Covenant only to the states with which it has diplomatic relations. Moreover, the Government of the Republic of Turkey has declared that it ratifies the Covenant exclusively with regard to the national territory where the Constitution and the legal and administrative order of the Republic of Turkey are applied. Furthermore, the Government of the Republic of Turkey has reserved the right to interpret and apply the provisions of Article 13 paragraphs (3) and (4) of the Covenant in accordance with the provisions of Articles 3, 14 and 42 of the Constitution of the Republic of Turkey.

The Government of the Federal Republic of Germany would like to recall that it is in the common interest of all states that treaties to which they have chosen to become parties are respected and applied as to their object and purpose by all parties, and that states areprepared to undertake any legislative changes necessary to comply with their obligations under these treaties. The Government of the Federal Republic of Germany is therefore concerned about declarations and reservations such as those made and expressed by the Republic of Turkey with respect to the International Covenant on Economic, Social and Cultural Rights.

However, the Government of the Federal Republic of Germany believes these declarations do not aim to limit the Covenant's scope in relation to those states with which Turkey has established bonds under the Covenant, and that they do not aim to impose any other restrictions that re not provided for by the Covenant. The Government of the Federal Republic of Germany attaches great importance to the liberties recognized in Article 13 paragraphs (3) and (4) of the Covenant. The Government of the Federal Republic of Germany understands the reservation expressed by the Government of the Republic of Turkey to mean that this Article will be interpreted and applied in such a way that protects the essence of the freedoms guaranteed therein.

"The Government of the Federal Republic of Germany has carefully examined the declaration made by the

Government of the Islamic Republic of Pakistan upon signature of the International Covenant on Economic, Social and Cultural Rights.

The Government of the Islamic Republic of Pakistan declared that it "will implement the (...) Provisions in a progressive manner, in keeping with the existing economic conditions and the development plans of the country". Since some fundamental obligations resulting from the International Covenant on Economic, Social and Cultural Rights, including in particular the principle of non-discrimination found in Article 2 (2) thereof, are not susceptible to progressive implementation and are thus to be guaranteed immediately, the declaration represents a significant qualification of Pakistan's commitment to guarantee the human rights referred to in the Covenant.

The Government of the Islamic Republic of Pakistan also declared that "the provisions of the Covenant shall, however, be subject to the provisions of the constitution of the Islamic Republic of Pakistan". The Government of the Federal Republic of Germany is of the opinion that this leaves it unclear to which extent the Islamic Republic of Pakistan considers itself bound by the obligations resulting from the Covenant.

The Government of the Federal Republic of Germany therefore regards the above-mentioned declarations as reservations and as incompatible with the object and purpose of the Covenant.

The Government of the Federal Republic of Germany therefore objects to the above-mentioned reservations made by the Government of the Islamic Republic of Pakistan to the International Covenant on Economic, Social and Cultural Rights. This objection shall not preclude the entry into force of the Covenant between the Federal Republic of Germany and the Islamic Republic of Pakistan."

The Government of the Federal Republic of Germany is of the opinion that by granting its Constitution precedence over a provision of the Covenant as well as by restricting the term self-determination contained in Article 1 of the Covenant, Myanmar has made a reservation which makes it unclear to what extent Myanmar accepts being bound by the Covenant.

If Myanmar grants its Constitution precedence then this is a reservation of general and indeterminate scope. What is important when it comes to applying the provisions of the Covenant is conformity with international law and not with the national legislation of the state which has acceded to the Covenant.

The right to self-determination anchored in the United Nations Charter and in the Covenant applies to all peoples and not only to peoples under foreign rule. All peoples therefore have the inalienable right to freely determine their political status and to freely pursue their economic, social and cultural development. The German Government cannot regard as legally valid an interpretation of the right to self-determination which is at variance with the clear meaning of the provision in question. Furthermore, it considers that any restriction of its applicability to all peoples is incompatible with the object and purpose of the Covenant.

The Government of the Federal Republic of Germany therefore objects to this reservation, which is incompatible with the object and purpose of the Covenant and thus impermissible.

This objection shall not preclude the entry into force of the Covenant between the Federal Republic of Germany and Myanmar.

The Government of the Federal Republic of Germany has carefully examined the reservation and statement made by the State of Qatar with regard to the International Covenant on Economic, Social and Cultural Rights of 16 December 1966.

Both the reservation to Article 3 and the statement concerning Article 8 make the application of these provisions of the Covenant subject to the Islamic Sharia or national legislation. The statement concerning Article 8 is thus of its nature also a reservation.

The Government of the Federal Republic of Germany is of the opinion that by making the application of Article 3 and Article 8 of the Covenant subject to the Islamic Sharia or national law, the State of Qatar has submitted reservations which raise doubts concerning the extent to which it intends to fulfil its obligations under the Covenant.

The above-mentioned reservations are incompatible with the object and purpose of the Covenant and are accordingly not permitted under Article 19 sub-paragraph (c) of the Vienna Convention on the Law of Treaties of 23 May 1969. The Federal Republic of Germany thus objects to these reservations.

This objection shall not preclude the entry into force of the Covenant between the Federal Republic of Germany and the State of Qatar.

GREECE

"The Government of Greece has examined the declarations made by the Republic of Turkey upon ratifying the International Covenant on Economic, Social and Cultural Rights.

The Republic of Turkey declares that it will implement the provisions of the Covenant only to the States with which it has diplomatic relations.

In the view of the Government of Greece, this declaration in fact amounts to a reservation. This reservation is incompatible with the principle that inter-State reciprocity has no place in the context of human rights treaties, which concern the endowment of individuals with rights. It is therefore contrary to the object and purpose of the Covenant.

The Republic of Turkey furthermore declares that the Covenant 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.

In the view of the Government of Greece, this declaration in fact amounts to a reservation. This reservation is incompatible with the obligation of a State Party to respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of such State Party. Accordingly, this reservation is contrary to the object and purpose of the Covenant.

For these reasons, the Government of Greece objects to the aforesaid reservations made by the Republic of Turkey to the International Covenant on Economic, Social and Cultural Rights.

This objection shall not preclude the entry into force of the Covenant between the Hellenic Republic and the Republic of Turkey. The Covenant, therefore, enters into force between the two States without the Republic of Turkey benefiting from these reservations."

"The Government of the Hellenic Republic has examined the reservation and the statement made by the State of Qatar upon accession to the International Covenant on Economic, Social and Cultural Rights of 16 December 1966 (hereinafter 'the Covenant').

In the above reservation, the State of Qatar states that it does not consider itself bound by the provisions of Article 3 of the Covenant 'for they contravene the Islamic Sharia with regard to questions of inheritance and birth'.

Moreover, in the statement made upon accession to the Covenant, the Government of the State of Qatar declares

that it shall implement Article 8 of the Covenant based on the understanding that 'what is meant by 'trade unions' and their related issues [...] is in line with the provisions of the Labor Law and national legislation'. However, in the view of the Government of the Hellenic Republic, this statement in fact amounts to a reservation as it limits the scope of application of Article 8 solely to the extent that it does not contravene the relevant national legislation of Qatar.

The Government of the Hellenic Republic notes that the above reservations are of a general and indeterminate scope, as they purport to subject the application of the aforementioned provisions of the Covenant to the Islamic sharia and national legislation, without, however, specifying the content thereof, and are, accordingly, contrary to the object and purpose of the Covenant, since they do not clearly define for the other States Parties the extent to which Qatar has accepted the obligations of the Covenant.

For the above reasons, the Government of the Hellenic Republic considers the aforesaid reservations of Qatar impermissible as contrary to the object and purpose of the Covenant, according to customary international law, as codified by the Vienna Convention on the Law of the Treaties.

The Government of the Hellenic Republic, therefore, objects to the abovementioned reservations made by the State of Qatar upon accession to the International Covenant on Economic, Social and Cultural Rights.

This objection shall not preclude the entry into force of the Covenant between the Hellenic Republic and the State of Qatar."

HUNGARY

"Hungary has examined the reservation and statement made by the State of Qatar upon ratification of the International Covenant on Economic, Social and Cultural Rights done in New York on 16 December 1966.

The reservation to Article 3 of the Covenant make[s] the application of this provision subject to the Islamic Sharia. The statement to Article 8 of the Covenant make[s] the application of this provision subject to the national legislation. Hungary considers the statement to Article 8 made by the State of Qatar by its nature also as a reservation.

Hungary is of the view that making the application of Article 3 of the Covenant subject to the Islamic Sharia and Article 8 of the Covenant subject to the national legislation raises doubts as to the extent of Qatar's commitment to meet its obligations under the Covenant and are incompatible with the object and purpose of the Covenant, that is to promote, protect and ensure the full and equal enjoyment of all economic, social and cultural rights by all individuals.

Hungary considers the aforementioned reservations inadmissible as they are not permitted under Article 19 sub-paragraph (c) of the Vienna Convention on the Law of Treaties, thus objects to these reservations. This objection shall not preclude the entry into force of the Covenant between Hungary and the State of Qatar. The Covenant will thus become operative between the two States without the State of Qatar benefitting from its reservations."

IRELAND

"Ireland has examined the declaration made by Myanmar to the International Covenant on Economic, Social and Cultural Rights at the time of its ratification on 6 October 2017.

Ireland is of the view that the declaration of Myanmar, purporting to subject the application of the term "the right of self-determination" to the provisions of the Constitution of the Republic of the Union of Myanmar, in substance constitutes a reservation limiting the scope of the Covenant.

Ireland considers that a reservation which consists of a general reference to the Constitution of the reserving State and which does not clearly specify the extent of the derogation from the provision of the Covenant may cast doubt on the commitment of the reserving state to fulfil its obligations under the Covenant. Ireland is furthermore of the view that such a reservation may undermine the basis of international treaty law and is incompatible with the object and purpose of the Covenant. Ireland recalls that under international treaty law a reservation incompatible with the object and purpose of the Covenant shall not be permitted.

Ireland therefore objects to the aforesaid reservation made by Myanmar to Article 1 of the International Covenant on Economic, Social and Cultural Rights.

This objection shall not preclude the entry into force of the Covenant between Ireland and Myanmar."

"Ireland welcomes the accession of Qatar to the International Covenant on Economic, Social and Cultural Rights on 21 May 2018.

Ireland has examined the reservation and statement made by Qatar to the International Covenant on Economic, Social and Cultural Rights at the time of its accession.

Ireland is of the view that the reservation by Qatar, purporting to exclude its obligations under Article 3, is contrary to the object and purpose of the Covenant.

Ireland is furthermore of the view that the statement by Qatar, purporting to subject the implementation of Article 8 to national law, in substance constitutes a reservation limiting the scope of the Covenant.

Ireland considers that such reservations, which purport to subject the reserving State's obligations under an international agreement to national law without specifying the content thereof and which do not clearly specify the extent of the derogation from the provisions of the international agreement, may cast doubt on the commitment of the reserving State to fulfil its obligations under the international agreement. Ireland is furthermore of the view that such a reservation may undermine the basis of international treaty law and is incompatible with the object and purpose of the international agreement. Ireland recalls that under international treaty law a reservation incompatible with the object and purpose of the international agreement shall not be permitted.

Ireland therefore objects to the aforesaid reservations made by Qatar to Articles 3 and 8 of the International Covenant on Economic, Social and Cultural Rights.

This objection shall not preclude the entry into force of the Covenant between Ireland and Qatar."

ITALY

"The Government of Italy considers these reservations to be contrary to the object and the purpose of this International Covenant. The Government of Italy notes that the said reservations include a reservation of a general kind in respect of the provisions on the internal law.

The Government of Italy therefore objects to the aforesaid reservations made by the Government of Kuwait to the [said Covenant].

This objection does not preclude the entry into force in its entirety of the Covenant between the State of Kuwait and the Italian Republic."

"The Government of the Italian Republic has carefully examined the reservation and statement by the State of

Qatar with regard to the International Covenant on Economic, Social and Cultural Rights of 16 December 1966.

Both the reservation to Article 3 and the statement concerning Article 8 make the application of these provisions of the Covenant subject to the Islamic Sharia or national legislation. The statement concerning Article 8 is thus of its nature also a reservation.

The Government of the Italian Republic is of the opinion that by making the application of Article 3 and Article 8 of the Covenant subject to the Islamic Sharia or national law, the State of Qatar has submitted reservations which raise doubts concerning the extent to which it intends to fulfil its obligations under the Covenant.

The above-mentioned reservations are incompatible with the object and purpose of the Covenant and are accordingly not permitted under customary international law, as codified in Article 19 sub-paragraph (c) of the Vienna Convention on the Law of Treaties of 23 May 1969. The Italian Republic thus objects to these reservations.

This objection shall not preclude the entry into force of the Covenant between the Italian Republic and the State of Qatar."

LATVIA

"The Government of the Republic of Latvia has carefully examined the declaration made by the Islamic Republic of Pakistan to the International Covenant on [Economic, Social and Cultural] Rights upon accession.

The Government of the Republic of Latvia considers that the declaration contains general reference to national law, making the provisions of International Covenant subject to the national law of the Islamic Republic of Pakistan.

Thus, the Government of the Republic of Latvia is of the opinion that the declaration is in fact a unilateral act deemed to limit the scope of application of the International Covenant and therefore, it shall be regarded as a reservation.

Moreover, the Government of the Republic of Latvia noted that the reservation does not make it clear to what extent the Islamic Republic of Pakistan considers itself bound by the provisions of the International Covenant and whether the way of implementation of the provisions of the International Covenant is in line with the object and purpose of the International Covenant.

The Government of the Republic of Latvia recalls that customary international law as codified by Vienna Convention on the Law of Treaties, and in particular Article 19 (c), sets out the reservations that are incompatible with the object and purpose of a treaty are not permissible.

The Government of the Republic of Latvia therefore objects to the aforesaid reservations made by the Islamic Republic of Pakistan to the International Covenant on Economic, Social and Cultural Rights.

However, this objection shall not preclude the entry into force of the International Covenant between the Republic of Latvia and the Islamic Republic of Pakistan. Thus, the International Covenant will become operative without the Islamic Republic of Pakistan benefiting from its reservation."

"The Government of the Republic of Latvia has carefully examined the declaration made by the Republic of the Union of Myanmar upon ratification of the International Covenant on Economic, Social and Cultural Rights.

In the view of the Government of the Republic of Latvia, this declaration amounts to a reservation. Article 1 of the Covenant forms the very basis of the Covenant and its main purpose, thus no derogations from those obligations can be made.

Moreover, a reservation which subordinates any provision of the Covenant in general to the Constitution of the Republic of the Union of Myanmar constitutes a reservation of general scope which is likely to cast doubt on the full commitment of the Republic of the Union of Myanmar to the object and purpose of the Covenant.

Reservation made by the Republic of the Union of Myanmar seeks to limit the scope of the Covenant on a unilateral basis thus the reservation is incompatible with the object and the purpose of the Covenant and therefore inadmissible under Article 19(c) of the Vienna Convention on the Law of Treaties. Therefore, the Government of the Republic of Latvia objects to this reservation.

However, this objection shall not preclude the entry into force of the Covenant between the Republic of Latvia and the Republic of the Union of Myanmar. The Covenant will thus become operative between the two States without the Republic of the Union of Myanmar benefitting from its declaration."

"The Government of the Republic of Latvia has carefully examined the reservation and the statement made by the State of Qatar upon ratification of the 1966 Covenant on Economic, Social and Cultural rights.

The Republic of Latvia considers that Article 3 of the Covenant forms the very basis of the Covenant and its main purpose, thus no derogations from those obligations can be made. In addition, the statement regarding the provisions of Article 8 of the Covenant making the application of these provisions subject to national law is in its own nature also a reservation.

The reservations made by the State of Qatar regarding Article 3 and Article 8 [exclude] the legal effect of central provision[s] of the Covenant, thus the reservations are incompatible with the object and the purpose of the Covenant and therefore inadmissible under Article 19 (c) of the 1969 Vienna Convention on the Law of Treaties.

However, this objection shall not preclude the entry into force of the Covenant between the Republic of Latvia and the State of Qatar. Thus, the Covenant will become operative between the two States without the State of Qatar benefitting from its reservations."

NETHERLANDS (KINGDOM OF THE)

"The Government of the Kingdom of the Netherlands objects to the declaration made by the Government of the Republic of India in relation to article 1 of the International Covenant on Civil and Political Rights and article 1 of the International Covenant on Economic, Social and Cultural Rights, since the right of self determination as embodied in the Covenants is conferred upon all peoples. This follows not only from the very language of article 1 common to the two Covenants but as well from the most authoritative statement of the law concerned, i.e., the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations. Any attempt to limit the scope of this right or to attach conditions not provided for in the relevant instruments would undermine the concept of self-determination itself and would thereby seriously weaken its universally acceptable character."

"In the opinion of the Government of the Kingdom of the Netherlands, the interpretative declaration concerning article 13, paragraphs 3 and 4 of the International Covenant on Economic, Social and Cultural Rights must be regarded as a reservation to the Covenant. From the text and history of the Covenant it follows that the reservation with respect to article 13, paragraphs 3 and 4 made by the Government of Algeria is incompatible with the object and purpose of the Covenant. The Government

of the Kingdom of the Netherlands therefore considers the reservation unacceptable and formally raises an objection to it.

[This objection is] not an obstacle to the entry into force of [the Covenant] between the Kingdom of the Netherlands and Algeria."

[Same objection identical in essence, mutatis mutandis, as the one made for Algeria.]

".....the statement made by the Government of the People's Republic of China to article 8.1 (a) of the International Covenant on Economic, Social and Cultural Rights.

The Government of the Kingdom of the Netherlands has examined the statement and would like to recall that, under well established international treaty law, the name 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 the Kingdom of the Netherlands considers that the statement made by the Government of the People's Republic of China to article 8.1 (a) of the International Covenant on Economic, Social and Cultural Rights in substance constitutes a reservation.

The Government of the Kingdom of the Netherlands notes that the application of Article 8.1 (a) of the Covenant is being made subject to a statement referring to the contents of national legislation. 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. Furthermore, the right to form and join a trade union of one's choice is one of the fundamental principles of the Covenant.

The Government of the Kingdom of the Netherlands therefore objects to the reservation made by the People's Republic of China to the International Covenant on Economic, Social and Cultural Rights. This objection shall not preclude the entry into force of the Covenant between the Kingdom of the Netherlands and China."

"The Government of the Kingdomof the Netherlands has examined the declaration made by the Islamic Republic of Pakistan on 3 November 2004 upon signature of the International Covenant on Economic, Social and Cultural Rights, done at New York on 16 December 1966.

The Government of the Kingdom of the Netherlands would like to recall that the status of a statement is not determined by the designation assigned to it. The application of the provisions f the International Covenant on Economic, Social and Cultural Rights has been made subject to the provisions of the constitution of the Islamic Republic of Pakistan.

This makes it unclear to what extent the Islamic Republic of Pakistan considers itself bound by the obligations of the treaty. It is of the common interest of States that all parties respect treaties to which they have chosen to become parties and that States are prepared to undertake any legislative changes necessary to comply with their obligations under the treaties. A reservation as formulated by the Islamic Republic of Pakistan is thus likely to contribute to undermining the basis of international treaty law.

The Government of the Kingdom of the Netherlands considers that the declaration made by the Islamic Republic of Pakistan to the International Covenant on Economic, Social and Cultural Rights in substance constitutes a reservation.

The Government of the Kingdom of the Netherlands therefore objects to the declaration made by the Islamic Republic of Pakistan to the International Covenant on Economic, Social and Cultural Rights.

This objection shall not preclude the entry into force of the Covenant between the Kingdom of the Netherlands and the Islamic Republic of Pakistan, without Pakistan benefiting from its declaration."

“The Government of the Kingdom of the Netherlands has carefully examined the declaration made by the Republic of the Union of Myanmar upon ratification on 6 October 2017 of the International Covenant on Economic, Social and Cultural Rights.

The Government of the Kingdom of the Netherlands considers that the declaration made by the Republic of the Union of Myanmar in substance constitutes a reservation limiting the scope of the right of self-determination of all peoples in Article 1 of the Covenant, by applying that provision only in conformity with the Constitution of Myanmar.

The Government of the Kingdom of the Netherlands considers that such a reservation, which seeks to limit the responsibilities of the reserving State under the Covenant by invoking provisions of its domestic law, is likely to deprive the provisions of the Covenant of their effect and therefore must be regarded as incompatible with the object and purpose of the Covenant.

The Government of the Kingdom of the Netherlands recalls that according to customary international law, as codified in the Vienna Convention on the Law of Treaties, reservations incompatible with the object and purpose of a treaty shall not be permitted.

The Government of the Kingdom of the Netherlands therefore objects to the reservation of the Republic of the Union of Myanmar to the Covenant. This objection shall not preclude the entry into force of the Covenant between the Kingdom of the Netherlands and the Republic of the Union of Myanmar.”

“The Government of the Kingdom of the Netherlands has carefully examined the reservation and the statement made by the State of Qatar upon accession to the International Covenant on Economic, Social and Cultural Rights, as communicated by the Secretary-General via depositary notification C.N.260.2018.TREATIES-IV.3 of 21 May 2018, and wishes to communicate the following.

The Government of the Kingdom of the Netherlands notes that Qatar does not consider itself bound by the provisions of Article 3 of the International Covenant on Economic, Social and Cultural Rights, for they contravene the Islamic Sharia with regard to questions of inheritance and birth.

Further, the Government of the Kingdom of the Netherlands considers that the statement made by the State of Qatar with respect to Article 8 of the Covenant in substance constitutes a reservation limiting the scope of the rights of trade unions in Article 8 of the Covenant, by applying that provision only in conformity with the national legislation of the State of Qatar.

The Government of the Kingdom of the Netherlands considers that such reservations, which seek to limit the responsibilities of the reserving State under the Covenant by invoking provisions of the Islamic Sharia and national legislation, are likely to deprive the provisions of the Covenant of their effect and therefore must be regarded as incompatible with the object and purpose of the Covenant.

The Government of the Kingdom of the Netherlands recalls that according to customary international law, as codified in the Vienna Convention on the Law of Treaties, reservations incompatible with the object and purpose of a treaty shall not be permitted.

The Government of the Kingdom of the Netherlands therefore objects to the reservations of the State of Qatar to the Covenant.

This objection shall not preclude the entry into force of the Covenant between the Kingdom of the Netherlands and the State of Qatar."

NORWAY

"In the view of the Government of Norway, a statement by which a State Party purports to limit its responsibilities by invoking general principles of internal law may create doubts about the commitment of the reserving State to the objective and purpose of the Convention and, moreover, contribute to undermining the basis of international treaty law. Under well-established treaty law, a State is not permitted to invoke internal law as justification for its failure to perform its treaty obligations. Furthermore, the Government of Norway finds the reservations made to article 8, paragraph 1 (d) and article 9 as being problematic in view of the object and purpose of the Covenant. For these reasons, the Government of Norway objects to the said reservations made by the Government of Kuwait.

The Government of Norway does not consider this objection to preclude the entry into force of the Covenant between the Kingdom of Norway and the State of Kuwait.

"The Government of Norway has examined the statement made by the People's Republic of China upon ratification of the International Covenant on Economic, Social and Cultural Rights.

It is the Government of Norway's position that the statement made by China in substance constitutes a reservation, and consequently can be made subject to objections.

According to the first paragraph of the statement, the application of Article 8.1(a) of the Covenant shall be consistent with relevant provisions of national legislation. This reference to national legislation, without further description of its contents, exempts the other States Parties from the possibility of assessing the intended effects of the statement. Further, the contents of the relevant provision is not only in itself of fundamental importance, as failure to implement it can also contribute to a less effective implementation of other provisions of the Covenant, such as Articles 6 and 7.

For these reasons, the Government of Norway objects to the said part of the statement made by the People's Republic of China, as it is incompatible with the object and purpose of the Covenant.

This objection does not preclude the entry into force in its entirety of the Covenant between the Kingdom of Norway and the People's Republic of China. The Covenant thus becomes operative between Norway and China without China benefiting from the reservation."

"The Government of the Kingdom of Norway have examined the Declaration made by the Government of the Islamic Republic of Pakistan on 3 November 2004 on signature of the International Covenant on Economic, Social and Cultural Rights (New York, 16 December 1966). According to the first part of the Declaration, the Government of the Islamic Republic of Pakistan "will implement the (...) provisions (embodied in the Covenant) in a progressive manner, in keeping with the existing economic conditions and the development plans of the country". Since some fundamental obligations embodied in the Covenant, including in particular the principle of non-discrimination found in Article 2 (2) thereof, are not susceptible to progressive implementation and are thus to be guaranteed immediately, the Government of the Kingdom of Norway consider that this part of the Declarationrepresents a significant qualification of Pakistan's commitment to guarantee the provisions embodied in the Covenant.

According to the second part of the Declaration, "(t)he provisions of the Covenant shall, however, be subject to the provisions of the constitution of the Islamic Republic of Pakistan. "The Goverment of the Kingdom of Norway note that a general reference to national law without specifying its contents does not clearly define for the other States Parties to the Convention the extent to which the reserving State has accepted the obligations of the Convention.

The Government of the Kingdom of Norway consider that both parts of the Government of the Islamic Republic of Pakistan's Declaration seek to limit the scope of the Covenant on a unilateral basis and therefore constitute reservations. The Government of the Kingdom of Norway consider both reservations to be incompatible with the object and purpose of the Covenant, and therefore object to the reservations made by the Government of the Islamic Republic of Pakistan.

This objection does not preclude the entry into force in its entirety of the Covenant between the Kingdom of Norway and the Islamic Republic of Pakistan, without the Islamic Republic of Pakistan benefiting from its reservations."

"... the Government of the Kingdom of Norway has carefully examined the reservation and the statement made by the State of Qatar upon accession to the International Covenant on Economic, Social and Cultural Rights of 16 December 1966.

The reservation to Article 3 and the statement concerning Article 8 make these provisions subject to the Islamic Sharia or national legislation. Both declarations are thus formulated as reservations.

The Government of the Kingdom of Norway is of the view that by making the application of Article 3 and Article 8 of the Covenant subject to the Islamic Sharia or national law, the State of Qatar has submitted reservations which raise doubts as to the full commitment of the State of Qatar to the object and purpose of the Covenant.

The Government of the Kingdom of Norway thus objects to these reservations. This objection shall not preclude the entry into force of the Covenant between the Kingdom of Norway and the State of Qatar."

PAKISTAN

"The Government of Islamic Republic of Pakistan objects to the declaration made by the Republic of India in respect of article 1 of the International Covenant on Economic, Social and Cultural Rights and article 1 of the International Covenant on Civil and Political Rights.

The right of Self-determination as enshrined in the Charter of the United Nations and as embodied in the Covenants applies to all peoples under foreign occupation and alien domination.

The Government of the Islamic Republic of Pakistan cannot consider as valid any interpretation of the right of self-determination which is contrary to the clear language of the provisions in question. Moreover, the said reservation is incompatible with the object and purpose of the Covenants. This objection shall not preclude the entry into force of the Covenant between the Islamic Republic of Pakistan and India without India benefiting from its reservations."

POLAND

"The Government of the Republic of Poland has carefully examined the [reservation] to the Article 3 and the declaration to the Article 8 of the International Covenant on Economic, Social and Cultural Rights, done in New York on December 16, 1966, done upon its [accession] on May 21, 2018.

The Government of the Republic of Poland considers the reservation that the Qatar does not consider itself bound by the provisions of Article 3 of the International Covenant on Economic, Social and Cultural Rights, for they contravene the Islamic Sharia with regard to questions of inheritance and birth and the statement according to which the Qatar shall interpret that what is

meant by 'trade unions' and their related issues stated in Article 8 of the International Covenant on Economic, Social and Cultural Rights, is in line with the provisions of the Labor Law and national legislation and that the Qatar reserves the right to implement that article in accordance with such understanding is incompatible with the object and purpose of the Covenant. Therefore the Government of the Republic of Poland objects to them.

This objection shall not preclude the entry into force of the [Covenant] between the Republic of Poland and the State of Qatar."

PORTUGAL

"The Government of Portugal hereby presents its formal objection to the interpretative declarations made by the Government of Algeria upon ratification of the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights. The Government of Portugal having examined the contents of the said declarations reached the conclusion that they can be regarded as reservations and therefore should be considered invalid as well as incompatible with the purposes and object of the Covenants.

This objection shall not preclude the entry into force of the Covenants between Portugal and Algeria."

"The Government of Portugal considers that reservations by which a State limits its responsibilities under the International Covenant on Economic, Social and Cultural Rights (ICESCR) by invoking certain provisions of national law in general terms may create doubts as to the commitment of the reserving State to the object and purpose of the convention and, moreover, contribute to undermining the basis of international law.

It is in the common interest of all 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 Portugal therefore objects to the reservation by Turkey to the ICESCR. This objection shall not constitute an obstacle to the entry into force of the Covenant between Portugal and Turkey."

"The Government of the Portuguese Republic has examined the declaration made by the Government of the Republic of the Union of Myanmar to Article I of the International Covenant on Economic, Social and Cultural Rights and considers that it is in fact a reservation that seeks to limit the scope of the Covenant on a unilateral basis.

The Government of the Portuguese Republic considers that reservations by which a State limits its responsibilities under the International Covenant on Economic, Social and Cultural Rights by invoking the domestic law or/and religious beliefs and principles raise doubts as to the commitment of the reserving State to the object and purpose of the Convention, as such reservations are likely to deprive the provisions of the Convention of their effect and are contrary to the object and purpose thereof.

The Government of the Portuguese Republic recalls that, according to customary international law as codified in the Vienna Convention on the Law of Treaties, a reservation incompatible with the object and purpose of the Covenant shall not be permitted.

Furthermore, the Government of the Portuguese Republic does not share the interpretation of "the right of self-determination" expressed by the Government of the Republic of the Union of Myanmar which limits the content of this right and is not in line with the definition enshrined in International Law.

Thus the Government of the Portuguese Republic objects to this reservation.

This objection shall not preclude the entry into force of the Covenant between the Portuguese Republic and the Republic of the Union of Myanmar."

"The Government of the Portuguese Republic has examined the contents of the reservation to Article 3 and of the statement regarding Article 8 of the International Covenant on Economic, Social and Cultural Rights made by the State of Qatar.

The Government of the Portuguese Republic considers that the reservation to Article 3 of the International Covenant on Economic, Social and Cultural Rights is contrary to the object and purpose of the International Covenant on Economic, Social and Cultural Rights.

Furthermore, it considers that the statement regarding Article 8 of the Covenant is in fact a reservation that seeks to limit the scope of the Covenant on a unilateral basis.

The Government of the Portuguese Republic considers that reservations by which a State limits its responsibilities under [the] International Covenant on Economic, Social and Cultural Rights by invoking the domestic law or/and religious beliefs and principles [raise] doubts as to the commitment of the reserving State to the object and purpose of the Convention, as such reservations are likely to deprive the provisions of the Convention of their effect and are contrary to the object and purpose thereof.

The Government of the Portuguese Republic recalls that, according to customary international law as codified in the Vienna Convention on the Law of Treaties, a reservation incompatible with the object and purpose of the Covenant shall not be permitted.

Thus, the Government of the Portuguese Republic objects to these reservations.

This objection shall not preclude the entry into force of the Covenant between the Portuguese Republic and the State of Qatar."

REPUBLIC OF MOLDOVA

"The Government of the Republic of Moldova has carefully examined the reservation and statement made by the State of Qatar on May 21, 2018 upon accession to the International Covenant on Economic, Social and Cultural Rights of 16 December 1966.

Both the reservation to Article 3 and the statement concerning Article 8 make the application of these provisions of the Covenant subject to the Islamic Sharia or national legislation. The statement concerning Article 8 is thus of its nature also a reservation.

The Republic of Moldova considers that the reservations regarding Articles 3 and 8 of the Covenant are incompatible with the object and purpose of the Covenant since these articles form an essential element of the Covenant, and are accordingly not permitted under Article 19 sub-paragraph (c) of the Vienna Convention on the Law of Treaties of 23 May 1969.

Therefore, the Republic of Moldova objects to the aforementioned reservations made by the State of Qatar.

This objection shall not preclude the entry into force of the Covenant between the Republic of Moldova and

the State of Qatar. The Covenant enters into force in its entire[t]y between the Republic of Moldova and the State of Qatar, without the State of Qatar benefiting from its reservation.”

ROMANIA

“Romania has examined the reservation and the declaration made upon [accession] by the State of Qatar to the International Covenant on Economic, Social and Cultural Rights (New York, 1966).

Romania considers that the reservation aiming to interpret the Article 3 of the Covenant in the light of the Islamic sharia and the declaration aiming at interpreting the Article 8 of the Covenant in the light with the national legislation qualifies them as reservations of undefined character, inadmissible under the Vienna Convention on the Law of Treaties. In accordance with Article 27 of Vienna Convention on the Law of Treaties, it is the duty of States Parties to a treaty to ensure that their internal law allows the application and observance of the treaty.

Moreover, the general nature of the reservations limits the understanding as to the extent of the obligations assumed by State of Qatar under the International Covenant on Economic, Social and Cultural Rights.

Therefore, Romania objects to the reservations formulated by State of Qatar to the International Covenant on Economic, Social and Cultural Rights as being incompatible with the scope and purpose of the International Covenant on Economic, Social and Cultural Rights, as required by the Article 19 (c) of the Vienna Convention on the Law of Treaties.

This objection shall not affect the entry into force of the International Covenant on Economic, Social and Cultural Rights between Romania and State of Qatar.”

SLOVAKIA

“The Government of the Slovak Republic has carefully examined the reservation made by the Government of the Islamic Republic of Pakistan upon ratification of the International Covenant on Economic, Social and Cultural Rights, adopted on 16 December 1966, according to which, ‘Pakistan, with a view to achieving progressively the full realization of the rights recognized in the present

Covenant, shall use all ap[p]ropriate means to the maximum of its available resources.’

The Government of the Slovak Republic is of the view that the reservation is too general and unclear and raises doubts as to the commitment of the Islamic Republic of Pakistan to its obligations under the Covenant, essential for the fulfillment of its object and purpose.

The Government of the Slovak Republic objects for these reasons to the above mentioned reservation made by the Government of the Islamic Republic of Pakistan upon ratification of the International Covenant on Economic, Social and Cultural Rights.

This objection shall not preclude the entry into force of the International Covenant on Economic, Social and Cultural Rights between the Slovak Republic and the Islamic Republic of Pakistan. The International Covenant on Economic, Social and Cultural Rights enters into force in its entirety between the Slovak Republic and the Islamic Republic of Pakistan, without the Pakistan benefiting from its reservation.”

SPAIN

The Government of the Kingdom of Spain has examined the Declaration made by the Government of the Islamic Republic of Pakistan on 3 November 2004 on signature of the International Covenant on Economic, Social and Cultural Rights, of 16 December 1966.

The Government of the Kingdom of Spain points out that regardless of what it may be called, a unilateral declaration made by a State for the purpose of excluding or changing the legal effects of certain provisions of a treaty as it applies to that State constitutes a reservation.

The Government of the Kingdom of Spain considers that the Declaration made by the Government of the Islamic Republic of Pakistan, which seeks to subject the application of the provisions of the Covenant to the provisions of the constitution of the Islamic Republic of Pakistan is a reservation which seeks to limit the legal effects of the Covenant as it applies to the Islamic Republic of Pakistan. A reservation that includes a general reference to national law without specifying its contents does not make it possible to determine clearly the extent to which the Islamic Republic of Pakistan has accepted the obligations of the Covenant and, consequently, creates doubts as to the commitment of the Islamic Republic of Pakistan to the object and purpose of the Covenant.

The Government of the Kingdom of Spain considers that the Declaration made by the Government of the Islamic Republic of Pakistan to the effect that it subjects its obligations under the International Covenant on Economic, Social and Cultural Rights to the provisions of its constitution is a reservation and that that reservation is incompatible with the object and purpose of the Covenant.

According to customary international law, as codified in the Vienna Convention on the Law of Treaties, reservations that are incompatible with the object and purpose of a treaty are not permissible.

Consequently, the Government of the Kingdom of Spain objects to the reservation made by the Government of the Islamic Republic of Pakistan to the International Covenant on Economic, Social and Cultural Rights.

This objection shall not preclude the entry into force of the Covenant between the Kingdom of Spain and the Islamic Republic of Pakistan.

SWEDEN

"[The Government of Sweden] is of the view that these general reservations may raise doubts as to the commitment of Kuwait to the object and purpose of the Covenant.

The Government of Sweden regards the reservation concerning article 8 (1) (d), in which the Government of Kuwait reserves the right not to apply the right to strike expressly stated in the Covenant, as well as the interpretative declaration regarding article 9, according to which the right to social security would only apply to Kuwaitis, as being problematic in view of the object and purpose of the Covenant. It particularly considers the declaration regarding article 9, as a result of which the many foreigners working on Kuwaiti territory would, in principle, be totally excluded from social security protection, cannot be based on article 2 (3) of the Covenant.

It is in the common interest of all parties that a treaty should be respected, as to its object and purpose, by all parties.

The Government of Sweden therefore objects to the above-mentioned general reservations and interpretative declarations.

This objection does not preclude the entry into force of the Covenant between Kuwait and Sweden in its entirety."

“In this context the Government of Sweden would like to recall, that under well-established international treaty law, the name 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. Thus, the Government of Sweden considers that the declarations made by the Government of Bangladesh, in the absence of further clarification, in substance constitute reservations to the Covenant.

The declaration concerning article 1 places on the exercise of the rig of peoples to self-determination conditions not provided for in international law. To attach such conditions could undermine the concept of self-determination itself and would thereby seriously weaken its universally acceptable character.

Furthermore, the Government of Sweden notes that the declaration relating to articles 2 and 3 as well as 7 and 8 respectively, imply that these articles of the Covenant are being made subject to a general reservation referring to relevant provisions of the domestic laws of Bangladesh.

Consequently, the Government of Sweden is of the view that, in the absence of further clarification, these declarations raise doubts as to the commitment of Bangladesh to the object and purpose of the Covenant and would recall that, according to well-established international law, a reservation incompatible with the object and purpose of a treaty 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 necessary to comply with their obligations under these treaties.

The Government of Sweden therefore objects to the aforesaid general reservations made by the Government of Bangladesh to the International Covenant on Economic, Social and Cultural Rights.

This objection does not preclude the entry into force of the Covenant between Bangladesh and Sweden. The Covenant will thus become operative between the two States without Bangladesh benefiting from the declarations".

"The Government of Sweden has examined the statement and would like to recall that, under well-established international treaty law, the name 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 statement made by the Government of the People's Republic of China to article 8.1 (a) of the International Covenant on Economic, Social and Cultural Rights in substance constitutes a reservation.

The Government of Sweden notes that the application of Article 8.1 (a) of the Covenant is being made subject to a statement referring to the contents of national legislation. 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. Furthermore, the right to form and join a trade union of one's choice is one of the fundamental principles of the Covenant. The Government of Sweden wishes to recall that, according to customary international 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 reservation made by the People's Republic of China to the International Covenant on Economic, Social and Cultural Rights. This objection shall not preclude the entry into force of the Covenant between China and Sweden. The Covenant enters into force without China benefiting from the reservation."

"The Government of Sweden has examined the declarations and reservation made by the Republic of Turkey upon ratifying the International Covenant on Economic, Social and Cultural Rights.

The Republic of Turkey declares that it will implement the provisions of the Covenant only to the State 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 of the Republic of Turkey makes it unclear to what extent the Republic of Turkey considers itself bound by the obligations of the Covenant. In absence of further clarification, therefore, the reservation raises doubt as to the commitment of the Republic of Turkey to the object and purpose of the Covenant.

The Government of Sweden notes that the interpretation and application of paragraphs 3 and 4 of article 13 of the Covenant is being made subject to a reservation referring to certain provisions of the Constitution of the Republic of Turkey without specifying their contents. The Government of Sweden is of the view that in the absence of further clarification, this reservation, which does not clearly specify the extent of the Republic of Turkey's derogation from the provisions in question, raises serious doubts as to the commitment of the Republic of Turkey to the object and purpose of the Covenant.

According to established customary law as codified by the Vienna Convention on the Law of Treaties, reservations incompatible with the object and purpose of a treaty shall not be permitted. It is in the common interest of all 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 Sweden therefore objects to the aforesaid reservations made by the Republic of Turkey to the International Covenant on Economic, Social and Cultural Rights.

This objection shall not preclude the entry into force of the Covenant between the Republic of Turkey and Sweden. The Covenant enters into force in its entirety between the two States, without the Republic of Turkey benefiting from its reservations."

"The Government of Sweden would like to recall 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 is of the view that although Article 2 (1) of the Covenant allows for a progressive realization of the provisions, this may not be invoked as a basis for discrimination.

The application of the provisions of the Covenant has been made subject to provisions of the constitution of the Islamic Republic of Pakistan. This makes it unclear to what extent the Islamic Republic of Pakistan considers itself bound by the obligations of the treaty and therefore raises doubts as to the commitment of the Islamic Republic of Pakistan to the object and purpose of the Covenant. The Government of Sweden considers that the declaration made by the Government of the Islamic Republic of Pakistan to the International Covenant on Economic, Social and Cultural Rights in substance constitutes a reservation.

It is of common interest of States that all Parties respect treaties to whichthey have chosen to become parties and that States are prepared to undertake any legislative changes necessary to comply with their obligations under the treaties. According to customary international 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 reservation made by the Islamic Republic of Pakistan to the International Covenant on Economic, Social and Cultural Rights.

This objection shall not preclude the entry into force of the Covenant between Pakistan and Sweden, without Pakistan benefiting from its reservation."

“The Government of Sweden has examined the declaration made by the Government of the Republic of the Union of Myanmar upon ratification to the International Covenant on Economic, Social and Cultural Rights by which, with reference to Article 1, it declared that the term ‘right to self-determination’ does not apply

to any section of people within a sovereign independent state and cannot be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of a sovereign and independent state and also that the provision of the Covenant will only be applied in conformity with the Constitution of Myanmar.

In this context the Government of Sweden would like to recall, that under well-established international treaty law, the name 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. Thus, the Government of Sweden considers that the declaration made by the Government of Myanmar, in the absence of further clarification, in substance constitutes a reservation to the Covenant.

The declaration concerning Article 1 places conditions on the exercise of the right of peoples to self-determination not provided for in international law. To attach such conditions could undermine the concept of self-determination itself and would thereby seriously weaken its universally acceptable character.

Furthermore, the Government of Sweden notes that the declaration implies that Article 1 of the Covenant is made subject to a general reservation referring to domestic law of Myanmar.

Consequently, the Government of Sweden is of the view that the declaration raises doubts as to the commitment of Myanmar to the object and purpose of the Covenant and would recall that, according to customary international 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. 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.

For this reason, the Government of Sweden objects to the aforementioned reservation made by the Government of Myanmar. This objection shall not preclude the entry into force of the treaty between Sweden and Myanmar. The treaty enters into force in its entirety between Myanmar and Sweden without Myanmar benefiting from its reservation."

SWITZERLAND

The Swiss Federal Council has examined the reservation and the statement made by the State of Qatar upon accession to the International Covenant on Economic, Social and Cultural Rights of 16 December 1966.

The Swiss Federal Council considers that the declaration of Qatar concerning article 8 of the Covenant amounts, in fact, to a reservation. Reservations subjecting all or part of article 3 and article 8 of the Covenant in general terms to Islamic Sharia and/or national legislation constitute reservations of general scope which raise doubts about the full commitment of the State of Qatar to the object and purpose of the Covenant. The Swiss Federal Council recalls that, according to sub-paragraph (c) of article 19 of the Vienna Convention of 23 May 1969 on the Law of Treaties, reservations incompatible with the object and purpose of the Covenant are not permitted.

It is in the common interest of States that instruments to which they have chosen to become parties be respected in their object and purpose by all parties, and that States be prepared to amend their legislation in order to fulfil their treaty obligations.

Henceforth, the Swiss Federal Council objects to these reservations of the State of Qatar. This objection shall not preclude the entry into force of the Covenant, in its entirety, between Switzerland and the State of Qatar.

UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

"The Government of the United Kingdom have examined the Declaration made by the Government of Pakistan on 3 November 2004 on signature of the International Covenant on Economic, Social and Cultural Rights (done at New York on 16 December 1966).

The Government of the United Kingdom consider that the Government of Pakistan's Declaration which seeks to subject its obligations under the Covenant to the provisions of its own Constitution is a reservation which seeks to limit the scope of the Covenant on a unilateral basis. The Government of the United Kingdom note that a reservation to a Convention which consists of a general reference to national law without specifying its contents does not clearly define for the other States Parties to the Convention the extent to which the reserving State has accepted the obligations of the Convention. The Government of the United Kingdom therefore object to this reservation made by the Government of Pakistan.

This objection shall not preclude the entry into force of the Covenant between the United Kingdom of Great Britain and Northern Ireland and Pakistan."

"The Government of the United Kingdom of Great Britain and Northern Ireland has examined the reservation and declaration made by the State of Qatar on ratification of the International Covenant on Economic, Social and Cultural Rights ('the Covenant'), done at New York on 16 December 1966, which read:

Reservation

The State of Qatar does not consider itself bound by the provisions of Article 3 of the International Covenant on Economic, Social and Cultural Rights, for they contravene the Islamic Sharia with regard to questions of inheritance and birth.

Declaration

The State of Qatar shall interpret that what is meant by "trade unions" and their related issues stated in Article 8 of the International Covenant on Economic, Social and Cultural Right[s], is in line with the provisions of the Labor Law and national legislation. The State of Qatar reserves the right to implement that article in accordance with such understanding.

In respect of the reservation to Article 3, the Government of the United Kingdom understands this to mean that the State of Qatar considers itself bound by the provisions of Article 3, except with regard to questions of inheritance and birth, and will interpret the State of Qatar's obligations under the Covenant accordingly.

The Government of the United Kingdom considers that the Government of the State of Qatar's declaration in respect of Article 8, which seeks to subject its obligations under the Covenant to the provisions of its own national legislation, is a reservation which seeks to limit the scope of the Covenant on a unilateral basis. The Government of the United Kingdom notes that a reservation to a convention which consists of a general reference to national law without specifying its contents does not clearly define for the other States Parties to the convention the extent to which the reserving State has

accepted the obligations of the convention. The Government of the United Kingdom therefore objects to this reservation made by the Government of the State of Qatar.

This objection shall not preclude the entry into force of the Covenant between the United Kingdom of Great Britain and Northern Ireland and the State of Qatar."

Territorial Application

Participant	***Date of receipt of the notification***	***Territories***
Netherlands (Kingdom of the)[12]	11 Dec 1978	Netherlands Antilles
Portugal[6]	27 Apr 1993	Macau
United Kingdom of Great Britain and Northern Ireland[8,15]	20 May 1976	Belize, Bermuda, British Virgin Islands, Cayman Islands, Falkland Islands (Malvinas) and Dependencies, Gibraltar, Gilbert Islands, Guernsey, Hong Kong, Isle of Man, Jersey, Montserrat, Pitcairn, Henderson, Ducie and Oeno Islands, Solomon Islands, St. Helena and Dependencies, Turks and Caicos Islands and Tuvalu

---

Notes:

[1] The thirty-fifth instrument of ratification or accession was deposited with the Secretary-General on 3 October 1975. The Contracting States did not object to having those instruments accompanied with reservations taken into account under article 27 (1) for the purpose of determining the date of general entry into force of the Covenant (See, C.N.5.1976 of 5 January 1976).

[2] The German Democratic Republic had signed and ratified the Convention with reservations on 27 March 1973 and 8 November 1973, respectively (See, C.N.88.1973.TREATIES-3 of 20 April 1973). For the text of the reservations, see United Nations, *Treaty Series* , vol. 993. p. 83. See also note 2 under "Germany" in the "Historical Information" section in the front matter of this volume.

[3] The former Yugoslavia had signed and ratified the Convenant on 8 August 1967 and 2 June 1971, 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 in the front matter of this volume.

[4] The signature was effected by Democratic Kampuchea. In this regard the Secretary-General received, on 5 November 1980, the following communication from the Government of 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 signature of the Human Rights Covenants by the representative of the so-called Democratic Kampuchea, a régime that ceased to exist as a result of the people's revolution in Kampuchea, is null and void.

"The signing of the Human Rights Covenants by an individual, whose régime during its short period of reign in Kampuchea had exterminated about 3 million people and had thus grossly violated the elementary norms of human rights, each and every provision of the Human Rights Covenants is a regrettable precedence, which discredits the noble aims and lofty principles of the United Nations Charter, the very spirit of the above-mentioned Covenants, gravely impairs the prestige of the United Nations."

Thereafter, similar communications were received from the Government of the following States on the dates indicated and their texts were circulated as depositary notifications or, at the request of the States concerned, as official documents of the General Assembly (A/33/781 and A/35/784):

Participant:	***Date of receipt:***		
German Democratic Republic	11	Dec	1980
Poland	12	Dec	1980
Ukraine	16	Dec	1980
Hungary	19	Jan	1981
Bulgaria	29	Jan	1981
Belarus	18	Feb	1981
Russian Federation	18	Feb	1981
Czechoslovakia	10	Mar	1981

[5] Although Democratic Kampuchea had signed both [the International Covenant on Economic, Social and Political Rights and the International Covenant on Civil and Political Rights] on 17 October 1980 (see note 3 in this chapter), the Government of Cambodia deposited an instrument of accession to the said Covenants.

[6] In its notification of territorial application to Macau, the Government of Portugal stated the following:

... The Covenants are confirmed and proclaimed binding and valid, and they shall have effect and be implemented and observed without exception, bearing in mind that:

Article 1. The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, ratified, respectively, by Act No. 29/78 of 12 June, and by Act No. 45/78 of 11 July, shall be applicable in the territory of Macau.

Article 2 . 1. The applicability in Macau of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, and in particular of article 1 in both Covenants, shall in no way effect the status of Macau as defined in the Constitution of the Portuguese Republic and in the Organic Statute of Macau.

2. The applicability of the Covenants in Macau shall in no way affect the provisions of the Joint Declaration of the Government of the Portuguese Republic and the Government of the People's Republic of China on the Question of Macau, signed on 13 April 1987, especially with respect to the provision specifying that Macau forms part of Chinese territory and that the Government of the People's Republic of China will resume the exercise of sovereignty over Macau with effect from 20 December 1999, and that Portugal will be responsible for the administration until 19 December 1999.

Article 3. Article 25 (b) of the International Covenant on Civil and Political Rights shall not apply to Macau with respect to the composition of elected bodies and the method of choosing and electing their officials as defined in the Constitution of the Portuguese Republic, the Organic Statute of Macau and provisions of the Joint Declaration on the Question of Macau.

Article 4. Article 12 (4) and article 13 of the International Covenant on Civil and Political Rights shall not apply to Macau with respect to the entry and exit of individuals and the expulsion of foreigners from the territory. These matters shall continue to be regulated by the Organic Statute of Macau and other applicable legislation, and also by the Joint Declaration on the Question of Macau.

Article 5. 1. The provisions of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights that are applicable to Macau shall be implemented in Macau, in particular through specific legal documents issued by the organs of government of the territory.

Subsequently, on 21 October and 3 December 1999, the Secretary-General received communications concerning the status of Macao from Portugal and China (see note 3 under "China" and note 1 under "Portugal" regarding Macao 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 Covenant with reservation made by China will also apply to the Macao Special Administrative Region as well as with the following declaration:

1. The application of the Covenant, and its article 1 in particular, to the Macao Special Administrative Region shall not affect the status of Macao as defined in the Joint Declaration and in the Basic Law.

2. The provisions of the Covenant which are applicable to the Macao Special Administrative Region shall be implemented in Macao through legislation of the Macao Special Administrative Region.

The residents of Macao shall not be restricted in the rights and freedoms that they are entitled to, unless otherwise provided for by law. In case of restrictions, they shall not contravene the provisions of the Covenant that are applicable to the Macao Special Administrative Region.

Within the above ambit, the Government of the People's Republic of China will assume the responsibility for the international righttions that place on a Party to the Covenant.

[7] Signed on behalf of the Republic of China on 5 October 1967. See note 1 under "China" in the "Historical Information" section in the front matter of this volume.

With reference to the above-mentioned signature, communications have been addressed to the Secretary-General by the Permanent Representatives of Permanent Missions to the United Nations of Bulgaria, Byelorussian SSR, Czechoslovakia, Mongolia, Romania, the Ukrainian SSR, the Union of Soviet Socialist Republics and Yugoslavia, stating that their Governments did not recognize the said signature as valid since the only Government authorized to represent China and to assume obligations on its behalf was 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 twenty-first regular session of the General Assembly of the United Nations and contributed to the formulation of, and signed the Covenants and the Optional Protocol concerned, and that "any statements or reservations relating to the above-mentioned Covenants and Optional Protocol 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 these Covenants and Optional Protocol".

[8] With regard to the application of the Covenant to Hong Kong, the Secretary-General received communications concerning the status of Hong Kong from China and the United Kingdom (see note 2 under "China" and note 2 under "United Kingdom of Great Britain and Northern Ireland" concering Hong Kong in the "Historical Information" section in the front matter of this volume). Upon resuming the exercise of sovereignty over Hong Kong, China notified the Secretary-General that the Covenant with the reservation made by China will also apply to the Hong Kong Special Administrative Region.

Further, on 20 April 2001, the Secretary-General received from the Government of China the following communication:

1. Article 6 of the Covenant does not preclude the formulation of regulations by the HKSAR for employment restrictions, based on place of birth or residence qualifications, for the purpose of safeguarding the employment opportunities of local workers in the HKSAR

2. "National federations or confederations" in Article 8.1(b) of the Covenant shall be interpreted, in this case, as "federations or confederations in the HKSAR", and this Article does not imply the right of trade union federations or confederations to form or join political organizations or bodies established outside the HKSAR.

[9] Czechoslovakia had signed and ratified the Covenant on 7 October 1968 and 23 December 1975, respectively, with declarations. For the text of the declarations, see United Nations, *Treaty Series* , vol. 993, pp.78 and 85. See also note 3 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] See note 1 under "Germany" regarding Berlin (West) in the "Historical Information" section in the front matter of this volume.

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

[12] See notes 1 and 2 under "Netherlands" regarding Aruba/Netherlands Antilles in the "Historical Information" section in the front matter of this volume.

[13] See note 1 "New Zealand" regarding Tokelau under in the "Historical Information" section in the preliminary pages in the front matter of this volume.

[14] In a communication received on 10 May 1982, the Government of Solomon Islands declared that Solomon Islands maintains the reservations entered by the United Kingdom save in so far as the same cannot apply to Solomon Islands.

[15] 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."

Upon ratification, the Government of Argentina made the following declaration with regard to the above-mentioned declaration made by the United Kingdom of Great Britain and Northern Ireland:

The Argentine Republic rejects the extension, notified to the Secretary-General of the United Nations on 20 May 1976 by the United Kingdom of Great Britain and Northern Ireland, of the application of the International Covenant on Economic, Social and Cultural Rights, adopted by the General Assembly of the United Nations on 16 December 1966, to the Malvinas, South Georgia and South Sandwich Islands, and reaffirms its sovereign rights to those archipelagos, which form an integral part of its national territory.

The General Assembly of the United Nations had adopted resol- utions 2065 (XX), 3160 (XXVIII),1/49, 37/9, 38/12, 39/6 and 40/21 in which it recognizes the existence of a sovereignty dispute regarding the question of the Falkland Islands (Malvinas) and urges the Argentine Republic and the United Kingdom of Great Britain and Northern Ireland to pursue negotiations in order to find as soon as possible a peaceful and definitive solution to the dispute, through the good offices of the Secretary-General of the United Nations, who shall inform the General Assembly of the progress made."

With reference to the above-mentioned declaration by the Govern- ment of Argentina, the Secretary-General received, on 13 January 1988, from the Government of the United Kingdom of Great Britain and Northern Ireland the following communication:

"The Government of the United Kingdom of Great Britain and Northern Ireland rejects the statements made by the Argentine Republic, regarding the Falkland Islands and South Georgia and the South Sandwich Islands, when ratifying [the said Covenants and acceding to the said Protocol].

The Government of the United Kingdom of Great Britain and Northern Ireland has no doubt as to British sovereignty over the Falkland Islands and South Georgia and the South Sandwich Islands and its consequent right to extend treaties to those territories."

[16] The formality was effected by the Yemen Arab Republic. See also note 1 under "Yemen" in the "Historical Information" section in the front matter of this volume.

[17] With respect to the interpretative declarations made by Algeria the Secretary-General received, on 25 October 1990, from the Government of Germany the following declaration:

[The Federal Republic of Germany] interprets the declaration under paragraph 2 to mean that the latter is not intended to eliminate the obligation of Algeria to ensure that the rights guaranteed in article 8, paragraph 1, of the International Covenant on Economic, Social and Cultural Rights and in article 22 of the International Covenant on Civil and Political Rights may be restricted only for the reasons mentioned in the said articles and that such restrictions shall be prescribed by law.

It interprets the declaration under paragraph 4 to mean that Algeria, by referring to its domestic legal system, does not intend to restrict its obligation to ensure through appropriate steps equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution.

[18] In this regard, the Secretary-General received

communications from the following Governments on the dates indicated hereinafter:

Germany (17 December 1999):

"The Government of the Federal Republic of Germany notes that the declaration concerning article 1 constitutes a reservation that places on the exercise of the right of all peoples to self-determination conditions not provided for in international law. To attach such conditions could undermine the concept of self-determination and seriously weaken its universally acceptable character.

The Government of the Federal Republic of Germany further notes that the declarations with regard to articles 2 and 3, 7 and 8, and 10 and 13 constitute reservations of a general nature in respect of provisions of the Covenant which may be contrary to the Constitution, legislation, economic conditions and development plans of Bangladesh.

The Government of the Federal Republic of Germany is of the view that these general reservations raise doubts as to the full commitment of Bangladesh to the object and purpose of the Covenant. 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 these treaties.

The Government of the Federal Republic of Germany objects to the aforementioned reservations made by the Government of the People's Republic of Bangladesh to the International Covenant on Economic, Social and Cultural Rights. This objection does not preclude the entry into force of the Covenant between the Federal Republic of Germany and the People's Republic of Bangladesh".

Netherlands (20 December 1999):

"The Government of the Kingdom of the Netherlands has examined the declarations made by the Government of Bangladesh at the time of its accession to the International Covenant on economic, social and ctural rights and considers the declarations concerning Articles 1, 2 and 3, and 7 and 8 as reservations.

The Government of the Kingdom of the Netherlands objects to the reservation made by the Government of Bangladesh in relation to Article 1 of the said Covenant, since the right of self-determination as embodied in the Covenant is conferred upon all peoples. This follows not only from the very language of Article 1 of the Covenant but as well from the most authoritative statement of the law concerned, i.e. the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations. Any attempt to limit the scope of this right or to attach conditions not provided for in the relevant instruments would undermine the concept of self-determination itself and would thereby seriously weaken its universally acceptable character.

Furthermore, the Government of the Kingdom of the Netherlands objects to the reservations made by the Government of Bangladesh in relation to Articles 2 and 3, and, 7 and 8 of the said Covenant.

The Government of the Kingdom of the Netherlands considers that such reservations which seek to limit the responsibilities of the reserving State under the Covenant by invoking national law, may raise doubts as to the commitment of this State to the object and purpose of the Covenant and, moreover, contribute to undermining the basis of international treaty law.

It is in the common interest of States that treaties to which they have chosen to become parties should be respected, as to object and purpose by all parties.

The Government of the Kingdom of the Netherlands therefore objects to the aforesaid reservations made by the Government of Bangladesh.

These objections shall not preclude the entry into force of the Convention between the Kingdom of the Netherlands and Bangladesh".

[19] On 30 September 1992, the Government of Belarus notified the Secretary-General its decision to withdraw the reservation made upon signature and confirmed upon ratification. For the text of the reservation, see United Nations, *Treaty Series* , vol. 993, p. 78.

[20] On 21 March 2001, the Government of the Congo informed the Secretary-General that it had decided to withdraw its reservation made upon accession which read as follows:

Reservation:

The Government of the People's Republic of the Congo declares that it does not consider itself bound by the provisions of article 13, paragraphs 3 and 4 ...

Paragraphs 3 and 4 of article 13 of the International Covenant on Economic, Social and Cultural Rights embody the principle of freedom of education by allowing parents the liberty to choose for their children schools other than those established by the public authorities. Those provisions also authorize individuals to establish and direct educational institutions.

In our country, such provisions are inconsistent with the principle of nationalization of education and with the monopoly granted to the State in that area.

[21] In a communication received on 14 January 1976, the Government of Denmark notified the Secretary-General that it withdraws its reservation made prior with regard to article 7 (a) (i) on equal pay for equal work.

[22] In two communications received by the Secretary-General on 10 July 1969 and 23 March 1971 respectively, the Government of Israel declared that it "has noted the political character of the declaration made by the Government of Iraq on signing and ratifying the above Covenants. In the view of the Government of Israel, these two Covenants are 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.

Identical communications, *mutatis mutandis* , were received by the Secretary-General from the Government of Israel on 9 July 1969 in respect of the declaration made upon accession by the Government of Syria, and on 29 June 1970 in respect of the

declaration made upon accession by the Government of Libya. In the latter communication, the Government of Israel moreover stated that the declaration concerned "cannot in any way affect the obligations of the Libyan Arab Republic already existing under general international law".

[23] On 11 September 2012, the Government of Japan informed the Secretary-General that it had decided to withdraw the following reservation made upon signature and confirmed upon ratification:

"In applying the provisions of sub-paragraphs (b) and (c) of paragraph 2 of article 13 of the International Covenant on Economic, Social and Cultural Rights, Japan reserves the right not to be bound by `in particular by the progressive introduction of free education' referred to in the said provisions."

[24] Upon ratification, the Government of Malta indicated that it had decided to withdraw its reservation made upon signature to paragraph 2, article 10. For the text of the said reservation, see United Nations, *Treaty Series* , vol. 993, p. 80.

[25] On 6 July 2017, the Kingdom of the Netherlands notified the Secretary-General as follows of its decision to withdraw its reservation with respect to article 8 (1) (d) of the Covenant made upon ratification:

"… the Kingdom of the Netherlands, for Aruba, Curaçao, Sint Maarten and the Caribbean part of the Netherlands (the islands of Bonaire, Sint Eustatius and Saba), withdraws the reservation made with respect to Article 8, paragraph 1, under d, of the International Covenant on Economic, Social and Cultural Rights…"

The reservation made upon ratification read as follows:

"Article 8, paragraph l(d)

The Kingdom of the Netherlands does not accept this provision in the case of the Netherlands Antilles with regard to the latter's central and local government bodies."

[26] On 5 September 2003, the Government of New Zealand informed the Secretary-General that it had decided to withdraw the following reservation in respect only of the metropolitan territory of New Zealand. The reservation reads as follows:

"The Government of New Zealand reserves the right to postpone, in the economic circumstances foreseeable at the present time, the implementation of article 10 (2) as it relates to paid maternity leave or leave with adequate social security benefits."

Moreover, the Government of New Zealand notified the Secretary-General of the the following territorial exclusion:

"Declares that, 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, the withdrawal of this reservation 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."

See also note 1 under "Cook Islands" and note 1 under "Niue" in the "Historical Information" section in the front matter of this volume.

[27] With regard to the declaration made by Pakistan upon signature, the Secetary-General received a communication from the following State on the date indicated hereinafter:

Austria (25 November 2005):

"The Government of Austria has examined the declaration made by the Islamic Republic of Pakistan upon signature of the International Covenant on Economic, Social and Cultural Rights.

The application of the provisions of the Covenant has been made subject to provisions of national law. This makes it unclear to what extent the Islamic Republic of Pakistan considers itself bound by the obligations of the treaty and therefore raises concerns as to the commitment of the Islamic Republic of Pakistan to the object and purpose of the Covenant.

The Government of Austria considers that the declaration made by the Islamic Republic of Pakistan to the Covenant in substance constitutes a reservation and that this reservation is incompatible with the object and the purpose of the Covenant.

The Government of Austria therefore objects to the reservation made by the Islamic Republic of Pakistan to the Covenant.

This objection shall not preclude the entry into force of the Covenant between the Islamic Republic of Pakistan and the Republic of Austria."

[28] On 17 April 2008, the Government of Pakistan informed the Secretary-General that it had decided to withdraw the declaration made upon signature. The declaration reads as follows:

"While the Government of Islamic Republic of Pakistan accepts the provisions embodied in the International Covenant on Economic, Social and Cultural Rights, it will implement the said provisions in a progressive manner, in keeping with the existing economic conditions and the development plans of the country. The provisions of the Covenant shall, however, be subject to the provisions of the constitution of the Islamic Republic of Pakistan."

[29] With regard to the reservation made by Pakistan upon ratification, the Secetary-General received the following communications from the following States on the dates indicated hereinafter:

France (16 April 2009):

The Government of the French Republic has examined the reservation made by the Government of the Islamic Republic of Pakistan upon ratification of the International Covenant on Economic, Social and Cultural Rights, which was adopted on 16

December 1966. The reservation states that “Pakistan, with a view to achieving progressively the full realization of the rights recognized in the

present Covenant, shall use all appropriate means to the maximum of its available resources.” Although this declaration has been referred to as a “reservation”, it simply reformulates the content of article 2, paragraph 1, of the Covenant. Furthermore, it cannot have the effect of modifying the other provisions of the Covenant without constituting a reservation of general scope that is incompatible with the object and purpose of the Covenant. The Government of the French Republic therefore considers the

“reservation” by Pakistan to be a mere declaration that is devoid of legal effect.

Netherlands (15 April 2009):

"The Government of the Kingdom of the Netherlands has carefully examined the reservation made by the Government of Pakistan upon ratifying the International Covenant on Economic, Social and Cultural Rights. It is the understanding of the Kingdom of the Netherlands that the reservation of Pakistan does not exclude or modify the legal effect of the provisions of the Covenant in their application to Pakistan."

[30] The Secretary-General received the following communication(s) related to the reservations made by Qatar, on the date(s) indicated hereinafter:

Sweden (22 May 2019)

“The Government of Sweden has examined the statement and the reservation made by the State of Qatar upon accession to the International Covenant on Economic, Social and Cultural Rights. In this context the Government of Sweden would like to recall, that under well-established international treaty law, the name 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. Thus, the Government of Sweden considers that the statement made by the State of Qatar concerning Article 8, in the absence of further clarification, in substance constitutes a reservation to the [Covenant].

The Government of Sweden notes that the interpretation and application of Article 3 and Article 8 are made subject to in general terms to Islamic sharia and/or national legislation. The Government of Sweden is of the view that such reservations, which does not clearly specify the extent of the derogations, raises doubt as to the commitment of the State of Qatar to the object and purpose of the [Covenant].

According to customary international law, as codified in the Vienna Convention on the Law of Treaties, reservations incompatible with the object and purpose of the [Covenant] 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 necessary to comply with their obligations under the treaties.

For this reason, the Government of Sweden objects to the aforementioned reservations made by the Government of Qatar. The [Covenant] shall enter into force in its entirety between the two States, without Qatar benefitting from its reservations.”

[31] On 15 December 2008, the Government of Rwanda informed the Secretary-General that it had decided to withdraw the reservation made upon accession. The reservation reads as follows:

The Rwandese Republic [is] bound, however, in respect of education, only by the provisions of its Constitution.

Annex 78

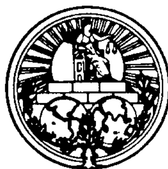
COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS, AVIS CONSULTATIFS ET ORDONNANCES

1980

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS, ADVISORY OPINIONS AND ORDERS



INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

CASE CONCERNING UNITED STATES DIPLOMATIC AND CONSULAR STAFF IN TEHRAN

(UNITED STATES OF AMERICA *v.* IRAN)

JUDGMENT OF 24 MAY 1980

1980

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRE RELATIVE AU PERSONNEL DIPLOMATIQUE ET CONSULAIRE DES ÉTATS-UNIS À TÉHÉRAN

(ÉTATS-UNIS D'AMÉRIQUE c. IRAN)

ARRÊT DU 24 MAI 1980

Official citation :

United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980, p. 3.

Mode officiel de citation :

Personnel diplomatique et consulaire des Etats-Unis à Téhéran, arrêt, C.I.J. Recueil 1980, p. 3.

Sales number
N° de vente : 451

24 MAY 1980

JUDGMENT

CASE CONCERNING UNITED STATES DIPLOMATIC AND CONSULAR STAFF IN TEHRAN (UNITED STATES OF AMERICA *v.* IRAN)

AFFAIRE RELATIVE AU PERSONNEL DIPLOMATIQUE ET CONSULAIRE DES ÉTATS-UNIS À TÉHÉRAN (ÉTATS-UNIS D'AMÉRIQUE c. IRAN)

24 MAI 1980

ARRÊT

INTERNATIONAL COURT OF JUSTICE

1980
24 May
General List
No. 64

YEAR 1980

24 May 1980

CASE CONCERNING UNITED STATES DIPLOMATIC AND CONSULAR STAFF IN TEHRAN

(UNITED STATES OF AMERICA *v.* IRAN)

Article 53 of the Statute – Proof of Facts – Admissibility of Proceedings – Existence of wider political dispute no bar to legal proceedings – Security Council proceedings no restriction on functioning of the Court – Fact-finding commission established by Secretary-General.

Jurisdiction of the Court – Optional Protocols to Vienna Conventions of 1961 and 1963 on Diplomatic and Consular Relations – 1955 Treaty of Amity, Economic Relations and Consular Rights (USA/Iran) – Provision for recourse to Court unless parties agree to "settlement by some other pacific means" – Right to file unilateral Application – Whether counter-measures a bar to invoking Treaty of Amity.

State responsibility for violations of Vienna Conventions of 1961 and 1963 on Diplomatic and Consular Relations – Action by persons not acting on behalf of State – Non-imputability thereof to State – Breach by State of obligation of protection – Subsequent decision to maintain situation so created on behalf of State – Use of situation as means of coercion.

Question of special circumstances as possible justification of conduct of State – Remedies provided for by diplomatic law for abuses.

Cumulative effect of successive breaches of international obligations – Fundamental character of international diplomatic and consular law.

JUDGMENT

Present: *President* Sir Humphrey WALDOCK; *Vice-President* ELIAS; *Judges* FORSTER, GROS, LACHS, MOROZOV, NAGENDRA SINGH, RUDA, MOSLER, TARAZI, ODA, AGO, EL-ERIAN, SETTE-CAMARA, BAXTER; *Registrar* AQUARONE.

In the case concerning United States Diplomatic and Consular Staff in Tehran,

between

the United States of America,

represented by

The Honorable Roberts B. Owen, Legal Adviser, Department of State,

as Agent,

H.E. Mrs. Geri Joseph, Ambassador of the United States of America to the Netherlands,

as Deputy Agent,

Mr. Stephen M. Schwebel, Deputy Legal Adviser, Department of State,

as Deputy Agent and Counsel,

Mr. Thomas J. Dunnigan, Counsellor, Embassy of the United States of America,

as Deputy Agent,

assisted by

Mr. David H. Small, Assistant Legal Adviser, Department of State,
Mr. Ted L. Stein, Attorney-Adviser, Department of State,
Mr. Hugh V. Simon, Jr., Second Secretary, Embassy of the United States of America,

as Advisers,

and

the Islamic Republic of Iran,

THE COURT,

composed as above,

delivers the following Judgment :

1. On 29 November 1979, the Legal Adviser of the Department of State of the United States of America handed to the Registrar an Application instituting proceedings against the Islamic Republic of Iran in respect of a dispute concerning the seizure and holding as hostages of members of the United States diplomatic and consular staff and certain other United States nationals.

2. Pursuant to Article 40, paragraph 2, of the Statute and Article 38, paragraph 4, of the Rules of Court, the Application was at once communicated to the Government of Iran. In accordance with Article 40, paragraph 3, of the Statute and Article 42 of the Rules of Court, the Secretary-General of the United Nations, the Members of the United Nations, and other States entitled to appear before the Court were notified of the Application.

3. On 29 November 1979, the same day as the Application was filed, the

Government of the United States filed in the Registry of the Court a request for the indication of provisional measures under Article 41 of the Statute and Article 73 of the Rules of Court. By an Order dated 15 December 1979, and adopted unanimously, the Court indicated provisional measures in the case.

4. By an Order made by the President of the Court dated 24 December 1979, 15 January 1980 was fixed as the time-limit for the filing of the Memorial of the United States, and 18 February 1980 as the time-limit for the Counter-Memorial of Iran, with liberty for Iran, if it appointed an Agent for the purpose of appearing before the Court and presenting its observations on the case, to apply for reconsideration of such time-limit. The Memorial of the United States was filed on 15 January 1980, within the time-limit prescribed, and was communicated to the Government of Iran ; no Counter-Memorial was filed by the Government of Iran, nor was any agent appointed or any application made for reconsideration of the time-limit.

5. The case thus became ready for hearing on 19 February 1980, the day following the expiration of the time-limit fixed for the Counter-Memorial of Iran. In circumstances explained in paragraphs 41 and 42 below, and after due notice to the Parties, 18 March 1980 was fixed as the date for the opening of the oral proceedings ; on 18, 19 and 20 March 1980, public hearings were held, in the course of which the Court heard the oral argument of the Agent and Counsel of the United States ; the Government of Iran was not represented at the hearings. Questions were addressed to the Agent of the United States by Members of the Court both during the course of the hearings and subsequently, and replies were given either orally at the hearings or in writing, in accordance with Article 61, paragraph 4, of the Rules of Court.

6. On 6 December 1979, the Registrar addressed the notifications provided for in Article 63 of the Statute of the Court to the States which according to information supplied by the Secretary-General of the United Nations as depositary were parties to one or more of the following Conventions and Protocols :

(a) the Vienna Convention on Diplomatic Relations of 1961 ;
(b) the Optional Protocol to that Convention concerning the Compulsory Settlement of Disputes ;
(c) the Vienna Convention on Consular Relations of 1963 ;
(d) the Optional Protocol to that Convention concerning the Compulsory Settlement of Disputes ;
(e) the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, of 1973.

7. The Court, after ascertaining the views of the Government of the United States on the matter, and affording the Government of Iran the opportunity of making its views known, decided pursuant to Article 53, paragraph 2, of the Rules of Court that copies of the pleadings and documents annexed should be made accessible to the public with effect from 25 March 1980.

8. In the course of the written proceedings the following submissions were presented on behalf of the Government of the United States of America :

in the Application :

"The United States requests the Court to adjudge and declare as follows :

(a) That the Government of Iran, in tolerating, encouraging, and failing to prevent and punish the conduct described in the preceding Statement of Facts, violated its international legal obligations to the United States as provided by

- Articles 22, 24, 25, 27, 29, 31, 37 and 47 of the Vienna Convention on Diplomatic Relations,
- Articles 28, 31, 33, 34, 36 and 40 of the Vienna Convention on Consular Relations,
- Articles 4 and 7 of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, and
- Articles II (4), XIII, XVIII and XIX of the Treaty of Amity, Economic Relations, and Consular Rights between the United States and Iran, and
- Articles 2 (3), 2 (4) and 33 of the Charter of the United Nations ;

(b) That pursuant to the foregoing international legal obligations, the Government of Iran is under a particular obligation immediately to secure the release of all United States nationals currently being detained within the premises of the United States Embassy in Tehran and to assure that all such persons and all other United States nationals in Tehran are allowed to leave Iran safely ;

(c) That the Government of Iran shall pay to the United States, in its own right and in the exercise of its right of diplomatic protection of its nationals, reparation for the foregoing violations of Iran's international legal obligations to the United States, in a sum to be determined by the Court ; and

(d) That the Government of Iran submit to its competent authorities for the purpose of prosecution those persons responsible for the crimes committed against the premises and staff of the United States Embassy and against the premises of its Consulates" ;

in the Memorial :

"The Government of the United States respectfully requests that the Court adjudge and declare as follows :

(a) that the Government of the Islamic Republic of Iran, in permitting, tolerating, encouraging, adopting, and endeavouring to exploit, as well as in failing to prevent and punish, the conduct described in the Statement of the Facts, violated its international legal obligations to the United States as provided by :

- Articles 22, 24, 25, 26, 27, 29, 31, 37, 44 and 47 of the Vienna Convention on Diplomatic Relations ;
- Articles 5, 27, 28, 31, 33, 34, 35, 36, 40 and 72 of the Vienna Convention on Consular Relations ;

- Article II (4), XIII, XVIII and XIX of the Treaty of Amity, Economic Relations, and Consular Rights between the United States of America and Iran ; and
- Articles 2, 4 and 7 of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents ;

(b) that, pursuant to the foregoing international legal obligations :

(i) the Government of the Islamic Republic of Iran shall immediately ensure that the premises at the United States Embassy, Chancery and Consulates are restored to the possession of the United States authorities under their exclusive control, and shall ensure their inviolability and effective protection as provided for by the treaties in force between the two States, and by general international law ;

(ii) the Government of the Islamic Republic of Iran shall ensure the immediate release, without any exception, of all persons of United States nationality who are or have been held in the Embassy of the United States of America or in the Ministry of Foreign Affairs in Tehran, or who are or have been held as hostages elsewhere, and afford full protection to all such persons, in accordance with the treaties in force between the two States, and with general international law ;

(iii) the Government of the Islamic Republic of Iran shall, as from that moment, afford to all the diplomatic and consular personnel of the United States the protection, privileges and immunities to which they are entitled under the treaties in force between the two States, and under general international law, including immunity from any form of criminal jurisdiction and freedom and facilities to leave the territory of Iran ;

(iv) the Government of the Islamic Republic of Iran shall, in affording the diplomatic and consular personnel of the United States the protection, privileges and immunities to which they are entitled, including immunity from any form of criminal jurisdiction, ensure that no such personnel shall be obliged to appear on trial or as a witness, deponent, source of information, or in any other role, at any proceedings, whether formal or informal, initiated by or with the acquiescence of the Iranian Government, whether such proceedings be denominated a 'trial', 'grand jury', 'international commission' or otherwise ;

(v) the Government of the Islamic Republic of Iran shall submit to its competent authorities for the purpose of prosecution, or extradite to the United States, those persons responsible for the crimes committed against the personnel and premises of the United States Embassy and Consulates in Iran ;

(c) that the United States of America is entitled to the payment to it, in its own right and in the exercise of its right of diplomatic protection of its nationals held hostage, of reparation by the Islamic Republic of Iran for

the violations of the above international legal obligations which it owes to the United States, in a sum to be determined by the Court at a subsequent stage of the proceedings."

9. At the close of the oral proceedings, written submissions were filed in the Registry of the Court on behalf of the Government of the United States of America in accordance with Article 60, paragraph 2, of the Rules of Court ; a copy thereof was transmitted to the Government of Iran. Those submissions were identical with the submissions presented in the Memorial of the United States.

10. No pleadings were filed by the Government of Iran, which also was not represented at the oral proceedings, and no submissions were therefore presented on its behalf. The position of that Government was, however, defined in two communications addressed to the Court by the Minister for Foreign Affairs of Iran ; the first of these was a letter dated 9 December 1979 and transmitted by telegram the same day (the text of which was set out in full in the Court's Order of 15 December 1979, *I.C.J. Reports 1979*, pp. 10-11) ; the second was a letter transmitted by telex dated 16 March 1980 and received on 17 March 1980, the text of which followed closely that of the letter of 9 December 1979 and reads as follows :

[Translation from French]

"I have the honour to acknowledge receipt of the telegram concerning the meeting of the International Court of Justice to be held on 17 March 1980 at the request of the Government of the United States of America, and to set forth for you below, once again, the position of the Government of the Islamic Republic of Iran in that respect :

The Government of the Islamic Republic of Iran wishes to express its respect for the International Court of Justice, and for its distinguished Members, for what they have achieved in the quest for a just and equitable solution to legal conflicts between States, and respectfully draws the attention of the Court to the deep-rootedness and the essential character of the Islamic Revolution of Iran, a revolution of a whole oppressed nation against its oppressors and their masters, the examination of whose numerous repercussions is essentially and directly a matter within the national sovereignty of Iran.

The Government of the Islamic Republic of Iran considers that the Court cannot and should not take cognizance of the case which the Government of the United States of America has submitted to it, and in the most significant fashion, a case confined to what is called the question of the 'hostages of the American Embassy in Tehran'.

For this question only represents a marginal and secondary aspect of an overall problem, one such that it cannot be studied separately, and which involves, *inter alia*, more than 25 years of continual interference by the United States in the internal affairs of Iran, the shameless exploitation of our country, and numerous crimes perpetrated against the Iranian people, contrary to and in conflict with all international and humanitarian norms.

The problem involved in the conflict between Iran and the United States is thus not one of the interpretation and the application of the treaties upon

which the American Application is based, but results from an overall situation containing much more fundamental and more complex elements. Consequently, the Court cannot examine the American Application divorced from its proper context, namely the whole political dossier of the relations between Iran and the United States over the last 25 years.

With regard to the request for provisional measures, as formulated by the United States, it in fact implies that the Court should have passed judgment on the actual substance of the case submitted to it, which the Court cannot do without breach of the norms governing its jurisdiction. Furthermore, since provisional measures are by definition intended to protect the interest of the parties, they cannot be unilateral, as they are in the request submitted by the American Government."

The matters raised in those two communications are considered later in this Judgment (paragraphs 33-38 and 81-82).

* * *

11. The position taken up by the Iranian Government in regard to the present proceedings brings into operation Article 53 of the Statute, under which the Court is required *inter alia* to satisfy itself that the claims of the Applicant are well founded in fact. As to this article the Court pointed out in the *Corfu Channel* case that this requirement is to be understood as applying within certain limits :

> "While Article 53 thus obliges the Court to consider the submissions of the Party which appears, it does not compel the Court to examine their accuracy in all their details ; for this might in certain unopposed cases prove impossible in practice. It is sufficient for the Court to convince itself by such methods as it considers suitable that the submissions are well founded." (*I.C.J. Reports 1949,* p. 248.)

In the present case, the United States has explained that, owing to the events in Iran of which it complains, it has been unable since then to have access to its diplomatic and consular representatives, premises and archives in Iran ; and that in consequence it has been unable to furnish detailed factual evidence on some matters occurring after 4 November 1979. It mentioned in particular the lack of any factual evidence concerning the treatment and conditions of the persons held hostage in Tehran. On this point, however, without giving the names of the persons concerned, it has submitted copies of declarations sworn by six of the 13 hostages who had been released after two weeks of detention and returned to the United States in November 1979.

12. The essential facts of the present case are, for the most part, matters of public knowledge which have received extensive coverage in the world press and in radio and television broadcasts from Iran and other countries.

They have been presented to the Court by the United States in its Memorial, in statements of its Agent and Counsel during the oral proceedings, and in written replies to questions put by Members of the Court. Annexed or appended to the Memorial are numerous extracts of statements made by Iranian and United States officials, either at press conferences or on radio or television, and submitted to the Court in support of the request for provisional measures and as a means of demonstrating the truth of the account of the facts stated in the Memorial. Included also in the Memorial is a "Statement of Verification" made by a high official of the United States Department of State having "overall responsibility within the Department for matters relating to the crisis in Iran". While emphasizing that in the circumstances of the case the United States has had to rely on newspaper, radio and television reports for a number of the facts stated in the Memorial, the high official concerned certifies that to the best of his knowledge and belief the facts there stated are true. In addition, after the filing of the Memorial, and by leave of the Court, a large quantity of further documents of a similar kind to those already presented were submitted by the United States for the purpose of bringing up to date the Court's information concerning the continuing situation in regard to the occupation of the Embassy and detention of the hostages.

13. The result is that the Court has available to it a massive body of information from various sources concerning the facts and circumstances of the present case, including numerous official statements of both Iranian and United States authorities. So far as newspaper, radio and television reports emanating from Iran are concerned, the Court has necessarily in some cases relied on translations into English supplied by the Applicant. The information available, however, is wholly consistent and concordant as to the main facts and circumstances of the case. This information, as well as the United States Memorial and the records of the oral proceedings, has all been communicated by the Court to the Iranian Government without having evoked from that Government any denial or questioning of the facts alleged before the Court by the United States. Accordingly, the Court is satisfied that, within the meaning of Article 53 of the Statute, the allegations of fact on which the United States bases its claims in the present case are well founded.

* * *

14. Before examining the events of 4 November 1979, directly complained of by the Government of the United States, it is appropriate to mention certain other incidents which occurred before that date. At about 10.45 a.m. on 14 February 1979, during the unrest in Iran following the fall of the Government of Dr. Bakhtiar, the last Prime Minister appointed by the Shah, an armed group attacked and seized the United States Embassy in Tehran, taking prisoner the 70 persons they found there, including the Ambassador. Two persons associated with the Embassy staff were killed ; serious damage was caused to the Embassy and there were some acts of

pillaging of the Ambassador's residence. On this occasion, while the Iranian authorities had not been able to prevent the incursion, they acted promptly in response to the urgent appeal for assistance made by the Embassy during the attack. At about 12 noon, Mr. Yazdi, then a Deputy Prime Minister, arrived at the Embassy accompanied by a member of the national police, at least one official and a contingent of Revolutionary Guards ; they quelled the disturbance and returned control of the compound to American diplomatic officials. On 11 March 1979 the United States Ambassador received a letter dated 1 March from the Prime Minister, Dr. Bazargan, expressing regrets for the attack on the Embassy, stating that arrangements had been made to prevent any repetition of such incidents, and indicating readiness to make reparation for the damage. Attacks were also made during the same period on the United States Consulates in Tabriz and Shiraz.

15. In October 1979, the Government of the United States was contemplating permitting the former Shah of Iran, who was then in Mexico, to enter the United States for medical treatment. Officials of the United States Government feared that, in the political climate prevailing in Iran, the admission of the former Shah might increase the tension already existing between the two States, and *inter alia* result in renewed violence against the United States Embassy in Tehran, and it was decided for this reason to request assurances from the Government of Iran that adequate protection would be provided. On 21 October 1979, at a meeting at which were present the Iranian Prime Minister, Dr. Bazargan, the Iranian Minister for Foreign Affairs, Dr. Yazdi, and the United States Chargé d'affaires in Tehran, the Government of Iran was informed of the decision to admit the former Shah to the United States, and of the concern felt by the United States Government about the possible public reaction in Tehran. When the United States Chargé d'affaires requested assurances that the Embassy and its personnel would be adequately protected, assurances were given by the Foreign Minister that the Government of Iran would fulfil its international obligation to protect the Embassy. The request for such assurances was repeated at a further meeting the following day, 22 October, and the Foreign Minister renewed his assurances that protection would be provided. The former Shah arrived in the United States on 22 October. On 30 October, the Government of Iran, which had repeatedly expressed its serious opposition to the admission of the former Shah to the United States, and had asked the United States to permit two Iranian physicians to verify the reality and the nature of his illness, requested the United States to bring about his return to Iran. Nevertheless, on 31 October, the Security Officer of the United States Embassy was told by the Commander of the Iranian National Police that the police had been instructed to provide full protection for the personnel of the Embassy.

16. On 1 November 1979, while a very large demonstration was being held elsewhere in Tehran, large numbers of demonstrators marched to and fro in front of the United States Embassy. Under the then existing security arrangements the Iranian authorities normally maintained 10 to 15 uni-

formed policemen outside the Embassy compound and a contingent of Revolutionary Guards nearby ; on this occasion the normal complement of police was stationed outside the compound and the Embassy reported to the State Department that it felt confident that it could get more protection if needed. The Chief of Police came to the Embassy personally and met the Chargé d'affaires, who informed Washington that the Chief was "taking his job of protecting the Embassy very seriously". It was announced on the radio, and by the prayer leader at the main demonstration in another location in the city, that people should not go to the Embassy. During the day, the number of demonstrators at the Embassy was around 5,000, but protection was maintained by Iranian security forces. That evening, as the crowd dispersed, both the Iranian Chief of Protocol and the Chief of Police expressed relief to the Chargé d'affaires that everything had gone well.

17. At approximately 10.30 a.m. on 4 November 1979, during the course of a demonstration of approximately 3,000 persons, the United States Embassy compound in Tehran was overrun by a strong armed group of several hundred people. The Iranian security personnel are reported to have simply disappeared from the scene ; at all events it is established that they made no apparent effort to deter or prevent the demonstrators from seizing the Embassy's premises. The invading group (who subsequently described themselves as "Muslim Student Followers of the Imam's Policy", and who will hereafter be referred to as "the militants") gained access by force to the compound and to the ground floor of the Chancery building. Over two hours after the beginning of the attack, and after the militants had attempted to set fire to the Chancery building and to cut through the upstairs steel doors with a torch, they gained entry to the upper floor ; one hour later they gained control of the main vault. The militants also seized the other buildings, including the various residences, on the Embassy compound. In the course of the attack, all the diplomatic and consular personnel and other persons present in the premises were seized as hostages, and detained in the Embassy compound ; subsequently other United States personnel and one United States private citizen seized elsewhere in Tehran were brought to the compound and added to the number of hostages.

18. During the three hours or more of the assault, repeated calls for help were made from the Embassy to the Iranian Foreign Ministry, and repeated efforts to secure help from the Iranian authorities were also made through direct discussions by the United States Chargé d'affaires, who was at the Foreign Ministry at the time, together with two other members of the mission. From there he made contact with the Prime Minister's Office and with Foreign Ministry officials. A request was also made to the Iranian Chargé d'affaires in Washington for assistance in putting an end to the seizure of the Embassy. Despite these repeated requests, no Iranian secu-

rity forces were sent in time to provide relief and protection to the Embassy. In fact when Revolutionary Guards ultimately arrived on the scene, despatched by the Government "to prevent clashes", they considered that their task was merely to "protect the safety of both the hostages and the students", according to statements subsequently made by the Iranian Government's spokesman, and by the operations commander of the Guards. No attempt was made by the Iranian Government to clear the Embassy premises, to rescue the persons held hostage, or to persuade the militants to terminate their action against the Embassy.

19. During the morning of 5 November, only hours after the seizure of the Embassy, the United States Consulates in Tabriz and Shiraz were also seized ; again the Iranian Government took no protective action. The operation of these Consulates had been suspended since the attack in February 1979 (paragraph 14 above), and therefore no United States personnel were seized on these premises.

20. The United States diplomatic mission and consular posts in Iran were not the only ones whose premises were subjected to demonstrations during the revolutionary period in Iran. On 5 November 1979, a group invaded the British Embassy in Tehran but was ejected after a brief occupation. On 6 November 1979 a brief occupation of the Consulate of Iraq at Kermanshah occurred but was brought to an end on instructions of the Ayatollah Khomeini ; no damage was done to the Consulate or its contents. On 1 January 1980 an attack was made on the Embassy in Tehran of the USSR by a large mob, but as a result of the protection given by the Iranian authorities to the Embassy, no serious damage was done.

21. The premises of the United States Embassy in Tehran have remained in the hands of militants ; and the same appears to be the case with the Consulates at Tabriz and Shiraz. Of the total number of United States citizens seized and held as hostages, 13 were released on 18-20 November 1979, but the remainder have continued to be held up to the present time. The release of the 13 hostages was effected pursuant to a decree by the Ayatollah Khomeini addressed to the militants, dated 17 November 1979, in which he called upon the militants to "hand over the blacks and the women, if it is proven they did not spy, to the Ministry of Foreign Affairs so that they may be immediately expelled from Iran".

22. The persons still held hostage in Iran include, according to the information furnished to the Court by the United States, at least 28 persons having the status, duly recognized by the Government of Iran, of "member of the diplomatic staff" within the meaning of the Vienna Convention on Diplomatic Relations of 1961; at least 20 persons having the status, similarly recognized, of "member of the administrative and technical staff" within the meaning of that Convention ; and two other persons of United States nationality not possessing either diplomatic or consular status. Of the persons with the status of member of the diplomatic staff, four are members of the Consular Section of the Mission.

23. Allegations have been made by the Government of the United States of inhumane treatment of hostages ; the militants and Iranian authorities have asserted that the hostages have been well treated, and have allowed special visits to the hostages by religious personalities and by representatives of the International Committee of the Red Cross. The specific allegations of ill-treatment have not however been refuted. Examples of such allegations, which are mentioned in some of the sworn declarations of hostages released in November 1979, are as follows : at the outset of the occupation of the Embassy some were paraded bound and blindfolded before hostile and chanting crowds ; at least during the initial period of their captivity, hostages were kept bound, and frequently blindfolded, denied mail or any communication with their government or with each other, subjected to interrogation, threatened with weapons.

24. Those archives and documents of the United States Embassy which were not destroyed by the staff during the attack on 4 November have been ransacked by the militants. Documents purporting to come from this source have been disseminated by the militants and by the Government-controlled media.

25. The United States Chargé d'affaires in Tehran and the two other members of the diplomatic staff of the Embassy who were in the premises of the Iranian Ministry of Foreign Affairs at the time of the attack have not left the Ministry since ; their exact situation there has been the subject of conflicting statements. On 7 November 1979, it was stated in an announcement by the Iranian Foreign Ministry that "as the protection of foreign nationals is the duty of the Iranian Government", the Chargé d'affaires was "staying in" the Ministry. On 1 December 1979, Mr. Sadegh Ghotbzadeh, who had become Foreign Minister, stated that

> "it has been announced that, if the U.S. Embassy's chargé d'affaires and his two companions, who have sought asylum in the Iranian Ministry of Foreign Affairs, should leave this ministry, the ministry would not accept any responsibility for them".

According to a press report of 4 December, the Foreign Minister amplified this statement by saying that as long as they remained in the ministry he was personally responsible for ensuring that nothing happened to them, but that "as soon as they leave the ministry precincts they will fall back into the hands of justice, and then I will be the first to demand that they be arrested and tried". The militants made it clear that they regarded the Chargé and his two colleagues as hostages also. When in March 1980 the Public Prosecutor of the Islamic Revolution of Iran called for one of the three diplomats to be handed over to him, it was announced by the Foreign Minister that

> "Regarding the fate of the three Americans in the Ministry of Foreign Affairs, the decision rests first with the imam of the nation [i.e., the Ayatollah Khomeini] ; in case there is no clear decision by the

imam of the nation, the Revolution Council will make a decision on this matter."

26. From the outset of the attack upon its Embassy in Tehran, the United States protested to the Government of Iran both at the attack and at the seizure and detention of the hostages. On 7 November a former Attorney-General of the United States, Mr. Ramsey Clark, was instructed to go with an assistant to Iran to deliver a message from the President of the United States to the Ayatollah Khomeini. The text of that message has not been made available to the Court by the Applicant, but the United States Government has informed the Court that it thereby protested at the conduct of the Government of Iran and called for release of the hostages, and that Mr. Clark was also authorized to discuss all avenues for resolution of the crisis. While he was en route, Tehran radio broadcast a message from the Ayatollah Khomeini dated 7 November, solemnly forbidding members of the Revolutionary Council and all the responsible officials to meet the United States representatives. In that message it was asserted that "the U.S. Embassy in Iran is our enemies' centre of espionage against our sacred Islamic movement", and the message continued :

> "Should the United States hand over to Iran the deposed shah . . . and give up espionage against our movement, the way to talks would be opened on the issue of certain relations which are in the interest of the nation."

Subsequently, despite the efforts of the United Sates Government to open negotiations, it became clear that the Iranian authorities would have no direct contact with representatives of the United States Government concerning the holding of the hostages.

27. During the period which has elapsed since the seizure of the Embassy a number of statements have been made by various governmental authorities in Iran which are relevant to the Court's examination of the responsibility attributed to the Government of Iran in the submissions of the United States. These statements will be examined by the Court in considering these submissions (paragraphs 59 and 70-74 below).

* *

28. On 9 November 1979, the Permanent Representative of the United States to the United Nations addressed a letter to the President of the Security Council, requesting urgent consideration of what might be done to secure the release of the hostages and to restore the "sanctity of diplomatic personnel and establishments". The same day, the President of the Security Council made a public statement urging the release of the hostages, and the President of the General Assembly announced that he was sending a personal message to the Ayatollah Khomeini appealing for their

release. On 25 November 1979, the Secretary-General of the United Nations addressed a letter to the President of the Security Council referring to the seizure of the United States Embassy in Tehran and the detention of its diplomatic personnel, and requesting an urgent meeting of the Security Council "in an effort to seek a peaceful solution to the problem". The Security Council met on 27 November and 4 December 1979 ; on the latter occasion, no representative of Iran was present, but the Council took note of a letter of 13 November 1979 from the Supervisor of the Iranian Foreign Ministry to the Secretary-General. The Security Council then adopted resolution 457 (1979), calling on Iran to release the personnel of the Embassy immediately, to provide them with protection and to allow them to leave the country. The resolution also called on the two Governments to take steps to resolve peacefully the remaining issues between them, and requested the Secretary-General to lend his good offices for the immediate implementation of the resolution, and to take all appropriate measures to that end. It further stated that the Council would "remain actively seized of the matter" and requested the Secretary-General to report to it urgently on any developments with regard to his efforts.

29. On 31 December 1979, the Security Council met again and adopted resolution 461 (1979), in which it reiterated both its calls to the Iranian Government and its request to the Secretary-General to lend his good offices for achieving the object of the Council's resolution. The Secretary-General visited Tehran on 1-3 January 1980, and reported to the Security Council on 6 January. On 20 February 1980, the Secretary-General announced the setting up of a commission to undertake a "fact-finding mission" to Iran. The Court will revert to the terms of reference of this commission and the progress of its work in connection with a question of admissibility of the proceedings (paragraphs 39-40 below).

* *

30. Prior to the institution of the present proceedings, in addition to the approach made by the Government of the United States to the United Nations Security Council, that Government also took certain unilateral action in response to the actions for which it holds the Government of Iran responsible. On 10 November 1979, steps were taken to identify all Iranian students in the United States who were not in compliance with the terms of their entry visas, and to commence deportation proceedings against those who were in violation of applicable immigration laws and regulations. On 12 November 1979, the President of the United States ordered the discontinuation of all oil purchases from Iran for delivery to the United States. Believing that the Government of Iran was about to withdraw all Iranian funds from United States banks and to refuse to accept payment in dollars for oil, and to repudiate obligations owed to the United States and to United States nationals, the President on 14 November 1979 acted to block the very large official Iranian assets in the United States or in United

States control, including deposits both in banks in the United States and in foreign branches and subsidiaries of United States banks. On 12 December 1979, after the institution of the present proceedings, the United States informed the Iranian Chargé d'affaires in Washington that the number of personnel assigned to the Iranian Embassy and consular posts in the United States was to be restricted.

31. Subsequently to the indication by the Court of provisional measures, and during the present proceedings, the United States Government took other action. A draft resolution was introduced into the United Nations Security Council calling for economic sanctions against Iran. When it was put to the vote on 13 January 1980, the result was 10 votes in favour, 2 against, and 2 abstentions (one member not having participated in the voting) ; as a permanent member of the Council cast a negative vote, the draft resolution was not adopted. On 7 April 1980 the United States Government broke off diplomatic relations with the Government of Iran. At the same time, the United States Government prohibited exports from the United States to Iran – one of the sanctions previously proposed by it to the Security Council. Steps were taken to prepare an inventory of the assets of the Government of Iran frozen on 14 November 1979, and to make a census of outstanding claims of American nationals against the Government of Iran, with a view to "designing a program against Iran for the hostages, the hostage families and other U.S. claimants" involving the preparation of legislation "to facilitate processing and paying of these claims" and all visas issued to Iranian citizens for future entry into the United States were cancelled. On 17 April 1980, the United States Government announced further economic measures directed against Iran, prohibited travel there by United States citizens, and made further plans for reparations to be paid to the hostages and their families out of frozen Iranian assets.

32. During the night of 24-25 April 1980 the President of the United States set in motion, and subsequently terminated for technical reasons, an operation within Iranian territory designed to effect the rescue of the hostages by United States military units. In an announcement made on 25 April, President Carter explained that the operation had been planned over a long period as a humanitarian mission to rescue the hostages, and had finally been set in motion by him in the belief that the situation in Iran posed mounting dangers to the safety of the hostages and that their early release was highly unlikely. He stated that the operation had been under way in Iran when equipment failure compelled its termination ; and that in the course of the withdrawal of the rescue forces two United States aircraft had collided in a remote desert location in Iran. He further stated that preparations for the rescue operations had been ordered for humanitarian reasons, to protect the national interests of the United States, and to alleviate international tensions. At the same time, he emphasized that the operation had not been motivated by hostility towards Iran or the Iranian people. The texts of President Carter's announcement and of certain other

official documents relating to the operation have been transmitted to the Court by the United States Agent in response to a request made by the President of the Court on 25 April. Amongst these documents is the text of a report made by the United States to the Security Council on 25 April, "pursuant to Article 51 of the Charter of the United Nations". In that report, the United States maintained that the mission had been carried out by it "in exercise of its inherent right of self-defence with the aim of extricating American nationals who have been and remain the victims of the Iranian armed attack on our Embassy". The Court will refer further to this operation later in the present Judgment (paragraphs 93 and 94 below).

* * *

33. It is to be regretted that the Iranian Government has not appeared before the Court in order to put forward its arguments on the questions of law and of fact which arise in the present case ; and that, in consequence, the Court has not had the assistance it might have derived from such arguments or from any evidence adduced in support of them. Nevertheless, in accordance with its settled jurisprudence, the Court, in applying Article 53 of its Statute, must first take up, *proprio motu*, any preliminary question, whether of admissibility or of jurisdiction, that appears from the information before it to arise in the case and the decision of which might constitute a bar to any further examination of the merits of the Applicant's case. The Court will, therefore, first address itself to the considerations put forward by the Iranian Government in its letters of 9 December 1979 and 16 March 1980, on the basis of which it maintains that the Court ought not to take cognizance of the present case.

34. The Iranian Government in its letter of 9 December 1979 drew attention to what it referred to as the "deep rootedness and the essential character of the Islamic Revolution of Iran, a revolution of a whole oppressed nation against its oppressors and their masters". The examination of the "numerous repercussions" of the revolution, it added, is "a matter essentially and directly within the national sovereignty of Iran". However, as the Court pointed out in its Order of 15 December 1979,

> "a dispute which concerns diplomatic and consular premises and the detention of internationally protected persons, and involves the interpretation or application of multilateral conventions codifying the international law governing diplomatic and consular relations, is one which by its very nature falls within international jurisdiction" (*I.C.J. Reports 1979*, p. 16, para. 25).

In its later letter of 16 March 1980 the Government of Iran confined itself to repeating the observations on this point which it had made in its letter of 9 December 1979, without putting forward any additional arguments or explanations. In these circumstances, the Court finds it sufficient here to recall and confirm its previous statement on the matter in its Order of 15 December 1979.

35. In its letter of 9 December 1979 the Government of Iran maintained that the Court could not and should not take cognizance of the present case for another reason, namely that the case submitted to the Court by the United States, is "confined to what is called the question of the 'hostages of the American Embassy in Tehran' ". It then went on to explain why it considered this to preclude the Court from taking cognizance of the case :

> "For this question only represents a marginal and secondary aspect of an overall problem, one such that it cannot be studied separately, and which involves, *inter alia,* more than 25 years of continual interference by the United States in the internal affairs of Iran, the shameless exploitation of our country, and numerous crimes perpetrated against the Iranian people, contrary to and in conflict with all international and humanitarian norms.
>
> The problem involved in the conflict between Iran and the United States is thus not one of the interpretation and the application of the treaties upon which the American Application is based, but results from an overall situation containing much more fundamental and more complex elements. Consequently, the Court cannot examine the American Application divorced from its proper context, namely the whole political dossier of the relations between Iran and the United States over the last 25 years. This dossier includes, *inter alia,* all the crimes perpetrated in Iran by the American Government, in particular the *coup d'état* of 1953 stirred up and carried out by the CIA, the overthrow of the lawful national government of Dr. Mossadegh, the restoration of the Shah and of his régime which was under the control of American interests, and all the social, economic, cultural and political consequences of the direct interventions in our internal affairs, as well as grave, flagrant and continuous violations of all international norms, committed by the United States in Iran."

36. The Court, however, in its Order of 15 December 1979, made it clear that the seizure of the United States Embassy and Consulates and the detention of internationally protected persons as hostages cannot be considered as something "secondary" or "marginal", having regard to the importance of the legal principles involved. It also referred to a statement of the Secretary-General of the United Nations, and to Security Council resolution 457 (1979), as evidencing the importance attached by the international community as a whole to the observance of those principles in the present case as well as its concern at the dangerous level of tension between Iran and the United States. The Court, at the same time, pointed out that no provision of the Statute or Rules contemplates that the Court should decline to take cognizance of one aspect of a dispute merely because that dispute has other aspects, however important. It further underlined that, if the Iranian Government considered the alleged activities of the United States in Iran legally to have a close connection with the subject-matter of

the United States' Application, it was open to that Government to present its own arguments regarding those activities to the Court either by way of defence in a Counter-Memorial or by way of a counter-claim.

37. The Iranian Government, notwithstanding the terms of the Court's Order, did not file any pleadings and did not appear before the Court. By its own choice, therefore, it has forgone the opportunities offered to it under the Statute and Rules of Court to submit evidence and arguments in support of its contention in regard to the "overall problem". Even in its later letter of 16 March 1980, the Government of Iran confined itself to repeating what it had said in its letter of 9 December 1979, without offering any explanations in regard to the points to which the Court had drawn attention in its Order of 15 December 1979. It has provided no explanation of the reasons why it considers that the violations of diplomatic and consular law alleged in the United States' Application cannot be examined by the Court separately from what it describes as the "overall problem" involving "more than 25 years of continual interference by the United States in the internal affairs of Iran". Nor has it made any attempt to explain, still less define, what connection, legal or factual, there may be between the "overall problem" of its general grievances against the United States and the particular events that gave rise to the United States' claims in the present case which, in its view, precludes the separate examination of those claims by the Court. This was the more necessary because legal disputes between sovereign States by their very nature are likely to occur in political contexts, and often form only one element in a wider and long-standing political dispute between the States concerned. Yet never has the view been put forward before that, because a legal dispute submitted to the Court is only one aspect of a political dispute, the Court should decline to resolve for the parties the legal questions at issue between them. Nor can any basis for such a view of the Court's functions or jurisdiction be found in the Charter or the Statute of the Court ; if the Court were, contrary to its settled jurisprudence, to adopt such a view, it would impose a far-reaching and unwarranted restriction upon the role of the Court in the peaceful solution of international disputes.

38. It follows that the considerations and arguments put forward in the Iranian Government's letters of 9 December 1979 and 16 March 1980 do not, in the opinion of the Court, disclose any ground on which it should conclude that it cannot or ought not to take cognizance of the present case.

* *

39. The Court, however, has also thought it right to examine, *ex officio,* whether its competence to decide the present case, or the admissibility of the present proceedings, might possibly have been affected by the setting up of the Commission announced by the Secretary-General of the United

Nations on 20 February 1980. As already indicated, the occupation of the Embassy and detention of its diplomatic and consular staff as hostages was referred to the United Nations Security Council by the United States on 9 November 1979 and by the Secretary-General on 25 November. Four days later, while the matter was still before the Security Council, the United States submitted the present Application to the Court together with a request for the indication of provisional measures. On 4 December, the Security Council adopted resolution 457 (1979) (the terms of which have already been indicated in paragraph 28 above), whereby the Council would "remain actively seized of the matter" and the Secretary-General was requested to report to it urgently on developments regarding the efforts he was to make pursuant to the resolution. In announcing the setting up of the Commission on 20 February 1980, the Secretary-General stated its terms of reference to be "to undertake a fact-finding mission to Iran to hear Iran's grievances and to allow for an early solution of the crisis between Iran and the United States" ; and he further stated that it was to complete its work as soon as possible and submit its report to him. Subsequently, in a message cabled to the President of the Court on 15 March 1980, the Secretary-General confirmed the mandate of the Commission to be as stated in his announcement of 20 February, adding that the Governments of Iran and the United States had "agreed to the establishment of the Commission on that basis". In this message, the Secretary-General also informed the Court of the decision of the Commission to suspend its activities in Tehran and to return to New York on 11 March 1980 "to confer with the Secretary-General with a view to pursuing its tasks which it regards as indivisible". The message stated that while, in the circumstances, the Commission was not in a position to submit its report, it was prepared to return to Tehran, in accordance with its mandate and the instructions of the Secretary-General, when the situation required. The message further stated that the Secretary-General would continue his efforts, as requested by the Security Council, to search for a peaceful solution of the crisis, and would remain in contact with the parties and the Commission regarding the resumption of its work.

40. Consequently, there can be no doubt at all that the Security Council was "actively seized of the matter" and that the Secretary-General was under an express mandate from the Council to use his good offices in the matter when, on 15 December, the Court decided unanimously that it was competent to entertain the United States' request for an indication of provisional measures, and proceeded to indicate such measures. As already mentioned the Council met again on 31 December 1979 and adopted resolution 461 (1979). In the preamble to this second resolution the Security Council expressly took into account the Court's Order of 15 December 1979 indicating provisional measures ; and it does not seem to have occurred to any member of the Council that there was or could be anything irregular in the simultaneous exercise of their respective functions by the Court and the Security Council. Nor is there in this any cause for surprise.

Whereas Article 12 of the Charter expressly forbids the General Assembly to make any recommendation with regard to a dispute or situation while the Security Council is exercising its functions in respect of that dispute or situation, no such restriction is placed on the functioning of the Court by any provision of either the Charter or the Statute of the Court. The reasons are clear. It is for the Court, the principal judicial organ of the United Nations, to resolve any legal questions that may be in issue between parties to a dispute ; and the resolution of such legal questions by the Court may be an important, and sometimes decisive, factor in promoting the peaceful settlement of the dispute. This is indeed recognized by Article 36 of the Charter, paragraph 3 of which specifically provides that :

> "In making recommendations under this Article the Security Council should also take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court."

41. In the present instance the proceedings before the Court continued in accordance with the Statute and Rules of Court and, on 15 January 1980, the United States filed its Memorial. The time-limit fixed for delivery of Iran's Counter-Memorial then expired on 18 February 1980 without Iran's having filed a Counter-Memorial or having made a request for the extension of the time-limit. Consequently, on the following day the case became ready for hearing and, pursuant to Article 31 of the Rules, the views of the Applicant State were requested regarding the date for the opening of the oral proceedings. On 19 February 1980 the Court was informed by the United States Agent that, owing to the delicate stage of negotiations bearing upon the release of the hostages in the United States Embassy, he would be grateful if the Court for the time being would defer setting a date for the opening of the oral proceedings. On the very next day, 20 February, the Secretary-General announced the establishment of the above-mentioned Commission, which commenced its work in Tehran on 23 February. Asked on 27 February to clarify the position of the United States in regard to the future procedure, the Agent stated that the Commission would not address itself to the claims submitted by the United States to the Court. The United States, he said, continued to be anxious to secure an early judgment on the merits, and he suggested 17 March as a convenient date for the opening of the oral proceedings. At the same time, however, he added that consideration of the well-being of the hostages might lead the United States to suggest a later date. The Iranian Government was then asked, in a telex message of 28 February, for any views it might wish to express as to the date for the opening of the hearings, mention being made of 17 March as one possible date. No reply had been received from the Iranian Government when, on 10 March, the Commission, unable to complete its mission, decided to suspend its activities in Tehran and to return to New York.

42. On 11 March, that is immediately upon the departure of the Com-

mission from Tehran, the United States notified the Court of its readiness to proceed with the hearings, suggesting that they should begin on 17 March. A further telex was accordingly sent to the Iranian Government on 12 March informing it of the United States' request and stating that the Court would meet on 17 March to determine the subsequent procedure. The Iranian Government's reply was contained in the letter of 16 March to which the Court has already referred (paragraph 10 above). In that letter, while making no mention of the proposed oral proceedings, the Iranian Government reiterated the reasons advanced in its previous letter of 9 December 1979 for considering that the Court ought not to take cognizance of the case. The letter contained no reference to the Commission, and still less any suggestion that the continuance of the proceedings before the Court might be affected by the existence of the Commission or the mandate given to the Secretary-General by the Security Council. Having regard to the circumstances which the Court has described, it can find no trace of any understanding on the part of either the United States or Iran that the establishment of the Commission might involve a postponement of all proceedings before the Court until the conclusion of the work of the Commission and of the Security Council's consideration of the matter.

43. The Commission, as previously observed, was established to undertake a "fact-finding mission to Iran to hear Iran's grievances and to *allow* for an early solution of the *crisis* between Iran and the United States" (emphasis added). It was not set up by the Secretary-General as a tribunal empowered to decide the matters of fact or of law in dispute between Iran and the United States ; nor was its setting up accepted by them on any such basis. On the contrary, he created the Commission rather as an organ or instrument for mediation, conciliation or negotiation to provide a means of easing the situation of crisis existing between the two countries ; and this, clearly, was the basis on which Iran and the United States agreed to its being set up. The establishment of the Commission by the Secretary-General with the agreement of the two States cannot, therefore, be considered in itself as in any way incompatible with the continuance of parallel proceedings before the Court. Negotiation, enquiry, mediation, conciliation, arbitration and judicial settlement are enumerated together in Article 33 of the Charter as means for the peaceful settlement of disputes. As was pointed out in the *Aegean Sea Continental Shelf* case, the jurisprudence of the Court provides various examples of cases in which negotiations and recourse to judicial settlement by the Court have been pursued *pari passu.* In that case, in which also the dispute had been referred to the Security Council, the Court held expressly that "the fact that negotiations are being actively pursued during the present proceedings is not, legally, any obstacle to the exercise by the Court of its judicial function" (*I.C.J. Reports 1978,* p. 12, para. 29).

44. It follows that neither the mandate given by the Security Council to the Secretary-General in resolutions 457 and 461 of 1979, nor the setting up of the Commission by the Secretary-General, can be considered as

constituting any obstacle to the exercise of the Court's jurisdiction in the present case. It further follows that the Court must now proceed, in accordance with Article 53, paragraph 2, of the Statute, to determine whether it has jurisdiction to decide the present case and whether the United States' claims are well founded in fact and in law.

* * *

45. Article 53 of the Statute requires the Court, before deciding in favour of an Applicant's claim, to satisfy itself that it has jurisdiction, in accordance with Articles 36 and 37, empowering it to do so. In the present case the principal claims of the United States relate essentially to alleged violations by Iran of its obligations to the United States under the Vienna Conventions of 1961 on Diplomatic Relations and of 1963 on Consular Relations. With regard to these claims the United States has invoked as the basis for the Court's jurisdiction Article I of the Optional Protocols concerning the Compulsory Settlement of Disputes which accompany these Conventions. The United Nations publication *Multilateral Treaties in respect of which the Secretary-General Performs Depository Functions* lists both Iran and the United States as parties to the Vienna Conventions of 1961 and 1963, as also to their accompanying Protocols concerning the Compulsory Settlement of Disputes, and in each case without any reservation to the instrument in question. The Vienna Conventions, which codify the law of diplomatic and consular relations, state principles and rules essential for the maintenance of peaceful relations between States and accepted throughout the world by nations of all creeds, cultures and political complexions. Moreover, the Iranian Government has not maintained in its communications to the Court that the two Vienna Conventions and Protocols are not in force as between Iran and the United States. Accordingly, as indicated in the Court's Order of 15 December 1979, the Optional Protocols manifestly provide a possible basis for the Court's jurisdiction, with respect to the United States' claims under the Vienna Conventions of 1961 and 1963. It only remains, therefore, to consider whether the present dispute in fact falls within the scope of their provisions.

46. The terms of Article I, which are the same in the two Protocols, provide :

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

The United States' claims here in question concern alleged violations by Iran of its obligations under several articles of the Vienna Conventions of 1961 and 1963 with respect to the privileges and immunities of the per-

sonnel, the inviolability of the premises and archives, and the provision of facilities for the performance of the functions of the United States Embassy and Consulates in Iran. In so far as its claims relate to two private individuals held hostage in the Embassy, the situation of these individuals falls under the provisions of the Vienna Convention of 1961 guaranteeing the inviolability of the premises of embassies, and of Article 5 of the 1963 Convention concerning the consular functions of assisting nationals and protecting and safeguarding their interests. By their very nature all these claims concern the interpretation or application of one or other of the two Vienna Conventions.

47. The occupation of the United States Embassy by militants on 4 November 1979 and the detention of its personnel as hostages was an event of a kind to provoke an immediate protest from any government, as it did from the United States Government, which despatched a special emissary to Iran to deliver a formal protest. Although the special emissary, denied all contact with Iranian officials, never entered Iran, the Iranian Government was left in no doubt as to the reaction of the United States to the taking over of its Embassy and detention of its diplomatic and consular staff as hostages. Indeed, the Court was informed that the United States was meanwhile making its views known to the Iranian Government through its Chargé d'affaires, who has been kept since 4 November 1979 in the Iranian Foreign Ministry itself, where he happened to be with two other members of his mission during the attack on the Embassy. In any event, by a letter of 9 November 1979, the United States brought the situation in regard to its Embassy before the Security Council. The Iranian Government did not take any part in the debates on the matter in the Council, and it was still refusing to enter into any discussions on the subject when, on 29 November 1979, the United States filed the present Application submitting its claims to the Court. It is clear that on that date there existed a dispute arising out of the interpretation or application of the Vienna Conventions and thus one falling within the scope of Article I of the Protocols.

48. Articles II and III of the Protocols, it is true, provide that within a period of two months after one party has notified its opinion to the other that a dispute exists, the parties may agree either : *(a)* "to resort not to the International Court of Justice but to an arbitral tribunal", or *(b)* "to adopt a conciliation procedure before resorting to the International Court of Justice". The terms of Articles II and III however, when read in conjunction with those of Article I and with the Preamble to the Protocols, make it crystal clear that they are not to be understood as laying down a precondition of the applicability of the precise and categorical provision contained in Article I establishing the compulsory jurisdiction of the Court in respect of disputes arising out of the interpretation or application of the

Vienna Convention in question. Articles II and III provide only that, as a substitute for recourse to the Court, the parties *may agree* upon resort either to arbitration or to conciliation. It follows, first, that Articles II and III have no application unless recourse to arbitration or conciliation has been proposed by one of the parties to the dispute and the other has expressed its readiness to consider the proposal. Secondly, it follows that only then may the provisions in those articles regarding a two months' period come into play, and function as a time-limit upon the conclusion of the agreement as to the organization of the alternative procedure.

49. In the present instance, neither of the parties to the dispute proposed recourse to either of the two alternatives, before the filing of the Application or at any time afterwards. On the contrary, the Iranian authorities refused to enter into any discussion of the matter with the United States, and this could only be understood by the United States as ruling out, *in limine*, any question of arriving at an agreement to resort to arbitration or conciliation under Article II or Article III of the Protocols, instead of recourse to the Court. Accordingly, when the United States filed its Application on 29 November 1979, it was unquestionably free to have recourse to Article I of the Protocols, and to invoke it as a basis for establishing the Court's jurisdiction with respect to its claims under the Vienna Conventions of 1961 and 1963.

* *

50. However, the United States also presents claims in respect of alleged violations by Iran of Articles II, paragraph 4, XIII, XVIII and XIX of the Treaty of Amity, Economic Relations, and Consular Rights of 1955 between the United States and Iran, which entered into force on 16 June 1957. With regard to these claims the United States has invoked paragraph 2 of Article XXI of the Treaty as the basis for the Court's jurisdiction. The claims of the United States under this Treaty overlap in considerable measure with its claims under the two Vienna Conventions and more especially the Convention of 1963. In this respect, therefore, the dispute between the United States and Iran regarding those claims is at the same time a dispute arising out of the interpretation or application of the Vienna Conventions which falls within Article I of their Protocols. It was for this reason that in its Order of 15 December 1979 indicating provisional measures the Court did not find it necessary to enter into the question whether Article XXI, paragraph 2, of the 1955 Treaty might also have provided a basis for the exercise of its jurisdiction in the present case. But taking into account that Article II, paragraph 4, of the 1955 Treaty provides that "nationals of either High Contracting Party shall receive the most constant protection and security within the territories of the other High Contracting Party . . .", the Court considers that at the present stage of the proceedings that Treaty has importance in regard to the claims of the United States in respect of the two private individuals said to be held

hostage in Iran. Accordingly, the Court will now consider whether a basis for the exercise of its jurisdiction with respect to the alleged violations of the 1955 Treaty may be found in Article XXI, paragraph 2, of the Treaty.

51. Paragraph 2 of that Article reads :

> "Any dispute between the High Contracting Parties as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the High Contracting Parties agree to settlement by some other pacific means."

As previously pointed out, when the United States filed its Application on 29 November 1979, its attempts to negotiate with Iran in regard to the overrunning of its Embassy and detention of its nationals as hostages had reached a deadlock, owing to the refusal of the Iranian Government to enter into any discussion of the matter. In consequence, there existed at that date not only a dispute but, beyond any doubt, a "dispute . . . not satisfactorily adjusted by diplomacy" within the meaning of Article XXI, paragraph 2, of the 1955 Treaty ; and this dispute comprised, *inter alia,* the matters that are the subject of the United States' claims under that Treaty.

52. The provision made in the 1955 Treaty for disputes as to its interpretation or application to be referred to the Court is similar to the system adopted in the Optional Protocols to the Vienna Conventions which the Court has already explained. Article XXI, paragraph 2, of the Treaty establishes the jurisdiction of the Court as compulsory for such disputes, unless the parties *agree* to settlement by some other means. In the present instance, as in the case of the Optional Protocols, the immediate and total refusal of the Iranian authorities to enter into any negotiations with the United States excluded *in limine* any question of an *agreement* to have recourse to "some other pacific means" for the settlement of the dispute. Consequently, under the terms of Article XXI, paragraph 2, the United States was free on 29 November 1979 to invoke its provisions for the purpose of referring its claims against Iran under the 1955 Treaty to the Court. While that Article does not provide in express terms that either party may bring a case to the Court by unilateral application, it is evident, as the United States contended in its Memorial, that this is what the parties intended. Provisions drawn in similar terms are very common in bilateral treaties of amity or of establishment, and the intention of the parties in accepting such clauses is clearly to provide for such a right of unilateral recourse to the Court, in the absence of agreement to employ some other pacific means of settlement.

53. The point has also been raised whether, having regard to certain counter-measures taken by the United States vis-à-vis Iran, it is open to the United States to rely on the Treaty of Amity, Economic Relations, and

Consular Rights in the present proceedings. However, all the measures in question were taken by the United States after the seizure of its Embassy by an armed group and subsequent detention of its diplomatic and consular staff as hostages. They were measures taken in response to what the United States believed to be grave and manifest violations of international law by Iran, including violations of the 1955 Treaty itself. In any event, any alleged violation of the Treaty by either party could not have the effect of precluding that party from invoking the provisions of the Treaty concerning pacific settlement of disputes.

54. No suggestion has been made by Iran that the 1955 Treaty was not in force on 4 November 1979 when the United States Embassy was overrun and its nationals taken hostage, or on 29 November when the United States submitted the dispute to the Court. The very purpose of a treaty of amity, and indeed of a treaty of establishment, is to promote friendly relations between the two countries concerned, and between their two peoples, more especially by mutual undertakings to ensure the protection and security of their nationals in each other's territory. It is precisely when difficulties arise that the treaty assumes its greatest importance, and the whole object of Article XXI, paragraph 2, of the 1955 Treaty was to establish the means for arriving at a friendly settlement of such difficulties by the Court or by other peaceful means. It would, therefore, be incompatible with the whole purpose of the 1955 Treaty if recourse to the Court under Article XXI, paragraph 2, were now to be found not to be open to the parties precisely at the moment when such recourse was most needed. Furthermore, although the machinery for the effective operation of the 1955 Treaty has, no doubt, now been impaired by reason of diplomatic relations between the two countries having been broken off by the United States, its provisions remain part of the corpus of law applicable between the United States and Iran.

* *

55. The United States has further invoked Article 13 of the Convention of 1973 on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, as a basis for the exercise of the Court's jurisdiction with respect to its claims under that Convention. The Court does not, however, find it necessary in the present Judgment to enter into the question whether, in the particular circumstances of the case, Article 13 of that Convention provides a basis for the exercise of the Court's jurisdiction with respect to those claims.

* * *

56. The principal facts material for the Court's decision on the merits of the present case have been set out earlier in this Judgment. Those facts have

to be looked at by the Court from two points of view. First, 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. The events which are the subject of the United States' claims fall into two phases which it will be convenient to examine separately.

57. The first of these phases covers the armed attack on the United States Embassy by militants on 4 November 1979, the overrunning of its premises, the seizure of its inmates as hostages, the appropriation of its property and archives and the conduct of the Iranian authorities in the face of those occurrences. The attack and the subsequent overrunning, bit by bit, of the whole Embassy premises, was an operation which continued over a period of some three hours without any body of police, any military unit or any Iranian official intervening to try to stop or impede it from being carried through to its completion. The result of the attack was considerable damage to the Embassy premises and property, the forcible opening and seizure of its archives, the confiscation of the archives and other documents found in the Embassy and, most grave of all, the seizure by force of its diplomatic and consular personnel as hostages, together with two United States nationals.

58. No suggestion has been made that the militants, when they executed their attack on the Embassy, had any form of official status as recognized "agents" or organs of the Iranian State. Their conduct in mounting the attack, overrunning the Embassy and seizing its inmates as hostages cannot, therefore, be regarded as imputable to that State on that basis. Their conduct might be considered as itself directly imputable to the Iranian State only if it were established that, in fact, on the occasion in question the militants acted on behalf on the State, having been charged by some competent organ of the Iranian State to carry out a specific operation. The information before the Court does not, however, suffice to establish with the requisite certainty the existence at that time of such a link between the militants and any competent organ of the State.

59. Previously, it is true, the religious leader of the country, the Ayatollah Khomeini, had made several public declarations inveighing against the United States as responsible for all his country's problems. In so doing, it would appear, the Ayatollah Khomeini was giving utterance to the general resentment felt by supporters of the revolution at the admission of the former Shah to the United States. The information before the Court also indicates that a spokesman for the militants, in explaining their action afterwards, did expressly refer to a message issued by the Ayatollah Khomeini, on 1 November 1979. In that message the Ayatollah Khomeini had declared that it was "up to the dear pupils, students and theological students to expand with all their might their attacks against the United States and Israel, so they may force the United States to return the deposed and criminal shah, and to condemn this great plot" (that is, a plot to stir up

dissension between the main streams of Islamic thought). In the view of the Court, however, it would be going too far to interpret such general declarations of the Ayatollah Khomeini to the people or students of Iran as amounting to an authorization from the State to undertake the specific operation of invading and seizing the United States Embassy. To do so would, indeed, conflict with the assertions of the militants themselves who are reported to have claimed credit for having devised and carried out the plan to occupy the Embassy. Again, congratulations after the event, such as those reportedly telephoned to the militants by the Ayatollah Khomeini on the actual evening of the attack, and other subsequent statements of official approval, though highly significant in another context shortly to be considered, do not alter the initially independent and unofficial character of the militants' attack on the Embassy.

60. The first phase, here under examination, of the events complained of also includes the attacks on the United States Consulates at Tabriz and Shiraz. Like the attack on the Embassy, they appear to have been executed by militants not having an official character, and successful because of lack of sufficient protection.

61. The conclusion just reached by the Court, that the initiation of the attack on the United States Embassy on 4 November 1979, and of the attacks on the Consulates at Tabriz and Shiraz the following day, cannot be considered as in itself imputable to the Iranian State does not mean that Iran is, in consequence, free of any responsibility in regard to those attacks ; for its own conduct was in conflict with its international obligations. By a number of provisions of the Vienna Conventions of 1961 and 1963, Iran was placed under the most categorical obligations, as a receiving State, to take appropriate steps to ensure the protection of the United States Embassy and Consulates, their staffs, their archives, their means of communication and the freedom of movement of the members of their staffs.

62. Thus, after solemnly proclaiming the inviolability of the premises of a diplomatic mission, Article 22 of the 1961 Convention continues in paragraph 2 :

> "*The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any* intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity." (Emphasis added.)

So, too, after proclaiming that the person of a diplomatic agent shall be inviolable, and that he shall not be liable to any form of arrest or detention, Article 29 provides :

> "The receiving State shall treat him with due respect and *shall take all appropriate steps to prevent any attack on his person, freedom or dignity.*" (Emphasis added.)

The obligation of a receiving State to protect the inviolability of the

archives and documents of a diplomatic mission is laid down in Article 24, which specifically provides that they are to be "inviolable at any time and wherever they may be". Under Article 25 it is required to "accord full facilities for the performance of the functions of the mission", under Article 26 to "ensure to all members of the mission freedom of movement and travel in its territory", and under Article 27 to "permit and protect free communication on the part of the mission for all official purposes". Analogous provisions are to be found in the 1963 Convention regarding the privileges and immunities of consular missions and their staffs (Art. 31, para. 3, Arts. 40, 33, 28, 34 and 35). In the view of the Court, the obligations of the Iranian Government here in question are not merely contractual obligations established by the Vienna Conventions of 1961 and 1963, but also obligations under general international law.

63. The facts set out in paragraphs 14 to 27 above establish to the satisfaction of the Court that on 4 November 1979 the Iranian Government failed altogether to take any "appropriate steps" to protect the premises, staff and archives of the United States' mission against attack by the militants, and to take any steps either to prevent this attack or to stop it before it reached its completion. They also show that on 5 November 1979 the Iranian Government similarly failed to take appropriate steps for the protection of the United States Consulates at Tabriz and Shiraz. In addition they show, in the opinion of the Court, that the failure of the Iranian Government to take such steps was due to more than mere negligence or lack of appropriate means.

64. The total inaction of the Iranian authorities on that date in face of urgent and repeated requests for help contrasts very sharply with its conduct on several other occasions of a similar kind. Some eight months earlier, on 14 February 1979, the United States Embassy in Tehran had itself been subjected to the armed attack mentioned above (paragraph 14), in the course of which the attackers had taken the Ambassador and his staff prisoner. On that occasion, however, a detachment of Revolutionary Guards, sent by the Government, had arrived promptly, together with a Deputy Prime Minister, and had quickly succeeded in freeing the Ambassador and his staff and restoring the Embassy to him. On 1 March 1979, moreover, the Prime Minister of Iran had sent a letter expressing deep regret at the incident, giving an assurance that appropriate arrangements had been made to prevent any repetition of such incidents, and indicating the willingness of his Government to indemnify the United States for the damage. On 1 November 1979, only three days before the events which gave rise to the present case, the Iranian police intervened quickly and effectively to protect the United States Embassy when a large crowd of demonstrators spent several hours marching up and down outside it. Furthermore, on other occasions in November 1979 and January 1980, invasions or attempted invasions of other foreign embassies in Tehran were frustrated or speedily terminated.

65. A similar pattern of facts appears in relation to consulates. In

February 1979, at about the same time as the first attack on the United States Embassy, attacks were made by demonstrators on its Consulates in Tabriz and Shiraz ; but the Iranian authorities then took the necessary steps to clear them of the demonstrators. On the other hand, the Iranian authorities took no action to prevent the attack of 5 November 1979, or to restore the Consulates to the possession of the United States. In contrast, when on the next day militants invaded the Iraqi Consulate in Kermanshah, prompt steps were taken by the Iranian authorities to secure their withdrawal from the Consulate. Thus in this case, the Iranian authorities and police took the necessary steps to prevent and check the attempted invasion or return the premises to their rightful owners.

66. As to the actual conduct of the Iranian authorities when faced with the events of 4 November 1979, the information before the Court establishes that, despite assurances previously given by them to the United States Government and despite repeated and urgent calls for help, they took no apparent steps either to prevent the militants from invading the Embassy or to persuade or to compel them to withdraw. Furthermore, after the militants had forced an entry into the premises of the Embassy, the Iranian authorities made no effort to compel or even to persuade them to withdraw from the Embassy and to free the diplomatic and consular staff whom they had made prisoner.

67. This inaction of the Iranian Government by itself constituted clear and serious violation of Iran's obligations to the United States under the provisions of Article 22, paragraph 2, and Articles 24, 25, 26, 27 and 29 of the 1961 Vienna Convention on Diplomatic Relations, and Articles 5 and 36 of the 1963 Vienna Convention on Consular Relations. Similarly, with respect to the attacks on the Consulates at Tabriz and Shiraz, the inaction of the Iranian authorities entailed clear and serious breaches of its obligations under the provisions of several further articles of the 1963 Convention on Consular Relations. So far as concerns the two private United States nationals seized as hostages by the invading militants, that inaction entailed, albeit incidentally, a breach of its obligations under Article II, paragraph 4, of the 1955 Treaty of Amity, Economic Relations, and Consular Rights which, in addition to the obligations of Iran existing under general international law, requires the parties to ensure "the most constant protection and security" to each other's nationals in their respective territories.

68. The Court is therefore led inevitably to conclude, in regard to the first phase of the events which has so far been considered, that on 4 November 1979 the Iranian authorities :

(a) were fully aware of their obligations under the conventions in force to take appropriate steps to protect the premises of the United States Embassy and its diplomatic and consular staff from any attack and from any infringement of their inviolability, and to ensure the

security of such other persons as might be present on the said premises ;

(b) were fully aware, as a result of the appeals for help made by the United States Embassy, of the urgent need for action on their part ;

(c) had the means at their disposal to perform their obligations ;

(d) completely failed to comply with these obligations.

Similarly, the Court is led to conclude that the Iranian authorities were equally aware of their obligations to protect the United States Consulates at Tabriz and Shiraz, and of the need for action on their part, and similarly failed to use the means which were at their disposal to comply with their obligations.

* *

69. The second phase of the events which are the subject of the United States' claims comprises the whole series of facts which occurred following the completion of the occupation of the United States Embassy by the militants, and the seizure of the Consulates at Tabriz and Shiraz. The occupation having taken place and the diplomatic and consular personnel of the United States' mission having been taken hostage, the action required of the Iranian Government by the Vienna Conventions and by general international law was manifest. Its plain duty was at once to make every effort, and to take every appropriate step, to bring these flagrant infringements of the inviolability of the premises, archives and diplomatic and consular staff of the United States Embassy to a speedy end, to restore the Consulates at Tabriz and Shiraz to United States control, and in general to re-establish the status quo and to offer reparation for the damage.

70. No such step was, however, taken by the Iranian authorities. At a press conference on 5 November the Foreign Minister, Mr. Yazdi, conceded that "according to international regulations the Iranian Government is dutybound to safeguard the life and property of foreign nationals". But he made no mention of Iran's obligation to safeguard the inviolability of foreign embassies and diplomats ; and he ended by announcing that the action of the students "enjoys the endorsement and support of the government, because America herself is responsible for this incident". As to the Prime Minister, Mr. Bazargan, he does not appear to have made any statement on the matter before resigning his office on 5 November.

71. In any event expressions of approval of the take-over of the Embassy, and indeed also of the Consulates at Tabriz and Shiraz, by militants came immediately from numerous Iranian authorities, including religious, judicial, executive, police and broadcasting authorities. Above all, the Ayatollah Khomeini himself made crystal clear the endorsement by the State both of the take-over of the Embassy and Consulates and of the

detention of the Embassy staff as hostages. At a reception in Qom on 5 November, the Ayatollah Khomeini left his audience in no doubt as to his approval of the action of the militants in occupying the Embassy, to which he said they had resorted "because they saw that the shah was allowed in America". Saying that he had been informed that the "centre occupied by our young men . . . has been a lair of espionage and plotting", he asked how the young people could be expected "simply to remain idle and witness all these things". Furthermore he expressly stigmatized as "rotten roots" those in Iran who were "hoping we would mediate and tell the young people to leave this place". The Ayatollah's refusal to order "the young people" to put an end to their occupation of the Embassy, or the militants in Tabriz and Shiraz to evacuate the United States Consulates there, must have appeared the more significant when, on 6 November, he instructed "the young people" who had occupied the Iraqi Consulate in Kermanshah that they should leave it as soon as possible. The true significance of this was only reinforced when, next day, he expressly forbade members of the Revolutionary Council and all responsible officials to meet the special representatives sent by President Carter to try and obtain the release of the hostages and evacuation of the Embassy.

72. At any rate, thus fortified in their action, the militants at the Embassy at once went one step farther. On 6 November they proclaimed that the Embassy, which they too referred to as "the U.S. centre of plots and espionage", would remain under their occupation, and that they were watching "most closely" the members of the diplomatic staff taken hostage whom they called "U.S. mercenaries and spies".

73. The seal of official government approval was finally set on this situation by a decree issued on 17 November 1979 by the Ayatollah Khomeini. His decree began with the assertion that the American Embassy was "a centre of espionage and conspiracy" and that "those people who hatched plots against our Islamic movement in that place do not enjoy international diplomatic respect". He went on expressly to declare that the premises of the Embassy and the hostages would remain as they were until the United States had handed over the former Shah for trial and returned his property to Iran. This statement of policy the Ayatollah qualified only to the extent of requesting the militants holding the hostages to "hand over the blacks and the women, if it is proven that they did not spy, to the Ministry of Foreign Affairs so that they may be immediately expelled from Iran". As to the rest of the hostages, he made the Iranian Government's intentions all too clear :

> "The noble Iranian nation will not give permission for the release of the rest of them. Therefore, the rest of them will be under arrest until the American Government acts according to the wish of the nation."

74. 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. The militants, authors of the invasion and jailers of the hostages, had now become agents of the Iranian State for whose acts the State itself was internationally responsible. On 6 May 1980, the Minister for Foreign Affairs, Mr. Ghotbzadeh, is reported to have said in a television interview that the occupation of the United States Embassy had been "done by our nation". Moreover, in the prevailing circumstances the situation of the hostages was aggravated by the fact that their detention by the militants did not even offer the normal guarantees which might have been afforded by police and security forces subject to the discipline and the control of official superiors.

75. During the six months which have elapsed since the situation just described was created by the decree of the Ayatollah Khomeini, it has undergone no material change. The Court's Order of 15 December 1979 indicating provisional measures, which called for the immediate restoration of the Embassy to the United States and the release of the hostages, was publicly rejected by the Minister for Foreign Affairs on the following day and has been ignored by all Iranian authorities. On two occasions, namely on 23 February and on 7 April 1980, the Ayatollah Khomeini laid it down that the hostages should remain at the United States Embassy under the control of the militants until the new Iranian parliament should have assembled and taken a decision as to their fate. His adherence to that policy also made it impossible to obtain his consent to the transfer of the hostages from the control of the militants to that of the Government or of the Council of the Revolution. In any event, while highly desirable from the humanitarian and safety points of view, such a transfer would not have resulted in any material change in the legal situation, for its sponsors themselves emphasized that it must not be understood as signifying the release of the hostages.

* *

76. The Iranian authorities' decision to continue the subjection of the premises of the United States Embassy to occupation by militants and of the Embassy staff to detention as hostages, clearly gave rise to repeated and multiple breaches of the applicable provisions of the Vienna Conven-

tions even more serious than those which arose from their failure to take any steps to prevent the attacks on the inviolability of these premises and staff.

77. In the first place, these facts constituted breaches additional to those already committed of paragraph 2 of Article 22 of the 1961 Vienna Convention on Diplomatic Relations which requires Iran to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of its peace or impairment of its dignity. Paragraphs 1 and 3 of that Article have also been infringed, and continue to be infringed, since they forbid agents of a receiving State to enter the premises of a mission without consent or to undertake any search, requisition, attachment or like measure on the premises. Secondly, they constitute continuing breaches of Article 29 of the same Convention which forbids any arrest or detention of a diplomatic agent and any attack on his person, freedom or dignity. Thirdly, the Iranian authorities are without doubt in continuing breach of the provisions of Articles 25, 26 and 27 of the 1961 Vienna Convention and of pertinent provisions of the 1963 Vienna Convention concerning facilities for the performance of functions, freedom of movement and communications for diplomatic and consular staff, as well as of Article 24 of the former Convention and Article 33 of the latter, which provide for the absolute inviolability of the archives and documents of diplomatic missions and consulates. This particular violation has been made manifest to the world by repeated statements by the militants occupying the Embassy, who claim to be in possession of documents from the archives, and by various government authorities, purporting to specify the contents thereof. Finally, the continued detention as hostages of the two private individuals of United States nationality entails a renewed breach of the obligations of Iran under Article II, paragraph 4, of the 1955 Treaty of Amity, Economic Relations, and Consular Rights.

78. Inevitably, in considering the compatibility or otherwise of the conduct of the Iranian authorities with the requirements of the Vienna Conventions, the Court has focussed its attention primarily on the occupation of the Embassy and the treatment of the United States diplomatic and consular personnel within the Embassy. It is however evident that the question of the compatibility of their conduct with the Vienna Conventions also arises in connection with the treatment of the United States Chargé d'affaires and two members of his staff in the Ministry of Foreign Affairs on 4 November 1979 and since that date. The facts of this case establish to the satisfaction of the Court that on 4 November 1979 and thereafter the Iranian authorities have withheld from the Chargé d'affaires and the two members of his staff the necessary protection and facilities to permit them to leave the Ministry in safety. Accordingly it appears to the Court that with respect to these three members of the United States' mission the Iranian authorities have committed a continuing breach of their obligations under Articles 26 and 29 of the 1961 Vienna Convention on Diplomatic Relations. It further appears to the Court that the con-

tinuation of that situation over a long period has, in the circumstances, amounted to detention in the Ministry.

79. The Court moreover cannot conclude its observations on the series of acts which it has found to be imputable to the Iranian State and to be patently inconsistent with its international obligations under the Vienna Conventions of 1961 and 1963 without mention also of another fact. This is that judicial authorities of the Islamic Republic of Iran and the Minister for Foreign Affairs have frequently voiced or associated themselves with, a threat first announced by the militants, of having some of the hostages submitted to trial before a court or some other body. These threats may at present merely be acts in contemplation. But the Court considers it necessary here and now to stress that, if the intention to submit the hostages to any form of criminal trial or investigation were to be put into effect, that would constitute a grave breach by Iran of its obligations under Article 31, paragraph 1, of the 1961 Vienna Convention. This paragraph states in the most express terms : "A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State." Again, if there were an attempt to compel the hostages to bear witness, a suggestion renewed at the time of the visit to Iran of the Secretary-General's Commission, Iran would without question be violating paragraph 2 of that same Article of the 1961 Vienna Convention which provides that : "A diplomatic agent is not obliged to give evidence as a witness."

* *

80. The facts of the present case, viewed in the light of the applicable rules of law, thus speak loudly and clearly of successive and still continuing breaches by Iran of its obligations to the United States under the Vienna Conventions of 1961 and 1963, as well as under the Treaty of 1955. Before drawing from this finding the conclusions which flow from it, in terms of the international responsibility of the Iranian State vis-à-vis the United States of America, the Court considers that it should examine one further point. The Court cannot overlook the fact that on the Iranian side, in often imprecise terms, the idea has been put forward that the conduct of the Iranian Government, at the time of the events of 4 November 1979 and subsequently, might be justified by the existence of special circumstances.

81. In his letters of 9 December 1979 and 16 March 1980, as previously recalled, Iran's Minister for Foreign Affairs referred to the present case as only "a marginal and secondary aspect of an overall problem". This problem, he maintained, "involves, *inter alia,* more than 25 years of continual interference by the United States in the internal affairs of Iran, the shameless exploitation of our country, and numerous crimes perpetrated against the Iranian people, contrary to and in conflict with all international and humanitarian norms". In the first of the two letters he indeed singled out amongst the "crimes" which he attributed to the United States an alleged complicity on the part of the Central Intelligence Agency in the coup d'état of 1953 and in the restoration of the Shah to the throne of Iran.

Invoking these alleged crimes of the United States, the Iranian Foreign Minister took the position that the United States' Application could not be examined by the Court divorced from its proper context, which he insisted was "the whole political dossier of the relations between Iran and the United States over the last 25 years".

82. The Court must however observe, first of all, that the matters alleged in the Iranian Foreign Minister's letters of 9 December 1979 and 16 March 1980 are of a kind which, if invoked in legal proceedings, must clearly be established to the satisfaction of the tribunal with all the requisite proof. The Court, in its Order of 15 December 1979, pointed out that if the Iranian Government considered the alleged activities of the United States in Iran legally to have a close connection with the subject-matter of the Application it was open to Iran to present its own case regarding those activities to the Court by way of defence to the United States' claims. The Iranian Government, however, did not appear before the Court. Moreover, even in his letter of 16 March 1980, transmitted to the Court some three months after the issue of that Order, the Iranian Foreign Minister did not furnish the Court with any further information regarding the alleged criminal activities of the United States in Iran, or explain on what legal basis he considered these allegations to constitute a relevant answer to the United States' claims. The large body of information submitted by the United States itself to the Court includes, it is true, some statements emanating from Iranian authorities or from the militants in which reference is made to alleged espionage and interference in Iran by the United States centred upon its Embassy in Tehran. These statements are, however, of the same general character as the assertions of alleged criminal activities of the United States contained in the Foreign Minister's letters, and are unsupported by evidence furnished by Iran before the Court. Hence they do not provide a basis on which the Court could form a judicial opinion on the truth or otherwise of the matters there alleged.

83. In any case, even if the alleged criminal activities of the United States in Iran could be considered as having been established, the question would remain whether they could be regarded by the Court as constituting a justification of Iran's conduct and thus a defence to the United States' claims in the present case. The Court, however, is unable to accept that they can be so regarded. This is because diplomatic law itself provides the necessary means of defence against, and sanction for, illicit activities by members of diplomatic or consular missions.

84. The Vienna Conventions of 1961 and 1963 contain express provisions to meet the case when members of an embassy staff, under the cover of diplomatic privileges and immunities, engage in such abuses of their functions as espionage or interference in the internal affairs of the receiving State. It is precisely with the possibility of such abuses in contemplation that Article 41, paragraph 1, of the Vienna Convention on Diplomatic

Relations, and Article 55, paragraph 1, of the Vienna Convention on Consular Relations, provide

> "Without prejudice to their privileges and immunities, it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the receiving State. They also have a duty not to interfere in the internal affairs of that State."

Paragraph 3 of Article 41 of the 1961 Convention further states : "The premises of the mission must not be used in any manner incompatible with the functions of the missions . . . ": an analogous provision, with respect to consular premises is to be found in Article 55, paragraph 2, of the 1963 Convention.

85. Thus, it is for the very purpose of providing a remedy for such possible abuses of diplomatic functions that Article 9 of the 1961 Convention on Diplomatic Relations stipulates :

> "1. The receiving State may at any time and without having to explain its decision, notify the sending State that the head of the mission or any member of the diplomatic staff of the mission is *persona non grata* or that any other member of the staff of the mission is not acceptable. In any such case, the sending State shall, as appropriate, either recall the person concerned or terminate his functions with the mission. A person may be declared *non grata* or not acceptable before arriving in the territory of the receiving State.
>
> 2. If the sending State refuses or fails within a reasonable period to carry out its obligations under paragraph 1 of this Article, the receiving State may refuse to recognize the person concerned as a member of the mission."

The 1963 Convention contains, in Article 23, paragraphs 1 and 4, analogous provisions in respect of consular officers and consular staff. Paragraph 1 of Article 9 of the 1961 Convention, and paragraph 4 of Article 23 of the 1963 Convention, take account of the difficulty that may be experienced in practice of proving such abuses in every case or, indeed, of determining exactly when exercise of the diplomatic function, expressly recognized in Article 3 (1) *(d)* of the 1961 Convention, of "ascertaining by all lawful means conditions and developments in the receiving State" may be considered as involving such acts as "espionage" or "interference in internal affairs". The way in which Article 9, paragraph 1, takes account of any such difficulty is by providing expressly in its opening sentence that the receiving State may "at any time and without having to explain its decision" notify the sending State that any particular member of its diplomatic mission is "*persona non grata*" or "not acceptable" (and similarly Article 23, paragraph 4, of the 1963 Convention provides that "the receiving State is not obliged to give to the sending State reasons for its de-

cision"). Beyond that remedy for dealing with abuses of the diplomatic function by individual members of a mission, a receiving State has in its hands a more radical remedy if abuses of their functions by members of a mission reach serious proportions. This is the power which every receiving State has, at its own discretion, to break off diplomatic relations with a sending State and to call for the immediate closure of the offending mission.

86. The rules of diplomatic law, in short, constitute a self-contained régime 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. These means are, by their nature, entirely efficacious, for unless the sending State recalls the member of the mission objected to forthwith, the prospect of the almost immediate loss of his privileges and immunities, because of the withdrawal by the receiving State of his recognition as a member of the mission, will in practice compel that person, in his own interest, to depart at once. But the principle of the inviolability of the persons of diplomatic agents and the premises of diplomatic missions is one of the very foundations of this long-established régime, to the evolution of which the traditions of Islam made a substantial contribution. The fundamental character of the principle of inviolability is, moreover, strongly underlined by the provisions of Articles 44 and 45 of the Convention of 1961 (cf. also Articles 26 and 27 of the Convention of 1963). Even in the case of armed conflict or in the case of a breach in diplomatic relations those provisions require that both the inviolability of the members of a diplomatic mission and of the premises, property and archives of the mission must be respected by the receiving State. Naturally, the observance of this principle does not mean – and this the Applicant Government expressly acknowledges – that a diplomatic agent caught in the act of committing an assault or other offence may not, on occasion, be briefly arrested by the police of the receiving State in order to prevent the commission of the particular crime. But such eventualities bear no relation at all to what occurred in the present case.

87. In the present case, the Iranian Government did not break off diplomatic relations with the United States ; and in response to a question put to him by a Member of the Court, the United States Agent informed the Court that at no time before the events of 4 November 1979 had the Iranian Government declared, or indicated any intention to declare, any member of the United States diplomatic or consular staff in Tehran *persona non grata.* The Iranian Government did not, therefore, employ the remedies placed at its disposal by diplomatic law specifically for dealing with activities of the kind of which it now complains. Instead, it allowed a group of militants to attack and occupy the United States Embassy by force, and to seize the diplomatic and consular staff as hostages ; instead, it has endorsed that action of those militants and has deliberately maintained their occupation of the Embassy and detention of its staff as a

means of coercing the sending State. It has, at the same time, refused altogether to discuss this situation with representatives of the United States. The Court, therefore, can only conclude that Iran did not have recourse to the normal and efficacious means at its disposal, but resorted to coercive action against the United States Embassy and its staff.

88. In an address given on 5 November 1979, the Ayatollah Khomeini traced the origin of the operation carried out by the Islamic militants on the previous day to the news of the arrival of the former Shah of Iran in the United States. That fact may no doubt have been the ultimate catalyst of the resentment felt in certain circles in Iran and among the Iranian population against the former Shah for his alleged misdeeds, and also against the United States Government which was being publicly accused of having restored him to the throne, of having supported him for many years and of planning to go on doing so. But whatever be the truth in regard to those matters, they could hardly be considered as having provided a justification for the attack on the United States Embassy and its diplomatic mission. Whatever extenuation of the responsibility to be attached to the conduct of the Iranian authorities may be found in the offence felt by them because of the admission of the Shah to the United States, that feeling of offence could not affect the imperative character of the legal obligations incumbent upon the Iranian Government which is not altered by a state of diplomatic tension between the two countries. Still less could a mere refusal or failure on the part of the United States to extradite the Shah to Iran be considered to modify the obligations of the Iranian authorities, quite apart from any legal difficulties, in internal or international law, there might be in acceding to such a request for extradition.

89. Accordingly, the Court finds that no circumstances exist in the present case which are capable of negativing the fundamentally unlawful character of the conduct pursued by the Iranian State on 4 November 1979 and thereafter. This finding does not however exclude the possibility that some of the circumstances alleged, if duly established, may later be found to have some relevance in determining the consequences of the responsibility incurred by the Iranian State with respect to that conduct, although they could not be considered to alter its unlawful character.

* * *

90. On the basis of the foregoing detailed examination of the merits of the case, the Court finds that Iran, by committing successive and continuing breaches of the obligations laid upon it by the Vienna Conventions of 1961 and 1963 on Diplomatic and Consular Relations, the Treaty of Amity, Economic Relations, and Consular Rights of 1955, and the applicable rules of general international law, has incurred responsibility towards the United States. As to the consequences of this finding, it clearly

entails an obligation on the part of the Iranian State to make reparation for the injury thereby caused to the United States. Since however Iran's breaches of its obligations are still continuing, the form and amount of such reparation cannot be determined at the present date.

91. At the same time the Court finds itself obliged to stress the cumulative effect of Iran's breaches of its obligations when taken together. A marked escalation of these breaches can be seen to have occurred in the transition from the failure on the part of the Iranian authorities to oppose the armed attack by the militants on 4 November 1979 and their seizure of the Embassy premises and staff, to the almost immediate endorsement by those authorities of the situation thus created, and then to their maintaining deliberately for many months the occupation of the Embassy and detention of its staff by a group of armed militants acting on behalf of the State for the purpose of forcing the United States to bow to certain demands. Wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights. But what has above all to be emphasized is the extent and seriousness of the conflict between the conduct of the Iranian State and its obligations under the whole corpus of the international rules of which diplomatic and consular law is comprised, rules the fundamental character of which the Court must here again strongly affirm. In its Order of 15 December 1979, the Court made a point of stressing that the obligations laid on States by the two Vienna Conventions are of cardinal importance for the maintenance of good relations between States in the interdependent world of today. "There is no more fundamental prerequisite for the conduct of relations between States", the Court there said, "than the inviolability of diplomatic envoys and embassies, so that throughout history nations of all creeds and cultures have observed reciprocal obligations for that purpose." The institution of diplomacy, the Court continued, has proved to be "an instrument essential for effective co-operation in the international community, and for enabling States, irrespective of their differing constitutional and social systems, to achieve mutual understanding and to resolve their differences by peaceful means" (*I.C.J. Reports 1979*, p. 19).

92. It is a matter of deep regret that the situation which occasioned those observations has not been rectified since they were made. Having regard to their importance the Court considers it essential to reiterate them in the present Judgment. The frequency with which at the present time the principles of international law governing diplomatic and consular relations are set at naught by individuals or groups of individuals is already deplorable. But this case is unique and of very particular gravity because here it is not only private individuals or groups of individuals that have disregarded and set at naught the inviolability of a foreign embassy, but the government of the receiving State itself. Therefore in recalling yet again the extreme importance of the principles of law which it is called upon to apply

in the present case, the Court considers it to be its duty to draw 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.

* *

93. Before drawing the appropriate conclusions from its findings on the merits in this case, the Court considers that it cannot let pass without comment the incursion into the territory of Iran made by United States military units on 24-25 April 1980, an account of which has been given earlier in this Judgment (paragraph 32). No doubt the United States Government may have had understandable preoccupations with respect to the well-being of its nationals held hostage in its Embassy for over five months. No doubt also the United States Government may have had understandable feelings of frustration at Iran's long-continued detention of the hostages, notwithstanding two resolutions of the Security Council as well as the Court's own Order of 15 December 1979 calling expressly for their immediate release. Nevertheless, in the circumstances of the present proceedings, the Court cannot fail to express its concern in regard to the United States' incursion into Iran. When, as previously recalled, this case had become ready for hearing on 19 February 1980, the United States Agent requested the Court, owing to the delicate stage of certain negotiations, to defer setting a date for the hearings. Subsequently, on 11 March, the Agent informed the Court of the United States Government's anxiety to obtain an early judgment on the merits of the case. The hearings were accordingly held on 18, 19 and 20 March, and the Court was in course of preparing the present judgment adjudicating upon the claims of the United States against Iran when the operation of 24 April 1980 took place. The Court therefore feels bound to observe that an operation undertaken in those circumstances, from whatever motive, is of a kind calculated to undermine respect for the judicial process in international relations ; and to recall that in paragraph 47, 1 B, of its Order of 15 December 1979 the Court had indicated that no action was to be taken by either party which might aggravate the tension between the two countries.

94. At the same time, however, the Court must point out that neither the question of the legality of the operation of 24 April 1980, under the Charter of the United Nations and under general international law, nor any possible question of responsibility flowing from it, is before the Court. It must also point out that this question can have no bearing on the evaluation of

the conduct of the Iranian Government over six months earlier, on 4 November 1979, which is the subject-matter of the United States' Application. It follows that the findings reached by the Court in this Judgment are not affected by that operation.

* * *

95. For these reasons,

THE COURT,

1. By thirteen votes to two,

Decides that the Islamic Republic of Iran, by the conduct which the Court has set out in this Judgment, has violated in several respects, and is still violating, obligations owed by it to the United States of America under international conventions in force between the two countries, as well as under long-established rules of general international law ;

IN FAVOUR : *President* Sir Humphrey Waldock ; *Vice-President* Elias ; *Judges* Forster, Gros, Lachs, Nagendra Singh, Ruda, Mosler, Oda, Ago, El-Erian, Sette-Camara and Baxter.

AGAINST : *Judges* Morozov and Tarazi.

2. By thirteen votes to two,

Decides that the violations of these obligations engage the responsibility of the Islamic Republic of Iran towards the United States of America under international law ;

IN FAVOUR : *President* Sir Humphrey Waldock ; *Vice-President* Elias ; *Judges* Forster, Gros, Lachs, Nagendra Singh, Ruda, Mosler, Oda, Ago, El-Erian, Sette-Camara and Baxter.

AGAINST : *Judges* Morozov and Tarazi.

3. Unanimously,

Decides that the Government of the Islamic Republic of Iran must immediately take all steps to redress the situation resulting from the events of 4 November 1979 and what followed from these events, and to that end :

(a) must immediately terminate the unlawful detention of the United States Chargé d'affaires and other diplomatic and consular staff and other United States nationals now held hostage in Iran, and must immediately release each and every one and entrust them to the protecting Power (Article 45 of the 1961 Vienna Convention on Diplomatic Relations) ;

(b) must ensure that all the said persons have the necessary means of leaving Iranian territory, including means of transport ;

(c) must immediately place in the hands of the protecting Power the premises, property, archives and documents of the United States Embassy in Tehran and of its Consulates in Iran ;

4. Unanimously,

Decides that no member of the United States diplomatic or consular staff may be kept in Iran to be subjected to any form of judicial proceedings or to participate in them as a witness ;

5. By twelve votes to three,

Decides that the Government of the Islamic Republic of Iran is under an obligation to make reparation to the Government of the United States of America for the injury caused to the latter by the events of 4 November 1979 and what followed from these events ;

IN FAVOUR : *President* Sir Humphrey Waldock ; *Vice-President* Elias ; *Judges* Forster, Gros, Nagendra Singh, Ruda, Mosler, Oda, Ago, El-Erian, Sette-Camara and Baxter.

AGAINST : *Judges* Lachs, Morozov and Tarazi.

6. By fourteen votes to one,

Decides that the form and amount of such reparation, failing agreement between the Parties, shall be settled by the Court, and reserves for this purpose the subsequent procedure in the case.

IN FAVOUR : *President* Sir Humphrey Waldock ; *Vice-President* Elias ; *Judges* Forster, Gros, Lachs, Nagendra Singh, Ruda, Mosler, Tarazi, Oda, Ago, El-Erian, Sette-Camara and Baxter.

AGAINST : *Judge* Morozov.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this twenty-fourth day of May, one thousand nine hundred and eighty, in three copies, one of which will be placed in the archives of the Court, and the others transmitted to the Government of the United States of America and the Government of the Islamic Republic of Iran, respectively.

(Signed) Humphrey WALDOCK,
President.

(Signed) S. AQUARONE,
Registrar.

Judge LACHS appends a separate opinion to the Judgment of the Court.

Judges MOROZOV and TARAZI append dissenting opinions to the Judgment of the Court.

(Initialled) H.W.

(Initialled) S.A.

Annex 79

CHAPTER XXIII

LAW OF TREATIES

1. VIENNA CONVENTION ON THE LAW OF TREATIES

Vienna, 23 May 1969

ENTRY INTO FORCE: 27 January 1980, in accordance with article 84(1).

REGISTRATION: 27 January 1980, No. 18232.

STATUS: Signatories: 45. Parties: 116.

TEXT: United Nations, *Treaty Series* , vol. 1155, p. 331.

Note: The Convention was adopted on 22 May 1969 and opened for signature on 23 May 1969 by the United Nations Conference on the Law of Treaties. The Conference was convened pursuant to General Assembly resolutions 2166 (XXI)[1] of 5 December 1966 and 2287 (XXII)[2]of 6 December 1967. The Conference held two sessions, both at the Neue Hofburg in Vienna, the first session from 26 March to 24 May 1968 and the second session from 9 April to 22 May 1969. In addition to the Convention, the Conference adopted the Final Act and certain declarations and resolutions, which are annexed to that Act. By unanimous decision of the Conference, the original of the Final Act was deposited in the archives of the Federal Ministry for Foreign Affairs of Austria. The text of the Final Act is included in document A/CONF.39/11/Add.2.

Participant	*Signature*	*Accession(a), Succession(d), Ratification*
Afghanistan	23 May 1969	
Albania		27 Jun 2001 a
Algeria		8 Nov 1988 a
Andorra		5 Apr 2004 a
Argentina	23 May 1969	5 Dec 1972
Armenia		17 May 2005 a
Australia		13 Jun 1974 a
Austria		30 Apr 1979 a
Azerbaijan		11 Jan 2018 a
Barbados	23 May 1969	24 Jun 1971
Belarus		1 May 1986 a
Belgium		1 Sep 1992 a
Benin		2 Nov 2017 a
Bolivia (Plurinational State of)	23 May 1969	
Bosnia and Herzegovina[3]		1 Sep 1993 d
Brazil	23 May 1969	25 Sep 2009
Bulgaria		21 Apr 1987 a
Burkina Faso		25 May 2006 a
Cambodia	23 May 1969	
Cameroon		23 Oct 1991 a
Canada		14 Oct 1970 a
Central African Republic		10 Dec 1971 a
Chile	23 May 1969	9 Apr 1981
China[4]		3 Sep 1997 a
Colombia	23 May 1969	10 Apr 1985
Congo	23 May 1969	12 Apr 1982
Costa Rica	23 May 1969	22 Nov 1996
Côte d'Ivoire	23 Jul 1969	
Croatia[3]		12 Oct 1992 d
Cuba		9 Sep 1998 a
Cyprus		28 Dec 1976 a
Czech Republic[5]		22 Feb 1993 d
Democratic Republic of the Congo		25 Jul 1977 a
Denmark	18 Apr 1970	1 Jun 1976
Dominican Republic		1 Apr 2010 a
Ecuador	23 May 1969	11 Feb 2005
Egypt		11 Feb 1982 a
El Salvador	16 Feb 1970	
Estonia		21 Oct 1991 a
Ethiopia	30 Apr 1970	
Finland	23 May 1969	19 Aug 1977
Gabon		5 Nov 2004 a
Georgia		8 Jun 1995 a

Participant	Signature	Accession(a), Succession(d), Ratification
Germany[6,7]	30 Apr 1970	21 Jul 1987
Ghana	23 May 1969	
Greece		30 Oct 1974 a
Guatemala	23 May 1969	21 Jul 1997
Guinea		16 Sep 2005 a
Guyana	23 May 1969	15 Sep 2005
Haiti		25 Aug 1980 a
Holy See	30 Sep 1969	25 Feb 1977
Honduras	23 May 1969	20 Sep 1979
Hungary		19 Jun 1987 a
Iran (Islamic Republic of)	23 May 1969	
Ireland		7 Aug 2006 a
Italy	22 Apr 1970	25 Jul 1974
Jamaica	23 May 1969	28 Jul 1970
Japan		2 Jul 1981 a
Kazakhstan		5 Jan 1994 a
Kenya	23 May 1969	
Kiribati		15 Sep 2005 a
Kuwait		11 Nov 1975 a
Kyrgyzstan		11 May 1999 a
Lao People's Democratic Republic		31 Mar 1998 a
Latvia		4 May 1993 a
Lesotho		3 Mar 1972 a
Liberia	23 May 1969	29 Aug 1985
Libya		22 Dec 2008 a
Liechtenstein		8 Feb 1990 a
Lithuania		15 Jan 1992 a
Luxembourg	4 Sep 1969	23 May 2003
Madagascar	23 May 1969	
Malawi		23 Aug 1983 a
Malaysia		27 Jul 1994 a
Maldives		14 Sep 2005 a
Mali		31 Aug 1998 a
Malta		26 Sep 2012 a
Mauritius		18 Jan 1973 a
Mexico	23 May 1969	25 Sep 1974
Mongolia		16 May 1988 a
Montenegro[8]		23 Oct 2006 d
Morocco	23 May 1969	26 Sep 1972
Mozambique		8 May 2001 a
Myanmar		16 Sep 1998 a
Nauru		5 May 1978 a
Nepal	23 May 1969	
Netherlands (Kingdom of the)[9]		9 Apr 1985 a
New Zealand	29 Apr 1970	4 Aug 1971
Niger		27 Oct 1971 a
Nigeria	23 May 1969	31 Jul 1969
North Macedonia[3]		8 Jul 1999 d
Oman		18 Oct 1990 a
Pakistan	29 Apr 1970	
Panama		28 Jul 1980 a
Paraguay		3 Feb 1972 a
Peru	23 May 1969	14 Sep 2000
Philippines	23 May 1969	15 Nov 1972
Poland		2 Jul 1990 a
Portugal		6 Feb 2004 a
Republic of Korea[10]	27 Nov 1969	27 Apr 1977
Republic of Moldova		26 Jan 1993 a
Russian Federation		29 Apr 1986 a
Rwanda		3 Jan 1980 a
Saudi Arabia		14 Apr 2003 a
Senegal		11 Apr 1986 a
Serbia[3]		12 Mar 2001 d
Slovakia[5]		28 May 1993 d
Slovenia[3]		6 Jul 1992 d
Solomon Islands		9 Aug 1989 a
Spain		16 May 1972 a
St. Vincent and the Grenadines		27 Apr 1999 a
State of Palestine		2 Apr 2014 a
Sudan	23 May 1969	18 Apr 1990
Suriname		31 Jan 1991 a
Sweden	23 Apr 1970	4 Feb 1975
Switzerland		7 May 1990 a
Syrian Arab Republic		2 Oct 1970 a
Tajikistan		6 May 1996 a
Timor-Leste		8 Jan 2013 a
Togo		28 Dec 1979 a
Trinidad and Tobago	23 May 1969	
Tunisia		23 Jun 1971 a
Turkmenistan		4 Jan 1996 a
Ukraine		14 May 1986 a
United Kingdom of Great Britain and Northern Ireland	20 Apr 1970	25 Jun 1971

Participant	Signature	Accession(a), Succession(d), Ratification
United Republic of Tanzania		12 Apr 1976 a
United States of America	24 Apr 1970	
Uruguay	23 May 1969	5 Mar 1982
Uzbekistan		12 Jul 1995 a
Viet Nam		10 Oct 2001 a
Zambia	23 May 1969	

Declarations and Reservations
(Unless otherwise indicated, the declarations and reservations were made upon ratification, accession or succession.)

AFGHANISTAN

"Afghanistan's understanding of article 62 (fundamental change of circumstances) is as follows:

"Sub-paragraph 2 (a) of this article does not cover unequal and illegal treaties, or any treaties which were contrary to the principle of self-determination. This view was also supported by the Expert Consultant in his statement of 11 May 1968 in the Committee of the Whole and on 14 May 1969 (doc. A/CONF.39/L.40) to the Conference."

ALGERIA

The accession of the People's Democratic Republic of Algeria to the present Convention does not in any way mean recognition of Israel.

This accession shall not be interpreted as involving the es-tablishment of relations of any kind whatever with Israel.

The Government of the People's Democratic Republic of Algeria considers that the competence of the International Court of Justice cannot be exercised with respect to a dispute such as that envisaged in article 66 (a) at the request of one of the parties alone.

It declares that, in each case, the prior agreement of all the parties concerned is necessary for the dispute to be submitted to the said Court.

ARGENTINA

(a) The Argentine Republic does not regard the rule con- tained in article 45 *(b)* as applicable to it inasmuch as the rule in question provides for the renunciation of rights in advance.

(b) The Argentine Republic does not accept the idea that a fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may be invoked as a ground for terminating or withdrawing from the treaty; moreover, it objects to the reservations made by Afghanistan, Morocco and Syria with respect to article 62, paragraph 2 *(a)* , and to any reservations to the same effect as those of the States referred to which may be made in the future with respect to article 62.

The application of this Convention to territories whose sovereignty is a subject of dispute between two or more States, whether or not they are parties to it, cannot be deemed to imply a modification, renunciation or abandonment of the position heretofore maintained by each of them.

ARMENIA[11]

"The Republic of Armenia does not consider itself bound by the provisions of article 66 of the Vienna Convention on the Law of Treaties and declares that for any dispute among the Contracting Parties concerning the application or the interpretation of any article of part V of the Convention to be submitted to the International Court of Justice for a decision or to the Conciliation Commission for consideration the consent of all the parties to the dispute is required in each separate case."

BELARUS

[Same reservations and declaration, identical in essence , mutatis mutandis, *as the one made by the Russian Federation.]*

BELGIUM[12]

The Belgian State will not be bound by articles 53 and 64 of the Convention with regard to any party which, in formulating a reservation concerning article 66 (a), objects to the settlement procedure established by this article.

BOLIVIA (PLURINATIONAL STATE OF)

1. The shortcomings of the Vienna Convention on the Law of Treaties are such as to postpone the realization of the aspirations of mankind.
2. Nevertheless, the rules endorsed by the Convention do represent significant advances, based on the principles of international justice which Bolivia has traditionally supported.

BRAZIL

... with a reservation to articles 25 and 66.

BULGARIA[13]

The People's Republic of Bulgaria considers it necessary to underline that articles 81 and 83 of the Convention, which pre- clude a number of States from becoming parties to it, are of an unjustifiably restrictive character. These provisions are incompatible with the very nature of the Convention, which is of a universal character and should be open for accession by all States.

CANADA

"In acceding to the Vienna Convention on the Law of Trea- ties, the Government of Canada declares its understanding that nothing in article 66 of the Convention is intended to exclude the jurisdiction of the International Court of Justice where such jurisdiction exists under the provisions of any treaty in force binding the parties with regard to the settlement of disputes. In relation to states parties to the Vienna Convention which accept as compulsory the jurisdiction of the International Court of Justice, the Government of Canada declares that it does

not regard the provisions of article 66 of the Vienna Convention as providing `some other method of peaceful settlement' within the meaning of paragraph 2 (a) of the declaration of the Government of Canada accepting as compulsory the jurisdiction of the International Court of Justice which was deposited with the Secretary-General of the United Nations on April 7, 1970."

CHILE

The Republic of Chile declares its adherence to the general principle of the immutability of treaties, without prejudice to the right of States to stipulate, in particular, rules which modify this principle, and for this reason formulates a reservation relating to the provisions of article 62, paragraphs 1 and 3, of the Con- vention, which it considers inapplicable to Chile.

CHINA

1. The People's Republic of China makes its reservation to article 66 of the said Convention.
2. The signature to the said Convention by the Taiwan authorities on 27 April 1970 in the name of "China" is illegal and therefore null and void.

COLOMBIA

With regard to article 25, Colombia formulates the reserva- tion that the Political Constitution of Colombia does not recog- nize the provisional application of treaties; it is the responsibility of the National Congress to approve or disapprove any treaties and conventions which the Government concludes with other States or with international legal entities.

COSTA RICA[14]

1. With regard to articles 11 and 12, the delegation of Costa Rica wishes to make a reservation to the effect that the Costa Rican system of constitutional law does not authorize any form of consent which is not subject to ratification by the Legislative Assembly.
2. With regard to article 25, it wishes to make a reservation to the effect that the Political Constitution of Costa Rica does not permit the provisional application of treaties, either.
3. With regard to article 27, it interprets this article as refer ring to secondary law and not to the provisions of the Political Constitution.
4. With regard to article 38, its interpretation is that no customary rule of general international law shall take precedence over any rule of the Inter-American System to which, in its view, this Convention is supplementary.

CUBA

The Government of the Republic of Cuba enters an explicit reservation to the procedure established under article 66 of the Convention, since it believes that any dispute should be settled by any means adopted by agreement between the parties to the dispute; the Republic of Cuba therefore cannot accept solutions which provide means for one of the parties, without the consent of the other to submit the dispute to procedures for judicial settlement, arbitration and conciliation.

The Government of the Republic of Cuba declares that the Vienna Convention on the Law of Treaties essentially codified and systematized the norms that had been established by custom and other sources of international law concerning negotiation, signature, ratification, entry into force, termination and other stipulations relating to international treaties; hence, those provisions, owing to their compulsory character, by virtue of having been established by universally recognized sources of international law, particularly those relating to invalidity, termination and suspension of the application of treaties, are applicable [to] any treaty negotiated by the Republic of Cuba prior to the aforesaid convention, essentially, treaties, covenants and concessions negotiated under conditions of inequality or which disregard or diminish its sovereignty and territorial integrity.

CZECH REPUBLIC[5]

DENMARK

As between itself and any State which formulates, wholly or in part, a reservation relating to the provisions of article 66 of the Convention concerning the compulsory settlement of certain disputes, Denmark will not consider itself bound by those provisions of part V of the Convention, according to which the procedures for settlement set forth in article 66 are not to apply in the event of reservations formulated by other States.

ECUADOR

In signing this Convention, Ecuador has not considered it necessary to make any reservation in regard to article 4 of the Convention because it understands that the rules referred to in the first part of article 4 include the principle of the peaceful settlement of disputes, which is set forth in Article 2, paragraph 3 of the Charter of the United Nations and which, as *jus cogens* , has universal and mandatory force.

Ecuador also considers that the first part of article 4 is appli- cable to existing treaties.

It wishes to place on record, in this form, its view that the said article 4 incorporates the indisputable principle that, in cases where the Convention codifies rules of *lex lata* , these rules, as pre-existing rules, may be invoked and applied to treaties signed before the entry into force of this Convention, which is the instrument codifying the rules.

In ratifying this Convention, Ecuador wishes to place on record its adherence to the principles, norms and methods of peaceful settlement of disputes provided for in the Charter of the United Nations and in other international instruments on the subject, which have been expressly included in the Ecuadorian legal system in article 4, paragraph 3, of the Political Constitution of the Republic.

FINLAND[15]

"Finland also declares that as to its relation with any State which has made or makes a reservation to the effect that this State will not be bound by some or all of the provisions of article 66, Finland will consider itself bound neither by those procedural provisions nor by the substantive provisions of part V of the Convention to which the procedures provided for in article 66 do not apply as a result of the said reservation."

GERMANY[6]

"The Federal Republic of Germany reserves the right, upon ratifying the Vienna Convention on the Law of Treaties, to state its views on the declarations made by other States upon signing or ratifying or acceding to that Convention and to make reservations regarding certain provisions of the said Convention."

. . .

2. The Federal Republic of Germany assumes that the jurisdiction of the International Court of Justice brought about by consent of States outside the Vienna Convention on the Law of Treaties cannot be excluded by invoking the provisions of article 66 (b) of the Convention.
3. The Federal Republic of Germany interprets 'measures taken in conformity with the Charter of the

United Nations', as referred to in article 75, to mean future decisions by the Security Council of the United Nations in conformity with Chapter VII of the Charter for the maintenance of international peace and security.

GUATEMALA[16]

I. Guatemala cannot accept any provision of this Convention which would prejudice its rights and its claim to the Territory of Belize.

II. Guatemala will not apply articles [...], 25 and 66 in so far as they are contrary to the provisions of the Constitution of the Republic.

III. Guatemala will apply the provision contained in article 38 only in cases where it considers that it is in the national interest to do so.

(a) The Republic of Guatemala formally confirms reservations I and III which it formulated upon signing the [said Convention], to the effect, respectively, that Guatemala could not accept any provision of the Convention which would prejudice its rights and its claim to the territory of Belize and that it would apply the provision contained in article 38 of the Convention only in cases where it considered that it was in the national interest to do so;

(b) With respect to reservation II, which was formulated on the same occasion and which indicated that the Republic of Guatemala would not apply articles [...], 25 and 66 of the [said Convention] insofar as they were contrary to the Constitution, Guatemala states:

(b) (I) That it confirms the reservation with respect to the non-application of articles 25 and 66 of the Convention, insofar as both are incompatible with provisions of the Political Constitution currently in force;

(b) (II) [...]

Guatemala's consent to be bound by a treaty is subject to compliance with the requirements and procedures established in its Political Constitution. For Guatemala, the signature or initialling of a treaty by its representative is always understood to be *ad referendum* and subject, in either case, to confirmation by its Government.

(c) A reservation is hereby formulated with respect to article 27 of the Convention, to the effect that the article is understood to refer to the provisions ofhe secondary legislation of Guatemala and not to those of its Political Constitution, which take precedence over any law or treaty.

HUNGARY[17]

KUWAIT

The participation of Kuwait in this Convention does not mean in any way recognition of Israel by the Government of the State of Kuwait and that furthermore, no treaty relations will arise between the State of Kuwait and Israel.

MONGOLIA[18]

1. The Mongolian People's Republic declares that it reserves the right to take any measures to safeguard its interests in the case of the non-observance by other States of the provisions of the Vienna Convention on the Law of Treaties.

2. The Mongolian People's Republic deems it appropriate to draw attention to the discriminatory nature of article 81 and 83 of the Vienna Convention on the Law of Treaties and declares that the Convention should be open for accession by all States.

MOROCCO

1. Morocco interprets paragraph 2 (a) of article 62 (Funda- mental change of circumstances) as not applying to unlawful or inequitable treaties, or to any treaty contrary to the principle of self-determination. Morocco's views on paragraph 2 (a) were supported by the Expert Consultant in his statements in the Committee of the Whole on 11 May1968 and before the Conference in plenary on 14 May 1969 (see Document A/CONF.39/L.40).

2. It shall be understood that Morocco's signature of this Convention does not in any way imply that it recognized Israel. Furthermore, no treaty relationships will be established between Morocco and Israel.

NETHERLANDS (KINGDOM OF THE)

"The Kingdom of the Netherlands does not regard the provi- sions of Article 66 (b) of the Convention as providing "some other method of peaceful settlement" within the meaning of the declaration of the Kingdom of the Netherlands accepting as compulsory the jurisdiction of the International Court of Justice which was deposited with the Secretary-General of the United Nations on 1 August 1956."

NEW ZEALAND

The Government of New Zealand declares its understanding that nothing in article 66 of the Convention is intended to exclude the jurisdiction of the International Court of Justice where such jurisdiction exists under the provisions of any treaty in force binding the parties with regard to the settlement of disputes. In relations to states parties to the Vienna Convention which accept as compulsory the jurisdiction of the International Court of Justice, the Government of New Zealand declares that it will not regard the provisions of article 66 of the Vienna Convention as providing "some other method of peaceful settlement" within the meaning of this phrase where it appears in the declaration of the Government of New Zealand accepting as compulsory the jurisdiction of the International Court of Justice, which was deposited with the Secretary-General of the League of Nations on 8 April 1940."

OMAN

According to the understanding of the Government of the Sultanate of Oman the implementation of paragraph (2) of article (62) of the said Convention does not include those Treaties which are contrary to the right to self-determination.

PERU[19]

For the Government of Peru, the application of articles 11, 12 and 25 of the Convention must be understood in accordance with, and subject to, the process of treaty signature, approval, ratification, accession and entry into force stipulated by its constitutional provisions.

PORTUGAL

"Article 66" of the Vienna of the Convention is inextricably linked with the provisions of Part V to which it relates. Therefore, Portugal declares that as to its relation with any State which has made or makes a reservation to the effect that this State will not be bound by some or all of the provisions of article 66, it will consider itself bound neither by those procedural norms nor by the substantive norms of Part V of the Convention to which the procedures provided for in Article 66 do not apply as a result of the said reservation. However, Portugal does not object to the entry into force of the remaining of the Convention between the Portuguese Republic and such a State and considers that the absence of treaty relations between itself and that State with regard to all or certain norms of Part V will not in any way impair the latter to fulfil any obligation embodied in

those provisions to which it is subject under international law in dependently of the Convention".

Russian Federation

The Union of Soviet Socialist Republics does not consider itself bound by the provisions of article 66 of the Vienna Con- vention on the Law of Treaties and declares that, in order for any dispute among the Contracting Parties concerning the application or the interpretation of articles 53 or 64 to be submitted to the International Court of Justice for a decision or for any dispute concerning the application or interpretation of any other articles in Part V of the Convention to be submitted for consideration by the Conciliation Commission, the consent of all the parties to the dispute is required in each separate case, and that the conciliators constituting the Conciliation Commission may only be persons appointed by the parties to the dispute by common consent.

The Union of Soviet Socialist Republics will consider that it is not obligated by the provisions of article 20, paragraph 3 or of article 45 (b) of the Vienna Convention on the Law of Treaties, since they are contrary to established international practice.

The Union of Soviet Socialist Republics declares that it reserves the right to take any measures to safeguard its interests in the event of the non-observance by other States of the provisions of the Vienna Convention on the Law of Treaties.

Saudi Arabia

"... with a reservation regarding Article 66 so that the recourse to judgement or to arbitration should be preceded by agreement between the two countries concerned."

Slovakia[5]

Syrian Arab Republic

A–Acceptance of this Convention by the Syrian Arab Republic and ratification of it by its Government shall in no way signify recognition of Israel and cannot have as a result the establishment with the latter of any contact governed by the provisions of this Convention.

B–The Syrian Arab Republic considers that article 81 is not in conformity with the aims and purposes of the Convention in that it does not allow all States, without distinction or discrimination, to become parties to it.

C–The Government of the Syrian Arab Republic does not in any case accept the non-applicability of the principle of a funda- mental change of circumstances with regard to treaties es- tablishing boundaries, referred to in article 62, paragraph 2 (a), inasmuch as it regards this as a flagrant violation of an obligatory norm which forms part of general international law and which recognizes the right of peoples to self-determination.

D–The Government of the Syrian Arab Republic interprets the provisions in article 52 as follows:

The expression "the threat or use of force" used in this article extends also to the employment of economic, political, military and psychological coercion and to all types of coercion constraining a State to conclude a treaty against its wishes or its interests.

E–The accession of the Syrian Arab Republic to this Con- vention and the ratification of it by its Government shall not apply to the Annex to the Convention, which concerns obligatory conciliation.

Tunisia

The dispute referred to in article 66 *(a)* requires the consent of all parties thereto in order to be submitted to the International Court of Justice for a decision.

Ukraine

[*Same reservations and declaration, identical in essence* , mutatis mutandis, *as the one made by the Union of Soviet Socialist Republics* .]

United Kingdom of Great Britain and Northern Ireland[20]

"In signing the Vienna Convention on the Law of Treaties, the Government of the United Kingdom of Great Britain and Northern Ireland declare their understanding that nothing in article 66 of the Convention is intended to oust the jurisdiction of the International Court of Justice where such jurisdiction exists under any provisions in force binding the parties with regard to the settlement of disputes. In particular, and in relation to States parties to the Vienna Convention which accept as compulsory the jurisdiction of the International Court of Justice, the Government of the United Kingdom declare that they will not regard the provisions of sub-paragraph *(b)* of article 66 of the Vienna Convention as providing `some other method of peaceful settlement' within the meaning of sub-paragraph (i) (a) of the Declaration of the Government of the United Kingdom accepting as compulsory the jurisdiction of the International Court of Justice which was deposited with the Secretary-General of the United Nations on the 1st of January 1969.

"The Government of the United Kingdom, while reserving their position for the time being with regard to other declarations and reservations made by various States on signing the Convention, consider it necessary to state that the United Kingdom does not accept that Guatemala has any rights or any valid claim in respect of the territory of British Honduras."

It is [the United Kingdom's] understanding that nothing in Article 66 of the Convention is intended to oust the jurisdiction of the International Court of Justice where such jurisdiction exists under any provisions in force binding the parties with regard to the settlement of disputes. In particular, and in relation to States parties to the Vienna Convention which accept as compulsory the jurisdiction of the International Court, the United Kingdom will not regard the provisions of sub-paragraph *(b)* of Article 66 of the Vienna Convention on the Law of Treaties as providing 'some other method of peaceful settlement' within the meaning of sub-paragraph (i) (a) of the Declaration of the Government of the United Kingdom which was deposited with the Secretary-General of the United Nations on the 1st of January 1969.

United Republic of Tanzania

"Article 66 of the Convention shall not be applied to the United Republic of Tanzania by any State which enters a reservation on any provision of part V or the whole of that part of the Convention."

Viet Nam

“Acceding to this Convention, the Socialist Republic of Vietnam makes its reservation to article 66 of the said Convention.”

Objections
(Unless otherwise indicated the objections were made upon ratification, accession or succession.)

ALGERIA

The Government of the People's Democratic Republic of Algeria, dedicated to the principle of the inviolability of the frontiers inherited on accession to independence, expresses an objection to the reservation entered by the Kingdom of Morocco with regard to paragraph 2 (a) of article 62 of the Convention.

AUSTRIA

"Austria is of the view that the Guatemalan reservations refer almost exclusively to general rules of [the said Convention] many of which are solidly based on international customary law. The reservations could call into question well-established and universally accepted norms. Austria is of the view that the rservations also raise doubts as to their compatibility with the object and purpose of the [said Convention]. Austria therefore objects to these reservations.

This objection does not preclude the entry into force of the [said Convention] between Austria and Guatemala."

CANADA

". . . Canada does not consider itself in treaty relations with the Syrian Arab Republic in respect of those provisions of the Vienna Convention on the Law of Treaties to which the com-pulsory conciliation procedures set out in the annex to that Convention are applicable."

CHILE

The Republic of Chile formulates an objection to the reser-vations which have been made or may be made in the future relating to article 62, paragraph 2, of the Convention.

DENMARK

"These reservations refer to general rules of [the said Convention], many of which are solidly based on customary international law. The reservation - if accepted - could call to question well established and universally accepted norms.

It is the opinion of the Government of Denmark that the reservations are not compatible with the object and purpose of [said Convention].

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 Denmark therefore objects to the aforesaid reservations made by the Government of Guatemala to [the said Convention]. This objection does not preclude the entry into force of [the said Convention] between Guatemala and Denmark and will thus enter into force between Guatemala and Denmark without Guatemala benefitting from these reservations."

EGYPT

The Arab Republic of Egypt does not consider itself bound by part V of the Convention vis-à-vis States which formulate reservations concerning the procedures for judicial settlement and compulsory arbitration set forth in article 66 and in the annex to the Convention, and it rejects reservations made to the provisions of part V of the Convention.

FINLAND

"These reservations which consist of general references to national law and which do not clearly specify the extent of the derogation from the provisions of the Convention, may create serious doubts about the Committment of the reserving State as to the object and purpose of the Convention and may contribute to undermining the basis of international treaty law. In addition, the Government of Finland considers the reservation to article 27 of the Convention particularly problematic as it is a well-established rule of customary international law. The Government of Finland would like to recall that according to article 19 c of the [said] Convention, a reservation incompatible with the object and purpose of the Convention shall not be permitted.

The Government of Finland therefore objects to these reservations made by the Government of Guatemala to the [said] Convention.

This objection does not preclude the entry into force of the Convention between Guatemala and Finland. The Convention will thus become operative between the two States without Guatemala benefitting from these reservations."

GERMANY[6]

1. The Federal Republic of Germany rejects the reser- vations made by Tunisia, the Union of Soviet Socialist Republics, the Byelorussian Soviet Socialist Republic, the Ukrainian Soviet Socialist Republic and the German Democratic Republic and with regard to article 66 of the Vienna Convention on the Law of Treaties as incompatible with the object and purpose of the said Convention. In this connection it wishes to point out that, as stressed on numerous other occasions, the Government of the Federal Republic of Germany considers articles 53 and 64 to be inextricably linked to article 66 (a).

Objections, identical in essence, *mutatis mutandis* , were also formulated by the Government of the Federal Republic of Germany in regard to reservations made by various states, as follows:

(i) 27 January 1988: in respect of reservations formulated by Bulgaria, the Hungarian People's Republic and the Czechoslovak Socialist Republic.

(ii) 21 September 1988: in respect of the reservation made by Mongolia;

(iii) 30 January 1989: in respect of the reservation made by Algeria.

With respect to the reservation made by Viet Nam upon accession:

"The Government of the Federal Republic of Germany has examined the reservation to article 66 of the Vienna Convention on the Law of Treaties made by the Government of the Socialist Republic of Vietnam at the time of its accession to the Convention. The Government of the Federal Republic of Germany considers that the dispute settlement procedure provided for by article 66 is inextricably linked with the provisions of Part V of the Convention and was indeed the basis on which the Vienna Conference accepted elements of Part V. The dispute settlement set forth in article 66 therefore is an essential part of the Convention.

The Government of the Republic of Germany is thus of the view that the reservation excluding that procedures

for judicial settlement, arbitration and conciliation to be followed incase of a dispute, raises doubts as to the full commitment of the Socialist Republic of Vietnam to the object and purpose of the Vienna Convention on the Law of Treaties.

The Government of the Republic of Germany, therefore, objects to the reservation made by the Government of the Socialist Republic of Vietnam.

This objection does not preclude the entry into force of the Convention between the Federal Republic of Germany and the Socialist Republic of Vietnam".

ISRAEL

"The Government of Israel has noted the political character of paragraph 2 in the declaration made by the Government of Morocco on that occasion. In the view of the Government of Israel, this Convention is not the proper place for making such political pronouncements. Moreover, that declaration cannot in any way affect the obligations of Morocco already existing under general international law or under particular treaties. The Government of Israel will, in so far as concerns the substance of the matter, adopt towards the Government of Morocco an attitude of complete reciprocity."

[With respect of declaration "A" made by the Syrian Arab Republic, same declaration, in essence, as the one above.]

JAPAN

1. "The Government of Japan objects to any reservation in tended to exclude the application, wholly or in part, of the pro-visions of article 66 and the Annex concerning the obligatory procedures for settlement of disputes and does not consider Japan to be in treaty relations with any State which has formulated or will formulate such reservation, in respect of those provisions of Part V of the Convention regarding which the application of the obligatory procedures mentioned above are to be excluded as a result of the said reservation. Accordingly, the treaty relations between Japan and the Syrian Arab Republic will not include those provisions of Part V of the Convention to which the conciliation procedure in the Annex applies and the treaty relations between Japan and Tunisia will not include articles 53 and 64 of the Convention.

2. The Government of Japan does not accept the interpre-tation of article 52 put forward by the Government of the Syrian Arab Republic, since that interpretation does not correctly reflect the conclusions reached at the Conference of Vienna on the subject of coercion."

"[In view of its declaration made upon accession] . . . . the Government of Japan objects to the reservations made by the Governments of the German Democratic Republic and the Union of Soviet Socialist Republics to article 66 and the Annex of the Convention and reaffirms the position of Japan that [it] will not be in treaty relations with the above States in respect of the provisions of Part V of the Convention.

2. The Government of Japan objects to the reservation made by the Government of the Union of Soviet Socialist Republics to article 20, paragraph 3.

3. The Government of Japan objects to the declarations made by the Governments of the German Democratic Republic and the Union of Soviet Socialist Republics reserving their right to take any measures to safeguard their interests in the event of the non-observance by other States of the provisions of the Conven tion."

NETHERLANDS (KINGDOM OF THE)

"The Kingdom of the Netherlands is of the opinion that the provisions regarding the settlement of disputes, as laid down in Article 66 of the Convention, are an important part of the Con- vention and that they cannot be separated from the substantive rules with which they are connected. Consequently, the Kingdom of the Netherlands considers it necessary to object to any reservation which is made by another State and whose aim is to exclude the application, wholly or in part, of the provisions regarding the settlement of disputes. While not objecting to the entry into force of the Convention between the Kingdom of the Netherlands and such a State, the Kingdom of the Netherlands considers that their treaty relations will not include the provisions of Part V of the Convention with regard to which the application of the procedures regarding the settlement of disputes, as laid down in Article 66, wholly or in part is excluded.

The Kingdom of the Netherlands considers that the absence of treaty relations between the Kingdom of the Netherlands and such a State with regard to all or certain provisions of Part V will not in any way impair the duty of the latter to fulfil any obligation embodied in those provisions to which it is subject under international law independently of the Convention.

For the reasons set out above, the Kingdom of the Netherlands objects to the reservation of the Syrian Arab Republic, according to which its accession to the Convention shall not include the Annex, and to the reservation of Tunisia, according to which the submission to the International Court of Justice of a dispute referred to in Article 66 (a) requires the consent of all parties there to. Accordingly, the treaty relations between the Kingdom of the Netherlands and the Syrian Arab Republic will not include the provisions to which the conciliation procedure in the Annex applies and the treaty relations between the Kingdom of the Netherlands and Tunisia will not include Article 53 and 64 of the Convention."

Objections, identical in essence, *mutatis mutandis* , were also formulated by the Government of the Netherlands in regard to reservations made by various states, as follows:

(i) 25 September 1987: in respect of reservations formulated by the Union of Soviet Socialist Republics, the Byelorussian Soviet Socialist Republic, the Ukrainian Soviet Socialist Republic and the German Democratic Republic;

(ii) 14 July 1988: in respect of reservations made by the Government of Bulgaria, Czechoslovakia and Hungary;

(iii) 28 July 1988: in respect of one of the reservations made by Mongolia;

(iv) 30 January 1989: in respect of the reservation made by Algeria.

v) 14 September 1998: in respect of the reservation to article 66 made by Guatemala.

“In conformity with the terms of the objections the Kingdom of the Netherlands must be deemed to have objected to the reservation, excluding wholly or in part the procedures for the settlement of disputes, contained in article 66 of the Convention, as formulated by Cuba. Accordingly, the treaty relations between the Kingdom of the Netherlands and Cuba under the Convention do not include any of the provisions contained in Part V of the Convention. The Kingdom of the Netherlands reiterates that the absence of treaty relations between itself and Cuba in respect of Part V of the Convention will not in any way impair the duty of Cuba to fulfil any obligation embodied in those provisions to which it is subject under international law independent of the Convention."

"The Government of the Kingdom of the Netherlands has examined the reservation made by the Government of Peru at the time of its ratification of the Vienna Convention on the Law of Treaties. The Government of the Kingdom of the Netherlands nos that the articles 11, 12 and 25 of the Convention are being made subject to a general reservation referring to the contents of existing legislation in Peru.

The Government of the Kingdom of the Netherlands is of the view that, in the absence of further clarification, this reservation raises doubts as to the commitment of Peru as to the object and purpose of the Convention and would like to recall that, according to customary international 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.

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 the Kingdom of the Netherlands therefore objects to the aforesaid reservation made by the Government of Peru to the Vienna Convention on the Law of Treaties.

This objection shall not preclude the entry into force of the Convention between the Kingdom of the Netherlands and Peru."

"The Government of the Kingdom of the Netherlands has examined the reservation with regard to article 66 made by the Government of the Socialist Republic of Viet Nam at the time of its accession to the Vienna Convention on the Law of Treaties, concluded on 23 May 1969, and refers to the objections formulated by the Kingdom of the Netherlands upon its accession to the above-mentioned Convention on 9 April 1985.

In conformity with the terms of the objections the Kingdom of the Netherlands must be deemed to have objected to the reservation formulated by the Socialist Republic of Viet Nam, excluding wholly the procedures for the settlement of disputes contained in article 66 of the Convention. Accordingly, the treaty relations between the Kingdom of the Netherlands and the Socialist Republic of Viet Nam under the Convention do not include any of the provisions contained in Part V of the Convention.

The Kingdom of the Netherlands stresses that the absence of treaty relations between itself and the Socialist Republic of Viet Nam in respect of Part V of the Convention will not in any way impair the duty of Viet Nam to fulfil any obligation embodied in those provisions, to which it is bound under international law, independent of the Convention."

New Zealand

". . . The New Zealand Government objects to the reservation entered by the Government of Syria to the obligatory conciliation procedures contained in the Annex to the Vienna Convention on the Law of Treaties and does not accept the entry into force of the Convention as between New Zealand and Syria."

". . . The New Zealand Government objects to the reservation entered by the Government of Tunisia in respect of Article 66 *(a)* of the Convention and does not consider New Zealand to be in treaty relations with Tunisia in respect of those provisions of the Convention to which the dispute settlement procedure provided for in Article 66 *(a)* is applicable."

Sweden

"Article 66 of the Convention contains certain provisions re- garding procedures for judicial settlement, arbitration and con ciliation. According to these provisions a dispute concerning the application or the interpretation of articles 53 or 64, which deal with the so called *jus cogens* , may be submitted to the International Court of Justice. If the dispute concerns the application or the interpretation of any of the other articles in Part V of the Convention, the conciliation procedure specified in the Annex to the Convention may be set in motion.

"The Swedish Government considers that these provisions regarding the settlement of disputes are an important part of the Convention and that they cannot be separated from the sub- stantive rules with which they are connected. Consequently, the Swedish Government considers it necessary to raise objections to any reservation which is made by another State and whose aim is to exclude the application, wholly or in part, of the provisions regarding the settlement of disputes. While not objecting to the entry into force of the Convention between Sweden and such a State, the Swedish Government considers that their treaty relations will not include either the procedural provision in respect of which a reservation has been made or the substantive provisions to which that procedural provision relates.

"For the reasons set out above, the Swedish Government ob- jects to the reservation of the Syrian Arab Republic, according to which its accession to the Convention shall not include the Annex, and to the reservation of Tunisia, according to which the dispute referred to in article 66 (a) requires the consent of all parties thereto in order to be submitted to the International Court of Justice for a decision. In view of these reservations, the Swedish Government considers, *firstly* , that the treaty relations between Sweden and the Syrian Arab Republic will not include those provisions of Part V of the Convention to which the conciliation procedure in the Annex applies and, *secondly* , that the treaty relations between Sweden and Tunisia will not include articles 53 and 64 of the Convention.

"The Swedish Government has also taken note of the declar- ation of the Syrian Arab Republic, according to which it interprets the expression "the threat or use of force" as used in article 52 of the Convention so as to extend also to the employment of economic, political, military and psychological coercion and to all types of coercion constraining a State to conclude a treaty against its wishes or its interests. On this point, the Swedish Government observes that since article 52 refers to threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations, it should be interpreted in the light of the practice which has developed or will develop on the basis of the Charter."

With regard to reservations made by Guatemala upon ratification:

"The Government of Sweden is of the view that these reservations raise doubts as to their compatibility with the object and purpose of the Convention. The reservations refer almost exclusively to general rules of the Vienna Convention on the Law of Treaties, many of which are solidly based on customary international law. The reservaitons could call into question well established and universally accepted norms.

The Govenrment of Sweden notes in particular that the Government of Guatemala has entered a reservation that it would apply the provisions contained in article 38 of the Convention only in cases where it considered that it was in the national interest to do so; and furthermore a reservation with respect to article 27 of the Convention, to the effect that the article is understood to refer to the provisions of the secondary legislation of Guatemala and not to those of its Political Constitution, which take precedence over any law or 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.

The Government of Sweden therefore objects to the aforesaid reservations made by the Government of Guatemala to the [said] Convention.

This objection does not preclude the entry into force of the Convention between Guatemala and Sweden. The Convention will thus become operative between the two

States without Guatemala benefiting from this reservation."

"The Government of Sweden wishes to recall its statements of the 4th of February 1975, made in connection with its ratification of the Convention, relating to the accession of the Syrian Arab Republic and the Republic of Tunisia respectively, which reads as follows:

'Article 66 of the Convention contains certain provisions regarding procedures for judicial settlement, arbitration and conciliation. According to these provisions a dispute concerning the application or the interpretation of articles 53 or 64, which deal with the so called jus cogens, may be submitted to the International Court of Justice. If the dispute concerns the application or the interpretation of any of the other articles in Part V of the Convention, the conciliation procedure specified in the Annex to the Convention may be set in motion. The Swedish Government considers that these provisions regarding the settlement of disputes are an important part of the Convention and that they cannot be separated from the substantive rules with which they are connected. Consequently, the Swedish Government considers it necessary to raise objections to any reservation which is made by another State and whose aim is to exclude the application, wh or in part, of the provisions regarding the settlement of disputes. While not objecting to the entry into force of the Convention between Sweden and such a State, the Swedish Government considers that their treaty relations will not include either the procedural provision in respect of which a reservation has been made or the substantive provisions to which that procedural provision relates.' For the reasons set out above, which also apply to the reservation made by the Republic of Cuba, the Swedish Government objects to the reservation entered by the Government of the Republic of Cuba to the Vienna Convention on the Law of Treaties."

"The Government of Sweden has examined the reservation made by Peru at the time of its ratification of the Vienna Convention on the Law of Treaties.

The Government of Sweden notes that articles 11, 12 and 25 of the Convention are being made subject to a general reservation referring to the contents of existing legislation in Peru.

The Government of Sweden is of the view that, in the absence of further clarification, this reservation raises doubts as to the commitment of Peru to the object and purpose of the Convention and would like to recall that, according to customary international 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.

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 Sweden therefore objects to the aforesaid reservation by the Government of Peru to the Vienna Convention on the Law of Treaties.

This objection shall not preclude the entry into force of the Convention between Peru and Sweden. The Convention enters into force in its entirety between the two States, without Peru benefiting from its reservation."

UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

"The United Kingdom does not accept that the interpretation of Article 52 put forward by the Government of Syria correctly reflects the conclusions reached at the Conference of Vienna on the subject of coercion; the Conference dealt with this matter by adopting a Declaration on this subject which forms part of the Final Act;

"The United Kingdom objects to the reservation entered by the Government of Syria in respect of the Annex to the Conven- tion and does not accept the entry into force of the Convention as between the United Kingdom and Syria;

"With reference to a reservation in relation to the territory of British Honduras made by Guatemala on signing the Convention, the United Kingdom does not accept that Guatemala has any rights or any valid claim with respect to that territory; "The United Kingdom fully reserves its position in other respects with regard to the declarations made by various States on signature, to some of which the United Kingdom would object, if they were to be confirmed on ratification."

". . . The United Kingdom objects to the reservation entered by the Government of Tunisia in respect of Article 66 *(a)* of the Convention and does not accept the entry into force of the Con- vention as between the United Kingdom and Tunisia."

"The Government of the United Kingdom of Great Britain and Northern Ireland note that the instrument of ratification of the Government of Finland, which was deposited with the Secretary-General on 19 August 1977, contains a declaration relating to paragraph 2 of article 7 of the Convention. The Government of the United Kingdom wish to inform the Secretary-General that they do not regard that declaration as in any way affecting the interpretation or application of article 7."

"The Government of the United Kingdom of Great Britain and Northern Ireland object to the reservation entered by the Government of the Union of Soviet Socialist Republics by which it rejects the application of article 66 of the Convention. Article 66 provides in certain circumstances for the compulsory settlement of disputes by the International Court of Justice (in the case of disputes concerning the application or interpretation of articles 53 or 64) or by a conciliation procedure (in the case of the rest of Part V of the Convention). These provisions are inextricably linked with the provisions of Part V to which they relate. Their inclusion was the basis on which those parts of Part V which represent progressive development of international law were accepted by the Vienna Conference. Accordingly the United Kingdom does not consider that the treaty relations between it and the Soviet Union include Part V of the Convention.

With respect to any other reservation the intention of which is to exclude the application, in whole or in part, of the provisions of article 66, to which the United Kingdom has already objected or which is made after the reservation by the Government of the Union of Soviet Socialist Republics, the United Kingdom will not consider its treaty relations with the State which has formulated or will formulate such a reservation as including those provisions of Part V of the Convention with regard to which the application of article 66 is rejected by the reservation.

The instrument of accession deposited by the Union of Soviet Socialist Republics included also a declaration that it reserves the right to take "any measures" to safeguard its interests in the event of the non-observance by other States of the provisions of the Convention. The purpose and scope of this statement is unclear; but, given that the Union of Soviet Socialist Republics has rejected the application of article 66 of the Convention, it would seem to apply rather to acts by Parties to the Convention in respect of treaties where such acts are in breach of the Convention. In such circumstances a State would not be limited in its response to the measures in article 60: under customary international law it would be entitled to take other measures, provided always that they are reasonable and in proportion to the breach."

"The Government of the United Kingdom wish in this context to recall their declaration of 5 June 1987 [in respect of the accession of the Union of Soviet Socialist

Republics] which in accordance with its terms applies to the reservations mentioned above, and will similarly apply to any like reservations which any other State may formulate."

"The Government of the United Kingdom of Great Britain and Northern Ireland objects to the reservation [...]. The Government of the United Kingdom wishes in this context to recall their declaration of 5 June 1987 (in respect of the accession of the Union of Soviet Socialist Republics) which in accordance with its terms applies to the reservation mentioned above, and will apply similarly to any like reservation which any other State may formulate. Accordingly the United Kingdom does not consider that the treaty relations between it and the Republic of Cuba include Part V of the Convention."

"The instrument of accession deposited by the Government of the Socialist Republic of Vietnam contains a reservation in respect of article 66 of the Convention. The United Kingdom objects to the reservation entered by the Socialist Republic of Vietnam in respect of article 66 and does not accept the entry into force of the Convention as between the United Kingdom and the Socialist Republic of Vietnam."

UNITED STATES OF AMERICA

The Government of the United States of America objects to reservation E of the Syrian instrument of accession:

"In the view of the United States Government that reservation is incompatible with the object and purpose of the Convention and undermines the principle of impartial settlement of disputes concerning the invalidity, termination, and suspension of the operation of treaties, which was the subject of extensive negotiation at the Vienna Conference.

"The United States Government intends, at such time as it may become a party to the Vienna Convention on the Law of Treaties, to reaffirm its objection to the foregoing reservation and to reject treaty relations with the Syrian Arab Republic under all provisions in Part V of the Convention with regard to which the Syrian Arab Republic has rejected the obligatory conciliation procedures set forth in the Annex to the Convention.

"The United States Government is also concerned about Syrian reservation C declaring that the Syrian Arab Republic does not accept the non-applicability of the principle of a fundamental change of circumstances with regard to treaties establishing boundaries, as stated in Article 62, 2 *(a)* , and Syrian reservation D concerning its interpretation of the expression `the threat or use of force' in Article 52. However, in view of the United States Government's intention to reject treaty relations with the Syrian Arab Republic under all provisions in Part V to which reservations C and D relate, we do not consider it necessary at this time to object formally to those reservations.

"The United States Government will consider that the ab- sence of treaty relations between the United States of America and the Syrian Arab Republic with regard to certain provisions in Part V will not in any way impair the duty of the latter to fulfil any obligation embodied in those provisions to which it is subject under international law independently of the Vienna Convention on the Law of Treaties."

". . . The United States of America objects to the reservation by Tunisia to paragraph *(a)* of Article 66 of the Vienna Conven- tion on the Law of Treaties regarding a dispute as to the interpretation or application of Article 53 or 64. The right of a party to invoke the provisions of Article 53 or 64 is inextricably linked with the provisions of Article 42 regarding impeachment of the validity of a treaty and paragraph *(a)* of Article 66 regarding the right of any party to submit to the International Court of Justice for decision any dispute concerning the application or the interpretation of Article 53 or 64.

"Accordingly, the United States Government intends, at such time as it becomes a party to the Convention, to reaffirm its objection to the Tunisian reservation and declare that it will not consider that Article 53 or 64 of the Convention is in force between the United States of America and Tunisia."-

Notifications made under the Annex (paragraphes 1 and 2) (List of conciliators nominated for the purpose of constituting a conciliation commission) (For the list of conciliators whose nomination was not renewed, see note 21 hereinafter).[21]

Participant	*Nominations:*	*Date of deposit of notification with the Secretary-General:*
Germany	Prof. Dr. Wolff Heintschel von Heinegg	12 Mar 2001
Germany	Professor Dr. Andreas Zimmermann	12 March 2001
Netherlands	Professor René Lefeber	30 October 2020
Netherlands	Professor Liesbeth Lijnzaad	30 October 2020

Notes:

[1] Official Records of the General Assembly, Twenty-first Session, Supplement No. 16 (A/6316), p. 95.

[2] bid., Twenty-second Session, Supplement No. 16 (A/6716), p. 80.

[3] The former Yugoslavia had signed and ratified the Convention on 23 May 1969 and 27 August 1970, 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 in the front matter of this volume.

[4] Signed on behalf of the Republic of China on 27 April

1970. See note concerning signatures, ratifications, accessions, etc., on behalf of China (note 1 under "China" in the "Historical Information" secton in the front matter of this volume).

In a communication addressed to the Secretary-General with reference to the above-mentioned signature, the Permanent Mission of the Union of Soviet Socialist Republics stated that the said signature was irregular since the so-called "Government of China" represented no one and had no right to speak on behalf of China, there being only one Chinese State in the world-the People's Republic of China.

The Permanent Mission of Bulgaria to the United Nations later addressed to the Secretary-General a similar communication.

In two 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 United Nations Conference on the Law of Treaties in 1968 and 1969, contributed to the formulation of the Convention concerned and signed it, and that "any statements or reservations to the said 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 as a signatory of the said Convention".

[5] Czechoslovakia had acceded to the Convention on 29 July 1987, with a reservation. By a communication received on 19 October 1990, the Government of Czechoslovakia notified the Secretary-General of its decision to withdraw the reservation made upon accession with respect to article 66 of the Convention, which reads as follows:

The Czechoslovak Socialist Republic does not consider itself bound by the provisions of article 66 of the Convention and declares that, in accordance with the principle of sovereign equality of States, for any dispute to be submitted to the International Court of Justice or to a conciliation procedure, the consent of all the parties to the dispute is required in each separate case.

See also note 1 under "Czech Republic" and note 1 under "Slovakia" in the "Historical Information" section in the front matter of this volume.

[6] The German Democratic Republic had acceded to the Convention on 20 October 1986 with the following reservation and declarations:

Reservation:

The German Democratic Republic does not consider itself bound by the provisions of article 66 of the Convention.

In order to submit a dispute concerning the application or the interpretation of article 53 or 64 to the International Court of Justice for a decision or to submit a dispute on the application or the interpretation of any of the other articles of Part V of the Convention to the Conciliation Commission for consideration it shall be necessary in every single case to have the consent of all Parties to the dispute. The members of the Conciliation commission shall be appointed jointly by the Parties to the dispute.

Declarations:

The German Democratic Republic declares that it reserves itself the right to take measures to protect its interests in the case that other States would not comply with the provisions of the Convention.

The German Democratic Republic holds the view that the provisions of articles 81 and 83 of the Convention are in contradiction to the principle according to which any State, the policy of which is guided by the purposes and principles of the United Nations Charter, has the right to become a Party to Conventions affecting the interests of all States.

See also note 2 under "Germany" in the "Historical Information" section in the front matter of this volume.

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

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

[9] See note 1 under "Netherlands" regarding Aruba/Netherlands Antilles in the "Historical Information" section in the front matter of this volume.

[10] With reference to this signature, communications have been addressed to the Secretary-General by the Permanent Missions to the United Nations of Bulgaria, Mongolia and the Union of Soviet Socialist Republics, stating that the said signature was illegal inasmuch as the South Korean authorities could not under any circumstances speak on behalf of Korea.

In a communication addressed to the Secretary-General the Permanent Observer of the Republic of Korea to the United Nations declared that the above-mentioned statement by the Permanent Mission of the Union of Soviet Socialist Republics was without legal foundation and therefore neither affected the legitimate act of signing the Convention by the Government of the Republic of Korea nor prejudiced the rights and obligations of the Republic of Korea under it. He further stated that "in this connexion, it should be noted that the General Assembly of the United Nations declared at its third session and has continuously reaffirmed thereafter that the Government of the Republic of Korea is the only lawful Government in Korea".

Subsequently, in a communication received on 24 October 2002, the Government of Bulgaria informed the Secretary-General of the following:

"... upon signature of the above Convention by the Republic of Korea, in 1971, the Government of the People's Republic of Bulgaria[,] in [a] communication addressed to the Secretary-General with reference to the above-mentioned signature, ... stated that its Government considered the said signature was illegal inasmuch as the South Korean authorities could not speak on behalf of Korea.

Now therefore [the Government of the Republic of Bulgaria declares] that the Government of the Republic of Bulgaria, having reviewed the said declaration, hereby withdraws the same."

[11] Within a period of one year from the date of the depositary

notification transmitting the reservation (i.e. 13 July 2005), none of the Contracting Parties to the said Convention had notified the Secretary-General of an objection either to the deposit itself or to the procedure envisaged. Consequently, the reservation in question was accepted for deposit upon the above-stipulated one year period, that is on 13 July 2006.

[12] On 18 February 1993, the Government of Belgium notified the Secretary-General that its instrument of accession should have speci- fied that the said accession was made subject to the said reservation. None of the Contracting Parties to the Agreement having notified the Secretary-General of an objection either to the deposit itself or to the procedure envisaged, within a period of 90 days from the date its circulation (23 March 1993), the reservation is deemed to have been accepted.

[13] In a notification received on 6 May 1994, the Government of Bulgaria notified the Secretary-General that it had decided to withdraw the reservation made upon accession with regard to article 66 (a), which read as follows:

The People's Republic of Bulgaria does not consider itself bound by the provision of article 66, paragraph a) of the Convention, according to which any one of the parties to a dispute concerning the application or the interpretation of article 53 or 64 may, by a written application, submit it to the International Court of Justice for a decision unless the parties by common consent agree to submit the dispute to arbitration. The Government of the People's Republic of Bulgaria states that for the submission of such a dispute to the International Court of Justice for a decision, the preliminary consent of all parties to the dispute is needed.

[14] In this regard, on 13 October 1998, the Secretary-General received from the Government of the United Kingdom of Great Britain and Northern Ireland the following communication: "The Government of the United Kingdom object to the reservation entered by Costa Rica in respect of article 27 and reiterate their observation in respect of the similar reservation entered by the Republic of Guatemala."

[15] On 20 April 2001, the Government of Finland informed the Secretary-General that it had decided to withdraw its declaration in respect of article 7 (2) made upon ratification. The text of the declaration reads as follows:

"Finland declares its understanding that nothing in paragraph 2 of article 7 of the Convention is intended to modify any provisions of internal law in force in any Contracting State concerning competence to conclude treaties. Under the Constitution of Finland the competence to conclude treaties is given to the President of the Republic, who also decides on the issuance of full powers to the Head of Government and the Minister for Foreign Affairs.

[16] On 15 March 2007, the Government of Guatemala informed the Secretary-General of that it had decided the following:

"Withdraw in their entirety the reservations formulated by the Republic of Guatemala on 23 May 1969 and confirmed upon 14 May 1997 to Articles 11 and 12 of the Vienna Convention on the Law of Treaties."

The text of the reservations made upon signature and ratification read as follows:

Upon signature:

Reservations:

I. Guatemala cannot accept any provision of this Convention which would prejudice its rights and its claim to the Territory of Belize.

II. Guatemala will not apply articles 11, 12, 25 and 66 in so far as they are contrary to the provisions of the Constitution of the Republic.

III. Guatemala will apply the provision contained in article 38 only in cases where it considers that it is in the national interest to do so.

Upon ratification:

Reservations:

(a) The Republic of Guatemala formally confirms reservations I and III which it formulated upon signing the [said Convention], to the effect, respectively, that Guatemala could not accept any provision of the Convention which would prejudice its rights and its claim to the territory of Belize and that it would apply the provision contained in article 38 of the Convention only in cases where it considered that it was in the national interest to do so; (b) With respect to reservation II, which was formulated on the same occasion and which indicated that the Republic of Guatemala would not apply articles 11,12, 25 and 66 of the [said Convention] insofar as they were contrary to the Constitution, Guatemala states: (b) (I) That it confirms the reservation with respect to the non-application of articles 25 and 66 of the Convention, insofar as both are incompatible with provisions of the Political Constitution currently in force; (b) (II) That it also confirms the reservation with respect to the non-application of articles 11 and 12 of the Convention.

Guatemala's consent to be bound by a treatyis subject to compliance with the requirements and procedures established in its Political Constitution. For Guatemala, the signature or initialling of a treaty by its representative is always understood to be ad referendum and subject, in either case, to confirmation by its Government.

(c) A reservation is hereby formulated with respect to article 27 of the Convention, to the effect that the article is understood to refer to the provisions of the secondary legislation of Guatemala and not to those of its Political Constitution, which take precedence over any law or treaty.

In will be recalled that the Secretary-General received communications in regard to the said reservations from the various States on the dates indicated hereinafter:

Germany (21 September 1998):

These reservations refer almost exclusively to general rules of the Convention many of which are solidly based on customary international law. The reservations could call into question well-established and universally-accepted norms of international law, especially insofar as the reservations concern articles 27 and 38 of the Convention. The Government of the Federal Republic of

Germany is of the view that the reservations also raise doublts as to their compatibility with the object and purpose of the Convention. The Government of the Federal Republic of Germany therefore objects to these reservations. This objection does not preclude the entry into force of the Convention between Germany and Guatemala.

Belgium (30 September 1998):

The reservations entered by Guatemala essentially concern general rules laid down in the [said Convention], many of which form part of customary international law. These reservations could call into question firmly established and universally accepted norms. The Kingdom of Belgium therefore raises an objection to the reservations. This objection does not prevent the [said Convention] from taking effect between the Kingdom of Belgium and Guatemala.

United Kingdom of Great Britain and Northen Ireland (13 October 1998):

"The Government of the United Kingdom of Great Britain and Northern Ireland object to the reservation entered by the Republic of Guatemala in respect of article 27, and wish to observe that the customary international law rule set out in that article applies to constitutional as well as to other internal laws. The Government of the United Kingdom object also to the reservation entered by the Republic of Guatemala in respect of article 38, by which the Republic of Guatemala seek subjective application of the rule of customary international law set out in that article. The Government of the United Kingdom wish to recall their declaration of 5 June 1987 (in respect of the accession of the Union of Soviet Socialist Republics), which, in accordance with its terms, applies to the reservation entered by the Republic of Guatemala in respect of article 66 and will similarly apply to any like reservation which any other State may formulate."

[17] In a communication received on 8 December 1989, the Government of Hungary notified the Secretary-General that it had decided to withdraw as from that date, its reservation regarding article 66 made upon accession which reservation reads as follows:

The Hungarian People's Republic does not consider itself bound by the provisions of article 66 of the Vienna Convention on the Law of Treaties and declares that submission of a dispute concerning the application or the interpretation of article 53 or 64 to the International Court of Justice for a decision or submission of a dispute concerning the application or the interpretation of any articles in Part V of the Convention to a conciliation commission for consideration shall be subject to the consent of all the parties to the dispute and that the conciliators constituting the conciliation commission shall have been nominated exclusively with the common consent of the parties to the dispute.

[18] In a communication received on 19 July 1990, the Government of Mongolia notified the Secretary-General of its decision to withdraw the reservation made upon accession, which reads as follows:

1. The Mongolian People's Republic does not consider itself bound by the provisions of article 66 of the Convention.

The Mongolian People's Republic declares that submission of any dispute concerning the application or the interpretation of articles 53 and 64 to the International Court of Justice for a decision as well as submission of any dispute concerning the application or the interpretation of any other articles in Part V of the Convention to a conciliation commission for consideration shall be subject to the consent of all the parties to the dispute in each separate case, and that the conciliators constituting the conciliation commission shall be appointed by the parties to the dispute by common consent.

2. The Mongolian People's Republic is not obligated by the provisions of article 45 (b) of the Vienna Convention on the Law of Treaties, since they are contrary to established international practice.

[19] On 14 November 2001, the Secretary-General received from the Government of Austria the following communication:

"Austria has examined the reservation made by the Government of Peru at the time of its ratification of the Vienna Convention on the Law of Treaties, regarding the application of articles 11, 12 and 25 of the Convention.

The fact that Peru is making the application of the said articles subject to a general reservation referring to the contents of existing national legislation, in the absence of further clarification raises doubts as to the commitment of Peru to the object and purpose of the Convention. According to customary international 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. In Austria's view the reservation in question is therefore inadmissible to the extent that its application could negatively affect the compliance by Peru with its obligations under articles 11, 12 and 25 of the Convention.

For these reasons, Austria objects to the reservation made by the Government of Peru to the Vienna Convention on the Law of Treaties.

This objection shall not preclude the entry into force of the Convention in its entirety between Peru and Austria, without Peru benefiting from its reservation."

In this regard, the Secretary-General received, on 21 January 2002, from the Government of Peru the following communcation:

[The Government of Peru refers to the communication made by the Government of Austria relating to the reservation made by Peru upon ratification]. In this document, Member States are informed of a communication from the Government of Austria stating its objection to the reservation entered in respect of the Vienna Convention on the Law of Treaties by the Government of Peru on 14 September 2000 when depositing the corresponding instrument of ratification.

As the [Secretariat] is aware, article 20, paragraph 5, of the Vienna Convention states that "a reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation (...)". The ratification and reservation by Peru in respect of the Vienna Convention were communicated to Member States on 9 November 2000.

Since the communication from the Austrian Government was received by the Secretariat on 14 November 2001 and circulated to Member States on 28 November 2001, the Peruvian Mission is of the view that there is tacit acceptance on the part of the Austrian Government of the reservation entered by Peru, the 12-month period referred to in article 20, paragraph 5, of the Vienna Convention having elapsed without any objection being raised. The Peruvian Government considers the communication from the Austrian Government as being without legal effect, since it was not submitted in a timely manner.

[20] On 24 February 1998, the Secretary-General received from the Government of Guatemala the following communication:.

Guatemala maintains a territorial dispute over the illegal occupation of part of its territory by the Government of the United Kingdom of Great Britain and Northern Ireland, succeeded by the Government of Belize, and Guatemala therefore continues to assert a valid claim based on international law which must be settled by restoring to it the territory which historically and legally belongs to it.

[21] The nomination of the conciliators listed hereinafter was not renewed after five years:

State:	***Conciliators:***
Australia	Mr. Patrick Brazil, Professor James Richard Crawford
Austria	Professorr Stephen Verosta, Dr. Helmut Tuerk, Dr. Karl Zemanek, Ambassador Helmut Türk, Professor Karl Zemanek
Croatia	Dr. Stanko Nick, Professor Dr. Budislav Vukas
Cyprus	M. Criton Tornaritis, Mr. Michalakis Triantafillides, Mrs. Stella Soulioti
Denmark	Ambassador Paul Fischer, Prof. Isi Foighel, Ambassador Skjold Gustav Mellbin
Finland	Professor Isi Foighel, Professor Erik Castrén
Germany	Professor Thomas Oppermann (German Democratic Republic), Professor Günther Jaenicke (German Democratic Republic)
Iran (Islamic Republic of)	Mr. Morteza Kalantarian
Italy	Professor Riccardo Monaco, Professor Luigi Ferrari-Bravo
Japan	Professor Shigejiro Tabata, Judge Masato Fujisaki
Kenya	Mr. John Maximian Nazareth, Mr. S. Amos Wako
Mexico	Mr. Antonio Gomez Robledo, Mr. César Sepúlveda, Ambassador Alfonso de Rosenzweig-Diáz
Morocco	Mr. Abdelaziz Amine Filali, Mr. Ibrahim Keddara, Mr. Abdelaziz Benjelloun
Netherlands	Professor W. Riphagen, Professor A.M. Stuyt
North Macedoania	Dr. Milan Bulajic, Dr. Milivoj Despot, Dr. Budislav Vukas, Dr. Borut Bohte, Mrs. Elena Andreevska, Director of the Directorate on International Law, Mr. Goran Stevcevski, Director of the Directorate on International Law
Panama	Mr. Jorge E. Illueca, Mr. Nanader A. Pitty Velasquez
Paraguay	Dr. Luis María Ramírez Boettner, Dr. Jerónimo Irala Burgos
Portugal	Professor Wladimir Brito, Professeur Wladimir Brito
Slovakia	Dr. Igor Grexa, Director-General for Legal and Consular Affairs, Ministry of Foreign Affairs of Slovakia
Spain	Professor Julio Diego González Campos, Professor Manuel Diez de VelascoVallejo, Sr. D. José Antonio Pastor Ridruejo, Sr. D. Aurelio Pérez Giralda
Sweden	Mr. Gunnar Lagergren, Mr. Ivan Wallenberg, Mr. Hans Danelius, Mr. Love Gustav-Adolf Kellberg
Switzerland	Mr. Lucius Caflisch, Judge at the European Court of Human Rights, Mr. Walter Kälin, Professor of Public Law and International Law at the University of Berne
United Kingdom of Great Britain and Northern Ireland	Professor R.Y. Jennings, Sir Ian Sinclaire

Annex 80

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRE RELATIVE À L'APPLICATION DE LA CONVENTION INTERNATIONALE SUR L'ÉLIMINATION DE TOUTES LES FORMES DE DISCRIMINATION RACIALE

(GÉORGIE c. FÉDÉRATION DE RUSSIE)

DEMANDE EN INDICATION DE MESURES
CONSERVATOIRES

ORDONNANCE DU 15 OCTOBRE 2008

2008

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

CASE CONCERNING APPLICATION OF THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION

(GEORGIA *v.* RUSSIAN FEDERATION)

REQUEST FOR THE INDICATION OF PROVISIONAL
MEASURES

ORDER OF 15 OCTOBER 2008

Mode officiel de citation:

Application de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Géorgie c. Fédération de Russie), mesures conservatoires, ordonnance du 15 octobre 2008, C.I.J. Recueil 2008, p. 353

Official citation:

Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v. *Russian Federation), Provisional Measures, Order of 15 October 2008, I.C.J. Reports 2008*, p. 353

ISSN 0074-4441
ISBN 978-92-1-071050-3

N° de vente:
Sales number **941**

15 OCTOBRE 2008

ORDONNANCE

APPLICATION DE LA CONVENTION INTERNATIONALE SUR L'ÉLIMINATION DE TOUTES LES FORMES DE DISCRIMINATION RACIALE

(GÉORGIE c. FÉDÉRATION DE RUSSIE)

DEMANDE EN INDICATION DE MESURES CONSERVATOIRES

APPLICATION OF THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION

(GEORGIA *v.* RUSSIAN FEDERATION)

REQUEST FOR THE INDICATION OF PROVISIONAL MEASURES

15 OCTOBER 2008

ORDER

INTERNATIONAL COURT OF JUSTICE

YEAR 2008

2008
15 October
General List
No. 140

15 October 2008

CASE CONCERNING APPLICATION OF THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION

(GEORGIA *v.* RUSSIAN FEDERATION)

REQUEST FOR THE INDICATION OF PROVISIONAL MEASURES

ORDER

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

The International Court of Justice,

Composed as above,

After deliberation,

Having regard to Articles 41 and 48 of the Statute of the Court and to Articles 73, 74 and 75 of the Rules of Court,

Makes the following Order:

1. Whereas by an Application filed in the Registry of the Court on 12 August 2008, the Government of Georgia instituted proceedings against the Russian Federation for alleged violations of the International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter "CERD");

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

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

3. Whereas in its Application Georgia states that:

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

and that the Russian Federation seeks to consolidate changes in the ethnic composition of South Ossetia and Abkhazia resulting from its actions "by preventing the return to South Ossetia and Abkhazia of forcibly displaced ethnic Georgian citizens and by undermining Georgia's capacity to exercise jurisdiction in this part of its territory"; whereas Georgia contends that "[t]he changed demographic situation in South Ossetia and Abkhazia is intended to provide the foundation for the unlawful assertion of independence from Georgia by the *de facto* South Ossetian and Abkhaz separatist authorities";

4. Whereas Georgia explains the origin of the conflict in South Ossetia as follows:

> "On 10 November 1989, the Regional Public Council of the South Ossetian Autonomous District [which formed part of the Georgian Soviet Socialist Republic] formally requested the Georgian Supreme Soviet to upgrade the status of the District to 'Autonomous Republic'. After the Georgian Supreme Soviet refused, on 28 November 1990, the Regional Public Council of the South Ossetian Autonomous District re-named the District the 'Soviet Republic of South Ossetia', and scheduled elections for a new Supreme Council to be held on 9 December 1990 . . .
>
> On 11 December 1990, the Georgian Supreme Soviet declared the 9 December elections illegitimate . . ., annulled the results, and abolished the Autonomous District of South Ossetia and its Regional Public Council.
>
> Following these events, violent conflict broke out . . . Throughout 1991, coinciding with Georgia's Declaration of Independence on 9 April, over 1,000 people were killed in the fighting in South Osse-

tia. During this time, some 23,000 ethnic Georgians were forced to flee South Ossetia and settle in other parts of Georgia";

5. Whereas, in relation to the beginning of the conflict in Abkhazia, Georgia contends that following the dissolution of the Soviet Union in December 1991, "Abkhaz separatists under the leadership of Vladislav Ardzinba sought to secede from the Republic of Georgia, including by the use of force";

6. Whereas it is further contended in the Application that the Russian Federation has "violated its obligations under CERD during three distinct phases of its interventions in South Ossetia and Abkhazia" in the period from 1990 to August 2008;

7. Whereas Georgia asserts that the first phase of the intervention in South Ossetia took place between 1990 and 1992 and in Abkhazia between 1991 and 1994; whereas Georgia claims that during this first phase "the Russian Federation provided essential support to South Ossetian and Abkhaz separatists in their attacks against, and mass-expulsion of, virtually the entire ethnic Georgian population of South Ossetia and Abkhazia" and that support from the Russian Federation included "the provision of weapons and supplies and the recruitment of mercenaries to support separatist forces in both regions, and, in the case of Abkhazia, the deployment of Russian armed forces directly to assist military operations conducted by the separatists";

8. Whereas Georgia claims that hostilities formally came to an end in South Ossetia on 24 June 1992 following the Agreement on the Principles of the Settlement of the Georgian-Ossetian Conflict signed by Georgia, the South Ossetian "separatist forces" and the Russian Federation; and in Abkhazia on 14 May 1994 following the signing of the Moscow Agreement on a Ceasefire and Separation of Forces by Georgia, the Abkhaz "separatist forces" and the Russian Federation; whereas both agreements provided for the creation of joint peacekeeping forces which, according to Georgia, were "dominated by ostensibly neutral Russian peacekeepers";

9. Whereas Georgia maintains that the signature of these agreements, which "formalized the Russian Federation's dual status as a party to those conflicts and as an ostensible peacekeeper and facilitator of negotiations", marked the second phase of "the Russian Federation's intervention" in South Ossetia and Abkhazia respectively;

10. Whereas Georgia contends that:

> "By implementing racially discriminatory policies in South Ossetia and Abkhazia under cover of its peacekeeping mandate, the Russian Federation has sought to consolidate the forced displacement of the ethnic Georgian and other populations that resulted from 'ethnic cleansing' from 1991 to 1994";

whereas it claims that the Russian Federation "has supported the South Ossetian and Abkhaz separatists' quest for independence from Georgia"; and whereas Georgia concludes that "[a]chieving this goal necessarily implies the expulsion of ethnic Georgians and other populations from their homes, and denial of their right to return to their homes and to live in peace within the sovereign territory of Georgia";

11. Whereas Georgia asserts that, as part of its policy of racial discrimination, the Russian Federation "has consistently frustrated the return of Internally Displaced Persons (IDPs) since the conflicts of 1991-1994" and that, as a consequence, "demographic changes forced upon the population by the South Ossetian and Abkhaz separatists with Russian support are more likely to become permanent";

12. Whereas, in its Application, Georgia points out that in furtherance of its policy to support "South Ossetian and Abkhaz separatists", the Russian Federation has taken other actions that violate CERD; whereas, by way of example, Georgia contends that "the Russian Federation has conferred its citizenship upon almost the entire non-ethnic Georgian population of South Ossetia and Abkhazia" and that ethnic Georgians remaining in South Ossetia and Abkhazia "who have refused to renounce their Georgian citizenship in favour of Russian citizenship, have faced active intimidation and harassment by soldiers associated with [the] armed forces of the Russian Federation";

13. Whereas Georgia asserts that "the *de facto* separatist authorities of South Ossetia and Abkhazia enjoy unprecedented and far-reaching support from the Russian Federation in the implementation of discriminatory policies against the ethnic Georgian population" and that this support

> "has the effect of denying the right of self-determination to the ethnic Georgians remaining in South Ossetia and Abkhazia and those seeking to return to their homes in South Ossetia and Abkhazia since the ceasefires of 1992 and 1994, respectively";

and whereas it claims that "by recognizing and supporting South Ossetia's and Abkhazia's separatist authorities, the Russian Federation is also preventing Georgia from implementing its obligations under CERD, by assuming control over its territory";

14. Whereas in its Application Georgia claims that "the Russian Federation has also systematically attempted to undermine Georgia's territorial sovereignty" by taking steps to recognize the independence of South Ossetia and Abkhazia; and whereas it adds that these acts have "significantly escalated tensions in South Ossetia and Abkhazia, and opened the door to further conflict";

15. Whereas Georgia claims that, as from April 2008, in addition to

the measures designed to strengthen the legitimacy of the *de facto* institutions of the separatist authorities, "the Russian Federation [has] also increased its military activities in both regions as a prelude to its invasion of Georgia in August 2008"; and whereas, according to Georgia, "Russia's military build-up was accompanied by a campaign of discrimination against ethnic Georgians and others who might be opposed to the extension of Russian influence in South Ossetia and Abkhazia";

16. Whereas Georgia asserts that, "in contrast to Russian attempts to nurture the creation of ethnically homogeneous States that are politically, economically, socially and militarily beholden to it", Georgia has consistently "strived for the integration of multi-ethnic Abkhaz and South Ossetian societies into a democratic Georgian State" and offered both regions "unlimited autonomy"; and whereas Georgia contends that "it has also steadfastly pressed for the right of all IDPs (regardless of ethnicity) to return to their homes";

17. Whereas Georgia contends that the third phase of "the Russian Federation's intervention in South Ossetia and Abkhazia began on 8 August 2008, when Russian forces invaded Georgian territory";

18. Whereas Georgia alleges that,

> "in response to the persistent shelling of ethnic Georgian villages in South Ossetia by separatist forces, Georgian military forces launched a limited operation into territory held by ethnic separatists on 7 August 2008 for purposes of putting a stop to the attacks";

whereas it explains that the Russian Federation responded to Georgia's actions "with a full-scale invasion" of Georgian territory on 8 August 2008, "occupied more than half of Georgia and attacked civilians and civilian objects" throughout the country, "resulting in significant casualties and destruction";

19. Whereas, according to Georgia, at the same time the situation in Abkhazia quickly began to deteriorate, with attacks against Georgian villages in the Kodori valley, bombing of Georgia's Black Sea port of Poti and deployment of Russian ground troops and armoured vehicles in Abkhazia;

20. Whereas Georgia claims, "in its own right and as *parens patriae* of its citizens", that the Russian Federation,

> "through its State organs, State agents, and other persons and entities exercising governmental authority, and through the South Ossetian and Abkhaz separatist forces and other agents acting on the instructions of, and under the direction and control of the Russian Federation, is responsible for serious violations of its fundamental obligations under CERD, including Articles 2, 3, 4, 5 and 6";

21. Whereas Georgia further claims that these violations include, but are not limited to:

"*(a)* widespread and systematic discrimination against South Ossetia's and Abkhazia's ethnic Georgian population and other groups during the conflicts of 1991-1994, 1998, 2004 and 2008, reflected in acts including murder, unlawful attacks against civilians and civilian objects, torture, rape, deportation and forcible transfer, imprisonment and hostage-taking, enforced disappearance, wanton destruction and unlawful appropriation of property not justified by military necessity, and plunder;

(b) widespread and systematic denial on discriminatory grounds of the right of South Ossetia's and Abkhazia's ethnic Georgian and other refugees and IDPs to return to their homes;

(c) widespread and systematic unlawful appropriation and sale of homes and other property belonging to South Ossetia's and Abkhazia's ethnic Georgians and other groups forcibly displaced during the conflicts of 1991-1994, 1998, 2004 and 2008 and denied the right to return to the South Ossetian and Abkhaz regions;

(d) the continuing discriminatory treatment of ethnic Georgians in South Ossetia and in the Gali District of Abkhazia, including but not limited to pillage, hostage-taking, beatings and intimidation, denial of the freedom of movement, denial of their right to education in their mother tongue, pressure to obtain Russian citizenship and/or Russian passports, and threats of punitive taxes and expulsions for maintaining Georgian citizenship;

(e) the sponsoring, defending, and supporting of ethnic discrimination by the *de facto* South Ossetian and Abkhaz separatist authorities and the recognition as lawful of a situation created by a serious breach of Russia's obligations under CERD and of its obligations *erga omnes*, namely recognition in whole or in part of the South Ossetian and Abkhaz separatist entities amounting to recognition of a situation created by 'ethnic cleansing' constituting the crime against humanity of persecution and systematic discrimination on ethnic grounds;

(f) preventing the Republic of Georgia from exercising jurisdiction over its territory in the regions of South Ossetia [and] Abkhazia in order to implement its obligations under CERD; and

(g) the launching of a war of aggression against Georgia with the aims of (i) securing ethnically homogeneous allies in South Ossetia and Abkhazia free from Georgian political, social and cultural influence; (ii) permanently denying the right of dis-

placed ethnic Georgians to return to their homes in South Ossetia and Abkhazia; and (iii) permanently denying all the people of Georgia their right to self-determination in accordance with CERD";

22. Whereas, at the end of its Application, Georgia asks the Court to adjudge and declare that:

"the Russian Federation, through its State organs, State agents, and other persons and entities exercising governmental authority, and through the South Ossetian and Abkhaz separatist forces and other agents acting on the instructions of or under the direction and control of the Russian Federation, has violated its obligations under CERD by:

(a) engaging in acts and practices of 'racial discrimination against persons, groups of persons or institutions' and failing 'to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation' contrary to Article 2 (1) *(a)* of CERD;

(b) 'sponsoring, defending and supporting racial discrimination' contrary to Article 2 (1) *(b)* of CERD;

(c) failing to 'prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination' contrary to Article 2 (1) *(d)* of CERD;

(d) failing to condemn 'racial segregation' and failing to 'eradicate all practices of this nature' in South Ossetia and Abkhazia, contrary to Article 3 of CERD;

(e) failing to 'condemn all propaganda and all organizations . . . which attempt to justify or promote racial hatred and discrimination in any form' and failing 'to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination', contrary to Article 4 of CERD;

(f) undermining the enjoyment of the enumerated fundamental human rights in Article 5 by the ethnic Georgian, Greek and Jewish populations in South Ossetia and Abkhazia, contrary to Article 5 of CERD;

(g) failing to provide 'effective protection and remedies' against acts of racial discrimination, contrary to Article 6 of CERD";

23. Whereas Georgia also asks the Court

"to order the Russian Federation to take all steps necessary to comply with its obligations under CERD, including:

(a) immediately ceasing all military activities on the territory of the Republic of Georgia, including South Ossetia and Abkhazia, and immediate withdrawing of all Russian military personnel from the same;
(b) taking all necessary and appropriate measures to ensure the prompt and effective return of IDPs to South Ossetia and Abkhazia in conditions of safety and security;
(c) refraining from the unlawful appropriation of homes and property belonging to IDPs;
(d) taking all necessary measures to ensure that the remaining ethnic Georgian populations of South Ossetia and the Gali District are not subject to discriminatory treatment including but not limited to protecting them against pressures to assume Russian citizenship, and respect for their right to receive education in their mother tongue;
(e) paying full compensation for its role in supporting and failing to bring to an end the consequences of the ethnic cleansing that occurred in the 1991-1994 conflicts, and its subsequent refusal to allow the return of IDPs;
(f) not to recognize in any manner whatsoever the *de facto* South Ossetian and Abkhaz separatist authorities and the *fait accompli* created by ethnic cleansing;
(g) not to take any measures that would discriminate against persons, whether legal or natural, having Georgian nationality or ethnicity within its jurisdiction or control;
(h) allow Georgia to fulfil its obligations under CERD by withdrawing its forces from South Ossetia and Abkhazia and allowing Georgia to restore its authority and jurisdiction over those regions; and
(i) to pay full compensation to Georgia for all injuries resulting from its internationally wrongful acts";

24. Whereas, on 14 August 2008, Georgia, referring to Article 41 of the Statute of the Court and to Articles 73, 74 and 75 of the Rules of Court, submitted a Request for the indication of provisional measures, pending the Court's judgment in the proceedings instituted by Georgia against the Russian Federation, in order to preserve its rights under CERD "to protect its citizens against violent discriminatory acts by Russian armed forces, acting in concert with separatist militia and foreign mercenaries", including

"unlawful attacks against civilians and civilian objects, murder, forced displacement, denial of humanitarian assistance, and extensive pillage and destruction of towns and villages, in South Ossetia and neighbouring regions of Georgia, and in Abkhazia and neighbouring regions, under Russian occupation";

25. Whereas Georgia observes that "[t]he continuation of these violent

discriminatory acts constitutes an extremely urgent threat of irreparable harm to [its] rights under CERD in dispute in this case";

26. Whereas, in its Request for the indication of provisional measures, Georgia refers to the basis of jurisdiction of the Court invoked in its Application, and to the facts set out and the submissions made therein;

27. Whereas Georgia reiterates the contention made in its Application that

> "beginning in the early 1990s and acting in concert with separatist forces and mercenaries in the Georgian regions of South Ossetia and Abkhazia, the Russian Federation has engaged in a systematic policy of ethnic discrimination directed against the ethnic Georgian population and other groups in those regions";

and that these actions have "directly or indirectly resulted in the death or disappearance of thousands of civilians and the internal displacement of approximately 300,000 persons", whose right of return is being denied;

28. Whereas Georgia claims that, on 8 August 2008, the Russian Federation "launched a full-scale military invasion against Georgia in support of ethnic separatists in South Ossetia and Abkhazia", which has resulted in "hundreds of civilian deaths, extensive destruction of civilian property, and the displacement of virtually the entire ethnic Georgian population in South Ossetia"; and whereas it further claims that the withdrawal of the Georgian armed forces and the unilateral declaration of a ceasefire did not prevent the Russian Federation from continuing its military operations beyond South Ossetia into territories under the control of the Georgian Government;

29. Whereas Georgia contends that, on 13 August 2008, the

> "Russian armed forces, acting together with South Ossetian separatist militia and foreign mercenaries, have engaged in a campaign of ethnic cleansing involving murder and forced displacement of ethnic Georgians, and the pillage and extensive destruction of villages adjacent to South Ossetia";

30. Whereas Georgia alleges that the following facts constitute "discriminatory human rights abuses against Georgian citizens in and around South Ossetia":

"— Russian forces and separatist militia have summarily executed Georgian civilians and persons *hors de combat* after verifying their ethnicity in the villages of Nikosi, Kurta, and Armarishili;

— Russian forces and separatist militia have engaged in widespread pillage and burning of homes in the villages of Karbi, Mereti, Disevi, Ksuisi, Kitsnisi, Beloti, Vanati, and Satskheneti and have executed elderly civilians;
— Russian forces have forcibly transferred the remaining ethnic Georgians in South Ossetia to Kurta detention camp;
— in Gori, Russian forces bombed the hospital, university, market place, and post-office, even though this is an undefended town without any Georgian military presence";

31. Whereas Georgia observes that "[t]he systematic pillage and destruction of Georgian villages is clearly intended to prevent the return of civilians displaced as a result of Russia's aggression commencing August 8";

32. Whereas Georgia further contends that Russian military operations have extended to Abkhazia and beyond and have included "attacks against the Black Sea port of Poti resulting in numerous civilian deaths and extensive destruction of civilian property" and the occupation of the town of Zugdidi and the subjection of its population to "widespread pillage and other abuses"; whereas Georgia asserts that Georgian civilians in the district of Gali have been denied their freedom of movement and have faced increasing intimidation and pressure to adopt Russian citizenship;

33. Whereas Georgia claims that "the rights which are the subject of the dispute are set forth in Articles 2, 3, 4, 5 and 6 of CERD"; whereas Georgia further claims that the rights under CERD that Georgia seeks to protect with its Request "arise from the obligations of the Russian Federation to prevent acts of ethnic discrimination", including:

"*(a)* the right to ensure that the Russian Federation and separatist authorities under its direction and control refrain from any further act or practice of ethnic discrimination against Georgian citizens and that civilians are fully protected against such acts in territories under the occupation or effective control of Russian forces, pursuant to Article 2 (1);

(b) the right to ensure that the Russian Federation and separatist authorities under its direction and control refrain from any further acts resulting in the recognition of or rendering permanent the ethnic segregation of Georgian citizens through forced displacement or denial of the right of IDPs to return to their homes in South Ossetia, Abkhazia, and adjacent territories under the occupation or effective control of Russian forces, pursuant to Article 3;

(c) the right to ensure that the Russian Federation and separatist authorities under its direction and control refrain from any further acts violating the enjoyment by Georgian citizens of fundamental human rights including in particular the right to security of the person and protection against violence or bodily harm, the right to freedom of movement and residence within the borders of Georgia, the right of IDPs to return to their homes under conditions of safety, and the right to protection of homes and property against pillage and destruction, pursuant to Article 5; and

(d) the right to ensure that the Russian Federation and separatist authorities under its direction and control refrain from any acts denying to Georgian citizens under their jurisdiction effective protection and remedies against ethnic discrimination and violations of human rights pursuant to Article 6";

34. Whereas Georgia accordingly requests the Court "as a matter of utmost urgency" and "in order to prevent irreparable prejudice to the rights of Georgia and its citizens under CERD", to order the following measures:

"*(a)* the Russian Federation shall give full effect to its obligations under CERD;

(b) the Russian Federation shall immediately cease and desist from any and all conduct that could result, directly or indirectly, in any form of ethnic discrimination by its armed forces, or other organs, agents, and persons and entities exercising elements of governmental authority, or through separatist forces in South Ossetia and Abkhazia under its direction and control, or in territories under the occupation or effective control of Russian forces;

(c) the Russian Federation shall in particular immediately cease and desist from discriminatory violations of the human rights of ethnic Georgians, including attacks against civilians and civilian objects, murder, forced displacement, denial of humanitarian assistance, extensive pillage and destruction of towns and villages, and any measures that would render permanent the denial of the right to return of IDPs, in South Ossetia and adjoining regions of Georgia, and in Abkhazia and adjoining regions of Georgia, and any other territories under Russian occupation or effective control";

35. Whereas on 12 and 14 August 2008, dates on which the Application and the Request for the indication of provisional measures were filed

in the Registry respectively, the Deputy-Registrar advised the Government of the Russian Federation of the filing of those documents and forthwith sent it signed originals of them, in accordance with Article 40, paragraph 2, of the Statute of the Court and with Article 38, paragraph 4, and Article 73, paragraph 2, of the Rules of Court; whereas the Deputy-Registrar also notified the Secretary-General of the United Nations of the filing of those documents;

36. Whereas, on 15 August 2008, the Registrar informed the Parties that the President, acting under Article 74, paragraph 3, of the Rules of Court, had fixed 8 September 2008 as the date for the opening of the oral proceedings on the Request for the indication of provisional measures;

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

38. Whereas, pending the notification under Article 40, paragraph 3, of the Statute and Article 42 of the Rules of Court, by transmittal of the printed bilingual text of the Application to the Members of the United Nations, the Registrar, on 19 August 2008, informed those States of the filing of the Application and of its subject-matter, and of the filing of the Request for the indication of provisional measures;

39. Whereas, since the Court includes upon the Bench no judge of Georgian nationality, the Georgian Government has availed itself of the provisions of Article 31 of the Statute of the Court and has chosen Mr. Giorgio Gaja to sit as judge *ad hoc* in the case;

40. Whereas, by a Note Verbale of 19 August 2008, received in the Registry on the same day, the Russian Federation informed the Court of the appointment of Agents for the purposes of the case;

41. Whereas, on 25 August 2008, Georgia, referring to "the rapidly changing circumstances in Abkhazia and South Ossetia", submitted an "Amended Request for the Indication of Provisional Measures of Protection" (hereinafter the "Amended Request");

42. Whereas in the Amended Request Georgia claims that, "following its invasion commencing on 8 August 2008", the Russian Federation assumed control over all of South Ossetia and Abkhazia as well as "adjacent areas within the territory of Georgia"; whereas, according to Georgia, in these territories ethnic Georgians have been subjected to systematic discriminatory acts, including physical violence and the plunder and destruction of their homes; and whereas it is stated that "[t]he manifest objective of this discriminatory campaign is the mass-expulsion of the ethnic Georgian population from South Ossetia, Abkhazia, and other neighbouring areas of Georgia";

43. Whereas Georgia submits that in a number of specific areas of Georgia allegedly under Russian control, "widespread and systematic

acts of violent racial discrimination" have been committed against ethnic Georgians; and whereas it adds that "[a] particular cause for concern is the Russian occupation of [the] Akhalgori District, outside and to the east of South Ossetia, and previously under Georgian Government control";

44. Whereas it is contended in the Additional Request that the Russian Federation has consolidated its "effective control" over the occupied "Georgian regions of South Ossetia and Abkhazia, as well as adjacent territories" which are situated within "Georgia's internationally recognized boundaries"; and whereas therefore, for the purposes of the fulfilment by the Russian Federation of its obligations under CERD, "South Ossetia, Abkhazia, and relevant adjacent regions, fall within the Russian Federation's jurisdiction";

45. Whereas Georgia asserts in its Amended Request that it requests the Court to indicate provisional measures in order to prevent irreparable prejudice "to the right of ethnic Georgians to be free from discriminatory treatment, in particular violent or otherwise coercive acts . . . and other acts intended to expel them from their homes in South Ossetia, Abkhazia, and adjacent regions located within Georgian territory" and "to the right of return of ethnic Georgians to South Ossetia and Abkhazia";

46. Whereas Georgia alleges that, owing to the Russian Federation's continuing discrimination against ethnic Georgians in Abkhazia, South Ossetia and neighbouring areas,

> "the remaining ethnic Georgians in South Ossetia, Abkhazia, and adjacent regions, are at imminent risk of violent expulsion, death or personal injury, hostage-taking and unlawful detention, and damage to or loss of their homes and other property";

and whereas it adds that "the prospects for the return of those ethnic Georgians who have already been forced to flee are rapidly deteriorating";

47. Whereas Georgia states that it urgently requests the indication of provisional measures

> "to avert a situation whereby the implementation of a judgment of the Court upholding the rights of Georgian citizens under Articles 2 and 5 of CERD to remain in South Ossetia, Abkhazia, or adjacent regions, or to return to their homes in these territories, is rendered impossible";

48. Whereas in its Amended Request

> "Georgia respectfully requests the Court as a matter of urgency to order the following provisional measures, pending its determination of this case on the merits, to prevent irreparable harm to the rights

of ethnic Georgians under Articles 2 and 5 of CERD to be secure in their persons and to be protected against violence or bodily harm in the areas of Georgian territory under the effective control of the Russian Federation:

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

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

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

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

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

from those regions on the basis of their ethnicity or nationality;

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

49. Whereas, on 4 September 2008, Georgia communicated to the Court "Observations on Provisional Measures" consisting of a set of documents relating to Georgia's Amended Request for the indication of provisional measures; and whereas, on 5 September 2008, the Russian Federation communicated to the Court the "Contribution of the Russian Federation to the hearings on provisional measures" also consisting of a set of documents;

50. Whereas, at the public hearings held on 8, 9 and 10 September 2008, in accordance with Article 74, paragraph 3, of the Rules of Court, oral statements on the Request for the indication of provisional measures were presented by the following representatives of the Parties:

On behalf of Georgia: H.E. Ms Tina Burjaliani,
Mr. James R. Crawford,
Mr. Payam Akhavan,
Mr. Paul S. Reichler;

On behalf of the Russian Federation: H.E. Mr. Roman Kolodkin,
H.E. Mr. Kirill Gevorgian,
Mr. Alain Pellet,
Mr. Andreas Zimmermann,
Mr. Samuel Wordsworth;

* * *

51. Whereas, in its first round of oral argument, Georgia restated the position set out in its Application and in its Amended Request for the indication of provisional measures, and indicated that the requirements for the indication by the Court of the provisional measures requested have been met in the present case;

52. Whereas Georgia claimed that "the discrimination against the ethnic Georgian communities in Abkhazia, South Ossetia and the Gori district gained momentum" following 8 August 2008; and whereas it asserted that "in the last month, more than 158,000 ethnic Georgians have been added to the number of internally displaced persons in Georgia" which meant that "10 per cent of the Georgian population is now living in exile in their own country";

53. Whereas Georgia asserted that "there is no sign that the Russian Federation and the *de facto* separatist authorities in South Ossetia and

Abkhazia intend to cease" a campaign of "sustained and violent discrimination being waged" against ethnic Georgians in Abkhazia, South Ossetia and the Gori district before its objective, namely "the creation of two territories that are cleansed of ethnic Georgians and placed under the authority of separatists loyal to the Russian Federation", has been achieved; and whereas, according to Georgia, "the violent discrimination has continued since the so-called 'ceasefire', since Georgia filed its Application, and since the Request for provisional measures was put before the Court";

54. Whereas Georgia contended that "the obligations under the Convention are evidently engaged in relation to Russia's treatment of ethnic Georgians in Abkhazia, South Ossetia, and other areas of Georgia under Russian control" and reaffirmed that, for the purposes of its Request for the indication of provisional measures, the rights at issue before the Court are the rights of Georgia and ethnic Georgians guaranteed under Articles 2 and 5 of CERD;

55. Whereas Georgia stressed that its Request for the indication of provisional measures is directed specifically at the protection of the ethnic Georgian population who are at grave risk of imminent violence against their person and property in the Gali district of Abkhazia, the Akhalgori district of South Ossetia and the adjacent Gori district; and whereas Georgia claimed that "Russia exercises significant control over the Georgian territories under its occupation, and also controls the separatist régimes in Abkhazia and South Ossetia" and thus "has the power to stop ongoing acts of discrimination";

56. Whereas Georgia stated that the question of attribution would have to be dealt with on the merits of the case; whereas it contended however that "the evidence already available indicates on a *prima facie* basis that acts and omissions which form the basis of Georgia's complaint have been committed — and continue to be committed — by persons for whose conduct Russia is responsible";

57. Whereas at the end of the first round of oral observations Georgia reiterated its requests made in the Amended Request for the indication of provisional measures and in addition asked the Court "to order the respondent State to permit and facilitate, and to refrain from obstructing, the delivery of urgently needed humanitarian assistance to ethnic Georgians and others remaining in territory that is under the control of Russian forces";

*

58. Whereas, in its first round of oral argument the Russian Federation presented a brief account of the history of the region since the eighteenth century; whereas, regarding the first period referred to by Georgia

in its Application (see paragraphs 7-8 above), the Russian Federation explained that ethnic tensions in the Georgian autonomous regions, in particular in Abkhazia and South Ossetia, had been exacerbated in the late 1980s with the coming to power in Georgia of nationalists seeking independence, such as Zviad Gamsakhurdia, the first President of Georgia, who launched a political programme with the slogan "Georgia for Georgians"; whereas the Russian Federation contended that Georgia took steps to deprive Abkhazia and South Ossetia of their respective autonomous status, which actions "provoked a reaction on the part of the Abkhazians and Ossetians"; whereas the Russian Federation claimed that "Tblisi responded by sending military and paramilitary forces to Tskhinvali, the capital of South Ossetia, in January 1991" leading to a state of civil war; whereas, according to the Russian Federation, while on 9 April 1991 Georgia declared its independence, it denied the right of self-determination to Abkhazia and South Ossetia; and whereas, the Russian Federation added that a civil war broke out in 1992 in Abkhazia, with "the clashes between the Georgian forces and the Abkhaz militia caus[ing] many deaths on both sides";

59. Whereas the Russian Federation indicated that "the violent phase of the conflict in South Ossetia" came to an end by the signing on 24 June 1992 of the Treaty between the Russian Federation and Georgia on the principles of the settlement of the conflict; whereas the Russian Federation explained that, under this Treaty, a joint peacekeeping force consisting of three battalions — Russian, Georgian and Ossetian — was deployed in the region; and whereas, according to the Russian Federation, "in the Georgian villages, it was the Georgian forces that carried out the peacekeeping duties";

60. Whereas the Russian Federation claimed that the hostilities in Abkhazia were for the most part halted following the deployment of a Russian contingent acting as the Collective Peacekeeping Force of the Commonwealth of Independent States set up under the Moscow Agreement on a Ceasefire and Separation of Forces signed between Georgia and Abkhazia in 1994, "under the aegis of Russia"; whereas it added that in August 1993, the United Nations Security Council, by its resolution 858 (1993), had decided to establish the United Nations Observer Mission in Georgia (UNOMIG), whose task was to verify respect for an earlier ceasefire agreement of 27 July 1993; and whereas on 4 April 1994 Georgia, Abkhazia, the Russian Federation and the United Nations High Commissioner for Refugees signed the quadripartite agreement on the voluntary return of displaced persons;

61. Whereas the Russian Federation contended that "the mechanisms for peacekeeping and negotiation received the support of international governmental organizations such as the United Nations and the Organization for Security and Co-operation in Europe (OSCE), and of Georgia itself";

62. Whereas the Russian Federation maintained that "progress was

made in the peace process until Mr. Saakashvili came to power [in Georgia] at the end of 2003"; whereas it asserted that, from May 2004, troops and special units of the Georgian Ministry of the Interior were moved into the Georgian-Ossetian zone of conflict, reserved strictly for the peacekeeping forces, and that in August 2004 these troops bombarded Tskhinvali in an attempt to invade it; whereas the Russian Federation claimed that in February 2005 President Saakashvili formally renounced the ceasefire "which had been concluded between the parties in November 2004 through the active mediation of Russia"; and whereas, according to the Russian Federation, in Abkhazia "progress in the settlement process was abruptly halted by the deployment of the Georgian contingent in the Kodori gorge in 2006, in violation of all the agreements and of the decisions of the United Nations";

63. Whereas the Russian Federation asserted that it "had always acted in accordance with its role as a mediator in the conflicts" and "ha[d] continued to recognize the territorial integrity of Georgia, even after the holding of referendums in the two regions in which the overwhelming majority of Ossetians and Abkhazians voted for independence";

64. Whereas the Russian Federation contended that the situation in the Ossetian-Georgian conflict zone was suddenly aggravated on 1 and 2 August 2008 "when Georgian military forces bombarded residential areas of Tskhinvali, causing a number of casualties"; whereas it claimed that on the evening of 2 August and in the night of 3 August 2008, "Georgia openly manoeuvred its troops in the area of Tskhinvali, moving its forces and heavy armour towards the zone of conflict, which caused the civilian population to take flight" and that, on 7 August 2008, Georgian military units launched a massive attack on Tskhinvali, using heavy weapons in an indiscriminate way and bombarding "residential areas of Tskhinvali, the hospital, schools and children's nurseries"; whereas, according to the Russian Federation, "much of the South Ossetian capital was destroyed, and many other villages in South Ossetia virtually razed to the ground"; whereas the Russian Federation asserted that "the Georgian venture . . . has caused a real humanitarian disaster", as a result of which, in just two days, 34,000 refugees (a figure which represents half the entire Ossetian population) were forced to flee towards North Ossetia and across the Russian border;

65. Whereas the Russian Federation added that "the members of the Georgian contingent of the Collective Peacekeeping Forces deliberately opened fire on their Russian comrades in arms" and, as a result, the Russian Federation "lost 15 peacekeeping soldiers, with another 70 wounded";

66. Whereas the Russian Federation contended that "no one now disputes that the crisis in August was caused by the attack of the Georgian forces"; whereas the Russian Federation claimed that, "faced with this situation, [it] made every effort in its power to resolve the crisis by diplomatic means"; whereas the Russian Federation explained that it imme-

diately requested a meeting of the Security Council to bring the crisis to the attention of the international community but that this démarche was "to no avail"; whereas, the Russian Federation claimed that consequently, "Russia had no choice but to send reinforcements to the conflict zone in order to prevent further casualties among civilians and [Russian] peacekeeping soldiers"; whereas, the Russian Federation pointed out that in accordance with Article 51 of the United Nations Charter, it addressed a notification to this effect to the Security Council; whereas, at the same time, "Russia took urgent steps to provide humanitarian aid to the refugees and to other civilians who found themselves in danger"; and whereas the Russian Federation stressed that "this assistance was distributed without any discrimination, thus to the Georgian victims as well";

67. Whereas the Russian Federation stated that, on 12 August 2008, in Moscow, the Presidents of the Russian Federation and France adopted six principles for a political agreement "designed to bring about a permanent ceasefire in the Ossetian-Georgian zone of conflict"; whereas, according to the Russian Federation, these six "Medvedev-Sarkozy" principles "form a sound basis for restoring international peace and security in this region"; whereas the Russian Federation recalled that these six principles are as follows:

> "(1) non-use of force; (2) the absolute cessation of hostilities; (3) free access to humanitarian assistance; (4) withdrawal of the Georgian armed forces to their permanent positions; (5) withdrawal of the Russian armed forces to the line where they were stationed prior to the beginning of hostilities; pending the establishment of international mechanisms, the Russian peacekeeping forces will take additional security measures; (6) an international debate on ways to ensure security and stability in the region";

and whereas the Russian Federation stated that "the agreement protocol laying down these principles was signed in turn by the parties to the conflict, namely the leaders of South Ossetia, Abkhazia and Georgia, through the intermediary of Russia and in the presence of the OSCE and the European Union";

68. Whereas the Russian Federation claimed that it "immediately began to implement these six principles"; whereas it explained that the ceasefire was announced on 12 August 2008, and that on 16 August 2008, the Russian forces began their withdrawal which was completed around 2 September 2008; whereas, according to the Russian Federation, at the current time,

> "there is no military presence outside the security zones established in accordance with the fifth Medvedev-Sarkozy principle, all the more so because those zones coincide with the areas of responsibility of the peacekeeping forces as defined before Georgia launched its offensive";

69. Whereas, during the first round of oral argument, the Russian Federation stated that, at that time, there were 3,750 Russian peacekeeping soldiers in Abkhazia and 3,700 Russian troops in South Ossetia; whereas it pointed out that in South Ossetia 272 soldiers were stationed at observation posts along the perimeter of the security zone and, in addition, 180 soldiers were divided among ten observation posts along the border between South Ossetia and Georgia, while the remaining troops were engaged "in mine clearing, assembling and evacuating military equipment, rebuilding civilian infrastructure damaged in the hostilities . . . distributing humanitarian aid and providing medical assistance" in order "to help South Ossetia to return to normal life, including those Ossetian villages inhabited by Georgians"; whereas, the Russian Federation indicated that, in accordance with the fifth Medvedev-Sarkozy principle, "the additional security measures taken by the Russian forces will be ended when an international mechanism is put in place" and added that "Russia is involved in intensive negotiations on the creation of such a mechanism";

70. Whereas the Russian Federation contended that, until the present crisis, it merely played the role of an impartial mediator in the ethnic conflicts in the Caucasus, acting as a guarantor of peace and security in the region, and had never "practised, encouraged or supported racial discrimination in South Ossetia and Abkhazia"; and whereas it asserted that "the present dispute between Georgia and Russia has nothing to do with racial or ethnic discrimination";

71. Whereas the Russian Federation stressed that, as was apparent from the factual context of the case, the dispute brought by Georgia before the Court did not relate to racial discrimination; and whereas the Russian Federation claimed that, in the absence of a dispute between the Parties relating to the interpretation or application of CERD, the Court manifestly lacked jurisdiction to deal with the merits of the proceedings and thus the Request for the indication of provisional measures should be rejected;

72. Whereas the Russian Federation argued that Articles 2 and 5 of CERD did not apply extraterritorially and therefore the alleged acts invoked by Georgia could not be governed by the Convention; and whereas the Russian Federation asserted that in any event the preconditions for seisin of the Court laid down in Article 22 of CERD had not been satisfied;

73. Whereas the Russian Federation contended that Georgia had failed to demonstrate that the criteria for the grant of provisional measures under Article 41 of the Statute had been met, namely, "irreparable prejudice to the rights of Georgia" under CERD and urgency in the adoption of such provisional measures;

74. Whereas the Russian Federation submitted that, in any event, the requested provisional measures would not be justified since the Respondent had not in the past, "does not at present, nor will it in the future, exercise effective control over South Ossetia or Abkhazia"; whereas it

explained that the Russian Federation was not an occupying Power in South Ossetia and Abkhazia, that it had never assumed the role of the existing Abkhazian and South Ossetian authorities, "recognized as such by Georgia itself", which "have always retained their independence and continue to do so"; and whereas the Russian Federation added that "the Russian presence, apart from its participation in limited peace-keeping operations, has been restricted in time and stretches only for a few weeks";

75. Whereas the Russian Federation stated that "the conduct of South Ossetian and Abkhazian authorities is not conduct by organs of the Russian Federation" and explained that "South Ossetian or Abkhazian entities can neither be qualified as *de facto* organs of the Respondent, nor does the Respondent effectively direct and control them"; whereas it contended that, although the situation had evolved since 7 August 2008, "there [were] no indications that, as regards effective control, the relationship between the Respondent on the one hand, and South Ossetia and Abkhazia on the other, had changed in any legally relevant manner";

76. Whereas, according to the Russian Federation, the Georgian Request for the indication of provisional measures presupposes "*a priori* determinations as to the role of the Russian Federation in the recent conflict"; whereas the Russian Federation stated that the requested measures also presupposed that the Russian Federation "had been and continued to be involved in the acts enumerated in the Request"; whereas it further contended that, were the Court to adopt these measures, "it would have to share the underlying assumption" that the Russian Federation is indeed committing such acts and is legally responsible for them, "without the Court previously having had any chance to verify the underlying alleged facts in an orderly procedure and with a full evidentiary hearing"; and whereas the Russian Federation added that the requested measures, if adopted,

> "would impose upon the Respondent very ambiguous and unclear obligations, which, in any case, it [could not] comply with given that it is not . . . exercising effective control with regard to the territory in question and besides, is also legally not in a position to enforce the requested measures vis-à-vis South Ossetia respectively Abkhazia";

77. Whereas, finally, the Russian Federation argued that the provisional measures requested by Georgia "may not be indicated since they would necessarily prejudge the final outcome of the case"; whereas it asserted that, according to the Court's jurisprudence, "a major purpose of the proceedings under Article 41 is to avoid prejudging in any manner whatsoever the outcome of the claim on the merits"; and whereas the Russian Federation added that "the very purpose of Article 41 is to preserve the respective rights of both parties";

78. Whereas the Russian Federation requested the Court "to declare that it has no jurisdiction to adjudicate upon the Application of Georgia,

to reject the Request for provisional measures and to remove this case from the General List";

*

79. Whereas, in its second round of oral argument, Georgia restated its position that "Georgia's claims in its Application and the rights it asserts in both the initial and amended Requests are grounded in the 1965 Convention and in that Convention alone" and that "Georgia makes no claim here under international humanitarian law or the *jus ad bellum*"; and whereas Georgia affirmed its position that "the evidence that has been submitted is more than sufficient to establish the facts of ongoing ethnic cleansing for the purposes of a provisional measures hearing" and that "the risk of irreparable harm to the ethnic Georgians who still remain in the Akhalgori district of South Ossetia, the Gali district of Abkhazia, and the portion of the Gori district that Russian military forces still occupy as their so-called 'buffer zone'", is real and grave;

80. Whereas at the end of its second round of oral observations Georgia requested the Court

> "as a matter of urgency, to order the following provisional measures, pending its determination of this case on the merits, in order to prevent irreparable harm to the rights of ethnic Georgians under Articles 2 and 5 of the Convention on Racial Discrimination:
>
> *(a)* The Russian Federation shall take all necessary measures to ensure that no ethnic Georgians or any other persons are subject to violent or coercive acts of racial discrimination, including but not limited to the threat or infliction of death or bodily harm, hostage-taking and unlawful detention, the destruction or pillage of property, and other acts intended to expel them from their homes or villages in South Ossetia, Abkhazia and/or adjacent regions within Georgia;
>
> *(b)* The Russian Federation shall take all necessary measures to prevent groups or individuals from subjecting ethnic Georgians to coercive acts of racial discrimination, including but not limited to the threat or infliction of death or bodily harm, hostage-taking and unlawful detention, the destruction or theft of property, and other acts intended to expel them from their homes or villages in South Ossetia, Abkhazia and/or adjacent regions within Georgia;

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

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

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

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

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

and whereas Georgia also requested the Court to order that:

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

*

81. Whereas, in its second round of oral argument, the Russian Federation reiterated its position that there is no dispute between the Parties that falls within the scope of CERD;

82. Whereas it noted a number of recent developments relating to the situation in the zones of conflict; whereas, in particular, the Russian Federation mentioned an updated ceasefire plan announced on 8 September 2008 following talks between Presidents Medvedev and Sarkozy in Moscow, and quoted its highlights as contained in an Associated Press release as follows:

> "European Union Monitors: 200 European Union monitors to deploy to regions surrounding South Ossetia and Abkhazia by October 1.
>
> Russian Withdrawal: Russian peacekeeping forces to withdraw from posts outside the Black Sea port Poti and the area near the town of Senaki within seven days, on condition Georgia signs a pledge not to use force against the breakaway province of Abkhazia. Full withdrawal of Russian peacekeepers from regions surrounding South Ossetia and Abkhazia will take place within ten days of deployment of EU monitors.
>
> Georgian pullout: Georgian troops must return to their barracks by October 1.
>
> International talks: International talks to begin on October 15 in Geneva; agenda to include security and stability in South Caucasus and the question of return of refugees";

whereas the Russian Federation submitted to the Court the full text of the plan; whereas it contended that the number of Russian troops stationed at observation posts along the perimeter of the security zone had been reduced to 195 since 8 September 2008; and whereas it stated that refugees and displaced persons were returning to their places of residence;

83. Whereas at the end of its second round of oral observations the Russian Federation summarized its position as follows:

> "First: The dispute that the Applicant has tried to plead before this Court is evidently not a dispute under the 1965 Convention. If there were a dispute, it would relate to the use of force, humanitarian law, territorial integrity, but in any case not to racial discrimination.
>
> Second: Even if this dispute were under the 1965 Convention, the alleged breaches of the Convention are not capable of falling under the provisions of the said Convention, not the least because Articles 2 and 5 of the Convention are not applicable extraterritorially.
>
> Third: Even if such breaches occurred, they could not, even prima facie, be attributable to Russia that never did and does not now exercise, in the territories concerned, the extent of control required to overcome the set threshold.
>
> Fourth: Even if the 1965 Convention could be applicable, which . . . is not the case, the procedural requirements of Article 22 of the 1965 Convention have not been met. No evidence that the Applicant proposed to negotiate or employ the mechanisms of the Committee on Racial Discrimination prior to reference to this Court, has been nor could have been produced.

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

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

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

and whereas the Russian Federation requested the Court "to remove the case introduced by the Republic of Georgia on 12 September 2008 from the General List";

* * *

84. Whereas the Court, under its Statute, does not automatically have jurisdiction over legal disputes between States parties to that Statute or between other States entitled to appear before the Court; whereas the Court has repeatedly stated 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; and whereas the Court therefore has jurisdiction only between States parties to a dispute who have accepted the jurisdiction of the Court, either in general form or for the individual dispute concerned;

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

86. Whereas Georgia at the present stage of the proceedings seeks to found the jurisdiction of the Court solely on the compromissory clause contained in Article 22 of CERD; and whereas the Court must now proceed to examine whether the jurisdictional clause relied upon does furnish a basis for prima facie jurisdiction to rule on the merits such as would allow the Court, should it think that the circumstances so warrant, to indicate provisional measures;

*

87. Whereas Georgia asserts that, as regards the Court's jurisdiction *ratione personae*, both Georgia and the Russian Federation are Members of the United Nations and parties to the Statute of the Court; whereas it further states that both Georgia and the Russian Federation are parties to CERD, Georgia having deposited its instrument of accession on 2 June 1999 and the Russian Federation "by virtue of its continuation of the State personality of the USSR" which has been a party to CERD since 1969; and whereas Georgia adds that "neither party maintains any reservation to article 22 of the Convention";

88. Whereas Georgia contends that, as regards the Court's jurisdiction *ratione materiae*, the object and purpose of CERD is to eliminate racial discrimination in "all its forms and manifestations"; whereas it states that the principle of non-discrimination on racial, including ethnic, grounds is

> "concerned not merely with discrimination against individuals but with collective discrimination against communities and with fundamental issues relating to the composition of territorial communities, including the granting and withdrawal of nationality";

whereas Georgia points out that Article 22 of CERD confers upon the Court jurisdiction over "any dispute . . . with respect to the interpretation or application of this Convention"; whereas it stresses that the term "any dispute" concerns either the "interpretation or application" of the Convention; whereas it concludes that the Court has therefore "jurisdiction to pronounce on the scope of the rights and responsibilities set out in the Convention but also upon the consequences of breach of those rights and responsibilities";

89. Whereas Georgia argues that ethnic discrimination is and has been a key aspect in the conflicts in South Ossetia and Abkhazia; whereas it further argues that this case is, in particular, about the ethnic cleansing, as a form of racial discrimination, of ethnic Georgians and other minorities from regions within Georgian territory, in particular, for present purposes, the regions of Abkhazia, South Ossetia and the adjacent Gori district; whereas it alleges that ethnic Georgians have been "targeted, and forcibly expelled from these regions in great numbers and denied the

right to return over the course of more than a decade"; whereas it claims that the discrimination against the ethnic Georgians communities in the said regions has escalated following 8 August 2008;

90. Whereas Georgia contends in particular that, as a result of the Russian Federation's direct involvement in these ethnic conflicts and its essential support for the separatist *de facto* authorities and militias in South Ossetia and Abkhazia, "ethnic Georgians have been denied their fundamental rights under Article 5 of the Convention" (see paragraph 107 below); whereas, according to Georgia, the ethnic conflicts have escalated since August 2008 and the situation concerning internally displaced persons in the affected regions has significantly deteriorated; whereas Georgia contends that it "advances claims against Russia based upon obligations contained in the Convention on Racial Discrimination" and in this context "the means by which Russia has apparently breached its obligations under the Convention are irrelevant to the Court's jurisdiction"; whereas Georgia states that during the "Third Phase" of Russia's intervention, that allegedly commenced on 8 August 2008, "the means by which Russia has apparently acted in violation of its obligations under the Convention" have included, *inter alia*, the use of military force; and whereas Georgia concludes that, in its Application, it "does not invoke as a cause of action any claim that that force is unlawful under other instruments; it is pursuing remedies based on claims arising in relation to Russia's apparent breaches of this Convention";

91. Whereas Georgia asserts that, as regards the Court's jurisdiction *ratione loci* under Article 22 of CERD, it is necessary to distinguish between two categories of claims advanced by Georgia in its Application: first, "claims founded upon the acts or omissions of Russia's State organs within Russia itself", and second,

> "claims founded upon the acts or omissions of persons exercising Russia's governmental authority or other persons acting on the instructions or under the control of Russia within Georgian territory, particularly in Abkhazia and South Ossetia, as well as other areas of Georgia under *de facto* occupation by Russian military forces";

whereas, according to Georgia, no question concerning the spatial scope of the obligations under the Convention arises in respect of the first category of claims; and whereas Georgia contends that, in relation to the second category of claims,

> "the Court needs to be satisfied on a prima facie basis that Russia's obligations under the Convention extend to acts and omissions

attributable to Russia which have their locus within Georgia's territory and in particular in Abkhazia and South Ossetia";

92. Whereas Georgia argues that CERD "does not contain a general provision imposing a spatial limitation on the obligations it creates"; whereas Georgia notes, in particular, that no spatial limitation is included in Articles 2 and 5 which stipulate the "obligations of Russia and the corresponding rights of Georgia" that are in issue before the Court for the purposes of the Request for the indication of provisional measures; whereas Georgia observes that even if the Convention were to be construed as containing a general limitation limiting the spatial scope of its obligations, "this would not preclude the claims asserted by Georgia in this Application and in this Request" because "Abkhazia and South Ossetia have been within the power or effective control of Russia since Georgia lost control over those regions following the hostilities"; and whereas Georgia adds that the Russian invasion and deployment of additional military forces within Abkhazia and South Ossetia in August 2008 "has only served to consolidate further its effective control over those regions";

93. Whereas Georgia claims that, although certain aspects of the present dispute, as indicated in the Application, predate Georgia's accession to CERD, there is no difficulty in establishing "*ratione temporis* jurisdiction" in relation to what Georgia has described as the "Third Phase of Russia's Intervention in South Ossetia and Abkhazia", which allegedly commenced in August 2008; whereas Georgia stresses that

> "the rights in issue which form the basis for the present Request for provisional measures are rights under the Convention that Georgia submits have been, and continue to be, violated by Russia during this third temporal phase of the dispute";

94. Whereas, turning to the question of negotiations or recourse to the procedures provided for in CERD and referred to in Article 22, Georgia affirms that the present dispute between the Parties has not been settled by negotiation and that the procedures provided for in CERD "are not designed to be exclusive or compulsory in respect of disputes concerning the subject-matter of the Convention"; whereas, according to Georgia, "there is no indication in the Convention that all the procedures in Part II are to be exhausted before recourse is made to this Court" and therefore "it is not a condition precedent for the Court's jurisdiction"; and whereas Georgia adds that, in any event, there have been extensive bilateral contacts between the Parties and thus that, even if Article 22 of CERD were considered to lay down a condition precedent for the seisin of the Court, that condition has been satisfied;

*

95. Whereas the Russian Federation, referring to the basis of jurisdiction invoked by Georgia, namely Article 22 of CERD, states that the dispute which Georgia has brought before this Court is not a dispute on racial discrimination under the said Convention, but rather a dispute relating to the use of force, the principles of territorial integrity and self-determination, non-interference in the internal affairs of States, armed activities and international humanitarian law; and whereas, accordingly, the Russian Federation is of the view that "the Court manifestly lacks jurisdiction in the present case";

96. Whereas the Russian Federation asserts that the object of the dispute which Georgia seeks to have adjudicated by the Court "is not at all alleged violations by Russia of its obligations under the 1965 Convention", but rather solely "allegations of unlawful actions in violation of international humanitarian law in South Ossetia and Abkhazia";

97. Whereas the Russian Federation stresses that, in the Applicant's presentation of the supposedly relevant facts, the latter deals only with the various phases "of Russia's intervention" in South Ossetia and Abkhazia and that "it is indeed this 'intervention' which Georgia seeks to have condemned by the Court"; and whereas the Russian Federation adds that Georgia's "Observations" concern only armed attacks, indiscriminate attacks on civilians, the use of cluster bombs, declarations and recognition of independence and the plight of refugees and displaced persons, but not issues of racial discrimination; and whereas, according to Russia, the dispute between the Parties relates to "the intervention that Georgia blames the Russian Federation for undertaking in response to its own action with respect to Abkhazia and South Ossetia and the alleged violations of the rules of humanitarian law on that occasion";

98. Whereas the Russian Federation asserts that, while "there is unquestionably a dispute (or more than one dispute) between the Parties", this dispute does not concern the interpretation or application of CERD; whereas, according to the Russian Federation, this follows from "the pleadings submitted by Georgia and the file it has produced" as well as from "the attitude taken by the Respondent since the very early 1990s"; whereas the Russian Federation claims that, despite Georgia's contention that a dispute relating to CERD has existed between Georgia and the Russian Federation since 1991, the Georgian Government has failed to mention this dispute for 18 years in its relations with Russia, in the Security Council or the OSCE, in the organ established under the Convention to deal with it (the Committee on the Elimination of Racial Discrimination) as well as in its recent request for interim measures, of 11 and 12 August 2008, to the European Court of Human Rights, "which does not refer to Article 14 of the Convention"; whereas the Russian Federation claims that "this failure to act, this silence consistently maintained over so many years, indisputably attests to the absence in the view of

Georgia's leaders . . . of any dispute relating to the interpretation and application of the Convention";

99. Whereas the Russian Federation notes that, since Georgia ratified CERD in 1999 it has submitted three periodic reports to the Committee but that, in none of these, did Georgia invoke any breaches by the Russian Federation of its obligations under CERD, nor did it refer to any dispute with the Russian Federation — "no such dispute being mentioned either in the periodic reports or during examination of them in the discussions between Committee members and Georgia's representatives"; whereas the Russian Federation stresses that

> "it is particularly telling that no mention whatsoever was made of any dispute between Georgia and Russia over the application of the Convention during the CERD's most recent session, which concluded in Geneva on 15 August 2008, one week after the armed conflict broke out — . . . at the very time the Committee was formulating its concluding observations on the Russian Federation's eighteenth and nineteenth periodic reports";

and whereas the Russian Federation observes that Georgia could have seised the Committee pursuant to Article 11 while it was in session and could have brought "its grievances to the Committee's attention" in order to make use of the

> "early warning procedure in place in the CERD since 1993, enabling the Committee to react in urgent situations by seeking explanations from the State party concerned or by requesting intervention by other United Nations organs, including the Security Council or Secretary-General";

100. Whereas the Russian Federation contends that the wording of Articles 2 and 5 of CERD demonstrates that the different obligations listed therein "are clearly phrased as obligations to be implemented within each member State" and that therefore these provisions "do not apply extraterritorially"; whereas it states that "Articles 2 and 5 of CERD — upon which Georgia relies — do not bind the Respondent outside its own territory"; whereas, the Russian Federation maintains that, accordingly, "Russia's extraterritorial conduct is not governed by Articles 2 and 5 of CERD, hence those provisions cannot form the basis for the requested interim order either";

101. Whereas the Russian Federation argues that Article 22 of CERD lays down procedural preconditions for the seisin of the Court, namely that only if the dispute in question "is not settled by negotiation or by the procedures expressly provided for in this Convention" can it be referred to the Court; whereas the Russian Federation claims that "failing negotiation and/or recourse to the procedures laid down by the Convention"

the Court cannot be seised of a dispute; and whereas, according to the Russian Federation, this interpretation is endorsed by the *travaux préparatoires*, which show that "referral to the Court was seen by those who drafted the Convention . . . as a last resort when all other possibilities have proved ineffective";

102. Whereas the Russian Federation claims that, in the present case, "there has never been the slightest negotiation between the Parties on the interpretation or application of the Convention on the elimination of racial discrimination", that the procedures laid down by CERD have not been initiated either by the Russian Federation or by Georgia and that "even after the start of hostilities, Georgia did not refer the matter to the [Committee on the Elimination of Racial Discrimination] under Article 11 of the Convention"; whereas, according to the Russian Federation, the question of whether the negotiations and recourse to the Committee are cumulative or alternative preconditions is irrelevant because "there has been neither negotiation nor recourse to the procedure in Article 11 (or Article 14)" of CERD; and whereas the Russian Federation asserts consequently that, as the preconditions in Article 22 have not been met, Georgia has "no possibility of unilaterally seising the Court" and that the Court thus has no jurisdiction;

103. Whereas the Russian Federation concludes that, in the absence of a dispute relating to CERD, the Court manifestly lacks jurisdiction and that, even if such a dispute existed, in view of the fact that "it has in any case never given rise to the slightest attempt to reach a settlement between the Parties" and that "before Georgia filed its Application with the Court, on 12 August last, the Russian Federation never even suspected its existence", the lack of jurisdiction would also be manifest since the preconditions for the seisin of the Court laid down in Article 22 have not been met;

*

104. Whereas Article 22 of CERD, which Georgia invokes as the basis of jurisdiction of the Court in the present case, reads as follows:

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

105. Whereas, according to the information available from the Secretary-General of the United Nations as depositary, Georgia and the Russian Federation are parties to CERD; whereas Georgia deposited its instrument of accession on 2 June 1999 without reservation; whereas the

Union of Soviet Socialist Republics deposited its instrument of ratification on 4 February 1969 with a reservation to Article 22 of the Convention; whereas, by a communication received by the depositary on 8 March 1989, the Government of the Union of Soviet Socialist Republics notified the Secretary-General that it had decided to withdraw the reservation relating to Article 22; and whereas the Russian Federation, as the State continuing the legal personality of the Union of Soviet Socialist Republics, is a party to CERD without reservation;

106. Whereas the definition of racial discrimination in Article 1, paragraph 1, of CERD is as follows:

> "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which 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";

107. Whereas Articles 2 and 5 of CERD, violations of which are invoked by Georgia in the current proceedings, are couched in the following terms:

> "Article 2
>
> 1. States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end:
>
> *(a)* Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation;
>
> *(b)* Each State Party undertakes not to sponsor, defend or support racial discrimination by any persons or organizations;
>
> *(c)* Each State Party shall 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;
>
> *(d)* Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization;
>
> *(e)* Each State Party undertakes to encourage, where appropriate, integrationist multiracial organizations and movements and

other means of eliminating barriers between races, and to discourage anything which tends to strengthen racial division.

2. States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved";

"Article 5

In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake 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 following rights:

(a) The right to equal treatment before the tribunals and all other organs administering justice;

(b) The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution;

(c) Political rights, in particular the right to participate in elections — to vote and to stand for election — on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service;

(d) Other civil rights, in particular:

(i) The right to freedom of movement and residence within the border of the State;

(ii) The right to leave any country, including one's own, and to return to one's country;

(iii) The right to nationality;

(iv) The right to marriage and choice of spouse;

(v) The right to own property alone as well as in association with others;

(vi) The right to inherit;

(vii) The right to freedom of thought, conscience and religion;

(viii) The right to freedom of opinion and expression;

(ix) The right to freedom of peaceful assembly and association;

(e) Economic, social and cultural rights, in particular:

(i) The rights to work, to free choice of employment, to just

and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration;

(ii) The right to form and join trade unions;

(iii) The right to housing;

(iv) The right to public health, medical care, social security and social services;

(v) The right to education and training;

(vi) The right to equal participation in cultural activities;

(f) The right of access to any place or service intended for use by the general public, such as transport hotels, restaurants, cafes, theatres and parks";

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

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

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

111. Whereas the Parties differ on the question of whether the events which occurred in South Ossetia and Abkhazia, in particular following 8 August 2008, have given rise to issues relating to legal rights and obligations under CERD; whereas Georgia contends that the evidence it has submitted to the Court demonstrates that events in South Ossetia and in Abkhazia have involved racial discrimination of ethnic Georgians living in these regions and therefore fall under the provisions of Articles 2 and

5 of CERD; whereas it alleges that displaced ethnic Georgians, who have been expelled from South Ossetia and Abkhazia, have not been permitted to return to their place of residence even though the right of return is expressly guaranteed by Article 5 of CERD; whereas Georgia claims in addition that ethnic Georgians have been subject to violent attacks in South Ossetia since the 10 August 2008 ceasefire even though the right of security and protection against violence or bodily harm is also guaranteed by Article 5 of CERD; whereas the Russian Federation claims that the facts in issue relate exclusively to the use of force, humanitarian law and territorial integrity and therefore do not fall within the scope of CERD;

112. Whereas, in the view of the Court, the Parties disagree with regard to the applicability of Articles 2 and 5 of CERD in the context of the events in South Ossetia and Abkhazia; whereas, consequently, there appears to exist a dispute between the Parties as to the interpretation and application of CERD; whereas, moreover, the acts alleged by Georgia appear to be capable of contravening rights provided for by CERD, even if certain of these alleged acts might also be covered by other rules of international law, including humanitarian law; whereas this is sufficient at this stage to establish the existence of a dispute between the Parties capable of falling within the provisions of CERD, which is a necessary condition for the Court to have prima facie jurisdiction under Article 22 of CERD;

113. Whereas the Court, having established that such a dispute between the Parties exists, still needs to ascertain whether the procedural conditions set out in Article 22 of the Convention have been met, before deciding whether or not it has prima facie jurisdiction to deal with the case and accordingly has also the power to indicate provisional measures if the circumstances are found so to require; whereas it is recalled that Article 22 provides that a dispute relating to the interpretation or application of CERD may be referred to the Court if it "is not settled by negotiation or by the procedure expressly provided for in this Convention"; whereas Georgia claims that this phrase is descriptive of the fact that a dispute has not so been settled and does not represent conditions to be exhausted before the Court can be seized of the dispute; and whereas, according to Georgia, bilateral discussions and negotiations relating to the issues which form the subject-matter of the Convention have been held between the Parties; whereas, for its part, the Russian Federation argues that pursuant to Article 22 of CERD, prior negotiations or recourse to the procedures under CERD constitute an indispensable precondition for the seisin of the Court; and whereas it stresses that no negotiations have been held between the Parties on issues relating to CERD nor has Georgia, in accordance with the procedures envisaged in the Convention, brought any such issues to the attention of the Committee on the Elimination of Racial Discrimination;

114. Whereas the structure of Article 22 of CERD is not identical to that in certain other instruments which require that a period of time should have elapsed or that arbitration should have been attempted before initiation of any proceedings before the Court; whereas the phrase "any dispute . . . which is not settled by negotiation or by the procedure expressly provided for in this Convention" does not, in its plain meaning, suggest that formal negotiations in the framework of the Convention or recourse to the procedure referred to in Article 22 thereof constitute preconditions to be fulfilled before the seisin of the Court; whereas however Article 22 does suggest that some attempt should have been made by the claimant party to initiate, with the Respondent Party, discussions on issues that would fall under CERD;

115. Whereas it is apparent from the case file that such issues have been raised in bilateral contacts between the Parties, and, that these issues have manifestly not been resolved by negotiation prior to the filing of the Application; whereas, in several representations to the United Nations Security Council in the days before the filing of the Application, those same issues were raised by Georgia and commented upon by the Russian Federation; whereas therefore the Russian Federation was made aware of Georgia's position in that regard; and whereas the fact that CERD has not been specifically mentioned in a bilateral or multilateral context is not an obstacle to the seisin of the Court on the basis of Article 22 of the Convention;

116. Whereas Article 22 of CERD refers also to "the procedures expressly provided for" in the Convention; whereas, according to these procedures, "if a State Party considers that another State Party is not giving effect to the provisions of this Convention" the matter may properly be brought to the attention of the Committee on the Elimination of Racial Discrimination; whereas the Court notes that neither Party claims that the issues in dispute have been brought to the attention of the Committee;

117. Whereas the Court, in view of all the foregoing, considers that, prima facie, it has jurisdiction under Article 22 of CERD to deal with the case to the extent that the subject-matter of the dispute relates to the "interpretation or application" of the Convention; and whereas the Court may accordingly address the present Request for the indication of provisional measures;

* *

118. Whereas the power of the Court to indicate provisional measures under Article 41 of the Statute of the Court has as its object the preservation of the respective rights of the parties pending the decision of the Court, in order to ensure that irreparable prejudice shall not be caused to rights which are the subject of dispute in judicial proceedings; and whereas it follows that the Court must be concerned to preserve by such

measures the rights which may subsequently be adjudged by the Court to belong either to the Applicant or to the Respondent (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia (Serbia and Montenegro)), Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993*, p. 19, para. 34; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Provisional Measures, Order of 15 March 1996, I.C.J. Reports 1996 (I)*, p. 22, para. 35); whereas a link must therefore be established between the alleged rights, the protection of which is the subject of the provisional measures being sought, and the subject of the proceedings before the Court on the merits of the case;

119. Whereas, according to Georgia's Application, the rights that Georgia and its nationals may have on the basis of Articles 2, 3, 4, 5 and 6 of CERD constitute the subject of the proceedings pending before the Court on the merits of the case;

120. Whereas the legal rights which Georgia seeks to have protected by the indication of provisional measures are enumerated in the Request of Georgia for the indication of such measures filed on 14 August 2008 as follows:

"*(a)* the right to ensure that the Russian Federation and separatist authorities under its direction and control refrain from any further act or practice of ethnic discrimination against Georgian citizens and that civilians are fully protected against such acts in territories under the occupation or effective control of Russian forces, pursuant to Article 2 (1);

(b) the right to ensure that the Russian Federation and separatist authorities under its direction and control refrain from any further acts resulting in the recognition of or rendering permanent the ethnic segregation of Georgian citizens through forced displacement or denial of the right of IDPs to return to their homes in South Ossetia, Abkhazia, and adjacent territories under the occupation or effective control of Russian forces, pursuant to Article 3;

(c) the right to ensure that the Russian Federation and separatist authorities under its direction and control refrain from any further acts violating the enjoyment by Georgian citizens of fundamental human rights including in particular the right to security of the person and protection against violence or bodily harm, the right to freedom of movement and residence within the borders of Georgia, the right of IDPs to return to their homes under conditions of safety, and the right to protection of homes and property against pillage and destruction, pursuant to Article 5; and

(d) the right to ensure that the Russian Federation and separatist authorities under its direction and control refrain from any acts denying to Georgian citizens under their jurisdiction effective protection and remedies against ethnic discrimination and violations of human rights pursuant to Article 6";

121. Whereas in its Amended Request (see paragraph 41 above), Georgia, referring to Articles 2 and 5 of CERD, states that it seeks to protect "the right to security of person and protection against violence or bodily harm" and "the right of return" provided for in the above-mentioned Articles of the Convention;

122. Whereas, in its Amended Request, Georgia argues with regard to these rights, in particular, as follows:

> "By its Application filed on 12 August 2008, Georgia is seeking, *inter alia*, the Court's order directing the Russian Federation to take all necessary measures to ensure that the remaining ethnic Georgian populations of South Ossetia and Abkhazia are not subject to discriminatory treatment contrary to Articles 2 and 5 of CERD. Pending the Court's consideration of the merits of Georgia's claims and its request for relief, Georgia respectfully requests the Court to indicate provisional measures to prevent irreparable prejudice to the right of ethnic Georgians to be free from discriminatory treatment, in particular violent or otherwise coercive acts, including but not limited to the threat or infliction of death or bodily harm, hostage-taking and detention based on ethnicity, the destruction and pillage of property, and other acts intended to expel them from their homes in South Ossetia, Abkhazia, and adjacent regions located within Georgian territory.
>
> . . . .
>
> In its Application, Georgia seeks, *inter alia*, the Court's order to direct the Russian Federation to take all necessary measures to permit and facilitate the return of displaced ethnic Georgians to South Ossetia and Abkhazia in conditions of safety and security in recognition of the right of return guaranteed under Article 5 of CERD. Pending the Court's consideration of the merits of Georgia's claims under CERD and its request for relief, Georgia respectfully requests the Court to indicate provisional measures to prevent irreparable prejudice to the right of return of ethnic Georgians to South Ossetia and Abkhazia";

123. Whereas at the hearings Georgia reiterated that the rights for which it "seeks protection both in its Amended Request for provisional

measures and in its Application are the specific rights guaranteed by Articles 2 and 5 of the Convention"; and whereas it referred to these rights as follows:

> "Under Article 2, paragraph 1 *(a)* and *(b)*, Georgia has a right to have Russia, as a State party to the Convention, 'engage in no act or practice of racial discrimination against persons, groups of persons or institutions' and to undertake 'not to sponsor, defend or support racial discrimination by any persons or organizations'. Under paragraph 1 *(d)* of Article 2, Georgia also has the right to have Russia 'prohibit and bring to an end, by all appropriate means . . . racial discrimination by any persons, group or organization'. The specific rights protected by Article 5 are: first, the right under Article 5 *(b)* 'to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual, group or institution'; second, the right under Article 5 *(d)* (i) 'to freedom of movement and residence within the border of the State'; third, the right under Article 5 *(d)* (ii) 'to return'; fourth, the right under Article 5 *(d)* (iii) 'to nationality'; and fifth, the right under Article 5 *(d)* (v) 'to own property'";

124. Whereas the Russian Federation contends that the required connection between the rights which Georgia seeks to protect by its Request for the indication of provisional measures and the subject of the proceedings on the merits is lacking;

125. Whereas, in particular, it explains that "the measures listed in subparagraphs *(a)* and *(b)* of the Request, if ever adopted, would require Russia to take active steps to ensure or to prevent certain results from happening in the areas concerned" thereby presupposing that Articles 2 and 5 of CERD contain an obligation to prevent racial discrimination; whereas the Russian Federation argues that, as is apparent from the wording of Articles 2 and 5 of CERD, nowhere in these provisions "do States undertake to prevent breaches of the Convention" and that thus there is "no duty to prevent racial discrimination by other actors"; whereas, according to the Russian Federation, owing to this fact, a duty to prevent racial discrimination — or specific, positive measures said to flow from such duty — cannot form the subject of the proceedings on the merits; and whereas, therefore, any related right cannot be protected by the indication of provisional measures;

126. Whereas the Court notes that Articles 2 and 5 of CERD are intended to protect individuals from racial discrimination by obliging

States parties to undertake certain measures specified therein; whereas the Court considers that it is not appropriate, in the present phase, for it to pronounce on the issue of whether Articles 2 and 5 of CERD imply a duty to prevent racial discrimination by other actors; whereas States parties to CERD have the right to demand compliance by a State party with specific obligations incumbent upon it under Articles 2 and 5 of the Convention; whereas there is a correlation between respect for individual rights, the obligations of States parties under CERD and the right of States parties to seek compliance therewith; whereas in the view of the Court the rights which Georgia invokes in, and seeks to protect by, its Request for the indication of provisional measures have a sufficient connection with the merits of the case it brings for the purposes of the current proceedings; and whereas it is upon the rights thus claimed that the Court must focus its attention in its consideration of Georgia's Request for the indication of provisional measures;

127. Whereas the Court, having established the existence of a basis on which its jurisdiction might be founded, ought not to indicate measures for the protection of any disputed rights other than those which might ultimately form the basis of a judgment in the exercise of that jurisdiction; whereas accordingly the Court will confine its examination of the measures requested by Georgia, and of the grounds asserted for the request for such measures, to those which appear to fall within the scope of CERD (cf. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia (Serbia and Montenegro)), Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993*, p. 19);

* *

128. Whereas the power of the Court to indicate provisional measures under Article 41 of its Statute "presupposes that irreparable prejudice shall not be caused to rights which are the subject of a dispute in judicial proceedings" (*LaGrand (Germany* v. *United States of America), Provisional Measures, Order of 3 March 1999, I.C.J. Reports 1999 (I)*, pp. 14-15, para. 22);

129. Whereas the power of the Court to indicate provisional measures will be exercised only if there is urgency in the sense that there is a real risk that action prejudicial to the rights of either party might be taken before the Court has given its final decision (see, for example, *Passage through the Great Belt (Finland* v. *Denmark), Provisional Measures, Order of 29 July 1991, I.C.J. Reports 1991*, p. 17, para. 23; *Certain Criminal Proceedings in France (Republic of the Congo* v. *France), Provisional Measure, Order of 17 June 2003, I.C.J. Reports 2003*, p. 107, para. 22; *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Provisional Measures*, *Order of 23 January 2007, I.C.J. Reports 2007 (I)*,

p. 11, para. 32); and whereas the Court thus has to consider whether in the current proceedings such urgency exists;

*

130. Whereas Georgia argues that, in view of the conduct of the Russian Federation in South Ossetia, Abkhazia, and adjacent regions, provisional measures are urgently needed because the ethnic Georgians in these areas "are at imminent risk of violent expulsion, death or personal injury, hostage-taking and unlawful detention, and damage to or loss of their homes and other property" and "in addition, the prospects for the return of those ethnic Georgians who have already been forced to flee are rapidly deteriorating";

131. Whereas Georgia contends that reports of international and non-governmental organizations and witness statements, which are consistent with and corroborate these reports, provide evidence of "the ongoing, widespread and systematic abuses of rights of ethnic Georgians under the Convention" in South Ossetia, Abkhazia and other parts of Georgia "presently occupied by Russian forces" and allegedly show that ethnic Georgians who remain in these areas "are at imminent risk of violent attack and forced expulsion"; whereas, according to Georgia, there is evidence of a "real risk of continued ethnic cleansing by Russian military forces and separatist militias operating behind Russian lines, especially in those areas that still have significant Georgian populations"; and whereas Georgia asserts that this evidence also "shows a present failure, and a risk of continuing failure, on the part of the Russian authorities to ensure that rights for ethnic Georgians under the Convention are respected", particularly the rights of Georgians who still live in South Ossetia, Abkhazia and other regions of Georgia "presently occupied by Russian forces", and the rights of Georgians who wish to return to their homes in those regions;

132. Whereas Georgia claims that "the rights in dispute are threatened with harm that by its very nature is irreparable" because "no satisfaction, no award of reparations, could ever compensate for the extreme forms of prejudice" to those rights in the current proceedings; whereas it states that the risk of irreparable prejudice "is not necessarily removed by a suspension or cessation of the military hostilities that initially provided the context in which the risk was generated"; and whereas Georgia contends that "the widespread violations of the rights of ethnic Georgians under the Convention grew even worse after military engagements ceased, that they have continued unabated since then, and that they are continuing still";

133. Whereas Georgia claims that "the risk of irreparable prejudice to the rights at issue in this case is not only imminent, [but] is already happening", which is evidenced by the fact that "the ethnic cleansing and other forms of prohibited discrimination carried out against Georgians in Abkhazia, South Ossetia and other regions occupied by Russian forces are still occurring, and that they are likely to continue to occur and to recur";

134. Whereas, for its part, the Russian Federation states that "the criteria of Article 41 are not met in this case"; whereas it submits that "Georgia has not established that any rights opposable to Russia under Articles 2 and 5 of CERD — however broadly drawn — are exposed to 'serious risk' of irreparable damage";

135. Whereas, with reference to the period characterized by Georgia as "the first and second phases of Russia's intervention in South Ossetia and Abkhazia", the Russian Federation draws attention to the documents in the case file, in particular "statements of Georgian Ministers, decisions and international agreements to which Georgia is a party, in which Russia's role and the role of the peacekeeping forces are consented to and recognized as wholly beneficial";

136. Whereas, with reference to the events of August 2008, the Russian Federation argues that "the facts that can be relied on with reasonable certitude" go against the existence of a serious risk to the rights Georgia now claims, for the reasons that, first, armed actions have led to "deaths of the armed forces of all parties concerned, deaths of civilians of all ethnicities, and a mass displacement of persons of all ethnicities", and, second, that "the armed actions have now ceased, and civilians of all ethnicities are returning to some, although not yet all, of the former conflict zones"; and whereas, so far as concerns the principle of return, the Russian Federation refers to the fact that "on 15 August, in discussions with the United Nations High Commissioner for Refugees, the Russian Foreign Minister stated his agreement on the principle of the non-discriminatory nature of the right of return for all civilians forced to flee";

137. Whereas the Russian Federation asserts that "the case on urgency can only be built on the events subsequent to 7 August 2008" in light of the fact that before this date there was "evidently no urgency of the requisite degree — as Georgia had never even raised complaints of violations of the CERD with Russia"; whereas it further argues that any urgency to be found in the events occurring after 7 August 2008 relates to "the armed actions and their repercussions since that date"; whereas the Russian Federation explains that "major developments within the course of that period . . . tell against the case for urgency"; whereas it refers to the

ceasefire announced by the Russian Federation on 12 August 2008 and to the six principles for the peaceful settlement of the conflict adopted by the Presidents of the Russian Federation and France on the same day and subsequently signed on 13-16 August 2008 by the President of Georgia and leaders of South Ossetia and Abkhazia, "through the intermediary of Russia and in the presence of the OSCE and the European Union"; and whereas the Russian Federation claims that since then "the armed actions are at an end and large numbers of IDPs have in fact already returned to Gori and villages nearby";

138. Whereas the Russian Federation contends that Georgia's assertions that the Russian Federation is continuing to discriminate against ethnic Georgians in Abkhazia, South Ossetia and neighbouring areas by threatening the rights of ethnic Georgians to security and the right of return, and that Russia is actively supporting groups or individuals that continue to perpetrate acts of violence against ethnic Georgians, are not supported by the documents submitted by Georgia itself;

139. Whereas the Russian Federation argues that "the case on urgency in relation to Abkhazia is built almost exclusively on inference, and that [this] is not a sound basis for a provisional measures award";

140. Whereas the Russian Federation claims that its "positive démarches before the OSCE . . . with the European Union and President Sarkozy, are addressing precisely the problem that is being put before [the Court] as the basis for urgent provisional measures"; whereas the Russian Federation notes that, in accordance with the further principles announced on 8 September 2008, 200 European Union monitors will be deployed "into the South Ossetian and Abkhaz buffer zones, and Russian peacekeeping troops [will] make a full withdrawal ten days later"; whereas the Russian Federation asserts that "the plan provides that the United Nations and OSCE observers will also continue to carry out their mandates"; whereas the Russian Federation states that further security and stability issues and the question of the return of refugees are to be addressed in international talks, "which are imminent and are obviously to be at a very high level"; whereas the Russian Federation contends that the facts "contradict Georgia's assertion of an ongoing worsening crisis"; and whereas it points out that, while "there has been a humanitarian crisis to be sure . . . it is part of the recent armed conflict and is being addressed in that context at the highest levels";

*

141. Whereas the Court is not called upon, for the purpose of its decision on the Request for the indication of provisional measures, to establish the existence of breaches of CERD, but to determine whether the

circumstances require the indication of provisional measures for the protection of rights under CERD; whereas it cannot at this stage make definitive findings of fact, nor finding of attribution; and whereas the right of each Party to submit arguments in respect of the merits remains unaffected by the Court's decision on the Request for the indication of provisional measures;

142. Whereas, nevertheless, the rights in question in these proceedings, in particular those stipulated in Article 5, paragraphs *(b)* and *(d)* (i) of CERD, are of such a nature that prejudice to them could be irreparable; whereas the Court considers that violations of the right to security of persons and of the right to protection by the State against violence or bodily harm (Article 5, paragraph *(b)*) could involve potential loss of life or bodily injury and could therefore cause irreparable prejudice; whereas the Court further considers that violations of the right to freedom of movement and residence within a State's borders (*ibid.*, paragraph *(d)* (i)) could also cause irreparable prejudice in situations where the persons concerned are exposed to privation, hardship, anguish and even danger to life and health; and whereas the Court finds that individuals forced to leave their own place of residence and deprived of their right of return could, depending on the circumstances, be subject to a serious risk of irreparable prejudice;

143. Whereas the Court is aware of the exceptional and complex situation on the ground in South Ossetia, Abkhazia and adjacent areas and takes note of the continuing uncertainties as to where lines of authority lie; whereas, based on the information before it in the case file, the Court is of the opinion that the ethnic Georgian population in the areas affected by the recent conflict remains vulnerable;

Whereas the situation in South Ossetia, Abkhazia and adjacent areas in Georgia is unstable and could rapidly change; whereas, given the ongoing tension and the absence of an overall settlement to the conflict in this region, the Court considers that the ethnic Ossetian and Abkhazian populations also remain vulnerable;

Whereas, while the problems of refugees and internally displaced persons in this region are currently being addressed, they have not yet been resolved in their entirety;

Whereas, in light of the foregoing, with regard to these above-mentioned ethnic groups of the population, there exists an imminent risk that the rights at issue in this case mentioned in the previous paragraph may suffer irreparable prejudice;

144. Whereas States parties to CERD "condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms"; whereas in the view of the Court, in the circumstances brought to its attention in which there is a serious risk of acts of racial discrimination being committed, Georgia and the Russian Federation, whether or not any such

acts in the past may be legally attributable to them, are under a clear obligation to do all in their power to ensure that any such acts are not committed in the future;

145. Whereas the Court is satisfied that the indication of measures is required for the protection of rights under CERD which form the subject-matter of the dispute; and whereas the Court has the power, under its Statute, when a request for provisional measures has been made, to indicate measures that are in whole or in part other than those requested, or measures that are addressed to the party which has itself made the request; whereas Article 75, paragraph 2, of the Rules of Court specifically refers to this power of the Court; and whereas the Court has already exercised this power on several occasions in the past (*Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Provisional Measures, Order of 1 July 2000, I.C.J. Reports 2000*, p. 128, para. 43; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Provisional Measures, Order of 15 March 1996, I.C.J. Reports 1996 (I)*, p. 24, para. 48; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia (Serbia and Montenegro)), Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993*, p. 22, para. 46);

146. Whereas the Court, having found that the indication of provisional measures is required in the current proceedings, has considered the terms of the provisional measures requested by Georgia; whereas the Court does not find that, in the circumstances of the case, the measures to be indicated are to be identical to those requested by Georgia; whereas the Court, having considered the material before it, considers it appropriate to indicate measures addressed to both Parties;

*

147. Whereas the Court's "orders on provisional measures under Article 41 [of the Statute] have binding effect" (*LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001*, p. 506, para. 109) and thus create international legal obligations which both Parties are required to comply with (*Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, p. 258, para. 263);

* *

148. Whereas the decision given in the present proceedings in no way prejudges the question of the jurisdiction of the Court to deal with the merits of the case or any questions relating to the admissibility of the Application, or relating to the merits themselves; and whereas it leaves

unaffected the right of the Governments of Georgia and the Russian Federation to submit arguments in respect of those questions;

* * *

149. For these reasons,

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

Indicates the following provisional measures:

A. By eight votes to seven,

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

(1) refrain from any act of racial discrimination against persons, groups of persons or institutions;
(2) abstain from sponsoring, defending or supporting racial discrimination by any persons or organizations;

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

  (i) security of persons;
  (ii) the right of persons to freedom of movement and residence within the border of the State;
  (iii) the protection of the property of displaced persons and of refugees;

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

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

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

B. By eight votes to seven,

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

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

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

C. By eight votes to seven,

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

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

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

D. By eight votes to seven,

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

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

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

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this fifteenth day of October, two thousand and eight, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of Georgia and the Government of the Russian Federation, respectively.

(Signed) Rosalyn HIGGINS,
President.

(Signed) Philippe COUVREUR,
Registrar.

Vice-President AL-KHASAWNEH and Judges RANJEVA, SHI, KOROMA, TOMKA, BENNOUNA and SKOTNIKOV append a joint dissenting opinion to the Order of the Court; Judge *ad hoc* GAJA appends a declaration to the Order of the Court.

(Initialled) R.H.
(Initialled) Ph.C.

Annex 81

University of Minnesota
Human Rights Library

Delia Saldias de Lopez v. Uruguay, Communication No. 52/1979, U.N. Doc. CCPR/C/OP/1 at 88 (1984).

Submitted by: Delia Saldias de Lopez on 6 June 1979
Alleged victim: Sergio Ruben Lopez Burgos (author's husband)
State party: Uruguay
Date of adoption of views: 29 July 1981 (thirteenth session)

Arrest and abduction from another State--Jurisdiction of State party--UNHCR refugee status--Arbitrary arrest--Detention--Health of victim--Access to counsel-- Torture--Confession under duress-Procedural delays-- Trade union activities-Freedom of expression--Derogation from Covenant

Articles of Covenant: 2 (1), 4, 5 (1), 7, 9 (1) and (3), 12 (3), 14 (3), 19 and 22

Article of Optional Protocol: I

Views under article 5 (4) of the Optional Protocol'

1. The author of the communication is Delia Said/as de Lopez, a political refugee of Uruguayan nationality residing in Austria. She submits the communication on behalf of her husband, Sergio Ruben Lopez Burgos, a worker and trade-union leader in Uruguay.

2.1 The author states that mainly because of the alleged victim's active participation in the trade union movement, he was subjected to various forms of harassment by the authorities from the beginning of his trade union involvement. Thus, he was arrested in December 1974 and held without charges for four months. In May 1975, shortly after his release and while still subjected to harassment by the authorities, he moved to Argentina. In September 1975 he obtained recognition as a political refugee by the Office of the United Nations High Commissioner for Refugees.

2.2 The author claims that on 13 July 1976 her husband was kidnaped in Buenos Aires by members of the "Uruguayan security and intelligence forces" who were aided by Argentine para-military groups, and was secretly detained in Buenos Aires for about two weeks. On 26 July 1976 Mr. Lopez Burgos, together with several other Uruguayan nationals, was illegally and clandestinely transported to Uruguay, where he was detained incommunicado by the special security forces at a secret prison for three months. During his detention of approximately four months both in Argentina and Uruguay, he was continuously subjected to physical and mental torture and other cruel, inhuman or degrading treatment.

2.3 The author asserts that her husband was subjected to torture and ill-treatment as a consequence of which he suffered a broken jawbone and perforation of the eardrums. In substantiation of her allegations the author furnishes detailed testimony submitted by six exdetainees who were held, together with Mr. Lopez Burgos, in some of the secret detention places in Argentina and Uruguay, and who were later released (Cecilia Gayoso Jauregui, Alicia Cadenas, M6nica Solino, Ariel Soto, Nelson Dean Bermudez, Enrique Rodriguez Larreta). Some of these witnesses describe the arrest of Mr. Lopez Burgos and other Uruguayan refugees at a bar in Buenos Aires on 13 July 1976; on this occasion his lower jaw was allegedly broken by a blow with the butt of a revolver; he and the others were then taken to a house where he was interrogated, physically beaten and tortured. Some of the witnesses could identify several Uruguayan officers: Colonel Ramffez, Major Gavazzo (directly in charge of the torture sessions), Major Manuel Cordero, Major Mario Martinez and Captain Jorge

Silveira. The witnesses assert that Mr. Lopez Burgos was kept hanging for hours with his arms behind him, that he was given electric shocks, thrown on the floor, covered with chains that were connected with electric current, kept naked and wet; these tortures allegedly continued for ten days until Lopez Burgos and several others were blindfolded and taken by truck to a military base adjacent to the Buenos Aires airport; they were then flown by an Uruguayan plane to the Base Aerea Militar No. 1, adjacent to the Uruguayan National Airport at Carrasco, near Montevideo. Interrogation continued, accompanied by beatings and electric shocks; one witness alleges that in the course of one of these interrogations the fractured jaw of Mr. Lopez Burgos was injured further. The witnesses describe how Mr. Lopez Burgos and 13 others were transported to a chalet on Shangrila Beach and that all 14 were officially arrested there on 23 October 1976 and that the press was informed that "subversives" had been surprised at the chalet while conspiring. Four of the witnesses further assert that Lopez Burgos and several others were forced under threats to sign false statements which were subsequently used in the legal proceedings against them and to refrain from seeking any legal counsel other than Colonel Mario Rodriguez. Another witness adds that all the arrested, including Monica Solifio and Ines Quadros, whose parents are attorneys, were forced to name ex officio defense attorneys.

2.4 The author further states that her husband was transferred from the secret prison and held "at the disposition of military justice", first at a military hospital where for several months he had to undergo treatment because of the physical and mental effects of the torture applied to him prior to his "official" arrest, and subsequently at Libertad prison in San Jose. After a delay of 14 months his trial started in April 1978. At the time of writing, Mr. Lopez Burgos was still waiting for final judgement to be passed by the military court. The author adds in this connection that her husband was also denied the right to have legal defense counsel of his own choice. A military ex officio counsel was appointed by the authorities.

2.5 Mrs. Saldias de Lopez states that the case has not been submitted to any other procedure of international investigation or settlement.

2.6 She also claims that the limited number of domestic remedies which can be invoked in Uruguay under the "prompt security measures" have been exhausted and she also refers in this connection to an unsuccessful resort to arnparo by the mother of the victim in Argentina.

2.7 She has also furnished a copy of a letter from the Austrian Consulate in Montevideo, Uruguay, mentioning that the Austrian Government has granted a visa to Mr. LOPEZ Burgos and that this information has been communicated to the Uruguay Ministry of Foreign Affairs.

2.8 She alleges that the following articles of the Covenant on Civil and Political Rights have been violated by the Uruguayan authorities in respect of her husband: articles 7, 9 and 12 (1) and article 14 (3).

3. By its decision of 7 August 1979 the Human Rights Committee:

(1) Decided that the author was justified in acting on behalf of the alleged victim;

(2) Transmitted the communication under rule 91 of the provisional rules of procedure to the State party concerned, requesting information and observations relevant to the question of admissibility of the communication indicating that if the State party contended that domestic remedies had not been exhausted, it should give details of the effective remedies available to the alleged victim in the particular circumstances Of his case.

4. The State party, in its response under rule 91 of the provisional rules of procedure, dated 14 December 1979, states "that the communication concerned is completely devoid of any grounds which would make it admissible by the Committee since, in the course of the proceedings taken against Mr. Lopez Burgos he enjoyed all the guarantees afforded by the Uruguayan legal order". The State party refers in this connection to its previous submissions to the Committee in other cases citing the domestic remedies generally available at present in Uruguay. Furthermore the State party provides some factual evidence in the case as follows: Mr. Lopez Burgos was arrested on 23 October 1976 for his connection with subversive activities and detained under prompt security measures; on 4 November 1976, the second military examining magistrate charged him with presumed commission of the offence of "subversive association" under section 60 (V) of the Military Penal Code; on 8 March 1979, the court of first instance sentenced him to seven years' imprisonment for the offences specified in section 60 (V) of the Military Penal Code, section 60 (I) (6) in association with 60 (XII) of the Military Penal Code and sections 7,243 and 54 of the Ordinary Penal Code; subsequently, on

4 October 1979, the Supreme Military Court rendered final judgement, reducing his sentence to four years and six months. It is further stated that Mr. LOPEZ Burgos' defense counsel was Colonel Mario Rodriguez and that Mr. Lopez Burgos is being held at Military Detention Establishment No. 1. The Government of Uruguay also brings to the attention of the Committee a report on a medical examination of Mr. Lopez Burgos, stating in part as follows:

Medical history prior to imprisonment (Antecedentes personales anteriores a su "recursion"): operated on for bilateral inguinal hernia at the age of 12; (2) history of unstable arterial hypertension; (3) fracture of lower left jaw.

Family medical history: (1) father a diabetic.

Medical record in prison (Antecedents de "recursion"): treated by the dental surgery service of the Armed Forces Central Hospital for the fracture of the jaw with which he entered the Establishment. Discharged from the Armed Forces Central Hospital on 7 May 1977 with the fracture knitted and progressing well; subsequently examined for polyps of larynx on left vocal cord; a biopsy conducted ....

5. In a further letter dated 4 March 1980 the author, Delia Saldias de Lopez, refers to the Human Rights Committee's decision of 7 August 1979 and to the note of the Government of Uruguay dated 14 December 1979, and claims that the latter confirmed the author's previous statement concerning the exhaustion of all possible domestic remedies.

6. In the absence of any information contrary to the author's statement that the same matter had not been submitted to another procedure of international investigation or settlement and concluding, on the basis of the information before it, that there were no unexhausted domestic remedies which could or should have been pursued, the Committee decided on 24 March 1980:

(1) That the communication was admissible in so far as it relates to events which have allegedly continued or taken place after 23 March 1976 (the date of the entry into force of the Covenant and the Optional Protocol for Uruguay):

(2) That, in accordance with article 4 (2) of the Optional Protocol, the State party be requested to submit to the Committee, within six months of the date of the transmittal to it of this decision, written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by it;

(3) That the State party be informed that the written explanations or statements submitted by it under article 4 (2) of the Optional Protocol must primarily relate to the substance of the matter under consideration, and in particular the specific violations of the Covenant alleged to have occurred. The State party is requested, in this connection, to give information as to the whereabouts of Lopez Burgos between July and October 1976 and as to the circumstances in which he suffered a broken jaw and to enclose copies of any court orders or decisions of relevance to the matter under consideration.

7.1 In its submission under article 4 (2) of the Optional Protocol, dated 20 October 1980, the State party asserts that Mr. Lopez Burgos had legal assistance at all times and that he lodged an appeal; the result of the appeal was a sentence at second instance that reduced the penalty of seven years to four years and six months of rigorous imprisonment. The State party also rejects the allegation that Lopez Burgos was denied the right to have defense counsel of his own choice, asserting that he was not prevented from having one.

7.2 As to the circumstances under which Mr. Lopez Burgos' jaw was broken, the State party quotes from the "relevant medical report":

On 5 February 1977 he entered the Armed Forces Central Hospital with a fracture of the lower left jaw caused when he was engaged in athletic activities at the prison (Military Detention Establishment No. 1). He was treated by the dental surgery service of the hospital for the fracture of the jaw with which he entered the hospital. He was discharged on 7 May 1977 with the fracture knitted and progressing well.

7.3 Whereas the author claims that her husband was kidnaped by members of the Uruguayan security and intelligence forces on 13 July 1976, the State party asserts that Mr. Lopez Burgos, was arrested on 23

October 1976 and claims that the whereabouts of Mr. Lopez Burgos have been known since the date of his detention but no earlier information is available.

7.4 As to the right to have a defense counsel, the State party generally asserts that accused persons themselves and not the authorities choose from the list of court-appointed lawyers.

8.1 In her submission under rule 93 (3) dated 22 December 1980 the author indicates that since accused persons can only choose their lawyers from a list of military lawyers drawn up by the Uruguayan Government, her husband had no access to a civilian lawyer, unconnected with the Government, who might have provided "a genuine and impartial defense" and that he did not enjoy the proper safeguards of a fair trial.

8.2 With regard to the State party's explanations concerning the fractured jaw suffered by Lopez Burgos, the author claims that they are contradictory. The transcript of the medical report in the State party's note of 14 December 1979 lists the fracture in the paragraph beginning "Medical history prior to 'recursion'" and goes on to the paragraph beginning "Medical record 'de reclusion' "to state that Lopez Burgos was "treated by the dental surgery service of the Armed Forces Central Hospital for the fracture of the jaw with which he entered the establishment". In other words, the fracture occurred prior to his imprisonment. However, the note of 20 October 1980 states that he entered the hospital with a fractured jaw caused "when he was engaged in athletic activities at the prison". She reiterates her allegation that the fracture occurred as a consequence of the tortures to which Lopez Burgos was subjected between July and October 1976, when he was in the hands of the Uruguayan Special Security Forces.

9. The State party submitted additional comments under article 4 (2) of the Covenant in a note dated 5 May 1981, contending that there is no contradiction between the medical reports, because the State party used the term ' 'recursion" to mean "internacion en el establecimiento hospitalario" (hospitalization), and reasserts that the fracture occurred in the course of athletic activities in the prison.

10.1 The Human Rights Committee has considered the present communication in the light of all information made available to it by the parties, as provided in article 5 (1) of the Optional Protocol. The Committee bases its views inter alia on the following undisputed facts:

10.2 Sergio Ruben Lopez Burgos was living in Argentina as a political refugee until his disappearance on 13 July 1976; he subsequently reappeared in Montevideo, Uruguay, not later than 23 October 1976, the date of his purported arrest by Uruguayan authorities, and was detained under "prompt security measures". On 4 November 1976 pre-trial proceedings commenced when the second military examining magistrate charged him with the of fence of "subversive association", but the actual trial began in April 1978 before a military court of first instance, which sentenced him on 8 March 1979 to seven years' imprisonment; upon appeal the court of second instance reduced the sentence to four years six months. Lopez Burgos was treated for a broken jaw in a military hospital from 5 February to 7 May 1977.

11.1 In formulating its views the Human Rights Committee also takes into account the following considerations:

11.2 As regards the whereabouts of Lopez Burgos between July and October 1976 the Committee requested precise information from the State party on 24 March 1980. In its submission dated 20 October 1980 the State party claimed that it had no information. The Committee notes that the author has made precise allegations with respect to her husband's arrest and detention in Buenos Aires on 13 July 1976 by the Uruguayan security and intelligence forces and that witness testimony submitted by. her indicates the involvement of several Uruguayan officers identified by name. The State party has neither refuted these allegations nor adduced any adequate evidence that they have been duly investigated.

11.3 As regards the allegations of ill-treatment and torture, the Committee notes that the author has submitted detailed testimony from six ex-detainees who were held, together with Lopez Burgos, in some of the secret detention places in Argentina and Uruguay. The Committee notes further that the names of five Uruguayan officers allegedly responsible for or personally involved in the ill-treatment are given. The State party should have investigated the allegations in accordance' with its laws and its obligations under the Covenant and the Optional Protocol. As regards the fracture of the jaw, the Committee notes that the witness testimony submitted by the author indicates that the fracture occurred upon the arrest of Lopez Burgos on 13 July 1976

in Buenos Aires, when he was physically beaten. The State party's explanation that the jaw was broken in the course of athletic activities in the prison seems to contradict the State party's earlier statement that the injury occurred prior to his "recursion". The State party's submission of 14 December 1979 uses "recursion" initially to mean imprisonment, e.g. "Establecimiento Militar de Reclusion". The term reappears six lines later in the same document in connection with "Antecedents personales anteriores a su reclusion". The Committee is inclined to believe that "reclusi6n" in this context means imprisonment and not hospitalization as contended by the State party in its submission of 5 May 1981. At any rate, the State party's references to a medical report cannot be regarded as a sufficient refutation of the allegations of mistreatment and torture.

11.4 As to the nature of the judicial proceedings against L6pez Burgos the Committee requested the State party on 24 March 1980 to furnish copies of any court orders or decisions of relevance to the matter under consideration. The Committee notes that the State party has not submitted any court orders or decisions.

11.5 The State party has also not specified in what "subversive activities" L6pez Burgos was allegeally involved or clarified how or when he engaged in these activities. It would have been the duty of the State party to provide specific information in this regard, if it wanted to refute the allegations of the author that L6pez Burgos has been persecuted because of his involvement in the trade-union movement. The State party has not refuted the author's allegations that L6pez Burgos was forced to sign false testimony against himself and that this testimony was used in the trial against him. The State party has stated that L6pez Burgos was not prevented from choosing his own legal counsel. It has not, however, refuted witness testimony indicating that L6pez Burgos and others arrested with him, including M6nica Solifio and In~s Quadros, whose parents are attorneys, were forced to agree to ex officio legal counsel.

11.6 The Committee has considered whether acts and treatment, which are prima facie not in conformity with the Covenant, could for any reasons be justified under the Covenant in the circumstances of the case. The Government of Uruguay has referred to provisions, in Uruguayan law, of "prompt security measures". However, the Covenant (art. 4) does not allow national measures derogating from any of its provisions except in strictly defined circumstances, and the Government has not made any submissions of fact or law in relation thereto. Moreover, some of the facts referred to above raise issues under provisions from which the Covenant does not allow any derogation under any circumstances.

11.7 The Human Rights Committee notes that if the sentence of L6pez Burgos ran from the purported date of arrest on 23 October 1976, it was due to be completed on 23 April 1981, on which date he should consequently have been released.

11.8 The Committee notes that the Austrian Government has granted L6pez Burgos an entry visa. In this connection and pursuant to article 12 of the Covenant, the Committee observes that L6pez Burgos should be allowed to leave Uruguay, if he so wishes, and travel to Austria to join his wife, the author of this communication.

12. I The Human Rights Committee further observes that although the arrest and initial detention and mistreatment of Lopez Burgos allegedly took place on foreign territory, the Committee is not barred either by virtue of article 1 of the Optional Protocol ("... individuals subject to its jurisdiction ...") or by virtue of article 2 (1) of the Covenant ("... individuals within its territory and subject to its jurisdiction ... ") from considering these allegations, together with the claim of subsequent abduction into Uruguayan territory, inasmuch as these acts were perpetrated by Uruguayan agents acting on foreign soil.

12.2 The reference in article 1 of the Optional Protocol to "individuals subject to its jurisdiction" does not affect the above conclusion because the reference in that article is not to the place where the violation occurred, but rather to the relationship between the individual and the State in relation to a violation of any of the rights set forth in the Covenant, wherever they occurred.

12.3 Article 2 (1) of the Covenant places an obligation upon a State party to respect and to ensure rights "to all individuals within its territory and subject to its jurisdiction", but it does not imply that the State party concerned cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State, whether with the acquiescence of the Government of that State or in opposition to it. According to article 5 (1) of the Covenant:

Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.

In line with this, it would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory.

13. The Human Rights Committee, acting uncle[article 5 (4) of the Optional Protocol to the International Covenant on Civil and Political Rights is of the view that the communication discloses violations of the Covenant, in particular of:

Article 7, because of the treatment (including torture) suffered by Lopez Burgos at the hands of Uruguayan military officers in the period from July to October 1976 both in Argentina and Uruguay;

Article 9 (1), because the act of abduction into Uruguayan territory constituted an arbitrary arrest and detention;

Article 9 (3), because Lopez Burgos was not brought to trial within a reasonable time;

Article 14 (3) (d), because Lopez Burgos was forced to accept Colonel Mario Rodriguez as his legal counsel;

Article 14 (3) (g), because Lopez Burgos was compelled to sign a statement incriminating himself;

Article 22 (1) in conjunction with article 19 (I) and (2), because Lopez Burgos has suffered persecution for his trade union activities.

14. The Committee, accordingly, is of the view that the State party is under an obligation, pursuant to article 2 (3) of the Covenant, to provide effective remedies to Lopez Burgos, including immediate release, permission to leave Uruguay and compensation for the violations which he has suffered, and to take steps to ensure that similar violations do not occur in the future.

APPENDIX

Individual opinion submitted by a member of the Human Rights Committee under rule 94 (3) of the Committee's provisional rules of procedure

Communication No. 52/1979

Individual opinion appended to the Committee's views at the request of Mr. Christian Tomuschat:

1 concur in the views expressed by the majority. None the less, the arguments set out in paragraph 12 for affirming the applicability of the Covenant also with regard to those events which have taken place outside Uruguay need to be clarified and expanded. Indeed, the first sentence in paragraph 12.3, according to which article 2 (1) of the Covenant does not imply that a State party "cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State", is too broadly framed and might therefore give rise to misleading conclusions. In principle, the scope of application of the Covenant is not susceptible to being extended by reference to article 5, a provision designed to cover instances where formally rules under the Covenant seem to legitimize actions which substantially run counter to its purposes and general spirit. Thus, Governments may never use the limitation clauses supplementing the protected rights and freedoms to such an extent that the very substance of those rights and freedom would be annihilated: individuals are legally barred from availing themselves of the same rights and freedoms with a view to overthrowing the regime of the rule of law which constitutes the basic philosophy of the Covenant. In the present case, however, the Covenant does not even provide the pretext for a "right" to perpetrate the criminal acts which, according to the Committee's conviction, have been perpetrated by the Uruguayan authorities.

To construe the words "within its territory" pursuant to their strict literal meaning as excluding any responsibility for conduct occurring beyond the national boundaries would, however, lead to utterly absurd

results. The formula was intended to take care of objective difficulties which might impede the implementation of the Covenant in specific situations. Thus, a State party is normally unable to ensure the effective enjoyment of the rights under the Covenant to its citizens abroad, having at its disposal only the tools of diplomatic protection with their limited potential. Instances of occupation of foreign territory offer another example of situations which the drafters of the Covenant had in mind when they confined the obligation of States parties to their own territory. All these factual patterns have in common, however, that they provide plausible grounds for denying the protection of the Covenant. It may be concluded, therefore, that it was the intention of the drafters, whose sovereign decision cannot be challenged, to restrict the territorial scope of the Covenant in view of such situations where enforcing the Covenant would be likely to encounter exceptional obstacles. Never was it envisaged, however, to grant States parties unfettered discretionary power to carry out wilful and deliberate attacks against the freedom and personal integrity of their citizens living abroad. Consequently, despite the wording of article 2 (l), the events which took place outside Uruguay come within the purview of the Covenant.

---

1. The text of an individual opinion submitted by a Committee member is appended to these views.

Annex 82

UNIVERSITY OF MINNESOTA
Human Rights Library

Association Pour la Sauvegarde de la Paix au Burundi v. Tanzania, Kenya, Uganda, Rwanda, Zaire and Zambia, African Commission on Human and Peoples' Rights, Comm. No. 157/96 (2003).

157/96 - Association Pour la Sauvegarde de la Paix au Burundi /Tanzania, Kenya, Uganda, Rwanda, Zaire and Zambia

Rapporteur:

20 th session: Commissioner Duarte

21 st session: Commissioner Ondziel-Gnelenga

22 nd session: Commissioner Ondziel-Gnelenga

23 rd session: Commissioner Ondziel-Gnelenga

24 th session: Commissioner Ondziel-Gnelenga

25 th session: Commissioner Ondziel-Gnelenga

26 th session: Commissioner Rezag Bara

27 th session: Commissioner Rezag Bara

28 th session: Commissioner Rezag Bara

29 th Session: Commissioner Rezag Bara

30 th session: Commissioner Rezag Bara

31 st session: Commissioner Rezag Bara

32 nd session: Commissioner Rezag Bara

33 rd session: Commissioner Rezag Bara

Summary of Facts:

1. The communication was submitted by the *Association Pour la Sauvegarde de la Paix au Burundi* (ASP-Burundi, Association for the Preservation of Peace in Burundi), a non-governmental organisation based in Belgium. The communication pertains to the embargo imposed on Burundi by Tanzania, Kenya, Uganda, Rwanda, Zaire (now Democratic Republic of Congo), Ethiopia, and Zambia following the overthrow of the democratically elected government of Burundi and the installation of a government led by retired military ruler, Major Pierre Buyoya with the support of the military.

2. The Respondent states cited in the communication are all in the Great Lakes region, neighbouring Burundi and therefore have an interest in peace and stability in their region. At the Summit of the Great Lakes summit held in Arusha, Tanzania on 31 July 1996 following the unconstitutional change of government in Burundi, a resolution was adopted imposing an embargo on Burundi. The resolution was later supported by the United Nations Security Council and by the OAU. All except the Federal Republic of Ethiopia were, at the time of the submission of the communication, state parties to the African Charter on Human and Peoples' Rights. Ethiopia acceded to the African Charter on 17 June 1998.

The Complaint:

3. The Complainant claims that the embargo violates -:

- Article 4 of the African Charter, because it prevented the importation of essential goods such as fuel required for purification of water and the preservation of drugs; and prevented the exportation of tea and coffee, which are the country's only sources of revenue;
- Article 17 (1) of the African Charter, because the embargo prevented the importation of school materials;
- Article 22 of the African Charter, because the embargo prevented Burundians from having access to means of transportation by air and sea;
- Article 23(2) (b) of the African Charter, because Tanzania, Zaire and Kenya sheltered and supported terrorist militia.

4. The communication also alleges violation of Articles 3(1), (2) and (3) of the OAU Charter, because the embargo constitutes interference in the internal affairs of Burundi.

Procedure:

5. The communication is dated 18 th September 1996 and was received at the Secretariat on 30 th September 1996.

6. At its 20 th session, held in October 1996 in Grand Bay, Mauritius, the Commission decided to be seized of the communication.

7. On 10 th December 1996, the Secretariat sent copies of the communication to the Ugandan, Kenyan, Tanzanian, Zambian, Zairian and Rwandan governments.

8. On 12 th December 1996, a letter was sent to the Complainant indicating that the admissibility of the communication would be considered at the 21 st session.

9. At its 21 st session, held in April 1997, the Commission decided to be seized of the communication and deferred consideration of its admissibility to the following session. It also requested the Respondent States Parties to send in their comments within the stipulated deadline.

10. At its 22 nd session, the Commission declared the communication admissible and asked the Secretariat to obtain clarification on the terms of the embargo imposed on Burundi from the Secretary General of the OAU. The Respondent States Parties were also, once again, requested to provide the Commission with their reactions, as well as their comments and arguments as regards the decision on merit.

11. On 18 th November 1997, letters were addressed to the parties to inform them of the Commission's decision.

12. On 24 th February 1998, the Secretariat of the Commission wrote to the OAU Secretary General requesting clarification on the terms of the embargo imposed on Burundi.

13. On 19 th May 1998, the Secretariat received the Zambian government's reaction to the allegations made against it by the plaintiff. It claims that the sanctions imposed on Burundi ensued from a decision taken by Great Lakes countries in reaction to the coup d'état of 25 July 1996, which brought Major Pierre Buyoya to power, ousting the democratically elected government of President Ntibantuganya.

14. According to Zambia, the said sanctions were aimed at putting pressure on the regime of Major Buyoya with a view to causing it to restore constitutional legality, reinstate Parliament, which is the symbol of democracy, and lift the ban on political parties. It was also aimed at causing the regime to immediately and unconditionally initiate negotiations with all Burundian groups so as to re-establish peace and stability in the country, in accordance with the decisions of the Arusha regional Summit of 31 July 1996.

15. Regarding the allegation that Zambia violated resolution 2625(XXV), adopted on 24 th October 1970 by the General Assembly of the United Nations, the Zambian government claims that the United Nations Security Council, in resolution n° 1072(1996), upheld the decision of the Arusha regional Summit to impose sanctions on Burundi.

16. Furthermore, Zambia states that it has derived no benefit of any sort from the embargo imposed on Burundi. On the contrary – the embargo had affected not only the inhabitants of Burundi, but also those of the States that imposed it. In Zambia for example, it continues, many workers at the Mpulungu port were sent on unpaid leave because there was no work, as a result of the embargo. The Zambian State thereby lost many billion Kwacha in revenue. This, according to the Zambian government, is the cost Zambia accepted to pay to contribute to the international effort to promote democracy, justice and the rule of law.

17. Regarding the allegation of violation by Zambia of Article 3(1), (2) and 3 of the Charter of the Organisation of African Unity on non-interference in the internal affairs of member States, the Zambian government recalls that the Organisation of African Unity, through its Secretariat, has held many meetings on the situation in Burundi. It concludes, therefrom that the decisions of the Arusha Regional Summit were endorsed by the Organisation of African Unity. Moreover, it points out that the sanctions imposed on Burundi were decided in consultation with the United Nations Organisation and the Organisation of African Unity.

18. As regards the allegation of violation by Zambia of the provisions of article 4 of the African Charter on Human and Peoples' Rights on the right to life and physical and moral integrity, Zambia points out that the sanctions monitoring committee had authorised the importation into Burundi, through United Nations agencies, of essential items such as infants' food, medical and pharmaceutical products for emergency treatment, among others. It concludes therefore that the embargo is far from being a total blockade.

19. To the allegation of violation of article 17 of the African Charter on Human and Peoples' Rights on the right to education, Zambia responds with the same arguments indicated above.

20. Zambia stresses that it is a democratic State. This, it states, is enshrined in article 1.1 of its Constitution, which states that the country "…is a sovereign, unitary, indivisible, multiparty democratic State". It thereby justifies what it refers to as its support for the ongoing democratisation process in Africa and claims to abhor regimes led by ethnic minorities. The Great Lakes countries in general and Zambia in particular, it continues, were right in imposing sanctions on Burundi to bring about the restoration of democracy and discourage coups d'état in Africa.

21. On 8 th September 1998, the Secretariat received the reaction of the Tanzanian government on the communication under consideration. The latter rejected the allegations made against its country and ended with a plea for inadmissibility of the communication on the grounds among others that it contains several contradictions which were only aimed at defending the aggrieved state's interests. This country proceeded to argue its case as follows -:

22. “There is great confusion in the facts as presented by the Complainant; there are also many lies contained therein, particularly the accusation that Tanzania was preparing to send its army to Burundi at the request of the International Monetary Fund and the World Bank which had promised to fund the operation. The undeniable truth, and ASP-Burundi knows it well, is that the essential reason why Tanzania and the other countries in the region decided to impose sanctions is to bring about the negotiation of a lasting peace among all Burundian parties. The sanctions are used as a means of pressure, and the results are palpable, as in the restoration of the National Assembly, the lifting of the ban on political parties and the initiation of unconditional negotiations among all parties to the conflict. The discrete contacts with Mr. Léonard Nyangoma of CNDD are a step in the right direction envisaged in the imposition of the sanctions”.

23. Regarding the allegation that Tanzania violated article 4 of the African Charter, citing the article, it stresses, “it is rather surprising to see ASP-Burundi using this article to support an allegation of human rights violations resulting from the sanctions. This association forgets or pretends to be unaware that the security situation in Burundi took a turn for the worse before and after the coup d’état and that it can be said emphatically that this provision of the Charter had been violated in a shameless way during this period. In June 1996, President S. Ntibantuganya and the then Prime Minister, Mr. Nduwayo, came to Arusha to solicit sub-regional assistance in the form of troops”. Tanzania then goes on to enumerate some cases of violation of human rights by the Burundian government. It emphasises, inter alia, “that the war being waged against the Hutu militia by the Burundian army is conducted with ever increasing vigour, the massacre by the Burundian army of 126 refugees on their way back to their country from Tanzania, the establishment of concentration camps in Karugi, Mwamanya and Kayanza, camps that are populated by Hutus who are denied food even to the point of death, the detention of the Speaker of the National Assembly, Mr. Léons Ngandakumana…etc.”.

24. Reacting to the allegation of violation of article 17(1) of the Charter, Tanzania points out that “education and educational institutions were not the targets of the embargo; however, due to its multiplier effect, they were affected. In view of this, at the meeting held in Arusha on 6 April 1997, the leaders of the countries that had imposed the embargo decided to exclude educational materials on the list of items that are not subject to the embargo. This was with a view to alleviating the suffering of ordinary citizens”.

25. Responding to the allegation of violation of article 22 of the Charter, Tanzania argues that it is “difficult to conceive that it is possible to enjoy economic and socio-cultural rights without enjoying the fundamental rights, which are the political rights that condition the others. The most fundamental and important rights, which deserve to be recognised and which are currently being trampled upon by the regime in power are political rights. The Great Lakes countries, other African countries and the international community at large would like to see an end to the cycle of violence in Burundi. This can only be achieved by way of a political settlement negotiated among the various Burundian factions”.

26. Tanzania argues “the enjoyment of economic, cultural and social rights cannot be effective in the morass that Burundi has fallen into. Constitutional legality has first to be restored. That is the reinstatement of a democratically elected Parliament, the lifting of the ban on political parties, and the beginning of political talks involving all parties to the conflict…”. In reaction to the allegation of violation of article 23,2 of the Charter, Tanzania states “it has never granted shelter to terrorists fighting against Burundi. However, Tanzania admits that it has always welcomed in its territory streams of refugees from Rwanda and Burundi each time trouble fares up in those two countries. Tanzania has always refused to serve as a rear base or staging post for any armed movement against its neighbours. Leaders of political parties and factions are welcomed in Tanzania just like other refugees are. But they are not allowed to carry out military activity against Burundi from Tanzanian territory”.

27. In response to the accusation that it violated the provisions of article III paragraphs 1,2 and 3 of the OAU Charter, Tanzania states that “it has not violated any of the principles enshrined in those texts”. It emphasises that “despite its [small] size, Burundi remains a sovereign State like any other African State. The sanctions imposed on it by its neighbouring countries do not undermine its sovereignty or its territorial integrity, nor much less its inalienable right to its own existence”. On the contrary, continues Tanzania, “the sanctions could play an important role in reminding the Burundian authorities of the content of the preamble to the OAU Charter, which states that all members of the OAU are conscious of the fact that freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples. Another provision states that in order to create conditions for human progress, peace and security

must be established and maintained. Peace and security are lacking in Burundi and the sanctions imposed on it could be one of the means of achieving them through dialogue".

28. As regards the allegation of violation of article III paragraph 4 de of the OAU Charter, Tanzania comments "ASP-Burundi deliberately ignores one very important provision of the OAU Charter which states that OAU members solemnly affirm their adherence to the principle of the peaceful resolution of disputes by negotiation, mediation, conciliation and arbitration. The idea behind the imposition of the sanctions is precisely that of causing the application of this principle which a view to achieving lasting peace in Burundi. Contrary to ASP-Burundi's contention that a dangerous precedent had been set, Tanzania believes that the countries of the Great Lakes region had set a favourable precedent. In the pursuit of the goals and objectives of the OAU, article II paragraph 2(2) states "to these ends, the member States shall cooperate and harmonise their general policies in the political and diplomatic fields" Tanzania concludes its exposition with a response to ASP-Burundi's accusation that it had violated certain texts adopted by the United Nations, including some provisions of the Organisation's Charter. It emphasises in particular that "the concept of regional arrangement adopted by the Great Lakes countries is straight out of chapter VIII of the United Nations Charter: "article 52 of the said Charter stipulates that regional arrangements may be used for keeping international peace and security, with the proviso that such actions shall be consistent with the goals and principles of the United Nations. This provision allows for regional arrangements to be used for peaceful settlements before having recourse to the Security Council. And indeed, the Council encourages regional arrangements".

29. " Tanzania does not believe that the imposition of sanctions is an interference in the internal affairs of Burundi. Tanzania is more concerned about the potential consequences of the instability currently prevailing in Burundi. All neighbouring countries share the same concern, since it is true that the instability in Burundi signifies for them inflow of refugees, instability in their own territory as a consequence of that prevailing in Burundi and which could transform into a generalised conflagration in the entire region. The imposition of sanctions should be seen as a preventive means of self defence aimed at avoiding seeing the region plunge into instability and chaos".

30. Tanzania further emphasises that "in fact, all the sanctions that were adversely affecting the ordinary Burundian citizen were softened when the leaders of the Great Lakes countries met in Arusha on 16 April 1997. This included the lifting of the sanctions on food products, school materials, construction materials, as well as all medical items, and agricultural products and inputs".

31. "The sixth Summit of the Great Lakes countries held in Kampala on 21 February 1998, unanimously decided to maintain the sanctions against the Burundian military regime. In this vein, the enforcement of the sanctions shall be scrupulously monitored by the organ established for this purpose; this is with a view to ensuring the implementation of the decisions taken by the countries of the region. It is important to note that the sanctions were declared by the countries of the region and not unilaterally by Tanzania. Hence, if ASP-Burundi has a just cause to defend, it should do so against the region and not against Tanzania".

32. At its 24 th session held in Banjul, The Gambia, after hearing the Rwandan Ambassador, who presented his government's position on this affair, and considering the responses of Zambia and Tanzania, the Commission decided to address a recommendation to the Chairman in Office of the Organisation of African Unity (OAU), with a copy to the Secretary General, requesting the States involved in the affair to find means of reducing the effects of the embargo. It was however stressed that this should be without any prejudice to the decision that the Commission would take on the merit of the communication.

33. The Secretariat wrote to the parties informing them of the Commission's decision.

34. On 26 th March 1999, the Secretariat received the reaction of the author of the communication to the Tanzanian and Zambian memoranda. In its view, Tanzania's argument that it did not violate art. 4 of the African Charter is baseless. It argues that "after the coup d'état security in the country improved considerably. On the contrary, the embargo deprived the Burundian people of their basic needs, especially as regards health care and nutrition, claiming many victims".

35. It continues: " Tanzania claims not to have violated art. 17 of the Charter with the argument that the embargo was relaxed in April 1997. This shows a *contrario* that before the relaxation, which had no effect in reality, the said provision had been violated; that is from 31/07/96 to April 1997".

36. According to the plaintiff, " Tanzania also claims not to have violated art. 22 of the Charter with the argument that of all human rights, it is what it refers to as the "political right" that matters most". It continues by saying that Tanzania's argument is unfounded since "…the right to life for example is more important than any "political right". The choice is clear between someone who takes your life and someone who denies you your right to elect your head of State".

37. According to the plaintiff, "all groups that are attacking Burundi – PALIPEHUTU, FROLINA, CNDD... etc. – operate from that country".

38. The Complainant avers, " Tanzania claims not to have violated art. 3 items 1, 2, 3 of the OAU Charter. But imposing on Burundi a manner whereby it can "resolve" its internal problems, under the pressure of an embargo, undoubtedly constitutes interference in the internal affairs of Burundi".

39. The Complainant continues: "it is evident that Tanzania violated international law by imposing an embargo on Burundi. ASP-Burundi hereby calls on the African Commission on Human and Peoples' Rights to declare that country guilty and condemn it to pay damages". As regards the memorandum submitted by Zambia, the plaintiff states that:

40. " Zambia claims not to have violated resolution 2625 of the United Nations with the argument that the UN had approved the decision to impose the embargo. Whether the UN approved the measure or not changes nothing, for the initiative should have come from the United Nations and not the other way around! Hence, the decision to impose the embargo had no legal basis".

41. It continues: "along the same line of thought, Zambia claims that it did not violate Art. 3(1), (2), and (3) of the OAU Charter for the reason that the OAU had approved the embargo. Once again, the approval came after the fact. It was not the OAU that mandated these countries to impose the embargo".

42. According to the petitioner, " Zambia claims [...] that it did not violate art. 4 of the African Charter on Human and Peoples' Rights with the argument that in April 1997, some alleviation measures were introduced. ASP-Burundi points out that this provision was violated from the time of the imposition of the embargo (August 96) to the date those measures were introduced (April 97), and the measures did not even bear any effect in reality".

From the foregoing, the Complainant draws the following conclusion:

43**.** "It is abundantly clear that Zambia, as well as Tanzania, have violated international law and that this violation caused very serious injury to the Burundian people. ASP - Burundi therefore urges the African Commission on Human and Peoples' Rights to declare Zambia guilty of this and to constrain it to pay the relevant damages".

44. On 24 March 2000, the Secretariat received a Note Verbale from the Kenyan Ministry of Foreign Affairs requesting a copy of the communication submitted by ASP-Burundi. The request was met, and a reaction is still being awaited.

45. At its 27 th ordinary session held in Algeria, the Commission examined the case and deferred its further consideration to the next session.

46. The Commission's decision was communicated to the parties on 20 July 2000.

47. On 17 th August 2000, the Secretariat of the Commission received a Note Verbale from the Ministry of Foreign Affairs of the Republic of Uganda claiming that it had never been notified of the existence of this communication.

48. On 21 st August 2000, the Secretariat of the Commission replied the said Ministry stating among other things that such notification had long been served the competent authorities of the Republic of Uganda, in 1996, as soon as the case was filed. A copy of the communication was however forwarded to the Ministry.

49. During the 28 th ordinary session held in Cotonou, Benin, from 26 October to 6 November 2000, the Commission considered the communication and noted that although Ethiopia was a party to the case, it had never received notification of the communication.

50. The Commission therefore asked the Secretariat to check whether Ethiopia had ratified the African Charter at the time the decision on the embargo was taken.

51. If it had, the Secretariat should then send it notification of the communication opposing that embargo and ask for its comments and observations on the issue.

52. Given that Ethiopia ratified the African Charter two years after the decision to impose the embargo on Burundi was taken, the Secretariat of the Commission did not send a copy of the case file to Ethiopia for notification.

53. The Secretariat acted in this manner in accordance with the decision taken by the 28 th ordinary session of the Commission.

54. Moreover, this decision of the Commission is in line with the principle of non-retroactivity of the effects of agreements, which is contained in Article 28 of the Vienna Convention on Treaties.

55. The Secretariat informed the concerned parties about the decision of the 30 th session, and the Tanzanian and Zambian Embassies in Addis Ababa reacted by saying that their respective Governments were never informed of this case and they requested to be given a copy of the case-file.

56. In reply, the Secretariat conveyed the documents requested to the two Embassies, as well as all necessary information that could help elucidate the progress of the case submitted to the Commission, in respect of which their States had contributed by submitting defence statements.

57. At the 31 st session (2-16 May 2002, Pretoria, South Africa), delegates from some of the accused States (DRC, Rwanda, Tanzania, Uganda and Zambia) presented some oral comments on the position of their respective Governments during the Commission's consideration of the communications.

58. The said delegations in turn flatly rejected the allegations levelled against their Governments pointing out in a nutshell, that -:

- The sanctions adopted by the summit of the countries of the Great Lakes region held on 31 July 1996, in Arusha, Tanzania, was not aimed at providing advantages to the countries that made the decisions but, were meant to put pressure on the Government brought about by the military coup d'etat of 25 July 1996 in Burundi, with a view to bringing it to restore constitutional legality, democracy, peace and stability.
- The joint initiative taken by their Governments were part of their contribution to the international efforts aimed at promoting the rule of law, in spite of the sacrifices that this initiative entailed for the people of the countries that initiated the embargo against Burundi, who also suffered from the consequences of the said embargo.

59. After the session, the Secretariat informed the States concerned and the Complainants about the status of the communication by Note Verbale and by letter respectively.

60. At the 32 nd Session held from 17 th to 23 rd October 2002, in Banjul, The Gambia, the Commission was unable to consider the merits of Communication, because of time constraints occasioned by the reduction of this session's duration.

61. The African Commission consequently deferred consideration of the matter to its 33 rd Ordinary Session scheduled to take place from 15 th to 29 th May 2003, in Niamey, Niger.

62. The African Commission considered this communication during the 33 rd Ordinary Session and decided to deliver its decision on the merits.

LAW Admissibility

63. The Commission had to resolve the matter of the *locus standi* of the author of the communication. It would appear that the authors of the communication were in all respects representing the interests of the military regime of Burundi. The question that was raised was whether this communication should not rather be considered as a communication from a state and be examined under the provisions of Articles 47-54 of the African Charter. Given that it has been the practice of the Commission to receive communications from non-governmental organisations, it was resolved to consider this as a calls action. In the interests of the advancement of human rights this matter was not rigorously pursued especially as the Respondent states did not take exception by challenging the *locus standi* of the author of the communication. In the circumstances the matter was examined under Article 56.

64. Under article 56(5) and (6) of the African Charter on Human and People's Rights, communications other than those referred to in Article 55 received by the Commission and relating to human and people's rights shall be considered if they -:

- (5) "are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged";
- (6) "are submitted within a reasonable period from the time local remedies are exhausted, or from the date the Commission is seized with the matter".

65. These provisions of the African Charter are hardly applicable in this matter inasmuch as the national courts of Burundi have no jurisdiction over the state Respondents herein. This is yet another indication that this communication appropriately falls under *Communications from States* (Articles 47-54).

66. However, drawing from general international law and taking into account its mandate for the protection of human rights as stipulated in Article 45(2), the Commission takes the view that the communication deserves its attention and declares it admissible.

Merits

67. The communication was submitted by the *Association pour la Sauvegarde de la Paix au Burundi* against States of the Great Lakes region (DRC, Kenya, Rwanda, Tanzania, Uganda, Zambia) and Ethiopia, in the wake of an embargo declared by these countries against Burundi on 31 July 1996, following the coup d'etat carried out by the Burundian army on 25 July against the democratically elected government.

68. The communication alleges that by its very existence this embargo violated and continues to violate a number of international obligations to which these States have subscribed, including those emanating from the provisions of the Charter of the Organisation of African Unity (OAU), the African Charter on Human and Peoples' Rights, as well as Resolution 2625 (XXV) of the General Assembly of the United Nations on the principles of international law applicable to friendly relations and cooperation between States on the basis of the United Nations Charter.

69. The States accused in the communication, particularly Zambia and Tanzania which submitted written conclusions on the case, reject the allegations against them, stating among other things, that while it is true that the decision to impose an embargo against Burundi was taken at the Arusha summit of 31 July 1996 at which they participated, (with the exception of Zambia, which only joined the others after the Arusha decision), it is equally true that following this, the decision to impose an embargo against Burundi was endorsed by the Organisation of African Unity and the United Nations Security Council.

70. The decision to impose the embargo against Burundi is thus based, by implication, on the provisions of Chapters VII and VIII of the United Nations Charter, regarding "Action With Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression" and "Regional Arrangements", in the sense that the military coup which deposed the democratically elected government constituted a threat to, indeed a breach of, the peace in Burundi and the region.

71. The Respondent States took collective action as a sub-regional consortium to address a matter within the region that could constitute a threat to peace, stability and security. Their action was motivated by the

principles enshrined in the Charters of the OAU and of the United Nations. The Charter of the OAU stipulates that "freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples." It goes on to promote international cooperation "to achieve a better life for the peoples of Africa…"

72. The resolution to impose the embargo on Burundi was taken at a duly constituted summit of the states of the Great Lakes Region who had an interest in or were affected by the situation in Burundi. The resolution was subsequently presented to the appropriate organs of the OAU and the Security Council of the United Nations. No breach attaches to the procedure adopted by the states concerned. The embargo was not a mere unilateral action or a naked act of hostility but a carefully considered act of intervention which is sanctioned by international law. The endorsement of the embargo by resolution of the Security Council and of the summit of Heads of State and Government of the OAU does not merit a further enquiry as to how the action was initiated.

73. The United Nations Security Council is vested with authority to take prompt and effective action for the maintenance of international peace and security. In doing so, states agree that the Security Council "acts on their behalf…" This suggests that, once endorsed by resolution of the Security Council, the embargo is no longer the acts of a few neighbouring states but that it imposes obligations on all member states of the United Nations.

74. The Charter of the United Nations allows that member states of the UN may be called upon to apply measures including, "complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations…" Economic sanctions and embargoes are legitimate interventions in international law.

75. The critical question and one which may affect the legitimacy of the action is whether such action as has been determined is excessive and disproportionate, is indiscriminate and seeks to achieve ends beyond the legitimate purpose. Sanctions therefore cannot be open-ended, the effects thereof must be carefully monitored, measures must be adopted to meet the basic needs of the most vulnerable populations or they must be targeted at the main perpetrators or authors of the nuisance complained of. The Human Rights Committee has adopted a General Comment in this regard precisely in order to create boundaries and limits to the imposition of sanctions.

76. We are satisfied that the sanctions imposed were not indiscriminate, that they were targeted in that a list of affected goods was made. A monitoring committee was put in place and situation was monitored regularly. As a result of these reports adjustments were made accordingly. The report by the Secretary General of the OAU is indicative of the sensitivity called upon in international law: "…besides their political, economic and psychological impact, they (the sanctions) continue to have a harsh impact on the people. The paradox is that they enrich the rich and impoverish the poor, without effectively producing the desired results… It would, perhaps, be appropriate to review the question of the sanctions, in such a way as to minimise the suffering of the people, maximise and make effective the pressures on the intended target" (CM/2034 (LXVIII), 68 th Ordinary Session of the Council of Ministers, Ouagadougou, 1-6 June 1998).

77. We accept the argument that sanctions are not an end in themselves. They are not imposed for the sole purpose of causing suffering. They are imposed in order to bring about a peaceful resolution of a dispute. It is self-evident that Burundians were in dispute among themselves and the neighbouring states had a legitimate interest in a peaceful and speedy resolution of the dispute.

78. With regard to the allegations of interference in the domestic affairs of other sovereign states, the Commission recognises that international law has provided careful procedures where such interference may be legitimate. It is our view that the present matters falls on all fours with the provisions of international law.

79. Having thus dismissed the seminal charges against the Respondent states, however, the Commission wishes to observe that the matters complained of here have now been largely resolved. The embargo has been lifted and by the agency of the OAU and with the active participation of neighbouring states a peace process is underway in Burundi.

For these reasons, the African Commission,

Finds that the Respondent States are not guilty of violation of the African Charter on Human and Peoples' Rights as alleged.

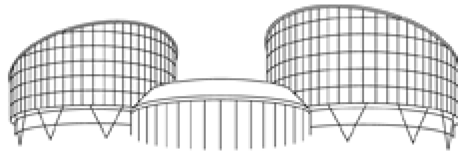
Takes note of the entry into force of the Burundi Peace and Reconciliation Agreement, alias Arusha Accords, and that the Respondent States in the communication are among the States that have sponsored the said Accord.

Also notes the efforts of the Respondent States aimed at restoring a lasting peace, for the development of the rule of law in Burundi, through the accession of all Burundian parties to the Arusha Accord.

Welcomes the entry into force of the Constitutive Act of the African Union in 2000 to which the Republic of Burundi and all the Respondent States are now party, and which also provides for the promotion and respect of human and peoples' rights and the explicit censure of States that "come to power by unconstitutional means".

Done at the 33 rd Ordinary Session held in Niamey, Niger from 15 th to 29 th May 2003

Annex 83



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

CASE OF AL-SKEINI AND OTHERS v. THE UNITED KINGDOM

(Application no. 55721/07)

JUDGMENT

STRASBOURG

7 July 2011

In the case of Al-Skeini and Others v. the United Kingdom**,**
The European Court of Human Rights, sitting as a Grand Chamber composed of:
Jean-Paul Costa, *President*,
Christos Rozakis,
Nicolas Bratza,
Françoise Tulkens,
Josep Casadevall,
Dean Spielmann,
Giovanni Bonello,
Elisabeth Steiner,
Lech Garlicki,
Ljiljana Mijović,
Davíd Thór Björgvinsson,
Isabelle Berro-Lefèvre,
George Nicolaou,
Luis López Guerra,

Luis López Guerra,
Ledi Bianku,
Ann Power,
Mihai Poalelungi, *judges*,
and Michael O'Boyle, *Deputy Registrar*,

Having deliberated in private on 9 and 16 June 2010 and 15 June 2011,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 55721/07) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by six Iraqi nationals, Mr Mazin Jum'aa Gatteh Al-Skeini, Ms Fattema Zabun Dahesh, Mr Hameed Abdul Rida Awaid Kareem, Mr Fadil Fayay Muzban, Mr Jabbar Kareem Ali and Colonel Daoud Mousa ("the applicants"), on 11 December 2007.

2. The applicants, who had been granted legal aid, were represented by Public Interest Lawyers, solicitors based in Birmingham. The United Kingdom Government ("the Government") were represented by their Agent, Mr D. Walton, Foreign and Commonwealth Office.

3. The applicants alleged that their relatives fell within United Kingdom jurisdiction when killed and that there had been no effective investigation into their deaths, in breach of Article 2 of the Convention.

4. The application was allocated to the Fourth Section of the Court (Rule 52 § 1 of the Rules of Court). On 16 December 2008 the Court decided to give notice of the application to the Government. It also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 1 of the Convention). The parties took turns to file observations on the admissibility and merits of the case. On 19 January 2010 the Chamber decided to relinquish jurisdiction in favour of the Grand Chamber (Article 30 of the Convention and Rule 72).

5. The composition of the Grand Chamber was determined according to the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24. Judge Peer Lorenzen, President of the Fifth Section, withdrew and was replaced by Judge Luis López Guerra, substitute judge.

6. The applicants and the Government each filed a further memorial on the admissibility and merits, and joint third-party comments were received from the Bar Human Rights Committee, the European Human Rights Advocacy Centre, Human Rights Watch, Interights, the International Federation for Human Rights, the Law Society, and Liberty ("the third-party interveners").

7. A hearing took place in public in the Human Rights Building, Strasbourg, on 9 June 2010 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*

Mr D. Walton, *Agent*,
Mr J. Eadie QC,
Ms C. Ivimy,
Mr S. Wordsworth, *Counsel*,
Ms L. Dann,
Ms H. Akiwumi, *Advisers*;

(b) *for the applicants*

Mr R. Singh QC,
Mr R. Husain QC,
Ms S. Fatima,
Ms N. Patel,
Mr T. Tridimas,
Ms H. Law, *Counsel*,
Mr P. Shiner,
Mr D. Carey,

Ms T. GREGORY,
Mr J. DUFFY, *Advisers*.

The Court heard addresses by Mr Eadie and Mr Singh.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The facts of the case may be summarised as follows.

A. The occupation of Iraq from 1 May 2003 to 28 June 2004

1. Background: United Nations Security Council Resolution 1441

9. On 8 November 2002 the United Nations Security Council, acting under Chapter VII of the Charter of the United Nations, adopted Resolution 1441. The Resolution decided, *inter alia*, that Iraq had been and remained in material breach of its obligations under previous United Nations Security Council resolutions to disarm and to cooperate with United Nations and International Atomic Energy Agency weapons inspectors. Resolution 1441 decided to afford Iraq a final opportunity to comply with its disarmament obligations and set up an enhanced inspection regime. It requested the Secretary-General of the United Nations immediately to notify Iraq of the Resolution and demanded that Iraq cooperate immediately, unconditionally, and actively with the inspectors. Resolution 1441 concluded by recalling that the Security Council had "repeatedly warned Iraq that it w[ould] face serious consequences as a result of its continued violations of its obligations". The Security Council decided to remain seised of the matter.

2. Major combat operations: 20 March to 1 May 2003

10. On 20 March 2003 a Coalition of armed forces under unified command, led by the United States of America with a large force from the United Kingdom and small contingents from Australia, Denmark and Poland, commenced the invasion of Iraq. By 5 April 2003 the British had captured Basra and by 9 April 2003 United States troops had gained control of Baghdad. Major combat operations in Iraq were declared complete on 1 May 2003. Thereafter, other States sent personnel to help with the reconstruction effort.

3. Legal and political developments in May 2003

11. On 8 May 2003 the Permanent Representatives of the United Kingdom and the United States of America at the United Nations addressed a joint letter to the President of the United Nations Security Council, which read as follows:

> "The United States of America, the United Kingdom of Great Britain and Northern Ireland and Coalition partners continue to act together to ensure the complete disarmament of Iraq of weapons of mass destruction and means of delivery in accordance with United Nations Security Council resolutions. The States participating in the Coalition will strictly abide by their obligations under international law, including those relating to the essential humanitarian needs of the people of Iraq. We will act to ensure that Iraq's oil is protected and used for the benefit of the Iraqi people.
>
> In order to meet these objectives and obligations in the post-conflict period in Iraq, the United States, the United Kingdom and Coalition partners, acting under existing command and control arrangements through the Commander of Coalition Forces, have created the Coalition Provisional Authority, which includes the Office of Reconstruction and Humanitarian Assistance, to exercise powers of government temporarily, and, as necessary, especially to provide security, to allow the delivery of humanitarian aid, and to eliminate weapons of mass destruction.
>
> The United States, the United Kingdom and Coalition partners, working through the Coalition Provisional Authority, shall, *inter alia*, provide for security in and for the provisional administration of Iraq, including by:

deterring hostilities; maintaining the territorial integrity of Iraq and securing Iraq's borders; securing, and removing, disabling, rendering harmless, eliminating or destroying (a) all of Iraq's weapons of mass destruction, ballistic missiles, unmanned aerial vehicles and all other chemical, biological and nuclear delivery systems; and (b) all elements of Iraq's programme to research, develop, design, manufacture, produce, support, assemble and employ such weapons and delivery systems and subsystems and components thereof, including but not limited to stocks of chemical and biological agents, nuclear-weapon-usable material, and other related materials, technology, equipment, facilities and intellectual property that have been used in or can materially contribute to these programmes; in consultation with relevant international organisations, facilitating the orderly and voluntary return of refugees and displaced persons; maintaining civil law and order, including through encouraging international efforts to rebuild the capacity of the Iraqi civilian police force; eliminating all terrorist infrastructure and resources within Iraq and working to ensure that terrorists and terrorist groups are denied safe haven; supporting and coordinating de-mining and related activities; promoting accountability for crimes and atrocities committed by the previous Iraqi regime; and assuming immediate control of Iraqi institutions responsible for military and security matters and providing, as appropriate, for the demilitarisation, demobilisation, control, command, reformation, disestablishment, or reorganisation of those institutions so that they no longer pose a threat to the Iraqi people or international peace and security but will be capable of defending Iraq's sovereignty and territorial integrity.

The United States, the United Kingdom and Coalition partners recognise the urgent need to create an environment in which the Iraqi people may freely determine their own political future. To this end, the United States, the United Kingdom and Coalition partners are facilitating the efforts of the Iraqi people to take the first steps towards forming a representative government, based on the rule of law, that affords fundamental freedoms and equal protection and justice under law to the people of Iraq without regard to ethnicity, religion or gender. The United States, the United Kingdom and Coalition partners are facilitating the establishment of representative institutions of government, and providing for the responsible administration of the Iraqi financial sector, for humanitarian relief, for economic reconstruction, for the transparent operation and repair of Iraq's infrastructure and natural resources, and for the progressive transfer of administrative responsibilities to such representative institutions of government, as appropriate. Our goal is to transfer responsibility for administration to representative Iraqi authorities as early as possible.

The United Nations has a vital role to play in providing humanitarian relief, in supporting the reconstruction of Iraq, and in helping in the formation of an Iraqi interim authority. The United States, the United Kingdom and Coalition partners are ready to work closely with representatives of the United Nations and its specialised agencies and look forward to the appointment of a special coordinator by the Secretary-General. We also welcome the support and contributions of member States, international and regional organisations, and other entities, under appropriate coordination arrangements with the Coalition Provisional Authority.

We would be grateful if you could arrange for the present letter to be circulated as a document of the Security Council.

(Signed) Jeremy Greenstock
Permanent Representative of the United Kingdom

(Signed) John D. Negroponte
Permanent Representative of the United States"

12. As mentioned in the above letter, the occupying States, acting through the Commander of Coalition Forces, created the Coalition Provisional Authority (CPA) to act as a "caretaker administration" until an Iraqi government could be established. It had power, *inter alia*, to issue legislation. On 13 May 2003 the US Secretary of Defence, Donald Rumsfeld, issued a memorandum formally appointing Ambassador Paul Bremer as Administrator of the CPA with responsibility for the temporary governance of Iraq. In CPA Regulation No. 1, dated 16 May 2003, Ambassador Bremer provided as follows:

"Pursuant to my authority as Administrator of the Coalition Provisional Authority (CPA), relevant UN Security Council resolutions, including Resolution 1483 (2003), and the laws and usages of war,

I hereby promulgate the following:

Section 1
The Coalition Provisional Authority

(1) The CPA shall exercise powers of government temporarily in order to provide for the effective administration of Iraq during the period of transitional administration, to restore conditions of security and stability, to create conditions in which the Iraqi people can freely determine their own political future, including by advancing efforts to restore and establish national and local institutions for representative governance and facilitating economic recovery and sustainable reconstruction and development.

(2) The CPA is vested with all executive, legislative and judicial authority necessary to achieve its objectives,

to be exercised under relevant UN Security Council resolutions, including Resolution 1483 (2003), and the laws and usages of war. This authority shall be exercised by the CPA Administrator.

(3) As the Commander of Coalition Forces, the Commander of US Central Command shall directly support the CPA by deterring hostilities; maintaining Iraq's territorial integrity and security; searching for, securing and destroying weapons of mass destruction; and assisting in carrying out Coalition policy generally.

Section 2
The Applicable Law

Unless suspended or replaced by the CPA or superseded by legislation issued by democratic institutions of Iraq, laws in force in Iraq as of 16 April 2003 shall continue to apply in Iraq in so far as the laws do not prevent the CPA from exercising its rights and fulfilling its obligations, or conflict with the present or any other Regulation or Order issued by the CPA.

...”

13. The CPA administration was divided into regional areas. CPA South was placed under United Kingdom responsibility and control, with a United Kingdom Regional Coordinator. It covered the southernmost four of Iraq's eighteen provinces, each having a governorate coordinator. United Kingdom troops were deployed in the same area. The United Kingdom was represented at CPA headquarters through the Office of the United Kingdom Special Representative. According to the Government, although the United Kingdom Special Representative and his Office sought to influence CPA policy and decisions, United Kingdom personnel had no formal decision-making power within the Authority. All the CPA's administrative and legislative decisions were taken by Ambassador Bremer.

14. United Nations Security Council Resolution 1483 referred to by Ambassador Bremer in CPA Regulation No. 1 was actually adopted six days later, on 22 May 2003. It provided as follows:

“*The Security Council*,

Recalling all its previous relevant resolutions,

Reaffirming the sovereignty and territorial integrity of Iraq,

Reaffirming also the importance of the disarmament of Iraqi weapons of mass destruction and of eventual confirmation of the disarmament of Iraq,

Stressing the right of the Iraqi people freely to determine their own political future and control their own natural resources, *welcoming* the commitment of all parties concerned to support the creation of an environment in which they may do so as soon as possible, and *expressing* resolve that the day when Iraqis govern themselves must come quickly,

Encouraging efforts by the people of Iraq to form a representative government based on the rule of law that affords equal rights and justice to all Iraqi citizens without regard to ethnicity, religion, or gender, and, in this connection, *recalls* Resolution 1325 (2000) of 31 October 2000,

Welcoming the first steps of the Iraqi people in this regard, and *noting* in this connection the 15 April 2003 Nasiriyah statement and the 28 April 2003 Baghdad statement,

Resolved that the United Nations should play a vital role in humanitarian relief, the reconstruction of Iraq, and the restoration and establishment of national and local institutions for representative governance,

...

Noting the letter of 8 May 2003 from the Permanent Representatives of the United States of America and the United Kingdom of Great Britain and Northern Ireland to the President of the Security Council (S/2003/538) and recognising the specific authorities, responsibilities, and obligations under applicable international law of these States as Occupying Powers under unified command (the ‘Authority’),

Noting further that other States that are not Occupying Powers are working now or in the future may work under the Authority,

Welcoming further the willingness of member States to contribute to stability and security in Iraq by contributing personnel, equipment, and other resources under the Authority,

Concerned that many Kuwaitis and Third-State Nationals still are not accounted for since 2 August 1990,

Determining that the situation in Iraq, although improved, continues to constitute a threat to international peace and security,

Acting under Chapter VII of the Charter of the United Nations,

1. *Appeals* to member States and concerned organisations to assist the people of Iraq in their efforts to reform their institutions and rebuild their country, and to contribute to conditions of stability and security in Iraq in accordance with this Resolution;

2. *Calls upon* all member States in a position to do so to respond immediately to the humanitarian appeals of the United Nations and other international organisations for Iraq and to help meet the humanitarian and other needs of the Iraqi people by providing food, medical supplies, and resources necessary for reconstruction and rehabilitation of Iraq's economic infrastructure;

3. *Appeals* to member States to deny safe haven to those members of the previous Iraqi regime who are alleged to be responsible for crimes and atrocities and to support actions to bring them to justice;

4. *Calls upon* the Authority, consistent with the Charter of the United Nations and other relevant international law, to promote the welfare of the Iraqi people through the effective administration of the territory, including in particular working towards the restoration of conditions of security and stability and the creation of conditions in which the Iraqi people can freely determine their own political future;

5. *Calls upon* all concerned to comply fully with their obligations under international law including in particular the Geneva Conventions of 1949 and the Hague Regulations of 1907;

...

8. *Requests* the Secretary-General to appoint a Special Representative for Iraq whose independent responsibilities shall involve reporting regularly to the Council on his activities under this Resolution, coordinating activities of the United Nations in post-conflict processes in Iraq, coordinating among United Nations and international agencies engaged in humanitarian assistance and reconstruction activities in Iraq, and, in coordination with the Authority, assisting the people of Iraq through:

(a) coordinating humanitarian and reconstruction assistance by United Nations agencies and between United Nations agencies and non-governmental organisations;

(b) promoting the safe, orderly, and voluntary return of refugees and displaced persons;

(c) working intensively with the Authority, the people of Iraq, and others concerned to advance efforts to restore and establish national and local institutions for representative governance, including by working together to facilitate a process leading to an internationally recognised, representative government of Iraq;

(d) facilitating the reconstruction of key infrastructure, in cooperation with other international organisations;

(e) promoting economic reconstruction and the conditions for sustainable development, including through coordination with national and regional organisations, as appropriate, civil society, donors, and the international financial institutions;

(f) encouraging international efforts to contribute to basic civilian administration functions;

(g) promoting the protection of human rights;

(h) encouraging international efforts to rebuild the capacity of the Iraqi civilian police force; and

(i) encouraging international efforts to promote legal and judicial reform;

9. *Supports* the formation, by the people of Iraq with the help of the Authority and working with the Special Representative, of an Iraqi interim administration as a transitional administration run by Iraqis, until an internationally recognised, representative government is established by the people of Iraq and assumes the responsibilities of the Authority;

...

24. *Requests* the Secretary-General to report to the Council at regular intervals on the work of the Special Representative with respect to the implementation of this Resolution and on the work of the International Advisory and Monitoring Board and *encourages* the United Kingdom of Great Britain and Northern Ireland and the United States of America to inform the Council at regular intervals of their efforts under this Resolution;

the United States of America to inform the Council at regular intervals of their efforts under this Resolution;

25. *Decides* to review the implementation of this Resolution within twelve months of adoption and to consider further steps that might be necessary.

26. *Calls upon* member States and international and regional organisations to contribute to the implementation of this Resolution;

27. *Decides* to remain seised of this matter."

5. Developments between July 2003 and June 2004

15. In July 2003 the Governing Council of Iraq was established. The CPA was required to consult with it on all matters concerning the temporary governance of Iraq.

16. On 16 October 2003 the United Nations Security Council passed Resolution 1511, which provided, *inter alia*, as follows:

"*The Security Council*

...

Underscoring that the sovereignty of Iraq resides in the State of Iraq, *reaffirming* the right of the Iraqi people freely to determine their own political future and control their own natural resources, *reiterating* its resolve that the day when Iraqis govern themselves must come quickly, and *recognising* the importance of international support, particularly that of countries in the region, Iraq's neighbours, and regional organisations, in taking forward this process expeditiously,

Recognising that international support for restoration of conditions of stability and security is essential to the well-being of the people of Iraq as well as to the ability of all concerned to carry out their work on behalf of the people of Iraq, and *welcoming* member State contributions in this regard under Resolution 1483 (2003),

Welcoming the decision of the Governing Council of Iraq to form a preparatory constitutional committee to prepare for a constitutional conference that will draft a Constitution to embody the aspirations of the Iraqi people, and *urging* it to complete this process quickly,

...

Determining that the situation in Iraq, although improved, continues to constitute a threat to international peace and security,

Acting under Chapter VII of the Charter of the United Nations,

1. *Reaffirms* the sovereignty and territorial integrity of Iraq, and *underscores*, in that context, the temporary nature of the exercise by the Coalition Provisional Authority (Authority) of the specific responsibilities, authorities, and obligations under applicable international law recognised and set forth in Resolution 1483 (2003), which will cease when an internationally recognised, representative government established by the people of Iraq is sworn in and assumes the responsibilities of the Authority, *inter alia*, through steps envisaged in paragraphs 4 through 7 and 10 below;

...

4. *Determines* that the Governing Council and its ministers are the principal bodies of the Iraqi interim administration, which, without prejudice to its further evolution, embodies the sovereignty of the State of Iraq during the transitional period until an internationally recognised, representative government is established and assumes the responsibilities of the Authority;

5. *Affirms* that the administration of Iraq will be progressively undertaken by the evolving structures of the Iraqi interim administration;

6. *Calls upon* the Authority, in this context, to return governing responsibilities and authorities to the people of Iraq as soon as practicable and *requests* the Authority, in cooperation as appropriate with the Governing Council and the Secretary-General, to report to the Council on the progress being made;

7. *Invites* the Governing Council to provide to the Security Council, for its review, no later than 15 December 2003, in cooperation with the Authority and, as circumstances permit, the Special Representative of the Secretary-General, a timetable and a programme for the drafting of a new Constitution for Iraq and for the holding of democratic elections under that Constitution;

8. *Resolves* that the United Nations, acting through the Secretary-General, his Special Representative, and

8. *Resolves* that the United Nations, acting through the Secretary-General, his Special Representative, and the United Nations Assistance Mission for Iraq, should strengthen its vital role in Iraq, including by providing humanitarian relief, promoting the economic reconstruction of and conditions for sustainable development in Iraq, and advancing efforts to restore and establish national and local institutions for representative government;

...

13. *Determines* that the provision of security and stability is essential to the successful completion of the political process as outlined in paragraph 7 above and to the ability of the United Nations to contribute effectively to that process and the implementation of Resolution 1483 (2003), and *authorises* a Multinational Force under unified command to take all necessary measures to contribute to the maintenance of security and stability in Iraq, including for the purpose of ensuring necessary conditions for the implementation of the timetable and programme as well as to contribute to the security of the United Nations Assistance Mission for Iraq, the Governing Council of Iraq and other institutions of the Iraqi interim administration, and key humanitarian and economic infrastructure;

14. *Urges* member States to contribute assistance under this United Nations mandate, including military forces, to the Multinational Force referred to in paragraph 13 above;

15. *Decides* that the Council shall review the requirements and mission of the Multinational Force referred to in paragraph 13 above not later than one year from the date of this Resolution, and that in any case the mandate of the Force shall expire upon the completion of the political process as described in paragraphs 4 through 7 and 10 above, and *expresses* readiness to consider on that occasion any future need for the continuation of the Multinational Force, taking into account the views of an internationally recognised, representative government of Iraq;

...

25. *Requests* that the United States, on behalf of the Multinational Force as outlined in paragraph 13 above, report to the Security Council on the efforts and progress of this Force as appropriate and not less than every six months;

26. *Decides* to remain seised of the matter."

17. On 8 March 2004 the Governing Council of Iraq promulgated the Law of Administration for the State of Iraq for the Transitional Period (known as the "Transitional Administrative Law"). This provided a temporary legal framework for the administration of Iraq for the transitional period which was due to commence by 30 June 2004 with the establishment of an interim Iraqi government and the dissolution of the CPA.

18. Provision for the new regime was made in United Nations Security Council Resolution 1546, adopted on 8 June 2004, which provided, *inter alia*, that the Security Council, acting under Chapter VII of the Charter of the United Nations:

"1. *Endorses* the formation of a sovereign interim government of Iraq, as presented on 1 June 2004, which will assume full responsibility and authority by 30 June 2004 for governing Iraq while refraining from taking any actions affecting Iraq's destiny beyond the limited interim period until an elected transitional government of Iraq assumes office as envisaged in paragraph 4 below;

2. *Welcomes* that, also by 30 June 2004, the occupation will end and the Coalition Provisional Authority will cease to exist, and that Iraq will reassert its full sovereignty;

...

8. *Welcomes* ongoing efforts by the incoming interim government of Iraq to develop Iraqi security forces including the Iraqi armed forces (hereinafter referred to as 'Iraqi security forces'), operating under the authority of the interim government of Iraq and its successors, which will progressively play a greater role and ultimately assume full responsibility for the maintenance of security and stability in Iraq;

9. *Notes* that the presence of the Multinational Force in Iraq is at the request of the incoming interim government of Iraq and therefore *reaffirms* the authorisation for the Multinational Force under unified command established under Resolution 1511 (2003), having regard to the letters annexed to this Resolution;

10. *Decides* that the Multinational Force shall have the authority to take all necessary measures to contribute to the maintenance of security and stability in Iraq in accordance with the letters annexed to this Resolution expressing, *inter alia*, the Iraqi request for the continued presence of the Multinational Force and setting out its tasks, including by preventing and deterring terrorism, so that, *inter alia*, the United Nations can fulfil its role in assisting the Iraqi people as outlined in paragraph 7 above and the Iraqi people can implement freely and without intimidation the timetable and programme for the political process and benefit from reconstruction and

rehabilitation activities;

..."

6. The transfer of authority to the Iraqi interim government

19. On 28 June 2004 full authority was transferred from the CPA to the Iraqi interim government and the CPA ceased to exist. Subsequently, the Multinational Force, including the British forces forming part of it, remained in Iraq pursuant to requests by the Iraqi government and authorisations from the United Nations Security Council.

B. United Kingdom armed forces in Iraq from May 2003 to June 2004

20. During this period, the Coalition Forces consisted of six divisions that were under the overall command of US generals. Four were US divisions and two were multinational. Each division was given responsibility for a particular geographical area of Iraq. The United Kingdom was given command of the Multinational Division (South-East), which comprised the provinces of Basra, Maysan, Thi Qar and Al-Muthanna, an area of 96,000 square kilometres with a population of 4.6 million. There were 14,500 Coalition troops, including 8,150 United Kingdom troops, stationed in the Multinational Division (South-East). The main theatre for operations by United Kingdom forces in the Multinational Division (South-East) were the Basra and Maysan provinces, with a total population of about 2.75 million people. Just over 8,000 British troops were deployed there, of whom just over 5,000 had operational responsibilities.

21. From 1 May 2003 onwards British forces in Iraq carried out two main functions. The first was to maintain security in the Multinational Division (South-East) area, in particular in the Basra and Maysan provinces. The principal security task was the effort to re-establish the Iraqi security forces, including the Iraqi police. Other tasks included patrols, arrests, anti-terrorist operations, policing of civil demonstrations, protection of essential utilities and infrastructure and protecting police stations. The second main function of the British troops was the support of the civil administration in Iraq in a variety of ways, from liaison with the CPA and Governing Council of Iraq and local government, to assisting with the rebuilding of the infrastructure.

22. In the Aitken Report (see paragraph 69 below), prepared on behalf of the Army Chief of General Staff, the post-conflict situation in Iraq was described as follows:

> "The context in which operations have been conducted in Iraq has been exceptionally complex. It is not for this report to comment on the *jus ad bellum* aspects of the operation, nor of the public's opinions of the invasion. It is, however, important to note that the Alliance's post-invasion plans concentrated more on the relief of a humanitarian disaster (which did not, in the event, occur on anything like the scale that had been anticipated), and less on the criminal activity and subsequent insurgency that actually took place. One consequence of that was that we had insufficient troops in theatre to deal effectively with the situation in which we found ourselves. Peace support operations require significantly larger numbers of troops to impose law and order than are required for prosecuting a war: ours were very thinly spread on the ground. In his investigation (in April 2005) of the Breadbasket incident [alleged abuse of Iraqis detained on suspicion of looting humanitarian aid stores], Brigadier Carter described conditions in Iraq thus:
>
> > '... May 2003, some four weeks or so after British forces had started to begin the transition from offensive operations to stabilisation. The situation was fluid. Battlegroups had been given geographic areas of responsibility based generally around their initial tactical objectives. Combat operations had officially ended, and [the] rules of engagement had changed to reflect this, but there was a rising trend of shooting incidents. Although these were principally between Iraqis, seeking to settle old scores or involved in criminal activity, there were early indications that the threat to British soldiers was developing ... The structure of the British forces was changing. Many of the heavier capabilities that had been required for the invasion were now being sent home. Some force elements were required for operations elsewhere, and there was pressure from the UK to downsize quickly to more sustainable numbers ... Local attitudes were also changing. Initially ecstatic with happiness, the formerly downtrodden Shia population in and around Basra had become suspicious, and by the middle of May people were frustrated. Aspirations and expectations were not being met. There was no Iraqi administration or governance. Fuel and potable water were in short supply, electricity was intermittent, and the hospitals were full of wounded from the combat operations phase. Bridges and key routes had been destroyed by Coalition bombing. Law and order had completely collapsed. The Iraqi police service had melted away; the few security guards who remained were old and incapable; and the Iraqi armed forces had been captured, disbanded or deserted. Criminals had been turned out onto the streets and the prisons had been stripped. The judiciary were in hiding. Every government facility had been raided and all loose items had been removed. Insecure buildings had been occupied by squatters. Crime was endemic and in parts of Basra a state of virtual anarchy prevailed. Hijackings, child kidnappings, revenge killings, car theft and burglary were

rife. In a very short space of time wealth was being comprehensively redistributed.'

In this environment, the British army was the sole agent of law and order within its area of operations. When the Association of Chief Police Officers' Lead for International Affairs, Mr Paul Kernaghan, visited Iraq in May 2003, he said that he would not recommend the deployment of civilian police officers to the theatre of operations due to the poor security situation. The last time the army had exercised the powers of an army of occupation was in 1945 – and it had spent many months preparing for that role; in May 2003, the same soldiers who had just fought a high-intensity, conventional war were expected to convert, almost overnight, into the only people capable of providing the agencies of government and humanitarian relief for the people of southern Iraq. Battlegroups (comprising a Lieutenant Colonel and about 500 soldiers) were allocated areas of responsibilities comprising hundreds of square miles; companies (a Major with about 100 men under command) were given whole towns to run. The British invasion plans had wisely limited damaging as much of the physical infrastructure as possible; but with only military personnel available to run that infrastructure, and very limited local staff support, the task placed huge strains on the army.

One of the effects of this lack of civil infrastructure was the conundrum British soldiers faced when dealing with routine crime. Our experience in Northern Ireland, and in peace support operations around the world, has inculcated the clear principle of police primacy when dealing with criminals in operational environments. Soldiers accept that they will encounter crime, and that they will occasionally be required to arrest those criminals; but (despite some experience of this syndrome in Kosovo in 1999) our doctrine and practice had not prepared us for dealing with those criminals when there was no civil police force, no judicial system to deal with offenders, and no prisons to detain them in. Even when a nascent Iraqi police force was re-established in 2003, troops on the ground had little confidence in its ability to deal fairly or reasonably with any criminals handed over to it. In hindsight, we now know that some soldiers acted outside the law in the way they dealt with local criminals. However diligent they were, commanders were unable to be everywhere, and so were physically unable to supervise their troops to the extent that they should; as a result, when those instances did occur, they were less likely to be spotted and prevented."

23. United Kingdom military records show that, as at 30 June 2004, there had been approximately 178 demonstrations and 1,050 violent attacks against Coalition Forces in the Multinational Division (South-East) since 1 May 2003. The violent attacks consisted of 5 anti-aircraft attacks, 12 grenade attacks, 101 attacks using improvised explosive devices, 52 attempted attacks using improvised explosive devices, 145 mortar attacks, 147 rocket-propelled grenade attacks, 535 shootings and 53 others. The same records show that, between May 2003 and March 2004, 49 Iraqis were known to have been killed in incidents in which British troops used force.

C. The rules of engagement

24. The use of force by British troops during operations is covered by the appropriate rules of engagement. The rules of engagement governing the use of lethal force by British troops in Iraq during the relevant period were the subject of guidance contained in a card issued to every soldier, known as "Card Alpha". Card Alpha set out the rules of engagement in the following terms:

"CARD A – GUIDANCE FOR OPENING FIRE FOR SERVICE PERSONNEL AUTHORISED TO CARRY ARMS AND AMMUNITION ON DUTY

GENERAL GUIDANCE

1. This guidance does not affect your inherent right to self-defence. However, in all situations you are to use no more force than absolutely necessary.

FIREARMS MUST ONLY BE USED AS A LAST RESORT

2. When guarding property, you must not use lethal force other than for the **protection of human life**.

PROTECTION OF HUMAN LIFE

3. You may only open fire against a person if he/she is committing or about to commit an act **likely to endanger life and there is no other way to prevent the danger**.

CHALLENGING

4. A challenge MUST be given before opening fire unless:

(a) to do this would be to increase the risk of death or grave injury to you or any other persons other than the

(a) to do this would be to increase the risk of death or grave injury to you or any other persons other than the attacker(s);

OR

(b) you or others in the immediate vicinity are under armed attack.

5. You are to challenge by shouting: '**NAVY, ARMY, AIR FORCE, STOP OR I FIRE**' or words to that effect.

OPENING FIRE

6. If you have to open fire you are to:

(a) fire only aimed shots;

AND

(b) fire no more rounds than are necessary;

AND

(c) take all reasonable precautions not to injure anyone other than your target."

D. Investigations into Iraqi civilian deaths involving British soldiers

1. The decision to refer an incident for investigation by the Royal Military Police

25. On 21 June 2003 Brigadier Moore (Commander of the 19 Mechanised Brigade in Iraq from June to November 2003) issued a formal policy on the investigation of shooting incidents. This policy provided that all shooting incidents were to be reported and the Divisional Provost Marshal was to be informed. Non-commissioned officers from the Royal Military Police were then to evaluate the incident and decide whether it fell within the rules of engagement. If it was decided that the incident did come within the rules of engagement, statements were to be recorded and a completed bulletin submitted through the chain of command. If the incident appeared to fall outside the rules of engagement and involved death or serious injury, the investigation was to be handed to the Special Investigation Branch of the Royal Military Police (see paragraph 28 below) by the Divisional Provost Marshal at the earliest opportunity.

26. However, Brigadier Moore decided that from 28 July 2003 this policy should be revised. The new policy required that all such incidents should be reported immediately by the soldier involved to the Multinational Division (South-East) by means of a "serious incident report". There would then be an investigation into the incident by the Company Commander or the soldier's Commanding Officer. In his evidence to the domestic courts, Brigadier Moore explained that:

> "The form of an investigation into an incident would vary according to the security situation on the ground and the circumstances of the individual case. Generally, it would involve the Company Commander or Commanding Officer taking statements from the members of the patrol involved, and reviewing radio logs. It might also include taking photographs of the scene. Sometimes there would be further investigation through a meeting with the family/tribe of the person killed. Investigations at unit-level, however, would not include a full forensic examination. Within the Brigade, we had no forensic capability."

If the Commanding Officer was satisfied, on the basis of the information available to him, that the soldier had acted lawfully and within the rules of engagement, there was no requirement to initiate an investigation by the Special Investigation Branch. The Commanding Officer would record his decision in writing to Brigadier Moore. If the Commanding Officer was not so satisfied, or if he had insufficient information to arrive at a decision, he was required to initiate a Special Investigation Branch investigation.

27. Between January and April 2004 there was a further reconsideration of this policy, prompted by the fact that the environment had become less hostile and also by the considerable media and parliamentary interest in incidents involving United Kingdom forces in which Iraqis had died. On 24 April 2004 a new policy was adopted by the Commander of the Multinational Division (South-East), requiring all shooting incidents involving United Kingdom forces which resulted in a civilian being killed or injured to be investigated by the Special Investigation Branch. In exceptional cases, the Brigade Commander could decide that an investigation was not

In exceptional cases, the Brigade Commander could decide that an investigation was not necessary. Any such decision had to be notified to the Commander of the Multinational Division (South-East) in writing.

2. Investigation by the Royal Military Police (Special Investigation Branch)

28. The Royal Military Police form part of the army and deploy with the army on operations abroad, but have a separate chain of command. Military police officers report to the Provost Marshal, who reports to the Adjutant General. Within the Royal Military Police, the Special Investigation Branch is responsible for the investigation of serious crimes committed by members of the British forces while on service, incidents involving contact between the military and civilians and any special investigations tasked to it, including incidents involving civilian deaths caused by British soldiers. To secure their practical independence on operations, the Special Investigation Branch deploy as entirely discrete units and are subject to their own chain of command, headed by provost officers who are deployed on operations for this purpose.

29. Investigations into Iraqi civilian deaths involving British soldiers were triggered either by the Special Investigation Branch being asked to investigate by the Commanding Officer of the units concerned or by the Special Investigation Branch of its own initiative, when it became aware of an incident by other means. However, the latter type of investigation could be terminated if the Special Investigation Branch was instructed to stop by the Provost Marshal or the Commanding Officer of the unit involved.

30. Special Investigation Branch investigations in Iraq were hampered by a number of difficulties, such as security problems, lack of interpreters, cultural considerations (for example, the Islamic practice requiring a body to be buried within twenty-four hours and left undisturbed for forty days), the lack of pathologists and post-mortem facilities, the lack of records, problems with logistics, the climate and general working conditions. The Aitken Report (see paragraph 69 below) summarised the position as follows:

> "It was not only the combat troops who were overstretched in these circumstances. The current military criminal justice system is relevant, independent, and fit for purpose; but even the most effective criminal justice system will struggle to investigate, advise on and prosecute cases where the civil infrastructure is effectively absent. And so, in the immediate aftermath of the ground war, the Service Police faced particular challenges in gathering evidence of a quality that would meet the very high standards required under English law. National records – usually an integral reference point for criminal investigations – were largely absent; a different understanding of the law between Iraqi people and British police added to an atmosphere of hostility and suspicion; and the army was facing an increasingly dangerous operational environment – indeed, on 24 June 2003, six members of the Royal Military Police were killed in Al Amarah. Local customs similarly hampered the execution of British standards of justice: in the case of Nadhem Abdullah, for instance, the family of the deceased refused to hand over the body for forensic examination – significantly reducing the quality of evidence surrounding his death."

The Aitken Report also referred to the problems caused to the Special Investigation Branch, when attempting to investigate serious allegations of abuse, by the sense of loyalty to fellow soldiers which could lead to a lack of cooperation from army personnel and to what the judge in the court martial concerning the killing of the sixth applicant's son had described as a "wall of silence" from some of the military witnesses called to give evidence.

31. On conclusion of a Special Investigation Branch investigation, the Special Investigation Branch officer would report in writing to the Commanding Officer of the unit involved. Such a report would include a covering letter and a summary of the evidence, together with copies of any documentary evidence relevant to the investigation in the form of statements from witnesses and investigators. The report would not contain any decision as to the facts or conclusions as to what had happened. It was then for the Commanding Officer to decide whether or not to refer the case to the Army Prosecuting Authority for possible trial by court martial.

32. The Aitken Report, dated 25 January 2008 (see paragraph 69 below), commented on the prosecution of armed forces personnel in connection with the death of Iraqi civilians, as follows:

> "Four cases involving Iraqi deaths as a result of deliberate abuse have been investigated, and subsequently referred to the Army Prosecuting Authority (APA) on the basis there was a prima facie case that the victims had been killed unlawfully by British troops. The APA preferred charges on three of these cases on the basis that it considered there was a realistic prospect of conviction, and that trial was in the public and service interest; and yet not one conviction for murder or manslaughter has been recorded.
>
> The army's position is straightforward on the issue of prosecution. Legal advice is available for commanding officers and higher authorities to assist with decisions on referring appropriate cases to the APA. The Director Army Legal Services (DALS), who is responsible to the Adjutant General for the provision of legal services to

Army Legal Services (DALS), who is responsible to the Adjutant General for the provision of legal services to the army, is additionally appointed by the Queen as the APA. In that capacity, he has responsibility for decisions on whether to direct trial for all cases referred by the military chain of command, and for the prosecution of all cases tried before courts martial, the Standing Civilian Court and the Summary Appeal Court and for appeals before the Courts-Martial Appeal Court and the House of Lords. DALS delegates these functions to ALS [(Army Legal Services)] officers appointed as prosecutors in the APA, and Brigadier Prosecutions has day-to-day responsibility for the APA. The APA is under the general superintendence of the Attorney General and is, rightly, independent of the army chain of command: the APA alone decides whether to direct court-martial trial and the appropriate charges, and neither the army chain of command, nor ministers, officials nor anyone else can make those decisions. However complex the situation in which it finds itself, the army must operate within the law at all times; once the APA has made its decision (based on the evidence and the law), the army has to accept that the consequences of prosecuting particular individuals or of particular charges may have a negative impact on its reputation.

The absence of a single conviction for murder or manslaughter as a result of deliberate abuse in Iraq may appear worrying, but it is explicable. Evidence has to be gathered (and, as already mentioned, this was not an easy process); that evidence has to be presented in court; and defendants are presumed innocent unless the prosecution can prove its case beyond reasonable doubt. That is a stiff test – no different to the one that applies in our civilian courts. In the broader context, the outcome from prosecutions brought to court martial by the APA is almost exactly comparable with the equivalent civilian courts: for example, as at the end of 2006, the conviction rates after trial in the court-martial system stood at 12% as compared with 13% in the Crown Courts. It is inevitable that some prosecutions will fail; but this does not mean that they should not have been brought in the first place. It is the courts, after all, that determine guilt, not the prosecutors. Indeed, the fact that only a small number of all the 200-odd cases investigated by Service Police in Iraq resulted in prosecution could be interpreted as both a positive and a negative indicator: positive, in that the evidence and the context did not support the preferring of criminal charges; but negative, in that we know that the Service Police were hugely hampered, in some cases, in their ability to collect evidence of a high enough standard for charges to be preferred or for cases to be successfully prosecuted.

It is important to note that none of this implies any fundamental flaws in the effectiveness of the key elements of the military criminal justice system. Both the Special Investigation Branch of the Royal Military Police (RMP(SIB)) and the APA were independently inspected during 2007. The police inspection reported that '... Her Majesty's Inspectorate of Constabulary assess the RMP(SIB) as having the capability and capacity to run a competent level 3 (serious criminal) reactive investigation'; and the inspection of the APA in February and March 2007 by Her Majesty's Crown Prosecution Service Inspectorate concluded that: '... the APA undertakes its responsibilities in a thorough and professional manner, often in difficult circumstances', adding that 95.7% of decisions to proceed to trial were correct on evidential grounds, and 100% of decisions to proceed to trial were properly based on public or service interest grounds."

E. The deaths of the applicants' relatives

33. The following accounts are based on the witness statements of the applicants and the British soldiers involved in each incident. These statements were also submitted to the domestic courts and, as regards all but the fifth applicant, summarised in their judgments (particularly the judgment of the Divisional Court).

1. The first applicant

34. The first applicant is the brother of Hazim Jum'aa Gatteh Al-Skeini ("Hazim Al-Skeini"), who was 23 years old at the time of his death. Hazim Al-Skeini was one of two Iraqis from the Beini Skein tribe who were shot dead in the Al-Majidiyah area of Basra just before midnight on 4 August 2003 by Sergeant A., the Commander of a British patrol.

35. In his witness statement, the first applicant explained that, during the evening in question, various members of his family had been gathering at a house in Al-Majidiyah for a funeral ceremony. In Iraq it is customary for guns to be discharged at a funeral. The first applicant stated that he was engaged in receiving guests at the house, as they arrived for the ceremony, and saw his brother fired upon by British soldiers as he was walking along the street towards the house. According to the first applicant, his brother was unarmed and only about ten metres away from the soldiers when he was shot and killed. Another man with him was also killed. He had no idea why the soldiers opened fire.

36. According to the British account of the incident, the patrol, approaching on foot and on a very dark night, heard heavy gunfire from a number of different points in Al-Majidiyah. As the patrol got deeper into the village they came upon two Iraqi men in the street. One was about five metres from Sergeant A., who was leading the patrol. Sergeant A. saw that he was armed and pointing the gun in his direction. In the dark, it was impossible to tell the position of the second

man. Believing that his life and those of the other soldiers in the patrol were at immediate risk, Sergeant A. opened fire on the two men without giving any verbal warning.

37. The following day, Sergeant A. produced a written statement describing the incident. This was passed to the Commanding Officer of his battalion, Colonel G., who took the view that the incident fell within the rules of engagement and duly wrote a report to that effect. Colonel G. sent the report to the Brigade, where it was considered by Brigadier Moore. Brigadier Moore queried whether the other man had been pointing his gun at the patrol. Colonel G. wrote a further report that dealt with this query to Brigadier Moore's satisfaction. The original report was not retained in the Brigade records. Having considered Colonel G.'s further report, as did his Deputy Chief of Staff and his legal adviser, Brigadier Moore was satisfied that the actions of Sergeant A. fell within the rules of engagement and so he did not order any further investigation.

38. On 11, 13 and 16 August 2003 Colonel G. met with members of the dead men's tribe. He explained why Sergeant A. had opened fire and gave the tribe a charitable donation of 2,500 United States dollars (USD) from the British Army Goodwill Payment Committee, together with a letter explaining the circumstances of the deaths and acknowledging that the deceased had not intended to attack anyone.

2. The second applicant

39. The second applicant is the widow of Muhammad Salim, who was shot and fatally wounded by Sergeant C. shortly after midnight on 6 November 2003.

40. The second applicant was not present when her husband was shot and her evidence was based on what she was told by those who were present. She stated that on 5 November 2003, during Ramadan, Muhammad Salim went to visit his brother-in-law at his home in Basra. At about 11.30 p.m. British soldiers raided the house. They broke down the front door. One of the British soldiers came face-to-face with the second applicant's husband in the hall of the house and fired a shot at him, hitting him in the stomach. The British soldiers took him to the Czech military hospital, where he died on 7 November 2003.

41. According to the British account of the incident, the patrol had received information from an acquaintance of one of their interpreters that a group of men armed with long-barrelled weapons, grenades and rocket- propelled grenades had been seen entering the house. The order was given for a quick search-and-arrest operation. After the patrol failed to gain entry by knocking, the door was broken down. Sergeant C. entered the house through the front door with two other soldiers and cleared the first room. As he entered the second room, he heard automatic gunfire from within the house. When Sergeant C. moved forward into the next room by the bottom of the stairs, two men armed with long-barrelled weapons rushed down the stairs towards him. There was no time to give a verbal warning. Sergeant C. believed that his life was in immediate danger. He fired one shot at the leading man, the second applicant's husband, and hit him in the stomach. He then trained his weapon on the second man who dropped his gun. The applicant's family subsequently informed the patrol that they were lawyers and were in dispute with another family of lawyers over the ownership of office premises, which had led to their being subjected to two armed attacks which they had reported to the police, one three days before and one only thirty minutes before the patrol's forced entry.

42. On 6 November 2003 the Company Commander produced a report of the incident. He concluded that the patrol had deliberately been provided with false intelligence by the other side in the feud. Having considered the report and spoken to the Company Commander, Colonel G. came to the conclusion that the incident fell within the rules of engagement and did not require any further Special Investigation Branch investigation. He therefore produced a report to that effect the same day and forwarded it to the Brigade, where it was considered by Brigadier General Jones. Brigadier Jones discussed the matter with his Deputy Chief of Staff and his legal adviser. He also discussed the case with his political adviser. As a result, Brigadier Jones also concluded that it was a straightforward case that fell within the rules of engagement and duly issued a report to that effect. The applicant, who had three young children and an elderly mother-in-law to support, received USD 2,000 from the British Army Goodwill Payment Committee, together with a letter setting out the circumstances of the killing.

3. The third applicant

43. The third applicant is the widower of Hannan Mahaibas Sadde Shmailawi, who was shot

and fatally wounded on 10 November 2003 at the Institute of Education in the Al-Maqaal area of Basra, where the third applicant worked as a night porter and lived with his wife and family.

44. According to the third applicant's witness statement, at about 8 p.m. on the evening in question, he and his family were sitting round the dinner table when there was a sudden burst of machine-gunfire from outside the building. Bullets struck his wife in the head and ankles and one of his children on the arm. The applicant's wife and child were taken to hospital, where his child recovered but his wife died.

45. According to the British account of the incident, the third applicant's wife was shot during a firefight between a British patrol and a number of unknown gunmen. When the area was illuminated by parachute flares, at least three men with long-barrelled weapons were seen in open ground, two of whom were firing directly at the British soldiers. One of the gunmen was shot dead during this exchange of fire with the patrol. After about seven to ten minutes, the firing ceased and armed people were seen running away. A woman (the third applicant's wife) with a head injury and a child with an arm injury were found when the buildings were searched. Both were taken to hospital.

46. The following morning, the Company Commander produced a report concerning the incident, together with statements from the soldiers involved. After he had considered the report and statements, Colonel G. came to the conclusion that the incident fell within the rules of engagement and did not require any further Special Investigation Branch investigation. He duly produced a report to that effect, which he then forwarded to the Brigade. The report was considered by Brigadier Jones, who also discussed the matter with his Deputy Chief of Staff, his legal adviser and Colonel G. As a result, Brigadier Jones came to the conclusion that the incident fell within the rules of engagement and required no further investigation.

4. The fourth applicant

47. The fourth applicant is the brother of Waleed Fayay Muzban, aged 43, who was shot and fatally injured on the night of 24 August 2003 by Lance Corporal S. in the Al-Maqaal area of Basra.

48. The fourth applicant was not present when his brother was shot, but he claims that the incident was witnessed by his neighbours. In his witness statement he stated that his understanding was that his brother was returning home from work at about 8.30 p.m. on the evening in question. He was driving a minibus along a street called Souq Hitteen, near where he and the fourth applicant lived. For no apparent reason, according to the applicant's statement, the minibus "came under a barrage of bullets", as a result of which Waleed was mortally wounded in the chest and stomach.

49. Lance Corporal S. was a member of a patrol carrying out a check around the perimeter of a Coalition military base (Fort Apache), where three Royal Military Police officers had been killed by gunfire from a vehicle the previous day. According to the British soldier's account of the incident, Lance Corporal S. became suspicious of a minibus, with curtains over its windows, that was being driven towards the patrol at a slow speed with its headlights dipped. When the vehicle was signalled to stop, it appeared to be trying to evade the soldiers so Lance Corporal S. pointed his weapon at the driver and ordered him to stop. The vehicle then stopped and Lance Corporal S. approached the driver's door and greeted the driver (the fourth applicant's brother). The driver reacted in an aggressive manner and appeared to be shouting over his shoulder to people in the curtained-off area in the back of the vehicle. When Lance Corporal S. tried to look into the back of the vehicle, the driver pushed him away by punching him in the chest. The driver then shouted into the back of the vehicle and made a grab for Lance Corporal S.'s weapon. Lance Corporal S. had to use force to pull himself free. The driver then accelerated away, swerving in the direction of various other members of the patrol as he did so. Lance Corporal S. fired at the vehicle's tyres and it came to a halt about 100 metres from the patrol. The driver turned and again shouted into the rear of the vehicle. He appeared to be reaching for a weapon. Lance Corporal S. believed that his team was about to be fired on by the driver and others in the vehicle. He therefore fired about five aimed shots. As the vehicle sped off, Lance Corporal S. fired another two shots at the rear of the vehicle. After a short interval, the vehicle screeched to a halt. The driver got out and shouted at the British soldiers. He was ordered to lie on the ground. The patrol then approached the vehicle to check for other armed men. The vehicle proved to be empty. The driver was found to have three bullet wounds in his back and hip. He was given first aid and then taken to the Czech military hospital where he died later that day or the following

day.

50. The Special Investigation Branch commenced an investigation on 29 August 2003. The investigators recovered fragments of bullets, empty bullet cases and took digital photographs of the scene. The vehicle was recovered and transported to the United Kingdom. The deceased's body had been returned to the family for burial and no post mortem had been carried out, so the Special Investigation Branch took statements from the two Iraqi surgeons who had operated on him. A meeting was arranged with the family to seek their consent for an exhumation and post mortem, but this was delayed. Nine military witnesses involved in the incident were interviewed and had statements taken and a further four individuals were interviewed but found to have no evidence to offer. Lance Corporal S. was not, however, questioned. Since he was suspected by the Special Investigation Branch of having acted contrary to the rules of engagement, it was Special Investigation Branch practice not to interview him until there was enough evidence to charge him. A forensic examination was carried out at the scene on 6 September 2003.

51. On 29 August 2003 Colonel G. sent his initial report concerning the incident to Brigadier Moore. In it he stated that he was satisfied that Lance Corporal S. believed that he was acting lawfully within the rules of engagement. However, Colonel G. went on to express the view that it was a complex case that would benefit from a Special Investigation Branch investigation. After Brigadier Moore had considered Colonel G.'s report, discussed the matter with his Deputy Chief of Staff and taken legal advice, it was decided that the matter could be resolved with a unit-level investigation, subject to a number of queries being satisfactorily answered. As a result, Colonel G. produced a further report dated 12 September 2003, in which he dealt with the various queries and concluded that a Special Investigation Branch investigation was no longer required. After discussing the matter again with his Deputy Chief of Staff and having taken further legal advice, Brigadier Moore concluded that the case fell within the rules of engagement.

52. By this stage, Brigadier Moore had been informed that the Special Investigation Branch had commenced an investigation into the incident. On 17 September 2003 Colonel G. wrote to the Special Investigation Branch asking them to terminate the investigation. The same request was made by Brigadier Moore through his Chief of Staff during a meeting with the Senior Investigating Officer from the Special Investigation Branch. The Special Investigation Branch investigation was terminated on 23 September 2003. The deceased's family received USD 1,400 from the British Army Goodwill Payment Committee and a further USD 3,000 in compensation for the minibus.

53. Following the fourth applicant's application for judicial review (see paragraph 73 below), the case was reviewed by senior investigation officers in the Special Investigation Branch and the decision was taken to reopen the investigation. The investigation was reopened on 7 June 2004 and completed on 3 December 2004, despite difficulties caused by the very dangerous conditions in Iraq at that time.

54. On completing the investigation, the Special Investigation Branch reported to the soldier's Commanding Officer, who referred the case to the Army Prosecuting Authority in February 2005. The Army Prosecuting Authority decided that a formal preliminary examination of the witnesses should be held, in order to clarify any uncertainties and ambiguities in the evidence. Depositions were taken by the Army Prosecuting Authority from the soldiers who had witnessed the shooting, and who were the only known witnesses. Advice was obtained from an independent senior counsel, who advised that there was no realistic prospect of conviction, since there was no realistic prospect of establishing that Lance Corporal S. had not fired in self-defence. The file was sent to the Attorney General, who decided not to exercise his jurisdiction to order a criminal prosecution.

5. The fifth applicant

55. The fifth applicant is the father of Ahmed Jabbar Kareem Ali, who died on 8 May 2003, aged 15.

56. According to the statements made by the fifth applicant for the purpose of United Kingdom court proceedings, on 8 May 2003 his son did not return home at 1.30 p.m. as expected. The fifth applicant went to look for him at Al-Saad Square, where he was told that British soldiers had arrested some Iraqi youths earlier in the day. The applicant continued to search for his son and was contacted the following morning by A., another young Iraqi, who told the applicant that he, the applicant's son and two others had been arrested by British soldiers the previous day, beaten up and forced into the waters of the Shatt Al-Arab. Later, on 9 May

2003, the applicant's brother informed "the British police" about the incident and was requested to surrender Ahmed's identity card. Having spent several days waiting and searching, the applicant found his son's body in the water on 10 May 2003.

57. The applicant immediately took his son's body to "the British police station", where he was told to take the body to the local hospital. The Iraqi doctor on duty told the applicant that he was not qualified to carry out a post mortem and that there were no pathologists available. The applicant decided to bury his son, since in accordance with Islamic practice burial should take place within twenty-four hours of death.

58. About ten to fifteen days after his son's funeral, the applicant returned to "the British police station" to ask for an investigation, but he was informed that it was not the business of "the British police" to deal with such matters. He returned to the "police station" some days later, and was informed that the Royal Military Police wished to contact him and that he should go to the presidential palace. The following day, the applicant met with Special Investigation Branch officers at the presidential palace and was informed that an investigation would be commenced.

59. The Special Investigation Branch interviewed A. and took a statement from him. They took statements from the applicant and other family members. At least a month after the incident, the investigators went to Al-Saad Square and retrieved clothing belonging to the applicant's son and to the other young men who had been arrested at the same time. At the end of the forty-day mourning period, the applicant consented to his son's body being exhumed for post-mortem examination, but it was not possible at that point to establish either whether Ahmed had been beaten prior to death or what had been the cause of death. The applicant contends that he was never given an explanation as to the post-mortem findings and that he was not kept fully informed of the progress of the investigation in general, since many of the documents he was given were in English or had been badly translated into Arabic.

60. The applicant claims that eighteen months elapsed after the exhumation of his son's body during which time he had no contact with the investigators. In August 2005 he was informed that four soldiers had been charged with manslaughter and that a trial would take place in England. The court martial was held between September 2005 and May 2006. By that time, three of the seven soldiers who had been accused of his homicide had left the army, and a further two were absent without leave. It was the prosecution case that the soldiers had assisted Iraqi police officers to arrest the four youths on suspicion of looting and that they had driven them to the river and forced them in at gunpoint "to teach them a lesson". The applicant and A. gave evidence to the court martial in April 2006. The applicant found the trial process confusing and intimidating and he was left with the impression that the court was biased in favour of the accused. A. gave evidence that the applicant's son had appeared to be in distress in the water, but that the soldiers had driven away without helping him. However, he was not able to identify the defendants as the soldiers involved. The defendants denied any responsibility for the death and were acquitted because A.'s evidence was found to be inconsistent and unreliable.

61. The applicant's son's case was one of the six cases investigated in the Aitken Report (see paragraph 69 below). Under the heading "Learning lessons from discipline cases" the report stated:

> "... we know that two initial police reports were produced in May 2003 relating to allegations that, on two separate occasions but within the space of just over a fortnight, Iraqis had drowned in the Shat' al-Arab at the hands of British soldiers. That one of those cases did not subsequently proceed to trial is irrelevant: at the time, an ostensibly unusual event was alleged to have occurred twice in a short space of time. With all their other duties, the commanders on the ground cannot reasonably be blamed for failing to identify what may or may not have been a trend; but a more immediate, effective system for referring that sort of information to others with the capacity to analyse it might have identified such a trend. In fact, the evidence suggests that these were two isolated incidents; but had they been a symptom of a more fundamental failing, they might have been overlooked. By comparison, if there had been two reports of a new weapon being used by insurgents to attack British armoured vehicles within a fortnight, it is certain that the lessons learned process would have identified its significance, determined the counter-measures needed to combat it, and quickly disseminated new procedures to mitigate the risk. The fact that this process does not apply to disciplinary matters is only partly explained by the need for confidentiality and the preservation of evidence; but it is a failure in the process that could be fairly easily rectified without compromising the fundamental principle of innocence until proven guilty."

The report continued, under the heading "Delay":

> "The amount of time taken to resolve some of the cases with which this report is concerned has been unacceptable. ... The court martial in connection with the death of Ahmed Jabbar Kareem did not convene until September 2005, twenty-eight months after he died; by that time, three of the seven soldiers who had been accused of his murder had left the army, and a further two were absent without leave.

> In most cases, it is inappropriate for the army to take administrative action against any officer or soldier until the disciplinary process has been completed, because of the risk of prejudicing the trial. When that disciplinary process takes as long as it has taken in most of these cases, then the impact of any subsequent administrative sanctions is significantly reduced – indeed, such sanctions are likely to be counterproductive. Moreover, the longer the disciplinary process takes, the less likely it is that the chain of command will take proactive measures to rectify the matters that contributed to the commission of the crimes in the first place."

62. The fifth applicant brought civil proceedings against the Ministry of Defence for damages in respect of his son's death. The claim was settled without going to hearing, by the payment of 115,000 pounds sterling (GBP) on 15 December 2008. In addition, on 20 February 2009 Major General Cubbitt wrote to the fifth applicant and formally apologised on behalf of the British army for its role in his son's death.

6. The sixth applicant

63. The sixth applicant is a Colonel in the Basra police force. His son, Baha Mousa, was aged 26 when he died while in the custody of the British army, three days after having been arrested by soldiers on 14 September 2003.

64. According to the sixth applicant, on the night of 13 to 14 September 2003 his son had been working as a receptionist at the Ibn Al-Haitham Hotel in Basra. Early in the morning of 14 September, the applicant went to the hotel to pick his son up from work. On his arrival he noticed that a British unit had surrounded the hotel. The applicant's son and six other hotel employees were lying on the floor of the hotel lobby with their hands behind their heads. The applicant expressed his concern to the lieutenant in charge of the operation, who reassured him that it was a routine investigation that would be over in a couple of hours. On the third day after his son had been detained, the sixth applicant was visited by a Royal Military Police unit. He was told that his son had been killed in custody at a British military base in Basra. He was asked to identify the corpse. The applicant's son's body and face were covered in blood and bruises; his nose was broken and part of the skin of his face had been torn away.

65. One of the other hotel employees who was arrested on 14 September 2003 stated in a witness statement prepared for the United Kingdom domestic court proceedings that, once the prisoners had arrived at the base, the Iraqi detainees were hooded, forced to maintain stress positions, denied food and water and kicked and beaten. During the detention, Baha Mousa was taken into another room, where he could be heard screaming and moaning.

66. Late on 15 September 2003 Brigadier Moore, who had taken part in the operation in which the hotel employees had been arrested, was informed that Baha Mousa was dead and that other detainees had been ill-treated. The Special Investigation Branch was immediately called in to investigate the death. Since local hospitals were on strike, a pathologist was flown in from the United Kingdom. Baha Mousa was found to have ninety-three identifiable injuries on his body and to have died of asphyxiation. Eight other Iraqis had also been inhumanely treated, with two requiring hospital treatment. The investigation was concluded in early April 2004 and the report distributed to the unit's chain of command.

67. On 14 December 2004 the Divisional Court held that the inquiry into the applicant's son's death had not been effective (see paragraph 77 below). On 21 December 2005 the Court of Appeal decided to remit the question to the Divisional Court since there had been further developments (see paragraph 81 below).

68. On 19 July 2005 seven British soldiers were charged with criminal offences in connection with Baha Mousa's death. On 19 September 2006, at the start of the court martial, one of the soldiers pleaded guilty to the war crime of inhumane treatment but not guilty to manslaughter. On 14 February 2007 charges were dropped against four of the seven soldiers and on 13 March 2007 the other two soldiers were acquitted. On 30 April 2007 the soldier convicted of inhumane treatment was sentenced to one year's imprisonment and dismissal from the army.

69. On 25 January 2008 the Ministry of Defence published a report written by Brigadier Robert Aitken concerning six cases of alleged deliberate abuse and killing of Iraqi civilians, including the deaths of the fifth and sixth applicants' sons ("the Aitken Report").

70. The applicant brought civil proceedings against the Ministry of Defence, which concluded in July 2008 by the formal and public acknowledgement of liability and the payment of GBP 575,000 in compensation.

71. In a written statement given in Parliament on 14 May 2008, the Secretary of State for

Defence announced that there would be a public inquiry into the death of Baha Mousa. The inquiry is chaired by a retired Court of Appeal judge, with the following terms of reference:

> "To investigate and report on the circumstances surrounding the death of Baha Mousa and the treatment of those detained with him, taking account of the investigations which have already taken place, in particular where responsibility lay for approving the practice of conditioning detainees by any members of the 1st Battalion, The Queen's Lancashire Regiment in Iraq in 2003, and to make recommendations."

At the time of adoption of the present judgment, the inquiry had concluded the oral hearings but had not yet delivered its report.

F. The domestic proceedings under the Human Rights Act

1. The Divisional Court

72. On 26 March 2004 the Secretary of State for Defence decided, in connection with the deaths of thirteen Iraqi civilians including the relatives of the six applicants, (1) not to conduct independent inquiries into the deaths; (2) not to accept liability for the deaths; and (3) not to pay just satisfaction.

73. The thirteen claimants applied for judicial review of these decisions, seeking declarations that both the procedural and the substantive obligations of Article 2 (and, in the case of the sixth applicant, Article 3) of the Convention had been violated as a result of the deaths and the Secretary of State's refusal to order any investigation. On 11 May 2004 a judge of the Divisional Court directed that six test cases would proceed to hearing (including the cases of the first, second, third, fourth and sixth applicants) and that the other seven cases (including that of the fifth applicant) would be stayed pending the resolution of the preliminary issues.

74. On 14 December 2004 the Divisional Court rejected the claims of the first four applicants but accepted the claim of the sixth applicant ([2004] EWHC 2911 (Admin)). Having reviewed this Court's case-law, in particular *Banković and Others v. Belgium and Others* ((dec.) [GC], no. 52207/99, ECHR 2001-XII), it held that, essentially, jurisdiction under Article 1 of the Convention was territorial, although there were exceptions. One exception applied where a State Party had effective control of an area outside its own territory. This basis of jurisdiction applied only where the territory of one Contracting State was controlled by another Contracting State, since the Convention operated essentially within its own regional sphere and permitted no vacuum within that space. This basis of jurisdiction could not, therefore, apply in Iraq.

75. There was an additional exception, which arose from the exercise of authority by a Contracting State's agents anywhere in the world, but this was limited to specific cases recognised by international law and identified piecemeal in the Court's case-law. No general rationale in respect of this group of exceptions was discernable from the Court's case-law. However, the instances recognised so far arose out of the exercise of State authority in or from a location which had a discrete quasi-territorial quality, or where the State agent's presence in the foreign State was consented to by that State and protected by international law, such as embassies, consulates, vessels and aircraft registered in the respondent State. A British military prison, operating in Iraq with the consent of the Iraqi sovereign authorities and containing arrested suspects, could be covered by this narrow exception. It was arguable that *Öcalan v. Turkey* (no. 46221/99, 12 March 2003), also fell into this category, since the applicant was arrested in a Turkish aircraft and taken immediately to Turkey. However, the Divisional Court did not consider that the Chamber judgment in *Öcalan* should be treated as "illuminating", since Turkey had not raised any objection based on lack of jurisdiction at the admissibility stage.

76. It followed that the deaths as a result of military operations in the field, such as those complained of by the first four applicants, did not fall within the United Kingdom's jurisdiction under Article 1 of the Convention, but that the death of the sixth applicant's son, in a British military prison, did. The Divisional Court further held that the scope of the Human Rights Act 1998 was identical to that of the Convention for these purposes.

77. The Divisional Court found that there had been a breach of the investigative duty under Articles 2 and 3 of the Convention in respect of the sixth applicant's son since, by July 2004, some ten months after the killing, the results of the investigation were unknown and inconclusive. The judge commented that:

> "329. ... Although there has been evidence of a rather general nature about the difficulties of conducting investigations in Iraq at that time – about basic security problems involved in going to Iraqi homes to interview

investigations in Iraq at that time – about basic security problems involved in going to Iraqi homes to interview people, about lack of interpreters, cultural differences, logistic problems, lack of records, and so forth – without any further understanding of the outcome of the [Special Investigation Branch's] report, it is impossible to understand what, if any, relevance any of this has to a death which occurred not in the highways or byways of Iraq, but in a military prison under the control of British forces. ...

330. Although Captain Logan says that identity parades were logistically very difficult, detainees were moved to a different location, and some military witnesses had returned to the UK, she also says that these problems only delayed the process but did not prevent it taking place 'satisfactorily' ... There is nothing else before us to explain the dilatoriness of the investigative process: which might possibly be compared with the progress, and open public scrutiny, which we have noted seems to have been achieved with other investigations arising out of possible offences in prisons under the control of US forces. As for the [Special Investigation Branch's] report itself, on the evidence before us ... that would not contain any decision as to the facts or any conclusions as to what has or might have happened.

331. In these circumstances we cannot accept [counsel for the Government's] submission that the investigation has been adequate in terms of the procedural obligation arising out of Article 2 of the Convention. Even if an investigation solely in the hands of the [Special Investigation Branch] might be said to be independent, on the grounds that the [Special Investigation Branch] are hierarchically and practically independent of the military units under investigation, as to which we have doubts in part because the report of the [Special Investigation Branch] is to the unit chain of command itself, it is difficult to say that the investigation which has occurred has been timely, open or effective."

In respect of the other five deaths, the judge considered that, if he were wrong on the jurisdiction issue and the claims did fall within the scope of the Convention, the investigative duty under Article 2 had not been met, for the following reasons:

"337. ... in all these cases, as in the case of Mr Mousa, the United Kingdom authorities were proceeding on the basis that the Convention did not apply. Thus the immediate investigations were in each case conducted, as a matter of policy, by the unit involved: only in case 4, that concerning Mr Waleed Muzban, was there any involvement of the [Special Investigation Branch], and that was stood down, at any rate before being reopened (at some uncertain time) upon a review of the file back in the UK. The investigations were therefore not independent. Nor were they effective, for they essentially consisted only in a comparatively superficial exercise, based on the evidence of the soldiers involved themselves, and even then on a paucity of interviews or witness statements, an exercise which was one-sided and omitted the assistance of forensic evidence such as might have become available from ballistic or medical expertise.

...

339. In connection with these cases, [counsel for the Government's] main submission was that, in extremely difficult situations, both in operational terms in the field and in terms of post-event investigations, the army and the authorities had done their best. He particularly emphasised the following aspects of the evidence. There was no rule of law in Iraq; at the start of the occupation there was no police force at all, and at best the force was totally inadequate, as well as being under constant attack; although the Iraqi courts were functioning, they were subject to intimidation; there was no local civil inquest system or capability; the local communications systems were not functioning; there were no mortuaries, no post-mortem system, no reliable pathologists; the security situation was the worst ever experienced by seasoned soldiers; there was daily fighting between tribal and criminal gangs; the number of troops available were small; and cultural differences exacerbated all these difficulties.

340. We would not discount these difficulties, which cumulatively must have amounted to grave impediments for anyone concerned to conduct investigations as they might have liked to have carried them out. However, irrespective of [counsel for the applicants'] submission, in reliance on the Turkish cases, that security problems provide no excuse for a failure in the Article 2 investigative duty, we would conclude that, on the hypothesis stated, the investigations would still not pass muster. They were not independent; they were one-sided; and the commanders concerned were not trying to do their best according to the dictates of Article 2.

341. That is not to say, however, that, in other circumstances, we would ignore the strategic difficulties of the situation. The Turkish cases are all concerned with deaths within the State Party's own territory. In that context, the Court was entitled to be highly sceptical about the State's own professions of difficulties in an investigative path which it in any event may hardly have chosen to follow. It seems to us that this scepticism cannot be so easily transplanted in the extraterritorial setting. ..."

2. The Court of Appeal

78. The first four applicants appealed against the Divisional Court's finding that their relatives did not fall within the United Kingdom's jurisdiction. The Secretary of State also cross-appealed against the finding in relation to the sixth applicant's son; although he accepted before the Court of Appeal that an Iraqi in the actual custody of British soldiers in a military detention centre in

Iraq was within the United Kingdom's jurisdiction under Article 1 of the Convention, he contended that the Human Rights Act had no extraterritorial effect and that the sixth applicant's claim was not, therefore, enforceable in the national courts.

79. On 21 December 2005 the Court of Appeal dismissed the appeals and the cross-appeal ([2005] EWCA Civ 1609). Having reviewed the Court's case-law on jurisdiction under Article 1 of the Convention, Brooke LJ, who gave the leading judgment, held that a State could exercise extraterritorial jurisdiction when it applied control and authority over a complainant (which he termed "State agent authority", abbreviated to "SAA") and when it held effective control of an area outside its borders ("effective control of an area" or "ECA"), observing as follows:

> "80. I would therefore be more cautious than the Divisional Court in my approach to the *Banković* [*and Others*] judgment. It seems to me that it left open both the ECA and SAA approaches to extraterritorial jurisdiction, while at the same time emphasising (in paragraph 60) that because an SAA approach might constitute a violation of another State's sovereignty (for example, when someone is kidnapped by the agents of a State on the territory of another State without that State's invitation or consent), this route to any recognition that extraterritorial jurisdiction has been exercised within the meaning of an international treaty should be approached with caution."

He considered, *inter alia*, the cases of *Öcalan v. Turkey* ([GC], no. 46221/99, ECHR 2005-IV); *Freda v. Italy* ((dec.), no. 8916/80, Commission decision of 7 October 1980, Decisions and Reports (DR) 21, p. 250); and *Sánchez Ramirez v. France* ((dec.), no. 28780/95, Commission decision of 24 June 1996, DR 86-A, p. 155); and observed that these cases had nothing to do with the principle of public international law relating to activities within aircraft registered with a State flying over the territory of another State. Instead, the findings of jurisdiction in these cases were examples of the "State agent authority" doctrine applying when someone was within the control and authority of agents of a Contracting State, even outside the *espace juridique* of the Council of Europe, and whether or not the host State consented to the exercise of control and authority on its soil. Applying the relevant principles to the facts of the case, he concluded that the sixth applicant's son came within the control and authority of the United Kingdom, and therefore its jurisdiction, from the time he was arrested at the hotel. The relatives of the other claimants had not been under the control and authority of British troops at the time when they were killed, and were not therefore within the United Kingdom's jurisdiction. He concluded in this connection that:

> "110. ... It is essential, in my judgment, to set rules which are readily intelligible. If troops deliberately and effectively restrict someone's liberty he is under their control. This did not happen in any of these five cases."

80. He then examined whether, on the facts, it could be said that British troops were in effective control of Basra City during the period in question, such as to fix the United Kingdom with jurisdiction under the "effective control of an area" doctrine. On this point, Brooke LJ concluded as follows:

> "119. Basra City was in the [Coalition Provisional Authority] regional area called 'CPA South'. During the period of military occupation there was a significant degree of British responsibility and authority in CPA South, although its staff were drawn from five different countries and until the end of July 2003 the regional coordinator was a Dane. Indeed, only one of the four governorate teams in CPA South was headed by a British coordinator. However, although the chain of command for the British military presence in Iraq led ultimately to a US general, the Al-Basra and Maysan provinces were an area of direct British military responsibility. As I have already said ..., the Secretary of State accepts that the UK was an Occupying Power within the meaning of Article 42 of the Hague Regulations ..., at least in those areas of southern Iraq, and particularly Basra City, where British troops exercised sufficient authority for this purpose.
>
> 120. But whatever may have been the position under the Hague Regulations, the question this court has to address is whether British troops were in effective control of Basra City for ECA purposes. The situation in August to November 2003 contrasts starkly with the situations in northern Cyprus and in the Russian-occupied part of Moldova which feature in Strasbourg case-law. In each of those cases part of the territory of a Contracting State was occupied by another Contracting State which had every intention of exercising its control on a long-term basis. The civilian administration of those territories was under the control of the Occupying State, and it deployed sufficient troops to ensure that its control of the area was effective.
>
> 121. [The statement of Brigadier Moore, whose command included the British forces in the Basra area between May and November 2003] tells a very different story. He was not provided with nearly enough troops and other resources to enable his brigade to exercise effective control of Basra City. ... [H]e described how the local police would not uphold the law. If British troops arrested somebody and gave them to the Iraqi police, the police would hand them over to the judiciary, who were themselves intimidated by the local tribes, and the suspected criminals were back on the streets within a day or two. This state of affairs gave the British no confidence in the local criminal justice system. It also diluted their credibility with local people. Although British

confidence in the local criminal justice system. It also diluted their credibility with local people. Although British troops arranged local protection for the judges, this made little difference. The prisons, for their part, were barely functioning.

122. After describing other aspects of the highly volatile situation in which a relatively small number of British military personnel were trying to police a large city as best they could, Brig[adier] Moore said ...:

> 'The combination of terrorist activity, the volatile situation and the ineffectiveness of Iraqi security forces meant that the security situation remained on a knife-edge for much of our tour. Despite our high work rate and best efforts, I felt that at the end of August 2003 we were standing on the edge of an abyss. It was only when subsequent reinforcements arrived ... and we started to receive intelligence from some of the Islamic parties that I started to regain the initiative.'

123. Unlike the Turkish army in northern Cyprus, the British military forces had no control over the civil administration of Iraq. ...

124. In my judgment it is quite impossible to hold that the UK, although an Occupying Power for the purposes of the Hague Regulations and [the] Geneva IV [Convention], was in effective control of Basra City for the purposes of [the European Court's] jurisprudence at the material time. If it had been, it would have been obliged, pursuant to the *Banković* [*and Others*] judgment, to secure to everyone in Basra City the rights and freedoms guaranteed by the [Convention]. One only has to state that proposition to see how utterly unreal it is. The UK possessed no executive, legislative or judicial authority in Basra City, other than the limited authority given to its military forces, and as an Occupying Power it was bound to respect the laws in force in Iraq unless absolutely prevented (see Article 43 of the Hague Regulations ...). It could not be equated with a civil power: it was simply there to maintain security, and to support the civil administration in Iraq in a number of different ways ..."

Sedley LJ observed, in connection with this issue:

"194. On the one hand, it sits ill in the mouth of a State which has helped to displace and dismantle by force another nation's civil authority to plead that, as an Occupying Power, it has so little control that it cannot be responsible for securing the population's basic rights. ... [However,] the fact is that it cannot: the invasion brought in its wake a vacuum of civil authority which British forces were and still are unable to fill. On the evidence before the Court they were, at least between mid-2003 and mid-2004, holding a fragile line against anarchy."

81. The Court of Appeal unanimously concluded that, save for the death of the sixth applicant's son, which fell within the "State agent authority" exception, the United Kingdom did not have jurisdiction under Article 1 of the Convention. It decided that the sixth applicant's claim also fell within the scope of the Human Rights Act 1998. Since the Divisional Court's examination of the case, additional information had emerged about the investigation into the death of the sixth applicant's son, including that court-martial proceedings were pending against a number of soldiers. The Court of Appeal therefore remitted the question whether there had been an adequate investigation to the Divisional Court for reconsideration following the completion of the court-martial proceedings.

82. Despite his conclusion on jurisdiction, Brooke LJ, at the express invitation of the Government, commented on the adequacy of the investigations carried out into the deaths, as follows:

"139. After all, the first two Articles of the [Convention] merely articulate the contemporary concern of the entire European community about the importance that must always be attached to every human life. ... Needless to say, the obligation to comply with these well-established international human rights standards would require, among other things, a far greater investment in the resources available to the Royal Military Police than was available to them in Iraq, and a complete severance of their investigations from the military chain of command.

140. In other words, if international standards are to be observed, the task of investigating incidents in which a human life is taken by British forces must be completely taken away from the military chain of command and vested in the [Royal Military Police]. It contains the requisite independence so long as it is free to decide for itself when to start and when to cease an investigation, and so long as it reports in the first instance to the [Army Prosecuting Authority] and not to the military chain of command. It must then conduct an effective investigation, and it will be helped in this regard by the passages from [the European Court's] case-law I have quoted. Many of the deficiencies highlighted by the evidence in this case will be remedied if the [Royal Military Police] perform this role, and if they are also properly trained and properly resourced to conduct their investigations with the requisite degree of thoroughness."

3. The House of Lords

83. The first four applicants appealed and the Secretary of State cross-appealed to the

House of Lords, which gave judgment on 13 June 2007 ([2007] UKHL 26). The majority of the House of Lords (Lord Rodger of Earlsferry, Baroness Hale of Richmond, Lord Carswell and Lord Brown of Eaton-under-Heywood) held that the general purpose of the Human Rights Act 1998 was to provide a remedial structure in domestic law for the rights guaranteed by the Convention, and that the 1998 Act should therefore be interpreted as applying wherever the United Kingdom had jurisdiction under Article 1 of the Convention. Lord Bingham of Cornhill, dissenting, held that the Human Rights Act had no extraterritorial application.

84. In relation to the first four applicants' complaints, the majority of the House of Lords found that the United Kingdom did not have jurisdiction over the deaths. Because of his opinion that the Human Rights Act had no extraterritorial application, Lord Bingham did not consider it useful to express a view as to whether the United Kingdom exercised jurisdiction within the meaning of Article 1 of the Convention.

85. Lord Brown, with whom the majority agreed, began by observing that ultimately the decision about how Article 1 of the Convention should be interpreted and applied was for the European Court of Human Rights, since the duty of the national court was only to keep pace with the Court's case-law; there was a danger in a national court construing the Convention too generously in favour of an applicant, since the respondent State had no means of referring such a case to the Court. Lord Brown took as his starting-point the decision of the Grand Chamber in *Banković and Others* (cited above), which he described as "a watershed authority in the light of which the Strasbourg jurisprudence as a whole has to be re-evaluated". He considered that the following propositions could be derived from the decision in *Banković and Others* (paragraph 109 of the House of Lords judgment):

> "1. Article 1 reflects an 'essentially territorial notion of jurisdiction' (a phrase repeated several times in the Court's judgment), 'other bases of jurisdiction being exceptional and requiring special justification in the particular circumstances of each case' (§ 61). The Convention operates, subject to Article 56, 'in an essentially regional context and notably in the legal space (*espace juridique*) of the Contracting States' (§ 80) (i.e. within the area of the Council of Europe countries).
>
> 2. The Court recognises Article 1 jurisdiction to avoid a 'vacuum in human rights' protection' when the territory 'would normally be covered by the Convention' (§ 80) (i.e. in a Council of Europe country) where otherwise (as in northern Cyprus) the inhabitants 'would have found themselves excluded from the benefits of the Convention safeguards and system which they had previously enjoyed' (§ 80).
>
> 3. The rights and freedoms defined in the Convention cannot be 'divided and tailored' (§ 75).
>
> 4. The circumstances in which the Court has exceptionally recognised the extraterritorial exercise of jurisdiction by a State include:
>
> (i) Where the State 'through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the government of that territory, exercises all or some of the public powers normally to be exercised by [the government of that territory]' (§ 71) (i.e. when otherwise there would be a vacuum within a Council of Europe country, the government of that country itself being unable 'to fulfil the obligations it had undertaken under the Convention' (§ 80) (as in northern Cyprus)).
>
> (ii) '[C]ases involving the activities of its diplomatic or consular agents abroad and on board craft and vessels registered in, or flying the flag of, that State [where] customary international law and treaty provisions have recognised the extraterritorial exercise of jurisdiction' (§ 73).
>
> (iii) Certain other cases where a State's responsibility 'could, in principle, be engaged because of acts ... which produced effects or were performed outside their own territory' (§ 69). *Drozd* [*and Janousek*] *v. France* [*and Spain*] ([26 June] 1992[, Series A no. 240]) 14 EHRR 745 (at § 91) is the only authority specifically referred to in *Banković* [*and Others*] as exemplifying this class of exception to the general rule. *Drozd* [*and Janousek*], however, contemplated no more than that, if a French judge exercised jurisdiction extraterritorially in Andorra in his capacity as a French judge, then anyone complaining of a violation of his Convention rights by that judge would be regarded as being within France's jurisdiction.
>
> (iv) The *Soering v.* [*the*] *United Kingdom* ([7 July] 1989[, Series A no. 161]) 11 EHRR 439 line of cases, the Court pointed out, involves action by the State whilst the person concerned is 'on its territory, clearly within its jurisdiction' ([*Banković and Others*,] § 68) and not, therefore, the exercise of the State's jurisdiction abroad."

Lord Brown referred to the *Öcalan*, *Freda* and *Sánchez Ramirez* line of cases (cited above), in each of which the applicant was forcibly removed from a country outside the Council of

Europe, with the full cooperation of the foreign authorities, to stand trial in the respondent State. He observed that this line of cases concerning "irregular extraditions" constituted one category of "exceptional" cases expressly contemplated by *Banković and Others* (cited above), as having "special justification" for extraterritorial jurisdiction under Article 1 of the Convention. He did not consider that the first four applicants' cases fell into any of the exceptions to the territorial principle so far recognised by the Court.

86. Lord Brown next considered the Court's judgment in *Issa and Others v. Turkey* (no. 31821/96, § 71, 16 November 2004), on which the applicants relied, and held as follows:

> "127. If and in so far as *Issa* [*and Others*] is said to support the altogether wider notions of Article 1 jurisdiction contended for by the appellants on this appeal, I cannot accept it. In the first place, the statements relied upon must be regarded as *obiter dicta*. Secondly, as just explained, such wider assertions of jurisdiction are not supported by the authorities cited (at any rate, those authorities accepted as relevant by the Grand Chamber in *Banković* [*and Others*]). Thirdly, such wider view of jurisdiction would clearly be inconsistent both with the reasoning in *Banković* [*and Others*] and, indeed, with its result. Either it would extend the 'effective control' principle beyond the Council of Europe area (where alone it had previously been applied, as has been seen, to northern Cyprus, to the Ajarian Autonomous Republic in Georgia and to Transdniestria) to Iraq, an area (like the FRY [Federal Republic of Yugoslavia] considered in *Banković* [*and Others*]) outside the Council of Europe – and, indeed, would do so contrary to the inescapable logic of the Court's case-law on Article 56. Alternatively it would stretch to breaking point the concept of jurisdiction extending extraterritorially to those subject to a State's 'authority and control'. It is one thing to recognise as exceptional the specific narrow categories of cases I have sought to summarise above; it would be quite another to accept that whenever a Contracting State acts (militarily or otherwise) through its agents abroad, those affected by such activities fall within its Article 1 jurisdiction. Such a contention would prove altogether too much. It would make a nonsense of much that was said in *Banković* [*and Others*], not least as to the Convention being 'a constitutional instrument of European public order', operating 'in an essentially regional context', 'not designed to be applied throughout the world, even in respect of the conduct of Contracting States' (§ 80). It would, indeed, make redundant the principle of 'effective control' of an area: what need for that if jurisdiction arises in any event under a general principle of 'authority and control' irrespective of whether the area is (a) effectively controlled or (b) within the Council of Europe?
>
> 128. There is one other central objection to the creation of the wide basis of jurisdiction here contended for by the appellants under the rubric 'control and authority', going beyond that arising in any of the narrowly recognised categories already discussed and yet short of that arising from the effective control of territory within the Council of Europe area. *Banković* [*and Others*] (and later *Assanidze* [*v. Georgia* [GC], no. 71503/01, ECHR 2004-II]) stands, as stated, for the indivisible nature of Article 1 jurisdiction: it cannot be 'divided and tailored'. As *Banković* [*and Others*] had earlier pointed out (at § 40) 'the applicant's interpretation of jurisdiction would invert and divide the positive obligation on Contracting States to secure the substantive rights in a manner never contemplated by Article 1 of the Convention'. When, moreover, the Convention applies, it operates as 'a living instrument'. *Öcalan* provides an example of this, a recognition that the interpretation of Article 2 has been modified consequent on 'the territories encompassed by the member States of the Council of Europe [having] become a zone free of capital punishment' (§ 163). (Paragraphs 64 and 65 of *Banković* [*and Others*], I may note, contrast on the one hand 'the Convention's substantive provisions' and 'the competence of the Convention organs', to both of which the 'living instrument' approach applies and, on the other hand, the scope of Article 1 – 'the scope and reach of the entire Convention' – to which it does not.) Bear in mind too the rigour with which the Court applies the Convention, well exemplified by the series of cases from the conflict zone of south-eastern Turkey in which, the State's difficulties notwithstanding, no dilution has been permitted of the investigative obligations arising under Articles 2 and 3.
>
> 129. The point is this: except where a State really does have effective control of territory, it cannot hope to secure Convention rights within that territory and, unless it is within the area of the Council of Europe, it is unlikely in any event to find certain of the Convention rights it is bound to secure reconcilable with the customs of the resident population. Indeed it goes further than that. During the period in question here it is common ground that the UK was an Occupying Power in southern Iraq and bound as such by [the] Geneva IV [Convention] and by the Hague Regulations. Article 43 of the Hague Regulations provides that the occupant 'shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country'. The appellants argue that occupation within the meaning of the Hague Regulations necessarily involves the occupant having effective control of the area and so being responsible for securing there all Convention rights and freedoms. So far as this being the case, however, the occupants' obligation is to respect 'the laws in force', not to introduce laws and the means to enforce them (for example, courts and a justice system) such as to satisfy the requirements of the Convention. Often (for example where Sharia law is in force) Convention rights would clearly be incompatible with the laws of the territory occupied."

87. Lord Rodger (at paragraph 83), with whom Baroness Hale agreed, and Lord Carswell (paragraph 97) expressly held that the United Kingdom was not in effective control of Basra City and the surrounding area for purposes of jurisdiction under Article 1 of the Convention at the relevant time.

88. The Secretary of State accepted that the facts of the sixth applicant's case fell within the United Kingdom's jurisdiction under Article 1 of the Convention. The parties therefore agreed that if (as the majority held) the jurisdictional scope of the Human Rights Act was the same as that of the Convention, the sixth applicant's case should be remitted to the Divisional Court, as the Court of Appeal had ordered. In consequence, it was unnecessary for the House of Lords to examine the jurisdictional issue in relation to the death of the sixth applicant's son. However, Lord Brown, with whom the majority agreed, concluded:

"132. ... As for the sixth case, I for my part would recognise the UK's jurisdiction over Mr Mousa only on the narrow basis found established by the Divisional Court, essentially by analogy with the extraterritorial exception made for embassies (an analogy recognised too in *Hess v.* [*the*] United *Kingdom* ([no. 6231/73, Commission decision of 28 May] 1975[, Decisions and Reports 2, p.]72, a Commission decision in the context of a foreign prison which had itself referred to the embassy case of *X. v.* [*Germany*, no. 1611/62, Commission decision of 25 September 1965, Yearbook 8, p. 158]). ..."

II. RELEVANT INTERNATIONAL LAW MATERIALS

A. International humanitarian law on belligerent occupation

89. The duties of an Occupying Power can be found primarily in Articles 42 to 56 of the Regulations concerning the Laws and Customs of War on Land (The Hague, 18 October 1907) ("the Hague Regulations") and Articles 27 to 34 and 47 to 78 of the Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (of 12 August 1949) ("the Fourth Geneva Convention"), as well as in certain provisions 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), of 8 June 1977 ("Additional Protocol I").

Articles 42 and 43 of the Hague Regulations provide as follows:

Article 42

"Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised."

Article 43

"The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."

Article 64 of the Fourth Geneva Convention provides that penal laws may be repealed or suspended by the Occupying Power only where they constitute a threat to the security or an obstacle to the application of the Fourth Geneva Convention. It also details the situations in which the Occupying Power is entitled to introduce legislative measures. These are specifically:

"... provisions which are essential to enable the Occupying Power to fulfil its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them."

Agreements concluded between the Occupying Power and the local authorities cannot deprive the population of the occupied territory of the protection afforded by international humanitarian law and protected persons themselves can in no circumstances renounce their rights (Fourth Geneva Convention, Articles 8 and 47). Occupation does not create any change in the status of the territory (see Article 4 of Additional Protocol I), which can only be effected by a peace treaty or by annexation followed by recognition. The former sovereign remains sovereign and there is no change in the nationality of the inhabitants.

B. Case-law of the International Court of Justice concerning the interrelationship between international humanitarian law and international human rights law and the extraterritorial obligations of States under international human rights law

90. In the proceedings concerning the International Court of Justice's Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (9 July 2004), Israel denied that the human rights instruments to which it was a party, including the International Covenant on Civil and Political Rights, were applicable to the Occupied Palestinian Territory and asserted (at paragraph 102) that:

> "humanitarian law is the protection granted in a conflict situation such as the one in the West Bank and Gaza Strip, whereas human rights treaties were intended for the protection of citizens from their own government in times of peace."

In order to determine whether the instruments were applicable in the Occupied Palestinian Territory, the International Court of Justice first addressed the issue of the relationship between international humanitarian law and international human rights law, holding as follows:

> "106. ... the Court considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law."

The International Court of Justice next considered the question whether the International Covenant on Civil and Political Rights was capable of applying outside the State's national territory and whether it applied in the Occupied Palestinian Territory. It held as follows (references and citations omitted):

> "108. The scope of application of the International Covenant on Civil and Political Rights is defined by Article 2, paragraph 1, thereof, which provides:
>
> > 'Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'
>
> This provision can be interpreted as covering only individuals who are both present within a State's territory and subject to that State's jurisdiction. It can also be construed as covering both individuals present within a State's territory and those outside that territory but subject to that State's jurisdiction. The Court will thus seek to determine the meaning to be given to this text.
>
> 109. The Court would observe that, while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory. Considering the object and purpose of the International Covenant on Civil and Political Rights, it would seem natural that, even when such is the case, States Parties to the Covenant should be bound to comply with its provisions.
>
> The constant practice of the Human Rights Committee is consistent with this. Thus, the Committee has found the Covenant applicable where the State exercises its jurisdiction on foreign territory. It has ruled on the legality of acts by Uruguay in cases of arrests carried out by Uruguayan agents in Brazil or Argentina ... It decided to the same effect in the case of the confiscation of a passport by a Uruguayan consulate in Germany ...
>
> 110. The Court takes note in this connection of the position taken by Israel, in relation to the applicability of the Covenant, in its communications to the Human Rights Committee, and of the view of the Committee.
>
> In 1998, Israel stated that, when preparing its report to the Committee, it had had to face the question 'whether individuals resident in the occupied territories were indeed subject to Israel's jurisdiction' for purposes of the application of the Covenant ... Israel took the position that 'the Covenant and similar instruments did not apply directly to the current situation in the occupied territories' ...
>
> The Committee, in its concluding observations after examination of the report, expressed concern at Israel's attitude and pointed 'to the long-standing presence of Israel in [the occupied] territories, Israel's ambiguous attitude towards their future status, as well as the exercise of effective jurisdiction by Israeli security forces therein' ... In 2003 in face of Israel's consistent position, to the effect that 'the Covenant does not apply beyond its own territory, notably in the West Bank and Gaza ...', the Committee reached the following conclusion:
>
> > 'in the current circumstances, the provisions of the Covenant apply to the benefit of the population of the occupied territories, for all conduct by the State Party's authorities or agents in those territories that affect the enjoyment of rights enshrined in the Covenant and fall within the ambit of State responsibility of Israel under the principles of public international law' ...

111. In conclusion, the Court considers that the International Covenant on Civil and Political Rights is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory."

In addition, the International Court of Justice appeared to assume that, even in respect of extraterritorial acts, it would in principle be possible for a State to derogate from its obligations under the International Covenant on Civil and Political Rights, Article 4 § 1 of which provides:

"In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin."

Thus, in paragraph 136 of its Advisory Opinion, having considered whether the acts in question were justified under international humanitarian law on grounds of military exigency, the International Court of Justice held:

"136. The Court would further observe that some human rights conventions, and in particular the International Covenant on Civil and Political Rights, contain provisions which States Parties may invoke in order to derogate, under various conditions, from certain of their conventional obligations. In this respect, the Court would however recall that the communication notified by Israel to the Secretary-General of the United Nations under Article 4 of the International Covenant on Civil and Political Rights concerns only Article 9 of the Covenant, relating to the right to freedom and security of person (see paragraph 127 above); Israel is accordingly bound to respect all the other provisions of that instrument."

91. In its judgment *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo (DRC) v. Uganda*) of 19 December 2005, the International Court of Justice considered whether, during the relevant period, Uganda was an "Occupying Power" of any part of the territory of the Democratic Republic of the Congo, within the meaning of customary international law, as reflected in Article 42 of the Hague Regulations (§§ 172-73 of the judgment). The International Court of Justice found that Ugandan forces were stationed in the province of Ituri and exercised authority there, in the sense that they had substituted their own authority for that of the Congolese government (§§ 174-76). The International Court of Justice continued:

"178. The Court thus concludes that Uganda was the Occupying Power in Ituri at the relevant time. As such it was under an obligation, according to Article 43 of the Hague Regulations of 1907, to take all the measures in its power to restore, and ensure, as far as possible, public order and safety in the occupied area, while respecting, unless absolutely prevented, the laws in force in the DRC. This obligation comprised the duty to secure respect for the applicable rules of international human rights law and international humanitarian law, to protect the inhabitants of the occupied territory against acts of violence, and not to tolerate such violence by any third party.

179. The Court, having concluded that Uganda was an Occupying Power in Ituri at the relevant time, finds that Uganda's responsibility is engaged both for any acts of its military that violated its international obligations and for any lack of vigilance in preventing violations of human rights and international humanitarian law by other actors present in the occupied territory, including rebel groups acting on their own account.

180. The Court notes that Uganda at all times has responsibility for all actions and omissions of its own military forces in the territory of the DRC in breach of its obligations under the rules of international human rights law and international humanitarian law which are relevant and applicable in the specific situation."

The International Court of Justice established the facts relating to the serious breaches of human rights allegedly attributable to Uganda, in the occupied Ituri region and elsewhere (§§ 205-12). In order to determine whether the conduct in question constituted a breach of Uganda's international obligations, the International Court of Justice recalled its finding in the above-cited *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* Advisory Opinion that both international humanitarian law and international human rights law would have to be taken into consideration and that international human rights instruments were capable of having an extraterritorial application, "particularly in occupied territories" (§ 216). The International Court of Justice next determined which were "the applicable rules of international human rights law and international humanitarian law", by listing the international humanitarian and international human rights treaties to which both Uganda and the Democratic Republic of the Congo were party, together with the relevant principles of customary international law (§§ 217-19).

C. The duty to investigate alleged violations of the right to life in situations of armed

conflict and occupation under international humanitarian law and international human rights law

92. Article 121 of the Geneva Convention (III) relative to the Treatment of Prisoners of War (of 12 August 1949) (“the Third Geneva Convention”) provides that an official enquiry must be held by the Detaining Power following the suspected homicide of a prisoner of war. Article 131 of the Fourth Geneva Convention provides:

> “Every death or serious injury of an internee, caused or suspected to have been caused by a sentry, another internee or any other person, as well as any death the cause of which is unknown, shall be immediately followed by an official enquiry by the Detaining Power. A communication on this subject shall be sent immediately to the Protecting Power. The evidence of any witnesses shall be taken, and a report including such evidence shall be prepared and forwarded to the said Protecting Power. If the enquiry indicates the guilt of one or more persons, the Detaining Power shall take all necessary steps to ensure the prosecution of the person or persons responsible.”

The Geneva Conventions also place an obligation on each High Contracting Party to investigate and prosecute alleged grave breaches of the Conventions, including the wilful killing of protected persons (Articles 49 and 50 of the Geneva Convention (I) for the Amelioration of the Condition of the Sick and Wounded in the Field (of 12 August 1949) (“the First Geneva Convention”); Articles 50 and 51 of the Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (of 12 August 1949) (“the Second Geneva Convention”); Articles 129 and 130 of the Third Geneva Convention; and Articles 146 and 147 of the Fourth Geneva Convention).

93. In his report of 8 March 2006 on extrajudicial, summary or arbitrary executions (E/CN.4/2006/53), the United Nations Special Rapporteur, Philip Alston, observed in connection with the right to life under Article 6 of the International Covenant on Civil and Political Rights in situations of armed conflict and occupation (footnotes omitted):

> “36. Armed conflict and occupation do not discharge the State’s duty to investigate and prosecute human rights abuses. The right to life is non-derogable regardless of circumstance. This prohibits any practice of not investigating alleged violations during armed conflict or occupation. As the Human Rights Committee has held, ‘It is inherent in the protection of rights explicitly recognised as non-derogable ... that they must be secured by procedural guarantees ... The provisions of the [International Covenant on Civil and Political Rights] relating to procedural safeguards may never be made subject to measures that would circumvent the protection of non-derogable rights’. It is undeniable that during armed conflicts circumstances will sometimes impede investigation. Such circumstances will never discharge the obligation to investigate – this would eviscerate the non-derogable character of the right to life – but they may affect the modalities or particulars of the investigation. In addition to being fully responsible for the conduct of their agents, in relation to the acts of private actors States are also held to a standard of due diligence in armed conflicts as well as peace. On a case-by-case basis a State might utilise less effective measures of investigation in response to concrete constraints. For example, when hostile forces control the scene of a shooting, conducting an autopsy may prove impossible. Regardless of the circumstances, however, investigations must always be conducted as effectively as possible and never be reduced to mere formality. ...”

94. In its judgment in the *Case of the “Mapiripán Massacre” v. Colombia* of 15 September 2005, the Inter-American Court of Human Rights held, *inter alia*, in connection with the respondent State’s failure fully to investigate the massacre of civilians carried out by a paramilitary group with the alleged assistance of the State authorities:

> “238. In this regard, the Court recognises the difficult circumstances of Colombia, where its population and its institutions strive to attain peace. However, the country’s conditions, no matter how difficult, do not release a State Party to the American Convention of its obligations set forth in this treaty, which specifically continue in cases such as the instant one. The Court has argued that when the State conducts or tolerates actions leading to extra-legal executions, not investigating them adequately and not punishing those responsible, as appropriate, it breaches the duties to respect rights set forth in the Convention and to ensure their free and full exercise, both by the alleged victim and by his or her next of kin, it does not allow society to learn what happened, and it reproduces the conditions of impunity for this type of facts to happen once again.”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

95. The applicants contended that their relatives were within the jurisdiction of the United Kingdom under Article 1 of the Convention at the moment of death and that, except in relation to the sixth applicant, the United Kingdom had not complied with its investigative duty under Article 2.

96. The Government accepted that the sixth applicant's son had been within United Kingdom jurisdiction but denied that the United Kingdom had jurisdiction over any of the other deceased. They contended that, since the second and third applicants' relatives had been killed after the adoption of United Nations Security Council Resolution 1511 (see paragraph 16 above), the acts which led to their deaths were attributable to the United Nations and not to the United Kingdom. In addition, the Government contended that the fifth applicant's case should be declared inadmissible for non-exhaustion of domestic remedies and that the fifth and sixth applicants no longer had victim status.

A. Admissibility

1. *Attribution*

97. The Government pointed out that the operations that led to the deaths of the second and third applicants' relatives occurred after 16 October 2003, when the United Nations Security Council adopted Resolution 1511. Paragraph 13 of that Resolution authorised a Multinational Force to take "all necessary measures to contribute to the maintenance of security and stability in Iraq" (see paragraph 16 above). It followed that, in conducting the relevant operations in which the second and third applicants' relatives were shot, United Kingdom troops were not exercising the sovereign authority of the United Kingdom but the international authority of the Multinational Force acting pursuant to the binding decision of the United Nations Security Council.

98. The applicants stressed that the Government had not raised this argument at any stage during the domestic proceedings. Moreover, an identical argument had been advanced by the Government and rejected by the House of Lords in *R. (on the application of Al-Jedda) (FC) (Appellant) v. Secretary of State for Defence (Respondent)* [2007] UKHL 58.

99. The Court recalls that it is intended to be subsidiary to the national systems safeguarding human rights. It is, therefore, appropriate that the national courts should initially have the opportunity to determine questions of the compatibility of domestic law with the Convention and that, if an application is nonetheless subsequently brought before the Court, it should have the benefit of the views of the national courts, as being in direct and continuous contact with the forces of their countries. It is thus of importance that the arguments put by the Government before the national courts should be on the same lines as those put before this Court. In particular, it is not open to a Government to put to the Court arguments which are inconsistent with the position they adopted before the national courts (see *A. and Others v. the United Kingdom* [GC], no. 3455/05, § 154, ECHR 2009).

100. The Government did not contend before the national courts that any of the killings of the applicants' relatives were not attributable to United Kingdom armed forces. The Court considers, therefore, that the Government are estopped from raising this objection in the present proceedings.

2. *Jurisdiction*

101. The Government further contended that the acts in question took place in southern Iraq and outside the United Kingdom's jurisdiction under Article 1 of the Convention. The sole exception was the killing of the sixth applicant's son, which occurred in a British military prison over which the United Kingdom did have jurisdiction.

102. The Court considers that the question whether the applicants' cases fall within the jurisdiction of the respondent State is closely linked to the merits of their complaints. It therefore joins this preliminary question to the merits.

3. *Exhaustion of domestic remedies*

103. The Government contended that the fifth applicant's case should be declared inadmissible for non-exhaustion of domestic remedies. They pointed out that although he

brought judicial review proceedings alleging breaches of his substantive and procedural rights under Articles 2 and 3, his claim was stayed pending resolution of the six test cases (see paragraph 73 above). After those claims had been resolved, it would have been open to the applicant to apply to the Divisional Court to lift the stay, but he did not do so. His case was not a shooting incident, and the domestic courts had not had the opportunity to consider the facts relevant to his claims that his son was within the jurisdiction of the United Kingdom and that there had been a breach of the procedural obligation.

104. The applicants invited the Court to reject this submission. A judicial-review claim had been lodged by the fifth applicant on 5 May 2004. It was, by agreement, stayed pending the outcome of the six test cases (see paragraph 73 above). The fifth applicant would have had no reasonable prospects of success if, after the House of Lords gave judgment in *Al-Skeini and Others (Respondents) v. Secretary of State for Defence (Appellant) Al-Skeini and Others (Appellants) v. Secretary of State for Defence (Respondent) (Consolidated Appeals)* [2007] UKHL 26, he had sought to revive and pursue his stayed judicial-review claim. The lower courts would have been bound by the House of Lords' interpretation of Article 1 and would have applied it so as to find that the applicant's deceased son had not been within United Kingdom jurisdiction.

105. The Court observes that, according to the fifth applicant, his son died when, having been arrested by United Kingdom soldiers on suspicion of looting, he was driven in an army vehicle to the river and forced to jump in. His case is, therefore, distinguishable on its alleged facts from those of the first, second and fourth applicants, whose relatives were shot by British soldiers; the third applicant, whose wife was shot during exchange of fire between British troops and unknown gunmen; and the sixth applicant, whose son was killed while detained in a British military detention facility. It is true that the House of Lords in the *Al-Skeini* proceedings did not have before it a case similar to the fifth applicant's, where an Iraqi civilian met his death having been taken into British military custody, but without being detained in a military prison. Nonetheless, the Court considers that the applicants are correct in their assessment that the fifth applicant would have had no prospects of success had he subsequently sought to pursue his judicial-review application in the domestic courts. Lord Brown, with whom the majority of the House of Lords agreed, made it clear that he preferred the approach to jurisdiction in the sixth applicant's case taken by the Divisional Court, namely that jurisdiction arose in respect of Baha Mousa only because he died while detained in a British military prison (see paragraph 88 above). In these circumstances, the Court does not consider that the fifth applicant can be criticised for failing to attempt to revive his claim before the Divisional Court. It follows that the Government's preliminary objection based on non-exhaustion of domestic remedies must be rejected.

4. Victim status

106. The Government submitted that the fifth and sixth applicants could no longer claim to be victims of any violations of their rights under Article 2, since the death of each of their sons had been fully investigated by the national authorities and compensation paid to the applicants.

107. The Court considers that this question is also closely linked and should be joined to the merits of the complaint under Article 2.

5. Conclusion on admissibility

108. The Court considers that the application raises serious questions of fact and law which are of such complexity that their determination should depend on an examination on the merits. It cannot, therefore, be considered manifestly ill-founded within the meaning of Article 35 § 3 of the Convention, and no other ground for declaring it inadmissible has been established. It must therefore be declared admissible.

B. Merits

1. Jurisdiction

(a) The parties' submissions

(i) The Government

109. The Government submitted that the leading authority on the concept of "jurisdiction" within the meaning of Article 1 of the Convention was the Court's decision in *Banković and Others* (cited above). *Banković and Others* established that the fact that an individual had been affected by an act committed by a Contracting State or its agents was not sufficient to establish that he was within that State's jurisdiction. Jurisdiction under Article 1 was "primarily" or "essentially" territorial and any extension of jurisdiction outside the territory of the Contracting State was "exceptional" and required "special justification in the particular circumstances of each case". The Court had held in *Banković and Others* that the Convention rights could not be "divided and tailored". Within its jurisdiction, a Contracting State was under an obligation to secure all the Convention rights and freedoms. The Court had also held in *Banković and Others* that the Convention was "an instrument of European public order" and "a multilateral treaty operating, subject to Article 56 of the Convention, in an essentially regional context and notably in the legal space (*espace juridique*) of the Contracting States". The essentially territorial basis of jurisdiction reflected principles of international law and took account of the practical and legal difficulties faced by a State operating on another State's territory, particularly in regions which did not share the values of the Council of Europe member States.

110. In the Government's submission, the Grand Chamber in *Banković and Others*, having conducted a comprehensive review of the case-law, identified a limited number of exceptions to the territorial principle. The principal exception derived from the case-law on northern Cyprus and applied when a State, as a consequence of military action, exercised effective control of an area outside its national territory. Where the Court had found this exceptional basis of jurisdiction to apply, it had stressed that the State exercising effective control was thereby responsible for securing the entire range of substantive Convention rights in the territory in question (see *Loizidou v. Turkey* (preliminary objections), 23 March 1995, § 62, Series A no. 310; *Cyprus v. Turkey* [GC], no. 25781/94, §§ 75-80, ECHR 2001-IV; *Banković and Others*, cited above, §§ 70-71; and *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, §§ 314-16, ECHR 2004-VII). Moreover, despite *dicta* to the contrary in the subsequent Chamber judgment in *Issa and Others* (cited above), the Grand Chamber in *Banković and Others* made it clear that the "effective control of an area" basis of jurisdiction could apply only within the legal space of the Convention. In addition to the control exercised by Turkey in northern Cyprus, the Court had applied this exception in relation to only one other area, Transdniestria, which also fell within the territory of another Contracting State. Any other approach would risk requiring the State to impose culturally alien standards, in breach of the principle of sovereign self-determination.

111. According to the Government, the Court's case-law on Article 56 of the Convention further indicated that a State would not be held to exercise Article 1 jurisdiction over an overseas territory merely by virtue of exercising effective control there (see *Quark Fishing Ltd v. the United Kingdom* (dec.), no. 15305/06, ECHR 2006-XIV). If the "effective control of territory" exception were held to apply outside the territories of the Contracting States, this would lead to the conclusion that a State was free to choose whether or not to extend the Convention and its Protocols to a non-metropolitan territory outside the Convention "*espace juridique*" over which it might in fact have exercised control for decades, but was not free to choose whether to extend the Convention to territories outside that space over which it exercised effective control as a result of military action only temporarily, for example only until peace and security could be restored.

112. The Government submitted that, since Iraq fell outside the legal space of the Convention, the "effective control of an area" exceptional basis of jurisdiction could not apply. In any event, the United Kingdom did not have "effective control" over any part of Iraq during the relevant time. This was the conclusion of the domestic courts, which had all the available evidence before them. The number of Coalition Forces, including United Kingdom forces, was small: in south-east Iraq, an area of 96,000 square kilometres with a population of 4.6 million, there were 14,500 Coalition troops, including 8,150 United Kingdom troops. United Kingdom troops operated in the Al-Basra and Maysan provinces, which had a population of 2.76 million for 8,119 troops. United Kingdom forces in Iraq were faced with real practical difficulties in restoring conditions of security and stability so as to enable the Iraqi people freely to determine their political future. The principal reason for this was that at the start of the occupation there was no competent system of local law enforcement in place, while at the same time there was

competent system of local law enforcement in place, while at the same time there was widespread violent crime, terrorism and tribal fighting involving the use of light and heavy weapons.

113. Governing authority in Iraq during the occupation was exercised by the Coalition Provisional Authority (CPA), which was governed by United States Ambassador Paul Bremer and which was not a subordinate authority of the United Kingdom. In addition, from July 2003 there was a central Iraqi Governing Council and a number of local Iraqi councils. The status of the CPA and Iraqi administration was wholly different from that of the "Turkish Republic of Northern Cyprus" (the "TRNC") in Cyprus or the "Moldovan Republic of Transdniestria" (the "MRT") in Transdniestria, which were both characterised by the Court as "self-proclaimed authorities which are not recognised by the international community". The authority of the CPA and the Iraqi administration was recognised by the international community, through the United Nations Security Council. Moreover, the purpose of the United Kingdom's joint occupation of Iraq was to transfer authority as soon as possible to a representative Iraqi administration. In keeping with this purpose, the occupation lasted for only just over a year.

114. In the Government's submission, the fact that between May 2003 and June 2004 the United Kingdom was an Occupying Power within the meaning of the Hague Regulations (see paragraph 89 above) did not, in itself, give rise to an obligation to secure the Convention rights and freedoms to the inhabitants of south-east Iraq. As an Occupying Power the United Kingdom did not have sovereignty over Iraq and was not entitled to treat the area under its occupation as its own territory or as a colony subject to its complete power and authority. The Hague Regulations did not confer on the United Kingdom the power to amend the laws and Constitution of Iraq so as to conform to the United Kingdom's own domestic law or regional multilateral international obligations such as the Convention. On the contrary, the Hague Regulations set limits on the United Kingdom's powers, notably the obligation to respect the laws in force in Iraq "unless absolutely prevented". Moreover, the resolutions passed by the United Nations Security Council recognised that governing authority in Iraq during the occupation was to be exercised by the CPA and that the aim of the occupation was to transfer authority as soon as possible to a representative Iraqi administration. It followed that the international legal framework, far from establishing that the United Kingdom was obliged to secure Convention rights in Iraq, established instead that the United Kingdom would have been acting contrary to its international obligations if it had sought to modify the Constitution of Iraq so as to comply with the Convention. In any event, the Court's case-law demonstrated that it approached the question whether a State exercised jurisdiction extraterritorially as one of fact, informed by the particular nature and history of the Convention. The obligations imposed by the Fourth Geneva Convention and the Hague Regulations were carefully tailored to the circumstances of occupation and could not in themselves have consequences for the very different issue of jurisdiction under the Convention.

115. The Government accepted that it was possible to identify from the case-law a number of other exceptional categories where jurisdiction could be exercised by a State outside its territory and outside the Convention region. In *Banković and Others* (cited above) the Grand Chamber referred to other cases involving the activities of diplomatic or consular agents abroad and on board craft and vessels registered in or flying the flag of the State. In *Banković and Others*, the Court also cited as an example *Drozd and Janousek v. France and Spain* (26 June 1992, Series A no. 240), which demonstrated that jurisdiction could be exercised by a State if it brought an individual before its own court, sitting outside its territory, to apply its own criminal law. In its judgment in *Öcalan* (cited above, § 91), the Grand Chamber held that Turkey had exercised jurisdiction over the applicant when he was "arrested by members of the Turkish security forces inside an aircraft registered in Turkey in the international zone of Nairobi Airport" and "physically forced to return to Turkey by Turkish officials and was under their authority and control following his arrest and return to Turkey". In the Government's submission, none of these exceptions applied in the first, second, third and fourth applicants' cases.

116. The Government contended that the applicants' submission that, in shooting their relatives, the United Kingdom soldiers exercised "authority and control" over the deceased, so as to bring them within the United Kingdom's jurisdiction, was directly contrary to the decision in *Banković and Others* (cited above). In *Banković and Others*, the Grand Chamber considered the applicability of the Convention to extraterritorial military operations generally, having regard, *inter alia*, to State practice and Article 15 of the Convention, and concluded that the Convention did not apply to the military action of the respondent States which resulted in those applicants'

not apply to the military action of the respondent States which resulted in those applicants' relatives' deaths. Equally, in the present case, the military action of United Kingdom soldiers in shooting the applicants' relatives while carrying out military security operations in Iraq did not constitute an exercise of jurisdiction over them. No distinction could be drawn in this respect between a death resulting from a bombing and one resulting from a shooting in the course of a ground operation.

117. The Government rejected the applicants' argument that a jurisdictional link existed because the United Kingdom soldiers were exercising "legal authority" over the deceased, derived from the obligation under the Hague Regulations to ensure "public order and safety" in the occupied territory. The meaning of Article 1 of the Convention was autonomous and could not be determined by reference to wholly distinct provisions of international humanitarian law. Moreover, the duty relied on was owed to every Iraqi citizen within the occupied territory and, if the applicants were correct, the United Kingdom would have been required to secure Convention rights to them all. Nor could it be said that United Kingdom troops at the relevant time were exercising "public powers" pursuant to treaty arrangements (see *Banković and Others*, cited above, § 73). In fact, United Kingdom troops were exercising military power in an effort to create a situation in which governmental functions could be exercised and the rule of law could properly operate. No sensible distinction could be drawn between the different types of military operation undertaken by them. There was no basis for concluding that the applicability of the Convention should turn upon the particular activity that a soldier was engaged in at the time of the alleged violation, whether street patrol, ground offensive or aerial bombardment.

118. In conclusion, the Government submitted that the domestic courts were correct that the United Kingdom did not exercise any Article 1 jurisdiction over the relatives of the first to fourth applicants at the time of their deaths. The cases could not be distinguished from that of the deceased in *Banković and Others* (cited above). Nor were the facts of the fifth applicant's case sufficient to distinguish it in this respect from those of the first to fourth applicants. The fifth applicant's son was not arrested in circumstances similar to those which founded jurisdiction in *Öcalan* (cited above). As a suspected looter, in the situation of extreme public disorder in the immediate aftermath of the cessation of major combat activities, he was physically required by United Kingdom soldiers to move from the place of looting to another location. The acts of the United Kingdom soldiers involved an assertion of military power over the fifth applicant's son, but no more. The Government accepted that the sixth applicant's son was within United Kingdom jurisdiction when he died, but only on the basis found by the Divisional Court and subsequently by Lord Brown, with whom Lords Rodger and Carswell and Baroness Hale agreed, namely that jurisdiction was established when the deceased was detained in a United Kingdom-run military detention facility located in a United Kingdom base, essentially by analogy with the extraterritorial exception made for embassies. At the hearing before the Court, counsel for the Government confirmed that it was the Government's position that, for example, an individual being taken to a British detention facility on foreign soil in a British military vehicle would not fall within the United Kingdom's jurisdiction until the moment the vehicle and individual passed within the perimeter of the facility.

119. This did not mean that United Kingdom troops were free to act with impunity in Iraq. As Lord Bingham observed in his opinion in the House of Lords, the acts of the United Kingdom forces were subject to and regulated by international humanitarian law. United Kingdom soldiers in Iraq were also subject to United Kingdom domestic criminal law and could be prosecuted in the national courts. The International Criminal Court had jurisdiction to prosecute war crimes where the State was unwilling or unable to prosecute. Civil claims in tort could also be brought in the United Kingdom courts against United Kingdom agents and authorities alleged to have caused injury to individuals in Iraq.

(ii) The applicants

120. The applicants accepted that jurisdiction under Article 1 was essentially territorial. However, they underlined that it was not exclusively so and that it was possible for a Contracting State to exercise jurisdiction extraterritorially. The procedure under Article 56 allowed States to extend the reach of the Convention to other territories, with due regard to local requirements, by means of a notified declaration. However, it was clear from the case-law that Article 56 was not an exclusive mechanism for extraterritorial applicability.

121. The applicants submitted that the case-law of the Court and Commission recognised the exercise by States of jurisdiction extraterritorially through the principles of both "State agent

exercise by States of jurisdiction extraterritorially through the principles of both "State agent authority" and "effective control of an area". The first reference to "State agent authority" jurisdiction was in the Commission's admissibility decision in *Cyprus v. Turkey* (nos. 6780/74 and 6950/75, Commission decision of 26 May 1975, DR 2, p. 125, at p. 136), when the Commission observed that "authorised agents of the State ... not only remain under its jurisdiction when abroad but bring any other persons or property 'within the jurisdiction' of that State, to the extent that they exercise authority over such persons or property". This principle was subsequently applied in *Cyprus v. Turkey* (nos. 6780/74 and 6950/75, Commission's report of 10 July 1976), when the Commission found that the actions of Turkish soldiers in Cyprus involved the exercise of Turkish jurisdiction. These actions comprised the killing of civilians, including individuals subject to the order of an officer and others shot while attempting to recover possessions from property under Turkish control; the rape of women in empty houses and on the street; the arbitrary detention of civilians; cruelty to detainees; the displacement of civilians; and the military confiscation of property. Since Turkey did not accept the Court's jurisdiction until 1990, the case was never examined by the Court. The Commission's report, however, did not support the suggestion that military custodial authority alone constituted a relationship of sufficient authority and control.

122. The applicants pointed out that in the later cases against Turkey concerning northern Cyprus which were examined by the Commission and the Court during the 1990s, Turkey accepted that its jurisdiction under Article 1 would be engaged in respect of the direct acts of Turkish military personnel. However, the Turkish Government shifted ground and argued that it did not have jurisdiction because the acts in question were not committed by Turkish agents but were instead attributable to an autonomous local administration installed in 1983, the "TRNC". The Court, in *Loizidou* (preliminary objections) and in *Cyprus v. Turkey* (both cited above), countered this argument by elaborating the principle of "effective control of an area", which applied (see *Loizidou* (preliminary objections), § 62):

> "when as a consequence of military action – whether lawful or unlawful – [a Contracting State] exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration."

In these cases, the Court did not give any indication that the "State agent authority" principle had been supplanted. In fact, in *Loizidou* (preliminary objections), before setting out the principle of "effective control of an area" jurisdiction, the Court observed (§ 62) that:

> "In addition, the responsibility of Contracting Parties can be involved because of acts of their authorities, whether performed within or outside national boundaries, which produce effects outside their own territory (see the *Drozd and Janousek v. France and Spain* judgment of 26 June 1992, Series A no. 240, p. 29, § 91)."

Furthermore, its conclusion on the question whether the alleged violation was capable of falling within Turkish jurisdiction relied on both grounds equally (§ 63):

> "In this connection the respondent Government have acknowledged that the applicant's loss of control of her property stems from the occupation of the northern part of Cyprus by Turkish troops and the establishment there of the 'TRNC'. Furthermore, it has not been disputed that the applicant was prevented by Turkish troops from gaining access to her property."

In the Court's subsequent case-law, the two principles had continued to be placed side by side (see *Banković and Others*, cited above, §§ 69-73; *Issa and Others*, cited above, §§ 69-71; *Andreou v. Turkey* (dec.), no. 45653/99, 3 June 2008; and *Solomou and Others v. Turkey*, no. 36832/97, §§ 44-45, 24 June 2008). There was no precedent of the Court to suggest that "State agent authority" jurisdiction was inapt as a means of analysing direct actions by military State agents exercising authority.

123. The applicants argued that their dead family members fell within the United Kingdom's jurisdiction under the "State agent authority" principle. The Government had accepted, in respect of the sixth applicant's son, that the exercise of authority and control by British military personnel in Iraq was capable of engaging the United Kingdom's extraterritorial jurisdiction. However, jurisdiction in extraterritorial detention cases did not rest on the idea of a military prison as a quasi-territorial enclave. Jurisdiction in respect of the sixth applicant's son would equally have arisen had he been tortured and killed while under arrest at the hotel where he worked or in a locked army vehicle parked outside. Moreover, the authority and control exercised by military personnel was not limited in principle to actions as custodians, even if the arrest and detention of persons outside State territory could be seen as a classic instance of State agent authority (as

was argued by the respondent Governments in *Banković and Others*, cited above, § 37).

124. The applicants submitted that the deceased relatives of all six applicants fell within United Kingdom jurisdiction by virtue of the authority and control exercised over them by United Kingdom State agents. They emphasised that British armed forces had responsibility for public order in Iraq, maintaining the safety and security of local civilians and supporting the civil administration. In performing these functions, the British armed forces were operating within the wider context of the United Kingdom's occupation of south-east Iraq. The control and authority was also exercised through the CPA South Regional Office, which was staffed primarily by British personnel. The individuals killed were civilians to whom the British armed forces owed the duty of safety and security. There was thus a particular relationship of authority and control between the soldiers and the civilians killed. To find that these individuals fell within the authority of the United Kingdom armed forces would not require the acceptance of the impact-based approach to jurisdiction which was rejected in *Banković and Others* (cited above), but would instead rest on a particular relationship of authority and control. In the alternative, the applicants argued that, at least in respect of the deceased relatives of the second, fourth, fifth and sixth applicants, the British soldiers exercised sufficient authority and control to bring the victims within the United Kingdom's jurisdiction.

125. The applicants further contended that their dead relatives fell within United Kingdom jurisdiction because, at the relevant time, the United Kingdom was in effective control of south-east Iraq. It was their case that where, as a matter of international law, territory was occupied by a State as an Occupying Power, because that territory was actually placed under the authority of that State's hostile army (see Article 42 of the Hague Regulations; paragraph 89 above), that was sufficient to constitute extraterritorial jurisdiction under Article 1 of the Convention. This consequence of belligerent occupation reflected the approach in international law, both as regards extraterritorial jurisdiction and extraterritorial application of human rights based on "jurisdiction".

126. They rejected the idea that the "effective control of an area" basis of jurisdiction could apply only within the legal space of the Convention. Furthermore, they reasoned that to require a State to exert complete control, similar to that exercised within its own territory, would lead to the perverse position whereby facts disclosing a violation of the Convention would, instead of entitling the victim to a remedy, form the evidential basis for a finding that the State did not exercise jurisdiction. Similarly, defining the existence of control over an area by reference to troop numbers alone would be uncertain, allow evasion of responsibility and promote arbitrariness. The application of the Convention should influence the actions of the Contracting States, prompting careful consideration of military intervention and ensuring sufficient troop numbers to meet their international obligations. The applicants endorsed the approach suggested by Sedley LJ in the Court of Appeal (see paragraph 80 above), that a Contracting State in military occupation was under a duty to do everything possible to keep order and protect essential civil rights. While the Court's case-law (the northern Cyprus cases and *Ilaşcu and Others*, cited above) included details of numbers of military personnel deployed, this was relevant to establishing whether a territory had actually been placed under the authority of a hostile army, in cases where the respondent States (Turkey and Russia) denied being in occupation. Where, as in the present case, the respondent State accepted that it was in occupation of the territory, such an assessment was unnecessary.

127. The applicants argued that the duty of an occupying State under international humanitarian law to apply the domestic law of the territorial State and not to impose its own law could not be used to evade jurisdiction under the Convention, since the "effective control of an area" basis of jurisdiction applied also to unlawful occupation. They referred to the judgment of the International Court of Justice in *Armed Activities on the Territory of the Congo* and its Advisory Opinion *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (see paragraphs 90-91 above), where it found that the occupying State was under a duty to apply international human rights law. The clear principle emerging from these cases was that belligerent occupation in international law was a basis for the recognition of extraterritorial human rights jurisdiction.

(iii) The third-party interveners

128. The third-party interveners (see paragraph 6 above) emphasised that the Convention was adopted in the aftermath of the events in Europe of the 1930s and 1940s, when appalling

human rights abuses were carried out by military forces in occupied territories. It was inconceivable that the drafters of the Convention should have considered that the prospective responsibilities of States should be confined to violations perpetrated on their own territories. Moreover, public international law required that the concept of "jurisdiction" be interpreted in the light of the object and purpose of the particular treaty. The Court had repeatedly had regard to the Convention's special character as an instrument for human rights protection. It was relevant that one of the guiding principles under international human rights law, which had been applied by the United Nations Human Rights Committee and the International Court of Justice when considering the conduct of States outside their territory, was the need to avoid unconscionable double standards, by allowing a State to perpetrate violations on foreign territory which would not be permitted on its own territory.

129. The third-party interveners further emphasised that it was common ground between the international and regional courts and human rights bodies that, when determining whether the acts or omissions of a State's agents abroad fall within its "jurisdiction", regard must be had to the existence of control, authority or power of that State over the individual in question. When the agents of the State exercised such control, authority or power over an individual outside its territory, that State's obligation to respect human rights continued. This was a factual test, to be determined with regard to the circumstances of the particular act or omission of the State agents. Certain situations, such as military occupations, created a strong presumption that individuals were under the control, authority or power of the occupying State. Indeed, one principle which emerged from the case-law of the International Court of Justice, *inter alia* (see paragraphs 90-91 above), was that once a situation was qualified as an occupation within the meaning of international humanitarian law, there was a strong presumption of "jurisdiction" for the purposes of the application of human rights law.

(b) The Court's assessment

(i) General principles relevant to jurisdiction under Article 1 of the Convention

130. Article 1 of the Convention reads as follows:

> "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of [the] Convention."

As provided by this Article, the engagement undertaken by a Contracting State is confined to "securing" ("*reconnaître*" in the French text) the listed rights and freedoms to persons within its own "jurisdiction" (see *Soering v. the United Kingdom*, 7 July 1989, § 86, Series A no. 161, and *Banković and Others*, cited above, § 66). "Jurisdiction" under Article 1 is a threshold criterion. The exercise of jurisdiction is a necessary condition for a Contracting State to be able to be held responsible for acts or omissions imputable to it which give rise to an allegation of the infringement of rights and freedoms set forth in the Convention (see *Ilaşcu and Others*, cited above, § 311).

(α) The territorial principle

131. A State's jurisdictional competence under Article 1 is primarily territorial (see *Soering*, cited above, § 86; *Banković and Others*, cited above, §§ 61 and 67; and *Ilaşcu and Others*, cited above, § 312). Jurisdiction is presumed to be exercised normally throughout the State's territory (see *Ilaşcu and Others*, cited above, § 312, and *Assanidze v. Georgia* [GC], no. 71503/01, § 139, ECHR 2004-II). Conversely, acts of the Contracting States performed, or producing effects, outside their territories can constitute an exercise of jurisdiction within the meaning of Article 1 only in exceptional cases (see *Banković and Others*, cited above, § 67).

132. To date, the Court in its case-law has recognised a number of exceptional circumstances capable of giving rise to the exercise of jurisdiction by a Contracting State outside its own territorial boundaries. In each case, the question whether exceptional circumstances exist which require and justify a finding by the Court that the State was exercising jurisdiction extraterritorially must be determined with reference to the particular facts.

(β) State agent authority and control

133. The Court has recognised in its case-law that, as an exception to the principle of

territoriality, a Contracting State's jurisdiction under Article 1 may extend to acts of its authorities which produce effects outside its own territory (see *Drozd and Janousek*, cited above, § 91; *Loizidou* (preliminary objections), cited above, § 62; *Loizidou v. Turkey* (merits), 18 December 1996, § 52, *Reports of Judgments and Decisions* 1996-VI; and *Banković and Others*, cited above, § 69). The statement of principle, as it appears in *Drozd and Janousek* and the other cases just cited, is very broad: the Court states merely that the Contracting Party's responsibility "can be involved" in these circumstances. It is necessary to examine the Court's case-law to identify the defining principles.

134. Firstly, it is clear that the acts of diplomatic and consular agents, who are present on foreign territory in accordance with provisions of international law, may amount to an exercise of jurisdiction when these agents exert authority and control over others (see *Banković and Others*, cited above, § 73; see also *X. v. Germany*, no. 1611/62, Commission decision of 25 September 1965, Yearbook 8, p. 158; *X. v. the United Kingdom*, no. 7547/76, Commission decision of 15 December 1977, DR 12, p. 73; and *M. v. Denmark*, no. 17392/90, Commission decision of 14 October 1992, DR 73, p. 193).

135. Secondly, the Court has recognised the exercise of extraterritorial jurisdiction by a Contracting State when, through the consent, invitation or acquiescence of the Government of that territory, it exercises all or some of the public powers normally to be exercised by that Government (see *Banković and Others*, cited above, § 71). Thus, where, in accordance with custom, treaty or other agreement, authorities of the Contracting State carry out executive or judicial functions on the territory of another State, the Contracting State may be responsible for breaches of the Convention thereby incurred, as long as the acts in question are attributable to it rather than to the territorial State (see *Drozd and Janousek*, cited above; *Gentilhomme and Others v. France*, nos. 48205/99, 48207/99 and 48209/99, 14 May 2002; and *X. and Y. v. Switzerland*, nos. 7289/75 and 7349/76, Commission decision of 14 July 1977, DR 9, p. 57).

136. In addition, the Court's case-law demonstrates that, in certain circumstances, the use of force by a State's agents operating outside its territory may bring the individual thereby brought under the control of the State's authorities into the State's Article 1 jurisdiction. This principle has been applied where an individual is taken into the custody of State agents abroad. For example, in *Öcalan* (cited above, § 91), the Court held that "directly after being handed over to the Turkish officials by the Kenyan officials, the applicant was effectively under Turkish authority and therefore within the 'jurisdiction' of that State for the purposes of Article 1 of the Convention, even though in this instance Turkey exercised its authority outside its territory". In *Issa and Others* (cited above), the Court indicated that, had it been established that Turkish soldiers had taken the applicants' relatives into custody in northern Iraq, taken them to a nearby cave and executed them, the deceased would have been within Turkish jurisdiction by virtue of the soldiers' authority and control over them. In *Al-Saadoon and Mufdhi v. the United Kingdom* ((dec.), no. 61498/08, §§ 86-89, 30 June 2009), the Court held that two Iraqi nationals detained in British-controlled military prisons in Iraq fell within the jurisdiction of the United Kingdom, since the United Kingdom exercised total and exclusive control over the prisons and the individuals detained in them. Finally, in *Medvedyev and Others v. France* ([GC], no. 3394/03, § 67, ECHR 2010), the Court held that the applicants were within French jurisdiction for the purposes of Article 1 of the Convention by virtue of the exercise by French agents of full and exclusive control over a ship and its crew from the time of its interception in international waters. The Court does not consider that jurisdiction in the above cases arose solely from the control exercised by the Contracting State over the buildings, aircraft or ship in which the individuals were held. What is decisive in such cases is the exercise of physical power and control over the person in question.

137. It is clear that, whenever the State, through its agents, exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section I of the Convention that are relevant to the situation of that individual. In this sense, therefore, the Convention rights can be "divided and tailored" (compare *Banković and Others*, cited above, § 75).

(γ) Effective control over an area

138. Another exception to the principle that jurisdiction under Article 1 is limited to a State's own territory occurs when, as a consequence of lawful or unlawful military action, a Contracting State exercises effective control of an area outside that national territory. The obligation to

secure, in such an area, the rights and freedoms set out in the Convention, derives from the fact of such control, whether it be exercised directly, through the Contracting State's own armed forces, or through a subordinate local administration (see *Loizidou* (preliminary objections), cited above, § 62; *Cyprus v. Turkey*, cited above, § 76; *Banković and Others*, cited above, § 70; *Ilaşcu and Others*, cited above, §§ 314-16; and *Loizidou* (merits), cited above, § 52). Where the fact of such domination over the territory is established, it is not necessary to determine whether the Contracting State exercises detailed control over the policies and actions of the subordinate local administration. The fact that the local administration survives as a result of the Contracting State's military and other support entails that State's responsibility for its policies and actions. The controlling State has the responsibility under Article 1 to secure, within the area under its control, the entire range of substantive rights set out in the Convention and those additional Protocols which it has ratified. It will be liable for any violations of those rights (see *Cyprus v. Turkey*, cited above, §§ 76-77).

139. It is a question of fact whether a Contracting State exercises effective control over an area outside its own territory. In determining whether effective control exists, the Court will primarily have reference to the strength of the State's military presence in the area (see *Loizidou* (merits), cited above, §§ 16 and 56, and *Ilaşcu and Others*, cited above, § 387). Other indicators may also be relevant, such as the extent to which its military, economic and political support for the local subordinate administration provides it with influence and control over the region (see *Ilaşcu and Others*, cited above, §§ 388-94).

140. The "effective control" principle of jurisdiction set out above does not replace the system of declarations under Article 56 of the Convention (formerly Article 63) which the States decided, when drafting the Convention, to apply to territories overseas for whose international relations they were responsible. Article 56 § 1 provides a mechanism whereby any State may decide to extend the application of the Convention, "with due regard ... to local requirements", to all or any of the territories for whose international relations it is responsible. The existence of this mechanism, which was included in the Convention for historical reasons, cannot be interpreted in present conditions as limiting the scope of the term "jurisdiction" in Article 1. The situations covered by the "effective control" principle are clearly separate and distinct from circumstances where a Contracting State has not, through a declaration under Article 56, extended the Convention or any of its Protocols to an overseas territory for whose international relations it is responsible (see *Loizidou* (preliminary objections), cited above, §§ 86-89, and *Quark Fishing Ltd*, cited above).

(δ) The legal space ("*espace juridique*") of the Convention

141. The Convention is a constitutional instrument of European public order (see *Loizidou* (preliminary objections), cited above, § 75). It does not govern the actions of States not Parties to it, nor does it purport to be a means of requiring the Contracting States to impose Convention standards on other States (see *Soering*, cited above, § 86).

142. The Court has emphasised that, where the territory of one Convention State is occupied by the armed forces of another, the occupying State should in principle be held accountable under the Convention for breaches of human rights within the occupied territory, because to hold otherwise would be to deprive the population of that territory of the rights and freedoms hitherto enjoyed and would result in a "vacuum" of protection within the "legal space of the Convention" (see *Cyprus v. Turkey*, cited above, § 78, and *Banković and Others*, cited above, § 80). However, the importance of establishing the occupying State's jurisdiction in such cases does not imply, *a contrario*, that jurisdiction under Article 1 of the Convention can never exist outside the territory covered by the Council of Europe member States. The Court has not in its case-law applied any such restriction (see, among other examples, *Öcalan*; *Issa and Others*; *Al-Saadoon and Mufdhi*; and *Medvedyev and Others*, all cited above).

(ii) Application of these principles to the facts of the case

143. In determining whether the United Kingdom had jurisdiction over any of the applicants' relatives when they died, the Court takes as its starting-point that, on 20 March 2003, the United Kingdom together with the United States of America and their Coalition partners, through their armed forces, entered Iraq with the aim of displacing the Ba'ath regime then in power. This aim was achieved by 1 May 2003, when major combat operations were declared to be complete and the United States of America and the United Kingdom became Occupying Powers within the

the United States of America and the United Kingdom became Occupying Powers within the meaning of Article 42 of the Hague Regulations (see paragraph 89 above).

144. As explained in the letter dated 8 May 2003 sent jointly by the Permanent Representatives of the United Kingdom and the United States of America to the President of the United Nations Security Council (see paragraph 11 above), the United States of America and the United Kingdom, having displaced the previous regime, created the CPA "to exercise powers of government temporarily". One of the powers of government specifically referred to in the letter of 8 May 2003 to be exercised by the United States of America and the United Kingdom through the CPA was the provision of security in Iraq, including the maintenance of civil law and order. The letter further stated that "[t]he United States, the United Kingdom and Coalition partners, working through the Coalition Provisional Authority, shall, *inter alia*, provide for security in and for the provisional administration of Iraq, including by ... assuming immediate control of Iraqi institutions responsible for military and security matters".

145. In its first legislative act, CPA Regulation No. 1 of 16 May 2003, the CPA declared that it would "exercise powers of government temporarily in order to provide for the effective administration of Iraq during the period of transitional administration, to restore conditions of security and stability" (see paragraph 12 above).

146. The contents of the letter of 8 May 2003 were noted by the Security Council in Resolution 1483, adopted on 22 May 2003. This Resolution gave further recognition to the security role which had been assumed by the United States of America and the United Kingdom when, in paragraph 4, it called upon the Occupying Powers "to promote the welfare of the Iraqi people through the effective administration of the territory, including in particular working towards the restoration of conditions of security and stability" (see paragraph 14 above).

147. During this period, the United Kingdom had command of the military division Multinational Division (South-East), which included the province of Al-Basra, where the applicants' relatives died. From 1 May 2003 onwards the British forces in Al-Basra took responsibility for maintaining security and supporting the civil administration. Among the United Kingdom's security tasks were patrols, arrests, anti-terrorist operations, policing of civil demonstrations, protection of essential utilities and infrastructure and protecting police stations (see paragraph 21 above).

148. In July 2003 the Governing Council of Iraq was established. The CPA remained in power, although it was required to consult with the Governing Council (see paragraph 15 above). In Resolution 1511, adopted on 16 October 2003, the United Nations Security Council underscored the temporary nature of the exercise by the CPA of the authorities and responsibilities set out in Resolution 1483. It also authorised "a Multinational Force under unified command to take all necessary measures to contribute to the maintenance of security and stability in Iraq" (see paragraph 16 above). United Nations Security Council Resolution 1546, adopted on 8 June 2004, endorsed "the formation of a sovereign interim government of Iraq ... which will assume full responsibility and authority by 30 June 2004 for governing Iraq" (see paragraph 18 above). In the event, the occupation came to an end on 28 June 2004, when full authority for governing Iraq passed to the interim Iraqi government from the CPA, which then ceased to exist (see paragraph 19 above).

(iii) Conclusion as regards jurisdiction

149. It can be seen, therefore, that following the removal from power of the Ba'ath regime and until the accession of the interim Iraqi government, the United Kingdom (together with the United States of America) assumed in Iraq the exercise of some of the public powers normally to be exercised by a sovereign government. In particular, the United Kingdom assumed authority and responsibility for the maintenance of security in south-east Iraq. In these exceptional circumstances, the Court considers that the United Kingdom, through its soldiers engaged in security operations in Basra during the period in question, exercised authority and control over individuals killed in the course of such security operations, so as to establish a jurisdictional link between the deceased and the United Kingdom for the purposes of Article 1 of the Convention.

150. Against this background, the Court recalls that the deaths at issue in the present case occurred during the relevant period: the fifth applicant's son died on 8 May 2003; the first and fourth applicants' brothers died in August 2003; the sixth applicant's son died in September 2003; and the spouses of the second and third applicants died in November 2003. It is not disputed that the deaths of the first, second, fourth, fifth and sixth applicants' relatives were

caused by the acts of British soldiers during the course of or contiguous to security operations carried out by British forces in various parts of Basra City. It follows that in all these cases there was a jurisdictional link for the purposes of Article 1 of the Convention between the United Kingdom and the deceased. The third applicant's wife was killed during an exchange of fire between a patrol of British soldiers and unidentified gunmen and it is not known which side fired the fatal bullet. The Court considers that, since the death occurred in the course of a United Kingdom security operation, when British soldiers carried out a patrol in the vicinity of the applicant's home and joined in the fatal exchange of fire, there was a jurisdictional link between the United Kingdom and this deceased also.

2. Alleged breach of the investigative duty under Article 2 of the Convention

151. The applicants did not complain before the Court of any substantive breach of the right to life under Article 2. Instead they complained that the Government had not fulfilled its procedural duty to carry out an effective investigation into the killings.

Article 2 of the Convention provides as follows:

> "1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
>
> 2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:
>
> (a) in defence of any person from unlawful violence;
>
> (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
>
> (c) in action lawfully taken for the purpose of quelling a riot or insurrection."

(a) The parties' submissions

(i) The Government

152. The Government reasoned that the procedural duty under Article 2 had to be interpreted in harmony with the relevant principles of international law. Moreover, any implied duty should not be interpreted in such a way as to place an impossible or disproportionate burden on a Contracting State. The United Kingdom did not have full control over the territory of Iraq and, in particular, did not have legislative, administrative or judicial competence. If the investigative duty were to apply extraterritorially, it had to take account of these circumstances, and also of the very difficult security conditions in which British personnel were operating.

153. The Government accepted that the investigations into the deaths of the first, second and third applicants' relatives were not sufficiently independent for the purposes of Article 2, since in each case the investigation was carried out solely by the Commanding Officers of the soldiers alleged to be responsible. However, they submitted that the investigations carried out in respect of the deaths of the fourth and fifth applicants' relatives complied with Article 2. Nor had there been any violation of the investigative duty in respect of the sixth applicant; indeed, he did not allege that the investigation in his case had failed to comply with Article 2.

154. The Government emphasised, generally, that the Royal Military Police investigators were institutionally independent of the armed forces. They submitted that the Court of Appeal had been correct in concluding that the Special Investigation Branch of the Royal Military Police was capable of conducting independent investigations (see paragraph 82 above), although Brooke LJ had also commented that the task of investigating loss of life "must be completely taken away from the military chain of command and vested in the [Royal Military Police]". The role of the military chain of command in notifying the Special Investigation Branch of an incident requiring investigation, and its subsequent role in referring cases investigated by the Special Investigation Branch to the Army Prosecuting Authority did not, however, mean that those investigations lacked independence as required by Articles 2 or 3 (see *Cooper v. the United Kingdom* [GC], no. 48843/99, §§ 108-15, ECHR 2003-XII; *McKerr v. the United Kingdom*, no. 28883/95, ECHR 2001-III; and *Paul and Audrey Edwards v. the United Kingdom*, no. 46477/99, ECHR 2002-II). The Army Prosecuting Authority was staffed by legally qualified officers. It was

wholly independent from the military chain of command in relation to its prosecuting function. Its independence had been recognised by the Court in *Cooper* (cited above).

155. The Government pointed out that an investigation into the fourth applicant's brother's death was commenced by the Special Investigation Branch on 29 August 2003, five days after the shooting on 14 August. The Special Investigation Branch recovered fragments of bullets, empty bullet cases and the vehicle, and took digital photographs of the scene. They interviewed the doctors who treated the deceased and took statements. Nine military witnesses involved in the incident were interviewed and had statements taken and four further witnesses were interviewed but had no evidence to offer. The investigation was discontinued on 17 September 2003 after the Brigade Commander expressed the view that the shooting fell within the rules of engagement and was lawful. However, the decision to discontinue was taken by a Special Investigation Branch senior investigating officer, who was independent of the military chain of command. The investigation was reopened on 7 June 2004 and completed on 3 December 2004, despite the difficult security conditions in Iraq at that time. The case was then referred to the Army Prosecuting Authority, which decided not to bring criminal charges as there was no realistic prospect of proving that the soldier who shot the fourth applicant's brother had not been acting in self-defence. The Attorney General was notified and he decided not to exercise his jurisdiction to order a prosecution. In the Government's submission, the investigation was effective, in that it identified the person responsible for the death and established that the laws governing the use of force had been followed. The investigation was reasonably prompt, in particular when regard was had to the extreme difficulty of investigating in the extraterritorial context. If the halting of the initial investigation gave rise to any lack of independence, this was cured by the subsequent investigation and the involvement of the Army Prosecuting Authority and the Attorney General (see *Gül v. Turkey*, no. 22676/93, §§ 92-95, 14 December 2000; see also *McCann and Others v. the United Kingdom*, 27 September 1995, §§ 157 and 162-64, Series A no. 324).

156. The Government submitted that there was no evidence, in the fifth applicant's case, that the military chain of command interfered with the Special Investigation Branch investigation so as to compromise its independence. On the contrary, after receiving the investigation report the military chain of command referred the case to the Army Prosecuting Authority who in turn referred it for independent criminal trial. There was no undue delay in the investigation, in particular having regard to the difficulties faced by United Kingdom investigators investigating an incident which took place in Iraq eight days after the cessation of major combat operations. The fifth applicant was fully and sufficiently involved in the investigation. His participation culminated in the United Kingdom authorities flying him to England so that he could attend the court martial and give evidence. In addition to the Special Investigation Branch investigation and the criminal proceedings against the four soldiers, the fifth applicant brought civil proceedings in the United Kingdom domestic courts, claiming damages for battery and assault, negligence and misfeasance in public office. In those proceedings, he gave an account of his son's death and the investigation which followed it. The proceedings were settled when the Ministry of Defence admitted liability and agreed to pay GBP 115,000 by way of compensation. Moreover, on 20 February 2009 Major General Cubitt wrote to the fifth applicant and formally apologised on behalf of the British army for its role in the death of his son. In these circumstances, the fifth applicant could no longer claim to be a victim of a violation of the Convention within the meaning of Article 34. Further, or in the alternative, it was no longer justified to continue the examination of the application (Article 37 § 1 (c) of the Convention).

157. The Government further emphasised that the sixth applicant had expressly confirmed that he did not claim before the Court that the Government had violated his Convention rights. This reflected the fact that, in relation to his son's death, there had been

(a) a full investigation by the Special Investigation Branch, leading to the bringing of criminal charges against six soldiers, one of whom was convicted;

(b) civil proceedings brought by the applicant, which were settled when the Government admitted liability for the mistreatment and death of the applicant's son and paid damages of GBP 575,000;

(c) a formal public acknowledgement by the Government of the breach of the applicant's son's rights under Articles 2 and 3;

(d) judicial review proceedings, in which the applicant complained of a breach of his procedural rights under Articles 2 and 3 and in which it was agreed by the parties and ordered by

the House of Lords that the question whether there had been a breach of the procedural obligation should be remitted to the Divisional Court; and

(e) a public inquiry, which was ongoing.

In these circumstances, the applicant could no longer claim to be a victim for the purposes of Article 34 of the Convention.

(ii) The applicants

158. The applicants emphasised that the Court's case-law regarding south-eastern Turkey demonstrated that the procedural duty under Article 2 was not modified by reference to security problems in a conflict zone. The same principle had to apply in relation to any attempt by the Government to rely on either the security situation or the lack of infrastructure and facilities in Iraq. The United Kingdom was aware, or should have been aware, prior to the invasion and during the subsequent occupation, of the difficulties it would encounter. Its shortcomings in making provision for those difficulties could not exonerate it from the failure to comply with the investigative duty.

159. They submitted that the United Kingdom had failed in its procedural duty as regards the first, second, third, fourth and fifth applicants. The Royal Military Police was an element of the British army and was not, in either institutional or practical terms, independent from the military chain of command. The army units exercised control over it in matters relating to safety and logistical support while in theatre. Its involvement in incidents was wholly dependent on a request from the military unit in question, as was illustrated by the fourth applicant's case, where the Special Investigation Branch response was stood down upon the instruction of the Commanding Officer. The Royal Military Police appeared to have been wholly dependent on the military chain of command for information about incidents. If it produced a report, this was given to the military chain of command, which decided whether to forward it to the Army Prosecuting Authority. The inadequacies within the Royal Military Police, regarding both lack of resources and independence, were noted by the Court of Appeal and by the Aitken Report.

160. The applicants pointed out that the Special Investigation Branch investigation into the fourth applicant's case had been discontinued at the request of the military chain of command. The further investigatory phase, reopened as a result of litigation in the domestic courts, was similarly deficient, given the lack of independence of the Special Investigation Branch and the extreme delay in interviewing the person responsible for firing the shots and securing other key evidence. In the fifth applicant's case, the investigation was initiated at the repeated urging of the family, after considerable obstruction and delay on the part of the British authorities. The investigators were not independent from the military chain of command and the victim's family were not sufficiently involved. The applicants contended that the Government's objection that the fifth applicant lacked victim status should be rejected. The court-martial proceedings and the compensation he had received in settlement of the civil proceedings were inadequate to satisfy the procedural requirement under Article 2. In contrast, the sixth applicant did not claim still to be a victim of the violation of his procedural rights under Articles 2 and 3.

(b) The Court's assessment

(i) General principles

161. The Court is conscious that the deaths in the present case occurred in Basra City in south-east Iraq in the aftermath of the invasion, during a period when crime and violence were endemic. Although major combat operations had ceased on 1 May 2003, the Coalition Forces in south-east Iraq, including British soldiers and military police, were the target of over a thousand violent attacks in the subsequent thirteen months. In tandem with the security problems, there were serious breakdowns in the civilian infrastructure, including the law enforcement and criminal justice systems (see paragraphs 22-23 above; see also the findings of the Court of Appeal at paragraph 80 above).

162. While remaining fully aware of this context, the Court's approach must be guided by the knowledge that the object and purpose of the Convention as an instrument for the protection of individual human beings requires that its provisions be interpreted and applied so as to make its safeguards practical and effective. Article 2, which protects the right to life and sets out the circumstances when deprivation of life may be justified, ranks as one of the most fundamental

provisions of the Convention. No derogation from it is permitted under Article 15, "except in respect of deaths resulting from lawful acts of war". Article 2 covers both intentional killing and also the situations in which it is permitted to use force which may result, as an unintended outcome, in the deprivation of life. Any use of force must be no more than "absolutely necessary" for the achievement of one or more of the purposes set out in sub-paragraphs (a) to (c) (see *McCann and Others*, cited above, §§ 146-48).

163. The general legal prohibition of arbitrary killing by agents of the State would be ineffective in practice if there existed no procedure for reviewing the lawfulness of the use of lethal force by State authorities. The obligation to protect the right to life under this provision, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention", requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, *inter alios*, agents of the State (see *McCann and Others*, cited above, § 161). The essential purpose of such an investigation is to secure the effective implementation of the domestic laws safeguarding the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility (see *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, § 110, ECHR 2005-VII). However, the investigation should also be broad enough to permit the investigating authorities to take into consideration not only the actions of the State agents who directly used lethal force but also all the surrounding circumstances, including such matters as the planning and control of the operations in question, where this is necessary in order to determine whether the State complied with its obligation under Article 2 to protect life (see, by implication, *McCann and Others*, cited above, §§ 150 and 162; *Hugh Jordan v. the United Kingdom*, no. 24746/94, § 128, 4 May 2001; *McKerr*, cited above, §§ 143 and 151; *Shanaghan v. the United Kingdom*, no. 37715/97, §§ 100-25, 4 May 2001; *Finucane v. the United Kingdom*, no. 29178/95, §§ 77-78, ECHR 2003-VIII; *Nachova and Others*, cited above, §§ 114-15; and, *mutatis mutandis*, *Tzekov v. Bulgaria*, no. 45500/99, § 71, 23 February 2006).

164. The Court has held that the procedural obligation under Article 2 continues to apply in difficult security conditions, including in a context of armed conflict (see, among other examples, *Güleç v. Turkey*, 27 July 1998, § 81, *Reports* 1998-IV; *Ergi v. Turkey*, 28 July 1998, §§ 79 and 82, *Reports* 1998-IV; *Ahmet Özkan and Others v. Turkey*, no. 21689/93, §§ 85-90, 309-20 and 326-30, 6 April 2004; *Isayeva v. Russia*, no. 57950/00, §§ 180 and 210, 24 February 2005; and *Kanlibaş v. Turkey*, no. 32444/96, §§ 39-51, 8 December 2005). It is clear that where the death to be investigated under Article 2 occurs in circumstances of generalised violence, armed conflict or insurgency, obstacles may be placed in the way of investigators and, as the United Nations Special Rapporteur has also observed (see paragraph 93 above), concrete constraints may compel the use of less effective measures of investigation or may cause an investigation to be delayed (see, for example, *Bazorkina v. Russia*, no. 69481/01, § 121, 27 July 2006). Nonetheless, the obligation under Article 2 to safeguard life entails that, even in difficult security conditions, all reasonable steps must be taken to ensure that an effective, independent investigation is conducted into alleged breaches of the right to life (see, among many other examples, *Kaya v. Turkey*, 19 February 1998, §§ 86-92, *Reports* 1998-I; *Ergi*, cited above, §§ 82-85; *Tanrıkulu v. Turkey* [GC], no. 23763/94, §§ 101-10, ECHR 1999-IV; *Khashiyev and Akayeva v. Russia*, nos. 57942/00 and 57945/00, §§ 156-66, 24 February 2005; *Isayeva*, cited above, §§ 215-24; and *Musayev and Others v. Russia*, nos. 57941/00, 58699/00 and 60403/00, §§ 158-65, 26 July 2007).

165. What form of investigation will achieve the purposes of Article 2 may vary depending on the circumstances. However, whatever mode is employed, the authorities must act of their own motion once the matter has come to their attention. They cannot leave it to the initiative of the next of kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures (see *Ahmet Özkan and Others*, cited above, § 310, and *Isayeva*, cited above, § 210). Civil proceedings, which are undertaken on the initiative of the next of kin, not the authorities, and which do not involve the identification or punishment of any alleged perpetrator, cannot be taken into account in the assessment of the State's compliance with its procedural obligations under Article 2 of the Convention (see, for example, *Hugh Jordan*, cited above, § 141). Moreover, the procedural obligation of the State under Article 2 cannot be satisfied merely by awarding damages (see *McKerr*, cited above, § 121, and *Bazorkina*, cited above, § 117).

166. As stated above, the investigation must be effective in the sense that it is capable of leading to a determination of whether the force used was or was not justified in the

leading to a determination of whether the force used was or was not justified in the circumstances and to the identification and punishment of those responsible. This is not an obligation of result, but of means. The authorities must take the reasonable steps available to them to secure the evidence concerning the incident, including, *inter alia*, eyewitness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death. Any deficiency in the investigation which undermines its ability to establish the cause of death or the person or persons responsible will risk falling foul of this standard (see *Ahmet Özkan and Others*, cited above, § 312, and *Isayeva*, cited above, § 212 and the cases cited therein).

167. For an investigation into alleged unlawful killing by State agents to be effective, it is necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events. This means not only a lack of hierarchical or institutional connection but also a practical independence (see, for example, *Shanaghan*, cited above, § 104). A requirement of promptness and reasonable expedition is implicit in this context. While there may be obstacles or difficulties which prevent progress in an investigation in a particular situation, a prompt response by the authorities in investigating a use of lethal force may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts. For the same reasons, there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny required may well vary from case to case. In all cases, however, the victim's next of kin must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests (see *Ahmet Özkan and Others*, cited above, §§ 311-14, and *Isayeva*, cited above, §§ 211-14 and the cases cited therein).

(ii) Application of these principles to the facts of the case

168. The Court takes as its starting-point the practical problems caused to the investigating authorities by the fact that the United Kingdom was an Occupying Power in a foreign and hostile region in the immediate aftermath of invasion and war. These practical problems included the breakdown in the civil infrastructure, leading, *inter alia*, to shortages of local pathologists and facilities for autopsies; the scope for linguistic and cultural misunderstandings between the occupiers and the local population; and the danger inherent in any activity in Iraq at that time. As stated above, the Court considers that in circumstances such as these the procedural duty under Article 2 must be applied realistically, to take account of specific problems faced by investigators.

169. Nonetheless, the fact that the United Kingdom was in occupation also entailed that, if any investigation into acts allegedly committed by British soldiers was to be effective, it was particularly important that the investigating authority was, and was seen to be, operationally independent of the military chain of command.

170. It was not in issue in the first, second and fourth applicants' cases that their relatives were shot by British soldiers, whose identities were known. The question for investigation was whether in each case the soldier fired in conformity with the rules of engagement. In respect of the third applicant, Article 2 required an investigation to determine the circumstances of the shooting, including whether appropriate steps were taken to safeguard civilians in the vicinity. As regards the fifth applicant's son, although the Court has not been provided with the documents relating to the court martial, it appears to have been accepted that he died of drowning. It needed to be determined whether British soldiers had, as alleged, beaten the boy and forced him into the water. In each case, eyewitness testimony was crucial. It was therefore essential that, as quickly after the event as possible, the military witnesses, and in particular the alleged perpetrators, should have been questioned by an expert and fully independent investigator. Similarly, every effort should have been taken to identify Iraqi eyewitnesses and to persuade them that they would not place themselves at risk by coming forward and giving information and that their evidence would be treated seriously and acted upon without delay.

171. It is clear that the investigations into the shooting of the first, second and third applicants' relatives fell short of the requirements of Article 2, since the investigation process remained entirely within the military chain of command and was limited to taking statements from the soldiers involved. Moreover, the Government accept this conclusion.

172. As regards the other applicants, although there was an investigation by the Special Investigation Branch into the death of the fourth applicant's brother and the fifth applicant's son, the Court does not consider that this was sufficient to comply with the requirements of Article 2

the Court does not consider that this was sufficient to comply with the requirements of Article 2. It is true that the Royal Military Police, including its Special Investigation Branch, had a separate chain of command from the soldiers on combat duty whom it was required to investigate. However, as the domestic courts observed (see paragraphs 77 and 82 above), the Special Investigation Branch was not, during the relevant period, operationally independent from the military chain of command. It was generally for the Commanding Officer of the unit involved in the incident to decide whether the Special Investigation Branch should be called in. If the Special Investigation Branch decided on its own initiative to commence an investigation, this investigation could be closed at the request of the military chain of command, as demonstrated in the fourth applicant's case. On conclusion of a Special Investigation Branch investigation, the report was sent to the Commanding Officer, who was responsible for deciding whether or not the case should be referred to the Army Prosecuting Authority. The Court considers, in agreement with Brooke LJ (see paragraph 82 above), that the fact that the Special Investigation Branch was not "free to decide for itself when to start and cease an investigation" and did not report "in the first instance to the [Army Prosecuting Authority]" rather than to the military chain of command, meant that it could not be seen as sufficiently independent from the soldiers implicated in the events to satisfy the requirements of Article 2.

173. It follows that the initial investigation into the shooting of the fourth applicant's brother was flawed by the lack of independence of the Special Investigation Branch officers. During the initial phase of the investigation, material was collected from the scene of the shooting and statements were taken from the soldiers present. However, Lance Corporal S., the soldier who shot the applicant's brother, was not questioned by Special Investigation Branch investigators during this initial phase. It appears that the Special Investigation Branch interviewed four Iraqi witnesses, who may have included the neighbours the applicant believes to have witnessed the shooting, but did not take statements from them. In any event, as a result of the lack of independence, the investigation was terminated while still incomplete. It was subsequently reopened, some nine months later, and it would appear that forensic tests were carried out at that stage on the material collected from the scene, including the bullet fragments and the vehicle. The Special Investigation Branch report was sent to the Commanding Officer, who decided to refer the case to the Army Prosecuting Authority. The prosecutors took depositions from the soldiers who witnessed the incident and decided, having taken further independent legal advice, that there was no evidence that Lance Corporal S. had not acted in legitimate self-defence. As previously stated, eyewitness testimony was central in this case, since the cause of the death was not in dispute. The Court considers that the long period of time that was allowed to elapse before Lance Corporal S. was questioned about the incident, combined with the delay in having a fully independent investigator interview the other military witnesses, entailed a high risk that the evidence was contaminated and unreliable by the time the Army Prosecuting Authority came to consider it. Moreover, it does not appear that any fully independent investigator took evidence from the Iraqi neighbours who the applicant claims witnessed the shooting.

174. While there is no evidence that the military chain of command attempted to intervene in the investigation into the fifth applicant's son's death, the Court considers that the Special Investigation Branch investigators lacked independence for the reasons set out above. In addition, no explanation has been provided by the Government in respect of the long delay between the death and the court martial. It appears that the delay seriously undermined the effectiveness of the investigation, not least because some of the soldiers accused of involvement in the incident were by then untraceable (see, in this respect, the comments in the Aitken Report, paragraph 61 above). Moreover, the Court considers that the narrow focus of the criminal proceedings against the accused soldiers was inadequate to satisfy the requirements of Article 2 in the particular circumstances of this case. There appears to be at least prima facie evidence that the applicant's son, a minor, was taken into the custody of British soldiers who were assisting the Iraqi police to take measures to combat looting and that, as a result of his mistreatment by the soldiers, he drowned. In these circumstances, the Court considers that Article 2 required an independent examination, accessible to the victim's family and to the public, of the broader issues of State responsibility for the death, including the instructions, training and supervision given to soldiers undertaking tasks such as this in the aftermath of the invasion.

175. In the light of the foregoing, the Court does not consider that the procedural duty under Article 2 has been satisfied in respect of the fifth applicant. Although he has received a substantial sum in settlement of his civil claim, together with an admission of liability on behalf of

substantial sum in settlement of his civil claim, together with an admission of liability on behalf of the army, there has never been a full and independent investigation into the circumstances of his son's death (see paragraph 165 above). It follows that the fifth applicant can still claim to be a victim within the meaning of Article 34 and that the Government's preliminary objection regarding his lack of victim status must be rejected.

176. In contrast, the Court notes that a full, public inquiry is nearing completion into the circumstances of the sixth applicant's son's death. In the light of this inquiry, the Court notes that the sixth applicant accepts that he is no longer a victim of any breach of the procedural obligation under Article 2. The Court therefore accepts the Government's objection in respect of the sixth applicant.

177. In conclusion, the Court finds a violation of the procedural duty under Article 2 of the Convention in respect of the first, second, third, fourth and fifth applicants.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

178. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

179. The first, second, third, fourth and fifth applicants asked the Court to order the Government to carry out an Article 2-compliant investigation into their relatives' deaths. They also claimed 15,000 pounds sterling (GBP) each in compensation for the distress they had suffered because of the United Kingdom's failure to conduct a Convention-compliant investigation into the deaths.

180. The Government pointed out that the Court had repeatedly and expressly refused to direct the State to carry out a fresh investigation in cases in which it had found a breach of the procedural duty under Article 2 (see, for example, *Varnava and Others v. Turkey* [GC], nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, § 222, ECHR 2009; *Ülkü Ekinci v. Turkey*, no. 27602/95, § 179, 16 July 2002; and *Finucane*, cited above, § 89). They further submitted that a finding of a violation would be sufficient just satisfaction in the circumstances. In the alternative, if the Court decided to make an award, the Government noted that the sum claimed by the applicants was higher than generally awarded. They did not, however, propose a sum, leaving it to the Court to decide on an equitable basis.

181. As regards the applicants' request concerning the provision of an effective investigation, the Court reiterates the general principle that the respondent State remains free to choose the means by which it will discharge its legal obligation under Article 46 of the Convention, provided that such means are compatible with the conclusions set out in the Court's judgment. Consequently, it considers that in these applications it falls to the Committee of Ministers acting under Article 46 of the Convention to address the issues as to what may be required in practical terms by way of compliance (see *Varnava and Others*, cited above, § 222, and the cases cited therein).

182. As regards the claim for monetary compensation, the Court recalls that it is not its role under Article 41 to function akin to a domestic tort mechanism court in apportioning fault and compensatory damages between civil parties. Its guiding principle is equity, which above all involves flexibility and an objective consideration of what is just, fair and reasonable in all the circumstances of the case, including not only the position of the applicant but the overall context in which the breach occurred. Its non-pecuniary awards serve to give recognition to the fact that moral damage occurred as a result of a breach of a fundamental human right and reflect in the broadest of terms the severity of the damage (see *Varnava and Others*, cited above, § 224, and the cases cited therein). In the light of all the circumstances of the present case, the Court considers that, to compensate each of the first five applicants for the distress caused by the lack of a fully independent investigation into the deaths of their relatives, it would be just and equitable to award the full amount claimed, which, when converted into euros, comes to approximately 17,000 euros (EUR) each.

approximately 17,000 euros (EUR) each.

B. Costs and expenses

183. The applicants, emphasising the complexity and importance of the case, claimed for over 580 hours' legal work by their solicitors and four counsel in respect of the proceedings before the Court, at a total cost of GBP 119,928.

184. The Government acknowledged that the issues were complex, but nonetheless submitted that the claim was excessive, given that the applicants' legal advisers were familiar with all aspects of the claim since they had acted for the applicants in the domestic legal proceedings, which had been publicly funded. Furthermore, the hourly rates claimed by the applicants' counsel, ranging between GBP 500 and GBP 235, and the hourly rates claimed by the applicants' solicitors, ranging between GBP 180 and GBP 130, were unreasonably high. Nor had it been necessary to engage two Queen's Counsel and two junior counsel.

185. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 50,000 for the proceedings before the Court.

C. Default interest

186. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Rejects* the Government's preliminary objections regarding attribution and non-exhaustion of domestic remedies;

2. *Joins to the merits* the questions whether the applicants fell within the jurisdiction of the respondent State and whether the fifth and sixth applicants retained victim status;

3. *Declares* the application admissible;

4. *Holds* that the applicants' deceased relatives fell within the jurisdiction of the respondent State and *dismisses* the Government's preliminary objection as regards jurisdiction;

5. *Holds* that the sixth applicant can no longer claim to be a victim of a violation of the procedural obligation under Article 2 of the Convention;

6. *Holds* that there has been a breach of the procedural obligation under Article 2 of the Convention to carry out an adequate and effective investigation into the deaths of the relatives of the first, second, third, fourth and fifth applicants and *dismisses* the Government's preliminary objection as regards the victim status of the fifth applicant;

7. *Holds*
   (a) that the respondent State is to pay each of the first five applicants, within three months, EUR 17,000 (seventeen thousand euros), plus any tax that may be chargeable on this sum, in respect of non-pecuniary damage, to be converted into pounds sterling at the rate applicable at the date of settlement;
   (b) that the respondent State is to pay jointly to the first five applicants, within three months, EUR 50,000 (fifty thousand euros), plus any tax that may be chargeable to the applicants on this sum, in respect of costs and expenses, to be converted into pounds sterling at the rate applicable at the date of settlement;

applicable at the date of settlement;

(c) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

8. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 7 July 2011.

Michael O'Boyle Jean-Paul Costa
Deputy Registrar President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:
(a) concurring opinion of Judge Rozakis;
(b) concurring opinion of Judge Bonello.

J.-P.C.
M.O'B.

CONCURRING OPINION OF JUDGE ROZAKIS

When citing the general principles relevant to a State Party's jurisdiction under Article 1 of the Convention (see paragraphs 130 et seq. of the Grand Chamber judgment), the Court reiterates its established case-law that apart from the territorial aspect determining the jurisdictional competence of a State Party to the Convention, there are "exceptional circumstances capable of giving rise to the exercise of jurisdiction by a Contracting State outside its own territorial boundaries" (see paragraph 132). It then proceeds to discuss such exceptional circumstances. In paragraphs 133 to 137, under the title "State agent authority and control", it refers to situations where State agents operating extraterritorially, and exercising control and authority over individuals, create a jurisdictional link with their State and its obligations under the Convention, making that State responsible for the acts or omissions of its agents, in cases where they affect the rights or freedoms of individuals protected by the Convention. Characteristic examples of such exceptional circumstances of extraterritorial jurisdiction are mentioned in the judgment (see paragraphs 134-36), and concern the acts of diplomatic and consular agents, the exercise of authority and control over foreign territory by individuals which is allowed by a third State through its consent, invitation or acquiescence, and the use of force by State agents operating outside its territory.

So far so good, but then, under the title "Effective control over an area", the Court refers to "[a]nother exception to the principle [of] jurisdiction", when "as a consequence of lawful or unlawful military action, a Contracting State exercises effective control of an area outside [its] national territory" (see paragraph 138). I regret to say that I cannot agree that this ground of jurisdiction constitutes a separate ("another") ground of jurisdiction, which differs from the "State authority and control" jurisdictional link. It is part and parcel, to my mind, of that latter jurisdictional link, and concerns a particular aspect of it. The differing elements, which distinguish that particular aspect from the jurisdictional categories mentioned by the Court, can be presented cumulatively or in isolation as the following: (a) the usually large-scale use of force; (b) the occupation of a territory for a prolonged period of time; and/or (c) in the case of occupation, the exercise of power by a subordinate local administration, whose acts do not exonerate the occupying State from its responsibility under the Convention.

As a consequence, I consider that the right approach to the matter would have been for the Court to have included that aspect of jurisdiction in the exercise of the "State authority and control" test, and to have simply determined that "effective" control is a condition for the exercise

control" test, and to have simply determined that "effective" control is a condition for the exercise of jurisdiction which brings a State within the boundaries of the Convention, as delimited by its Article 1.

CONCURRING OPINION OF JUDGE BONELLO

1. These six cases deal primarily with the issue of whether Iraqi civilians who allegedly lost their lives at the hands of United Kingdom soldiers, in non-combat situations in the United Kingdom-occupied Basra region of Iraq, were "within the jurisdiction" of the United Kingdom when those killings took place.

2. When, in March 2003, the United Kingdom, together with the other Coalition Forces, invaded Iraq, the Coalition Provisional Authority (CPA) conferred upon members of that Authority the fullest jurisdictional powers over Iraq: "The CPA is vested with all executive, legislative and judicial authority necessary to achieve its objectives." This included the "power to issue legislation": "The CPA shall exercise powers of government temporarily."[1]

3. I fully agreed with the findings of the Court, but I would have employed a different test (a "functional jurisdiction" test) to establish whether or not the victims fell within the jurisdiction of the United Kingdom. Though the present judgment has placed the doctrines of extraterritorial jurisdiction on a sounder footing than ever before, I still do not consider wholly satisfactory the re-elaboration of the traditional tests to which the Court has resorted.

Extraterritorial jurisdiction or functional jurisdiction?

4. The Court's case-law on Article 1 of the Convention (the jurisdiction of the Contracting Parties) has, so far, been bedevilled by an inability or an unwillingness to establish a coherent and axiomatic regime, grounded in essential basics and even-handedly applicable across the widest spectrum of jurisdictional controversies.

5. Up until now, the Court has, in matters concerning the extraterritorial jurisdiction of Contracting Parties, spawned a number of "leading" judgments based on a need-to-decide basis, patchwork case-law at best. Inevitably, the doctrines established seem to go too far to some, and not far enough to others. As the Court has, in these cases, always tailored its tenets to sets of specific facts, it is hardly surprising that those tenets then seem to limp when applied to sets of different facts. Principles settled in one judgment may appear more or less justifiable in themselves, but they then betray an awkward fit when measured against principles established in another. *Issa and Others v. Turkey* (no. 31821/96, 16 November 2004) flies in the face of *Banković and Others v. Belgium and Others* ([GC] (dec.), no. 52207/99, ECHR 2001-XII) and the cohabitation of *Behrami v. France* and *Saramati v. France, Germany and Norway* ((dec.) [GC], nos. 71412/01 and 78166/01, 2 May 2007) with *Berić and Others v. Bosnia and Herzegovina* ((dec.), nos. 36357/04 and others, 16 October 2007) is, overall, quite problematic.

6. The late Lord Rodger of Earlsferry in the House of Lords had my full sympathy when he lamented that, in its application of extraterritorial jurisdiction "the judgments and decisions of the European Court do not speak with one voice". The differences, he rightly noted, are not merely ones of emphasis. Some "appear much more serious"[2].

7. The truth seems to be that Article 1 case-law has, before the present judgment, enshrined everything and the opposite of everything. In consequence, the judicial decision-making process in Strasbourg has, so far, squandered more energy in attempting to reconcile the barely reconcilable than in trying to erect intellectual constructs of more universal application. A considerable number of different approaches to extraterritorial jurisdiction have so far been experimented with by the Court on a case-by-case basis, some not completely exempt from internal contradiction.

8. My guileless plea is to return to the drawing board. To stop fashioning doctrines which somehow seem to accommodate the facts, but rather, to appraise the facts against the immutable principles which underlie the fundamental functions of the Convention.

9. The founding members of the Convention, and each subsequent Contracting Party, strove to achieve one aim, at once infinitesimal and infinite: the supremacy of the rule of human rights law. In Article 1 they undertook to secure *to everyone within their jurisdiction* the rights and freedoms enshrined in the Convention. This was, and remains, the cornerstone of the Convention. That was, and remains, the agenda heralded in its Preamble: "the *universal* and effective recognition and observance" of fundamental human rights. "Universal" hardly suggests an observance parcelled off by territory on the checkerboard of geography.

an observance parcelled off by territory on the checkerboard of geography.

10. States ensure the observance of human rights in five primordial ways: firstly, by not violating (through their agents) human rights; secondly, by having in place systems which prevent breaches of human rights; thirdly, by investigating complaints of human rights abuses; fourthly, by scourging those of their agents who infringe human rights; and, finally, by compensating the victims of breaches of human rights. These constitute the basic minimum *functions* assumed by every State by virtue of its having contracted into the Convention.

11. A "functional" test would see a State effectively exercising "jurisdiction" whenever it falls within its power to perform, or not to perform, any of these five functions. Very simply put, *a State has jurisdiction for the purposes of Article 1 whenever the observance or the breach of any of these functions is within its authority and control.*

12. Jurisdiction means no less and no more than "authority over" and "control of". In relation to Convention obligations, jurisdiction is neither territorial nor extraterritorial: it ought to be functional – in the sense that when it is within a State's authority and control whether a breach of human rights is, or is not, committed, whether its perpetrators are, or are not, identified and punished, whether the victims of violations are, or are not, compensated, it would be an imposture to claim that, ah yes, that State had authority and control, but, ah no, it had no jurisdiction.

13. The duties assumed through ratifying the Convention go hand in hand with the duty to perform and observe them. Jurisdiction arises from the mere fact of having assumed those obligations *and from having the capability to fulfil them* (or not to fulfil them).

14. If the perpetrators of an alleged human rights violation are within the authority and control of one of the Contracting Parties, it is to me totally consequential that their actions by virtue of that State's authority engage the jurisdiction of the Contracting Party. I resist any helpful schizophrenia by which a nervous sniper is within the jurisdiction, his act of shooting is within the jurisdiction, but then the victims of that nervous sniper happily choke in blood outside it. Any hiatus between what logical superglue has inexorably bonded appears defiantly meretricious, one of those infelicitous legal fictions a court of human rights can well do without.

15. Adhering to doctrines other than this may lead in practice to some riotous absurdities in their effects. If two civilian Iraqis are together in a street in Basra, and a United Kingdom soldier kills the first before arrest and the second after arrest, the first dies desolate, deprived of the comforts of United Kingdom jurisdiction, the second delighted that his life was evicted from his body within the jurisdiction of the United Kingdom. Same United Kingdom soldier, same gun, same ammunition, same patch of street – same inept distinctions. I find these pseudo-differentials spurious and designed to promote a culture of law that perverts, rather than fosters, the cause of human rights justice.

16. In my view, the one honest test, in *all* circumstances (including extraterritoriality), is the following: did it depend on the agents of the State whether the alleged violation would be committed or would not be committed? Was it within the power of the State to punish the perpetrators and to compensate the victims? If the answer is yes, self-evidently the facts fall squarely within the jurisdiction of the State. All the rest seems to me clumsy, self-serving alibi-hunting, unworthy of any State that has grandiosely undertaken to secure the "universal" observance of human rights whenever and wherever it is within its power to secure them, and, may I add, of courts whose only *raison d'être* should be to ensure that those obligations are not avoided or evaded. The Court has, in the present judgment, thankfully placed a sanitary cordon between itself and some of these approaches.

17. The failure to espouse an obvious functional test, based exclusively on the programmatic agenda of the Convention, has, in the past, led to the adoption of a handful of sub-tests, some of which may have served defilers of Convention values far better than they have the Convention itself. Some of these tests have empowered the abusers and short-changed their victims. For me the primary questions to be answered boil down to these: when a State ratifies the Convention, does it undertake to promote human rights wherever it can, or does it undertake to promote human rights inside its own confines and to breach them everywhere else? Did the Contracting Party ratify the Convention with the deliberate intent of discriminating between the sanctity of human rights within its own territory and their paltry insignificance everywhere else?

18. I am unwilling to endorse *à la carte* respect for human rights. I think poorly of an esteem for human rights that turns casual and approximate depending on geographical coordinates. Any State that worships fundamental rights on its own territory but then feels free to make a mockery of them anywhere else does not, as far as I am concerned, belong to that comity of nations for

which the supremacy of human rights is both mission and clarion call. In substance the United Kingdom is arguing, sadly, I believe, that it ratified the Convention with the deliberate intent of regulating the conduct of its armed forces according to latitude: gentlemen at home, hoodlums elsewhere.

19. The functional test I propose would also cater for the more rarefied reaches of human rights protection, like respect for the positive obligations imposed on Contracting Parties: was it within the State's authority and control to see that those positive obligations would be respected? If it was, then the functional jurisdiction of the State would come into play, with all its natural consequences. If, in the circumstances, the State is not in such a position of authority and control as to be able to ensure extraterritorially the fulfilment of any or all of its positive obligations, that lack of functional authority and control excludes jurisdiction, limitedly to those specific rights the State is not in a position to enforce.

20. This would be my universal vision of what this Court is all about – a bright-line approach rather than case-by-case improvisations, more or less inspired, more or less insipid, cluttering the case-law with doctrines which are, at best, barely compatible and at worst blatantly contradictory – and none measured against the essential yardstick of the supremacy and universality of human rights anytime, anywhere.

Exceptions?

21. I consider the doctrine of functional jurisdiction to be so linear and compelling that I would be unwilling to acquiesce to any exceptions, even more so in the realm of the near-absolute rights to life and to freedom from torture and degrading or inhuman treatment or punishment. Without ever reneging on the principle of the inherent jurisdiction of the Occupying Power that usually flows from military conquest, at most the Court could consider very limited exceptions to the way in which Articles 2 and 3 are applied in extreme cases of clear and present threats to national security that would otherwise significantly endanger the war effort. I would not, personally, subscribe to any exceptions at all.

Conclusion

22. Applying the functional test to the specifics of these cases, I arrive at the manifest and inescapable conclusion that all the facts and all the victims of the alleged killings said to have been committed by United Kingdom servicemen fall squarely within the jurisdiction of the United Kingdom, which had, in Basra and its surroundings, an obligation to ensure the observance of Articles 2 and 3 of the Convention. It is uncontested that the servicemen who allegedly committed the acts that led to the deaths of the victims were under United Kingdom authority and control; that it was within the United Kingdom's authority and control whether to investigate those deaths or not; that it was within the United Kingdom's authority and control whether to punish any human rights violations, if established; and that it was within the United Kingdom's authority and control whether to compensate the victims of those alleged violations or their heirs. Concluding that the United Kingdom had *all this* within its full authority and control, but still had no jurisdiction, would for me amount to a finding as consequential as a good fairy tale and as persuasive as a bad one.

23. The test adopted by the Court in this case has led to a unanimous finding of jurisdiction. Though I believe the functional test I endorse would better suit any dispute relating to extraterritorial jurisdiction, I would still have found that, whatever the test adopted, all the six killings before the Court engaged United Kingdom jurisdiction. I attach to this opinion a few random observations to buttress my conclusions.

Presumption of jurisdiction

24. I would propose a different test from that espoused by the domestic courts to establish or dismiss extraterritorial jurisdiction in terms of Article 1, in cases concerning military occupation, when a State becomes the recognised "Occupying Power" according to the Geneva and The Hague instruments. Once a State is acknowledged by international law to be "an Occupying Power", a rebuttable presumption ought to arise that the Occupying Power has "authority and

control” over the occupied territory, over what goes on there and over those who happen to be in it – with all the consequences that flow from a legal presumption. It will then be incumbent on the Occupying Power to prove that such was the state of anarchy and impotence prevailing, that it suffered a deficit of effective authority and control. It will no longer be for the victim of wartime atrocities to prove that the Occupying Power actually exercised authority and control. It will be for the Occupying Power to rebut it.

25. I was puzzled to read in the domestic proceedings that “the applicants had failed to make a case” for United Kingdom authority and control in the Basra region. I believe that the mere fact of a formally acknowledged military occupation ought to shift any burden of proof from the applicants to the respondent Government.

26. And it will, in my view, be quite arduous for an officially recognised “Occupying Power” to disprove authority and control over impugned acts, their victims and their perpetrators. The Occupying Power could only do that successfully in the case of infamies committed by forces other than its own, during a state of total breakdown of law and order. I find it bizarre, not to say offensive, that an Occupying Power can plead that it had no authority and control over acts committed by its own armed forces well under its own chain of command, claiming with one voice its authority and control over the perpetrators of those atrocities, but with the other, disowning any authority and control over atrocities committed by them and over their victims.

27. It is my view that jurisdiction is established when authority and control over others are established. For me, in the present cases, it is well beyond surreal to claim that a military colossus which waltzed into Iraq when it chose, settled there for as long as it cared to and only left when it no longer suited its interests to remain, can persuasively claim not to have exercised authority and control over an area specifically assigned to it in the geography of the war games played by the victorious. I find it uncaring to the intellect for a State to disclaim accountability for what its officers, wearing its uniforms, wielding its weapons, sallying forth from its encampments and returning there, are alleged to have done. The six victims are said to have lost their lives as a result of the unlawful actions of United Kingdom soldiers in non-combat situations – but no one answers for their death. I guess we are expected to blame it on the evil eye.

28. Jurisdiction flows not only from the exercise of democratic governance, not only from ruthless tyranny, not only from colonial usurpation. It also hangs from the mouth of a firearm. In non-combat situations, everyone in the line of fire of a gun is within the authority and control of whoever is wielding it.

Futility of the case-law

29. The undeniable fact is that this Court has never, before today, had to deal with any case in which the factual profiles were in any way similar to those of the present applications. This Court has, so far, had several occasions to determine complaints which raised issues of extraterritorial jurisdiction, but all of a markedly different nature. Endeavouring to export doctrines of jurisdiction hammered out in a case of a solitary air strike over a radio station abroad (see *Banković and Others*, cited above) to allegations of atrocities committed by the forces of an Occupying Power, which has assumed and kept armed control of a foreign territory for well over three years, is anything but consequent. I find the jurisdictional guidelines established by the Court to regulate the capture by France of a Cambodian drug-running ship on the high seas, for the specific purpose of intercepting her cargo and bringing the crew to justice (see *Medvedyev and Others v. France* [GC], no. 3394/03, ECHR 2010), to be quite distracting and time-wasting when the issue relates to a large territory outside the United Kingdom, conquered and held for over three years by the force of arms of a mighty foreign military set-up, recognised officially by international law as an “Occupying Power”, and which had established itself indefinitely there.

30. In my view, this relentless search for eminently tangential case-law is as fruitful and fulfilling as trying to solve one crossword puzzle with the clues of another. The Court could, in my view, have started the exercise by accepting that this was judicial *terra incognita*, and could have worked out an organic doctrine of extraterritorial jurisdiction, untrammelled by the irrelevant and indifferent to the obfuscating.

Indivisibility of human rights

31. The foregoing analysis is not at all invalidated by what is termed the "indivisibility of human rights" argument which runs thus: as human rights are indivisible, once a State is considered to have extraterritorial "jurisdiction", then that State is held to be bound to enforce *all* the human rights enshrined in the Convention. Conversely, if that State is not in a position to enforce the whole range of Convention human rights, it does not have jurisdiction.

32. Hardly so. Extraterritorially, a Contracting State is obliged to ensure the observance of all those human rights which *it is in a position to ensure*. It is quite possible to envisage situations in which a Contracting State, in its role as an Occupying Power, has well within its authority the power not to commit torture or extrajudicial killings, to punish those who commit them and to compensate the victims – but at the same time that Contracting State does not have the extent of authority and control required to ensure to all persons the right to education or the right to free and fair elections: those fundamental rights it can enforce would fall squarely within its jurisdiction, those it cannot, on the wrong side of the bright line. If the "indivisibility of human rights" is to have any meaning at all, I would prefer that meaning to run hand in hand with that of the "universality of human rights".

33. I believe that it ill suits the respondent Government to argue, as they have, that their inability to secure respect for all fundamental rights in Basra gave them the right not to respect any at all.

A vacuum of jurisdiction?

34. In spite of the fact that, as a leading partner in the Coalition Provisional Authority, the United Kingdom Government were "vested with all executive, legislative and judicial authority"[3] over that part of vanquished Iraq assigned to them, the United Kingdom went a long and eloquent way in its attempt to establish that it did not exercise jurisdiction over the area assigned to it. It just stopped short of sharing with the Court who did. Who was the mysterious, faceless rival which, instead of it, exercised executive, legislative and judicial authority for three years and more over the area delegated to the United Kingdom? There unquestionably existed a highly volatile situation on the ground, pockets of violent insurgency and a pervasive, sullen resistance to the military presence.

35. However, in the Basra region, some authority was still giving orders, laying down the law (*juris dicere* – defining what the binding norm of law is), running the correctional facilities, delivering the mail, establishing and maintaining communications, providing health services, supplying food and water, restraining military contraband and controlling criminality and terrorism as best it could. This authority, full and complete over the United Kingdom military, harassed and maimed over the rest, was the United Kingdom's.

36. The alternative would be to claim that Basra and the region under the United Kingdom's executive, legislative and judicial responsibility hovered in an implacable legal void, sucked inside that legendary black hole, whose utter repulsion of any authority lasted well over three years – a proposition unlikely to find many takers on the legal market.

Human rights imperialism

37. I confess to be quite unimpressed by the pleadings of the United Kingdom Government to the effect that exporting the European Convention on Human Rights to Iraq would have amounted to "human rights imperialism". It ill behoves a State that imposed its military imperialism over another sovereign State without the frailest imprimatur from the international community, to resent the charge of having exported human rights imperialism to the vanquished enemy. It is like wearing with conceit your badge of international law banditry, but then recoiling in shock at being suspected of human rights promotion.

38. Personally, I would have respected better these virginal blushes of some statesmen had they worn them the other way round. Being bountiful with military imperialism but bashful of the stigma of human rights imperialism, sounds to me like not resisting sufficiently the urge to frequent the lower neighbourhoods of political inconstancy. For my part, I believe that those who export war ought to see to the parallel export of guarantees against the atrocities of war. And then, if necessary, bear with some fortitude the opprobrium of being labelled human rights imperialists.

39. I, for one, advertise my diversity. At my age, it may no longer be elegant to have dreams. But that of being branded in perpetuity a "human rights imperialist" sounds to me, I

But that of being branded in perpetuity a human rights imperialist sounds to me, I acknowledge, particularly seductive.

---

[1]. Paragraph 12 of the Grand Chamber judgment.

[2]. Paragraph 67, House of Lords opinion in *Al-Skeini and Others (Respondents) v. Secretary of State for Defence (Appellant) Al-Skeini and Others (Appellants) v. Secretary of State for Defence (Respondent) (Consolidated Appeals)*, [2007] UKHL 26.

[3]. See paragraph 12 of the Grand Chamber judgment.