Annex 668

"Remarks by the President on the Paris Agreement", *The White House*,
5 October 2016

Briefing Room

Your Weekly Address

Speeches & Remarks

Press Briefings

Statements & Releases

White House Schedule

Presidential Actions

- Executive Orders
- Presidential Memoranda
- Proclamations

Legislation

- Pending Legislation
- Signed Legislation
- Vetoed Legislation

Nominations & Appointments

Disclosures

The White House

Office of the Press Secretary

For Immediate Release

October 05, 2016

Remarks by the President on the Paris Agreement

Rose Garden

**Please see below for a correction, marked with an asterisk.

3:30 P.M. EDT

THE PRESIDENT: Good afternoon, everybody. Today is a historic day in the fight to protect our planet for future generations.

Ten months ago, in Paris, I said before the world that we needed a strong global agreement to reduce carbon pollution and to set the world on a low-carbon course. The result was the Paris Agreement. Last month, the United States and China -- the world's two largest economies and largest emitters -- formally joined that agreement together. And today, the world has officially crossed the threshold for the Paris Agreement to take effect.

Today, the world meets the moment. And if we follow through on the commitments that this agreement embodies, history may well judge it as a turning point for our planet.

Of course, it took a long time to reach this day. One of the reasons I ran for this office was to make America a leader in this mission. And over the past eight years, we've done just that. In 2009, we salvaged a chaotic climate summit in Copenhagen, establishing the principle that all nations have a role to play in combating climate change. And at home, we led by example, with historic investments in growing industries like wind and solar that created a steady stream of new jobs. We set the first-ever nationwide standards to limit the amount of carbon pollution that power plants can dump into the air our children breathe. From the cars and trucks we drive to the homes and businesses in which we live and work, we've changed fundamentally the way we consume energy.

Now, keep in mind, the skeptics said these actions would kill jobs. And instead, we saw -- even as we were bringing down these carbon levels -- the longest streak of job creation in American history. We drove economic output to new highs. And we drove our carbon pollution to its lowest levels in two decades.

We continued to lead by example with our historic joint announcement with China two years ago, where we put forward even more ambitious climate targets. And that achievement encouraged dozens of other countries to set more ambitious climate targets of their own. And that, in turn, paved the way for our success in Paris -- the idea that no nation, not even one as powerful as ours, can solve this challenge alone. All of us have to solve it together.

Now, the Paris Agreement alone will not solve the climate crisis. Even if we meet every target embodied in the agreement, we'll only get to part of where we need to go. But make no mistake, this agreement will help delay or avoid some of the worst consequences of climate change. It will help other nations ratchet down their dangerous carbon emissions over time, and set bolder targets as technology advances, all under a strong system of transparency that allows each nation to evaluate the progress of all other nations. And by sending a signal that this is going to be our future -- a clean energy future -- it opens up the floodgates for businesses, and scientists, and engineers to unleash high-tech, low-carbon investment and innovation at a scale that we've never seen before. So this gives us the best possible shot to save the one planet we've got.

I know diplomacy *can be [isn't always] easy, and progress on the world stage can sometimes be slow. But together, with steady persistent effort, with strong, principled, American leadership, with optimism and faith and hope, we're proving that it is possible.

And I want to embarrass my Senior Advisor, Brian Deese -- who is standing right over there -- because he worked tirelessly to make this deal possible. He, and John Kerry, Gina McCarthy at the EPA, everybody on their teams have done an extraordinary job to get us to this point -- and America should be as proud of them as I am of them.

I also want to thank the people of every nation that has moved quickly to bring the Paris Agreement into force. I encourage folks who have not yet submitted their documentation to enter into this agreement to do so as soon as possible. And in the coming days, let's help finish additional agreements to limit aviation emissions, to phase down dangerous use of hydrofluorocarbons -- all of which will help build a world that is safer, and more prosperous, and more secure, and more free than the one that was left for us.

That's our most important mission, to make sure our kids and our grandkids have at least as beautiful a planet, and hopefully more beautiful, than the one that we have. And today, I'm a little more confident that we can get the job done.

So thank you very much, everybody.

END
3:35 P.M. EDT

Annex 669

Oral Statement by India at the twenty-second session of the Conference of the Parties (COP 22) to the United Nations Framework Convention on Climate Change (UNFCCC), 16 November 2016

COUNTRY STATEMENT FOR COP-22, MARRAKECH, MOROCCO
Statement by Mr. Anil Madhav Dave, Hon'ble Minister of State (Independent Charge), Environment, Forest & Climate Change

16 November, 2016

Mr. President,

Excellencies,

Ladies and Gentlemen,

I convey my thanks to Government of Morocco for their warm hospitality and hosting the COP 22.

I take this opportunity to congratulate the world leaders and everyone gathered here today in this enchanting city of Marrakech for reaching a very important and historical milestone of Paris Agreement coming into force.

Our work is not complete yet. This is just the beginning of the journey we have committed to embark upon for saving the only planet we have.

Mr. President, relations between India and Morocco go back to the 14th century when the famous Moroccon traveler and writer, Ibn Batuta travelled to India. Over the years, we have always enjoyed cordial relations, with significant growth in our bilateral relations. I assure you of our continued support for in making Marrakech a COP that enhances our determination and moves us towards real outcome on the ground.

Going forward, we expect that the direction set by Paris Agreement will be followed at COP-22 and all decisions would respect the spirit of common but differentiated responsibility and respective capability set in the Agreement.

While taking final decisions, we need to ensure that NDCs are 'nationally determined', country driven and comprehensive so as to include all pillars of action including adaptation, mitigation and means of implementation.

Access to adequate and predictable climate finance, especially from Funds under the Convention, in both pre 2020 and post 2020 period remains an overriding concern for developing countries.

Mr. President,

Despite our serious resource constraints and developmental priorities, India is undertaking ambitious adaptation and mitigation actions, by increasing energy efficiency across sectors and making greater use of renewables, under the able leadership of our Hon'ble Prime Minister.

India has already achieved about 45 GW of grid connected Renewable Energy Capacity, about ten-fold increase in over a decade. Our airports are using solar energy and will move towards becoming carbon neutral. We are working on Greening of India's extensive Railway routes and Highways.

For all this, We are mobilizing domestic funds through various schemes including a Cess of 6 US Dollar (INR 400) per tonne on Coal. We have set up a National Adaptation Fund to help states implement their Action Plans. A Citizen centric scheme named Pradhan Mantri Ujjwala Yojana has been launched to provide free clean cooking gas connections to women below poverty line. Another scheme called Ujala supports commercial adoption of energy efficient LED bulbs.

Mr. President,

We have already initiated the process to develop Implementation Plan for our NDCs in post 2020 period and are confident that we will be able to achieve our goals.

However Mr. President, I am of the view that it is absolutely critical and necessary that equal focus is given to Pre -2020 actions by developed countries under Kyoto Protocol and that they provide effective Finance, Technology Transfer and Capacity building support to developing countries.

Mr. President and Excellencies,

Once, when asked for a message to humanity, Gandhiji said, "my life is my message". Hence the life of Mahatma Gandhi, a life of simple living based on minimum requirements is a role model for us. Scientific reports show that increasing human demand on the Earth's ecosystems will exceed its carrying capacity by about 75 percent by 2020. Small changes in our everyday lives, by moderating our lifestyles and encouraging sustainable consumption and production patterns will contribute in a big way.

Finally, we must remember that while we all are gathered here to talk about climate action, we need to consider the needs of most poor and vulnerable population. It is extremely important that our actions are based on 'Climate Justice' and protect the poor and vulnerable from climate change risks.

THANK YOU!

Annex 670

Written Observations of the Federative Republic of Brazil, December 2023, in the *Request for Advisory Opinion OC-32 on Climate Emergency and Human Rights presented by the Republic of Chile and the Republic of Colombia*
(Portuguese original and English translation)

FEDERAL REPUBLIC OF BRAZIL

INTER-AMERICAN COURT OF HUMAN RIGHTS
REQUEST FOR A CONS ULTATIVE OPINION
CLIMATE EMERGENCY AND HUMAN RIGHTS
BRAZILIAN CONTRIBUTIONS

DECEMBER 2023

time, to move towards emissions reductions or limitation targets across the board. economy, in the light of different national circumstances'".

16. Climate change is therefore a global phenomenon. At the same time, the responsibilities and impacts associated with it, i.e. its causes and con- sequences, are unevenly distributed and affect the Latin American region in different ways. in the light of their ecological and socio-economic vulnerabilities. Facing climate change falls to all countries, individually and jointly, and each must be called upon t o respond in accordance with their common but differentiated responsibilities and respective capacities, in the light of different national circumstances.

17. Based on these introductory considerations, the questions in the request for an advisory opinion will be organized here into three topics: (i) general principles; (ii) the obligations of states towards each other; (iii) the obligations of states towards persons under their jurisdiction.

IV - **GENERAL PRINCIPLES**

18. Among the specific principles that should guide state obligations in the field of human rights protection in the face of climate change, Brazil suggests that the Court take into account those listed below, enshrined in treaties and documents listed here in a non-exhaustive list:

a. Respect for human rights and fundamental freedoms'[4]

b. Equality and non-discrimination on the grounds of race, color, sex, gender, idiosyncrasy, religion, political or any other opinion, sexual orientation and gender identity"

c. Fairness for present and future generations'[6]

d. Priority consideration for children's rights'

e. Prevention, due diligence and precaution'

" Available in: https://unfccc.int/files/essential background/convention/application/pdf/englishyarisagreement.pdf. Accessed on September 2023.
' Arts. 1 of the ACHR; art. 1 of the DADHR; art. 2 of the ICCPR, IP ESCR and DUHR.
'^ Arts. 1, 24 and 25 of the ACHR; Art. 11 of the DADHR; Art. 2 **of the** ICCPR **and** the UDHR; **AGOAS** resolutions.
' Art. 3.1 of the **UNFCCC;** § 59 of OC-23/17.
" Art. 3.1 of the CRC; Art. 19 of the ACHR; Art. VII of the DADD H.

f. Use of the best available scientific evidence and, where appropriate, of traditional, local and indigenous knowledge'

g. Democratic participation, access to information and access to justice[20]

h. National sovereignty and non-intervention"

i. Common but differentiated responsibilities and respective capacities, in the light of different national circumstances'°.

j. International cooperation[2] '

k. Protection of natural systems and biodiversity as autonomous legal interests with intrinsic value, regardless of their use for human activities[2] '

19. In the opinion of the Brazilian state, on the basis of these principles, which are complementary and mutually reinforcing, the Court will be able to clarify the content and scope of states' obligations in the field of climate change in a systematic and coherent way.

V - **OBLIGATIONS OF THE STATES TO** EACH OTHER

A. THE PRINCIPLE OF COMMON BUT DIFFERENTIATED RESPONSIBILITIES (CBDR-RC)

20. In order to correctly define the content and scope of states' obligations to each other, it is important to take into account the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances (CBDR-RC). This is one of the fundamental pillars of climate diplomacy and international environmental law. At the origin of the current multilateral environmental regimes, it is enshrined as Principle 7 of the 1992 Rio Declaration: "States will cooperate, in a spirit of global partnership, for the conservation, protection and restoration of human health and the environment".

' Art. 3.3 of the UNFCCC; §§ 118 and 175 et seq. of OC-23/17. ' Art. 4.2(d) of the UNFCCC; arts. 4.1 and 7.7 of the Paris Agreement. [20] Arts. 13, 23, 24 and 25 of the ACHR; art. XVII of the DADHR.
' Arts. 2.4 and 2.7 of the UN Charter; Art. 13.3 of the Paris Agreement; Principle 2 of the UN Declaration on the Rights of the Child.
Rio (1992).

REPÚBLICA FEDERATIVA DO BRASIL

CORTE INTERAMERICANA DE DIREITOS HUMANOS
SOLICITAÇÃO DE OPINIÃO CONSULTIVA
EMERGÊNCIA CLIMÁTICA E DIREITOS HUMANOS
CONTRIBUIÇÕES DO BRASIL

DEZEMBRO DE 2023

tempo, caminhar em direção à redução de emissões ou metas de limitação em toda a economia, à luz das diferentes circunstâncias nacionais"[13].

16. A mudança do clima, portanto, apresenta-se como fenômeno global. Ao mesmo tempo, as responsabilidades e os impactos a ela associados, ou seja, suas causas e consequências, distribuem-se desigualmente e afetam a região latino-americana de modo particular, à luz de suas vulnerabilidades ecológicas e socioeconômicas. O enfrentamento às mudanças climáticas recai sobre todos os países, individualmente e em conjunto, e cada um deve ser chamado a responder de acordo suas responsabilidades comuns, porém diferenciadas, e respectivas capacidades, à luz das diferentes circunstâncias nacionais.

17. Com base nessas considerações introdutórias, as perguntas do pedido de parecer consultivo serão aqui organizadas em três tópicos: (i) princípios gerais; (ii) as obrigações dos estados entre si; (iii) as obrigações dos estados devidas às pessoas sob sua jurisdição.

IV – PRINCÍPIOS GERAIS

18. Entre os princípios específicos que devem nortear as obrigações estatais no campo da proteção dos direitos humanos frente às mudanças climáticas, o Brasil sugere à Corte que leve em consideração os enumerados a seguir, consagrados em tratados e documentos aqui elencados em rol não exaustivo:

a. Respeito aos direitos humanos e liberdades fundamentais[14]

b. Igualdade e não discriminação por motivo de raça, cor, sexo, gênero, idioma, religião, opiniões políticas ou de qualquer outra natureza, orientação sexual e identidade de gênero[15]

c. Equidade para gerações presentes e futuras[16]

d. Consideração prioritária dos direitos das crianças[17]

e. Prevenção, devida diligência e precaução[18]

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[13] Disponível em: https://unfccc.int/files/essential_background/convention/application/pdf/english_paris_agreement.pdf. Acesso em 11 set. 2023.
[14] Arts. 1° da CADH; art. I da DADDH; art. 2° do PIDCP, do PIDESC e da DUDH.
[15] Arts. 1°, 24 e 25 da CADH; art. II da DADDH; art. 2° do PIDCP e da DUDH; resoluções da AGOEA.
[16] Art. 3.1 da UNFCCC; § 59 da OC-23/17.
[17] Art. 3.1 da CRC; art. 19 da CADH; art. VII da DADDH.

f. Uso da melhor evidência científica disponível e, quando apropriado, de conhecimentos tradicionais, locais e de povos indígenas[19]

g. Participação democrática, acesso à informação e acesso à justiça[20]

h. Soberania nacional e não intervenção[21]

i. Responsabilidades comuns, porém diferenciadas, e respectivas capacidades, à luz das diferentes circunstâncias nacionais[22]

j. Cooperação internacional[23]

k. Proteção dos sistemas naturais e da biodiversidade como interesses jurídicos autônomos, com valor intrínseco, independentemente de sua utilidade para as atividades humanas[24]

19. No entendimento do estado brasileiro, com base nesses princípios, que se complementam e se reforçam mutuamente, a Corte poderá esclarecer o conteúdo e o alcance das obrigações dos estados no domínio das mudanças climáticas de forma sistemática e coerente.

V – OBRIGAÇÕES DOS ESTADOS ENTRE SI

A. O PRINCÍPIO DAS RESPONSABILIDADES COMUNS, PORÉM DIFERENCIADAS (CBDR-RC)

20. Para corretamente precisar o conteúdo e o alcance das obrigações dos estados entre si, é importante ter em conta o princípio das responsabilidades comuns, porém diferenciadas e respectivas capacidades, à luz das diferentes circunstâncias nacionais (CBDR-RC). Trata-se de um dos pilares fundamentais da diplomacia climática e do direito internacional ambiental. Na origem dos atuais regimes multilaterais ambientais, é consagrado como o Princípio 7 da Declaração do Rio de 1992: "Os Estados irão cooperar, em espírito de parceria global, para a conservação, proteção e restauração da saúde

[18] Art. 3.3 da UNFCCC; §§ 118 e 175 e seguintes da OC-23/17.
[19] Art. 4.2(d) da UNFCCC; arts. 4.1 e 7.7 do Acordo de Paris.
[20] Arts. 13, 23, 24 e 25 da CADH; art. XVIII da DADDH.
[21] Arts. 2.4 e 2.7 da Carta das Nações Unidas; art. 13.3 do Acordo de Paris; Princípio 2 da Declaração do Rio (1992).
[22] Art. 3.1 da UNFCCC; arts. 2.2, 4.4 e 4.5 do Acordo de Paris; princípio n. 7 da Declaração do Rio (1992).
[23] Art. 2º do PIDESC; art. 26 da CADH; art. 1º do Protocolo de San Salvador; art. 3.5 da UNFCCC.
[24] Preâmbulo (§ 1º) e art. 1º da Convenção sobre Diversidade Biológica (1992); § 62 da OC-23/17.

Annex 671

Written Observations of the Republic of Paraguay, December 2023, in the *Request for Advisory Opinion OC-32 on Climate Emergency and Human Rights presented by the Republic of Chile and the Republic of Colombia* (Spanish original and English translation)

Sesquicentennial of the National Epic 1864 - 1870".

Ministry of Foreign Affairs

REQUEST FOR AN ADVISORY OPINION TO THE INTER-AMERICAN COURT OF HUMAN RIGHTS

"CLIMATE EMERGENCY AND HUMAN RIGHTS".

COMMENTS FROM THE PARAGUAYAN STATE

DECEMBER 2023

displacement and migration, especially from rural to urban areas, and can contribute to increased risk of exploitation, including trafficking in persons on the move.

IV. PARAGUAY'S ENVIRONMENTAL PROTECTION AND CLIMATE CHANGE LEGAL FRAMEWORK

23. With respect to current environmental protection legislation in Paraguay, it should be noted that the 1992 Constitution establishes fundamental principles and rights related to the environment, which lay the foundations for the protection and conservation of the country's environment.

24. The articles of the Constitution that contain provisions on environmental protection are as follows:

- Article 7: recognizes the right of all people to a healthy and balanced environment, as well as the duty to protect and conserve it for present and future generations.
- Article 8: establishes that the State has the responsibility to promote sustainable development, the conservation of natural resources and the preservation of the environment.
- Article 17: recognizes and guarantees the right to property, but establishes that it may not be exercised in a manner that undermines the rights of third parties, the social interest or damages the environment.
- Article 46: establishes that everyone has the right to live in a healthy and balanced environment, and that it is the responsibility of the State to guarantee this right.
- Article 47: recognizes the right of individuals and communities to participate in decision-making that affects the environment, as well as the right of access to information and justice in environmental matters.

25. With respect to the international instruments to which Paraguay has adhered with respect to climate change, the State mentions that, by virtue of Law No. 251/1993, Paraguay approved the Convention on Climate Change adopted during the United Nations Conference on Environment and Development -the Earth Summit- held in the city of Rio de Janeiro in 1992.

26. Likewise, Law No. 1447/1999 approved the Kyoto Protocol to the United Nations Framework Convention on Climate Change. Paraguay's ratification of the two aforementioned international treaties led to the development of Laws No. 251/1993 and No. 1447/1999 through Decree No. 14943 of October 9, 2001, which implemented the National Climate Change Program (PNCC).

27. This regulatory development was also accompanied by the enactment of Law No. 1561/2000, which "created the National Environmental System, the National Environmental Council and the Environmental Secretariat". This law created a public entity specifically responsible for environmental policy. This institutional growth was strengthened with the enactment of Law No. 6123/2018, which elevated said Secretariat to ministerial rank, with the creation of the Ministry of Environment and Sustainable Development, thus strengthening the institutional capacity. It should be added that in a complementary and specific manner, the existence of the National Forestry Institute, an institution responsible for the administration, promotion and sustainable development of forest resources in Paraguay.

28. It is also appropriate to add that Paraguay signed and ratified in 2016 the so-called "Paris Agreement", signed within the framework of the United Nations Framework Convention on Climate Change (COP 25). In this sense, the State has adopted the commitment to reduce its greenhouse gas emissions in light of said instrument and thus continues its positive contribution to global efforts against the problem of climate change.

29. In addition, and specifically, the legislative framework relating to environmental law includes the following laws:

- Law No. 583/1976: "Approves and Ratifies the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)".
- Law No. 1195/1986: That "United Nations Convention on the Law of the Sea".
- Law No. 1231/1986: Which "approves and ratifies the convention on the protection of the World Cultural and Natural Heritage".
- Law No. 251/1993: "Approving and Ratifying the United Nations Framework Convention on Climate Change".
- Law No. 61/1992: "Approving and ratifying the Vienna Convention for the Protection of the Ozone Layer".
- Law No. 96/1992 on Wildlife, whose objective is the protection, management and conservation of the fauna and flora that in isolation or together, temporarily or permanently, have the national territory as their biogeographic distribution area.
- Law No. 234/1993: "Approving Convention No. 169 on Indigenous and Tribal Peoples in Independent Countries".
- Law No. 251/1993: "Approving the Framework Convention on Climate Change, adopted during the United Nations Conference on Environment and Development, held in Rio de Janeiro - Brazil".
- Law Nº 253/1993: "Approving the Framework Convention on Biological Diversity, adopted during the United Nations Conference on Environment and Development, held in Rio de Janeiro - Brazil".

- Law No. 294/1993: Environmental Impact Assessment. This law establishes the procedures for the evaluation and environmental control of projects, works or activities that may cause significant impacts on the environment.
- Law No. 350/1994: "Approving the Convention on Wetlands of International Importance, especially as habitat for waterfowl".
- Law No. 352/1994: Wildlife Protected Areas: this law establishes the protection of wild fauna and its habitats, as well as the regulation of hunting, fishing and commercialization of protected species.
- Law No. 536/1995: for the Promotion of Afforestation and Reforestation, whose purpose is the establishment of forests with native or exotic species on land that lacks them or where they are insufficient.
- Law No. 567/1995: "Approving the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal".
- Law No. 716/1996 which punishes crimes against the environment and its amendment Law No. 2717/2005.
- Law No. 970/1996: "Approving the United Nations Convention to Combat Desertification".
- Law No. 1314/1998: Approving the "Convention on the Conservation of Migratory Species of Wild Animals".
- Law No. 1447/1999: "Approving the Kyoto Protocol to the United Nations Framework Convention on Climate Change".
- Law No. 1561/2000 which "creates the National Environmental System, the National Environmental Council and the Environmental Secretariat".
- Law No. 2135/2003: "Approving the Rotterdam Convention on the Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade".
- Law No. 2309/2003: "Approving the Cartagena Protocol on Biosafety to the Convention on Biological Diversity".
- Law No. 2333/2004: Which "approves the Stockholm Convention, which eliminates the production of persistent organic pollutants (POPs)".
- Law 2524/2004 of Prohibition in the Eastern Region of the Transformation and Conversion Activities of Surfaces with Forest Cover. The objective of this regulation is to promote the protection, recovery and improvement of the native forest in the Eastern Region. The Western Region is subject to current environmental regulations.
- Law No. 3001/2006 on the Valuation and Remuneration of Environmental Services, whose objective is to promote the conservation, protection, recovery and sustainable development of the country's biological diversity and natural resources, through the fair, timely and adequate valuation and remuneration of the environmental services generated by human management activities....
- Law No. 3239/2007: Water Resources Law. This law regulates the use, exploitation and conservation of water resources, establishing the

rights and responsibilities of users and promoting the protection of water bodies.

- Law No. 4241/2010 on the Reestablishment of Watercourse Protective Forests within the National Territory, which declares as protective zones the natural areas bordering watercourses for their conservation and to contribute to the compliance with environmental protection and adaptation measures required to guarantee the integrity of water resources.
- Law N° 5681/2016: whereby "the Paris Agreement on Climate Change is approved".
- Law No. 5875/2017: National Law on Climate Change, whose objective is to establish the general regulatory framework that allows planning and responding, in an urgent, adequate, coordinated and sustained manner to the impacts of climate change.
- Law No. 6123/2018: which elevates the Secretariat of the Environment to the rank of Ministry and renames it the Ministry of Environment and Sustainable Development.
- Law No. 6125/2018: which "approves the Kigali Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer".
- Law No. 6256/2018: which prohibits the activities of transformation and conversion of areas with forest cover in the Eastern Region. This law prohibits the logging and conversion of natural forests and establishes provisions for the protection and recovery of the same, in the Eastern Region. The Western Region is subject to the environmental provisions in force.

30. As the Court will be able to observe, the normative development to address aspects related to the subject is constant. Likewise, Paraguay's normative progress accompanies international efforts in this area and to this end, in addition to its regulations, it develops and implements plans, programs and policies through the competent national institutions, which will be detailed below.

V. PUBLIC POLICIES IN THE ENVIRONMENTAL FIELD RELATED TO CLIMATE CHANGE.

31. It should be noted that Paraguay has had a National Policy on Climate Change since 2011, which aims to install the issue of climate change at the national level and promote the implementation of articulated measures consistent with the priorities of national development, within the framework of the commitments derived from the mandates of international conventions and aimed at the sustainability of the system. This policy was governed by the Secretariat of the Environment (SEAM), which is currently the Ministry of Environment and Sustainable Development (MADES).

32. It also has key tools to create resilient communities in the face of the effects of climate change, including a National Strategy since 2015.

Ministerio de Relaciones Exteriores

SOLICITUD DE OPINIÓN CONSULTIVA A LA CORTE INTERAMERICANA DE DERECHOS HUMANOS

"EMERGENCIA CLIMÁTICA Y DERECHOS HUMANOS"

OBSERVACIONES DEL ESTADO PARAGUAYO

DICIEMBRE DE 2023

desplazamientos y la migración, especialmente de las zonas rurales a las urbanas, y puede contribuir a aumentar el riesgo de explotación, incluida la trata de personas en movimiento.

IV. MARCO LEGAL DEL PARAGUAY RELATIVO A LA PROTECCIÓN DEL MEDIOAMBIENTE Y SOBRE EL CAMBIO CLIMÁTICO

23. Con respecto a la legislación vigente en Paraguay relativa a la protección del medio ambiente, cabe puntualizar que la Constitución de 1992 establece principios y derechos fundamentales relacionados con el medio ambiente, que sientan las bases para la protección y conservación del medio ambiente en el país.

24. Los artículos de la Constitución que contienen disposiciones sobre protección al medio ambiente son los siguientes:

- Artículo 7: reconoce el derecho de todas las personas a un ambiente saludable y equilibrado, así como el deber de protegerlo y conservarlos para las generaciones presentes y futuras.
- Artículo 8: establece que el Estado tiene la responsabilidad de promover el desarrollo sostenible, la conservación de los recursos naturales y la preservación del medio ambiente.
- Artículo 17: reconoce y garantiza el derecho a la propiedad, pero establece que esta no puede ser ejercida en forma tal que menoscabe los derechos de terceros, el interés social o dañe el ambiente.
- Artículo 46: establece que toda persona tiene derecho a vivir en un ambiente sano y equilibrado, y que es responsabilidad del Estado garantizar este derecho.
- Artículo 47: reconoce el derecho de las personas y las comunidades a participar en la toma de decisiones que afecten al medioambiente, así como el derecho de acceso a la información y a la justicia en temas ambientales.

25. Con respecto a los instrumentos internacionales a los cuales el Paraguay se ha adherido con respecto al cambio climático, el Estado menciona que, en virtud de la Ley Nº 251/1993, el Paraguay aprobó el Convenio sobre Cambio Climático adoptado durante la Conferencia de las Naciones Unidas sobre Medio Ambiente y Desarrollo –la Cumbre de la Tierra- celebrada en la ciudad de Río de Janeiro en 1992.

26. Asimismo, por Ley Nº 1447/1999 se aprobó el Protocolo de Kyoto de la Convención Marco de las Naciones Unidas sobre Cambio Climático. La ratificación paraguaya de los dos tratados internacionales mencionados dio lugar al desarrollo de las Leyes N° 251/1993 y N° 1447/1999 a través del Decreto Nº 14943 del 9 de octubre de 2001 por el cual se implementó el Programa Nacional de Cambio Climático (PNCC).

27. Este desarrollo normativo también estuvo acompañado con la sanción de la Ley N° 1561/2000 que "crea el Sistema Nacional del Ambiente, el Consejo Nacional del Ambiente y la Secretaria del Ambiente". A través de dicha normativa, se creó una entidad pública rectora en materia de política ambiental, de manera específica. Este crecimiento institucional fue fortalecido con la sanción de la Ley N.° 6123/2018, que elevó dicha Secretaría a rango ministerial, con la creación del Ministerio del Ambiente y Desarrollo Sostenible, fortaleciendo así la capacidad institucional. Cabe agregar que de manera complementaria y específica, la existencia del Instituto Forestal Nacional, institución encargada de la administración, promoción y desarrollo sostenible de los recursos forestales en el Paraguay.

28. También es oportuno agregar que el Paraguay suscribió y ratificó en 2016 el denominado "Acuerdo de Paris", suscrito en dentro del marco de Convenio Marco de las Naciones Unidas sobre Cambio Climático (COP 25). En tal sentido, el Estado ha adoptado el compromiso para reducir sus emisiones de gases de efectos invernaderos a la luz de dicho instrumento y continúa así su positiva contribución a los esfuerzos mundiales contra la problemática del cambio climático.

29. Asimismo y de manera específica, el marco legislativo referente al derecho ambiental incluye las leyes que se citan a continuación:

- Ley Nº 583/1976: Que "Aprueba y Ratifica la Convención sobre el Comercio Internacional de Especies Amenazadas de Fauna y Flora Silvestres (CITES)".
- Ley Nº 1195/1986: Que "Convención de las Naciones Unidas sobre el derecho del mar".
- Ley N° 1231/1986: Que "aprueba y ratifica la convención sobre la protección del Patrimonio Mundial, Cultural y Natural".
- Ley N° 251/1993: Que "Aprueba y Ratifica la Convención Marco de las Naciones Unidas sobre el Cambio Climático".
- Ley N°61/1992: Que "aprueba y ratifica el Convenio de Viena para la protección de la Capa de Ozono".
- Ley N° 96/1992 De Vida Silvestre, cuyo objetivo es la protección, manejo y conservación de la fauna y flora que en forma aislada o conjunta, temporal o permanente, tienen al territorio nacional como área de distribución biogeográfica.
- Ley Nº 234/1993: Que "Aprueba el Convenio No. 169 sobre Pueblos Indígenas y Tribales en Países Independientes".
- Ley N° 251/1993: Que "Aprueba el Convenio Marco sobre Cambio Climático, adoptado durante la Conferencia de las Naciones Unidas sobre el Medio Ambiente y Desarrollo, celebrado en Río de Janeiro – Brasil".
- Ley Nº 253/1993: Que "aprueba el que Aprueba el Convenio Marco sobre Diversidad Biológica, adoptado durante la Conferencia de las Naciones Unidas sobre el Medio Ambiente y Desarrollo, celebrado en Río de Janeiro - Brasil".

- Ley Nº 294/1993: de Evaluación de Impacto Ambiental. Esta ley establece los procedimientos para la evaluación y control ambiental de proyectos, obras o actividades que puedan causar impactos significativos en el ambiente.
- Ley Nº 350/1994: que "Aprueba la Convención Relativa a los Humedales de Importancia Internacional, especialmente como hábitat de aves acuáticas".
- Ley Nº 352/1994: de Áreas Silvestres Protegidas: esta ley establece la protección de la fauna silvestre y sus hábitats, así como la regulación de la caza, la pesca y comercialización de especies protegidas.
- Ley N° 536/1995: de Fomento a la Forestación y Reforestación, cuyo propósito es el establecimiento de bosques con especies nativas o exóticas en terrenos que carezcan de ellas o donde sean insuficientes.
- Ley N° 567/1995: que "aprueba el Convenio de Basilea sobre el Control de los Movimientos Transfronterizos de los Desechos Peligrosos y su Eliminación".
- Ley N° 716/1996 que Sanciona Delitos contra el Medio Ambiente y su modificatoria Ley N° 2717/2005.
- Ley Nº 970/1996: Que "aprueba la Convención de las Naciones Unidas de Lucha contra la Desertificación".
- Ley N° 1314/1998: Que aprueba "la Convención sobre la Conservación de las Especies Migratorias de Animales Silvestres".
- Ley N° 1447/1999: Que "aprueba el Protocolo de Kyoto de la Convención Marco de las Naciones Unidas sobre Cambio Climático".
- Ley N° 1561/2000 que "crea el Sistema Nacional del Ambiente, el Consejo Nacional del Ambiente y la Secretaria del Ambiente".
- Ley Nº 2135/2003: Que "aprueba el Convenio de Rotterdam sobre el Procedimiento de Consentimiento Fundamentado Aplicable a Ciertos Plaguicidas y Productos Químicos Peligrosos Objeto de Comercio Internacional".
- Ley N° 2309/2003: Que "aprueba el Protocolo de Cartagena sobre Seguridad de la Biotecnología del Convenio sobre la Diversidad Biológica".
- Ley Nº 2333/2004: Que "aprueba el Convenio de Estocolmo, que elimina la producción de contaminantes orgánicos persistentes (COPs)".
- Ley 2524/2004 de Prohibición en la Región Oriental de las Actividades de Transformación y Conversión de Superficies con cobertura de Bosques. El objetivo de esta normativa es propiciar la protección, recuperación, y el mejoramiento del bosque nativo en la Región Oriental. La Región Occidental se encuentra sujeta a las disposiciones ambientales vigentes.
- Ley N° 3001/2006 de Valoración y Retribución de los Servicios Ambientales, cuyo objetivo es propiciar la conservación, la protección, la recuperación y el desarrollo sustentable de la diversidad biológica y de los recursos naturales del país, a través de la valoración y retribución justa, oportuna y adecuada de los servicios ambientales generados por las actividades humanas de manejo..
- Ley Nº 3239/2007: de Recursos Hídricos. Esta ley regula el uso, aprovechamiento y conservación de los recursos hídricos, estableciendo los

derechos y responsabilidades de los usuarios y promoviendo la protección de los cuerpos de agua.

- Ley N° 4241/2010 de Restablecimiento de Bosques Protectores de Cauces Hídricos dentro del Territorio Nacional, que declara como zonas protectoras a las áreas naturales que bordean a los cauces hídricos para la conservación de los mismos y contribuir al cumplimiento de medidas de adecuación y protección ambiental que se requieren para garantizar la integridad de los recursos hídricos.
- Ley N° 5681/2016: Por la cual se "aprueba el Acuerdo de París sobre el Cambio Climático".
- Ley N° 5875/2017: Nacional de Cambio Climático, cuyo objetivo es establecer el marco general normativo que permita planificar y responder, de manera urgente, adecuada, coordinada y sostenida a los impactos del cambio climático.
- Ley N.° 6123/2018: Que eleva al rango de Ministerio a la Secretaría del Ambiente y pasa a denominarse Ministerio del Ambiente y Desarrollo Sostenible.
- Ley N° 6125/2018: Que "aprueba la Enmienda de Kigali al Protocolo de Montreal relativo a las sustancias que agotan la capa de ozono".
- Ley Nº 6256/2018: Que prohíbe las actividades de transformación y conversión de superficies con cobertura de bosques en la Región Oriental. Esta ley prohíbe la tala y conversión de bosques naturales y establece disposiciones para la protección y recuperación de los mismos, en la Región Oriental. La Región Occidental se encuentra sujeta a las disposiciones ambientales vigentes.

30. Como podrá observar esa Corte, el desarrollo normativo para abordar aspectos vinculados a la temática es constante. Asimismo, el avance normativo del Paraguay acompaña los esfuerzos internacionales en el ámbito y para tal efecto, además de sus normas, desarrolla e implementa planes, programas y políticas, a través de las instituciones nacionales competentes, los cuales serán detallados más adelante.

V. POLÍTICAS PÚBLICAS DEL ÁMBITO AMBIENTAL REFERENTE AL CAMBIO CLIMÁTICO

31. Cabe puntualizar que Paraguay cuenta con una Política Nacional de Cambio Climático desde el 2011, que tiene por objetivo instalar el tema del cambio climático a nivel nacional e impulsar la implementación de medidas articuladas coherentes con las prioridades del desarrollo nacional, en el marco de los compromisos derivados de los mandatos de las convenciones internacionales y que apunten a la sostenibilidad del sistema. Dicha Política era regida por la Secretaría del Ambiente (SEAM), que en la actualidad es el Ministerio del Ambiente y Desarrollo Sostenible (MADES).

32. Además posee herramientas claves para crear comunidades resilientes ante los efectos del cambio climático, entre ellas, cuenta desde 2015 con una Estrategia Nacional

Annex 671 bis

Operationalization of the new funding arrangements, including a fund, for responding to loss and damage referred to in paragraphs 2–3 of decisions 2/CP.27 and 2/CMA.4, Decision 1/CP.28, Report of the Conference of the Parties on its twenty-eighth session, held in the United Arab Emirates from 30 November to 13 December 2023, FCCC/CP/2023/11/Add.1, 15 March 2024

United Nations

Framework Convention on Climate Change

FCCC/CP/2023/11/Add.1

Distr.: General
15 March 2024

Original: English

Conference of the Parties

Report of the Conference of the Parties on its twenty-eighth session, held in the United Arab Emirates from 30 November to 13 December 2023

Addendum

Part two: Action taken by the Conference of the Parties at its twenty-eighth session

Contents

Decisions adopted by the Conference of the Parties

Decision 1/CP.28

Operationalization of the new funding arrangements, including a fund, for responding to loss and damage referred to in paragraphs 2–3 of decisions 2/CP.27 and 2/CMA.4

The Conference of the Parties and the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement,

Recalling decisions 2/CP.27 and 2/CMA.4,

Also recalling decisions 2/CP.27, paragraph 2, and 2/CMA.4, paragraph 2, by which new funding arrangements were established for assisting developing countries that are particularly vulnerable to the adverse effects of climate change in responding to loss and damage, including with a focus on addressing loss and damage, by providing and assisting in mobilizing new and additional resources, and which specify that these new arrangements complement and include sources, funds, processes and initiatives under and outside the Convention and the Paris Agreement,

Further recalling decisions 2/CP.27, paragraphs 1 and 3, and 2/CMA.4, paragraphs 1 and 3, by which, in the context of establishing the new funding arrangements, a fund was established for responding to loss and damage whose mandate includes a focus on addressing loss and damage to assist developing countries that are particularly vulnerable to the adverse effects of climate change in responding to economic and non-economic loss and damage associated with the adverse effects of climate change, including extreme weather events and slow onset events,

Acknowledging that climate change is a common concern of humankind and that Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to a clean, healthy and sustainable environment, the right to health, the rights of Indigenous Peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity,[1]

Recalling the understanding of the Conference of the Parties and the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement that funding arrangements, including a fund, for responding to loss and damage are based on cooperation and facilitation and do not involve liability or compensation,[2]

Expressing appreciation to the Governments of Egypt, the Dominican Republic and the United Arab Emirates for hosting the 1st and 4th meetings, 3rd meeting and 5th meeting respectively of the transitional committee on the operationalization of the new funding arrangements for responding to loss and damage and the fund established in paragraph 3 of decisions 2/CP.27 and 2/CMA.4 and to the Governments of Australia, Germany, Norway and the United States of America for providing financial support for the work of the Committee,

1. *Welcome* the report of the transitional committee on the operationalization of the new funding arrangements for responding to loss and damage and the fund established in paragraph 3 of decisions 2/CP.27 and 2/CMA.4 (Transitional Committee)[3] containing recommendations on the operationalization of the funding arrangements for responding to loss and damage referred to in paragraph 2 of decisions 2/CP.27 and 2/CMA.4, including the fund referred to in paragraph 3 of the same decisions (hereinafter referred to as the Fund), and *take note with appreciation* of the work of the Transitional Committee in responding to its mandate;[4]

[1] Decision 1/CMA.4, eleventh preambular paragraph.
[2] FCCC/CP/2022/10, para. 7(b), and FCCC/PA/CMA/2022/10, para. 71.
[3] FCCC/CP/2023/9–FCCC/PA/CMA/2023/9.
[4] Decisions 2/CP.27, para. 4, and 2/CMA.4, para. 4.

2. *Approve* the Governing Instrument of the Fund, as contained in annex I;

3. *Decide* that the Fund will be serviced by a new, dedicated and independent secretariat;

4. *Also decide* that the Fund will be governed and supervised by a Board;

5. *Further decide* to designate the Fund as an entity entrusted with the operation of the Financial Mechanism of the Convention, also serving the Paris Agreement, which will be accountable to and function under the guidance of the Conference of the Parties and the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement;

6. *Decide* that arrangements with the Fund, consistent with the Governing Instrument of the Fund and to ensure that the Fund is accountable to and functions under the guidance of the Conference of the Parties and the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement, are to be approved by the Conference of the Parties at its twenty-ninth session (November 2024) and the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement at its sixth session (November 2024);

7. *Request* the Standing Committee on Finance to develop the arrangements referred to in paragraph 6 above, to be concluded between the Conference of the Parties, the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement and the Board of the Fund, consistently with the Governing Instrument of the Fund, for consideration and approval by the Board and subsequent consideration and approval by the Conference of the Parties at its twenty-ninth session and the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement at its sixth session;

8. *Invite* Parties, through their regional groups and constituencies, to submit nominations of representatives for membership of the Board of the Fund to the UNFCCC secretariat as soon as possible;

9. *Decide* that the alternate member for the seat on the Board of the Fund referred to in paragraph 17(g) of annex I will rotate among the developing country Parties in the regional groups and constituencies listed in paragraph 17(b–f) of annex I;

10. *Request* the UNFCCC secretariat to initiate arrangements for convening the first meeting of the Board of the Fund once all voting member nominations have been submitted, but no later than 31 January 2024, and to convene subsequent meetings until the secretariat of the Fund is operational;

11. *Urge* the Board of the Fund to promptly select the Executive Director of the Fund through a merit-based, open and transparent process;

12. *Also urge* developed country Parties to continue to provide support and *encourage* other Parties to provide, or continue to provide support, on a voluntary basis, for activities to address loss and damage;[5]

13. *Invite* financial contributions with developed country Parties continuing to take the lead to provide financial resources for commencing the operationalization of the Fund;

14. *Welcome* the offers of Australia, Canada, Denmark, Estonia, Finland, France, Germany, Iceland, Ireland, Italy, Japan, Netherlands (Kingdom of the), Norway, Portugal, Slovenia, Spain, Switzerland, the United Arab Emirates, the United Kingdom of Great Britain and Northern Ireland and the United States of America, as well as the European Commission, amounting to the equivalent of USD 792 million to the funding arrangements, including the contribution of USD 661 million to the Fund;

15. *Decide* that the Board of the Fund will be conferred with the legal personality and the legal capacity as necessary for discharging its roles and functions, in particular the legal capacity to negotiate, conclude and enter into a hosting arrangement with the World Bank as interim trustee and host of the Fund's secretariat;

[5] This paragraph is without prejudice to any future funding arrangements, any positions of Parties in current or future negotiations, or understandings and interpretations of the Convention and the Paris Agreement.

16. *Request* the Board of the Fund to select the host country of the Board through an open, transparent and competitive process, with the host country of the Board conferring to the Board the legal personality and the legal capacity as necessary for discharging its roles and functions;

17. *Invite* the World Bank, subject to paragraphs 20–24 below, to operationalize the Fund as a World Bank hosted financial intermediary fund for an interim period of four years, starting from the sessions of the Conference of the Parties and the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement at which the Board of the Fund confirms that the conditions referred to in paragraph 20 below can be met, with the Fund to be serviced by a new, dedicated and independent secretariat hosted by the World Bank;

18. *Confirm* their expectation that, as a financial intermediary fund, the Fund will operate through the legal personality and legal capacity of the World Bank, and the privileges and immunities accorded to the World Bank will apply to the officials, property, assets, archives, income, operations and transactions of the Fund;

19. *Invite* the World Bank to take the steps necessary to promptly operationalize the Fund as a financial intermediary fund and to submit to the Board of the Fund by no later than eight months after the conclusion of the twenty-eighth session of the Conference of the Parties the relevant financial intermediary fund documentation, approved by the World Bank Board of Directors, including a hosting agreement between the Board of the Fund and the World Bank based on consultations with and guidance from the Board of the Fund, as elaborated in paragraph 25 below;

20. *Decide* that, as further elaborated in paragraphs 21–24 below, the continued operationalization of the Fund during the interim period will be conditional on the World Bank hosting the Fund as a financial intermediary fund in a manner that:

(a) Is fully consistent with the Governing Instrument of the Fund;

(b) Ensures the full autonomy of the Board of the Fund to select the Executive Director of the Fund at a level of seniority set by the Board, in line with relevant World Bank human resources policies;

(c) Enables the Fund to establish and apply its own eligibility criteria, including on the basis of guidance from the Conference of the Parties and the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement;

(d) Ensures that the Governing Instrument of the Fund supersedes, where appropriate, the policies of the World Bank in instances where they differ;

(e) Allows all developing countries to directly access resources from the Fund, including through subnational, national and regional entities and through small grant funding for communities, consistent with the policies and procedures to be established by the Board of the Fund and applicable safeguards and fiduciary standards;

(f) Allows for the use of implementing entities other than multilateral development banks, the International Monetary Fund and United Nations agencies, consistent with the policies and procedures to be established by the Board of the Fund and applicable safeguards and fiduciary standards;

(g) Ensures that Parties to the Convention and the Paris Agreement that are not member countries of the World Bank are able to access the Fund without requiring decisions or waivers from the World Bank Board of Directors on individual funding requests;

(h) Permits the World Bank, in its role as trustee, to invest contributions to the Fund in the capital markets to preserve capital and general investment income, in line with due diligence considerations;

(i) Ensures that the Fund can receive contributions from a wide variety of sources, in line with due diligence considerations;

(j) Confirms that the Fund’s assets and its secretariat have the necessary privileges and immunities;

(k) Ensures a cost recovery methodology that is reasonable and appropriate;

21. *Also decide*, notwithstanding the invitation referred to in paragraph 17 above, that if the World Bank has not confirmed that it is willing and able to meet the conditions set out in paragraph 20 above within six months after the conclusion of the twenty-eighth session of the Conference of the Parties, the Board will launch the selection process for the host country of the Fund and the Conference of the Parties at its twenty-ninth session and the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement at its sixth session will approve the necessary amendments to the Governing Instrument of the Fund;

22. *Further decide* that, if the Board of the Fund determines that the relevant financial intermediary fund documentation referred to in paragraph 19 above, approved by the World Bank Board of Directors, does not ensure that the conditions set out in paragraph 20 above can be met during the interim period, the Conference of the Parties and the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement, on a recommendation of the Board of the Fund, will take the necessary steps to operationalize the Fund as an independent stand-alone institution, including approving the necessary amendments to the Governing Instrument of the Fund and providing guidance to the Board with respect to the selection process for the host country of the Fund, or the Conference of the Parties and the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement may take any other course of action deemed appropriate;

23. *Decide* that, if the conditions set out in paragraph 20 above have not been met, as determined by the Board of the Fund following an independent assessment of the performance of the World Bank as host of the Fund's secretariat, the Conference of the Parties and the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement will take steps at the end of the interim period referred to in paragraph 17 above to establish the Fund as an independent stand-alone institution, including with respect to any necessary amendments to the Governing Instrument of the Fund and providing guidance to the Board with respect to the selection process for the host country of the Fund, or take any other course of action deemed appropriate;

24. *Also decide* that, if the conditions set out in paragraph 20 above have been met, as determined by the Board of the Fund following an independent assessment of the performance of the World Bank as host of the Fund's secretariat, the Conference of the Parties and the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement will take steps at the end of the interim period referred to in paragraph 17 above to invite the World Bank to continue operationalizing the Fund as a financial intermediary fund, with or without conditions, as appropriate;

25. *Further decide* that, prior to the establishment of the financial intermediary fund, the Board of the Fund will provide guidance to the World Bank as it takes the necessary steps to establish the Fund as a financial intermediary fund;

26. *Decide* to establish an interim secretariat for the Fund to provide support, including administrative support, to the Board of the Fund during the transitional period until the establishment of the independent secretariat referred to in paragraph 3 above and *request* the secretariats of the UNFCCC and the Green Climate Fund and *invite* the United Nations Development Programme to jointly form this secretariat;

27. *Welcome* and *confirm* the recommendations of the Transitional Committee in relation to the funding arrangements contained in annex II.

Annex I

Governing Instrument of the Fund

1. The Fund is hereby operationalized in accordance with the following provisions.

I. Objectives and purpose

2. The purpose of the Fund is to assist developing countries that are particularly vulnerable to the adverse effects of climate change in responding to economic and non-economic loss and damage associated with the adverse effects of climate change, including extreme weather events and slow onset events.

3. Given the urgent and immediate need for new, additional, predictable and adequate financial resources to assist developing countries that are particularly vulnerable to the adverse effects of climate change in responding to economic and non-economic loss and damage associated with the adverse effects of climate change, including extreme weather events and slow onset events, especially in the context of ongoing and ex post (including rehabilitation, recovery and reconstruction) action, the Fund aims to be a new channel for multilateral finance to assist those countries in responding to loss and damage associated with the adverse effects of climate change. The Fund will also endeavour to assist those countries in mobilizing external finance to strengthen their efforts to respond to loss and damage while supporting both the achievement of international goals on sustainable development and the eradication of poverty.

4. The Fund should operate in a manner that promotes coherence and complementarity with new and existing funding arrangements for responding to loss and damage associated with the adverse effects of climate change across the international financial, climate, humanitarian, disaster risk reduction and development architectures. In accordance with the provisions set out in chapter VI below, the Fund will develop new coordination and cooperation mechanisms to help enhance complementarity and coherence and will facilitate linkages between itself and various funding sources, including relevant vertical funds, as appropriate, to, inter alia, promote access to available funding, avoid duplication and reduce fragmentation.

5. The Fund will operate in a transparent and accountable manner guided by efficiency and effectiveness and sound financial management. The Fund will pursue a country ownership approach to programmes and projects and seek to promote and strengthen national response systems through, among other means, the effective involvement of relevant institutions and stakeholders, including non-State actors. The Fund should be scalable and flexible; practise continuous learning, guided by monitoring and evaluation processes; strive to maximize the impact of its funding for responding to loss and damage associated with the adverse effects of climate change while promoting environmental, social, economic and development co-benefits; and take a culturally sensitive and gender-responsive approach.

II. Scope

6. The Fund will provide finance for addressing a variety of challenges associated with the adverse effects of climate change, such as climate-related emergencies, sea level rise, displacement, relocation, migration, insufficient climate information and data, and the need for climate-resilient reconstruction and recovery.

7. The Fund will focus on priority gaps within the current landscape of institutions, including global, regional and national institutions, that are funding activities related to responding to loss and damage. To this end, the Fund will provide complementary and additional support and improve the speed and adequacy of access to finance for responding to loss and damage by particularly vulnerable developing countries.

8. The Fund will provide support for responding to economic and non-economic loss and damage associated with the adverse effects of climate change. This support may include funding that is complementary to humanitarian actions taken immediately after an extreme weather event; funding for intermediate or long-term recovery, reconstruction or rehabilitation; and funding for actions that address slow onset events.

9. The support provided by the Fund may include developing national response plans; addressing insufficient climate information and data; and promoting equitable, safe and dignified human mobility in the form of displacement, relocation and migration in cases of temporary and permanent loss and damage.

III. Governance and institutional arrangements

A. Legal status

10. The Fund will possess international legal personality and appropriate legal capacity as is necessary for the exercise of its functions, the fulfilment of its objectives and the protection of its interests, in particular the capacity to enter into contracts, to acquire and dispose of movable and immovable property, and to institute legal proceedings in defence of its interests. The Fund will enjoy such privileges and immunities as are necessary for the independent fulfilment of its purpose. The officials of the Fund's secretariat will similarly enjoy such privileges and immunities as are necessary for the independent exercise of their official duties.

B. Relationship to the Conference of the Parties and the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement

11. The Fund will be designated as an entity entrusted with the operation of the Financial Mechanism of the Convention, which also serves the Paris Agreement, and will be accountable to and function under the guidance of the Conference of the Parties (COP) and the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement (CMA).

12. Arrangements for ensuring that the Fund is accountable to and functions under the guidance of the COP and the CMA, consistent with this Governing Instrument, will be concluded between the COP, the CMA and the Board of the Fund for consideration and approval at COP 29 (November 2024) and CMA 6 (November 2024).

13. The Board will:

(a) Receive guidance from the COP and the CMA on its policies, programme priorities and eligibility criteria;

(b) Take appropriate action in response to the guidance received from the COP and the CMA;

(c) Submit annual reports to the COP and the CMA for their consideration.

14. The Board may review the periodicity of the guidance from the COP and the CMA and make a recommendation thereon for consideration by the COP and the CMA.

C. Board

1. Composition

15. The Fund will be governed and supervised by a Board that is its decision-making body. The Board will have responsibility for setting the strategic direction of the Fund and for the Fund's governance and operational modalities, policies, frameworks and work programme, including relevant funding decisions.

16. The Board will have an equitable and balanced representation of all Parties within a transparent system of governance.

17. The Board will comprise 26 members, as follows:

(a) 12 members from developed countries;

(b) 3 members from African States;

(c) 3 members from Asia-Pacific States;

(d) 3 members from Latin American and Caribbean States;

(e) 2 members from small island developing States;

(f) 2 members from the least developed countries;

(g) 1 member from a developing country not included in the regional groups and constituencies referred to in paragraph 17(b–f) above.

18. Each Board member will have an alternate member, with alternate members entitled to participate in the meetings of the Board only through the principal member, without the right to vote, unless they are serving as the member. During the absence of a member from all or part of a meeting of the Board, its alternate will serve as the member.

19. The relevant regional groups and constituencies will nominate representatives with the appropriate technical, finance, loss and damage, and policy expertise, with due consideration given to gender balance, to serve as Board members, including alternate members.

20. The Board will enhance the engagement of stakeholders by inviting active observers, including youth, women, Indigenous Peoples and environmental non-governmental organizations, to participate in its meetings and related proceedings.

2. Roles and functions

21. The Board will serve the objectives and purpose of the Fund and steer the Fund's operations so that they evolve with the Fund's scale and maturity. The Board will exercise strategic leadership and flexibility to allow the Fund to evolve over time.

22. The Board will:

(a) Oversee the operation of all relevant components of the Fund;

(b) Develop and approve operational modalities, access modalities, financial instruments and funding structures;

(c) Approve funding in line with the Fund's criteria, modalities, policies and programmes;

(d) Approve a policy for the provision of grants, concessional resources and other financial instruments, modalities and facilities, taking into account access to other financial resources and debt sustainability;

(e) Approve specific operational policies and frameworks, including for the programme and project cycle;

(f) Develop a mechanism that will help ensure the activities financed by the Fund are implemented based on high-integrity environmental and social safeguards and fiduciary principles and standards;

(g) Develop, approve and periodically review the Fund's results measurement framework;

(h) Establish subcommittees, panels and expert bodies, as appropriate, and define their terms of reference;

(i) Develop an accountability framework for funding approvals, which may be delegated by the Board to the Executive Director of the Fund, subject to the relevant policies of the host institution;

(j) Develop a system for allocating resources, as outlined in paragraph 60 below;

(k) Establish additional thematic substructures to address specific activities, as appropriate;

(l) Develop relevant indicators and triggers to clarify access to different sources of support provided through the Fund;

(m) Establish, as appropriate, procedures for the monitoring and evaluation of performance and the financial accountability of activities financed by the Fund, and for any necessary external audits;

(n) Review and approve the administrative budget and work programme of the Fund and arrange for performance reviews and audits;

(o) Oversee the operation of all relevant organs of the Fund with respect to the Fund's activities, including the trustee, secretariat, subcommittees, and expert, advisory and evaluation panels;

(p) Prepare a long-term fundraising and resource mobilization strategy and plan for the Fund to mobilize financial resources from the sources outlined in paragraph 54 below;

(q) Select the Executive Director of the Fund;

(r) Ensure the expeditious disbursement of funds by the host institution in line with the policies and procedures of the Fund;

(s) Provide recommendations to the COP and the CMA, including information on means to enhance consistency, coordination and coherence with other sources, funds, initiatives and processes under and outside the Convention and the Paris Agreement;

(t) Exercise other functions, as appropriate, to fulfil the objectives of the Fund.

D. Rules of procedure of the Board

1. Co-chairs

23. The Board will elect two Co-Chairs from within its membership, one from a developed country and one from a developing country, who will serve a term of one year. The Co-Chairs may be re-elected. If a Board member is elected as Co-Chair, that member may request their alternate member to express the respective regional group's or constituency's viewpoint in Board deliberations. However, the Board member retains the right to vote.

2. Term of membership

24. Members and alternate members of the Board are to serve for a term of three years and are eligible to serve additional terms, as determined by their regional group or constituency, for a maximum of two consecutive terms.

3. Quorum

25. A three-fourths majority of Board members must be present at a meeting to constitute a quorum.

4. Decision-making

26. Decisions of the Board will be taken by consensus. If all efforts at reaching consensus have been exhausted and no consensus is reached, decisions will be taken by a four-fifths majority of the members present and voting. The Board will develop procedures for determining when all efforts at reaching consensus have been exhausted. The Board will adopt procedures for taking decisions between meetings.

5. Observers

27. The Fund will make arrangements to allow for the effective participation of observers in its meetings, including developing and carrying out an observer accreditation process.

6. Stakeholder input and participation

28. The Fund will establish consultative forums to engage and communicate with stakeholders. The forums will be open to a wide range of stakeholders, including representatives of civil society organizations, environmental and development non-governmental organizations, trade unions, Indigenous Peoples, youth, women, climate-induced migrants, industries and sectors impacted by climate change, community-based organizations, bilateral and multilateral development cooperation agencies, technical and research agencies, the private sector and governments. Participation in such forums should reflect a balance among United Nations geographical regions.

29. The Fund will develop mechanisms to promote the input and participation of stakeholders, including private sector actors, civil society organizations and the groups most vulnerable to the adverse effects of climate change, including women, youth and Indigenous Peoples, in the design, development and implementation of the activities financed by the Fund.

7. Expert and technical advice

30. The Board may establish expert and technical panels to support its work and to provide inputs to the Fund's activities. These panels may include representatives of relevant constituted bodies established under the Convention and the Paris Agreement.

8. Additional rules of procedure

31. The Board will develop additional rules of procedure.

E. Secretariat

1. Establishment

32. The Fund will be serviced by a new, dedicated and independent secretariat, which will be accountable to the Board. The secretariat will have effective management capabilities to execute the day-to-day operations of the Fund. The secretariat will be run by professional staff with relevant experience, including experience in a range of issues related to responding to loss and damage and experience in financial institutions. The selection of staff will be managed by the Executive Director of the Fund and will be a merit-based, open and transparent process, taking into account geographical and gender balance and cultural and linguistic diversity.

33. The secretariat will be headed by the Executive Director of the Fund, who will be selected by the Board. The Board will approve the job description and required qualifications for the Executive Director. The Executive Director will be selected through a merit-based, open and transparent process and will have the necessary experience and skills for the position.

34. The secretariat will include regional desks for all relevant United Nations geographical regions, the staff of which will build and maintain relationships with relevant actors in their respective regions to facilitate regionally informed decision-making, assessments and planning as the secretariat undertakes its functions. Regional desks may support and facilitate access to the Fund, as appropriate. The secretariat should also seek to enable multilingual engagement, as appropriate.

2. Functions

35. The secretariat will be responsible for the day-to-day operations of the Fund and will:

(a) Plan and execute all relevant operational and administrative duties;

(b) Report information on the activities of the Fund to the Board;

(c) Develop and implement procedures for coordinating the activities of the Fund with those of other relevant funding arrangements;

(d) Prepare performance reports on the implementation of activities financed by the Fund;

(e) Develop the work programme and administrative budget of the secretariat, as well as the administrative budget of the trustee, and submit these documents for consideration and approval by the Board;

(f) Operationalize the programme and project cycle;

(g) Prepare financial agreements related to the specific financing instrument to be concluded with an implementing entity;

(h) Monitor the financial risks of the Fund's portfolio;

(i) Work with the trustee to support the Board to enable it to fulfil its responsibilities;

(j) Coordinate monitoring and evaluation of programmes, projects and activities financed by the Fund;

(k) Establish and apply effective knowledge management practices;

(l) Establish modalities that allow recipients to use implementing entities, including international, regional, national and local entities, as appropriate, on the basis of functional equivalency with World Bank safeguards and standards;

(m) Assist countries in engaging with the Fund through its processes and procedures;

(n) Coordinate with the Santiago network for averting, minimizing and addressing loss and damage associated with the adverse effects of climate change to support countries seeking to access the Fund through technical assistance through the network;

(o) Take a regionally informed approach in responding to context-specific operational needs, capabilities and priorities of recipient countries;

(p) Perform any other functions assigned by the Board.

F. Trustee

36. The trustee will administer the assets of the Fund only for the purpose of, and in accordance with, the relevant decisions of the Board. The trustee will hold the assets of the Fund separate and apart from the assets of the trustee, but may commingle them for administrative and investment purposes with other assets maintained by the trustee. The trustee will establish and maintain separate records and accounts in order to identify the assets of the Fund.

37. The roles and responsibilities of the trustee include the receipt of contributions, implementation of the terms of contribution arrangements, the holding and investing of funds, the transfer of funds to implementing entities and/or other relevant recipients, accounting, reporting, and financial and fiduciary management, as well as ensuring compliance with established procedures and internal controls. The trustee will maintain appropriate financial records and prepare financial statements and other reports required by the Board, in accordance with internationally accepted fiduciary standards.

38. The trustee will be accountable to the Board for the performance of its responsibilities as trustee for the Fund.

39. The trustee should ensure that the Fund can receive financial inputs from philanthropic foundations and other non-public and alternative sources, including new and innovative sources of finance.

40. The trustee will arrange for the secretariat or another appropriate mechanism to undertake due diligence to allow for the receipt of non-sovereign contributions.

IV. Operational modalities

41. The Fund will have a streamlined and rapid approval process with simplified criteria and procedures, while also maintaining high fiduciary standards, environmental and social safeguards, financial transparency standards and accountability mechanisms. The Fund will avoid disproportionate bureaucratic obstacles to the access of resources.

V. Eligibility, country ownership and access

A. Eligibility

42. Developing countries that are particularly vulnerable to the adverse effects of climate change are eligible to receive resources from the Fund.

B. Country ownership and access modalities

43. The Fund will seek to promote and strengthen national responses for addressing loss and damage through pursuing country-led approaches, including through effective involvement of relevant institutions and stakeholders, in particular women, vulnerable communities and Indigenous Peoples.

44. The Fund will be responsive to country priorities and circumstances. The Fund will seek to utilize, where appropriate and available, existing national and regional systems and financial mechanisms.

45. The Fund will promote, in all its operations, direct engagement at the national and, where appropriate, subnational and local level to facilitate efficiency and the achievement of concrete results.

46. The Fund will involve developing country Parties that are particularly vulnerable to the adverse effects of climate change during all stages of the Fund's programme and project cycle, insofar as their respective projects are concerned.

47. The Fund may provide support for activities relevant to preparing and strengthening national processes and support systems. This may include support for developing proposed activities, projects and programmes, such as planning activities for addressing loss and damage; estimating financial requirements for implementing loss and damage activities; and establishing national loss and damage finance systems.

48. Developing countries may designate a national authority or national focal point to be responsible for overall management and implementation of activities, projects and programmes supported by the Fund. The authority or focal point will be consulted on any requests for funding through any access modalities, including those referred to in paragraph 49 below.

49. The Board will develop various modalities to facilitate access to the Fund's resources. These modalities may include:

(a) Direct access via direct budget support through national Governments, or in partnership with entities whose safeguards and standards have been judged functionally equivalent to those of multilateral development banks;

(b) Direct access via subnational, national and regional entities or in partnership with entities accredited to other funds, such as the Adaptation Fund, the Global Environment Facility and the Green Climate Fund;

(c) International access via multilateral or bilateral entities;

(d) Access to small grants that support communities, Indigenous Peoples and vulnerable groups and their livelihoods, including with respect to recovery after climate-related events;

(e) Rapid disbursement modalities, as appropriate.

50. The Fund will develop simplified procedures and criteria for fast-tracked screening to determine functional equivalency with internationally recognized standards of national and/or regional funding entities' safeguards and standards to manage funded programmes and projects in country, as appropriate.

VI. Complementarity and coherence

51. The Fund will play a key role in coordinating a coherent global response to loss and damage between the Fund and the funding arrangements. The Fund will promote efforts that enhance complementarity and coherence, such as the exchange of information and good practices and consultation with existing and new mechanisms.

52. The Fund will develop methods to enhance complementarity between its activities and the activities of other relevant bilateral, regional and global funding mechanisms and institutions in order to better utilize the full range of financial and technical capacities.

53. The Fund will also promote coherence in programming at the national level. The Fund will form partnerships with other funding arrangements to address priority gaps in their activities with the aim of reinforcing those activities and leveraging the resources of the funding arrangements and, as appropriate, to provide additional and complementary sources of finance.

VII. Financial inputs

54. The Fund is able to receive contributions from a wide variety of sources of funding, including grants and concessional loans from public, private and innovative sources, as appropriate.[6]

55. The Fund will have a periodic replenishment every four years and will maintain the flexibility to receive financial inputs on an ongoing basis.

56. The Board will prepare a long-term fundraising and resource mobilization strategy and plan for the Fund to guide its mobilization of new, additional, predictable and adequate financial resources from all sources of funding.

VIII. Financial instruments

57. The Fund will provide financing in the form of grants and highly concessional loans on the basis of the Board's policy for the provision of grants, concessional resources and other financial instruments, modalities and facilities. In its provision of finance, the Fund will make use of, inter alia, triggers, climate impact relevant indicators, debt sustainability considerations and criteria developed by the Board, and take into account guidance from the COP and the CMA.

58. The Fund may deploy a range of additional financial instruments that take into consideration debt sustainability (grants, highly concessional loans, guarantees, direct budget support and policy-based finance, equity, insurance mechanisms, risk-sharing mechanisms, pre-arranged finance, performance-based programmes and other financial products, as appropriate) to augment and complement national resources for addressing loss and damage.

[6] This paragraph is without prejudice to any future funding arrangements, any positions of Parties in current or future negotiations, or understandings and interpretations of the Convention and the Paris Agreement.

59. The Fund should be able to facilitate the blending of finance from different financial tools to optimize the use of public funding, especially in order to ensure effective results for vulnerable populations and the ecosystems on which they depend.

IX. Allocation of funding

60. The Board will develop and operate a resource allocation system. This system will take into account, inter alia:

(a) The priorities and needs of developing countries that are particularly vulnerable to the adverse effects of climate change, while taking into consideration the needs of climate-vulnerable communities;

(b) Considerations of the scale of impacts of particular climate events relative to national circumstances, including but not limited to response capacities of the impacted countries;

(c) The need to safeguard against the overconcentration of support provided by the Fund in any given country, group of countries or region;

(d) The best available data and information from entities such as the Intergovernmental Panel on Climate Change and/or pertinent knowledge from Indigenous Peoples and vulnerable communities on exposure and sensitivity to the adverse effects of climate change and on loss and damage, recognizing that such data, information and knowledge may be limited for specific countries and regions;

(e) Estimates of recovery and reconstruction costs based on data and information from relevant entities, in particular national and/or regional entities, recognizing that such data or information may be limited for specific countries and regions;

(f) A minimum percentage allocation floor for the least developed countries and small island developing States.

61. The allocation system will be dynamic and will be reviewed by the Board.

X. Monitoring

62. Programmes, projects and other activities financed by the Fund will be regularly monitored for impact, efficiency and effectiveness. The use of participatory monitoring involving stakeholders is encouraged.

63. A results measurement framework, with guidelines and appropriate performance indicators, will be developed, considered and approved by the Board. The performance of programmes, projects and other activities against these indicators will be reviewed periodically in order to support the continuous improvement of the Fund’s impact, effectiveness and operational performance.

XI. Evaluation

64. Periodic independent evaluations of the performance of the Fund will be conducted in order to provide an objective assessment of the results of the Fund, including of the activities financed by the Fund, and its effectiveness and efficiency. The purpose of these independent evaluations is to inform decision-making by the Board, identify and disseminate lessons learned, and support the accountability of the Fund.

65. The results of the periodic evaluations will be published by the secretariat. They will also be provided as part of the annual report of the Board to the COP and the CMA.

66. The Fund will be subject to periodic reviews conducted by the COP and the CMA. These periodic reviews will be informed by, inter alia, the results of the independent evaluation and the annual reports of the Board to the COP and the CMA.

XII. Fiduciary standards

67. The Fund will ensure that high-integrity fiduciary principles and standards are applied to its activities, and, to this end, the secretariat will work towards ensuring that each implementing entity applies such fiduciary principles and standards when implementing activities financed by the Fund. The secretariat will support the strengthening of the capacities of direct access implementing entities, where needed, to enable them to attain functional equivalency with the World Bank's fiduciary principles and standards, on the basis of modalities that will be developed by the Board.

XIII. Environmental and social safeguards

68. The Fund will ensure that best practice environmental and social safeguard policies are applied to its activities, and, to this end, the secretariat will work towards ensuring that each implementing entity applies such best practice environmental and social safeguard policies when implementing activities financed by the Fund. The secretariat will support the strengthening of the capacities of direct access implementing entities, where needed, to enable them to attain functional equivalency with the World Bank's environmental and social safeguards, on the basis of modalities that will be developed by the Board.

XIV. Accountability and independent mechanisms

69. Activities financed by the Fund will be subject to the implementing entity's independent integrity unit or functional equivalent, which will work with the secretariat to investigate allegations of fraud and corruption in coordination with relevant counterpart authorities and report to the Board on any such investigations.

70. The Fund's operations, including with respect to activities financed by it, will be subject to the host institution's policy on access to information. The activities financed by the Fund will also be subject to each implementing entity's policy on access to information.

71. Activities financed by the Fund will use the implementing entity's independent grievance redress mechanism to address complaints related to activities financed by the Fund, which will take appropriate action based on any agreements, findings and/or recommendations and report to the Board on any such action.

XV. Amendments to the Governing Instrument

72. The Board may recommend amendments to this Governing Instrument for consideration by the COP and the CMA.

XVI. Termination of the Fund

73. The Board may recommend the termination of the Fund for consideration by the COP and the CMA.

Annex II

Funding arrangements

I. Objective and scope

1. The purpose of the new funding arrangements, which complement and include sources, funds, processes and initiatives under and outside the Convention and the Paris Agreement, is to assist developing countries that are particularly vulnerable to the adverse effects of climate change in responding to loss and damage, including with a focus on addressing loss and damage by providing and assisting in mobilizing new and additional resources, including for addressing extreme weather events and slow onset events, especially in the context of ongoing and ex post action.[1]

2. The new funding arrangements include scaling up or enhancing existing and initiating new funding arrangements for responding to loss and damage.

3. The new funding arrangements will focus on providing and assisting in mobilizing new and additional resources while complementing sources, funds, processes and initiatives under and outside the Convention and the Paris Agreement.

II. Coordination and complementarity

4. The funding arrangements will increase the coherence of and coordination across the loss and damage finance architecture. They will contribute to avoiding the duplication of effort, maximizing and leveraging comparative advantages, sharing best practices and promoting synergies among the communities of practice related to loss and damage while continuing to assist in mobilizing new, additional and predictable financial resources.

5. The funding arrangements should ensure coordination at the national and regional level while also ensuring coherence at the operational level and in programmatic approaches.

6. The funding arrangements are to work in a manner coherent with and complementary to the fund established in paragraph 3 of decisions 2/CP.27 and 2/CMA.4 (hereinafter referred to as the Fund), which will be made possible through the best use of existing mechanisms, such as the Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts (WIM) and the Santiago network for averting, minimizing and addressing loss and damage associated with the adverse effects of climate change.

7. The Santiago network and its members should contribute to the above-mentioned coherence by aligning technical assistance catalysed under the network with efforts to build capacity and support the programmatic approaches of the Fund and the funding arrangements, as appropriate.

A. Relationship of the new funding arrangements with the Fund

8. The Fund will act as the platform for facilitating coordination and complementarity under the funding arrangements by establishing and operationalizing the high-level dialogue outlined in chapter II.B below.

9. The Board of the Fund is encouraged to create an approach for developing partnerships with other entities that form part of the funding arrangements.

10. The Board is requested to develop standard procedures informed, inter alia, by the work of the WIM to identify sources, funds, processes and initiatives under and outside the Convention and the Paris Agreement that are assisting developing countries in responding to

[1] Decisions 2/CP.27, para. 2, and 2/CMA.4, para. 2.

loss and damage from sudden or slow onset events, including economic or non-economic loss and damage (i.e. funding arrangements), for the purpose of supporting strengthened coordination and complementarity.

B. High-level dialogue

11. An annual high-level dialogue on coordination and complementarity (the dialogue) with representatives from the main entities that form part of the funding arrangements will be organized to:

(a) Facilitate a structured and timely exchange of relevant knowledge and information, including between the entities that form part of the funding arrangements and the Fund;

(b) Strengthen capacity and synergies to enhance the integration of measures to respond to loss and damage into sources, funds, processes and initiatives under and outside the Convention and the Paris Agreement by drawing on the experience of others, exchanging good policies and practices, and leveraging research and data systems;

(c) Promote the exchange of country and community experience in undertaking action to respond to loss and damage;

(d) Identify priority gaps and new opportunities for cooperation, coordination and complementarity;

(e) Develop recommendations on scaling up or enhancing existing as well as initiating new funding arrangements for responding to loss and damage.

12. The Board of the Fund will report on the dialogue through its annual report to the Conference of the Parties (COP) and the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement (CMA), and will include in the report information on actions to implement the recommendations arising from the dialogue, as well as recommendations on new funding arrangements.

13. The dialogue will be co-convened by the Fund and the United Nations Secretary-General, which may jointly designate a high-level representative that has the power to convene the entities that form part of the funding arrangements engaged in responding to loss and damage.

14. The dialogue will consist of no more than 30 high-level representatives of entities engaged in responding to loss and damage that form part of the new funding arrangements, invited by the co-conveners of the dialogue, including representatives of, inter alia:

(a) The Fund;

(b) The World Bank and regional development banks;

(c) The International Monetary Fund;

(d) Relevant United Nations agencies and other intergovernmental organizations as well as relevant regional, international, bilateral and multilateral organizations;

(e) Relevant multilateral climate funds, such as the Adaptation Fund, the Climate Investment Funds, the Global Environment Facility and the Green Climate Fund;

(f) The International Organization for Migration;

(g) The WIM Executive Committee and the Santiago network;

(h) Civil society, Indigenous Peoples and the philanthropic sector, as well as individual experts on loss and damage chosen on the basis of their expertise and their representation of different regions and perspectives.

15. The dialogue is to provide recommendations related to enhancing implementation of the objectives of the new funding arrangements in line with relevant COP and CMA decisions.

16. The dialogue will consider any comments or guidance from the COP and the CMA and will follow up on recommendations arising from previous dialogues.

III. Recommended actions with regard to the funding arrangements

17. Parties and relevant institutions should consider, as appropriate, developing and implementing additional funding arrangements for improving sources, funds, processes and initiatives under and outside the Convention and the Paris Agreement to address gaps in the speed of disbursement of, eligibility for, adequacy of and access to finance, especially pre-arranged finance, for responding to various challenges, such as climate-related emergencies, slow onset events, displacement, relocation, migration, insufficient climate information and data, and the need for climate-resilient reconstruction and recovery.

18. A wide variety of sources, including innovative sources, should be made available to support and complement the new and existing arrangements, including sources, funds, processes and initiatives under and outside the Convention and the Paris Agreement, and they should be made available in ways that ensure the new and existing funding arrangements target people and communities in climate-vulnerable situations (including women, children, youth, Indigenous Peoples, and climate-induced migrants and refugees in developing countries that are particularly vulnerable to the adverse impacts of climate change).

19. The Santiago network and its members should contribute to coherence by aligning the technical assistance catalysed under the network with efforts to build capacity and support programmatic approaches of the Fund and the funding arrangements.

20. The entities that form part of the funding arrangements should explore ways of better coordinating all channels of finance, including bilateral, regional and multilateral channels, with the aim of improving synergies and coherence among the existing and new arrangements for responding to loss and damage.

21. Initiatives such as Early Warnings for All, Climate Risk and Early Warning Systems, the Systematic Observations Financing Facility and the Global Shield against Climate Risks are welcome, and relevant actors are encouraged to increase their support for activities that enhance response to loss and damage.

22. United Nations agencies, multilateral development banks and bilateral agencies are invited to include, as appropriate, in their annual reports information on their efforts to assist developing countries that are particularly vulnerable to the adverse effects of climate change in responding to loss and damage, starting from 2024.

23. Multilateral development banks and relevant organizations such as the World Bank and the International Labour Organization are called on to scale up support for adaptive social protection mechanisms.

24. Relevant actors and contributors are urged to scale up anticipatory approaches through mechanisms such as the Central Emergency Response Fund, the Disaster Response Emergency Fund, the Start Network and country-based pooled funds.

25. The development of regional sources, funds, initiatives and processes to enhance approaches focused on unique regional challenges in responding to loss and damage should be explored. In this regard, the establishment of the Pacific Resilience Facility is welcomed.

26. Multilateral climate finance institutions and funds are encouraged to promote the inclusion of climate-induced migrants and refugees in their funded activities, consistently with existing investments, results frameworks, and funding windows and structures.

1st plenary meeting
6 December 2023

Decision 2/CP.28

Santiago network for averting, minimizing and addressing loss and damage associated with the adverse effects of climate change under the Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts

The Conference of the Parties[1]

1. *Endorses* decision 6/CMA.5, on the Santiago network for averting, minimizing and addressing loss and damage under the Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts, which provides as follows:

> "1. *Recalls* that the Santiago network for averting, minimizing and addressing loss and damage associated with the adverse effects of climate change was established to catalyse the technical assistance of relevant organizations, bodies, networks and experts for the implementation of relevant approaches to averting, minimizing and addressing loss and damage associated with the adverse effects of climate change at the local, national and regional level in developing countries that are particularly vulnerable to the adverse effects of climate change;[2]
>
> "2. *Also recalls* the request for the UNFCCC secretariat, under the guidance of the Chairs of the subsidiary bodies, to develop a draft host agreement (memorandum of understanding) with the host of the Santiago network secretariat recommended by the subsidiary bodies at their fifty-eighth sessions with a view to it being recommended for consideration and adoption by the governing body or bodies[3] at the session(s) to be held in November–December 2023;[4]
>
> "3. *Expresses appreciation* to Canada, Japan, Spain, Switzerland and the United States of America for their financial contributions to the work of the Santiago network;
>
> "4. *Recalls* decision 12/CMA.4, endorsed by decision 11/CP.27, which establishes the institutional arrangements of the Santiago network to enable its full operationalization, including to support its mandated role in catalysing technical assistance for the implementation of the relevant approaches at the local, national and regional level in developing countries that are particularly vulnerable to the adverse effects of climate change;[5]
>
> "5. *Also recalls* paragraph 16 of decision 12/CMA.4, which states that the Santiago network secretariat will be accountable to and operate under the guidance of the governing body or bodies through the Advisory Board of the Santiago network and hosted by an organization or a consortium of organizations able to provide the necessary administrative and infrastructural support for its effective functioning;
>
> "6. *Welcomes* the report on the hosting of the secretariat of the Santiago network,[6] prepared by the evaluation panel;[7]

[1] Nothing in this document prejudices Parties' views or prejudges outcomes on matters related to the governance of the Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts.

[2] Decision 2/CMA.2, para. 43.

[3] As footnote 1 above.

[4] Decision 12/CMA.4, para. 24.

[5] In accordance with the process outlined in paras. 19–23, decision 12/CMA.4, endorsed by decision 11/CP.27.

[6] FCCC/SB/2023/1.

[7] Details on the evaluation panel and the process for selecting the host are available at https://unfccc.int/SNevalpanel.

"7. *Notes* that two proposals were received in response to the call for proposals to host the Santiago network secretariat,[8] the executive summaries of which are available on the UNFCCC website;[9]

"8. *Welcomes* the efforts of the proponents in responding to the call for proposals to host the Santiago network secretariat, of the evaluation panel in assessing the proposals and preparing the report referred to in paragraph 6 above and of the UNFCCC secretariat in providing support for the host selection process, all within a limited time frame;

"9. *Notes with appreciation* the completion of the selection process for the host of the secretariat of the Santiago network, which was supported by an evaluation panel comprising four members of the Executive Committee of the Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts, two members of the Advisory Board of the Climate Technology Centre and Network and two members of the Paris Committee on Capacity-building and involved the participation of the two proponents that responded to the call for proposals for hosting the Santiago network secretariat;

"10. *Expresses appreciation* to both proponents that submitted proposals for hosting the Santiago network secretariat;

"11. *Selects* the joint proposal submitted by the consortium of the United Nations Office for Disaster Risk Reduction and the United Nations Office for Project Services for the hosting of the Santiago network secretariat for an initial term of five years, with five-year renewal periods;[10]

"12. *Encourages* the consortium, as host of the Santiago network secretariat, to consider exploring areas for collaboration with the Caribbean Development Bank, which also submitted a proposal for hosting, where appropriate;

"13. *Authorizes* the Executive Secretary to sign, on behalf of the governing body or bodies, the agreement between the governing body or bodies and the consortium regarding the hosting of the Santiago network secretariat;

"14. *Requests* the consortium, as host of the Santiago network secretariat, to ensure that the necessary arrangements are in place for the meetings of the Advisory Board of the Santiago network, including privileges and immunities for members of the Board in line with existing practice;

"15. *Also requests* the consortium, as host of the Santiago network secretariat, to undertake, by the end of January 2024, an analysis of the cost-effectiveness, including a cost–benefit analysis, of various locations around the world as options for the location of the head office of the Santiago network secretariat from a pool of potential locations that can provide the privileges and immunities referred to in paragraph 14 above, and to provide to the Advisory Board of the Santiago network the results of the analysis with its recommendation on which location would be the most cost-effective and suitable in the light of the roles and responsibilities and the organizational structure of the Santiago network secretariat as detailed in annex I to decision 12/CMA.4 for consideration and a decision thereon by the Advisory Board at its 1st meeting, to be held in 2024;

"16. *Encourages* the consortium, as host of the Santiago network secretariat, to make the necessary arrangements to promptly launch work under the Santiago network upon conclusion of the November–December 2023 session(s) of the governing body or bodies, including the appointment of a director of the secretariat through a merit-based, open and transparent process, who will facilitate the timely

[8] The call was issued on 31 December 2022 and is available at https://unfccc.int/documents/624794.

[9] https://unfccc.int/proposalsSNhost.

[10] Pursuant to decision 12/CMA.4, annex I, para. 21.

recruitment of the staff of the secretariat in line with the terms of reference of the Santiago network;[11]

"17. *Requests* the Santiago network secretariat to facilitate the 1st meeting of the Advisory Board of the Santiago network, to take place in 2024;

"18. *Also requests* the Santiago network secretariat to start managing, as soon as possible, the day-to-day operations of the secretariat, in line with its role and responsibilities;

"19. *Adopts* the memorandum of understanding between the Conference of the Parties and the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement on the one hand and the United Nations Office for Disaster Risk Reduction and the United Nations Office for Project Services on the other regarding the hosting of the Santiago network secretariat, as contained in the annex;

"20. *Reaffirms* that technical assistance provided under the Santiago network in a demand-driven manner will be developed through an inclusive, country-driven process, taking into account the needs of vulnerable people, Indigenous Peoples and local communities;

"21. *Also reaffirms* that, when technical assistance is provided under the Santiago network, it should take into consideration the cross-cutting issues referred to in the eleventh preambular paragraph of the Paris Agreement;

"22. *Reiterates* the request[12] to the UNFCCC secretariat to continue providing support for developing countries that are particularly vulnerable to the adverse effects of climate change that may seek or wish to benefit from the technical assistance available from organizations, bodies, networks and experts under the Santiago network, until the Santiago network secretariat is operational;

"23. *Requests* the UNFCCC secretariat to develop draft guidelines on preventing potential and addressing actual and perceived conflicts of interest in relation to the Santiago network, including any conflicts of interest that may arise when organizations, bodies, networks and experts are engaged in providing technical support to the Santiago network secretariat while responding to technical assistance requests, or when the host of the Santiago network secretariat is responding as an organization, body, network or expert to technical assistance requests, for review and approval by the Advisory Board of the Santiago network at its 1st meeting;

"24. *Also requests* the Santiago network secretariat to:

(a) Adhere to the mandate of the Santiago network and its functions, including facilitating the consideration of a wide range of topics relevant to averting, minimizing and addressing loss and damage, including but not limited to current and future impacts, priorities and actions related to averting, minimizing and addressing loss and damage pursuant to decisions 3/CP.18 and 2/CP.19; the areas referred to in Article 8, paragraph 4, of the Paris Agreement; and the strategic workstreams of the five-year rolling workplan of the Executive Committee of the Warsaw International Mechanism;

(b) Assume its roles and responsibilities, including that it shall be accountable to and operate under the guidance of the Advisory Board of the Santiago network, recognizing the different mandates of the host and the Santiago network, and that the Advisory Board will provide guidance and oversight to the Santiago network secretariat on the effective implementation of the functions of the network;

(c) Report annually to the Advisory Board of the Santiago network information on the in-kind and other support provided by its host that has contributed

[11] Decision 12/CMA.4, annex I, para. 15.
[12] Decision 12/CMA.4, para. 15.

to its ability to assume its roles and responsibilities, as set out in the terms of reference of the Santiago network;[13]

(d) Make use of regional and subregional United Nations offices in all United Nations geographical regions, as appropriate, to serve as designated units to provide relevant services and support for catalysing effective and timely technical assistance in developing countries particularly vulnerable to the adverse effects of climate change;

(e) Include in its annual report to the Advisory Board of the Santiago network information on the inclusive, balanced and equitable nature of the technical assistance catalysed across all regions with developing countries particularly vulnerable to the adverse effects of climate change and take action, as appropriate;

(f) Have a lean, cost-efficient organizational structure;[14]

(g) Make provisions for discussion on further arrangements for the implementation of the host agreement (memorandum of understanding) in line with future decisions of the governing body or bodies;

(h) Carry out financial management, auditing and reporting functions and implement a robust accountability system, sound financial systems of international standard, and a fiduciary record that ensures the correct, impartial administering and disbursement of funds;

"25. *Further requests* the Advisory Board of the Santiago network to develop its draft rules of procedure with a view to recommending them, through the subsidiary bodies at their sixty-first sessions (November 2024), for consideration and adoption by the governing body or bodies at the session(s) to be held in November 2024;

"26. *Invites* the Advisory Board of the Santiago network to consider and take appropriate action to catalyse technical assistance of relevant organizations, bodies, networks and experts at the local, national and regional level in developing countries particularly vulnerable to the adverse effects of climate change, including through the provision of guidance for the development by the Santiago network secretariat of guidelines and procedures[15] for ensuring the demand-driven nature of all requests for technical assistance submitted under the Santiago network, and to safeguard against conflicts of interest in, or, as appropriate, the overconcentration of, the provision and delivery of technical assistance through or by specific organizations, bodies, networks and experts;

"27. *Also invites* the Advisory Board of the Santiago network to provide guidance to the Santiago network secretariat on developing guidelines and procedures for enabling access to and assisting in preparing requests for technical assistance that recognize the significant capacity constraints of the least developed countries and small island developing States;

"28. *Requests* the host of the Santiago network secretariat to ensure that the Santiago network and its secretariat are able to receive the required financial and other support from a wide variety of sources through all parts of the consortium to implement the terms of reference of the Santiago network;

"29. *Recalls* paragraph 67 of decision 1/CMA.3, in which it was decided that the Santiago network will be provided with funds to support technical assistance for the implementation of relevant approaches to avert, minimize and address loss and damage associated with the adverse effects of climate change in developing countries in support of the functions set out in paragraph 9 of decision 19/CMA.3;

[13] Decision 12/CMA.4, annex I, para. 19.

[14] In accordance with decision 12/CMA.4, annex I, para. 13.

[15] In accordance with para. 17(b) of decision 12/CMA.4, endorsed by decision 11/CP.27.

"30. *Also recalls* paragraph 70 of decision 1/CMA.3, which urged developed country Parties to provide funds for the operation of the Santiago network and for the provision of technical assistance as set out in paragraph 67 of the same decision;

"31. *Further recalls* paragraph 6 of decision 12/CMA.4, endorsed by decision 11/CP.27, which encouraged others to provide support for the operation of the Santiago network and for the provision of technical assistance under the network;

"32. *Welcomes* the pledges made to the Santiago network as at 6 December 2023 by the European Union and its member States Denmark, Germany, Ireland and Luxembourg, and by Switzerland and the United Kingdom of Great Britain and Northern Ireland, amounting to approximately USD 40.7 million;[16]

"33. *Recalls* paragraph 69 of decision 1/CMA.3, which states that the Santiago network secretariat will administer the funds referred to in paragraph 67 of the same decision;

"34. *Welcomes* decisions 1/CP.28 and 5/CMA.5 on the operationalization of the new funding arrangements, including a fund, for assisting developing countries particularly vulnerable to the adverse effects of climate change in responding to loss and damage referred to in paragraphs 2–3 of decisions 2/CP.27 and 2/CMA.4, taking note of the parts of those decisions that relate to the Santiago network;

"35. *Requests* the Advisory Board of the Santiago network to designate up to two representatives to take part in the annual high-level dialogue on coordination and complementarity with representatives of the main entities forming part of the new funding arrangements, referred to in paragraph 2 of decisions 2/CP.27 and 2/CMA.4, pursuant to paragraphs 11–16 of annex II to decisions 1/CP.28 and 5/CMA.5;

"36. *Invites* the Santiago network secretariat to coordinate with the secretariat of the fund referred to in paragraph 3 of decisions 2/CP.27 and 2/CMA.4 in supporting developing countries particularly vulnerable to the adverse effects of climate change in seeking to access the fund through technical assistance and to contribute to coherence and complementarity with the fund by aligning the technical assistance it catalyses under the Santiago network to build capacity and support programmatic approaches of the funding arrangements, including a fund, referred to in paragraphs 2–3 of decisions 2/CP.27 and 2/CMA.4, as appropriate;

"37. *Decides* that, once the outstanding nominations for the Advisory Board of the Santiago network[17] have been received by the UNFCCC secretariat, the nominees will be deemed elected at this session or these sessions of the governing body or bodies, in accordance with established practice;

"38. *Notes* that considerations related to the governance of the Warsaw International Mechanism will continue at its sixth session (November 2024);[18]

"39. *Takes note* of the estimated budgetary implications of the activities to be undertaken by the UNFCCC secretariat referred to in paragraphs 22–23 above;

"40. *Requests* that the actions of the UNFCCC secretariat called for in this decision be undertaken subject to the availability of financial resources."

2. *Notes* that considerations related to the governance of the Warsaw International Mechanism will continue at its twenty-ninth session (November 2024).[19]

[16] Noting that this does not set a precedent for making pledges to the Santiago network.

[17] In accordance with decision 12/CMA.4, paras. 10–13.

[18] It is noted that discussions on the governance of the Warsaw International Mechanism did not produce an outcome; this is without prejudice to further consideration of this matter.

[19] As footnote 18 above.

Annex*

Memorandum of understanding between the Conference of the Parties to the United Nations Framework Convention on Climate Change and the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement, on the one hand, and the United Nations Office for Disaster Risk Reduction and the United Nations Office for Project Services, on the other, regarding the hosting of the Santiago network secretariat

This memorandum of understanding (MOU) is concluded between the Conference of the Parties to the United Nations Framework Convention on Climate Change (COP) and the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement (CMA) (hereinafter referred to as the "governing body or bodies"[1]) on the one hand and the United Nations Office for Disaster Risk Reduction (UNDRR) and the United Nations Office for Project Services (UNOPS) on the other (hereinafter each referred to as "the Party" and collectively referred to as "the Parties"), regarding the hosting of the secretariat of the Santiago network for averting, minimizing and addressing loss and damage associated with the adverse effects of climate change.

Whereas, the CMA, by decision 2/CMA.2, noted by the COP in decision 2/CP.25, established, as part of the Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts, the Santiago network for averting, minimizing and addressing loss and damage associated with the adverse effects of climate change,

Whereas, the mission of the Santiago network is to catalyse the technical assistance of relevant organizations, bodies, networks and experts for the implementation of relevant approaches for averting, minimizing and addressing loss and damage associated with the adverse effects of climate change at the local, national and regional level in developing countries that are particularly vulnerable to the adverse effects of climate change,

Whereas, the CMA, by decision 19/CMA.3, endorsed by the COP in decision 17/CP.26, decided the functions of the Santiago network,[2] which include facilitating the consideration of a wide range of topics relevant to averting, minimizing and addressing loss and damage approaches, including but not limited to current and future impacts, priorities and actions related to averting, minimizing and addressing loss and damage, pursuant to decisions 3/CP.18 and 2/CP.19, the areas referred to in Article 8, paragraph 4, of the Paris Agreement and the strategic workstreams of the five-year rolling workplan of the Executive Committee of the Warsaw International Mechanism (hereinafter referred to as the "Executive Committee"),

Whereas, the CMA, by decision 12/CMA.4, endorsed by the COP in decision 11/CP.27, adopted the terms of reference of the Santiago network[3] (hereinafter referred to as the "terms of reference") and decided that as part of its structure the Santiago network will have a hosted secretariat, to be known as the Santiago network secretariat, an Advisory Board and a network of member organizations, bodies, networks and experts,[4]

* Annex to decision 6/CMA.5 (see footnote 1 to this decision), endorsed by the Conference of the Parties in this decision.

[1] Nothing in this MOU prejudices the views of the Parties to the Convention or the views of the Parties to the Paris Agreement or prejudges outcomes on matters related to the governance of the Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts. This is without prejudice to further consideration of this matter.

[2] Decision 19/CMA.3, para. 9, with the decision endorsed by the COP in decision 17/CP.26.

[3] Decision 12/CMA.4, annex I.

[4] Decision 12/CMA.4, paras. 3 and 8, with the decision endorsed by the COP in decision 11/CP.27.

Whereas, UNDRR and UNOPS submitted a joint proposal dated 31 March 2023 (hereinafter referred to as the "Proposal") regarding the hosting of the Santiago network secretariat,

Whereas, UNDRR aims to substantially reduce the risk and losses in lives, livelihoods and health and in the economic, physical, social, cultural and environmental assets of persons, businesses, communities and countries as part of its mandate to support the implementation, follow-up and review of the Sendai Framework for Disaster Risk Reduction 2015–2030,

Whereas, UNOPS is an operational arm of the United Nations established by United Nations General Assembly decision 48/501 of 19 September 1994 and acts as a central resource for the United Nations system in procurement, contracts management and other capacity development activities, as well as providing efficient, cost-effective services to partners in its specialized areas,

Whereas, the CMA, by decision 6/CMA.5, endorsed by decision 2/CP.28, selected the Proposal for the hosting of the Santiago network secretariat,

Whereas, UNOPS confirms that it has the necessary authorization to enter into this MOU,

Whereas, the United Nations General Assembly, by decision 78/546,[5] authorized UNDRR to enter into this MOU,

Whereas, the UNFCCC Executive Secretary is authorized by the governing body or bodies to sign this MOU on behalf of the governing body or bodies,

NOW THEREFORE the Parties to this MOU have agreed to the following:

I. Purpose

1. The purpose of this MOU is to stipulate the terms of the relationship between the governing body or bodies and UNDRR and UNOPS with respect to the hosting of the Santiago network secretariat in accordance with decision 6/CMA.5, endorsed by the COP in decision 2/CP.28.

II. Role and responsibilities of the governing body or bodies[6]

2. The Santiago network secretariat shall be accountable to and operate under the guidance of the governing body or bodies through the Advisory Board of the Santiago network (hereinafter referred to as the "Advisory Board").

3. The governing body or bodies shall consider the joint annual report of the Santiago network and the Executive Committee, submitted through the subsidiary bodies in accordance with paragraph 19 of annex I to decision 12/CMA.4, endorsed by decision 11/CP.27, and other future decisions of the governing body or bodies, and provide guidance thereon.

4. In taking decisions that would affect the hosting of the Santiago network secretariat, the governing body or bodies shall take into consideration any views and information provided by UNDRR and UNOPS as host of the Santiago network secretariat.

[5] Decision entitled "Authorization for the United Nations Office for Disaster Risk Reduction regarding the hosting of the secretariat of the Santiago network for averting, minimizing and addressing loss and damage associated with the adverse effects of climate change".

[6] Nothing in this MOU prejudices the views of the Parties to the Convention or the views of the Parties to the Paris Agreement or prejudges outcomes on matters related to the governance of the Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts. This is without prejudice to further consideration of this matter.

III. Role and responsibilities of the Advisory Board of the Santiago network

5. The members of the Advisory Board shall be elected in accordance with decision 12/CMA.4, endorsed by decision 11/CP.27.

6. The Advisory Board shall provide guidance and oversight to the Santiago network secretariat on the effective implementation of the functions of the Santiago network in accordance with its terms of reference.

IV. Role and responsibilities of the United Nations Office for Disaster Risk Reduction and the United Nations Office for Project Services

7. UNDRR and UNOPS will host the Santiago network secretariat as a dedicated secretariat in accordance with the provisions of this MOU and the terms of reference, as well as with their respective legal and regulatory frameworks, including regulations, rules and procedures. Cooperation between UNDRR and UNOPS will be addressed in a separate agreement between the two organizations.

8. UNDRR and UNOPS shall make regional and subregional UNDRR offices in all United Nations geographical regions available, as appropriate, to serve as designated units for providing relevant services and support for catalysing effective and timely technical assistance in developing countries that are particularly vulnerable to the adverse effects of climate change.

9. UNOPS, in consultation with UNDRR, shall design a lean, cost-effective organizational structure and provide the necessary administrative and infrastructural support for the effective functioning of the Santiago network secretariat, in accordance with relevant UNOPS regulations, rules and procedures, and subject to the financing provided pursuant to chapter VII below.

10. UNOPS shall appoint, in consultation with UNDRR, subject to the endorsement of the Advisory Board[7] and pursuant to the Staff Regulations and Rules of the United Nations,[8] the Director of the Santiago network secretariat through a merit-based, open and transparent process.

11. UNOPS shall appoint, in consultation with UNDRR and in accordance with technical guidance from UNDRR, pursuant to the Staff Regulations and Rules of the United Nations, consistently with paragraph 33 below, a small core team of professional and administrative staff, managed by the Director, to support the Santiago network secretariat in meeting its responsibilities and performing its functions efficiently and effectively.

12. UNDRR will provide the Santiago network secretariat with technical backstopping and expertise in the domain of averting, minimizing and addressing loss and damage consistently with the guidelines for preventing potential and addressing actual and perceived conflicts of interest in relation to the Santiago network (see para. 15 below).

13. UNDRR and UNOPS shall provide in-kind and other support for the Santiago network secretariat to carry out its roles and responsibilities, as set out in the terms of reference of the Santiago network.

14. UNDRR and UNOPS shall provide periodic updates on matters regarding the Santiago network secretariat, and the Santiago network secretariat shall make this information available in the annual report prepared in accordance with paragraph 19 of annex I to decision 12/CMA.4, endorsed by decision 11/CP.27.

15. UNDRR and UNOPS shall implement the guidelines preventing potential and addressing actual and perceived conflicts of interest in relation to the Santiago network,

[7] In accordance with decision 12/CMA.4, annex I, para. 7(g).
[8] Available at https://digitallibrary.un.org/record/3930354.

including any conflicts of interest that may arise when organizations, bodies, networks and experts are engaged in providing technical support to the Santiago network secretariat while responding to technical assistance requests, or when the host of the Santiago network secretariat is responding as an organization, body, network or expert to technical assistance requests, which shall be approved by the Advisory Board at its 1st meeting.

16. UNDRR and UNOPS shall provide support to the work of the Advisory Board and ensure that the necessary arrangements are in place for the meetings of the Advisory Board, including privileges and immunities for members of the Board in line with existing practice.

17. The respective heads of UNDRR and UNOPS shall be responsible for the execution of the functions of UNDRR and UNOPS under this MOU in accordance with their respective legal and regulatory frameworks, including their regulations, rules, policies and procedures. UNDRR and UNOPS shall be legally responsible for any allegations, claims and/or damages arising from the activities performed pursuant to this MOU in the event of gross negligence or wilful misconduct on the respective parts of UNDRR and UNOPS and their personnel.

V. Role and functions of the Santiago network secretariat

18. The Santiago network secretariat shall operate within its terms of reference[9] and shall be accountable to and operate under the guidance of the Advisory Board and in accordance with relevant decisions of the governing body or bodies.

19. The Santiago network secretariat shall facilitate the implementation of the functions of the network and shall manage its day-to-day operations in accordance with decision 12/CMA.4, paragraph 6, endorsed by decision 11/CP.27, and other relevant decisions of the governing body or bodies.

20. The Santiago network secretariat shall elaborate modalities and procedures for the network under the guidance of and by the approval of the Advisory Board.[10]

21. The Santiago network secretariat shall develop and execute a work programme, to be approved by the Advisory Board, building on synergies with the five-year rolling workplan of the Executive Committee.[11]

22. The Santiago network secretariat shall manage and direct the disbursement of funds provided for the network consistently with respective UNOPS and UNDRR fiduciary principles and standards that promote a high level of integrity.

23. The Santiago network secretariat shall make use of regional and subregional United Nations offices in all United Nations geographical regions, as appropriate, to serve as designated units to provide relevant services and support for catalysing effective and timely technical assistance in developing countries particularly vulnerable to the adverse effects of climate change.

24. The Santiago network secretariat shall prepare, under the guidance of the Advisory Board, an annual report on the activities of the Santiago network secretariat and the Santiago network and on the performance of their respective functions for consideration and approval by the Advisory Board.[12] The annual report shall include the elements referred to in paragraph 18 of annex I to decision 12/CMA.4, endorsed by decision 11/CP.27.

25. The Santiago network secretariat shall report annually to the Advisory Board information on the in-kind and other support provided by UNDRR and UNOPS that has contributed to its ability to carry out its roles and responsibilities, as set out in the terms of reference.

26. The Santiago network secretariat shall administer, through UNOPS and, where required, UNDRR, in accordance with their respective regulations, rules and procedures, the funds that will be provided to the Santiago network to support technical assistance for the

[9] Decision 12/CMA.4, annex I, chap. IV.A.
[10] Decision 12/CMA.4, para. 17.
[11] Decision 12/CMA.4, annex I, chap IV.B.
[12] Decision 12/CMA.4, annex I, chap. VIII.

implementation of relevant approaches to averting, minimizing and addressing loss and damage associated with the adverse effects of climate change in developing countries that are particularly vulnerable to those effects in support of the functions of the Santiago network, including the engagement of appropriate organizations, bodies, networks and experts. The funds will be managed in accordance with the respective regulations and rules of UNOPS and UNDRR, as applicable.

27. The Santiago network secretariat shall carry out financial management, auditing and reporting functions and implement a robust accountability system, sound financial systems of international standard, and a fiduciary record that ensures the correct, impartial administering and disbursement of funds. The annual financial audit, in accordance with the United Nations single audit principle, shall be carried out in accordance with UNOPS regulations, rules and policies regarding audit, and will be made available to the Advisory Board and the funding sources within six months of the closure of the financial year.

28. The Santiago network secretariat shall ensure the coordination and collaboration of the Santiago network with relevant UNFCCC constituted bodies, in particular the Executive Committee, as well as exploring synergies with other initiatives and networks.

VI. Role and functions of the Director and staff of the Santiago network secretariat

29. The Director of the Santiago network secretariat shall provide strategic leadership to the network and manage its secretariat.

30. The Director shall have a fixed term of office no longer than the term of the MOU, which may be renewed subject to endorsement by the Advisory Board.

31. The Director shall be accountable to the Executive Director of UNOPS for administrative issues relating to the administrative effectiveness and efficiency of the Santiago network secretariat in accordance with relevant UNOPS regulations, rules and procedures, and to the Advisory Board for the effective implementation of the functions of the Santiago network. UNDRR may provide technical advice to the Director as needed.

32. The Director shall serve as the secretary to the Advisory Board and be responsible for facilitating and providing support for its work.

33. The Director shall facilitate timely recruitment of the staff of the secretariat in line with the terms of reference.

VII. Financial arrangements of the Santiago network secretariat

34. The costs associated with the Santiago network secretariat and the mobilization of the services of the network will be funded consistently with decision 1/CMA.3, paragraph 70, and decision 12/CMA.4, paragraph 6, subject to separate funding agreements to be entered into on behalf of the Santiago network secretariat by UNDRR and/or UNOPS as applicable, and the funding sources, and in-kind and other support from UNDRR and UNOPS as outlined in the Proposal.

35. UNDRR and UNOPS shall ensure that the Santiago network and its secretariat are able to receive the required financial and other support from a wide variety of sources through both UNDRR and UNOPS to implement the terms of reference.

36. For the implementation of the workplan of the Santiago network secretariat, a management fee will be applied to the overall budget in accordance with the relevant UNOPS regulations and rules on cost recovery for its services.

37. UNDRR will manage any dedicated funding received in accordance with the United Nations regulations and rules for the management of voluntary contributions and will recover any direct cost incurred while hosting the Santiago network secretariat, in accordance with its rules and regulations.

VIII. Review of the Santiago network secretariat

38. The Santiago network secretariat shall commission one independent review of the performance of the network, including sustainability and sources of funding, adequacy of funding levels relative to technical assistance requests, timelines, effectiveness, engagement, gender-responsiveness and delivery of technical assistance to communities particularly vulnerable to the adverse effects of climate change, in a timely manner so that the findings of the review can feed into the subsequent review of the Warsaw International Mechanism[13] for determining the need for further independent reviews of the performance of the Santiago network.[14]

IX. Implementation of this memorandum of understanding

39. The Advisory Board, UNDRR and UNOPS may agree on further arrangements for the implementation of this MOU in line with future decisions of the governing body or bodies and report thereon to the governing body or bodies. Future arrangements for the implementation of this MOU do not in any way amend the existing provisions of this MOU.

40. Nothing in or relating to this MOU will be deemed a waiver, express or implied, of any of the privileges and immunities of the United Nations, including its subsidiary organs.

X. Dispute settlement

41. The governing body or bodies, through the Advisory Board, and as facilitated by the UNFCCC secretariat, and UNDRR and UNOPS shall make their best efforts to amicably resolve any disputes, controversies or claims arising out of or relating to this MOU, including through use of mutually agreed dispute resolution methods.

XI. Entire agreement

42. Any annex to this MOU that is concluded in the future will be considered an integral part of this MOU. References to this MOU will be construed as including any annexes, as varied or amended in accordance with the terms of this MOU. This MOU represents the complete understanding between the Parties.

XII. Interpretation

43. This MOU will be interpreted in accordance with relevant decisions of the governing body or bodies and the legal and regulatory framework of UNOPS and UNDRR, as applicable, including the regulations, rules, policies and procedures of the United Nations Secretariat.

44. Any Party’s failure to request the implementation of a provision of this MOU will not constitute a waiver of that or any other provision of this MOU.

XIII. Term of this memorandum of understanding

45. The initial term of this MOU shall be five years from its entry into force, with five-year renewal periods, if so decided by the governing body or bodies and UNDRR and UNOPS.

[13] Decision 2/CMA.2, para. 46.
[14] Decision 12/CMA.4, annex I, para. 20.

XIV. Notification and amendment

46. Each Party will promptly notify the other in writing of any anticipated or actual material changes that will affect the execution of this MOU.

47. The Parties may amend this MOU by mutual written agreement.

XV. Entry into force

48. This MOU will enter into force upon the last date of signature by the duly authorized representatives of the Parties.

XVI. Termination

49. Subject to chapter XIII above, any Party may terminate this MOU by giving one year's prior written notice to the other Parties. The termination shall come into effect one year from the date of the receipt of such a communication.

50. Following the termination of this MOU, UNDRR and UNOPS shall take all necessary action to conclude their operations relating to the Santiago network secretariat in an expeditious manner. Any termination of this MOU will be without prejudice to any other rights and obligations of the Parties accrued prior to the date of the termination under this MOU or any legal instrument executed pursuant to this MOU.

5th plenary meeting
11 December 2023

Decision 3/CP.28

Report of the Executive Committee of the Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts

The Conference of the Parties[1]

1. *Endorses* decision 7/CMA.5, on the report of the Executive Committee of the Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts, and the report of the Executive Committee,[2] which provides as follows:

"1. *Welcomes* the 2023 report of the Executive Committee of the Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts[3] and *endorses* the recommendations in the report;

"2. *Notes with appreciation* the work of the Executive Committee and its thematic expert groups (three expert groups, a technical expert group and a task force) to date, including their progress in advancing the development of technical guides[4] informed by the best available science, and the efforts of the Executive Committee to organize activities to commemorate the tenth anniversary of the establishment of the Warsaw International Mechanism;

"3. *Expresses appreciation* to the organizations, experts and relevant stakeholders that contributed to the work reported in the document referred to in paragraph 1 above, including in relation to:

(a) The achievements of the thematic expert groups of the Executive Committee;

(b) The submission of information pursuant to paragraph 44 of decision 2/CMA.2, which is noted in decision 2/CP.25, relevant to the Santiago network for averting, minimizing and addressing loss and damage associated with the adverse effects of climate change;

(c) Activities related to the tenth anniversary of the establishment of the Warsaw International Mechanism, such as the submission of photographs for the photography exhibition;[5]

"4. *Also expresses appreciation* to the Government of the Philippines for hosting the 18th meeting of the Executive Committee and *invites* other Parties to offer to host future meetings of the Committee, as appropriate, with a view to broadening the range of stakeholders involved, and facilitating active engagement of Parties, in the work of the Committee across regions;

"5. *Encourages* relevant organizations and experts to continue to contribute as referred to in paragraph 3(a–b) above;

"6. *Also encourages* the Executive Committee to continue to strengthen dialogue, coordination, coherence and synergies with relevant bodies and organizations under and outside the Convention and the Paris Agreement;

[1] Nothing in this document prejudices Parties' views or prejudges outcomes on matters related to the governance of the Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts.

[2] FCCC/SB/2023/4 and Add.1–2.

[3] As footnote 2 above.

[4] In accordance with para. 26 of decision 2/CMA.2, which is noted in decision 2/CP.25.

[5] Under activity 1 of the five-year rolling workplan of the Executive Committee, contained in annex I to document FCCC/SB/2022/2/Add.2. Information on the photography exhibition is available at https://unfccc.int/wim-excom/L-and-D-in-focus.

"7. *Requests* the Executive Committee, in implementing its functions,[6] to:

(a) Consider ways to collaborate with the entities that form part of the funding arrangements, including a fund, established in paragraphs 2–3 of decisions 2/CP.27 and 2/CMA.4,[7] and report on the outcomes of that consideration in its annual reports;

(b) Engage actively in the work under the Santiago network and collaborate with the Advisory Board of the Santiago network through the representation of the Executive Committee on the Board as provided for in decision 12/CMA.4 and endorsed in decision 11/CP.27;

(c) Promote the use of the technical guides and knowledge products developed by the Executive Committee and its thematic expert groups, at the regional and national level, including for undertaking activities under the Santiago network and during dedicated virtual meetings, as appropriate;

(d) Consider translating, as appropriate, relevant outputs of the work of the Executive Committee and its thematic expert groups into all official United Nations languages so as to maximize their added value and promote their dissemination;

(e) Continue to develop, as appropriate and in collaboration with its thematic expert groups, technical guides on relevant topics under all the strategic workstreams of its five-year rolling workplan;[8]

"8. *Notes* that considerations related to the governance of the Warsaw International Mechanism will continue at its sixth session (November 2024);[9]

"9. *Takes note* of the estimated budgetary implications of the activities to be undertaken by the secretariat referred to in paragraphs 1 and 7 above;

"10. *Requests* that the actions of the secretariat called for in this decision be undertaken subject to the availability of financial resources."

2. *Notes* that considerations related to the governance of the Warsaw International Mechanism will continue at its twenty-ninth session (November 2024).[10]

6th plenary meeting
13 December 2023

[6] As set out in decision 2/CP.19, para. 5.

[7] For reference to the engagement of the Executive Committee of the Warsaw International Mechanism in the annual high-level dialogue on coordination and complementarity under the funding arrangements for responding to loss and damage, see annex II to decisions 1/CP.28 and 5/CMA.5.

[8] Contained in annex I to document FCCC/SB/2022/2/Add.2.

[9] It is noted that discussions on the governance of the Warsaw International Mechanism did not produce an outcome; this is without prejudice to further consideration of this matter.

[10] As footnote 9 above.

Decision 4/CP.28

Long-term climate finance

The Conference of the Parties,

Recalling Articles 4 and 11 of the Convention,

Also recalling decisions 1/CP.16, paragraphs 2, 4 and 97–101, 2/CP.17, paragraphs 126–132, 4/CP.18, 3/CP.19, 5/CP.20, 1/CP.21, 5/CP.21, 7/CP.22, 6/CP.23, 3/CP.24, 1/CP.26, 4/CP.26 and 13/CP.27,

1. *Recalls* the commitment of developed country Parties, in the context of meaningful mitigation actions and transparency on implementation, to a goal of mobilizing jointly USD 100 billion per year by 2020 to address the needs of developing country Parties in accordance with paragraph 98 of decision 1/CP.16;

2. *Also recalls* that, in accordance with paragraph 53 of decision 1/CP.21, developed country Parties reaffirmed the continuation of their existing collective mobilization goal through 2025 in the context of meaningful mitigation actions and transparency on implementation;

3. *Notes with deep regret* that the goal of developed country Parties to mobilize jointly USD 100 billion per year by 2020 in the context of meaningful mitigation actions and transparency on implementation was not met in 2021 and *welcomes* the ongoing efforts of developed country Parties towards achieving the goal of mobilizing jointly USD 100 billion per year;

4. *Notes* the efforts by developed country Parties to improve transparency of its delivery[1] and *looks forward* to further information on positive progress on the delivery made in 2022;

5. *Notes* the different estimates, in the report by the Standing Committee on Finance on progress towards achieving the goal of mobilizing jointly USD 100 billion per year to address the needs of developing countries in the context of meaningful mitigation actions and transparency on implementation,[2] of progress towards achieving the goal of mobilizing jointly USD 100 billion per year from a wide variety of sources, public and private, bilateral and multilateral, including alternative sources, and *recognizes* the lack of a common definition and accounting methodology in this regard;

6. *Urges* developed country Parties to fully deliver on the USD 100 billion per year goal urgently and through 2025, noting the significant role of public funds, and *calls on* developed country Parties to further enhance the coordination of their efforts to deliver the goal;

7. *Notes* the note by the President of the twenty-seventh session of the Conference of the Parties on the fifth biennial high-level ministerial dialogue on climate finance,[3] in particular the key messages contained therein;

8. *Welcomes* the recent pledges to the operating entities of the Financial Mechanism, the Adaptation Fund, the Least Developed Countries Fund and the Special Climate Change Fund;

9. *Also welcomes* contributions to the work on long-term finance and work related to the activities referred to in paragraph 17 below;

10. *Emphasizes* the need for further efforts to enhance access to climate finance, including through harmonized, simplified and direct access procedures, to address the needs of

[1] See https://www.auswaertiges-amt.de/blob/2631906/4eee299dac91ba9649638cbcfae754cb/231116-deu-can-bnrief-data.pdf.

[2] Standing Committee on Finance. 2022. *Report on progress towards achieving the goal of mobilizing jointly USD 100 billion per year to address the needs of developing countries in the context of meaningful mitigation actions and transparency on implementation*. Bonn: UNFCCC. Available at https://unfccc.int/process-and-meetings/bodies/constituted-bodies/standing-committee-on-finance-scf/progress-report.

[3] FCCC/CP/2023/7.

developing country Parties, in particular for the least developed countries and small island developing States;

11. *Encourages* developed country Parties to consider ways to enhance access to climate finance to respond to the needs and priorities of developing country Parties;

12. *Acknowledges* the fiscal constraints and increasing costs to adapt to the adverse effects of climate change and, in this context, *reiterates* the need for public and grant-based resources for adaptation in developing country Parties, especially those that are particularly vulnerable and have significant capacity constraints, such as the least developed countries and small island developing States;

13. *Also reiterates* that a significant amount of adaptation finance should come from the operating entities of the Financial Mechanism, the Adaptation Fund, the Least Developed Countries Fund and the Special Climate Change Fund;

14. *Requests* Parties to continue strengthening their enabling environments and policy frameworks to facilitate the mobilization and effective deployment of climate finance;

15. *Recognizes* the need to improve the effectiveness and quality of climate finance provided and mobilized from developed country Parties to achieve tangible impacts in developing country Parties and to improve transparency in this regard;

16. *Also recognizes* the importance of support provided and mobilized by developed country Parties to facilitate enhanced ambition and implementation;

17. *Reiterates* that the secretariat, in collaboration with the operating entities of the Financial Mechanism, United Nations agencies and bilateral, regional and other multilateral channels, will continue to explore ways and means to assist developing country Parties in assessing their needs and priorities in a country-driven manner, including their technological and capacity-building needs, and in translating climate finance needs into action;[4]

18. *Requests* the secretariat to prepare a report on its activities referred to in paragraph 17 above, to be made available to the Conference of the Parties at its twenty-ninth session (November 2024);

19. *Takes note* of the outline for the second report of the Standing Committee on Finance on progress towards achieving the goal of mobilizing jointly USD 100 billion per year to address the needs of developing countries in the context of meaningful mitigation actions and transparency on implementation[5] and *looks forward* to the deliberations on the report at the twenty-ninth session of the Conference of the Parties;

20. *Takes note* of the estimated budgetary implications of the activities to be undertaken by the secretariat referred to in paragraphs 17–19 above;

21. *Requests* that the actions of the secretariat called for in this decision be undertaken subject to the availability of financial resources.

6th plenary meeting
13 December 2023

[4] Decision 6/CP.23, para. 10.

[5] FCCC/CP/2023/2–FCCC/PA/CMA/2023/8, annex V.

Decision 5/CP.28

Matters relating to the Standing Committee on Finance

The Conference of the Parties,

Recalling Articles 4 and 11 of the Convention,

Also recalling decisions 12/CP.2, 12/CP.3, 1/CP.16, paragraph 112, 2/CP.17, paragraphs 120–121, 5/CP.18, 5/CP.19, 7/CP.19, 6/CP.20, 6/CP.21, 8/CP.22, 7/CP.23, 8/CP.23, 4/CP.24, 11/CP.25, 5/CP.26, 14/CP.27, 5/CMA.2, 10/CMA.3 and 14/CMA.4,

Taking note of decision 9/CMA.5,

1. *Welcomes with appreciation* the work of the Standing Committee on Finance in 2023;

2. *Notes* the 2023 report of the Standing Committee on Finance,[1] *endorses* the workplan of the Committee for 2024[2] and *underlines* the importance of the Committee focusing its work on its current mandates;

3. *Notes* the technical report by the Standing Committee on Finance on clustering types of climate finance definitions in use,[3] including the executive summary thereof,[4] and *also notes* the information therein on the clustering of elements aimed at assisting Parties in developing and applying definitions of climate finance and the discussions of the Standing Committee on Finance regarding a potential update to the operational definition of climate finance of the Committee;

4. *Further notes* the complexities, in relation to accounting of and reporting on climate finance at the aggregated level, associated with the application of the variety of definitions of climate finance in use by Parties and non-Party stakeholders;

5. *Welcomes* that the sixth Biennial Assessment and Overview of Climate Finance Flows will contain a section compiling the operational definitions of climate finance in use;

6. *Requests* the Standing Committee on Finance to consider updating, in the context of its sixth Biennial Assessment and Overview of Climate Finance Flows, its operational definition of climate finance, building on the non-exhaustive list of potential options identified in paragraph 44(a–c) of the executive summary referred to in paragraph 3 above;

7. *Also requests* the Standing Committee on Finance to prepare a report on common practices regarding climate finance definitions, reporting and accounting methods among Parties and climate finance providers, building on the information in the technical report and executive summary thereof referred to in paragraph 3 above, for consideration by the Conference of the Parties at its twenty-ninth session (November 2024);

8. *Endorses* the general outlines of the technical report of the sixth Biennial Assessment and Overview of Climate Finance Flows, of the second report on the determination of the needs of developing country Parties related to implementing the Convention and the Paris Agreement, and of the second report on progress towards achieving the goal of mobilizing jointly USD 100 billion per year to address the needs of developing countries in the context of meaningful mitigation actions and transparency on implementation;[5]

9. *Notes* that the sixth Biennial Assessment and Overview of Climate Finance Flows will continue to consider the balance between mitigation and adaptation finance and public and private financial flows;

[1] FCCC/CP/2023/2–FCCC/PA/CMA/2023/8.
[2] FCCC/CP/2023/2–FCCC/PA/CMA/2023/8, annex II.
[3] Standing Committee on Finance. 2023. *Report on clustering types of climate finance definitions in use*. Bonn: UNFCCC. Available at https://unfccc.int/SCF.
[4] FCCC/CP/2023/2/Add.2–FCCC/PA/CMA/2023/8/Add.2.
[5] FCCC/CP/2023/2–FCCC/PA/CMA/2023/8, annexes III–V.

10. *Welcomes* the successful conduct of the 2023 Forum of the Standing Committee on Finance on financing just transitions and *notes* the summary thereof;[6]

11. *Expresses gratitude* to the Governments of Australia and Thailand and the United Nations Economic and Social Commission for Asia and the Pacific for their financial, administrative and substantive support for the 2023 Forum of the Standing Committee on Finance;

12. *Welcomes* accelerating climate action and resilience through gender-responsive finance as the topic for the 2024 Forum of the Standing Committee on Finance and accelerating climate action and resilience through financing for sustainable food and agricultural systems as the topic for the 2025 Forum;

13. *Notes with concern* that the draft guidance for the operating entities of the Financial Mechanism prepared by the Standing Committee on Finance was not considered owing to a limited number of submissions and *requests* Parties and other constituted bodies under the Convention and the Paris Agreement to provide elements for the draft guidance well in advance of future sessions of the Conference of the Parties and the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement to enable the Committee to fulfil its mandate in this regard;

14. *Notes* the self-assessment report of the Standing Committee on Finance[7] and the technical paper by the secretariat on the second review of the functions of the Standing Committee on Finance[8] and *encourages* the Committee to consider the opportunities for improving its efficiency and effectiveness identified therein;

15. *Notes with appreciation* the efforts of the Standing Committee on Finance to strengthen its engagement with stakeholders in the context of its workplan, including the constituted bodies and private entities and other entities outside the UNFCCC process, and *encourages* the Committee to continue such efforts in 2024, including, as appropriate, with people and communities on the front line of climate change, including Indigenous Peoples and local communities;

16. *Also encourages* the Standing Committee on Finance to continue to enhance its efforts to ensure gender-responsiveness in implementing its workplan and *requests* Parties to consider gender balance and geographical representation when nominating members to the Committee;

17. *Expresses appreciation* to the European Union and the Governments of Japan and Switzerland for their financial contributions for the work of the Standing Committee on Finance and to the Governments of Austria, Switzerland and Thailand for hosting the meetings of the Committee in 2023;

18. *Requests* the Standing Committee on Finance to report to the Conference of the Parties at its twenty-ninth session on its progress in implementing its workplan for 2024;

19. *Also requests* the Standing Committee on Finance to consider the guidance provided to it in other relevant decisions of the Conference of the Parties.

6th plenary meeting
13 December 2023

[6] FCCC/CP/2023/2/Add.4–FCCC/PA/CMA/2023/8/Add.4.
[7] FCCC/CP/2023/2/Add.5−FCCC/PA/CMA/2023/8/Add.5.
[8] FCCC/TP/2023/4.

Decision 6/CP.28

Report of the Green Climate Fund to the Conference of the Parties and guidance to the Green Climate Fund

The Conference of the Parties,

Recalling decision 3/CP.17, annex,

1. *Welcomes* the report of the Green Climate Fund to the Conference of the Parties at its twenty-eighth session and its addendum,[1] including the information on action taken by the Board of the Green Climate Fund in response to guidance received from the Conference of the Parties;

2. *Also welcomes*:

(a) The increase in the number of funding proposals approved, which brings the total amount approved by the Board to USD 13.5 billion to support the implementation of 243 adaptation and mitigation projects and programmes in 129 developing countries;

(b) The increase in the number of entities accredited by the Board, which brings the total number of accredited entities to 121, of which 77 are direct access entities;

(c) The increase in the approval of grants for readiness support for national adaptation plans and other adaptation planning processes, bringing the total number of grants approved for readiness support for national adaptation plans and other adaptation planning processes to 105;

(d) The adoption by the Board of the Strategic Plan for the Green Climate Fund 2024–2027[2] and its strategic programming directions, aimed at increasing the Fund's impact and enhancing support for developing countries;

(e) The appointment of a new Executive Director of the Green Climate Fund;

(f) The Board's efforts to comprehensively review the Green Climate Fund's current approach to privileges and immunities, in line with the Governing Instrument for the Green Climate Fund and as outlined in the Strategic Plan for the Green Climate Fund 2024–2027;[3]

(g) The adoption of the 2024–2027 strategy for the Readiness and Preparatory Support Programme;[4]

(h) The Board's ongoing efforts to ensure the inclusion of Indigenous Peoples in the Green Climate Fund's activities, emphasizing their effective participation in processes, as outlined in the Fund's Indigenous Peoples policy;[5]

(i) The Board's efforts in enhancing project approval and disbursement processes;

(j) The Board's development of an approach for multilingualism that addresses challenges related to language and access to the Green Climate Fund for consideration by the Board no later than at its 39th meeting;

(k) The collaboration of the Board with the Climate Technology Centre and Network and the Technology Executive Committee;

[1] FCCC/CP/2023/8 and Add.1.

[2] Contained in annex III to Green Climate Fund document GCF/B.36/21.

[3] See para. 21(a)(v) of the Strategic Plan for the Green Climate Fund 2024–2027.

[4] Adopted by Green Climate Fund Board decision B.37/21, para. (b), as set out in Green Climate Fund document GCF/B.37/25, annex X.

[5] Adopted by Green Climate Fund Board decision B.19/11.

3. *Further welcomes* the success of the second replenishment of the Green Climate Fund, consisting of pledges to date made by 31 contributors for a total amount of USD 12.833 billion;

4. *Encourages* further pledges and contributions to the second replenishment of the Green Climate Fund;[6]

5. *Also encourages* pledges to the Green Climate Fund to be confirmed in the form of fully executed contribution agreements or arrangements as soon as possible;

6. *Recognizes* the Green Climate Fund's role in promoting the participation of private sector actors in developing countries, in particular local actors, including small and medium-sized enterprises and local financial intermediaries, and in supporting activities to enable private sector involvement in the least developed countries and small island developing States;

7. *Takes note* of the outcomes of the Green Climate Fund regional presence study[7] and *urges* the Board to expedite the finalization of its consideration of options for establishing Green Climate Fund regional presence, as outlined in the Strategic Plan for the Green Climate Fund 2024–2027;[8]

8. *Encourages* the Board to continue to support the formulation of national adaptation plans and other adaptation planning processes in line with the 2024–2027 strategy for the Readiness and Preparatory Support Programme;[9]

9. *Requests* the Board to continue its consideration, with a view to approving policy proposals, to support results-based payments for activities referred to in paragraph 70 of decision 1/CP.16, consistent with the provisions in paragraphs 35 and 55 of the Governing Instrument for the Green Climate Fund;

10. *Also requests* the Board to continue to enhance coherence and complementarity of the Green Climate Fund with other relevant bilateral, regional and global funding mechanisms and institutions, wherever feasible and to the extent possible, inter alia through joint programmes, outreach, and information-sharing, thereby improving access to climate finance and lowering transaction costs for developing countries;

11. *Urges* the Board to conclude the updating of the accreditation framework and to address the pending accreditation matters in line with Green Climate Fund decision B.34/19;[10]

12. *Requests* the Board to continue to accredit national and regional direct access entities, significantly increase direct access entity participation in Green Climate Fund programming and conclude its work on updating the accreditation framework;[11]

13. *Also requests* the Board to strengthen monitoring and reporting of disbursements for, and impacts arising from, multi-country funded activities on a per country basis, where practical, in a manner consistent with the integrated results management framework;[12]

14. *Encourages* the Board to continue to implement the Green Climate Fund updated gender policy and gender action plan;[13]

15. *Requests* the Board to continue supporting activities relevant to averting, minimizing and addressing loss and damage, consistent with the Green Climate Fund's existing investment, results framework and funding windows and structures and in line with the Strategic Plan for the Green Climate Fund 2024–2027, and *also requests* the Green Climate

[6] In accordance with Green Climate Fund Board decision B.37/19, para. (g).
[7] See Green Climate Fund Board document GCF/B.37/INF.13, annex I.
[8] See paras. 8 and 20(f)(i) of the Strategic Plan for the Green Climate Fund 2024–2027.
[9] See Climate Fund Board document GCF/B.37/25, annex X, para. 23(c–d).
[10] As contained in Green Climate Fund Board document GCF/B.34/28.
[11] See Green Climate Fund Board decisions B.34/19 para. (d) and B.37/18, para. (r).
[12] See Green Climate Fund Board decision B.29/01.
[13] In accordance with Green Climate Fund Board decision B.24/12, para. (e) and (f) respectively.

Fund to ensure coordination and complementarity in the context of the funding arrangements[14] with the fund established in paragraph 3 of decisions 2/CP.27 and 2/CMA.4;

16. *Further requests* the Board to significantly speed up the deployment of the updated Simplified Approval Process, in line with the Strategic Plan for the Green Climate Fund 2024–2027;

17. *Encourages* the Board to fully and effectively implement the 2024–2027 strategy for the Readiness and Preparatory Support Programme and the revised operational modalities of the Project Preparation Facility, ensuring that they provide adequate, timely and country-driven assistance for the development and implementation of projects and programmes;

18. *Requests* the Board to expedite consideration of a policy on programmatic approaches in line with paragraph 36 of the Governing Instrument for the Green Climate Fund;

19. *Invites* Parties to submit to the secretariat views and recommendations on elements of guidance for the Green Climate Fund via the submission portal[15] no later than 12 weeks prior to the twenty-ninth session of the Conference of the Parties (November 2024);

20. *Requests* the Standing Committee on Finance to take into consideration the submissions referred to in paragraph 19 above in preparing its draft guidance for the Green Climate Fund for consideration by the Conference of the Parties at its twenty-ninth session and the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement at its sixth session (November 2024);

21. *Also requests* the Board to include in its annual report to the Conference of the Parties information on the steps it has taken to implement the guidance provided in this decision;

22. *Takes note* of decision 10/CMA.5 and *decides* to transmit to the Green Climate Fund the guidance from the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement contained in paragraphs 2–6 of that decision.[16]

6th plenary meeting
13 December 2023

[14] See document FCCC/CP/2023/L.1–FCCC/PA/CMA/2023/L.1, annex II.
[15] https://www4.unfccc.int/sites/submissionsstaging/Pages/Home.aspx.
[16] In accordance with decision 1/CP.21, para. 61.

Decision 7/CP.28

Report of the Global Environment Facility to the Conference of the Parties and guidance to the Global Environment Facility

The Conference of the Parties

1. *Welcomes* the report of the Global Environment Facility to the Conference of the Parties at its twenty-eighth session and its addendum,[1] including the response of the Global Environment Facility to the guidance received from the Conference of the Parties;

2. *Notes* the work undertaken by the Global Environment Facility during its reporting period (1 July 2022 to 30 June 2023), including:

(a) Approval of 34 climate change projects and programmes under the Global Environment Facility Trust Fund, the Least Developed Countries Fund and the Special Climate Change Fund;

(b) Continued integration of climate change priorities into its other focal areas and integrated programmes and the expected avoidance or sequestration of 1,007.4 megatonnes of carbon dioxide equivalent achieved through such integration;

(c) Continued implementation of the long-term vision on complementarity, coherence and collaboration with the Green Climate Fund;

(d) Actions following cases of mismanagement of funding from the Global Environment Facility in projects managed by one of its implementing agencies;

(e) Continued work to implement the recommendations in decision 24/2020 of the Council of the Global Environment Facility;

3. *Welcomes* the successful start of the implementation of the eighth replenishment cycle, including the 11 integrated programmes, and *encourages* the Global Environment Facility to continue to track and regularly report to the Conference of the Parties the climate-related benefits of the integrated programmes;

4. *Also encourages* the Global Environment Facility to maximize global environmental benefits through its projects and programmes with a focus on co-benefits relating to climate change;

5. *Requests* the Global Environment Facility to continue its support to developing countries in implementing the reporting requirements under the Convention, consistent with its current mandates;

6. *Encourages* the Global Environment Facility to consider ways to better serve different regions, including by taking into account the needs of and challenges faced by developing countries in implementing the transparency requirements under the Convention;

7. *Also encourages* the Global Environment Facility to continue to strengthen its Small Grants Programme to provide better support for youth, women and girls, local communities and Indigenous Peoples;

8. *Welcomes with appreciation* the financial pledges to the Least Developed Countries Fund and the Special Climate Change Fund made by Belgium, Canada, France, Germany, Ireland, Norway, Spain, Sweden and the United Kingdom of Great Britain and Northern Ireland, equivalent to USD 179.06 million;

9. *Commends* the Least Developed Countries Fund and the Special Climate Change Fund for their enhanced support to developing countries and in particular the least developed

[1] FCCC/CP/2023/6 and Add.1.

countries and small island developing States for addressing the adverse impacts of climate change;

10. *Requests* the Global Environment Facility, in administering the Least Developed Countries Fund and the Special Climate Change Fund, to continue to support the least developed countries and small island developing States to utilize programmatic approaches to implement policies, programmes and projects identified in their national adaptation plans and adaptation components of nationally determined contributions;

11. *Invites* the Global Environment Facility to encourage its implementing agencies to facilitate more active engagement of women, youth, local communities and Indigenous Peoples in the formulation and implementation of its projects and programmes;

12. *Welcomes* the continued support by the Global Environment Facility for climate-friendly innovation, and technology development and transfer and related capacity-building, including in partnership with private sector actors and others, and *requests* the Global Environment Facility to continue to provide such support, in particular for technology needs assessments, and technology action plans and their implementation;

13. *Also requests* the Global Environment Facility to consider ways to enhance its ongoing work to fund activities relevant to averting, minimizing and addressing loss and damage, consistent with its current mandates;

14. *Encourages* the Global Environment Facility to continue its efforts to further streamline, consolidate and increase the efficiency of its operations, including by simplifying the information requirements for designing and implementing its projects and programmes;

15. *Welcomes* the ongoing efforts of the Global Environment Facility to improve its fiduciary standards, to which its implementing agencies are accountable;

16. *Also welcomes* the ongoing efforts of the Global Environment Facility to continue assessing and addressing the risks induced by the current level of funding concentration among some of its implementing agencies;

17. *Encourages* the Global Environment Facility to continue to show appropriate flexibility with respect to geographical restrictions in implementing agencies to reduce agency concentration and enable wider geographical reach of its projects, in a country-driven manner;[2]

18. *Also encourages* the Global Environment Facility to open a targeted round of implementing agency expansion within the Global Environment Facility partnership with a focus on underserved regions, with regard to implementing agency coverage, in line with existing policies and procedures;

19. *Further encourages* the Global Environment Facility to enhance coherence and complementarity with other climate finance delivery channels with a view to enhancing the impact and effectiveness of its work and decreasing transaction costs, inter alia through streamlining and simplifying, where feasible and to the extent possible, its procedures and guidelines and *takes note* of these ongoing efforts;

20. *Notes* the adoption of the private sector engagement strategy of the Global Environment Facility[3] at the 59th meeting of the Council of the Global Environment Facility and *encourages* the Global Environment Facility to reinforce its efforts to mobilize and engage with private sector actors during its eighth replenishment cycle;

21. *Requests* the Global Environment Facility, from existing allocations in the Blended Finance Global Programme, to further explore risk-taking and to foster innovation in the context of its programming in order to use its concessional financing more effectively and mobilize additional private funds;

[2] See Global Environment Facility document GEF/C.64/10.

[3] Global Environment Facility document GEF/C.59/07/Rev.1.

22. *Welcomes* the policy on gender equality[4] adopted by the Council of the Global Environment Facility and *encourages* the Global Environment Facility to ensure that all its implementing agencies apply this policy;

23. *Also encourages* the Global Environment Facility to further explore ways to provide support for assessing the needs and priorities of developing countries[5] in a country-driven manner, including technology and capacity-building needs, and for translating climate finance needs into action;

24. *Invites* Parties to submit to the secretariat their views and recommendations on elements of guidance for the Global Environment Facility via the submission portal[6] no later than 12 weeks prior to the twenty-ninth session of the Conference of the Parties (November 2024);

25. *Requests* the Standing Committee on Finance to take into consideration the submissions referred to in paragraph 24 above in preparing its draft guidance for the Global Environment Facility and to include in its annual report to the Conference of the Parties information on the steps it has taken to implement the guidance provided in this decision;

26. *Takes note* of decision 11/CMA.5 and *decides* to transmit to the Global Environment Facility the guidance from the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement contained in paragraphs 2–12 of that decision.[7]

6th plenary meeting
13 December 2023

[4] Global Environment Facility document SD/PL/02.

[5] With reference to Global Environment Facility. 2019. *Instrument for the Establishment of the Restructured Global Environment Facility*. Washington, D.C.: Global Environment Facility. Available at https://www.thegef.org/documents/instrument-establishment-restructured-gef.

[6] https://www4.unfccc.int/sites/submissionsstaging/Pages/Home.aspx.

[7] In accordance with decision 1/CP.21, para. 61.

Decision 8/CP.28

Compilation and synthesis of, and summary report on the in-session workshop on, biennial communications of information related to Article 9, paragraph 5, of the Paris Agreement

The Conference of the Parties,

Recalling Articles 4 and 11 of the Convention,

Also recalling decisions 8/CP.26, 12/CMA.1 and 14/CMA.3,

1. *Notes* the compilation and synthesis[1] prepared by the secretariat of the information contained in the second biennial communications submitted by Parties in accordance with Article 9, paragraph 5, of the Paris Agreement;

2. *Also notes* the summary report[2] on the second biennial in-session workshop on information to be provided by Parties in accordance with Article 9, paragraph 5, of the Paris Agreement, held on 6 June 2023;

3. *Takes note* of decision 13/CMA.5.

6th plenary meeting
13 December 2023

[1] FCCC/PA/CMA/2023/2/Rev.1.
[2] FCCC/PA/CMA/2023/3.

Decision 9/CP.28

Enhancing climate technology development and transfer through the Technology Mechanism

The Conference of the Parties,

Recalling decisions 2/CP.17, 1/CP.21, 15/CP.22, 21/CP.22, 15/CP.23, 12/CP.24, 13/CP.24, 14/CP.25, 9/CP.26 and 18/CP.27,

1. *Welcomes* the joint annual report of the Technology Executive Committee and the Climate Technology Centre and Network for 2023[1] and the progress of the implementation of the joint work programme of the Technology Mechanism for 2023–2027;[2]

2. *Also welcomes* the enhanced coordination and collaboration between the Technology Executive Committee and the Climate Technology Centre and Network, including through their adoption of new and improved modalities of work for advancing implementation of the joint work programme of the Technology Mechanism for 2023–2027 across their joint activities and common areas of work;[3]

3. *Invites* the Technology Executive Committee and the Climate Technology Centre and Network to continue efforts to enhance the exchange of systematic feedback on their work, including by the Technology Executive Committee taking into consideration lessons learned in relation to the provision of technical assistance by the Climate Technology Centre and Network, and the Climate Technology Centre and Network taking into consideration the policy recommendations of the Technology Executive Committee in providing technical assistance;

4. *Welcomes* the engagement of the Technology Executive Committee and the Climate Technology Centre and Network with national designated entities to provide technical and logistical support to them,[4] including through regional forums for national designated entities, and *invites* the Technology Executive Committee and the Climate Technology Centre and Network to report on the progress of the support provided;

5. *Also invites* Parties to explore ways of enhancing the provision of technical and logistical support to their national designated entities and improving national-level coordination, including of national designated entities with operational focal points of the Global Environment Facility, national designated authorities of the Green Climate Fund, and designated authorities and national implementing entities of the Adaptation Fund;

6. *Notes* the Technology Mechanism initiative on artificial intelligence for climate action,[5] the aim of which is to explore the role of artificial intelligence as a technological tool for advancing and scaling up transformative climate solutions for mitigation and adaptation action in developing countries, with a focus on the least developed countries and small island developing States, while also addressing the challenges and risks posed by artificial intelligence, such as energy consumption, data security and the digital divide;

7. *Requests* the Technology Executive Committee and the Climate Technology Centre and Network to implement the initiative referred to in paragraph 6 above in a manner that gives special attention to the capacity needs for its use and consider how it can support the implementation of technology needs assessment outcomes and the joint work programme of the Technology Mechanism for 2023–2027;

8. *Also requests* the Technology Executive Committee and the Climate Technology Centre and Network to enhance awareness of artificial intelligence and its potential role in,

[1] FCCC/SB/2023/3.

[2] Available at https://unfccc.int/ttclear/tec/workplan.

[3] Namely national systems of innovation, water–energy–food systems, energy systems, buildings and resilient infrastructure, business and industry, and technology needs assessments.

[4] As per decision 18/CP.27, para. 7.

[5] See https://unfccc.int/ttclear/acl_users/MultiPAS/artificial_intelligence.

as well as its impacts on, the implementation of the outcomes of technology needs assessments and the joint work programme of the Technology Mechanism for 2023–2027;

9. *Notes* the insufficient transfer and deployment of technology in developing countries, *encourages* the Technology Executive Committee and the Climate Technology Centre and Network to continue collaborating with the operating entities of the Financial Mechanism and relevant financial institutions with a view to enhancing the capacity of developing countries to prepare project proposals, facilitating their access to available funding for technology development and transfer and for implementing the results of their technology needs assessments and the technical assistance of the Climate Technology Centre and Network, and strengthening the transfer and deployment of technology and *calls for* regional balance in this work;

10. *Commends* the Technology Executive Committee and the Climate Technology Centre and Network on their continued efforts to mainstream gender considerations in the implementation of the joint work programme of the Technology Mechanism for 2023–2027, including the launch of the global roster of gender and climate change technology experts[6] and the endorsement of the Climate Technology Centre and Network gender policy and action plan, and *invites* them to continue mainstreaming gender considerations in their work;

11. *Notes with appreciation* the information prepared by the Technology Executive Committee and the Climate Technology Centre and Network on their action taken in response to the mandates from the Conference of the Parties at its twenty-seventh session and the subsidiary bodies at their fifty-seventh sessions[7] and *invites* the Technology Executive Committee and the Climate Technology Centre and Network to provide such information in their joint annual reports;

12. *Expresses appreciation* for the voluntary financial and other contributions received for the work under the Technology Mechanism and *encourages* the provision of enhanced support for that work through financial and other resources;

13. *Notes with concern* that gender balance in the composition of the Technology Executive Committee and the Advisory Board of the Climate Technology Centre and Network has not yet been achieved and *encourages* Parties to take steps to achieve a gender balance by nominating more female candidates as members of these bodies;

14. *Welcomes* the finalization of the Climate Technology Centre and Network resource mobilization and partnership strategy for 2023–2027,[8] which has the aim of diversifying the resources of the Climate Technology Centre and Network and ensuring its funding is adequate, predictable and flexible;

15. *Encourages* the Climate Technology Centre and Network, its host the United Nations Environment Programme and the UNFCCC secretariat to collaborate on resource mobilization to ensure effective implementation of the joint work programme of the Technology Mechanism for 2023–2027 and *requests* the Technology Executive Committee and the Climate Technology Centre and Network to include information on the progress of their efforts in their next joint annual report;

16. *Acknowledges* the role of the Climate Technology Centre and Network Partnership and Liaison Office in enhancing interaction among national designated entities and with the Green Climate Fund, and in providing technical support to developing countries across the core service areas of the Climate Technology Centre and Network and *requests* the Climate Technology Centre and Network to include information on the major outcomes of and lessons learned by its Partnership and Liaison Office in its annual reports;

17. *Notes with concern* that securing funding for implementing the mandates of the Technology Mechanism and its joint work programme for 2023–2027 remains a challenge,

[6] See https://www.ctc-n.org/network/gender-climate-expert-roster.

[7] See the document entitled "Responses from the TEC and the CTCN to guidance from Parties in 2023", available at https://unfccc.int/ttclear/tec/documents.html (under annual reports and related documents).

[8] See Climate Technology Centre and Network Advisory Board document AB/2023/22/22.1, available at https://www.ctc-n.org/calendar/events/22nd-ctcn-advisory-board-meeting (under documents).

especially for the Climate Technology Centre and Network, and *encourages* the provision of enhanced support.

5th plenary meeting
11 December 2023

Annex 671 ter

The Bridgetown Agenda for the Reform of the Global Financial Architecture version 3.0, *Government of Barbados, Ministry of Foreign Affairs and Foreign Trade*, 2024

Bridgetown Initiative

BRIDGETOWN INITIATIVE ON THE REFORM OF THE INTERNATIONAL DEVELOPMENT AND CLIMATE FINANCE ARCHITECTURE

Version 3.0

"We are living in the season of superlatives on a scorched Earth. To have any chance of reversing this trajectory, we must build a more responsive, fairer and more inclusive global financial system to fight inequalities, finance the climate transition, and accelerate the achievement of the Sustainable Development Goals."

- H.E. Mia Amor Mottley, Prime Minister of Barbados

THE GLOBAL ECONOMIC AND FINANCIAL SYSTEM CONTINUES TO FAIL US.

It is a matter of deep concern that, at a time when the world is expected to achieve only 15% of the Sustainable Development Goals (SDGs), prevailing conditions are such that Governments in the world's poorest countries are being forced to devote more resources to debt service than to health, education, and infrastructure combined. **As a result, in the last four years, 165 million people have fallen into poverty;** one in ten people now live on under $2/day.

In 2023, the global average **near-surface temperature was 1.45°C above the preindustrial baseline** and average temperatures temporarily **breached the critical 1.5°C threshold. Further, the year 2024 is becoming the warmest in recorded history.** The resulting impacts are especially devastating in climate vulnerable countries, which are home to 4.5 billion people, half of whom live in poverty. **This can no longer be ignored. It must be addressed. The voices of the people demand immediate attention and inclusion.**

Tinkering at the margins of a broken system is akin to rearranging deck chairs on the Titanic. **It is time to act in solidarity for people and planet.**

Unveiled in 2022, **the Bridgetown Initiative has helped to lead a paradigm shift in the discourse on scaling capital flows and reshaping the financing system to achieve the SDGs and spur climate action.** There is wide convergence on its tenets, including in the CVF-V20 Accra-Marrakech Agenda and the principles of the Global Climate Financing Framework. **The Bridgetown Initiative is not a dialogue about numbers, but an agenda for lives of dignity for billions across the globe.**

Some progress has been made. The International Monetary Fund (IMF) has created the Resilience and Sustainability Trust (RST). The G20 has committed to re-channeling more than $100 billion in Special Drawing Rights (SDRs). A Loss and Damage Fund was launched at COP28 with an initial $700 million in commitments. Multilateral Development Banks (MDBs) are increasingly supporting debt swaps. The Inter-American Development Bank (IADB), World Bank and other official sector lenders are including natural disaster clauses across a range of new and existing loan agreements. The Asian Development Bank has unlocked $100 billion of additional lending through reforms to its Capital Adequacy Framework.The African Development Bank (AfDB) is increasing lending by raising hybrid capital from private investors.

The World Bank has committed to tripling its guarantee capacity through the Multilateral Investment Guarantee Agency (MIGA), and other guarantee providers are scaling local currency offerings. Currency hedging solutions and early-stage project pipeline facilities are being announced, with support from pooled philanthropic funds. Finance Ministers under Brazil's G20 Presidency have committed to exploring ways to tax the super-rich.

STILL, THIS FALLS WOEFULLY SHORT OF WHAT IS REQUIRED.

There is much unfinished business. Global efforts to facilitate the restructuring of unsustainable debts have proven slow, reactive, and insufficient. While MDB reforms have momentum, we are a far cry from the $500 billion a year in additional official lending that the world requires to address the climate crisis and achieve the SDGs. While flows of climate finance from the private sector are growing, this is largely happening in developed economies for mitigation. Much more must be done to align private capital to sustainable development imperatives, especially for nature and adaptation. A more equitable governance of the International Financial Institutions remains elusive. Despite progress to expand liquidity support, high interest rates have combined with maturing debt to create an avalanche of unsustainable debt service over the next three years. Rather than driving a green and just transition, our trading system risks being subverted by geopolitical tensions over the control of resources critical for the energy transition.

Low and middle-income vulnerable countries, including small island developing states, **feel the implications of this acutely.** We cannot afford to choose between tackling development or climate; they are two sides of the same coin.

An additional **$1.8 trillion annually is needed to address the climate crisis and nature related investments in emerging markets and developing countries (EMDEs) and $1.2 trillion annually, to achieve the SDGs.** About $950 billion of the climate and nature financing gap is expected to be closed by domestic sources; the remaining $850 billion must come from external sources. **It is not an exaggeration to say that the level of financing which is made available, to which countries will have access and on what terms, are issues of survival for millions of people and for the well-being of our planet.**

The commitment of developing countries to establish policy frameworks that **preserve debt sustainability,** while defining and delivering on robust plans to promote socially-inclusive, equitable, climate-resilient and environmentally-sustainable development, must be supported. Such support must be realized through official development assistance and **development finance at a sufficient scale to enable country-owned, structural transformation strategies and move them up the value chain.**

To achieve this, **we need financing to be provided on affordable terms. This would enable countries to have greater fiscal space to invest in their future.** We must **invest in Global Public Goods (GPGs)**—including climate change adaptation and mitigation, fragility and conflict remediation, pandemic prevention and preparedness, energy access, food and nutrition security, soil health, water security and access, enabling digitalization, protecting biodiversity and nature—recognizing that our societies and economies are deeply interlinked. **We must look to new sources of financing, including international taxation regimes** that support the energy transition, action for adaptation, and loss and damage. This includes contributions from sectors benefiting the most from globalization, those with the largest carbon and greenhouse gas emissions, and those contributing the least to taxation. **We need a viable insurance market,** as a precondition for governments, businesses and individuals to invest in assets, whether infrastructure or homes.

I. WE MUST CHANGE THE RULES OF THE GAME

1. We call on **international financial institutions** to give a stronger voice to developing countries **in their governance and decision-making.**

2. We call on the G20 to reform the **Common Framework which falls woefully short of addressing borrower needs in a timely way,** including to **prevent countries from defaulting using proactive measures and, in cases of default,** to ensure that all creditor classes comply in an accelerated, time-bound, transparent and equitable manner. **Debt relief should be sufficiently robust to ensure countries are able to finance their development and climate goals.**

3. We call on the **IMF/World Bank to reform the growth forecasting methodologies** that feed into their Debt Sustainability Analysis (DSA) frameworks, including by (i) better reflecting investments in adaptation, clean energy and natural capital as potential drivers of long-term growth and enhanced resilience; (ii) identifying and promoting sustainable financing mixes (i.e. comprising cheap, ultra long-term debt, and grants in the case of low income countries) that support the achievement of climate and development goals in a fiscally sound manner that is less likely to contribute to the breaching of critical DSA thresholds; and (iii) providing transparency on its updated growth forecast models.

4. Alongside these reforms, we call upon the **Credit Rating Agencies** to work proactively to increase the transparency and consistency of their methodologies in order to make ratings outcomes more predictable for both market participants and issuers.

5. We call upon the **World Bank and other finance providers to include climate vulnerability, natural capital and biodiversity conservation needs in their criteria for allocating concessional finance,** addressing the inequity of many countries being classified as ineligible solely on a GNI per capita basis.

6. We call for **a multilateral trading regime that supports a green and just transition,** including by ensuring that carbon border adjustment mechanisms do not unfairly punish developing countries. **We call upon countries to revive a constructive dialogue** on the establishment of a **universal carbon pricing mechanism** and develop **high integrity carbon markets.**

II. WE MUST SHOCK PROOF ECONOMIES

7. We call upon the **IMF to boost country capacity to invest in resilience,** including by **re-channeling SDRs through MDBs.** We call upon the **IMF and its shareholders to agree on a new issuance of at least $650bn in SDRs to expand the balance sheets of MDBs to support SDGs and climate action.**

8. We call upon the **IMF to reduce the cost of lending** including by making it easier to access the Resilience and Sustainability Facility (RSF) on a stand-alone basis and extending the Extended Fund Facility repayment period to match the RSF.

9. To enhance **disaster preparedness** and provide **immediate liquidity support and greater breathing room to all climate-vulnerable countries in the aftermath of a climate disaster:**

- **a.** We call upon the IMF to **replenish the Catastrophe Containment and Relief Trust** and expand its eligibility criteria; and **expand the large natural disaster windows of the Rapid Credit Facility and Rapid Financing Instrument** to help countries respond to climate shocks.
- **b.** We call upon the **World Bank to establish a universal contingent financing facility available to all vulnerable countries on concessional terms.**
- **c.** We call upon all debtors and public and private **creditors to introduce natural disaster clauses and avoid the use of bullet payments** in all lending instruments.
- **d.** We call upon the **World Bank to expand natural disaster clauses to all climate vulnerable countries** and to broaden the trigger to include food and health crises.
- **e.** We call on bilateral donors to help **expand and deepen insurance markets, including by capitalizing regional risk pools** for key assets in vulnerable countries, and provide greater support to countries in assessing climate risks and tools to manage them.

III. WE MUST DRAMATICALLY INCREASE FINANCING FOR THE SDGS AND CLIMATE ACTION

10. **We call upon new and existing donor countries to replenish IDA21 by at least $120 billion and triple IDA by 2030.**

11. **We also call upon donor countries to replenish and strengthen existing vertical climate finance funds, including the Green Climate Fund (GCF),** to provide the catalytic funding needed to unlock investment in mitigation and adaptation.

12. **We call on MDBs to develop a plan to provide an additional $300 billion a year in affordable, longer-term (30-50 year) financing** for the SDGs, as well as for adaptation, and to expand the criteria used for allocating concessional financing to include climate vulnerability.

13. **We call on MDBs to fully implement the G20 Capital Adequacy Framework (CAF) recommendations** to significantly increase and improve lending. We call on **MDB shareholders to initiate new general capital increases** to ensure MDBs can provide the ongoing support to developing countries to achieve their development and climate goals.

14. **We call on MDBs, DFIs and climate funds to help mobilize at least $500 billion a year of private capital for climate action and the SDGs** – both international and domestic capital, including through:

a. Better and more project preparation and early-stage equity to build an investable pipeline of projects.
b. Developing, scaling and replicating effective risk-sharing and credit enhancement mechanisms, including guarantees and other blended finance instruments.
c. Deepening local capital markets, scaling local currency lending and derisking, reducing the cost of FX hedging and liquidity facilities and strengthening the role of regional development banks.
d. Partnering with philanthropy especially to develop and scale frontier adaptation business models and build the capacity and skills base to implement the transition.
e. Innovating robust solutions to the growing challenge of uninsurable assets and monetizing avoided costs.

15. **We call for new sources of progressive finance to fund GPGs and loss and damage** including through:

a. **An international tax on the super-rich.**
b. **Repurposing harmful subsidies.**
c. **Taxing fossil fuel company windfall profits** and implementing an **emissions levy on hard-to-abate sectors like aviation and shipping, along with international financial transactions** underpinned by a **comprehensive UN Tax Convention** to create a forum for truly inclusive tax negotiations.
d. A philanthropically-funded **Global Compact** for GPGs.

16. We call upon developed countries to **meaningfully capitalize and effectively operationalize the Loss and Damage Fund and deliver on the commitment to increase international biodiversity finance to least $30 billion** per year by 2030.

It will be imperative to take account of progress made at key moments and on pivotal issues over the next 18 months. **Progress on this agenda is critical. Failure to tangibly advance this agenda by the end of 2025, will yield unthinkable costs to lives, livelihoods and our planet.**

Ours is the responsibility to build a world of dignity for all on the planet we call 'home.'

WE CAN AND MUST DO BETTER.

Annex 672

International Status of South West Africa, Advisory Opinion of 11 July 1950, I.C.J. Reports 1950, p. 128

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

STATUT INTERNATIONAL DU SUD-OUEST AFRICAIN

AVIS CONSULTATIF DU 11 JUILLET 1950

1950

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

INTERNATIONAL STATUS OF SOUTH-WEST AFRICA

ADVISORY OPINION OF JULY 11th, 1950

Le présent avis doit être cité comme suit :

« *Statut international du Sud-Ouest africain, Avis consultatif : C. I. J. Recueil 1950, p. 128.* »

This Opinion should be cited as follows :

"International status of South-West Africa, Advisory Opinion : I.C.J. Reports 1950, p. 128."

N° de vente : Sales number 42

INTERNATIONAL COURT OF JUSTICE

YEAR 1950

July 11th, 1950

1950
July 11th
General List:
No. 10

INTERNATIONAL STATUS OF SOUTH-WEST AFRICA

Continued existence of the Mandate for South-West Africa conferred upon the Union of South Africa, and of the international obligations derived therefrom.—Article 22 of the Covenant of the League of Nations.—Article 80, paragraph 1, of the Charter.—International Mandates distinguished from the notions of mandate in national law.—Declarations by Union Government as to the continuance of its obligations under the Mandate. — Obligation of Union Government to accept supervision by the United Nations and to submit reports and petitions.—Competence of the General Assembly of the United Nations derived from Article 10 of the Charter.—Compulsory jurisdiction of the International Court of Justice.

Applicability of Chapter XII of the Charter.—Optional or compulsory nature of the placing of the Territory of South-West Africa under the Trusteeship System.—Articles 75, 77, 79 and 80, paragraph 2, of the Charter.

Competence to modify the international status of the Territory of South-West Africa.

ADVISORY OPINION

Present : President BASDEVANT ; *Vice-President* GUERRERO ; *Judges* ALVAREZ, HACKWORTH, WINIARSKI, ZORIČIĆ, DE VISSCHER, Sir ARNOLD MCNAIR, KLAESTAD, BADAWI PASHA, KRYLOV, READ, HSU MO, AZEVEDO ; *Registrar* HAMBRO.

THE COURT,

composed as above,

gives the following Advisory Opinion :

On December 6th, 1949, the General Assembly of the United Nations adopted the following resolution :

"*The General Assembly,*

Recalling its previous resolutions 65 (I) of 14 December 1946, 141 (II) of 1 November 1947 and 227 (III) of 26 November 1948 concerning the Territory of South-West Africa,

Considering that it is desirable that the General Assembly, for its further consideration of the question, should obtain an advisory opinion on its legal aspects,

1. *Decides* to submit the following questions to the International Court of Justice with a request for an advisory opinion which shall be transmitted to the General Assembly before its fifth regular session, if possible :

'What is the international status of the Territory of South-West Africa and what are the international obligations of the Union of South Africa arising therefrom, in particular :

(*a*) Does the Union of South Africa continue to have international obligations under the Mandate for South-West Africa and, if so, what are those obligations ?

(*b*) Are the provisions of Chapter XII of the Charter applicable and, if so, in what manner, to the Territory of South-West Africa ?

(*c*) Has the Union of South Africa the competence to modify the international status of the Territory of South-West Africa, or, in the event of a negative reply, where does competence rest to determine and modify the international status of the Territory ?'

2. *Requests* the Secretary-General to transmit the present resolution to the International Court of Justice, in accordance with Article 65 of the Statute of the Court, accompanied by all documents likely to throw light upon the question.

The Secretary-General shall include among these documents the text of Article 22 of the Covenant of the League of Nations ; the text of the Mandate for German South-West Africa, confirmed by the Council of the League on 17 December 1920 ; relevant documentation concerning the objectives and the functions of the Mandates System ; the text of the resolution adopted by the League of Nations on the question of Mandates on 18 April 1946 ; the text of Articles 77 and 80 of the Charter and data on the discussion of these articles in the San Francisco Conference and the General Assembly ; the report of the Fourth Committee and the official records, including the annexes, of the consideration of the

question of South-West Africa at the fourth session of the General Assembly."

By letter of December 19th, 1949, filed in the Registry on December 27th, the Secretary-General of the United Nations transmitted to the Court a certified true copy of the General Assembly's resolution.

On December 30th, 1949, in accordance with Article 66, paragraph 1, of the Statute, the Registrar gave notice of the request to all States entitled to appear before the Court. In addition, as the question submitted to the Court for advisory opinion by the General Assembly concerned Chapter XII of the Charter, the Registrar, on the same date, informed all Members of the United Nations, by means of a special and direct communication as provided in Article 66, paragraph 2, of the Statute that the Court was prepared to receive from them written statements on the question. By an order of the same date the President, the Court not being in session, appointed Monday, March 20th, 1950, as the date of expiry of the time-limit for the submission of written statements, and reserved the rest of the procedure for further decision.

Written statements were received within the prescribed time-limit from the following States : Egypt, Union of South Africa, the United States of America, India and Poland.

On March 7th, 1950, the Board of Directors of the International League of the Rights of Man sent a communication to the Court asking permission to submit written and oral statements on the question. On March 16th, the Court decided that it would receive from this organization a written statement to be filed before April 10th and confined to the legal questions which had been submitted to the Court. On the same day, the League was notified accordingly, but it did not send any communication within the time-limit prescribed.

By letter of January 23rd, 1950, the Secretary-General of the United Nations announced that he had designated Dr. I. Kerno, Assistant Secretary-General in charge of the Legal Department, as his representative before the Court, and that Dr. Kerno was authorized to submit any written or oral statements likely to furnish information to the Court on the question.

By letters dated March 1st and March 20th, 1950, filed in the Registry on March 8th and April 11th, respectively, the Secretary-General transmitted to the Registry the documents which he was instructed to submit according to the resolution of the General Assembly and Article 65 of the Statute. All these documents are enumerated in the list annexed to this Opinion.

By telegrams dated March 15th and April 29th, the Government of the Philippines announced its intention to present an oral statement. The Government of the Union of South Africa announced the same intention by letter of March 28th.

At public sittings held from May 16th to May 23rd, 1950, the Court heard oral statements submitted :

on behalf of the Secretary-General of the United Nations by Dr. Ivan Kerno, Assistant Secretary-General in charge of the Legal Department ;

on behalf of the Government of the Philippines by Judge José D. Ingles, member of the Philippine Permanent Delegation to the United Nations ;

on behalf of the Government of the Union of South Africa by Dr. L. Steyn, K.C., Senior Legal Adviser of the Ministry of Justice of the South-African Government.

* * *

The request for an opinion begins with a general question as follows :

> *"What is the international status of the Territory of South-West Africa and what are the international obligations of the Union of South Africa arising therefrom ?"*

The Court is of opinion that an examination of the three particular questions submitted to it will furnish a sufficient answer to this general question and that it is not neccessary to consider the general question separately. It will therefore begin at once with an examination of the particular questions.

Question (*a*) : *"Does the Union of South Africa continue to have international obligations under the Mandate for South-West Africa and, if so, what are those obligations ?"*

The Territory of South-West-Africa was one of the German overseas possessions in respect of which Germany, by Article 119 of the Treaty of Versailles, renounced all her rights and titles in favour of the Principal Allied and Associated Powers. When a decision was to be taken with regard to the future of these possessions as well as of other territories which, as a consequence of the war of 1914-1918, had ceased to be under the sovereignty of the States which formerly governed them, and which were inhabited by peoples not yet able to assume a full measure of self-government, two principles were considered to be of paramount importance : the principle of non-annexation and the principle that the well-being and development of such peoples form "a sacred trust of civilization".

With a view to giving practical effect to these principles, an international régime, the Mandates System, was created by Article 22 of the Covenant of the League of Nations. A "tutelage" was to be established for these peoples, and this tutelage was to be entrusted to certain advanced nations and exercised by them "as mandatories on behalf of the League".

Accordingly, the Principal Allied and Associated Powers agreed that a Mandate for the Territory of South-West Africa should be conferred upon His Britannic Majesty to be exercised on his behalf by the Government of the Union of South Africa and proposed the terms of this Mandate. His Britannic Majesty, for and on behalf of the Government of the Union of South Africa, agreed to accept the Mandate and undertook to exercise it on behalf of the League of Nations in accordance with the proposed terms. On December 17th, 1920, the Council of the League of Nations, confirming the Mandate, defined its terms.

In accordance with these terms, the Union of South Africa (the "Mandatory") was to have full power of administration and legislation over the Territory as an integral portion of the Union and could apply the laws of the Union to the Territory subject to such local modifications as circumstances might require. On the other hand, the Mandatory was to observe a number of obligations, and the Council of the League was to supervise the administration and see to it that these obligations were fulfilled.

The terms of this Mandate, as well as the provisions of Article 22 of the Covenant and the principles embodied therein, show that the creation of this new international institution did not involve any cession of territory or transfer of sovereignty to the Union of South Africa. The Union Government was to exercise an international function of administration on behalf of the League, with the object of promoting the well-being and development of the inhabitants.

It is now contended on behalf of the Union Government that this Mandate has lapsed, because the League has ceased to exist. This contention is based on a misconception of the legal situation created by Article 22 of the Covenant and by the Mandate itself. The League was not, as alleged by that Government, a "mandator" in the sense in which this term is used in the national law of certain States. It had only assumed an international function of supervision and control. The "Mandate" had only the name in common with the several notions of mandate in national law. The object of the Mandate regulated by international rules far exceeded that of contractual relations regulated by national law. The Mandate was created, in the interest of the inhabitants of the territory, and of humanity in general, as an international institution with an international object—a sacred trust of civilization. It is therefore not possible to draw any conclusion by analogy from the notions of mandate in national law or from any other legal conception of that law. The international rules regulating the Mandate constituted an international status for the Territory recognized by all the Members of the League of Nations, including the Union of South Africa.

The essentially international character of the functions which had been entrusted to the Union of South Africa appears particularly from the fact that by Article 22 of the Covenant and Article 6 of the Mandate the exercise of these functions was subjected to the supervision of the Council of the League of Nations and to the obligation to present annual reports to it ; it also appears from the fact that any Member of the League of Nations could, according to Article 7 of the Mandate, submit to the Permanent Court of International Justice any dispute with the Union Government relating to the interpretation or the application of the provisions of the Mandate.

The authority which the Union Government exercises over the Territory is based on the Mandate. If the Mandate lapsed, as the Union Government contends, the latter's authority would equally have lapsed. To retain the rights derived from the Mandate and to deny the obligations thereunder could not be justified.

These international obligations, assumed by the Union of South Africa, were of two kinds. One kind was directly related to the administration of the Territory, and corresponded to the sacred trust of civilization referred to in Article 22 of the Covenant. The other related to the machinery for implementation, and was closely linked to the supervision and control of the League. It corresponded to the "securities for the performance of this trust" referred to in the same article.

The first-mentioned group of obligations are defined in Article 22 of the Covenant and in Articles 2 to 5 of the Mandate. The Union undertook the general obligation to promote to the utmost the material and moral well-being and the social progress of the inhabitants. It assumed particular obligations relating to slave trade, forced labour, traffic in arms and ammunition, intoxicating spirits and beverages, military training and establishments, as well as obligations relating to freedom of conscience and free exercise of worship, including special obligations with regard to missionaries.

These obligations represent the very essence of the sacred trust of civilization. Their *raison d'être* and original object remain. Since their fulfilment did not depend on the existence of the League of Nations, they could not be brought to an end merely because this supervisory organ ceased to exist. Nor could the right of the population to have the Territory administered in accordance with these rules depend thereon.

This view is confirmed by Article 80, paragraph 1, of the Charter, which maintains the rights of States and peoples and the terms of existing international instruments until the territories in question are placed under the Trusteeship System. It is true that this provi-

sion only says that nothing in Chapter XII shall be construed to alter the rights of States or peoples or the terms of existing international instruments. But—as far as mandated territories are concerned, to which paragraph 2 of this article refers—this provision presupposes that the rights of States and peoples shall not lapse automatically on the dissolution of the League of Nations. It obviously was the intention to safeguard the rights of States and peoples under all circumstances and in all respects, until each territory should be placed under the Trusteeship System.

This view results, moreover, from the Resolution of the League of Nations of April 18th, 1946, which said :

> "Recalling that Article 22 of the Covenant applies to certain territories placed under Mandate the principle that the well-being and development of peoples not yet able to stand alone in the strenuous conditions of the modern world form a sacred trust of civilization :
>
> . . . . . .
>
> 3. Recognizes that, on the termination of the League's existence, its functions with respect to the mandated territories will come to an end, but notes that Chapters XI, XII and XIII of the Charter of the United Nations embody principles corresponding to those declared in Article 22 of the Covenant of the League ;
>
> 4. Takes note of the expressed intentions of the Members of the League now administering territories under Mandate to continue to administer them for the well-being and development of the peoples concerned in accordance with the obligations contained in the respective Mandates, until other arrangements have been agreed between the United Nations and the respective mandatory Powers."

As will be seen from this resolution, the Assembly said that the League's functions with respect to mandated territories would come to an end ; it did not say that the Mandates themselves came to an end. In confining itself to this statement, and in taking note, on the other hand, of the expressed intentions of the mandatory Powers to continue to administer the mandated territories in accordance with their respective Mandates, until other arrangements had been agreed upon between the United Nations and those Powers, the Assembly manifested its understanding that the Mandates were to continue in existence until "other arrangements" were established.

A similar view has on various occasions been expressed by the Union of South Africa. In declarations made to the League of Nations, as well as to the United Nations, the Union Government has acknowledged that its obligations under the Mandate continued

after the disappearance of the League. In a declaration made on April 9th, 1946, in the Assembly of the League of Nations, the representative of the Union Government, after having declared his Government's intention to seek international recognition for the Territory of South-West Africa as an integral part of the Union, stated: "In the meantime, the Union will continue to administer the Territory scrupulously in accordance with the obligations of the Mandate for the advancement and promotion of the interests of the inhabitants as she has done during the past six years when meetings of the Mandates Commission could not be held." After having said that the disappearance of the Mandates Commission and of the League Council would "necessarily preclude complete compliance with the letter of the Mandate", he added: "The Union Government will nevertheless regard the dissolution of the League as in no way diminishing its obligations under the Mandate, which it will continue to discharge with the full and proper appreciation of its responsibilities until such time as other arrangements are agreed upon concerning the future status of the Territory."

In a memorandum submitted on October 17th, 1946, by the South-African Legation in Washington to the Secretary-General of the United Nations, expression was given to a similar view. Though the League had at that time disappeared, the Union Government continued to refer to its responsibility under the Mandate. It stated: "This responsibility of the Union Government as Mandatory is necessarily inalienable." On November 4th, 1946, the Prime Minister of the Union, in a statement to the Fourth Committee of the United Nations General Assembly, repeated the declaration which the representative of the Union had made previously to the League of Nations.

In a letter of July 23rd, 1947, to the Secretary-General of the United Nations, the Legation of the Union referred to a resolution of the Union Parliament in which it was declared "that the Government should continue to render reports to the United Nations Organization as it has done heretofore under the Mandate". It was further stated in that letter: "In the circumstances the Union Government have no alternative but to maintain the *status quo* and to continue to administer the Territory in the spirit of the existing Mandate."

These declarations constitute recognition by the Union Government of the continuance of its obligations under the Mandate and not a mere indication of the future conduct of that Government. Interpretations placed upon legal instruments by the parties to them, though not conclusive as to their meaning, have considerable

probative value when they contain recognition by a party of its own obligations under an instrument. In this case the declarations of the Union of South Africa support the conclusions already reached by the Court.

* * *

The Court will now consider the above-mentioned second group of obligations. These obligations related to the machinery for implementation and were closely linked to the supervisory functions of the League of Nations—particularly the obligation of the Union of South Africa to submit to the supervision and control of the Council of the League and the obligation to render to it annual reports in accordance with Article 22 of the Covenant and Article 6 of the Mandate. Since the Council disappeared by the dissolution of the League, the question arises whether these supervisory functions are to be exercised by the new international organization created by the Charter, and whether the Union of South Africa is under an obligation to submit to a supervision by this new organ and to render annual reports to it.

Some doubts might arise from the fact that the supervisory functions of the League with regard to mandated territories not placed under the new Trusteeship System were neither expressly transferred to the United Nations nor expressly assumed by that organization. Nevertheless, there seem to be decisive reasons for an affirmative answer to the above-mentioned question.

The obligation incumbent upon a mandatory State to accept international supervision and to submit reports is an important part of the Mandates System. When the authors of the Covenant created this system, they considered that the effective performance of the sacred trust of civilization by the mandatory Powers required that the administration of mandated territories should be subject to international supervision. The authors of the Charter had in mind the same necessity when they organized an International Trusteeship System. The necessity for supervision continues to exist despite the disappearance of the supervisory organ under the Mandates System. It cannot be admitted that the obligation to submit to supervision has disappeared merely because the supervisory organ has ceased to exist, when the United Nations has another international organ performing similar, though not identical, supervisory functions.

These general considerations are confirmed by Article 80, paragraph 1, of the Charter, as this clause has been interpreted above. It purports to safeguard, not only the rights of States, but also the rights of the peoples of mandated territories until Trusteeship Agreements are concluded. The purpose must have been to provide a real

protection for those rights ; but no such rights of the peoples could be effectively safeguarded without international supervision and a duty to render reports to a supervisory organ.

The Assembly of the League of Nations, in its Resolution of April 18th, 1946, gave expression to a corresponding view. It recognized, as mentioned above, that the League's functions with regard to the mandated territories would come to an end, but noted that Chapters XI, XII and XIII of the Charter of the United Nations embody principles corresponding to those declared in Article 22 of the Covenant. It further took note of the intentions of the mandatory States to continue to administer the territories in accordance with the obligations contained in the Mandates until other arrangements should be agreed upon between the United Nations and the mandatory Powers. This resolution presupposes that the supervisory functions exercised by the League would be taken over by the United Nations.

The competence of the General Assembly of the United Nations to exercise such supervision and to receive and examine reports is derived from the provisions of Article 10 of the Charter, which authorizes the General Assembly to discuss any questions or any matters within the scope of the Charter and to make recommendations on these questions or matters to the Members of the United Nations. This competence was in fact exercised by the General Assembly in Resolution 141 (II) of November 1st, 1947, and in Resolution 227 (III) of November 26th, 1948, confirmed by Resolution 337 (IV) of December 6th, 1949.

For the above reasons, the Court has arrived at the conclusion that the General Assembly of the United Nations is legally qualified to exercise the supervisory functions previously exercised by the League of Nations with regard to the administration of the Territory, and that the Union of South Africa is under an obligation to submit to supervision and control of the General Assembly and to render annual reports to it.

The right of petition was not mentioned by Article 22 of the Covenant or by the provisions of the Mandate. But on January 31st, 1923, the Council of the League of Nations adopted certain rules relating to this matter. Petitions to the League from communities or sections of the populations of mandated territories were to be transmitted by the mandatory Governments, which were to attach to these petitions such comments as they might consider desirable. By this innovation the supervisory function of the Council was rendered more effective.

The Court is of opinion that this right, which the inhabitants of South-West Africa had thus acquired, is maintained by Article 80,

paragraph 1, of the Charter, as this clause has been interpreted above. In view of the result at which the Court has arrived with respect to the exercise of the supervisory functions by the United Nations and the obligation of the Union Government to submit to such supervision, and having regard to the fact that the dispatch and examination of petitions form a part of that supervision, the Court is of the opinion that petitions are to be transmitted by that Government to the General Assembly of the United Nations, which is legally qualified to deal with them.

It follows from what is said above that South-West Africa is still to be considered as a territory held under the Mandate of December 17th, 1920. The degree of supervision to be exercised by the General Assembly should not therefore exceed that which applied under the Mandates System, and should conform as far as possible to the procedure followed in this respect by the Council of the League of Nations. These observations are particularly applicable to annual reports and petitions.

According to Article 7 of the Mandate, disputes between the mandatory State and another Member of the League of Nations relating to the interpretation or the application of the provisions of the Mandate, if not settled by negotiation, should be submitted to the Permanent Court of International Justice. Having regard to Article 37 of the Statute of the International Court of Justice, and Article 80, paragraph 1, of the Charter, the Court is of opinion that this clause in the Mandate is still in force and that, therefore, the Union of South Africa is under an obligation to accept the compulsory jurisdiction of the Court according to those provisions.

* * *

Reference to Chapter XI of the Charter was made by various Governments in written and oral statements presented to the Court. Having regard to the results at which the Court has arrived, the question whether the provisions of that chapter are applicable does not arise for the purpose of the present Opinion. It is not included in the questions submitted to the Court and it is unnecessary to consider it.

* * *

Question (*b*) : "*Are the provisions of Chapter XII of the Charter applicable and, if so, in what manner, to the Territory of South-West Africa?*"

Territories held under Mandate were not by the Charter automatically placed under the new International Trusteeship System.

This system should, according to Articles 75 and 77, apply to territories which are placed thereunder by means of Trusteeship Agreements. South-West Africa, being a territory held under Mandate (Article 77 *a*), may be placed under the Trusteeship System in accordance with the provisions of Chapter XII. In this sense, that chapter is applicable to the Territory.

Question (*b*) further asks in what manner Chapter XII is applicable to the Territory. It appears from a number of documents submitted to the Court in accordance with the General Assembly's Resolution of December 6th, 1949, as well as from the written and the oral observations of several Governments, that the General Assembly, in asking about the manner of application of Chapter XII, was referring to the question whether the Charter imposes upon the Union of South Africa an obligation to place the Territory under the Trusteeship System by means of a Trusteeship Agreement.

Articles 75 and 77 show, in the opinion of the Court, that this question must be answered in the negative. The language used in both articles is permissive ("as may be placed thereunder"). Both refer to subsequent agreements by which the territories in question may be placed under the Trusteeship System. An "agreement" implies consent of the parties concerned, including the mandatory Power in the case of territories held under Mandate (Article 79). The parties must be free to accept or reject the terms of a contemplated agreement. No party can impose its terms on the other party. Article 77, paragraph 2, moreover, presupposes agreement not only with regard to its particular terms, but also as to which territories will be brought under the Trusteeship System.

It has been contended that the word "voluntarily", used in Article 77 with respect to category (*c*) only, shows that the placing of other territories under Trusteeship is compulsory. This word alone cannot, however, over-ride the principle derived from Articles 75, 77 and 79 considered as a whole. An obligation for a mandatory State to place the Territory under Trusteeship would have been expressed in a direct manner. The word "voluntarily" incorporated in category (*c*) can be explained as having been used out of an abundance of caution and as an added assurance of freedom of initiative to States having territories falling within that category.

It has also been contended that paragraph 2 of Article 80 imposes on mandatory States a duty to negotiate and conclude Trusteeship Agreements. The Court finds no justification for this contention. The paragraph merely states that the first paragraph of the article shall not be interpreted as giving grounds for delay or postponement of the negotiation and conclusion of agreements for placing mandated and other territories under the Trusteeship System as provided for in Article 77. There is nothing to suggest that the

provision was intended as an exception to the principle derived from Articles 75, 77 and 79. The provision is entirely negative in character and cannot be said to create an obligation to negotiate and conclude an agreement. Had the parties to the Charter intended to create an obligation of this kind for a mandatory State, such intention would necessarily have been expressed in positive terms.

It has further been maintained that Article 80, paragraph 2, creates an obligation for mandatory States to enter into negotiations with a view to concluding a Trusteeship Agreement. But an obligation to negotiate without any obligation to conclude an agreement can hardly be derived from this provision, which expressly refers to delay or postponement of "the negotiation and conclusion" of agreements. It is not limited to negotiations only. Moreover, it refers to the negotiation and conclusion of agreements for placing "mandated and other territories under the Trusteeship System as provided for in Article 77". In other words, it refers not merely to territories held under Mandate, but also to the territories mentioned in Article 77 (*b*) and (*c*). It is, however, evident that there can be no obligation to enter into negotiations with a view to concluding Trusteeship Agreements for those territories.

It is contended that the Trusteeship System created by the Charter would have no more than a theoretical existence if the mandatory Powers were not under an obligation to enter into negotiations with a view to concluding Trusteeship Agreements. This contention is not convincing, since an obligation merely to negotiate does not of itself assure the conclusion of Trusteeship Agreements. Nor was the Trusteeship System created only for mandated territories.

It is true that, while Members of the League of Nations regarded the Mandates System as the best method for discharging the sacred trust of civilization provided for in Article 22 of the Covenant, the Members of the United Nations considered the International Trusteeship System to be the best method for discharging a similar mission. It is equally true that the Charter has contemplated and regulated only a single system, the International Trusteeship System. It did not contemplate or regulate a co-existing Mandates System. It may thus be concluded that it was expected that the mandatory States would follow the normal course indicated by the Charter, namely, conclude Trusteeship Agreements. The Court is, however, unable to deduce from these general considerations any legal obligation for mandatory States to conclude or to negotiate such agreements. It is not for the Court to pronounce on the political or moral duties which these considerations may involve.

For these reasons, the Court considers that the Charter does not impose on the Union an obligation to place South-West Africa under the Trusteeship System.

* * *

Question (*c*) : "*Has the Union of South Africa the competence to modify the international status of the Territory of South-West Africa, or, in the event of a negative reply, where does competence rest to determine and modify the international status of the Territory?*"

The international status of the Territory results from the international rules regulating the rights, powers and obligations relating to the administration of the Territory and the supervision of that administration, as embodied in Article 22 of the Covenant and in the Mandate. It is clear that the Union has no competence to modify unilaterally the international status of the Territory or any of these international rules. This is shown by Article 7 of the Mandate, which expressly provides that the consent of the Council of the League of Nations is required for any modification of the terms of the Mandate.

The Court is further requested to say where competence to determine and modify the international status of the Territory rests.

Before answering this question, the Court repeats that the normal way of modifying the international status of the Territory would be to place it under the Trusteeship System by means of a Trusteeship Agreement in accordance with the provisions of Chapter XII of the Charter.

The competence to modify in other ways the international status of the Territory depended on the rules governing the amendment of Article 22 of the Covenant and the modification of the terms of the Mandate.

Article 26 of the Covenant laid down the procedure for amending provisions of the Covenant, including Article 22. On the other hand, Article 7 of the Mandate stipulates that the consent of the Council of the League was required for any modification of the terms of that Mandate. The rules thus laid down have become inapplicable following the dissolution of the League of Nations. But one cannot conclude therefrom that no proper procedure exists for modifying the international status of South-West Africa.

Article 7 of the Mandate, in requiring the consent of the Council of the League of Nations for any modification of its terms, brought into operation for this purpose the same organ which was invested with powers of supervision in respect of the administration of the Mandates. In accordance with the reply given above to Question (*a*), those powers of supervision now belong to the General Assembly of the United Nations. On the other hand, Articles 79 and 85 of the Charter require that a Trusteeship Agreement be concluded by the mandatory Power and approved by the General Assembly

before the International Trusteeship System may be substituted for the Mandates System. These articles also give the General Assembly authority to approve alterations or amendments of Trusteeship Agreements. By analogy, it can be inferred that the same procedure is applicable to any modification of the international status of a territory under Mandate which would not have for its purpose the placing of the territory under the Trusteeship System. This conclusion is strengthened by the action taken by the General Assembly and the attitude adopted by the Union of South Africa which is at present the only existing mandatory Power.

On January 22nd, 1946, before the Fourth Committee of the General Assembly, the representative of the Union of South Africa explained the special relationship between the Union and the Territory under its Mandate. There would—he said—be no attempt to draw up an agreement until the freely expressed will of both the European and native populations had been ascertained. He continued: "When that had been done, the decision of the Union would be submitted to the General Assembly for judgment."

On April 9th, 1946, before the Assembly of the League of Nations, the Union representative declared that "it is the intention of the Union Government, at the forthcoming session of the United Nations General Assembly in New York, to formulate its case for according South-West Africa a status under which it would be internationally recognized as an integral part of the Union".

In accordance with these declarations, the Union Government, by letter of August 12th, 1946, from its Legation in Washington, requested that the question of the desirability of the territorial integration in, and the annexation to, the Union of South Africa of the mandated Territory of South-West Africa, be included in the Agenda of the General Assembly. In a subsequent letter of October 9th, 1946, it was requested that the text of the item to be included in the Agenda be amended as follows: "Statement by the Government of the Union of South Africa on the outcome of their consultations with the peoples of South-West Africa as to the future status of the mandated Territory, and implementation to be given to the wishes thus expressed."

On November 4th, 1946, before the Fourth Committee, the Prime Minister of the Union of South Africa stated that the Union clearly understood "that its international responsibility precluded it from taking advantage of the war situation by effecting a change in the status of South-West Africa without proper consultation either of all the peoples of the Territory itself, or with the competent international organs".

By thus submitting the question of the future international status of the Territory to the "judgment" of the General Assembly as the "competent international organ", the Union Government recognized the competence of the General Assembly in the matter.

The General Assembly, on the other hand, affirmed its competence by Resolution 65 (I) of December 14th, 1946. It noted with satisfaction that the step taken by the Union showed the recognition of the interest and concern of the United Nations in the matter. It expressed the desire "that agreement between the United Nations and the Union of South Africa may hereafter be reached regarding the future status of the Mandated Territory of South-West Africa", and concluded: "The General Assembly, therefore, is unable to accede to the incorporation of the Territory of South-West Africa in the Union of South Africa."

Following the adoption of this resolution, the Union Government decided not to proceed with the incorporation of the Territory, but to maintain the *status quo*. The General Assembly took note of this decision in its Resolution 141 (II) of November 1st, 1947.

On the basis of these considerations, the Court concludes that competence to determine and modify the international status of South-West Africa rests with the Union of South Africa acting with the consent of the United Nations.

For these reasons,

The Court is of opinion,

On the General Question:

unanimously,

that South-West Africa is a territory under the international Mandate assumed by the Union of South Africa on December 17th, 1920;

On Question (a):

by twelve votes to two,

that the Union of South Africa continues to have the international obligations stated in Article 22 of the Covenant of the League of Nations and in the Mandate for South-West Africa as well as the obligation to transmit petitions from the inhabitants of that Territory, the supervisory functions to be exercised by the United Nations, to which the annual reports and the petitions are to be submitted, and the reference to the Permanent Court of International Justice to be replaced by a reference to the International Court of Justice, in accordance with Article 7 of the Mandate and Article 37 of the Statute of the Court;

On Question (b) :

unanimously,

that the provisions of Chapter XII of the Charter are applicable to the Territory of South-West Africa in the sense that they provide a means by which the Territory may be brought under the Trusteeship System;

and by eight votes to six,

that the provisions of Chapter XII of the Charter do not impose on the Union of South Africa a legal obligation to place the Territory under the Trusteeship System;

On Question (c) :

unanimously,

that the Union of South Africa acting alone has not the competence to modify the international status of the Territory of South-West Africa, and that the competence to determine and modify the international status of the Territory rests with the Union of South Africa acting with the consent of the United Nations.

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

(*Signed*) BASDEVANT,
President.

(*Signed*) E. HAMBRO,
Registrar.

Vice-President GUERRERO regrets that he is unable to concur in the opinion of the Court on the answer to the question under letter (*b*) and declares that in his opinion the Charter imposes on the Union of South Africa an obligation to place the Territory of

South-West Africa under the Trusteeship System, and that therefore the Union is bound under paragraph 2 of Article 80 of the Charter not to delay or postpone the negotiation and conclusion of an agreement for placing the Territory under the Trusteeship System. Otherwise Article 80 of the Charter would have no meaning. On this point and on the text in general, Mr. Guerrero shares the views expressed by Judge De Visscher.

Judges ZORIČIĆ and BADAWI PASHA declare that they regret to be unable to concur in the answer given by the Court to the second part of the question under letter (*b*). They share in general the views expressed on this point in the dissenting Opinion of Judge De Visscher.

Judge Sir ARNOLD MCNAIR and Judge READ, availing themselves of the right conferred on them by Article 57 of the Statute, have appended to the Opinion of the Court statements of their separate Opinions.

Judges ALVAREZ, DE VISSCHER and KRYLOV, availing themselves of the right conferred on them by Article 57 of the Statute, have appended to the Opinion of the Court statements of their dissenting Opinions.

(*Initialled*) J. B.

(*Initialled*) E. H.

ANNEX

List of documents submitted to the Court by the Secretary-General of the United Nations in application of Article 65 of the Statute

1

DOCUMENTS TRANSMITTED TO THE INTERNATIONAL COURT OF JUSTICE BY THE SECRETARY-GENERAL IN ACCORDANCE WITH RESOLUTION 338 (IV) ADOPTED BY THE GENERAL ASSEMBLY ON 6 DECEMBER, 1949

CONTENTS

I. DOCUMENTATION RELATING TO THE MANDATES SYSTEM

Folder 1.

The Treaty of Peace between the Allied and Associated Powers and Germany, 28 June, 1919—Part IV—German rights and interests outside Germany (excerpt)—Articles 118-127.

The Treaty of Peace between the Allied and Associated Powers and Germany, 28 June, 1919—Part I—The Covenant of the League of Nations (excerpt)—Article 22.

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[Volume XII, 1922, Numbers 1, 2, 3 and 4.]

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See below: League of Nations—Responsibilities of the League arising out of Article 22 (Mandates)—Report by the Council to the Assembly—Annex 14.

League of Nations—Official Journal—Minutes of the sixteenth session of the Council—Second meeting (excerpt)—531. Allowances to members of the Permanent Mandates Commission. [3rd Year, No. 2—February, 1922.]

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League of Nations—Permanent Mandates Commission—Rules of procedure submitted for the approval of the Council of the League of Nations. [C.404. M.295. 1921. VI.]

Rules of procedure of the Permanent Mandates Commission.

See above League of Nations—Official Journal—Minutes of the sixteenth session of the Council—Second meeting (excerpt)—Paragraph 535. [3rd Year, No. 2—February, 1922.]

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League of Nations—Permanent Mandates Commission—Minutes of the twelfth session (including the Report of the Commission to the Council)—Annex 4: Summary of the procedure to be followed in the matter of petitions concerning mandated territories. [C.545. M.194. 1927. VI.]

League of Nations—"C" Mandates—Questionnaire intended to facilitate the preparation of the annual reports of the mandatory Powers. [C.397. M.299. 1921. VI.]

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Second plenary meeting (excerpt)—Speech by Mr. Leif Egeland (Union of South Africa).

Fourth plenary meeting (excerpt)—Speech by Professor Bailey (Australia).

Seventh plenary meeting (excerpt).

Minutes of the First Committee (General Questions)—Third meeting (excerpt): 10. Assumption by the United Nations of certain functions, powers and activities of the League (continued): Mandates System.

Annex 24 C.—Mandates [resolution].

II. Charter of the United Nations

Folder 2.

Chapters XII and XIII of the Charter.

III. RECORDS OF THE UNITED NATIONS CONFERENCE ON INTERNATIONAL ORGANIZATION, SAN FRANCISCO, 1945

Folder 3.

Meeting of the heads of delegations to organize the Conference.

Meeting of the heads of delegations to organize the Conference, 26 April, 1945 [29, DC/4] (excerpt).	

Plenary sessions of the Conference.

Records of proceedings.

Verbatim minutes of the second plenary session, 27 April, 1945, speech by Mr. Forde (Australia) [20, P/6]	See Volume 1*, pp. 177 and 178.
Addendum to verbatim minutes of the fifth plenary session, 30 April, 1945 [42, P/10 (*a*)]	See Volume 1, pp. 401 to 405.
Verbatim minutes of the seventh plenary session, 1 May, 1945 [58, P/15], speech by Mr. Fraser (New Zealand)	See Volume 1, p. 512.

Commission II—General Assembly.

Records of proceedings.

Summary of meeting of Commission and committee officers, 3 May, 1945 [83, II/3]	See Volume 8, pp. 4 to 9.
Terms of reference for Commission II, Statement by the President, 3 May, 1945 [74, II/2]	See Volume 8, pp. 15 and 16.

Committee II/4—Trusteeship System.

Records of proceedings.

Summary report of 1st meeting, 5 May, 1945 [113, II/4/2]	See Volume 10, pp. 423 and 424.

* All references in this column are to volumes of the *Documents of the United Nations Conference on International Organization, San Francisco, 1945*, United Nations Information Organizations, London, New York.

Summary report of 2nd meeting, 10 May, 1945 [241, II/4/7] — See Volume 10, pp. 428 and 429.

Summary report of 3rd meeting, 11 May, 1945 [260, II/4/8] — See Volume 10, pp. 433 and 434.

Summary report of 4th meeting, 14 May, 1945 [310, II/4/11] — See Volume 10, pp. 439 to 441.

Summary report of 5th meeting, 15 May, 1945 [364, II/4/13] — See Volume 10, pp. 446 and 447.

Summary report of 6th meeting, 17 May, 1945 [404, II/4/17] — See Volume 10, pp. 452 to 454.

Corrigenda to the summary report of the 6th meeting, 17 May, 1945 [404, II/4/17 (1)] — See Volume 10, p. 454.

Summary report of 7th meeting, 18 May, 1945 [448, II/4/18] — See Volume 10, pp. 459 and 460.

Summary report of 8th meeting, 22 May, 1945 [512, II/4/21] — See Volume 10, pp. 468 to 470.

Summary report of 9th meeting, 23 May, 1945 [552, II/4/23] — See Volume 10, pp. 475 to 478.

Summary report of 10th meeting, 24 May, 1945 [580, II/4/24] — See Volume 10, pp. 485 to 488.

Summary report of 11th meeting, 31 May, 1945 [712, II/4/30] — See Volume 10, pp. 496 to 500.

Summary report of 12th meeting, 1 June, 1945 [735, II/4/31] — See Volume 10, pp. 506 and 507.

Summary report of 13th meeting, 8 June, 1945 [877, II/4/35] — See Volume 10, pp. 513 to 518.

Summary report of 14th meeting, 15 June, 1945 [1018, II/4/38] — See Volume 10, pp. 543 to 548.

Summary report of 15th meeting, 18 June, 1945 [1090, II/4/43] — See Volume 10, pp. 561 to 564.

Summary report of 16th meeting, 20 June, 1945 [1143, II/4/46] — See Volume 10, pp. 601 to 603.

Documents.

Opinion of the Department of Foreign Relations of Mexico [2, G/7 (*c*)] — See Volume 3, pp. 139 to 142, 145 to 148 and 162.

Observations of the Government of Venezuela [2, G/7 (*d*) (*l*)] — See Volume 3, pp. 222 and 223.

Comments and amendments by the delegation of Ecuador [2, G/7 (*p*)] — See Volume 3, p. 427.

Amendment submitted on behalf of Australia [2, G/14 (*l*)] — See Volume 3, pp. 548 and 549.

International Trusteeship System, French preliminary draft [2, G/26 (*a*)] — See Volume 3, pp. 604 to 606.

Arrangements for international trusteeship, additional chapter proposed by the United States [2, G/26 (*c*)] — See Volume 3, pp. 607 and 608.

Territorial trusteeship, United Kingdom draft of chapter for inclusion in United Nations Charter [2, G/26 (*d*)] — See Volume 3, pp. 609 to 614.

Draft proposals of the Chinese delegation on international territorial trusteeship [2, G/26 (*e*)] — See Volume 3, pp. 615 to 617.

Analysis of papers presented by Australia, China, France, United Kingdom and United States [230, II/4/5] — See Volume 10, pp. 641 to 655.

Amendments of the Soviet delegation to the United States draft on trusteeship system [2, G/26 (*f*)] — See Volume 3, pp. 618 and 619.

Supplement to analysis of papers presented by Australia, China, France, United Kingdom and United States—Analysis of proposal on trusteeship of the Soviet Union entitled "Amendments of the Soviet delegation to the United States draft on trusteeship system" [324, II/4/5 (*a*)] — See Volume 10, pp. 671 to 673.

Annex A to report of rapporteur of Committee II/4 — See Volume 10, pp. 614 to 618.

Annex B to report of rapporteur of Committee II/4 — See Volume 10, p. 619.

Annex C—Joint statement by the delegates of the United Kingdom and the United States — See Volume 10, pp. 620 and 621.

Annex D—Statement by the delegate of France — See Volume 10, p. 622.

Sub-Committee II/4/A.

Documents.

Text of working paper as approved and amended in full committee through the tenth meeting, 24 May, 1945 [WD. 33, II/4/A/1] — See Volume 10, pp. 701 to 703.

Text of paragraph A-1 adopted by the Sub-Committee in the meeting of 1 June, 1945 [727, II/4/A/2] — See Volume 10, p. 707.

Section B of chapter on dependent territories and arrangements for international trusteeship [1044, II/4/37 (2)] — See Volume 10, pp. 709 to 712.

Commission II—General Assembly.

Records of proceedings.

Verbatim minutes of 3rd meeting of Commission II, 20 June, 1945 [1144, II/16] — See Volume 8, pp. 125 to 154.

Corrigendum to verbatim minutes of 3rd meeting of Commission II, 20 June, 1945 [1208, II/16 (1)] — See Volume 8, pp. 155 to 159.

Co-ordination Committee.

Records of proceedings.

Summary record of 37th meeting, 20 June, 1945 [WD. 437, CO/201] (excerpt). [English only.]

Summary record of 40th meeting, 22 June, 1945 [WD. 440, CO/204] (excerpt). [English only.]

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Documents.

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Chapter XII, Declaration concerning Non-Self-Governing Territories. [WD. 411, CO/171.]

Chapter XII, Policy regarding Non-Self-Governing Territories [1134, CO/171 (1)] See Volume 15, pp. 104 to 106.

Chapter XII (A), International Trusteeship System. [WD. 412, CO/172.]

Chapter XII (X), International Trusteeship System [1138, CO/172 (1)] See Volume 15, pp. 107 to 113.

Chapter XII (B), The Trusteeship Council. [WD. 413, CO/173.]

Chapter XII (Y), The Trusteeship Council [1137, CO/173 (1)] See Volume 15, pp. 114 to 116.

Draft Charter of the United Nations as finally approved in English by both the Co-ordination Committee and the Advisory Committee of Jurists on 22 June, 1945. The text in French was approved in part by the Advisory Committee of Jurists on 22 June, 1945 [1159, CO/181] See Volume 15, pp. 170 to 212.

Plenary sessions of the Conference.

Records of proceedings.

Verbatim minutes of the 9th plenary session, 25 June, 1945 [1210, P/20]: See Volume 1,

Speech by the rapporteur of Commission II pp. 622 and 623,

Speech by the rapporteur of the Steering Committee pp. 628 and 629,

Speech by Lord Halifax p. 631.

Verbatim minutes of the closing plenary session, 26 June, 1945 [1209, P/19]: See Volume 1,
Speech by Mr. Koo (China) p. 661,
Speech by Mr. Gromyko (Union of Soviet Socialist Republics) p. 664,
Speech by Field-Marshal Smuts (Union of South Africa) p. 678.

Documents.

Report of the rapporteur of Commission II to the plenary session [1177, II/18] See Volume 8, pp. 249 to 256.

Revised report of the rapporteur of Commission II to the plenary session [1180, II/18 (1)] See Volume 8, pp. 265 to 272.

Charter of the United Nations and Statute of the International Court of Justice See Volume 15, pp. 335 to 364.

IV. RECORDS OF THE GENERAL ASSEMBLY, FIRST PART OF THE FIRST SESSION

Folder 4.

Inclusion of item in the agenda.

Documents.

Agenda for the first part of the First Session of the General Assembly.

Reference of items from the agenda of the General Assembly and the report of the Preparatory Commission to the Committees of the General Assembly—Report of the General Assembly (Annex 2 *c*) A/9.

Folder 5.

Plenary meetings of the General Assembly.

Records of proceedings.

12th plenary meeting (excerpt)—Discussion of the report of the Preparatory Commission —Speech by Mr. Nicholls (Union of South Africa).

Folder 6.

Fourth Committee.

Records of proceedings and documents.

Summary record of meetings from 1st to 12th meeting and annexes.

Folder 7.

Plenary meetings of the General Assembly.

Records of proceedings and document.

27th plenary meeting—Non-Self-Governing Peoples: report of the Fourth Committee: resolutions (A/34).

Non-Self-Governing Peoples—Report of the Fourth Committee to the General Assembly (Annex 13) A/34.

Folder 8.

Plenary meetings of the General Assembly.

Resolution.

Resolutions adopted on the report of the Fourth Committee—9 (1). Non-Self-Governing Peoples.

V. RECORDS OF THE GENERAL ASSEMBLY, SECOND PART OF THE FIRST SESSION

Folder 9.

Inclusion of item in the agenda.

Documents.

Agenda for the second part of the First Session of the General Assembly.

Allocation of agenda items to Committees—Report of the General Committee to the General Assembly (Annex 30) A/163.

Folder 10.

Fourth Committee.

Records of proceedings.

14th meeting.
15th meeting.
16th meeting.
17th meeting.
18th meeting.
19th meeting.
20th meeting.

Folder 11.

Fourth Committee.

Documents.

Suggested procedure for the consideration of items on the agenda of the Fourth Committee —Memorandum prepared by the Secretariat (Annex 10)	A/C.4/59.
Statement by Mr. Novikov, representative of the Union of Soviet Socialist Republics (Annex 11)	A/C.4/57.
Communications concerning Trusteeship Agreements—Memorandum prepared by the Secretariat (Annex 12)	A/117.
Report of the Secretary-General on Trusteeship Agreements (Annex 12 *a*)	A/135.
Delegation of India: draft resolution concerning the Administering Authority in Trust Territories (Annex 12 *b*)	A/C.4/33.
Delegation of China: draft resolution on Trusteeship Agreements (Annex 12 *c*)	A/C.4/64.
Statement by the Union of South Africa on the outcome of their consultations with the peoples of South-West Africa as to the future status of the mandated Territory and implementation to be given to the wishes thus expressed (Annex 13)	A/123.
Statement by Field-Marshal the Right Hon. J. C. Smuts, representative of the Union of South Africa (Annex 13 *a*)	A/C.4/41.
Delegation of Egypt: draft resolution concerning procedure with respect to consideration of the statement of the Government of the Union of South Africa with reference to South-West Africa (Annex 13 *b*)	A/C.4/47.
Delegation of India: draft resolution relating to South-West Africa (Annex 13 *c*)	A/C.4/65.
Communications received by the Secretariat relating to territories to which the trusteeship system might apply in accordance with Article 77 of the Charter—Memorandum prepared by the Secretariat	
Annex 16	A/C.4/37.
Annex 16 *a*	A/C.4/37/Add. 1.
Annex 16 *b*	A/C.4/37/Add. 2.
Report of Sub-Committee 2 (Annex 21)	A/C.4/68.

Folder 12.

Sub-Committee 2 of the Fourth Committee.

Records of proceedings.

1st meeting (excerpt).
2nd meeting (excerpt).
7th meeting (excerpt).
8th meeting.
9th meeting.
10th meeting.
13th meeting (excerpt).

Folder 13.

Sub-Committee 2 of the Fourth Committee.

Documents.

Composition of Sub-Committee 2 and proposed procedure—Memorandum by the Secretariat (Annex 1)	A/C.4/Sub.2/2.
Procedure to be followed in relation to the remaining work of the Sub-Committee—Proposal submitted by the rapporteur (Annex 1 *a*)	A/C.4/Sub.2/13.
Procedure to be followed in relation to the statement of the Government of the Union of South Africa—Proposal submitted by the rapporteur (Annex 4)	A/C.4/Sub.2/30.
Draft report by the rapporteur for submission to the Fourth Committee (Annex 5)	A/C.4/Sub.2/43.

Folder 14.

Fourth Committee.

Records of proceedings and document.

21st meeting.

25th meeting (excerpt).

Statement by the Union of South Africa on the outcome of their consultations with the peoples of South-West Africa as to the future status of the mandated territory and implementation to be given to the wishes thus expressed—Report of the Fourth Committee (Annex 76)	A/250.

Folder 15.

Plenary meetings of the General Assembly.

Records of proceedings and document.

64th meeting (excerpt)—Future status of South-West Africa: report of the Fourth Committee: resolution.

[*Note—See Folder 14 for:*
Report of the Fourth Committee A/250.]

Folder 16.

Plenary meetings of the General Assembly.

Resolution.

Resolutions adopted on the reports of the Fourth Committee—65 (I). Future status of South-West Africa.

VI. RECORDS OF THE GENERAL ASSEMBLY, SECOND SESSION

Folder 17.

Inclusion of item in the agenda.

Documents.

Agenda for the Second Session of the General Assembly.

Distribution of work among the Committees.

Folder 18.

Fourth Committee.

Records of proceedings.

29th meeting.
30th meeting.
31st meeting.
32nd meeting.
33rd meeting.
38th meeting.
39th meeting.
40th meeting.
44th meeting (excerpt).

45th meeting.
47th meeting (excerpt).

Folder 19.

Fourth Committee.

Documents.

Note by the Secretary-General on communications received by the Secretary-General —Annex 3 *c*	A/C.4/94.
Communications received by the Secretary-General : memorandum on South-West Africa by the Reverend Michael Scott, with a preface by Freda Troupe—Annex 3 *d*	A/C.4/95.
Communications received by the Secretary-General : letter from the Reverend Michael Scott transmitting petitions from inhabitants of South-West Africa—Annex 3 *e*	A/C.4/96.
Communications received by the Secretary-General : cablegram from the Reverend Michael Scott—Annex 3 *f*	A/C.4/97.
Statement by the delegation of the Union of South Africa regarding documents A/C.4/95 and A/C.4/96—Annex 3 *g*	A/C.4/118.
Draft resolution submitted by the delegation of India—Annex 3 *h*	A/C.4/99.
Poland : amendments to resolution proposed by India (A/C.4/99) *See Folder 18, 38th meeting, p. 49.*	A/C.4/103.
Amendments proposed by the delegation of Cuba to the draft resolution submitted by the delegation of India (A/C.4/99)—Annex 3 *i*	A/C.4/112.
Amendment proposed by the delegation of Panama to the draft resolution submitted by the delegation of India (A/C.4/99)—Annex 3 *j*	A/C.4/113.
Amendments proposed by the delegation of the Philippines to the draft resolution submitted by the delegation of India (A/C.4/99)—Annex 3 *k*	A/C.4/115/Rev. 1.
Revision by the delegation of India of the resolution submitted by the delegation of India (A/C.4/99)—Annex 3 *l*	A/C.4/99/Rev. 1.
Poland : amendment to revised resolution proposed by India (A/C.4/99/Rev. 1) *See Folder 18, 45th meeting, p. 96.*	A/C.4/122.

Draft resolution submitted by the delegation of Denmark—Annex 3 *m* — A/C.4/100.

Peru: amendment to resolution proposed by Denmark (A/C.4/100) — A/C.4/114.
See Folder 18, 39th meeting, p. 56.

Amendments proposed by the delegation of Belgium to the draft resolution submitted by the delegation of Denmark (A/C.4/100)—Annex 3 *n* — A/C.4/116.

Amendment proposed by the delegation of Denmark to the draft resolution submitted by the delegation of Denmark (A/C.4/100)—Annex 3 *o* — A/C.4/117.

Revision by the delegation of Denmark of the draft resolution submitted by the delegation of Denmark (A/C.4/100)—Annex 3 *p* — A/C.4/100/Rev. 1.

Netherlands: amendment to revised resolution proposed by Denmark (A/C.4/100/Rev. 1) — A/C.4/121.
See Folder 18, 45th meeting, p. 94.

[*Note: See Folder 21 for:*
Report of the Fourth Committee (A/422) — A/C.4/126.]

Folder 20.

Plenary meetings of the General Assembly.

Records of proceedings.

104th plenary meeting—Question of South-West Africa: report of the Fourth Committee (A/422 and A/429) (excerpt).

105th plenary meeting—Continuation of the discussion of proposed new trusteeship agreements.

Folder 21.

Plenary meetings of the General Assembly.

Documents.

Consideration of proposed new trusteeship agreements, if any: question of South-West Africa—Report of the Fourth Committee—Annex 13 — A/422.

Consideration of proposed new trusteeship agreements: question of South-West Africa—Communication from the Government of

the Union of South Africa on the future status of South-West Africa (General Assembly Resolutions 9 (I) of 9 February, 1946, and 65 (I) of 14 December, 1946)—Note by the Secretary-General A/334.

Consideration of proposed new trusteeship agreements: question of South-West Africa—Communication from the Government of the Union of South Africa on "steps taken by the Union Government to inform the population of South-West Africa of the outcome of the discussions at the last session of the United Nations General Assembly regarding the future of the Territory" (General Assembly Resolutions 9 (I) of 9 February, 1946, and 65 (I) of 14 December, 1946)—Note by the Secretary-General A/334/Add. 1.

Consideration of proposed new trusteeship agreements, if any: question of South-West Africa—Denmark: amendment to the draft resolution submitted by the Fourth Committee (A/422) A/429.

See Folder 20, 104th meeting, pp. 575-576.

Folder 22.

Plenary meetings of the General Assembly.

Resolution.

Resolutions adopted on the reports of the Fourth Committee—141 (II). Consideration of proposed new trusteeship agreements, if any: question of South-West Africa.

VII. Records of the Trusteeship Council, Second Session

Folder 23.

Inclusion of item in the agenda.

Document.

Agenda for the second session of the Trusteeship Council T/47/Rev. 1.

Folder 24.

Trusteeship Council.

Records of proceedings.

6th meeting (excerpt).

10th meeting (excerpt).

15th meeting.
18th meeting (excerpts).

Folder 25.

Trusteeship Council.

Documents.

General Assembly Resolution 141 (II) of 1 November, 1947, regarding the question of South-West Africa: Note by the Secretary-General T/52.

Report by the Government of the Union of South Africa on the administration of South-West Africa for the year 1946.

Communications received by the Secretary-General relating to South-West Africa: Note by the Secretariat T/55.

Communications received by the Secretary-General relating to South-West Africa: Note by the Secretariat T/55/Add. 1.

Questions to be transmitted to the Government of the Union of South Africa (Report of the Drafting Committee) T/96.
See Folder 26—Resolution 28 (II) of the Trusteeship Council—Annex and Folder 24—18th meeting, pp. 30 to 32.

Folder 26.

Trusteeship Council.

Resolution.

Resolutions adopted by the Trusteeship Council during its second session—28 (II). Report of the Government of the Union of South Africa on the administration of South-West Africa for the year 1946.

VIII. RECORDS OF THE TRUSTEESHIP COUNCIL, THIRD SESSION

Folder 27.

Inclusion of item in the agenda.

Document.

Agenda.

Folder 28.

Trusteeship Council.

Records of proceedings.

31st meeting (excerpt).
41st meeting.
42nd meeting (excerpt).

Folder 29.

Trusteeship Council.

Documents.

Reply of the Government of the Union of South Africa to the Trusteeship Council questionnaire on the report to the United Nations on the administration of South-West Africa for the year 1946	T/175.
Communications received by the Secretary-General under rule 24 of the rules of procedure for the Trusteeship Council	T/181.
Communications received by the Secretary-General under rule 24 of the rules of procedure for the Trusteeship Council	T/181/Add. 1.
Communications received by the Secretary-General under rule 24 of the rules of procedure for the Trusteeship Council	T/181/Add. 2.
Communications received by the Secretary-General under rule 24 of the rules of procedure for the Trusteeship Council	T/181/Add. 3.
Communications received by the Secretary-General under rule 24 of the rules of procedure for the Trusteeship Council	T/181/Add. 4.
Communications received by the Secretary-General under rule 24 of the rules of procedure for the Trusteeship Council	T/181/Add. 5.
Communications received by the Secretary-General under rule 24 of the rules of procedure for the Trusteeship Council	T/181/Add. 6.
Communications received by the Secretary-General under rule 24 of the rules of procedure for the Trusteeship Council	T/181/Add. 7.
Report of the Drafting Committee on the report on the administration of the Trust Territory of South-West Africa for 1946	T/209.

Report of the Trusteeship Council covering its second and third sessions—Chapter VII—South-West Africa—Report on the administration of South-West Africa for 1946 A/603.

IX. Records of the General Assembly, first part of the Third Session

Folder 30.

Inclusion of item in the agenda.

Documents.

Agenda of the General Assembly, Third Session.

Distribution of work among the Committees.

Folder 31.

Fourth Committee.

Records of proceedings.

76th meeting.
77th meeting.
78th meeting.
79th meeting.
80th meeting.
81st meeting.
82nd meeting.
83rd meeting.
84th meeting.
85th meeting.

Folder 32.

Fourth Committee.

Documents.

Report of the Fourth Committee A/734.

Denmark, Norway and Uruguay : draft resolution A/C.4/163/Corr. 1.
See A/734, pp. 405 and 406.

Denmark, Norway and Uruguay : revised draft resolution A/C.4/163/Rev. 1.
See A/734, pp. 407 and 411.

India : draft resolution — A/C.4/164.
See A/734, pp. 407 and 408.

Greece : amendment to the draft resolution of Denmark, Norway and Uruguay (A/C.4/163) — A/C.4/165.
See A/734, pp. 406 and 407.

Cuba : amendment to the draft resolution submitted by Denmark, Norway and Uruguay (A/C.4/163) — A/C.4/166.
See A/734, pp. 408 and 409.

India : sub-amendment to the amendment of Cuba (A/C.4/166) to the draft resolution of Denmark, Norway and Uruguay (A/C.4/163/Rev. 1) — A/C.4/167.
See Folder 31, 82nd meeting, pp. 358 and 359.

India : sub-amendment to the amendment of Cuba (A/C.4/166) to the draft resolution of Denmark, Norway and Uruguay (A/C.4/163/Rev. 1) — A/C.4/167/Rev. 1.
See A/734, pp. 408 and 410.

Burma and Philippines : amendment to the revised draft resolution of Denmark, Norway and Uruguay (A/C.4/163/Rev. 1) — A/C.4/168.
See Folder 31, 83rd meeting, p. 371.

Belgium : amendment to the draft resolution of Denmark, Norway and Uruguay (A/C.4/163/Rev. 1) — A/C.4/169.
See Folder 31, 82nd meeting, p. 362.

India : amendment to the revised draft resolution of Denmark, Norway and Uruguay (A/C.4/163/Rev. 1) — A/C.4/170.
See Folder 31, 84th meeting, p. 373.

Report of the Government of the Union of South Africa on the administration of South-West Africa : report of the Trusteeship Council—Letter dated 19 November, 1948, from the Delegation of the Union of South Africa to the Chairman of the Fourth Committee — A/C.4/171.

Draft report of the Fourth Committee — A/C.4/172.
Same text as A/734.

[*Note—See Folder 29 for :*
Report of the Trusteeship Council covering its second and third sessions—Chapter VII —South-West Africa—Report on the administration of South-West Africa for 1946 — A/603.]

Folder 33.

Plenary meetings of the General Assembly.

Records of proceedings and documents.

164th plenary meeting—Report of the Government of the Union of South Africa on the administration of South-West Africa. Report of the Trusteeship Council: report of the Fourth Committee.

[*Note—See Folder 29 for:*
Report of the Trusteeship Council covering its second and third sessions—Chapter VII—South-West Africa—Report on the administration of South-West Africa for 1946 A/603.

See Folder 32 for:
Report of the Fourth Committee A/734.]

Folder 34.

Plenary meetings of the General Assembly.

Resolution.

227 (III). Question of South-West Africa.

X. Records of the Trusteeship Council, Fifth Session

Folder 35.

Meetings of the Trusteeship Council.

Records of proceedings.

1st meeting.
25th meeting.
27th meeting.

Folder 36.

Trusteeship Council.

Documents.

Question of South-West Africa—Note by the Secretary-General T/371.

Question of South-West Africa: draft resolution submitted by the Philippines T/383.

[*Note—See Folder 42 for:*
Letter from Mr. J. R. Jordaan, deputy permanent representative of the Union of South Africa to the United Nations, addressed to the Secretary-General A/929.]

Folder 37.

South-West Africa Constitution Act.

Letter from Mr. J. R. Jordaan, deputy permanent representative of the Union of South Africa to the United Nations, addressed to the Secretary-General A/929.

South-West Africa Constitution Act, 1925—The Laws of South-West Africa, 1925 : Proclamations and principal Government notices issued in South-West Africa, 1st January to 31st December, 1925 (excerpt).

Folder 38.

Trusteeship Council.

Resolution.

111 (V). Question of South-West Africa.

XI. Records of the General Assembly, Fourth Session

Folder 39.

Inclusion of item in the agenda.

Document.

Agenda of the General Assembly—Fourth Session A/994, A/994/Add. 1 and A/994/Add. 2.

Distribution of work among the Committees.

Folder 40.

Fourth Committee.

Records of proceedings.

128th meeting.
129th meeting.
130th meeting.

131st meeting.
132nd meeting.
133rd meeting.
134th meeting.
135th meeting.
136th meeting.
137th meeting.
138th meeting.
139th meeting.
140th meeting.
141st meeting.

Folder 41.

Fourth Committee.

Documents.

India : draft resolution — A/C.4/L.53.
See Folder 42—Question of South-West Africa : report of the Trusteeship Council —Report of the Fourth Committee—Paragraph 29 (A/1180).

Denmark, Norway, Syria and Thailand : draft resolution — A/C.4/L.54.
See Folder 42—Question of South-West Africa : report of the Trusteeship Council —Report of the Fourth Committee—Paragraph 34 (i) (A/1180).

India : draft resolution — A/C.4/L.55.
See Folder 42—Question of South-West Africa : report of the Trusteeship Council —Report of the Fourth Committee—Paragraph 34 (ii) (A/1180).

Guatemala : proposal — A/C.4/L.56.

Guatemala : revised proposal — A/C.4/L.56/Rev. 1.
See Folder 42—Question of South-West Africa : report of the Trusteeship Council —Report of the Fourth Committee—Paragraph 7 (A/1180).

Dominican Republic : amendment to the proposal submitted by Guatemala (A/C.4/L.56) — A/C.4/L.58.
See Folder 40, 132nd meeting, paragraph 2.

Union of Soviet Socialist Republics : amendment to the draft resolution submitted by India (A/C.4/L.53) — A/C.4/L.61.
See Folder 42—Question of South-West Africa : report of the Trusteeship Council

—Report of the Fourth Committee—Paragraph 32 (A/1180).

Guatemala : amendment to the draft resolution submitted by India (A/C.4/L.53) — A/C.4/L.63.
See Folder 40, 136th meeting, paragraphs 48 and 49.

Denmark, India, Norway, Syria and Thailand : draft resolution — A/C.4/L.64.
See Folder 42—Question of South-West Africa : report of the Trusteeship Council —Report of the Fourth Committee—Paragraph 35 (A/1180).

Communications received by the Secretary-General — A/C.4/L.57 and A/C.4/L.57/Corr. 1.

Resolution adopted by the Fourth Committee at its 134th meeting, on 23 November, 1949 — A/C.4/L.60.
See Folder 42—Question of South-West Africa : report of the Trusteeship Council —Report of the Fourth Committee—Paragraph 10 (A/1180).

Report of Sub-Committee 7 to the Fourth Committee — A/C.4/L.62.

Question of South-West Africa : report of the Trusteeship Council—Draft report of the Fourth Committee — A/C.4/L.65.
See Folder 42—Question of South-West Africa : report of the Trusteeship Council —Report of the Fourth Committee—(A/1180).

Documents submitted by the Reverend Michael Scott — A/C.4/L.66.

Folder 42.

Plenary meetings of the General Assembly.

Records of proceedings and documents.

269th plenary meeting.

Letter from Mr. J. R. Jordaan, deputy permanent representative of the Union of South Africa to the United Nations, addressed to the Secretary-General — A/929.

Report of the Trusteeship Council covering its fourth and fifth sessions—3. Question of South-West Africa — A/933.

Note by the Secretary-General — A/962.

Question of South-West Africa : report of the Trusteeship Council—Report of the Fourth Committee A/1180.

Question of South-West Africa—Argentina, Belgium, Brazil, Canada, China, Denmark, Dominican Republic, Guatemala, Iraq, Lebanon, Mexico, Norway, Syria, Thailand, Turkey, United States of America, Uruguay : amendment to draft resolution II proposed by the Fourth Committee (A/1180) A/1197.

See 269th plenary meeting, paragraph 53.

Folder 43.

Plenary meetings of the General Assembly.

Resolutions.

Resolutions adopted on the reports of the Fourth Committee—337 (IV). Question of South-West Africa : reiteration of previous resolutions and submission of reports. 338 (IV). Question of South-West Africa : request for an advisory opinion of the International Court of Justice.

2

DOCUMENTS SUBMITTED TO THE COURT BY THE SECRETARY-GENERAL OF THE UNITED NATIONS AT THE REQUEST OF THE COURT

XXVIII

Non-self-governing territories

Summary of information transmitted to the Secretary-General during 1946.

United Nations Publications, Sales No. 1947 VIB 1.

Fourth Session

Special Committee on information transmitted under Article 73(e) of the Charter.

Non-self-governing territories.
Date of receipt of information on territories enumerated. Item IV of the Provisional Agenda A/AC.28/W.6

Fourth Session

Information from non-self-governing territories. Summary and analysis of information transmitted under Article 73 (e) of the Charter A/915,
Report of the Secretary-General.

Fourth Session

Information from non-self-governing territories.
Summary and analysis of information transmitted under Article 73 (e) of the Charter A/915 Addendum 1.
Report of the Secretary-General.

Annex 673

Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgement of 8 October 2007, I.C.J. Reports 1952, p. 659

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

CASE CONCERNING TERRITORIAL AND MARITIME DISPUTE BETWEEN NICARAGUA AND HONDURAS IN THE CARIBBEAN SEA

(NICARAGUA *v.* HONDURAS)

JUDGMENT OF 8 OCTOBER 2007

2007

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRE DU DIFFÉREND TERRITORIAL ET MARITIME ENTRE LE NICARAGUA ET LE HONDURAS DANS LA MER DES CARAÏBES

(NICARAGUA c. HONDURAS)

ARRÊT DU 8 OCTOBRE 2007

Official citation:
Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. *Honduras), Judgment, I.C.J. Reports 2007*, p. 659

Mode officiel de citation:
Différend territorial et maritime entre le Nicaragua et le Honduras dans la mer des Caraïbes (Nicaragua c. Honduras), arrêt, C.I.J. Recueil 2007, p. 659

ISSN 0074-4441
ISBN 978-92-1-071035-0

Sales number
N° de vente: 928

8 OCTOBER 2007

JUDGMENT

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(NICARAGUA *v.* HONDURAS)

DIFFÉREND TERRITORIAL ET MARITIME ENTRE LE NICARAGUA ET LE HONDURAS DANS LA MER DES CARAÏBES

(NICARAGUA c. HONDURAS)

8 OCTOBRE 2007

ARRÊT

TABLE OF CONTENTS

INTERNATIONAL COURT OF JUSTICE

2007
8 October
General List
No. 120

YEAR 2007

8 October 2007

CASE CONCERNING TERRITORIAL AND MARITIME DISPUTE BETWEEN NICARAGUA AND HONDURAS IN THE CARIBBEAN SEA

(NICARAGUA *v.* HONDURAS)

JUDGMENT

Present: *President* Higgins; *Vice-President* Al-Khasawneh; *Judges* Ranjeva, Shi, Koroma, Parra-Aranguren, Buergenthal, Owada, Simma, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov; *Judges* ad hoc Torres Bernárdez, Gaja; *Registrar* Couvreur.

In the case concerning territorial and maritime dispute between Nicaragua and Honduras 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, Counsel and Advocate;

H.E. Mr. Samuel Santos, Minister for Foreign Affairs of the Republic of Nicaragua;

Mr. Ian Brownlie, C.B.E., Q.C., F.B.A., member of the English Bar, Chairman of the United Nations International Law Commission, Emeritus Chichele Professor of Public International Law, University of Oxford,

member of the Institut de droit international, Distinguished Fellow, All Souls College, Oxford,
Mr. Alex Oude Elferink, Research Associate, Netherlands Institute for the Law of the Sea, Utrecht University,
Mr. Alain Pellet, Professor at the University of Paris X-Nanterre, member and former Chairman of the United Nations International Law Commission,
Mr. Antonio Remiro Brotóns, Professor of International Law, Universidad Autónoma, Madrid,

as Counsel and Advocates;

Mr. Robin Cleverly, M.A., D.Phil, C.Geol, F.G.S., Law of the Sea Consultant, Admiralty Consultancy Services,
Mr. Dick Gent, Law of the Sea Consultant, Admiralty Consultancy Services,

as Scientific and Technical Advisers;

Ms Tania Elena Pacheco Blandino, First Secretary, Embassy of the Republic of Nicaragua in the Kingdom of the Netherlands,
Ms Nadine Susani, Doctor of Public Law, Centre de droit international de Nanterre (CEDIN), University of Paris X-Nanterre,

as Assistant Advisers;

Ms Gina Hodgson, Ministry of Foreign Affairs of the Republic of Nicaragua,
Ms Ana Mogorrón Huerta,

as Assistants,

and

the Republic of Honduras,

represented by

H.E. Mr. Max Velásquez Díaz, Ambassador of the Republic of Honduras to the French Republic,
H.E. Mr. Roberto Flores Bermúdez, Ambassador of the Republic of Honduras to the United States of America,

as Agents;

H.E. Mr. Julio Rendón Barnica, Ambassador of the Republic of Honduras to the Kingdom of the Netherlands,

as Co-Agent;

Mr. Pierre-Marie Dupuy, Professor of Public International Law, University of Paris (Panthéon-Assas), and the European University Institute in Florence,
Mr. Luis Ignacio Sánchez Rodríguez, Professor of International Law, Universidad Complutense de Madrid,
Mr. Christopher Greenwood, C.M.G., Q.C., Professor of International Law, London School of Economics and Political Science,
Mr. Philippe Sands, Q.C., Professor of Law, University College London,

Mr. Jean-Pierre Quéneudec, Professor emeritus of International Law at the University of Paris I (Panthéon-Sorbonne),
Mr. David A. Colson, LeBoeuf, Lamb, Green & MacRae, L.L.P., Washing-

ton, D.C., member of the California State Bar and District of Columbia Bar,
Mr. Carlos Jiménez Piernas, Professor of International Law, Universidad de Alcalá, Madrid,
Mr. Richard Meese, avocat à la Cour d'appel de Paris,

as Counsel and Advocates;

H.E. Mr. Milton Jiménez Puerto, Minister for Foreign Affairs of the Republic of Honduras,
H.E. Mr. Eduardo Enrique Reina García, Deputy Minister for Foreign Affairs of the Republic of Honduras,
H.E. Mr. Carlos López Contreras, Ambassador, National Counsellor, Ministry of Foreign Affairs of the Republic of Honduras,
H.E. Mr. Roberto Arita Quiñónez, Ambassador, Director of the Special Bureau on Sovereignty Affairs, Ministry of Foreign Affairs of the Republic of Honduras,
H.E. Mr. José Eduardo Martell Mejía, Ambassador of the Republic of Honduras to the Kingdom of Spain,
H.E. Mr. Miguel Tosta Appel, Ambassador, Chairman of the Honduran Demarcation Commission, Ministry of Foreign Affairs of the Republic of Honduras,
H.E. Ms Patricia Licona Cubero, Ambassador, Adviser for Central American Integration Affairs, Ministry of Foreign Affairs of the Republic of Honduras,

as Advisers;

Ms Anjolie Singh, Assistant, University College London, member of the Indian Bar,
Ms Adriana Fabra, Associate Professor of International Law, Universitat Autónoma de Barcelona,
Mr. Javier Quel López, Professor of International Law, Universidad del País Vasco,
Ms Gabriela Membreño, Assistant Adviser to the Minister for Foreign Affairs of the Republic of Honduras,
Mr. Sergio Acosta, Minister Counsellor, Embassy of the Republic of Honduras in the Kingdom of the Netherlands,

as Assistant Advisers;

Mr. Scott Edmonds, Cartographer, International Mapping,
Mr. Thomas D. Frogh, Cartographer, International Mapping,

as Technical Advisers.

THE COURT,

composed as above,

after deliberation,

delivers the following Judgment:

1. On 8 December 1999 the Republic of Nicaragua (hereinafter "Nicaragua") filed in the Registry of the Court an Application dated the same day, instituting proceedings against the Republic of Honduras (hereinafter "Honduras") in respect of a dispute relating to the delimitation of the maritime areas appertaining to each of those States in the Caribbean Sea.

In its Application, Nicaragua seeks to found the jurisdiction of the Court on the provisions of Article XXXI of the American Treaty on Pacific Settlement, officially designated, according to Article LX thereof, as the "Pact of Bogotá" (hereinafter referred to as such), as well as on the declarations accepting the jurisdiction of the Court made by the Parties, as provided for in Article 36, paragraph 2, of the Statute of the Court.

2. Pursuant to Article 40, paragraph 2, of the Statute, the Registrar immediately communicated a certified copy of the Application to the Government of Honduras; and pursuant to paragraph 3 of that Article, all States entitled to appear before the Court were notified of the Application.

3. Pursuant to the instructions of the Court under Article 43 of the Rules of Court, the Registrar addressed to States parties to the Pact of Bogotá the notifications 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 moreover addressed to the Organization of American States (hereinafter "OAS") the notification provided for in Article 34, paragraph 3, of the Statute. The Registrar subsequently transmitted to this organization copies of the pleadings filed in the case and asked its Secretary-General to inform him whether or not it intended to present observations in writing within the meaning of Article 69, paragraph 3, of the Rules of Court. The OAS indicated that it did not intend to submit any such observations.

4. Pursuant to the instructions of the Court under Article 43 of the Rules of Court, the Registrar addressed to States parties to the United Nations Convention on the Law of the Sea of 10 December 1982 (hereinafter "UNCLOS") the notifications provided for in Article 63, paragraph 1, of the Statute. In addition, the Registrar addressed to the European Union, which is also party to that Convention, the notification provided for in Article 43, paragraph 2, of the Rules of Court, as adopted on 29 September 2005, and asked that organization whether or not it intended to furnish observations under that provision. In response, the Registrar was informed that the European Union did not intend to submit observations in the case.

5. Since the Court included upon the Bench no judge of the nationality of either of the Parties, each Party proceeded to exercise its right conferred by Article 31, paragraph 3, of the Statute to choose a judge *ad hoc* to sit in the case. Nicaragua chose Mr. Giorgio Gaja and Honduras first chose Mr. Julio González Campos, who resigned on 17 August 2006, and subsequently Mr. Santiago Torres Bernárdez.

6. By an Order dated 21 March 2000, the President of the Court fixed 21 March 2001 and 21 March 2002, respectively, as the time-limits for the filing of the Memorial of Nicaragua and the Counter-Memorial of Honduras; those pleadings were duly filed within the time-limits so prescribed.

7. At the time of filing of the Counter-Memorial, Honduras also filed two sets of additional documents which were not produced as annexes thereto, but were, according to Honduras, provided only for informational purposes. At a meeting held by the President of the Court with the Agents of the Parties on 5 June 2002 both Parties agreed on the procedure to be followed with regard to those additional documents. In particular, it was agreed that within three weeks following that meeting, Honduras would inform the Registry which of the additional documents it intended to produce as annexes to the said Counter-Memorial under Article 50 of the Rules of Court, and that by 13 September 2002 Honduras would file those annexes in the Registry. In accordance

with the agreed procedure, by a letter of 25 June 2002, the Co-Agent of Honduras provided the Registry with a list indicating which of the additional documents were to be produced as annexes. Those additional annexes to the Counter-Memorial of Honduras were duly filed within the time-limit agreed upon.

8. By an Order of 13 June 2002, the Court authorized the submission of a Reply by Nicaragua and a Rejoinder by Honduras, and fixed 13 January 2003 and 13 August 2003 as the respective time-limits for the filing of those pleadings. The Reply of Nicaragua and the Rejoinder of Honduras were filed within the time-limits so prescribed.

9. By letter of 22 May 2001, the Government of Colombia requested to be furnished with copies of the pleadings and documents annexed thereto. Having ascertained the views of the Parties pursuant to Article 53, paragraph 1, of the Rules of Court, the Court decided to grant that request. The Registrar communicated that decision to the Government of Colombia and to the Parties by letters of 29 June 2001. By letter of 6 May 2003 the Government of Jamaica requested to be furnished with copies of the pleadings and documents annexed thereto. Having ascertained the views of the Parties pursuant to Article 53, paragraph 1, of the Rules of Court, the Court decided to grant that request. The Registrar communicated that decision to the Government of Jamaica and to the Parties by letters of 30 May 2003.

By letter of 31 August 2004, the Government of El Salvador requested to be furnished with copies of the pleadings and annexed documents in the case. Having ascertained the views of the Parties pursuant to Article 53, paragraph 1, of the Rules of Court, the Court decided that it was not appropriate to grant that request. The Registrar communicated that decision to the Government of El Salvador and to the Parties by letters dated 20 October 2004.

10. By a joint letter of 9 February 2005, the Agent of Nicaragua and the Co-Agent of Honduras communicated to the Court a document signed at Tegucigalpa on 1 February 2005, whereby the Minister for Foreign Affairs of Nicaragua and the Secretary of State for Foreign Affairs of Honduras made known to the Court the wishes of their respective Heads of State regarding the scheduling of the hearings in the case.

11. By letter of 8 September 2006, the Government of El Salvador requested once again to be furnished with copies of the pleadings and annexed documents in the case. Having ascertained the views of the Parties pursuant to Article 53, paragraph 1, of the Rules of Court, the Court decided that it was not appropriate to grant that request. The Registrar communicated that decision to the Government of El Salvador and to the Parties by letters dated 16 November 2006.

12. On 2 February 2007, the Agent of Nicaragua informed the Court that his Government wished to produce 12 new documents, namely 11 letters and one satellite image, in accordance with Article 56 of the Rules of Court. The Court, having ascertained the views of the Honduran Government, decided that as one of the documents formed part of the case file as an annex to the Reply of Nicaragua, it should not be regarded as a new document, and that the satellite image was "part of a publication readily available" pursuant to paragraph 4 of Article 56 of the Rules of Court, and as such could be referred to during the oral proceedings. The Court further decided not to authorize the production of the remaining documents. The Registrar informed the Parties accordingly by letters of 26 February 2007.

13. On 15 February 2007, the Co-Agent of Honduras informed the Court that during the oral proceedings the Honduran Government intended to present

a short video. On 5 March 2007, the Registrar informed the Parties that the Court had decided not to accede to Honduras's request.

14. In accordance with Article 53, paragraph 2, of the Rules of Court, the Court decided, after ascertaining the views of the Parties, that copies of the pleadings and documents annexed would be made available to the public as from the opening of the oral proceedings.

15. Public hearings were held between 5 March and 23 March 2007, at which the Court heard the oral arguments and replies of:

For Nicaragua: H.E. Mr. Carlos José Argüello Gómez,
Mr. Alex Oude Elferink,
Mr. Ian Brownlie,
Mr. Antonio Remiro Brotóns,
Mr. Alain Pellet.

For Honduras: H.E. Mr. Max Velásquez Díaz,
Mr. Christopher Greenwood,
Mr. Luis Ignacio Sánchez Rodríguez,
Mr. Philippe Sands,
Mr. Carlos Jiménez Piernas,
Mr. Jean-Pierre Quéneudec,
Mr. Pierre-Marie Dupuy,
Mr. David A. Colson,
H.E. Mr. Roberto Flores Bermúdez.

16. At the hearings, questions were put by Members of the Court and replies given orally and in writing, in accordance with Article 61, paragraph 4, of the Rules of Court. Honduras commented orally on the oral replies given by Nicaragua. Pursuant to Article 72 of the Rules of Court, each Party presented written observations on the written replies received from the other.

*

17. In its Application, the following requests were made by Nicaragua:

> "Accordingly, *the Court is asked to determine* the course of the single maritime boundary between the areas of territorial sea, continental shelf and exclusive economic zone appertaining respectively to Nicaragua and Honduras, in accordance with equitable principles and relevant circumstances recognized by general international law as applicable to such a delimitation of a single maritime boundary.
>
> This request for the determination of a single maritime boundary is subject to the power of the Court to establish different delimitations, for shelf rights and fisheries respectively, if, in the light of the evidence, this course should be necessary in order to achieve an equitable solution.
>
> Whilst the principal purpose of this Application is to obtain a declaration concerning the determination of the maritime boundary or boundaries, the Government of Nicaragua reserves the right to claim compensation for interference with fishing vessels of Nicaraguan nationality or vessels licensed by Nicaragua, found to the north of the parallel of latitude

14° 59′ 08″ claimed by Honduras to be the course of the delimitation line. Nicaragua also reserves the right to claim compensation for any natural resources that may have been extracted or may be extracted in the future to the south of the line of delimitation that will be fixed by the Judgment of the Court.

The Government of Nicaragua, further, reserves the right to supplement or to amend the present Application as well as to request the Court to indicate provisional measures which might become necessary in order to preserve the rights of Nicaragua."

18. In the written proceedings, the following submissions were presented by the Parties:

On behalf of the Government of Nicaragua,

in the Memorial:

"Having regard to the considerations set forth in this Memorial and, in particular, the evidence relating to the relations of the Parties.

May it please the Court to adjudge and declare that:

The bisector of the lines representing the coastal fronts of the two parties, as applied and described in paragraphs 22 and 29, Chapter VIII above, and illustrated on the graphic, constitutes the boundary for the purposes of the delimitation of the disputed areas of the continental shelf and exclusive economic zone in the region of the Nicaraguan Rise.

The approximate median line, as described in paragraphs 27 and 29, Chapter X above, and illustrated on the graphic, constitutes the boundary for the purpose of the delimitation of the disputed areas of the territorial sea, extending to the outer limit of the territorial sea, but in the absence of a sector coterminous with the mouth of the River Coco and with the terminus of the land boundary";

in the Reply:

"In accordance with Article 49, paragraph 4, of the Rules of Court, the Government of the Republic of Nicaragua confirms the Submissions previously made in the Memorial submitted to the Court on 21 March 2001."

On behalf of the Government of Honduras,

in the Counter-Memorial:

"Having regard to the considerations set forth in this Counter-Memorial and, in particular, the evidence put to the Court by the Parties,

May it please the Court to adjudge and declare that:

1. The boundary for the purpose of the delimitation of the disputed areas of the territorial sea, and extending to the outer limit of the territorial sea, is a straight and horizontal line drawn from the current mouth of the River Coco, as agreed between the Parties, to the 12-mile limit at a point where it intersects with the 15th parallel (14° 59.8′); and

2. The boundary for the purpose of the delimitation of the disputed areas of the continental shelf and Exclusive Economic Zone in the region is a line extending from the above-mentioned point at the 12-mile limit,

eastwards along the 15th parallel (14° 59.8′) until it reaches the longitude at which the 1986 Honduras/Colombian maritime boundary begins (meridian 82); and further or in the alternative;

3. In the event that the Court decides not to adopt the line indicated above for the delimitation of the continental shelf and Exclusive Economic Zone, then the Court should declare a line extending from the 12-mile limit, eastwards down to the 15th parallel (14° 59.8′) and give due effect to the islands under Honduran sovereignty which are located immediately to the north of the 15th parallel";

in the Rejoinder:

"Having regard to the considerations set forth in the Honduran Counter-Memorial and this Rejoinder,

May it please the Court to adjudge and declare that:

1. From the point decided by the Honduras/Nicaragua Mixed Commission in 1962 at 14° 59.8′ N latitude, 83° 08.9′ W longitude to 14° 59.8′ N latitude, 83° 05.8′ W longitude, the demarcation of the fluvial boundary line and the delimitation of the maritime boundary line which divide the jurisdictions of Honduras and Nicaragua shall be the subject of negotiation between the Parties to this case which shall take into account the changing geographical characteristics of the mouth of the River Coco; and

2. East of 14° 59.8′ N latitude, 83° 05.8′ W longitude, the single maritime boundary which divides the maritime jurisdictions of Honduras and Nicaragua follows 14° 59.8′ N latitude until the jurisdiction of a third State is reached."

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

On behalf of the Government of Nicaragua,

At the hearing of 20 March 2007:

"Having regard to the considerations set forth in the Memorial, Reply and hearings and, in particular, the evidence relating to the relations of the Parties.

May it please the Court to adjudge and declare that:

The bisector of the lines representing the coastal fronts of the two Parties as described in the pleadings, drawn from a fixed point approximately 3 miles from the river mouth in the position 15° 02′ 00″ N and 83° 05′ 26″ W, constitutes the single maritime boundary for the purposes of the delimitation of the disputed areas of the territorial sea, exclusive economic zone and continental shelf in the region of the Nicaraguan Rise.

The starting-point of the delimitation is the thalweg of the main mouth of the River Coco such as it may be at any given moment as determined by the Award of the King of Spain of 1906.

Without prejudice to the foregoing, the Court is requested to decide the question of sovereignty over the islands and cays within the area in dispute."

On behalf of the Government of Honduras,

At the hearing of 23 March 2007:

"Having regard to the pleadings, written and oral, and to the evidence submitted by the Parties,

May it please the Court to adjudge and declare that:

1. The islands Bobel Cay, South Cay, Savanna Cay and Port Royal Cay, together with all other islands, cays, rocks, banks and reefs claimed by Nicaragua which lie north of the 15th parallel are under the sovereignty of the Republic of Honduras.
2. The starting-point of the maritime boundary to be delimited by the Court shall be a point located at 14° 59.8′ N latitude, 83° 05.8′ W longitude. The boundary from the point determined by the Mixed Commission in 1962 at 14° 59.8′ N latitude, 83° 08.9′ W longitude to the starting-point of the maritime boundary to be delimited by the Court shall be agreed between the Parties to this case on the basis of the Award of the King of Spain of 23 December 1906, which is binding upon the Parties, and taking into account the changing geographical characteristics of the mouth of the River Coco (also known as the River Segovia or Wanks).
3. East of the point at 14° 59.8′ N latitude, 83° 05.8′ W longitude, the single maritime boundary which divides the respective territorial seas, exclusive economic zones and continental shelves of Honduras and Nicaragua follows 14° 59.8′ N latitude, as the existing maritime boundary, or an adjusted equidistance line, until the jurisdiction of a third State is reached."

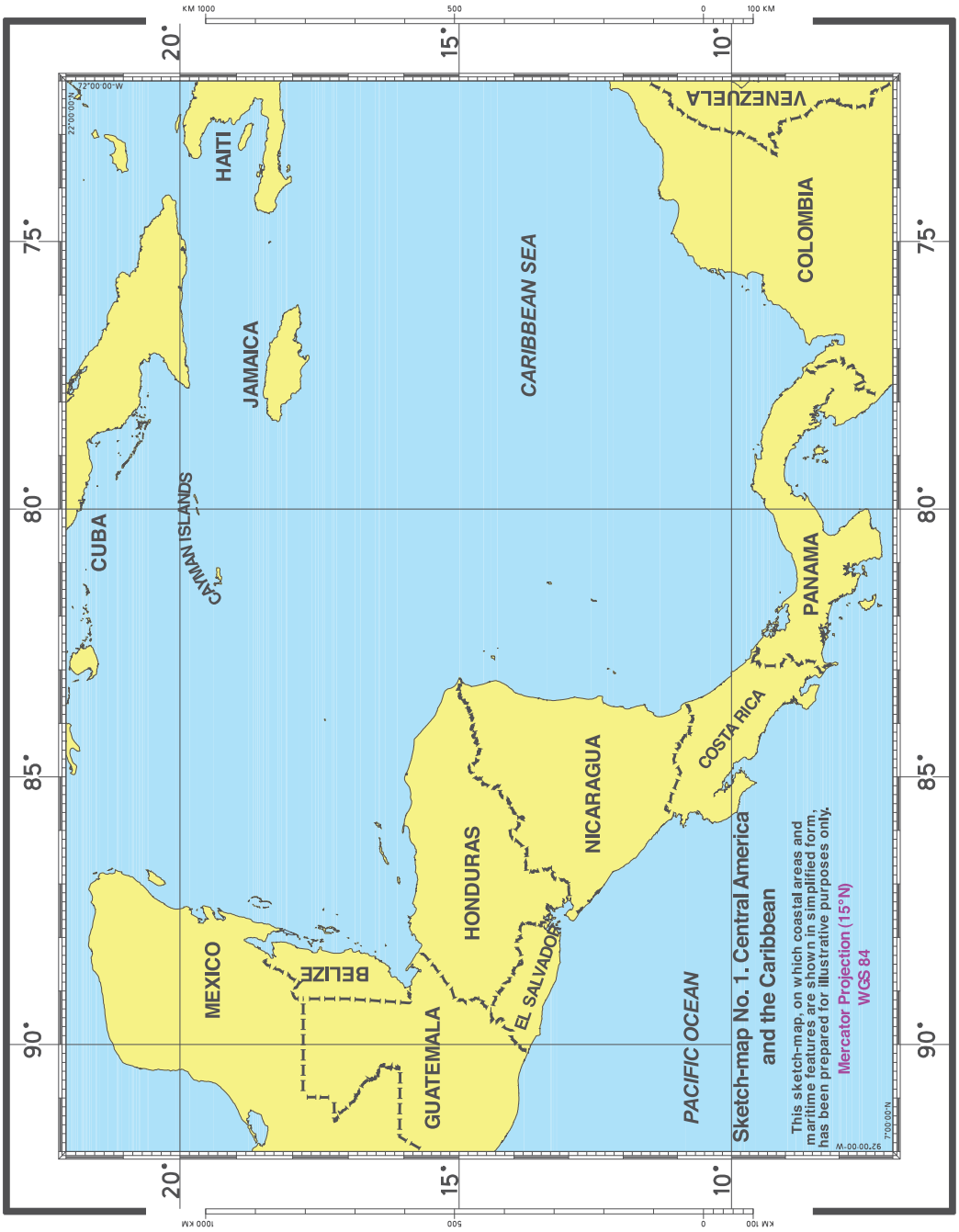
* * *

2. Geography

2.1. Configuration of the Nicaraguan and Honduran Coasts

20. The area within which the delimitation sought in the present case is to be carried out lies in the basin of the Atlantic Ocean between 9° to 22° N and 89° to 60° W, commonly known as the Caribbean Sea (for the general geography of the area, see below, p. 670, sketch-map No. 1). The Caribbean Sea embraces an area of approximately 2,754,000 square kilometres (1,063,000 square miles) and is located between the landmasses of North and South America. The Caribbean Sea is an arm of the Atlantic Ocean partially enclosed to the north and east by the islands of the West Indies, and bounded to the south and west by South and Central America.

21. The continental coasts of Venezuela, Colombia, and Panama bound the Caribbean Sea to the south and Costa Rica, Nicaragua, Honduras, Guatemala, Belize, and the Yucatán Peninsula of Mexico bound it to the west. To the north and east it is bounded by the Greater Antilles islands of Cuba, Hispaniola, Jamaica, and Puerto Rico and by the Lesser Antilles, consisting of the island arc that extends from the Virgin Islands


KM 1000
500
0
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20°
15°
10°
75°
80°
85°
90°
VENEZUELA
COLOMBIA
HAITI
JAMAICA
CARIBBEAN SEA
CUBA
CAYMAN ISLANDS
PANAMA
COSTA RICA
NICARAGUA
HONDURAS
EL SALVADOR
BELIZE
MEXICO
GUATEMALA
PACIFIC OCEAN
Sketch-map No. 1. Central America and the Caribbean
This sketch-map, on which coastal areas and maritime features are shown in simplified form, has been prepared for illustrative purposes only.
Mercator Projection (15°N)
WGS 84

in the north-east to the islands of Trinidad and Tobago, off the Venezuelan coast, in the south-east.

22. The Caribbean Sea is divided into four main submarine basins that are separated from one another by submerged ridges and rises. These are the Yucatán, Cayman, Colombian and Venezuelan basins. The northernmost Yucatán Basin is separated from the Gulf of Mexico by the Yucatán Channel, which runs between the island of Cuba and the Yucatán Peninsula of Mexico. The Cayman Basin, which is located further south, is partially separated from the Yucatán Basin by the Cayman Ridge that extends from the southern part of Cuba toward the Central American State of Guatemala and, midway, rises to the surface to form the Cayman Islands.

23. Nicaragua and Honduras are located in the south-western part of the Caribbean Sea. To the south of Nicaragua lie Costa Rica and Panama and to the east Nicaragua faces the mainland coast of Colombia. To the north-west of Honduras lie Guatemala, Belize and Mexico and to the north Honduras faces Cuba and the Cayman Islands. Finally, Jamaica is situated to the north-east of Nicaragua and Honduras. The south-western tip of the island of Jamaica is about 340 nautical miles distant from the mouth of the River Coco where the land boundary between Nicaragua and Honduras terminates on the Caribbean coast.

24. The Nicaraguan coastal front on the Caribbean Sea spans around 480 kilometres. The coast runs slightly west of south after Cape Gracias a Dios all the way to the Nicaraguan border with Costa Rica except for the eastward protrusion at Punta Gorda (14° 19′ N latitude).

25. Honduras, for its part, has a Caribbean coastal front of approximately 640 kilometres that runs generally in an east-west direction between the parallels 15° to 16° of north latitude. The Honduran segment of the Central American coast along the Caribbean continues its northward extension beyond Cape Gracias a Dios to Cape Falso (15° 14′ N latitude) where it begins to swing towards the west. At Cape Camarón (15° 59′ N latitude) the coast turns more sharply so that it runs almost due west all the way to the Honduran border with Guatemala.

26. The two coastlines roughly form a right angle that juts out to sea. The convexity of the coast is compounded by the cape formed at the mouth of the River Coco, which generally runs east as it nears the coast and meets the sea at the eastern tip of Cape Gracias a Dios. Cape Gracias a Dios marks the point of convergence of both States' coastlines. It abuts a concave coastline on its sides and has two points, one on each side of the margin of the River Coco separated by a few hundred metres.

27. The continental margin off the east coast of Nicaragua and Honduras is generally termed the "Nicaraguan Rise". It takes the form of a relatively flat triangular shaped platform, with depths around 20 metres. Approximately midway between the coast of those countries and the

coast of Jamaica, the Nicaraguan Rise terminates by deepening abruptly to depths of over 1,500 metres. Before descending to these greater depths the Rise is broken into several large banks, such as Thunder Knoll Bank and Rosalind Bank (also known as Rosalinda Bank) that are separated from the main platform by deeper channels of over 200 metres. In the shallow area of the ridge close to the mainland of Nicaragua and Honduras there are numerous reefs, some of which reach above the water surface in the form of cays.

28. Cays are small, low islands composed largely of sand derived from the physical breakdown of coral reefs by wave action and subsequent reworking by wind. Larger cays can accumulate enough sediment to allow for colonization and fixation by vegetation. The tropical shallow-water conditions of the western Caribbean are conducive for coral reef growth. Cays, and especially the smaller ones, are extremely vulnerable to tropical storms and hurricanes which occur frequently in the Caribbean.

29. The insular features present on the continental shelf in front of Cape Gracias a Dios, to the north of the 15th parallel, include Bobel Cay, Savanna Cay, Port Royal Cay and South Cay, located between 30 and 40 nautical miles east of the mouth of the River Coco.

In this Judgment, the names of the maritime features which appear in both the English and the French text and sketch-maps are those most commonly used, whether Spanish or English.

30. The area to the north-east of Cape Gracias a Dios also includes a number of important fishing banks located between 60 and 170 nautical miles from the mouth of the River Coco. Of particular importance are Middle Bank, Thunder Knoll Bank, Rosalind Bank and Gorda Bank.

2.2. Geomorphology of the Mouth of the River Coco

31. The land area abutting upon the maritime areas in dispute, which is known as the Miskito or Mosquito Coast, is one of deltas, sandbars, and lagoons. It is a coast where extensive and rapid morphological changes have occurred. As a result, the coast north and south of Cape Gracias a Dios is of a typical accumulative type: the shoreline is formed by long stretching sandy barrier islands or spits. Many of those islands and spits migrate constantly and slowly enclose lagoons which eventually will be filled with fine sediment and become dry land. A collection of coastal lagoons extends from Cape Camarón in Honduras to Bluefields, a town in the south of the Nicaraguan Caribbean coast. This chain of lagoons is separated from the sea by thin sand barriers. These lagoons are more in the nature of shallow pools formed by the rivers at their mouths than inroads from the sea. Continuous sediments are deposited in them and sand barriers obstruct their entrance. The most notable effect is the rapid

accretion and inevitable advance of the coastal front due to the constant deposition of terrigenous sediments carried by the rivers to the sea. The strong erosion of the mountains in the interior, the abundant rain and the considerable flow on the rivers that drain the Caribbean slope of the region cause this deposition.

32. The River Coco is the longest river of the Central American isthmus and bears one of the largest volumes of water. From a geomorphological point of view the mouth of the River Coco is a typical delta which forms a protrusion of the coastline forming a cape: Cape Gracias a Dios. All deltas are by definition geographical accidents of an unstable nature and suffer changes in size and form in relatively short periods of time. The River Coco has been progressively projecting Cape Gracias a Dios towards the sea carrying with it huge quantities of alluvium. The sediments deposited by the River Coco are dispersed by a network of diverging and shifting river channels, a process which gives rise to a deltaic plain. The hierarchy of the river channels changes rapidly: the main channels may quickly become secondary channels and vice versa. The accumulated delta sediments are subsequently transported and redeposited along the Honduran coast by the Caribbean Current and along the Nicaraguan coast by the Colombia-Panama Gyre (a circular current running anticlockwise along the Nicaraguan coast). In sum, both the delta of the River Coco and even the coastline north and south of it show a very active morpho-dynamism. The result is that the river mouth is constantly changing its shape, and unstable islands and shoals form in the mouth where the river deposits much of its sediment.

* *

3. Historical Background

33. Both Nicaragua and Honduras, which had been under the rule of Spain, became independent States in 1821. Thereafter, Nicaragua and Honduras, together with Guatemala, El Salvador, and Costa Rica, formed the Federal Republic of Central America, also known as the United Provinces of Central America, which existed from 1823 to 1840. In 1838 Nicaragua and Honduras seceded from the Federation, each maintaining the territory it had before. The Federation disintegrated in the period between 1838 and 1840.

34. On 25 July 1850, the Republic of Nicaragua and the Queen of Spain signed a treaty recognizing Nicaragua's independence from Spain. According to the terms of this Treaty the Queen of Spain recognized as "free, sovereign and independent the Republic of Nicaragua with all its territories that now belong to it from sea to sea, or that will later belong to it" (Art. II). The Treaty also stated that the Queen of Spain relinquished

> "the sovereignty, rights and actions she holds over the American territory located between the Atlantic and the Pacific sea, with its adjacent islands, known before by the name of the province of Nicaragua, now Republic of the same name, and over the remainder of the territories that have incorporated into said Republic" (Art. I).

The names of the adjacent islands pertaining to Nicaragua were not specified in the Treaty.

35. On 15 March 1866, the Republic of Honduras and the Queen of Spain signed a treaty recognizing Honduras's independence from Spain. According to the terms of this Treaty the Queen of Spain recognized the Republic of Honduras

> "as a free, sovereign and independent state, which comprises the entire territory that was the province of that name during the period of Spanish domination, this territory being bounded in the East, Southeast and South by the Republic of Nicaragua" (Art. I).

The Treaty also stated that the Queen renounced "the sovereignty, rights and claims that she has in respect of the territory of the said Republic". The Treaty recognized Honduran territory as comprising "the adjacent islands that lie along its coasts in both oceans" without identifying these islands by name.

36. Nicaragua and Honduras later attempted to delimit their boundary by signing the Ferrer-Medina Treaty in 1869 and the Ferrer-Uriarte Treaty in 1870, but neither treaty entered into force.

37. On 7 October 1894 Nicaragua and Honduras successfully concluded a general boundary treaty known as the Gámez-Bonilla Treaty which entered into force on 26 December 1896 (*I.C.J. Reports 1960*, pp. 199-202). Article II of the Treaty, according to the principle of *uti possidetis juris*, provided that "each Republic is owner of the territory which at the date of independence constituted respectively, the provinces of Honduras and Nicaragua". Article I of the Treaty further provided for the establishment of a Mixed Boundary Commission to demarcate the boundary between Nicaragua and Honduras:

> "The Governments of Honduras and Nicaragua shall appoint representatives who, duly authorized, shall organize a Mixed Boundary Commission, whose duty it shall be to settle in a friendly manner all pending doubts and differences, and to demarcate on the spot the dividing line which is to constitute the boundary between the two Republics."

38. The Commission, which met from 1900 to 1904, fixed the boundary from the Pacific Ocean at the Gulf of Fonseca to the Portillo de Teotecacinte, which is located approximately one third of the way across the land territory, but it was unable to determine the boundary from that point to the Atlantic coast. Pursuant to the terms of Article III of the

Gámez-Bonilla Treaty, Nicaragua and Honduras subsequently submitted their dispute over the remaining portion of the boundary to the King of Spain as sole arbitrator. King Alfonso XIII of Spain handed down an Arbitral Award on 23 December 1906, which drew a boundary from the mouth of the River Coco at Cape Gracias a Dios to Portillo de Teotecacinte. The operative part of the Award stated that:

> "The extreme common boundary point on the coast of the Atlantic will be the mouth of the River Coco, Segovia or Wanks, where it flows out in the sea close to Cape Gracias a Dios, taking as the mouth of the river that of its principal arm between Hara and the Island of San Pío where said Cape is situated, leaving to Honduras the islets and shoals existing within said principal arm before reaching the harbour bar, and retaining for Nicaragua the southern shore of the said principal mouth with the said Island of San Pío, and also the bay and town of Cape Gracias a Dios and the arm or estuary called Gracias which flows to Gracias a Dios Bay, between the mainland and said Island of San Pío.
>
> Starting from the mouth of the Segovia or Coco, the frontier line will follow the *vaguada* or thalweg of this river upstream without interruption until it reaches the place of its confluence with the Poteca or Bodega, and thence said frontier line will depart from the River Segovia, continuing along the thalweg of the said Poteca or Bodega upstream until it joins the River Guineo or Namaslí.
>
> From this junction the line will follow the direction which corresponds to the demarcation of the *Sitio de Teotecacinte* in accordance with the demarcation made in 1720 to terminate at the *Portillo de Teotecacinte* in such a manner that said *Sitio* remains wholly within the jurisdiction of Nicaragua." (*Arbitral Award Made by the King of Spain on 23 December 1906 (Honduras* v. *Nicaragua), Judgment, I.C.J. Reports 1960*, pp. 202-203.)

39. Nicaragua subsequently challenged the validity and binding character of the Arbitral Award in a Note dated 19 March 1912. After several failed attempts to settle this dispute and a number of boundary incidents in 1957, the Council of the OAS took up the issue that same year. Through the mediation of an *ad hoc* Committee established by the Council of the OAS, Nicaragua and Honduras agreed to submit their dispute to the International Court of Justice.

40. In its Application instituting proceedings, filed on 1 July 1958, Honduras requested the Court to adjudge and declare that the failure by Nicaragua to give effect to the Arbitral Award "constitut[ed] a breach of an international obligation" (*ibid.*, p. 195) and that Nicaragua was under an obligation to give effect to the Award. Nicaragua, for its part, requested the Court to adjudge and declare that the decision rendered by the King of Spain did not "possess the character of a binding arbitral award", that in any event it was "incapable of execution by reason of its omissions, contradictions and obscurities" and that Nicaragua and Honduras were

"in respect of their frontier in the same legal situation as before 23 December 1906" (*Arbitral Award Made by the King of Spain on 23 December 1906 (Honduras* v. *Nicaragua), Judgment, I.C.J. Reports 1960*, pp. 198 and 199), the date of the Award.

41. In its Judgment, having considered the arguments of the Parties and evidence in the case file, the Court first found that "the Parties [had] followed the procedure that had been agreed upon for submitting their respective cases" to an arbitrator in accordance with the provisions of the Gámez-Bonilla Treaty. Thus the designation of King Alfonso XIII as arbitrator entrusted with the task of ruling on the boundary dispute between the two Parties was valid. The Court then examined Nicaragua's contention that the Gámez-Bonilla Treaty had lapsed before the King of Spain had agreed to act as arbitrator and found that "the Gámez-Bonilla Treaty was in force till 24 December 1906, and that the King's acceptance on 17 October 1904 of his designation as arbitrator was well within the currency of the Treaty".

42. The Court further considered that,

> "having regard to the fact that the designation of the King of Spain as arbitrator was freely agreed to by Nicaragua, that no objection was taken by Nicaragua to the jurisdiction of the King of Spain as arbitrator either on the ground of irregularity in his designation as arbitrator or on the ground that the Gámez-Bonilla Treaty had lapsed even before the King of Spain had signified his acceptance of the office of arbitrator, and that Nicaragua fully participated in the arbitral proceedings before the King, it is no longer open to Nicaragua to rely on either of these contentions as furnishing a ground for the nullity of the Award" (*ibid.*, p. 209).

43. The Court then turned to Nicaragua's allegation that the Award was "a nullity" on the grounds that it had been vitiated by *(a)* "excess of jurisdiction", *(b)* "essential error" and *(c)* "lack or inadequacy of reasons in support of the conclusions arrived at by the Arbitrator".

44. The Court stated that Nicaragua "by express declaration and by conduct, recognized the Award as valid and it [was] no longer open to Nicaragua to go back upon that recognition and to challenge the validity of the Award". Even in the absence of such recognition "the Award would, in the judgment of the Court, still have to be recognized as valid" for the following reasons.

First, the Court was unable to uphold the claim that the King of Spain had gone beyond the authority conferred upon him. Second, the Court added that it had not been able to discover in the arguments of Nicaragua any precise indication of "essential error" which would have had the effect, as alleged by Nicaragua, "of rendering the Award a nullity". In this regard, the Court observed that "[t]he instances of 'essential error' that Nicaragua [had] brought to the notice of the Court amount[ed] to no more than the evaluation of documents and of other evidence submitted

to the arbitrator". Third, the Court rejected the last ground of nullity raised by Nicaragua by concluding that

> "an examination of the Award show[ed] that it deal[t] in logical order and in some detail with all relevant considerations and that it contain[ed] ample reasoning and explanations in support of the conclusions arrived at by the arbitrator" (*Arbitral Award Made by the King of Spain on 23 December 1906 (Honduras* v. *Nicaragua), Judgment, I.C.J. Reports 1960*, pp. 215 and 216).

45. The Court finally dealt with the argument by Nicaragua that the Award was not capable of execution by reason of its "omissions, contradictions and obscurities". In this regard, the Court noted that

> "In view of the clear directive in the operative clause [fixing the common boundary point on the coast of the Atlantic as the mouth of the river Segovia or Coco, where it flows out into the sea] and the explanations in support of it in the Award, the Court [did] not consider that the Award [was] incapable of execution by reason of any omissions, contradictions or obscurities."

46. In the operative part of its Judgment, the Court found that the Award made by the King of Spain on 23 December 1906 was valid and binding and that Nicaragua was under an obligation to give effect to it (*ibid.*, p. 217).

47. As Nicaragua and Honduras could not thereafter agree on how to implement the 1906 Arbitral Award, Nicaragua requested the intervention of the Inter-American Peace Committee. The Committee subsequently established a Mixed Commission which completed the demarcation of the boundary line with the placement of boundary markers in 1962. The Mixed Commission determined that the land boundary would begin at the mouth of the River Coco, at 14° 59.8′ N latitude and 83° 08.9′ W longitude.

48. From 1963 to 1979, Honduras and Nicaragua generally enjoyed friendly relations. The first efforts at bilateral negotiations between the Parties on matters relating to the maritime boundary in the Caribbean were initiated at the request of Nicaragua, by means of a diplomatic Note dated 11 May 1977. In this communication addressed to the Minister for Foreign Affairs of Honduras, the Ambassador of Nicaragua to Honduras noted that his "Government wish[ed] to initiate conversations leading to the determination of the definitive marine and sub-marine delimitation in the Atlantic and Caribbean Sea zone".

By a diplomatic Note of 20 May 1977 the Minister for Foreign Affairs of Honduras replied that his "Government accept[ed] with pleasure the opening of negotiations" on the maritime delimitation. However these negotiations made no progress consequent upon the Sandinista revolution that toppled the Somoza Government in July 1979. In the period that followed until 1990 (when the new Nicaraguan Government of Vio-

leta Chamorro was sworn into office), relations between Nicaragua and Honduras deteriorated.

49. On 21 September 1979, Honduras sent a diplomatic Note to Nicaragua stating that a Honduran fishing vessel had been attacked by Nicaragua 8 miles north of the 15th parallel, which, according to the Honduran Note, served "as the limit between Honduras and Nicaragua". On 24 September 1979, Nicaragua sent a diplomatic Note in reply offering assurance that an urgent investigation would be carried out regarding the "capture [of a] Honduran motor fishing vessel . . . and crew by [a] Honduran fishing vessel . . ., being used by Nicaraguan regular forces". The Nicaraguan Note made no mention of the assertion by Honduras that the 15th parallel served as the boundary line between the two countries.

50. Nicaragua, on 19 December 1979, enacted the Continental Shelf and Adjacent Sea Act. The Preamble to that Act stated that prior to 1979,

> "foreign intervention [had] not permit[ted] the full exercise by the People of Nicaragua of [the nation's] rights over the Continental Shelf and Adjacent Sea — rights which correspond[ed] to the Nicaraguan Nation by history, geography and International Law".

Article 2 of the Act provided that "[t]he sovereignty and jurisdiction of Nicaragua extends over the sea adjacent to its seacoasts for 200 nautical miles". The official map of the continental shelf of Nicaragua of 1980, and the official map of the Republic dated 1982, both included a box comprising Rosalind, Serranilla and adjacent areas up to parallel 17°.

51. Honduras promulgated a new Constitution on 11 January 1982, which provided in Article 10 that, among others, the cays of Palo de Campeche and Media Luna and the banks of Salmedina, Providencia, De Coral, Rosalind and Serranilla "and all others located in the Atlantic that historically, geographically and juridically belong to it" were Honduran. Article 11 of the 1982 Honduran Constitution further declared an exclusive economic zone of 200 nautical miles.

52. On 23 March 1982, Honduras sent a diplomatic Note to Nicaragua with regard to an incident on 21 March 1982, involving the capture of four Honduran fishing vessels to the north of the 15th parallel by two Nicaraguan coastguard vessels, which had subsequently towed the Honduran fishing vessels to a Nicaraguan port, Puerto Cabezas, lying at approximately 14° N latitude. In the Note, Honduras affirmed that the 15th parallel had been traditionally recognized as the boundary line:

> "On Sunday the 21st of this month, two coastguard launches of the Sandinista Navy penetrated as far as Bobel and Media Luna Cays, 16 miles to the North of Parallel 15, which has been tradition-

> ally recognised by both countries to be the dividing line in the Atlantic Ocean. In flagrant violation of our sovereignty in waters under Honduran jurisdiction, they proceeded to capture four Honduran fishing launches and their crews, all of Honduran nationality towing them toward Puerto Cabezas, in Nicaragua."

53. On 14 April 1982, Nicaragua sent a diplomatic Note in response to Honduras asserting that Nicaragua had never recognized any maritime boundary with Honduras in the Caribbean Sea:

> "Your Excellency refers in your Note that on Sunday, March 21st, two of our Coastguard ships 'penetrated as far as Bobel and Media Luna Cays, 16 miles North of Parallel 15. This has been traditionally recognized by both countries to be the dividing line in the Atlantic.' This affirmation, to the least, surprises us, since Nicaragua has not recognized any maritime frontier with Honduras in the Caribbean Sea, being undefined until today the maritime boundary between Honduras and Nicaragua in said sea. Nicaragua understands that in Honduras there is a criterion that aspires to establish said Parallel as the boundary line. At no time has Nicaragua recognized it as such since that would imply an attempt against the territorial integrity and national sovereignty of Nicaragua. According to the established rules of international law, territorial matters must be necessarily resolve[d] in treaties validly celebrated and in conformity with the internal dispositions of the contracting States, not having effected to date, any agreement in this regard. Therefore, Nicaragua rejects Your Excellency's affirmation in the sense that it claims to establish Parallel 15 as the boundary line between our two countries in the Caribbean Sea."

In the Note, Nicaragua further stated that it considered that negotiations on the delimitation in the Caribbean Sea "should be undertaken through mixed commissions" but that "[i]n the interest of avoiding frictions between [the] two countries" such discussions should be "postponed, in order to wait the adequate moment to proceed with negotiations".

54. By a diplomatic Note dated 3 May 1982, the Minister for Foreign Affairs of Honduras continued the exchange by proposing that, pending a resolution of the problem, a temporary line or zone be created which would be without prejudice to the maritime rights that either State might claim in the future in the Caribbean Sea:

> "I agree with Your Excellency when you affirm that the maritime border between Honduras and Nicaragua has not been legally delimited. Despite this, it cannot be denied that there exists, or at least that there used to exist, a traditionally accepted line, which is that which corresponds to the Parallel which crosses Cape Gracias a Dios.

> There is no other way of explaining why it is only since a few months ago that there have occurred, with worrying frequency, border incidents between our two countries.
>
> However, I coincide with Your Excellency that this is not the appropriate moment at which to open a discussion on maritime borders . . .
>
> From what both Your Excellency and my Government have expressed, it is clear that our two countries desire the maintenance of peace, and will abstain from introducing new points of controversy in the current circumstances. To this end, however, I consider it necessary to adopt some sort of criterion, albeit informal and transitional, in order to prevent incidents such as that which concerns us now. The temporary establishment of a line or zone might be considered which, without prejudice to the rights that the two States might claim in the future, could serve as a momentary indicator of their respective areas of jurisdiction. I am sure through the frank and cordial dialogue we have already started, we will be able to find a satisfactory solution for both Parties."

55. On 18 September 1982, Honduras sent a diplomatic Note to Nicaragua protesting an attack alleged to have been initiated by Nicaragua on that day against a Honduran fishing boat near Bobel and Media Luna cays, north of the 15th parallel.

56. By a diplomatic Note of 19 September 1982, Nicaragua rejected the Honduran proposal to create a temporary line or zone as set out in the Honduran Foreign Minister's diplomatic Note of 3 May 1982 and further contested Honduras's version of the facts concerning the attack on a fishing vessel alleged by Honduras in its Note of 18 September 1982. In particular, Nicaragua noted that

> "the Government of Nicaragua manifests its deep astonishment at certain affirmations stated by Your Excellency in your Note [of 18 September 1982], in relation to the jurisdictional zone in the Caribbean Sea. As we have pointed out in previous Notes, the maritime frontier between Honduras and Nicaragua in the Caribbean Sea is not delimited nor do there exist traditional lines of jurisdiction between our two countries in that zone. This unquestionable reality was already accepted by the Republic of Honduras, in Note No. 254 DSM dated May 3 of the current year, that His Excellency, the Minister of Foreign Affairs of that country, Doctor Edgardo Paz Barnica, addressed to the Minister of Nicaragua, Miguel D'Escoto Brockmann, that one of its parts literally expresses: 'I agree with Your Excellency when you affirm that the maritime frontier between Honduras and Nicaragua has not been legally delimited.'"

57. On 27 June 1984, Honduras sent Nicaragua a diplomatic Note in which it protested in respect of the Nicaraguan official map of 1982 and

requested the map's rectification. Honduras claimed that the map had wrongfully included the banks and cays of Rosalind and Serranilla which Honduras claimed pertained to it.

58. Accusations and counter accusations over supposed incursions in the disputed maritime area continued throughout the 1980s and the 1990s, including during periods of bilateral negotiations. Numerous incidents involving the capture and/or attack by each State of fishing vessels belonging to the other State in the vicinity of the 15th parallel were recorded in a series of diplomatic exchanges.

59. Honduras concluded a maritime boundary treaty with Colombia on 2 August 1986. On 8 September 1986, Nicaragua sent a diplomatic Note to Honduras stating that the said treaty "pretend[ed] to divide between Honduras and Colombia extensive zones that include insular territories, adjacent seas and continental shelf that historically, geographically and legally correspond to the sovereignty of Nicaragua".

60. In response, Honduras sent a diplomatic Note to Nicaragua dated 29 September 1986 stating that the treaty in question

> "constitutes the expression of the sovereign will of two States to establish their maritime boundary in areas over which Nicaragua does not exercise and has never exercised any jurisdiction whatsoever, given that it cannot provide . . . historical, geographical or legal grounds to support any claim that those areas belong to it".

Honduras further indicated in the same Note that it would be willing to enter into negotiations with the Nicaraguan Government with regard to the maritime delimitation.

61. The Parties, through a Joint Declaration of the Foreign Ministers of Honduras and Nicaragua made on 5 September 1990, established a Mixed Commission for Maritime Affairs. According to this Joint Declaration, the purpose of the Commission was "the prevention and solution of maritime problems between both countries". The Joint Declaration also stated that the Mixed Commission would "examine, as a priority, border issues in the maritime areas of the Gulf of Fonseca and the Atlantic coast, and the fisheries problems derived from the above". The Mixed Commission met for the first time on 27 May 1991.

62. In a further Joint Declaration of 29 November 1991, the Parties declared that it was "necessary to search for solutions consistent with the ideals for the integration of Central America". Nicaragua contends that:

> "The general intent of this Joint Declaration was that Nicaragua and Honduras would not make agreements with non-Central Ameri-

> can States that could prejudice either Party. The specific intention was that Honduras would not ratify the maritime delimitation Treaty she had concluded with Colombia in August 1986. Nicaragua for her part agreed to discontinue the case it had pending against Honduras in the [Central American] Court [of Justice]."

63. The Mixed Commission for Maritime Affairs held its second meeting on 5 August 1992, and was scheduled to meet again on 7 July 1993, but that meeting was postponed. On 24 March 1995, Nicaragua proposed that the Parties seek to examine again the delimitation of maritime areas in the Caribbean Sea. The Mixed Commission for Maritime Affairs was merged on 20 April 1995 with the Commission of Boundary Cooperation to form a new Bi-national Commission, which held its first meeting on 20 April 1995 whereby it was agreed to create a sub-commission in charge of delimitation issues in the Caribbean Sea and demarcation of areas already delimited in the Gulf of Fonseca. The Sub-commission was actually established at the second meeting of the Bi-national Commission held on 15 to 16 June 1995. The Sub-commission however was unable to resolve the delimitation differences in the Caribbean Sea (its last meeting scheduled for 25 April 1997 was cancelled by mutual consent).

64. On 19 April 1995 Honduras sent a diplomatic Note in protest at the capture of a Honduran fishing vessel by Nicaraguan coastguard vessels. On 5 May 1995, Nicaragua sent a diplomatic Note to Honduras in response, reiterating its claims "up to parallel 17 latitude North" that it had first advanced in a Note dated 12 December 1994. Continuing the exchange, Honduras maintained its position that the 15th parallel constituted the maritime boundary.

65. By diplomatic Notes dated 18 and 27 December 1995 sent to the Nicaraguan Minister for Foreign Affairs, Honduras protested the capture of five Honduran fishing vessels and their crew on 17 December 1995 by Nicaraguan coastguards. By Notes dated 20 December 1995 and 6 January 1996, Nicaragua, referring to the seizure of only four Honduran vessels, informed the Honduran Minister for Foreign Affairs, *inter alia*, that it "[could] not permit the exploitation by third States of its natural resources in its legitimate national maritime areas".

66. Following these incidents, an *ad hoc* Commission was constituted as a result of a meeting held between the Presidents of Nicaragua and Honduras on 14 January 1996. The *ad hoc* Commission held a special meeting on 22 January 1996 in which both the Honduran and Nicaraguan delegations stated that the purpose was to enter into an interim agreement for a provisional common fishing zone in order to avoid the recurrence of the capture of fishing boats. The *ad hoc* Commission also

met on 31 January 1996. These meetings did not produce any results and were discontinued. Honduras's proposal for a "common fishing zone . . . 'three nautical miles to the North and three nautical miles to the South of Parallel 15° 00′ 00″ Latitude North and 82° 00′ 00″ Longitude West'" was rejected by Nicaragua. Nicaragua's counter-proposal was for the creation of a common fishing zone between the 15th and 17th parallels, and was similarly rejected by Honduras.

67. On 24 September 1997, the Parties signed a Memorandum of Understanding which allowed for the revival of bilateral negotiations on the boundary issues through the constitution of a new Mixed Commission "in order to explore possible solutions to the situations existing in the Gulf of Fonseca, the Pacific Ocean and the Caribbean Sea". Honduras states that the 1997 Mixed Commission was the last effort at bilateral negotiations between the Parties. According to Nicaragua, the

> "last phase of 'negotiation' took place on November 28, 1999, when the President of the Republic of Nicaragua was unexpectedly informed of the decision of the Honduran Government to ratify four days later the Treaty of August 2, 1986 on Maritime Delimitation with Colombia".

Honduras states that

> "the significance of [the 1986 Treaty between Colombia and Honduras] lies in its recognition by Colombia that the maritime area to the north of the 15th parallel forms part of Honduras, and that the 82nd meridian is the appropriate terminus for the delimitation".

Nicaragua claims that "[f]uture negotiations became impossible once Honduras took the step of ratifying the Treaty with Colombia".

68. Nicaragua in its pleadings informed the Court of the fact that on 29 November 1999, it filed an application instituting proceedings against Honduras as well as a request for the indication of provisional measures before the Central American Court of Justice. On 30 November 1999, the Central American Court of Justice entered the case on its docket. The present Court observes that the relevant documents in the public domain, available in Spanish on the website of the Central American Court of Justice (www.ccj.org.ni), reveal the following facts.

69. In the Application, Nicaragua asked the Central American Court of Justice to declare that Honduras, by proceeding to the approval and ratification of the 1986 Treaty between Colombia and Honduras on maritime delimitation, was acting in violation of certain legal instruments of regional integration, including the Tegucigalpa Protocol to the Charter of the Organization of Central American States (that Protocol entered into force on 23 July 1992). In its request for the indication of provisional measures, Nicaragua asked the Central American Court of Justice to order Honduras to abstain from approving and ratifying the 1986 Treaty, until the sovereign interests of Nicaragua in its maritime spaces, the pat-

rimonial interests of Central America and the highest interests of the regional institutions had been "safeguarded". By Order of 30 November 1999 the Central American Court of Justice ruled that Honduras suspend the procedure of ratification of the 1986 Treaty pending the determination of the merits in the case.

Honduras and Colombia continued the ratification process and on 20 December 1999 exchanged instruments of ratification. On 7 January 2000, Nicaragua made a further request for the indication of provisional measures asking the Central American Court of Justice to declare the nullity of Honduras's process of ratification of the 1986 Treaty. By Order of 17 January 2000, the Central American Court of Justice ruled that Honduras had not complied with its Order on provisional measures dated 30 November 1999 but considered that it did not have jurisdiction to rule on the request made by Nicaragua to declare the nullity of Honduras's ratification process.

70. In its judgment on the merits, on 27 November 2001 the Central American Court of Justice confirmed the existence of a "territorial patrimony of Central America". The Central American Court of Justice further held that, by having ratified the 1986 Treaty between Colombia and Honduras on maritime delimitation, Honduras had infringed ("ha infringido") a number of provisions of the Tegucigalpa Protocol to the Charter of the Organization of Central American States, which set out, *inter alia*, the fundamental objectives and principles of the Central American Integration System, including the concept of the "territorial patrimony of Central America".

71. Throughout the 1990s several diplomatic Notes were also exchanged with regard to the Parties' publication of maps concerning the area in dispute. Among them was a Note of 7 April 1994 sent by the Honduran Minister for Foreign Affairs protesting Nicaragua's circulation of an official map of Nicaragua, displaying an area denominated the "Nicaraguan Rise". The map depicted certain banks and cays, including Serranilla, as pertaining to Nicaragua. On 14 April 1994, Nicaragua responded to Honduras's protest at said map, stating that

> "[w]ithout prejudice of the rights that correspond to Nicaragua, [the Honduran Government] will have observed that the official map of the Republic of Nicaragua, clarifies most strictly and categorically, that the maritime frontiers in the Caribbean Sea have not been legally delimited".

In 1994, Honduras published an official map of Honduras that included, among other features, Media Luna Cays, Alargado Reef, Rosalind Bank, and Serranilla Banks and Cays within the "Honduran insular possessions in the Caribbean Sea". This publication elicited a diplomatic Note from Nicaragua dated 9 June 1995, in which it protested

the 1994 Honduran map and asserted that Nicaragua possessed insular and maritime rights in the area north of the 15th parallel.

* * *

4. Positions of the Parties: A General Overview

4.1. Subject-matter of the Dispute

72. In its Application and written pleadings Nicaragua asked the Court to determine the course of the single maritime boundary between the areas of territorial sea, continental shelf and exclusive economic zone appertaining respectively to Nicaragua and Honduras in the Caribbean Sea. Nicaragua states that it has consistently maintained the position that its maritime boundary with Honduras in the Caribbean Sea has not been delimited. During the oral proceedings, Nicaragua also made a specific request that the Court pronounce on sovereignty over islands located in the disputed area to the north of the boundary line claimed by Honduras running along 14° 59.8′ North latitude (hereinafter, for the sake of simplicity, generally referred to as the "15th parallel").

*

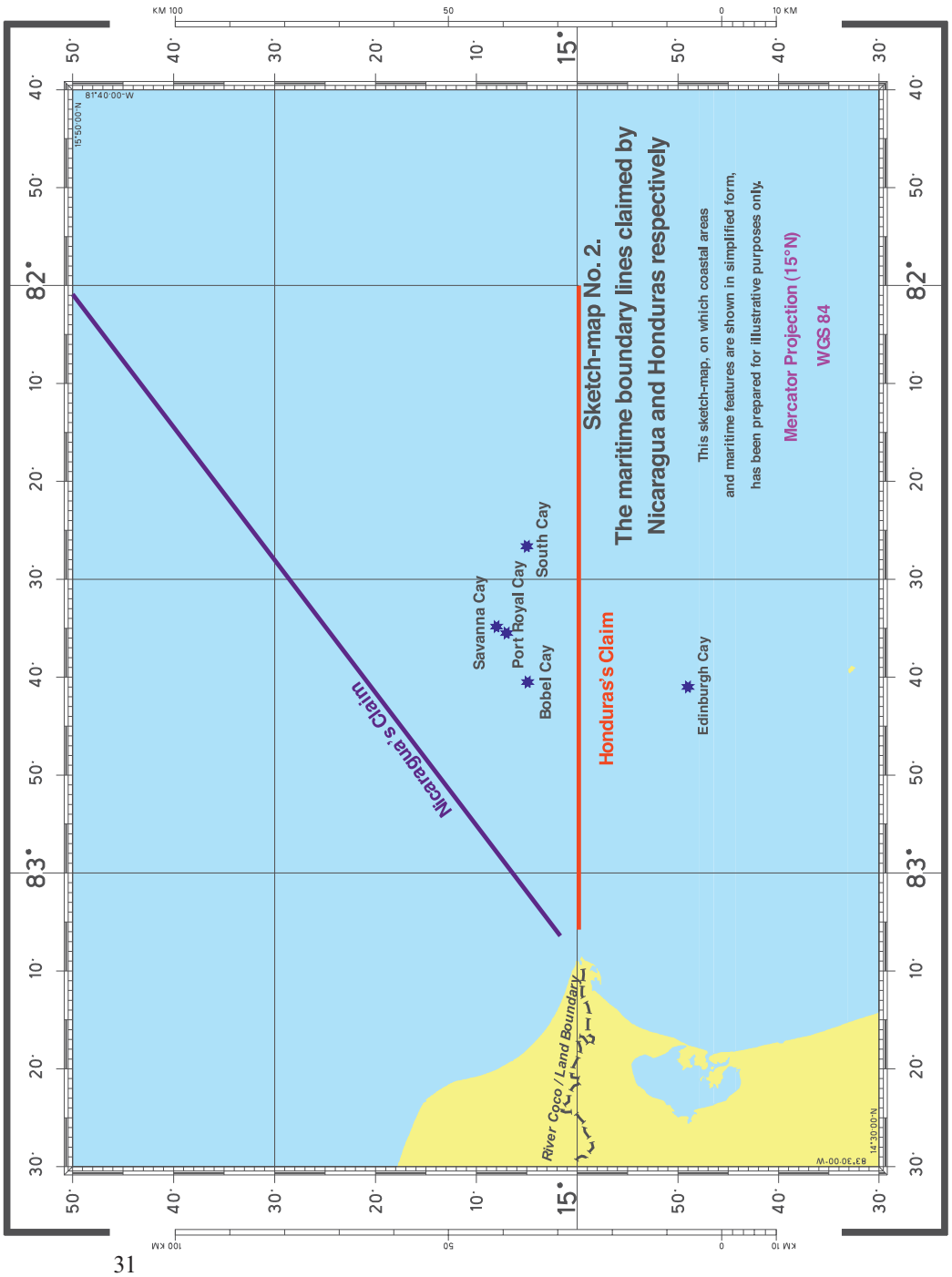
73. According to Honduras, there already exists in the Caribbean Sea a traditionally recognized boundary between the maritime spaces of Honduras and Nicaragua "which has its origins in the principle of *uti possidetis juris* and which is firmly rooted in the practice of both Honduras and Nicaragua and confirmed by the practice of third States". Honduras agrees that the Court should "determine the location of a single maritime boundary" and asks the Court to trace it following the "traditional maritime boundary" along the 15th parallel "until the jurisdiction of a third State is reached". During the oral proceedings Honduras also asked the Court to adjudge that

> "[t]he islands Bobel Cay, South Cay, Savanna Cay and Port Royal Cay, together with all other islands, cays, rocks, banks and reefs claimed by Nicaragua which lie north of the 15th parallel are under the sovereignty of the Republic of Honduras" (for the maritime boundary line claimed respectively by each Party, see below, p. 686, sketch-map No. 2).

* *

4.2. Sovereignty over the Islands in the Area in Dispute

74. Nicaragua claims sovereignty over the islands and cays in the disputed area of the Caribbean Sea to the north of the 15th parallel, including Bobel Cay, Savanna Cay, Port Royal Cay and South Cay.


Sketch-map No. 2.
The maritime boundary lines claimed by Nicaragua and Honduras respectively
This sketch-map, on which coastal areas and maritime features are shown in simplified form, has been prepared for illustrative purposes only.
Mercator Projection (15° N)
WGS 84
Nicaragua's Claim
Honduras's Claim
River Coco / Land Boundary Terminus
Savanna Cay
Port Royal Cay
South Cay
Bobel Cay
Edinburgh Cay
81°40'00"W
15°50'00"N
83°30'00"W
N.06°30'.3'1
KM 100
50
0
10 KM
100 KM
50
0
KM 10
15°
82°
83°

75. Nicaragua states that none of these islands, cays and rocks were *terra nullius* in 1821, when Nicaragua and Honduras gained independence from the Kingdom of Spain. However, according to Nicaragua, upon independence these features were not assigned to either of the Republics. Nicaragua adds that despite extensive research into the matter it is impossible to establish the *uti possidetis juris* situation of 1821 in respect of the cays in dispute. Nicaragua therefore concludes that recourse must be had to "other titles" and in particular contends that, in view of the geographical proximity of the islands to the Nicaraguan coastline, it holds original title over them under the principle of adjacency.

76. Nicaragua notes that as a matter of law *effectivités* cannot be substituted for original title. Therefore, in Nicaragua's view, the meagre *effectivités* invoked by Honduras cannot displace Nicaraguan title over the islands. Furthermore, Nicaragua argues that most of the *effectivités* alleged by Honduras occurred after the critical date (a concept that the Court will expand upon further at paragraph 117 below), which Nicaragua gives as 1977, when Honduras accepted Nicaragua's offer to hold negotiations on the maritime delimitation between the two countries in the Caribbean Sea. With regard to its own *effectivités*, Nicaragua argues that the exercise of its own sovereignty "over the maritime area in dispute including the cays, is attested to by the question of the turtle fisheries negotiations and agreements with Great Britain that began in the nineteenth century and were still ongoing in the 1960s".

77. Finally Nicaragua notes that its exercise of sovereignty and jurisdiction in the maritime area in question has been recognized by third States, and that the cartographic evidence, while not providing conclusive evidence, also supports its claim to sovereignty.

*

78. Honduras claims sovereignty over Bobel Cay, Savanna Cay, Port Royal Cay and South Cay, in addition to claiming title over other smaller islands and cays lying in the same area of the Caribbean Sea.

79. Honduras's primary argument is that it has an original title over the disputed islands derived from the doctrine of *uti possidetis juris*. Honduras concurs with Nicaragua in the belief that none of the islands and cays in dispute were *terra nullius* upon independence in 1821. However, according to Honduras at that date, Cape Gracias a Dios, lying along the 15th parallel, constituted the land and maritime boundary between the provinces of Honduras and Nicaragua. Thus on the basis of *uti possidetis juris* the islands formerly belonging to Spain north of the 15th parallel became the islands of the newly independent Republic of Honduras.

80. Honduras contends that its original title to the islands north of the

15th parallel is confirmed by many *effectivités*. In this regard Honduras, in relation to the islands, refers to the application of Honduran public and administrative legislation and laws as well as of its criminal and civil laws, the regulation of fisheries activities and immigration, the regulation by Honduras of exploration and exploitation of oil and gas, the carrying out of military and naval patrols, search and rescue operations and the participation by Honduras in public works and scientific surveys.

81. In the event that the Court finds that no State can make out a claim based on *uti possidetis juris*, Honduras argues that through its *effectivités* it has made out a superior claim compared to Nicaragua. In this regard Honduras contests Nicaragua's claim that the most of these *effectivités* occurred after the critical date as claimed by Nicaragua. Honduras does not accept Nicaragua's alleged critical date of 1977, but notes that in any event many of the acts of sovereignty over the disputed islands which it describes occurred before that date. Honduras argues that the critical date cannot be earlier than 21 March 2001, the date when Nicaragua filed its Memorial asserting for the first time that Nicaragua had title to the islands.

82. Finally, Honduras adds that a number of third States have recognized Honduran sovereignty over the islands, and that the cartographic evidence, while not of itself dispositive, supports Honduras's claim to sovereignty.

* *

4.3. Maritime Delimitation beyond the Territorial Sea

4.3.1. Nicaragua's line: bisector method

83. In its legal argument, Nicaragua begins with the delimitation of maritime areas beyond the territorial sea. In the circumstances of the case, Nicaragua proposes a method of delimitation consisting of "the bisector of the angle produced by constructing lines based upon the respective coastal frontages and producing extensions of these lines". Such a bisector is calculated from the general direction of the Nicaraguan coast and the general direction of the Honduran coast. These coastal fronts generate a bisector which runs from the mouth of the River Coco as a line of constant bearing (azimuth 52° 45′ 21″) until intersecting with the boundary of a third State in the vicinity of Rosalind Bank.

84. Nicaragua also states that "[b]ecause of the particular characteristics of the area in which the land boundary intersects with the coast, and for other reasons, the technical method of equidistance is not feasible" for the maritime delimitation between Nicaragua and Honduras. In particular Nicaragua refers to the fact that "the exact location where the land boundary ends is like the points of protruding needles" resulting in

a "pronounced turn in the direction of the coast precisely on the boundary line". Nicaragua argues that as a result of this geographical feature

> "the only two points that would dominate any delimitation based on median line or equidistance calculations are the two margins of the River. This remains the same even at a distance of 200 nautical miles if only the mainland coast is used."

*

85. Honduras asserts that Nicaragua's proposed bisector method "is based on a flawed assessment of coastal fronts and delimitation methods". The Atlantic coast of Nicaragua is relatively linear, runs "slightly west of south" all the way from Cape Gracias a Dios to Costa Rica and faces overall "slightly south of east". Thus there is no justification based on the configuration of Nicaragua's coast for the Nicaraguan bisector line running north-east. According to Honduras, Nicaragua's angle is supposed to have been constructed by taking account of the coastal directions of the Parties. However as the two coasts are treated by Nicaragua as straight lines the angle created bears no relationship to the actual coasts.

*

4.3.2. Honduras's line: "traditional boundary" along the parallel 14° 59.8′ North latitude ("the 15th parallel")

86. Honduras asks the Court to confirm what it claims is a traditional maritime boundary running along the 15th parallel between Honduras and Nicaragua in the Caribbean Sea and to continue that existing line until the jurisdiction of a third State is reached. According to Honduras this traditional line has its historical basis in the principle of *uti possidetis juris*. Honduras contends that upon independence in 1821 there was a maritime jurisdiction division aligned along the 15th parallel out to at least 6 nautical miles from Cape Gracias a Dios.

87. Honduras further claims that the Parties' conduct since independence demonstrates the existence of a tacit agreement that the 15th parallel has long been treated as the line dividing their maritime spaces. Honduras states that conduct in relation to the disputed islands and the maritime boundary are closely connected. Many of the acts expressing sovereignty over the islands also constitute conduct recognizing the 15th parallel as the maritime boundary. In this regard Honduras places particular emphasis on oil concessions, fisheries licences and naval patrols which, it contends, provide ample proof of

the acceptance by the Parties of the traditional boundary line offshore.

88. Honduras states that it was only in 1979, with the change in government in Nicaragua, that the "position and conduct of Nicaragua in relation to the establishment of the 15th parallel as the maritime boundary between the two States changed radically". Thus the critical date for the start of the controversy, in terms of the dispute between the Parties over the delimitation of their respective maritime spaces, cannot be before 1979. Honduras furthermore notes that in any event many of its examples of conduct occurred prior to that date.

89. Honduras also refers to the practice of the Parties as reflected in their diplomatic exchanges, their legislation and their cartography to demonstrate the mutually acknowledged existence of a traditional maritime boundary along the 15th parallel. In addition Honduras claims that the 15th parallel has been recognized as such a boundary by third States and international organizations.

90. While contending that the 15th parallel is a traditional line based on *uti possidetis juris* and confirmed by the subsequent conduct of the Parties showing their common acceptance of this line, Honduras also seeks to show that its line is in any event equitable in character. It compares it with the equidistance line of delimitation "constructed using standard methods", which, according to Honduras runs to the south of the 15th parallel. Honduras claims that Nicaragua would gain more maritime space with the "traditional line" than it would achieve by strict application of the equidistance line. Honduras further argues that the Honduran line does not cut-off the projection of the coastal front of Nicaragua and respects the principle of non-encroachment.

91. Were its contentions as to the 15th parallel not to be accepted by the Court, Honduras asks alternatively that the Court trace an adjusted equidistance line, until the jurisdiction of a third State is reached. Honduras maintains that the construction of a provisional equidistance line is possible and that there is therefore no reason to depart from "the practice almost universally adopted in the modern jurisprudence, both of this Court and of other tribunals, that is to begin with a provisional equidistance line".

*

92. Nicaragua contends that it has consistently held that the maritime spaces between the two States in the Caribbean Sea have not been delimited.

93. Nicaragua asserts that there is "no *uti possidetis juris* of 1821 that attributes or delimits maritime areas" between the two States and that

there are no Honduran acts of sovereignty or *effectivités* to support the contention that a traditional line exists along the 15th parallel. In particular, Nicaragua maintains that

> "the concept of *uti possidetis* that was used to determine the boundaries of the administrative divisions of the colonial power that were considered to be frozen in place at the moment of independence had nothing to do with maritime matters".

94. Nicaragua further states that there "is no line dividing the maritime areas of Nicaragua and Honduras based on a tacit agreement or any form of acquiescence or recognition whatever resulting from long-established and consistent practice".

95. With regard to the maritime spaces Nicaragua focuses on three elements representing alleged *effectivités* by Honduras — oil exploration concessions, fisheries activities and naval patrols. First, Nicaragua argues that the limits of oil concessions are not relevant to fixing a boundary between two States. Moreover,

> "none of the Honduran concessions states that its southern limit coincides with the maritime boundary with Nicaragua. Similarly, none of the Nicaraguan concessions defining a northern limit specifies that the limit coincides with the maritime boundary with Honduras."

Second, according to Nicaragua neither the witness statements nor fishing licences produced by Honduras nor the FAO fisheries reports can be considered as a confirmation of the existence of a "traditional boundary" or as evidence of Nicaragua's consent to such a boundary. Third, with regard to the naval patrols, Nicaragua notes that as a matter of law, naval or air patrols on the high seas cannot be equated to an *effectivité*. Nicaragua notes furthermore that many of these supposed *effectivités* took place after the critical date, which it gives as 1977.

96. As to the diplomatic exchanges between the Parties, Nicaragua maintains that "the Honduran claim that the 15th Parallel is the boundary of maritime areas with Nicaragua was not made formally until 1982" and was immediately rejected by Nicaragua. Nicaragua argues that Honduras has not presented any evidence that in the period prior to 1977 the Parties acquiesced to the existence of a traditional maritime boundary or that there were Honduran claims to the areas in question. On the contrary, there have been countless occasions in the context of diplomatic exchanges when Nicaragua has reaffirmed that there is no maritime boundary in the Caribbean Sea that is based on tradition or on any tacit acceptance by Nicaragua.

97. For the cartographic evidence, Nicaragua asserts that none of the

maps published in Nicaragua and reproduced by Honduras indicate that a maritime boundary runs along the 15th parallel. With regard to the claim that Nicaragua failed to protest against certain official maps produced by Honduras, Nicaragua comments that the absence of protest in regard to these maps is irrelevant due to the fact that the maps have no evidentiary value.

98. Nicaragua contends that, given the significant change in the direction of the coast, the boundary line which follows a parallel of latitude "is essentially inequitable" and "transgresses the primary equitable principle prohibiting the cutting-off of a state, in this case Nicaragua, from the continental shelf or exclusive economic zone lying in front of its coasts". Moreover, there is "a glaring disproportion between the maritime spaces that Honduras attributes to herself and those she considers to be Nicaraguan, bounded by the parallel of 15° N". Nicaragua concludes that the overall result is "grossly inequitable in terms of the law of maritime delimitation".

* *

4.4. Starting-point of the Maritime Boundary

99. Nicaragua recalls that the terminus of the land boundary between Nicaragua and Honduras was established by the 1906 Arbitral Award at the mouth of the principal arm of the River Coco (see paragraph 38 above). In 1962 the Mixed Boundary Commission determined that the starting-point of the land boundary at the mouth of the River Coco was situated at 14° 59.8′ North latitude and 83° 08.9′ West longitude (see paragraph 47 above). Nicaragua further states that since 1962 the mouth of the River Coco has moved more than 1 mile north and east due to the accretion of sediments and the trend of marine streams. As a result, the point plotted by the Commission is today located approximately 1 mile landwards from the actual mouth of the River Coco. According to Nicaragua the instability and fluctuations of the river mouth will continue in the "predictable future" and will lead to changes in the co-ordinates of the terminus of the land boundary. It thus proposes that the starting-point of the maritime boundary be set "at a prudent distance", namely 3 nautical miles out at sea from the actual mouth of the River Coco on the bisector line.

100. Nicaragua initially suggested that the Parties would have to negotiate "a line representing the boundary between the point of departure of the boundary at the mouth of the River Coco and the point of departure from which the Court will have determined the [maritime] boundary line". While leaving that proposal open, Nicaragua, in its final submissions, asked the Court to confirm that: "The starting-point of the delimitation is the thalweg of the main mouth of the River Coco such as it may

be at any given moment as determined by the Award of the King of Spain of 1906."

*

101. Honduras agrees that the terminal point of the land boundary between Honduras and Nicaragua fixed by the Mixed Commission in 1962, due to "the gradual movement eastwards of the actual mouth of the River Coco", "now lies well inside what would now be described as the 'mouth' in geographical terms". The instability of the mouth of the River Coco, "identified as the endpoint of the boundary" by the 1906 Award, according to Honduras, makes it undesirable to ask the Court "to determine either the location of the mouth of the river, or even the starting-point of the line immediately east of that point". While initially suggesting that the Court should be requested to "begin the line only at the outer limit of territorial waters", Honduras then, "seeking to minimise the point of difference with Nicaragua", accepted a starting-point of the boundary "at 3 miles from the terminal point adopted in 1962, rather than 12 miles from the coast, as proposed in the Counter-Memorial". However Honduras argues that the seaward fixed point should be measured from the point established by the 1962 Mixed Commission and located on the 15th parallel. The seaward fixed point should accordingly be established precisely 3 nautical miles due east from the 1962 point. Honduras also states that the Parties should negotiate an agreement covering the distance from the 1962 terminus point up to the 3-mile point seaward of the mouth of the River Coco.

4.5. Delimitation of the Territorial Sea

102. Nicaragua states that the delimitation of the territorial sea between States with adjacent coasts must be effected on the basis of the principles set out in Article 15 of UNCLOS. In the view of Nicaragua, in the present case however it is technically impossible to draw an equidistance line because it would have to be entirely drawn on the basis of the two outermost points of the mouth of the river, which are extremely unstable and continuously change position. Thus, according to Nicaragua, the bisector line should also be used for the delimitation of the territorial sea. Moreover, the bisector line in the territorial sea does not vary significantly from the "mean" equidistance line. Lastly, the segment of the line between the present terminus of the land boundary and the offshore point fixed 3 miles from the mouth of the River Coco, "allows for a harmonious, flexible and adjustable connection between the 'single line of delimitation' and [the endpoint of the land boundary]".

*

103. With regard to the boundary of the territorial sea, Honduras agrees with Nicaragua that there are "special circumstances" which, under Article 15 of UNCLOS "require a delimitation by a line other than a strict median line". However, according to Honduras, while the configuration of the continental landmass may be one such "special circumstance", of far greater significance "is the established practice of the Parties in treating the 15th parallel as their boundary from the mouth of the River Coco (14° 59.8′)". Honduras also identifies as a factor of "the greatest significance . . . the gradual movement eastwards of the actual mouth of the River Coco". Honduras therefore suggests that from the fixed seaward starting-point (3 miles due east from the point fixed by the Mixed Commission in 1962) the maritime boundary in the territorial sea (just as for the areas of the exclusive economic zone and continental shelf) should follow in an eastward direction the 15th parallel.

* * *

5. Admissibility of the New Claim relating to Sovereignty over the Islands in the Area in Dispute

104. The Court recalls that in its Application, Nicaragua requested the Court to determine

> "the course of the single maritime boundary between the areas of territorial sea, continental shelf and exclusive economic zone appertaining respectively to Nicaragua and Honduras, in accordance with equitable principles and relevant circumstances recognized by general international law as applicable to such a delimitation of a single maritime boundary".

The Government of Nicaragua further reserved its "right to supplement or to amend" the Application.

105. In its Memorial, Nicaragua, while not putting forward a claim of sovereignty as a formal submission,

> "reserve[d] [its] sovereign rights appurtenant to all the islets and rocks claimed by Nicaragua in the disputed area. The islets and rocks concerned include but are not confined to the following:
>
> > Hall Rock, South Cay, Arrecife Alargado, Bobel Cay, Port Royal Cay, Porpoise Cay, Savanna Cay, Savanna Reefs, Cayo Media Luna, Burn Cay, Logwood Cay, Cock Rock, Arrecifes de la Media Luna, and Cayo Serranilla".

106. During the first round of the oral proceedings the Agent of Nicaragua declared that

> "so that there is no possible misunderstanding on this point — that

> is, whether the issue of sovereignty over these features [i.e. the islands in the disputed area] is in question — then as of this moment Nicaragua wishes to anticipate that in its final submissions at the end of these oral pleadings it will specifically request a decision on the question of sovereignty over these features".

107. In its final submissions at the end of the oral proceedings, Nicaragua requested the Court, without prejudice to the line of the single maritime boundary "as described in the pleadings", "to decide the question of sovereignty over the islands and cays within the area in dispute".

108. The Court notes that

> "[t]here is no doubt that it is for the Applicant, in its Application, to present to the Court the dispute with which it wishes to seise the Court and to set out the claims which it is submitting to it" (*Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 447, para. 29).

Article 40, paragraph 1, of the Statute of the Court requires moreover that the "subject of the dispute" be indicated in the Application; and Article 38, paragraph 2, of the Rules of Court requires "the precise nature of the claim" to be specified in the Application. In a number of instances in the past the Court has had occasion to refer to these provisions. It has characterized them as "essential from the point of view of legal security and the good administration of justice" and, on this basis, the Court held inadmissible certain new claims, formulated during the course of proceedings, which, if they had been entertained, would have transformed the subject of the dispute originally brought before it under the terms of the Application (*Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992,* p. 267, para. 69; *Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 447, para. 29; see also *Prince von Pless Administration, Order of 4 February 1933, P.C.I.J., Series A/B, No. 52*, p. 14, and *Société Commerciale de Belgique, Judgment, 1939, P.C.I.J., Series A/B, No. 78*, p. 173).

109. The Court observes that, from a formal point of view, the claim relating to sovereignty over the islands in the maritime area in dispute, as presented in the final submissions of Nicaragua, is a new claim in relation to the claims presented in the Application and in the written pleadings.

110. However, the mere fact that a claim is new is not in itself decisive for the issue of admissibility. In order to determine whether a new claim introduced during the course of the proceedings is admissible the Court will need to consider whether,

> "although formally a new claim, the claim in question can be considered as included in the original claim in substance" (*Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Prelimi-*

nary Objections, Judgment, I.C.J. Reports 1992, pp. 265-266, para. 65).

For this purpose, to find that the new claim, as a matter of substance, has been included in the original claim, it is not sufficient that there should be links between them of a general nature. Moreover,

> "[a]n additional claim must have been implicit in the application (*Temple of Preah Vihear, Merits, Judgment, I.C.J. Reports 1962*, p. 36) or must arise 'directly out of the question which is the subject-matter of that Application' (*Fisheries Jurisdiction (Federal Republic of Germany* v. *Iceland), Merits, I.C.J. Reports 1974*, p. 203, para. 72)" (*Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 266, para. 67).

111. The Court will now consider whether Nicaragua's new claim relating to sovereignty over the islands in the area in dispute is admissible in light of the above criteria.

112. The maritime area in the Caribbean Sea to be delimited comprises a number of islands which may generate territorial sea, exclusive economic zone and continental shelf and a number of rocks which may generate territorial sea. Both Parties have agreed that none of the land features in the maritime area in dispute can be regarded as *terra nullius*, but each has asserted its own sovereignty over them. According to Nicaragua, by using a bisector as a method of delimitation, sovereignty over these features could be attributed to either Party depending on the position of the feature involved with respect to the bisector line.

113. On a number of occasions, the Court has emphasized that

> "the land dominates the sea" (*North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, p. 51, para. 96; *Aegean Sea Continental Shelf (Greece* v. *Turkey), Judgment, I.C.J. Reports 1978*, p. 36, para. 86; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain), Merits, Judgment, I.C.J. Reports 2001*, p. 97, para. 185).

Accordingly, it is

> "the terrestrial territorial situation that must be taken as starting point for the determination of the maritime rights of a coastal State. In accordance with Article 121, paragraph 2, of the 1982 Convention on the Law of the Sea, which reflects customary international law, islands, regardless of their size, in this respect enjoy the same status, and therefore generate the same maritime rights, as other land territory." (*Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain), Merits, Judgment, I.C.J. Reports 2001*, p. 97, para. 185.)

114. To draw a single maritime boundary line in an area of the Caribbean Sea where a number of islands and rocks are located the Court would have to consider what influence these maritime features might have on the course of that line. To plot that line the Court would first have to determine which State has sovereignty over the islands and rocks in the disputed area. The Court is bound to do so whether or not a formal claim has been made in this respect. Thus the claim relating to sovereignty is implicit in and arises directly out of the question which is the subject-matter of Nicaragua's Application, namely the delimitation of the disputed areas of the territorial sea, continental shelf and exclusive economic zone.

115. In the light of the foregoing, the Court concludes that the Nicaraguan claim relating to sovereignty over the islands in the maritime area in dispute is admissible as it is inherent in the original claim relating to the maritime delimitation between Nicaragua and Honduras in the Caribbean Sea.

116. In addition, the Court notes that the Respondent has contested neither the jurisdiction of the Court to entertain the Nicaraguan new claim regarding the islands, nor its admissibility. Moreover, Honduras, for its part, observed that the new Nicaraguan claim made "the nature of the task facing the Court" clearer so that the Court "is asked to decide both on title to the islands and on the maritime delimitation". Honduras further added that as the Court was faced with a dispute over land and maritime spaces, it "*must* resolve the question of sovereignty over the land *before* it turns to the maritime boundary" (emphasis in the original). In its final submissions Honduras asked the Court to adjudge and declare that:

> "The islands Bobel Cay, South Cay, Savanna Cay and Port Royal Cay, together with all other islands, cays, rocks, banks and reefs claimed by Nicaragua which lie north of the 15th parallel are under the sovereignty of the Republic of Honduras."

It is for the Court therefore to rule on the claims of the two Parties with respect to the islands in dispute.

* * *

6. The Critical Date

117. In the context of a maritime delimitation dispute or of a dispute related to sovereignty over land, the significance of a critical date lies in distinguishing between those acts performed *à titre de souverain* which are in principle relevant for the purpose of assessing and validating *effectivités*, and those acts occurring after such critical date, which are in general meaningless for that purpose, having been carried out by a State which, already having claims to assert in a legal dispute, could have taken

those actions strictly with the aim of buttressing those claims. Thus a critical date will be the dividing line after which the Parties' acts become irrelevant for the purposes of assessing the value of *effectivités*. As the Court explained in the *Indonesia/Malaysia* case,

> "it cannot take into consideration acts having taken place after the date on which the dispute between the Parties crystallized unless such acts are a normal continuation of prior acts and are not undertaken for the purpose of improving the legal position of the Party which relies on them" (*Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment, I.C.J. Reports 2002*, p. 682, para. 135).

*

118. Honduras contends that there are two disputes, albeit related: one as to whether Nicaragua or Honduras has title to the disputed islands; and the other as to whether the 15th parallel represents the current maritime frontier between the Parties. Nicaragua perceives it as a single dispute.

119. Honduras observes that in respect of the dispute concerning sovereignty over the maritime features in the disputed area there "may be more than one critical date". Thus, "[t]o the extent that the issue of title turns on the application of *uti possidetis*", the critical date would be 1821 — the date of independence of Honduras and Nicaragua from Spain. For the purposes of post-colonial *effectivités*, Honduras argues that the critical date "is obviously much later" and cannot be "earlier than the date of the filing of the Memorial — 21 March 2001 — since this was the first time that Nicaragua asserted that it had title to the islands".

120. With regard to the dispute over the maritime boundary, Honduras maintains that 1979, when the Sandinista Government came to power, constitutes the critical date, as up to that date "Nicaragua never showed the slightest interest in the cays and islands north of the 15th parallel". According to Honduras, once in power in 1979 the new Government launched "a campaign of prolonged harassment against Honduran fishing vessels north of the 15th parallel".

121. For Nicaragua, the critical date is 1977, when the Parties initiated negotiations on maritime delimitation, following an exchange of letters by the two Governments. Nicaragua asserts that the dispute over the maritime boundary, by implication, encompasses the dispute over the islands within the relevant area and therefore the critical date for both disputes coincides.

122. Honduras dismisses Nicaragua's alleged critical date of 1977 for the purposes of the dispute over the islands, since the diplomatic corre-

spondence exchanged by the two countries makes no mention of those maritime features. Honduras further argues that the 1977 exchange of letters, and Honduras's acceptance of the invitation "to initiate conversations leading to a definitive marine and sub-marine delimitation between Nicaragua and Honduras in the Atlantic and Caribbean Sea zones" did not mark the "crystallization of any dispute as no conflicting claims were raised at that time".

*

123. The Court considers that in cases where there exist two interrelated disputes, as in the present case, there is not necessarily a single critical date and that date may be different in the two disputes. For these reasons, the Court finds it necessary to distinguish two different critical dates which are to be applied to two different circumstances. One critical date concerns the attribution of sovereignty over the islands to one of the two contending States. The other critical date is related to the issue of delimitation of the disputed maritime area.

124. Rule by the Spanish Crown ended in 1821. An issue before the Court is any applicability of the *uti possidetis juris* principle to title to the islands and also to the establishment of a maritime boundary. This issue will be addressed, by reference to the specific circumstances of the present case, in sections 7.2 and 8.1.1. In the absence of any title based on the *uti possidetis juris* principle, the Court will seek to establish an alternative title to the islands arising out of *effectivités* in the post-colonial era. It will also seek to ascertain whether there existed a tacit agreement as to the maritime boundary during the same period. For these purposes, it will be necessary to determine critical dates by reference to the moment at which the two disputes crystallized.

125. It would be unfounded to set 1906 as the critical date on the basis that it was that year that the King of Spain delivered his Arbitral Award. It must be remembered that the Award dealt only with the land boundary between Nicaragua and Honduras. In contrast, the Court is called upon in the present case to delimit the maritime boundary between those two countries and to determine the sovereignty over the islands in dispute.

126. The Court reiterates that maritime rights derive from the coastal State's sovereignty over the land, a principle which can be summarized as "the land dominates the sea" (see paragraph 113 above). Following this approach, sovereignty over the islands needs to be determined prior to and independently from maritime delimitation.

127. As regards title to the islands in question, at the time of filing its Application, Nicaragua did not make to the Court any claim of title to the islands north of the 15th parallel. It was only in its Memorial of 21 March 2001 that Nicaragua for the first time made reference to the islands, without providing any basis for a legal claim, stating only that,

"[i]n the absence of the adoption of a bisector delimitation by the Court, Nicaragua reserves the sovereign rights appurtenant to all the islets and rocks claimed by Nicaragua in the disputed area". Yet in the submissions contained in the Nicaraguan Memorial, there is no claim to the islands in dispute. The same is true in the case of the submissions in the Nicaraguan Reply. It is only in its final submissions, at the end of the oral proceedings, that Nicaragua asks the Court "to decide the question of sovereignty over the islands and cays within the area in dispute".

128. The question of the admissibility of this late submission is dealt with above at paragraphs 104 to 116.

129. With regard to the dispute over the islands, the Court considers 2001 as the critical date, since it was only in its Memorial filed in 2001 that Nicaragua expressly reserved "the sovereign rights appurtenant to all the islets and rocks claimed by Nicaragua in the disputed area".

130. With regard to the dispute concerning the maritime delimitation, the Court finds that the exchange of letters of 1977 did not mark the point at which the dispute crystallized, according to the well-established definition of a dispute set down by the Permanent Court of International Justice, namely that "[a] dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons" (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 11). No claims or counter-claims were articulated by the two Parties at the time and the suggested process of negotiations came to nought.

131. In determining the critical date for the purposes of the dispute over the delimitation line, the Court notes that on 17 March 1982, a "Honduran vessel . . . was fishing . . . in waters under Honduran jurisdiction, when it was captured by a Nicaraguan patrol boat after cannon fire, and taken . . . to a Nicaraguan port", according to an official letter from Honduras. On 21 March 1982, two Nicaraguan coast-guard vessels captured four Honduran fishing vessels in the area of Bobel and Media Luna Cays. On 23 March 1982, Honduras sent a formal protest, stating that the Nicaraguan patrols had "penetrated as far as Bobel and Media Luna Cays, 16 miles North of parallel 15", which "has been traditionally recognised by both countries to be the dividing line in the Atlantic". On 14 April 1982, Nicaragua denied the existence of such a traditional line. Honduras for its part emphasized that while indeed the frontier had not been "legally delimited", at the same time "it [could not] be denied that there exists, or at least there used to exist, a traditionally accepted line, which is that which corresponds to the parallel which crosses Cape Gracias a Dios". It added that the existence of this traditionally accepted line was the only explanation for long undisturbed relations on the border and it was only in recent times that border incidents had begun to occur. In the view of the Court, it is from the time of these two

incidents that a dispute as to the maritime delimitation could be said to exist.

* * *

7. Sovereignty over the Islands

132. The Court will now address the question of sovereignty over maritime features in the disputed area of the Caribbean Sea.

* *

7.1. The Maritime Features in the Area in Dispute

133. It is commonly recognized that when the Central American States became independent in 1821, none of the islands adjacent to these States was *terra nullius*; the new States asserted sovereign titles over all the territories that had been under Spanish dominion. Their title was based on succession to all former Spanish colonial possessions. As explained in the decision rendered on 24 March 1922 by the Swiss Federal Council, which acted as arbitrator in the *Frontier Dispute between Colombia and Venezuela* case

> "while there might exist many regions which had never been occupied by the Spaniards and many unexplored . . ., these regions were reputed to belong in law to whichever of the Republics succeeded to the Spanish Province to which these territories were attached by virtue of the old Royal Ordinances of the Spanish mother country. These territories, although not occupied in fact, were by common consent deemed as occupied in law from the first hour by the newly created Republic . . ." (United Nations, *Reports of International Arbitral Awards (RIAA)*, Vol. I, p. 228.) *[Translation by the Registry.]*

134. But if there was to be no territory without a master, within the vast spatial expanses of the Spanish Crown not every single piece of land had a definitive identification or had been attached to a specific administrative colonial authority. In the words of an Arbitral Award rendered on 23 January 1933 by the Special Boundary Tribunal constituted by the Treaty of Arbitration between Guatemala and Honduras, this was due to "the lack of trustworthy information during colonial times" because "much of this territory was unexplored". In consequence,

> "not only had boundaries of jurisdiction not been fixed with precision by the Crown, but there were great areas in which there had been no effort to assert any semblance of administrative authority" (*RIAA*, Vol. II, p. 1325).

135. Given the dual nature of the present case — a maritime delimitation and a determination of sovereignty over islands situated in the maritime area in dispute — and taking into account the principle that the "land dominates the sea" (see paragraph 113 above), the legal nature of the land features in the disputed area must be assessed at the outset.

136. There are four relevant cays involved, Bobel Cay, Savanna Cay, Port Royal Cay and South Cay. All of these cays are located outside the territorial sea of the mainland of both Nicaragua and Honduras. They lie to the south of the bisector line advanced by the Applicant as the delimitation line, and to the north of the 15th parallel claimed by the Respondent as the delimitation line. In addition to these four main cays, there are a number of smaller islets, cays and reefs in the same area, of which the physical status (such as whether they are completely submerged below sea level, either permanently or at high tide), and consequently their legal status (for the purposes of the application of Articles 6, 13 or 121 of UNCLOS) are not clear.

137. The Court notes that the Parties do not dispute the fact that Bobel Cay, Savanna Cay, Port Royal Cay and South Cay remain above water at high tide. They thus fall within the definition and régime of islands under Article 121 of UNCLOS (to which Nicaragua and Honduras are both parties). Therefore these four features will hereinafter be referred to as islands.

The Court further notes that the Parties do not claim for these islands any maritime areas beyond the territorial sea (the question of the breadth of territorial sea around these islands will be dealt with below, see paragraph 302).

138. With the exception of these four islands, there seems to be an insufficiency in the information which the Court would require in order to identify a number of the other maritime features in the disputed area. In this regard, little assistance was provided in the written and oral procedures to define with the necessary precision the other "features" in respect of which the Parties are asking the Court to decide the question of territorial sovereignty.

139. In its final submissions, although Nicaragua requests the Court to decide the question of sovereignty over the islands and cays within the area in dispute, it does not there identify these features by name. Instead, it resorts to the use of a description in general terms, referring to "the islands and cays within the area in dispute". The Applicant does not list the islands and cays nor does it specify the legal characterization of these features. Although at moments in the past Nicaragua has laid claim to maritime areas up to the 17th parallel, in the context of the pleadings in the present case, the "area in dispute" should be understood to refer to the maritime area lying between the 15th parallel and the bisector line which Nicaragua claims as the maritime boundary (see paragraphs 19 and 83 above).

140. Honduras is more specific in its final submissions but only in that

it explicitly names the four features which it has called islands from the very beginning and over which it claims sovereignty: Bobel Cay, Savanna Cay, Port Royal Cay and South Cay. But then it uses a diffuse and indeterminate description: "together with all other islands, cays, rocks, banks and reefs claimed by Nicaragua which lie north of the 15th parallel". The problem with such a request is that, as stated above, Nicaragua does not specify in its final submissions "the islands and cays within the area in dispute" and, additionally, does not claim any "rocks, banks and reefs".

141. In this connection, the Court notes that features which are not permanently above water, and which lie outside of a State's territorial waters, should be distinguished from islands. As to the question of appropriation, in the case concerning *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain)*, the Court observed that it was not

> "aware of a uniform and widespread State practice which might have given rise to a customary rule which unequivocally permits or excludes appropriation of low-tide elevations" (*Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain), Merits, Judgment, I.C.J. Reports 2001*, p. 102, para. 205).

However, it added that:

> "The few existing rules do not justify a general assumption that low-tide elevations are territory in the same sense as islands. It has never been disputed that islands constitute terra firma, and are subject to the rules and principles of territorial acquisition; the difference in effects which the law of the sea attributes to islands and low-tide elevations is considerable. It is thus not established that in the absence of other rules and legal principles, low-tide elevations can, from the viewpoint of the acquisition of sovereignty, be fully assimilated with islands or other land territory." (*Ibid.*, para. 206.)

The Court also recalled "the rule that a low-tide elevation which is situated beyond the limits of the territorial sea does not have a territorial sea of its own" (*ibid.*, para. 207).

142. Additionally, in the case of those features that do not qualify as islands according to UNCLOS because they are not permanently above water at high tide, there was little further to be found in the pleadings addressing this matter.

143. During the proceedings, two other cays were mentioned: Logwood Cay (also called Palo de Campeche) and Media Luna Cay. In response to a question put by Judge *ad hoc* Gaja to the Parties in the course of the oral proceedings as to whether these cays would qualify as

islands within the meaning of Article 121, paragraph 1, of UNCLOS, the Parties have stated that Media Luna Cay is now submerged and thus that it is no longer an island. Uncertainty prevails in the case of Logwood Cay's current condition: according to Honduras it remains above water (though only slightly) at high tide; according to Nicaragua, it is completely submerged at high tide.

144. Given all these circumstances, the Court is not in a position to make a determinative finding on the maritime features in the area in dispute other than the four islands referred to in paragraph 137. The Court thus regards it as appropriate to pronounce only upon the question of sovereignty over Bobel Cay, Savanna Cay, Port Royal Cay and South Cay.

145. A claim was also made during the oral proceedings by each Party to an island in an entirely different location, namely, the island in the mouth of the River Coco. For the last century the unstable nature of the river mouth has meant that larger islands are liable to join their nearer bank and the future of smaller islands is uncertain. Because of the changing conditions of the area, the Court makes no finding as to sovereign title over islands in the mouth of the River Coco.

* *

7.2. The Uti Possidetis Juris *Principle and Sovereignty over the Islands in Dispute*

146. The Court observes that the principle of *uti possidetis juris* has been relied on by Honduras as the basis of sovereignty over the islands in dispute. This is contested by Nicaragua which asserts that sovereignty over the islands cannot be attributed to one or the other Party on the basis of this principle.

147. Honduras argues that the *uti possidetis juris* principle embedded in the Gámez-Bonilla Treaty and confirmed by the 1906 Award of the King of Spain and by the 1960 Judgment of the Court is applicable as between Honduras and Nicaragua, not only to their mainland territory, but also to the maritime area off the coast of the two countries which is now the subject of dispute for delimitation, together with the islands in the disputed area. Honduras adds that the line established as the line of maritime delimitation on the basis of the *uti possidetis juris* principle is the line that begins along the 15th parallel.

148. Honduras argues that because of the Royal Decree of 17 December 1760 which established that Spanish territorial waters extended for 6 nautical miles, Nicaragua and Honduras succeeded in 1821 not only to their mainland territory but also to islands and a maritime area extending 6 miles [RH, para. 3.16]. With respect to sovereignty over the islands in dispute by virtue of the principle of *uti possidetis juris*, Honduras relies in

the first place on the Royal Warrant of 23 August 1745 which established two military jurisdictions within the Captaincy-General of Guatemala, one running from the Yucatán Peninsula to Cape Gracias a Dios and the other from Cape Gracias a Dios down to but not including the Chagres River. The northern jurisdiction appertained to Honduras and the southern to Nicaragua. Honduras further refers to the Royal Decree of 20 November 1803, according to which "the Islands of San Andrés and the part of the Mosquito Coast from Cape Gracias a Dios inclusive to the Chagres River, shall be separated from the Captaincy-General of Guatemala and become dependent on the Vice Royalty of Santa Fé". Honduras contends that this Decree shows that the islands and waters north of Cape Gracias a Dios corresponded to the military and maritime jurisdiction of the Captaincy-General of Guatemala while the islands and waters south of the Cape corresponded to the Vice-Royalty of Santa Fé. Finally, Honduras maintains that before independence, the Government of Honduras exercised jurisdiction north of Cape Gracias a Dios, while the General Command of Nicaragua exercised jurisdiction south of the Cape.

149. Honduras claims that the 1850 Treaty between Spain and Nicaragua and the 1866 Treaty between Spain and Honduras respectively recognized the sovereignty of Nicaragua and Honduras over their mainland territories and adjacent islands that lie along their coasts. Honduras submits that the islands in dispute were closer to Honduras's coast than to any other part of the former Spanish empire. Honduras also notes that the existence of these islands was certainly known at the time of the independence of the Central American States, as maps dating to that period show the islands in dispute, such as, for example, an 1801 chart comprising the coasts of Yucatán, Mosquitos and Honduras.

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150. Nicaragua does not deny that the principle of *uti possidetis juris* may have relevance in establishing sovereignty over insular possessions, but it contends that the principle is not applicable in the current case, "as there is no evidence that the King of Spain attributed the dozens of Lilliputian cays, many of them not even having a name, to one or other of the provinces of the Captaincy-General of Guatemala". According to Nicaragua, the territorial sea fell at the time under the exclusive jurisdiction of the Spanish authorities in Madrid, and not under the control of the local authorities. Nicaragua argues that no documentary evidence supports the title of either Nicaragua or Honduras to the islands on the basis of the *uti possidetis juris* of 1821, which, according to Nicaragua, is unsurprising given their lack of economic or strategic significance. Nicaragua further argues that, in the absence of such evidence, the remaining consideration is "the location of the islets in dispute in relation to other territories of the states concerned". According to Nicaragua, however, at

the time of independence this principle of proximity operated not to the benefit of Honduras or Nicaragua, but rather to the benefit of the Captaincy-General of Guatemala which exercised direct jurisdiction over the settlements on the Mosquito Coast. In any event, Nicaragua claims that the islands are more proximate to Nicaragua's Edinburgh Cay than to any Honduran territory.

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151. The Court has recognized that "the principle of *uti possidetis* has kept its place among the most important legal principles" regarding territorial title and boundary delimitation at the moment of decolonization (*Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986*, p. 567, para. 26). In that case, the Chamber of the Court found that it

> "cannot disregard the principle of *uti possidetis juris*, the application of which gives rise to this respect of intangibility of frontiers . . . It is a general principle, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs. Its obvious purpose is to prevent the independence and stability of new States being endangered by fratricidal struggles provoked by the challenging of frontiers following the withdrawal of the administering power." (*Ibid.*, p. 565, para. 20.)

152. In that same Judgment, the Chamber of the Court examined different aspects of the *uti possidetis juris* principle. One such aspect

> "is found in the pre-eminence accorded to legal title over effective possession as a basis of sovereignty. Its purpose, at the time of the achievement of independence by the former Spanish colonies of America, was to scotch any designs which non-American colonizing powers might have on regions which had been assigned by the former metropolitan State to one division or another, but which were still uninhabited or unexplored." (*Ibid.*, p. 566, para. 23.)

153. According to the Judgment of the Chamber of the Court:

> "The essence of the principle lies in its primary aim of securing respect for the territorial boundaries at the moment when independence is achieved. Such territorial boundaries might be no more than delimitations between different administrative divisions or colonies all subject to the same sovereign. In that case, the application of the principle of *uti possidetis* resulted in administrative boundaries being transformed into international frontiers in the full sense of the term." *(Ibid.)*

154. It is beyond doubt that the *uti possidetis juris* principle is applicable to the question of territorial delimitation between Nicaragua and Honduras, both former Spanish colonial provinces. During the nine-

teenth century, negotiations aimed at determining the territorial boundary between Nicaragua and Honduras culminated in the conclusion of the Gámez-Bonilla Treaty of 7 October 1894, in which both States agreed in Article II, paragraph 3, that "each Republic [was] owner of the territory which at the date of independence constituted, respectively, the provinces of Honduras and Nicaragua". The terms of the Award of the King of Spain of 1906, based specifically on the principle of *uti possidetis juris* as established in Article II, paragraph 3, of the Gámez-Bonilla Treaty, defined the territorial boundary between the two countries with regard to the disputed portions of land, i.e. from Portillo de Teotecacinte to the Atlantic Coast. The validity and binding force of the 1906 Award have been confirmed by this Court in its 1960 Judgment and both Parties to the present dispute accept the Award as legally binding.

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155. The Court now turns from the question of territorial title settled in 1906 to the question currently before it of sovereignty over the islands.

156. The Court begins by observing that *uti possidetis juris* may, in principle, apply to offshore possessions and maritime spaces (*Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), Judgment, I.C.J. Reports 1992*, p. 558, para. 333; p. 589, para. 386).

157. It is well established that "a key aspect of the principle [of *uti possidetis juris*] is the denial of the possibility of *terra nullius*" (*ibid.*, p. 387, para. 42). However, that dictum cannot bring within the territory of successor States islands not shown to be subject to Spanish colonial rule, nor *ipso facto* render as "attributed", islands which have no connection with the mainland coast concerned. Even if both Parties in this case agree that there is no question of the islands concerned being *res nullius*, necessary legal questions remain to be answered.

158. The Court observes that the mere invocation of the principle of *uti possidetis juris* does not of itself provide a clear answer as to sovereignty over the disputed islands. If the islands are not *terra nullius*, as both Parties acknowledge and as is generally recognized, it must be assumed that they had been under the rule of the Spanish Crown. However, it does not necessarily follow that the successor to the disputed islands could only be Honduras, being the only State formally to have claimed such status. The Court recalls that *uti possidetis juris* presupposes the existence of a delimitation of territory between the colonial provinces concerned having been effected by the central colonial authorities. Thus in order to apply the principle of *uti possidetis juris* to the islands in dispute it must be shown that the

Spanish Crown had allocated them to one or the other of its colonial provinces.

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159. The Court accordingly now turns to the issue of whether there is convincing evidence which would allow it to determine whether and to which of the colonial provinces of the former Spanish America the islands in question had been attributed, bearing in mind the fact that these islands had at that time no particular strategic, economic or military significance. If indeed any such attribution were to be established, depending on whose administrative authority the islands would have fallen under during colonial rule, the disputed islands would subsequently have come under the sovereignty of either Honduras or Nicaragua at the time they became independent States in 1821.

160. In the case concerning the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, the Chamber of the Court, in its 1992 Judgment, found it necessary to consider whether it was "possible to establish the appurtenance in 1821 of each disputed island to one or the other of the various administrative units of the Spanish colonial structure in Central America". The conclusions of the Chamber are applicable to the present case:

> "In the case of the islands, there are no land titles of the kind which the Chamber has taken into account in order to reconstruct the limits of the *uti possidetis juris* on the mainland; and the legislative and administrative texts are confused and conflicting. The attribution of individual islands to the territorial administrative divisions of the Spanish colonial system, for the purposes of their allocation to the one or the other newly-independent State, may well have been a matter of some doubt and difficulty, judging by the evidence and information submitted. It should be recalled that when the principle of the *uti possidetis juris* is involved, the *jus* referred to is not international law but the constitutional or administrative law of the pre-independence sovereign, in this case Spanish colonial law; and it is perfectly possible that that law itself gave no clear and definitive answer to the appurtenance of marginal areas, or sparsely populated areas of minimal economic significance." (*Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), Judgment, I.C.J. Reports 1992*, pp. 558-559, para. 333.)

161. The Parties have not produced documentary or other evidence from the pre-independence era which explicitly refers to the islands. The Court further observes that proximity as such is not necessarily determinative of legal title. The information provided by the Parties on the colonial administration of Central America by Spain does not allow for cer-

tainty as to whether one entity (the Captaincy-General of Guatemala), or two subordinate entities (the Government of Honduras and the General Command of Nicaragua), exercised administration over the insular territories of Honduras and Nicaragua at that time. Until 1803 Nicaragua and Honduras were part of the Captaincy-General of Guatemala. On balance, the evidence presented in this case would seem to suggest that the Captaincy-General of Guatemala probably exercised jurisdiction over the areas north and south of Cape Gracias a Dios until 1803 when the Vice-Royalty of Santa Fé gained control over the part of the Mosquito Coast running south from Cape Gracias a Dios by virtue of the Royal Decree of that year (see also *I.C.J. Pleadings, Arbitral Award Made by the King of Spain on 23 December 1906 (Honduras* v. *Nicaragua)*, Vol. I, pp. 19-22).

162. Unlike the land territory where the administrative boundary between different provinces was more or less clearly demarcated, it is apparent that there was no clear-cut demarcation with regard to islands in general. This seems all the more so with regard to the islands in question, since they must have been scarcely inhabited, if at all, and possessed no natural resources to speak of for exploitation, except for fishing in the surrounding maritime area.

163. The Court observes that the Captaincy-General of Guatemala may well have had control over land and insular territories adjacent to coasts in order to provide security, prevent smuggling and undertake other measures to ensure the protection of the interests of the Spanish Crown. However there is no evidence to suggest that the islands in question played any role in the fulfilment of any of these strategic aims. All of those islands lie at some distance from the mouth of the River Coco. Savanna Cay is about 28 miles away, South Cay is some 41 miles, Bobel Cay is 27 miles and Port Royal Cay is 32 miles. Notwithstanding the historical and continuing importance of the *uti possidetis juris* principle, so closely associated with Latin American decolonization, it cannot in this case be said that the application of this principle to these small islands, located considerably offshore and not obviously adjacent to the mainland coast of Nicaragua or Honduras, would settle the issue of sovereignty over them.

164. With regard to the adjacency argument, the Court notes that the independence treaties concluded by Nicaragua and Honduras with Spain (see paragraphs 34 and 35 above) refer to adjacency with respect to mainland coasts rather than to offshore islands. Nicaragua's argument that the islands in dispute are closer to Edinburgh Cay, which belongs to Nicaragua, cannot therefore be accepted. While the Court does not rely on adjacency in reaching its findings, it observes that, in any event, the islands in dispute appear to be in fact closer to the coast of Honduras than to the coast of Nicaragua.

165. Having concluded that the question of sovereignty over the islands in dispute cannot be resolved on the above basis, the Court will now ascertain whether there were relevant *effectivités* during the colonial period. This test of "colonial *effectivités*" has been defined as

> "the conduct of the administrative authorities as proof of the effective exercise of territorial jurisdiction in the region during the colonial period" (*Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986*, p. 586, para. 63; *Frontier Dispute (Benin/Niger), Judgment, I.C.J. Reports 2005*, p. 120, para. 47).

In the present case, information about such conduct by the colonial administrative authorities is lacking. This may be due to the fact that:

> "The territory of each Party had belonged to the Crown of Spain. The ownership of the Spanish monarch had been absolute. In fact and law, the Spanish monarch had been in possession of all the territory of each. Prior to independence, each colonial entity being simply a unit of administration in all respects subject to the Spanish King, there was no possession in fact or law, in a political sense, independent of his possession. The only possession of either colonial entity before independence was such as could be ascribed to it by virtue of the administrative authority it enjoyed. The concept of '*uti possidetis* of 1821' thus necessarily refers to an administrative control which rested on the will of the Spanish Crown. For the purpose of drawing the line of '*uti possidetis* of 1821', we must look to the existence of that administrative control . . .
>
> [P]articular difficulties are encountered in drawing the line of '*uti possidetis* of 1821', by reason of the lack of trustworthy information during colonial times with respect to a large part of the territory in dispute. Much of this territory was unexplored. Other parts which had occasionally been visited were but vaguely known. In consequence, not only had boundaries of jurisdiction not been fixed with precision by the Crown, but there were great areas in which there had been no effort to assert any semblance of administrative authority." (Arbitral Award rendered on 23 January 1933 by the Special Boundary Tribunal constituted by the Treaty of Arbitration between Guatemala and Honduras, *RIAA*, Vol. II, pp. 1324-1325.)

166. The Court considers that, given the location of the disputed islands and the lack of any particular economic or strategic significance of these islands at the time, there were no colonial *effectivités* in relation to them. Thus the Court can neither found nor confirm on this basis a title to territory over the islands in question.

167. In light of the above considerations the Court concludes that the principle of *uti possidetis* affords inadequate assistance in determining

sovereignty over these islands because nothing clearly indicates whether the islands were attributed to the colonial provinces of Nicaragua or of Honduras prior to or upon independence. Neither can such attribution be discerned in the King of Spain's Arbitral Award of 1906. Equally, the Court has been presented with no evidence as to colonial *effectivités* in respect of these islands. Thus it has not been established that either Honduras or Nicaragua had title to these islands by virtue of *uti possidetis*.

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7.3. Post-colonial Effectivités *and Sovereignty over the Disputed Islands*

168. The Court will now examine the evidence submitted on post-colonial *effectivités* in determining sovereignty over the islands in dispute.

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169. Honduras states that in the event that the Court were to reject its claim to original title to the islands derived from *uti possidetis juris* and confirmed by post-colonial *effectivités*, then the matter would have to be decided "by examining which of the two States has made out a superior claim based upon the actual exercise or display of authorities over the islands, coupled with the necessary sovereign intent". Honduras contends that in this case it is evident that through its *effectivités* it has made out a superior claim compared to Nicaragua, which has offered no evidence of *effectivités*.

170. Honduras has produced a number of arguments and evidence aimed at demonstrating the existence of such *effectivités* — including acts of legislative and administrative control, the application of Honduran civil and criminal law to the disputed islands, the regulation of immigration, fishing activities carried out from the islands, naval patrols, the oil concession practice of Honduras and public works.

171. For its part, Nicaragua states that the *effectivités* invoked by Honduras cannot displace Nicaragua's original title over the islands based on adjacency. Making reference to the case concerning the *Frontier Dispute (Burkina Faso/Republic of Mali)*, Nicaragua maintains that it is only "[i]n the event that the *effectivité* does not co-exist with any legal title [that] it must invariably be taken into consideration" (*I.C.J. Reports 1986*, p. 587, para. 63). With regard to its own *effectivités*, Nicaragua argues that the exercise of its own sovereignty "over the maritime area in dispute including the cays, is attested to by the question of the turtle fisheries negotiations and agreements with Great Britain that began in the nineteenth century and were still ongoing in the 1960s". Nicaragua

further claims that in the 1970s "only Nicaragua was policing fishing activities in the area around the cays south of the Main Cape Channel and further to the east and north-east".

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172. A sovereign title may be inferred from the effective exercise of powers appertaining to the authority of the State over a given territory. To sustain a claim of sovereignty on that basis, a number of conditions must be proven conclusively. As described by the Permanent Court of International Justice

> "a claim to sovereignty based not upon some particular act or title such as a treaty of cession but merely upon continued display of authority, involves two elements each of which must be shown to exist: the intention and will to act as sovereign, and some actual exercise or display of such authority" (*Legal Status of Eastern Greenland, Judgment, 1933, P.C.I.J., Series A/B, No. 53*, pp. 45-46).

173. An additional element established by the Permanent Court of International Justice in the *Legal Status of Eastern Greenland* case is "the extent to which sovereignty is also claimed by some other Power" (*ibid.*, p. 46). The exercise of sovereign rights must also have a certain dimension proportionate to the nature of the case. In its Judgment in the *Eastern Greenland* case, the Court stated that:

> "It is impossible to read the record of the decisions in cases as to territorial sovereignty without observing that in many cases the tribunal has been satisfied with very little in the way of the actual exercise of sovereign rights, provided that the other State could not make out a superior claim. This is particularly true in the case of claims to sovereignty over areas in thinly populated or unsettled countries." *(Ibid.)*

174. Sovereignty over minor maritime features, such as the islands in dispute between Honduras and Nicaragua, may therefore be established on the basis of a relatively modest display of State powers in terms of quality and quantity. In the *Indonesia/Malaysia* case, the Court indicated that

> "in the case of very small islands which are uninhabited or not permanently inhabited — like Ligitan and Sipadan, which have been of little economic importance (at least until recently) — *effectivités* will indeed generally be scarce" (*Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment, I.C.J. Reports 2002*, p. 682, para. 134).

The Court further specified

> "it can only consider those acts as constituting a relevant display of authority which leave no doubt as to their specific reference to the islands in dispute as such. Regulations or administrative acts of a general nature can therefore be taken as *effectivités* with regard to Ligitan and Sipadan only if it is clear from their terms or their effects that they pertained to these two islands." (*Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment, I.C.J. Reports 2002*), pp. 682-683, para. 136.)

175. In keeping with this approach in the *Indonesia/Malaysia* case, the Court will examine whether in the present case the activities relied on by the contending Parties show a relevant display of sovereign authority despite being "modest in number" (*ibid.*, p. 685, para. 148). It will also be important to determine in this case whether these activities "cover a considerable period of time and show a pattern revealing an intention to exercise State functions in respect of the two islands in the context of the administration of a wider range of islands" *(ibid.)*.

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176. The Court will now consider the different categories of *effectivités* presented by the Parties.

177. *Legislative and administrative control*. Honduras claims it has exercised legislative and administrative control over the islands and provides a number of arguments in support of this proposition. Nicaragua does not seek to prove its own exercise of legislative and administrative control over the islands but instead argues that Honduras's evidence is insufficient.

178. Honduras's claim is based on the text of its Constitutions and of its Agrarian Law of 1936. The three Constitutions (1957, 1965, 1982) list islands which belong to Honduras, referring by name to a number of islands located in the Atlantic, including among others the cays of Falso, Gracias a Dios, Palo de Campeche "and all others located in the Atlantic, which historically, juridically and geographically (only the 1982 Constitution uses the term geographically) belong to it". The 1982 Constitution adds, by name, the cays of Media Luna and also Rosalind and Serranilla.

179. Under the title "Right of the State", the Honduran Agrarian Law of 1936 lists a number of cays that "belong to Honduras", "including Palo de Campeche" by name, and "others situated in the Atlantic Ocean". However, none of the Constitutions nor the Agrarian Law make explicit reference to the islands and cays in dispute. Honduras nonetheless states that the reference to Palo de Campeche and the other islands in the Atlantic should be taken to include the adjacent islands in dispute.

180. Nicaragua counters the Honduran legislative evidence on the grounds that it does not make any specific mention either of the area in dispute or of any intention to regulate activity on the islands. Nicaragua states that it therefore had "had no reason to protest" as the Honduran laws

> "have no relevance to the matter of maritime delimitation, not only because of their dates (those after 1977) but because of their content, which regulates matters within areas of Honduran sovereignty and jurisdiction with no specific mention of the islands".

181. The Court, noting that there is no reference to the four islands in dispute in the various Honduran Constitutions and in the Agrarian Law, further notes that there is no evidence that Honduras applied these legal instruments to the islands in any specific manner. The Court therefore finds that the Honduran claim that it had legislative and administrative control over the islands is not convincing.

182. *Application and enforcement of criminal and civil law*. Honduras also claims that its civil law has been applied and enforced by it in the disputed area, and provides various examples. It asserts that accidents in the area, usually involving divers, have long been reported to Honduras, rather than to Nicaraguan authorities. It claims that "the Honduran courts hear those cases because the accidents are treated as having occurred in the territory of Honduras". Honduras provides excerpts from four labour complaints, of which three were filed before the Labour Court of Puerto Lempira and one was filed before a court of Roatan (Bay Islands).

183. Honduras further claims that its "criminal laws are applied and enforced before its courts in relation to acts occurring on the islands" and that a "number of cases of theft and physical assault occurring on Savanna and Bobel Cays have been dealt with by the Honduran authorities and have reached the courts of Honduras". It provides an extract from a decision of the Lower Court of Puerto Lempira, dated 17 April 1997, related to a confiscation of a fibreglass boat which was found abandoned in Half Moon Cay. It provides a criminal complaint lodged before a court of Puerto Lempira stating that six aqualung sets had been stolen in South Cay from the ship "Mercante" and naming the two potential perpetrators who are to be summoned for interrogation. Honduras also places legal significance on a 1993 drug enforcement operation in the area by Honduras authorities and the United States Drug Enforcement Administration (DEA). This operation, known as the Satellite Operation Plan, involved the "conduct [of] reconnaissance operations to identify and locate, via the taking of aerial photographs, possible targets, areas and installations used in or connected to drug trafficking on a national scale, with the aim of neutralising criminal operations involving illicit drug trafficking". The Plan also provided for "suitably equipped aircraft" to "fly

over the national air space". A list of "islets and cays" is given in the Satellite Operation Plan which includes Bobel Cay, South Cay, Half Moon Cay and Savanna Cay.

184. Nicaragua challenges the contentions of Honduras but makes no claim with regard to its own application or enforcement of criminal and civil law. Nicaragua's objection is that all the examples adduced by Honduras stem from the 1990s, well after the critical date of 1977 proposed by Nicaragua. It also argues that the cases illustrated by Honduras may have been filed in its courts because they concerned Honduran nationals, not because the incidents took place on Honduran territory.

185. The Court is of the opinion that the evidence provided by Honduras of the application and enforcement of its criminal and civil laws does have legal significance in the present case. The fact that a number of these acts occurred in the 1990s is no obstacle to their relevance as the Court has found the critical date in relation to the islands to be 2001. The criminal complaints have relevance because the criminal acts occurred on the islands in dispute in this case (South Cay and Savanna Cay). The 1993 drug enforcement operation, while not necessarily an example of the application and enforcement of Honduran criminal law, can well be considered as an authorization by Honduras to the United States Drug Enforcement Administration (DEA) granting it the right to fly over the islands mentioned in the document, which are within the disputed area. The permit extended by Honduras to the DEA to overfly the "national air space", together with the specific mention of the four islands and cays, may be understood as a sovereign act by a State, amounting to a relevant *effectivité* in the area.

186. *Regulation of immigration*. Honduras argues that it maintains immigration records relating to foreign nationals living in Honduras and that such records "routinely include information on foreigners living on the islands now claimed by Nicaragua". By way of example, there is a Note dated 31 March 1999 addressed by the Regional Agent of Migration of Puerto Lempira to the General Director of Population and Migration Policy in Tegucigalpa by which a report is provided. In it there is a description of the number of huts in the inspected location, the nationality of persons (including in the case of foreigners details of their passport number, date of birth and visa expiry date) and the expiry date of their fishing licences. The information covers Bobel Cay, Savanna Cay, Port Royal Cay, South Cay and Gorda Cay.

187. The Court notes that there appears to have been substantial activity with regard to immigration and work-permit related regulation by Honduras of persons on the islands in 1999 and 2000. There is no evidence of any such regulation before 1999. Correspondence addressed by the Director of Population and Migration Policy to the Honduran Minister for the Interior regarding immigration movements on the disputed islands is dated November and December 1999. Honduras also provides evidence aimed at showing the exercise of regulatory powers on matters of immigration. In 1999, Honduran authorities visited the four islands and recorded the details of the foreigners living in South Cay, Port Royal Cay and Savanna Cay (Bobel Cay was uninhabited at the time, though it had previously been inhabited). Honduras provides a statement by a Honduran immigration officer who visited the islands three or four times from 1997 to 1999. He also accompanied the naval forces during their patrol of the area around the islands on two occasions. According to the immigration officer, the Town Hall of Puerto Lempira issues provisional work permits to Jamaican and Nicaraguan nationals and on occasion nationals of third States living on the islands have apparently received temporary permits until they obtain legal residence. Honduras also provides a document extending the visas of three Jamaican nationals "established in" Savanna Cay and South Cay.

188. Nicaragua again objects to the evidence of immigration regulatory activity by Honduras, claiming that it only dates back to 1999, i.e. after the critical date.

189. The Court finds that legal significance is to be attached to the evidence provided by Honduras on the regulation of immigration as proof of *effectivités*, notwithstanding that it began only in the late 1990s. The issuance of work permits and visas to Jamaican and Nicaraguan nationals exhibit a regulatory power on the part of Honduras. The visits to the islands by a Honduran immigration officer entails the exercise of jurisdictional authority, even if its purpose was to monitor rather than to regulate immigration on the islands. The time span for these acts of sovereignty is rather short, but then it is only Honduras which has undertaken measures in the area that can be regarded as acts performed *à titre de souverain*. There is no contention by Nicaragua of regulation by itself of immigration on the disputed islands either before or after the 1990s.

190. *Regulation of fisheries activities*. Honduras claims that the *bitácoras* (fishing licences) granted to fishermen are evidence of acts under governmental authority. It is said that "[m]any of the fishermen who work these areas and do so pursuant to Honduran-granted licences make

use of the islands. Some of them live on the islands and others just visit . . .". Honduras further claims that "[t]o support its conduct on fisheries, Honduras put before the Court 28 witness statements. Out of those 28, 24 refer to activities on the cays in sustaining fisheries activities authorized by Honduras".

191. Honduras provides evidence that there are buildings constructed on Savanna Cay which have been authorized and licensed by the authorities in Puerto Lempira. There is a testimony of a Jamaican national, "a fisherman by profession, currently living in Savanna Cay", who states that: "We have constructed all the buildings existing in the cay. These are registered in the municipality of Puerto Lempira. All the houses have been enumerated by the municipality, which commenced to enumerate them approximately two years ago." Another Jamaican national, who states that "for most part of the year [he is] living in Savanna Cay", also attests to Jamaicans "[having] constructed all the housing existing in this cay. These houses have been legally constructed with the consent of the Honduran authorities."

192. Honduras claims that "fishing equipment is stored on South Cay on the basis of a fishing permit obtained from the local authorities". A Mr. Mario Ricardo Dominguez places on record that due to his fishing activities,

> "he makes use of the installations located in South Cay as from [1992]; the installations in question include a wooden house where he stores fishing equipment, such as fishing nets, diving equipment, a freezer and an electricity plant . . . in order to conduct his fishing equipment he applies for a fishing permit each year from the Fishing Inspector of Puerto Lempira and satisfies the appropriate tax thereon".

193. Nicaragua contends that Honduras "does not present any evidence that the regulation of fishing activities by Honduras proves a title to the islets in dispute" and that Honduras more broadly fails to distinguish between activities of relevance to maritime delimitation and to the establishment of title over the islands.

194. The Court has stated that, with regard to activities by private persons, these

> "cannot be seen as *effectivités* if they do not take place on the basis of official regulations or under governmental authority" (*Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment, I.C.J. Reports 2002*, p. 683, para. 140).

In that regard, Honduras has presented witness statements to the effect that Honduras licenses fishing activities around the islands and cays, and

authorizes the construction of buildings on Savanna Cay. Whether the regulation of fishing activities by Honduras around the islands in dispute constituted an actual exercise or display of authority in respect of the disputed islands as such is a further question that must be determined.

195. The Court observes that all the evidence put forward by Honduras concerning fishing activities shows that these activities took place under Honduran authorization in the waters around the islands, but not that such fishing took place from the islands themselves. Instead, Honduras provides evidence that it has licensed activities on the islands which are related to fishing activities, such as the construction of buildings, or the storage of fishing boats. When looked at as a whole, the Court believes that the fishing licences, although undesignated as to areas, were known by the Honduran authorities to have been used for fishing taking place around the islands; Honduras authorized the construction of housing on the islands for purposes related to fishing activities. The Court is thus of the view that the Honduran authorities issued fishing permits with the belief that they had a legal entitlement to the maritime areas around the islands, derived from Honduran title over those islands. The evidence of Honduran-regulated fishing boats and construction on the islands is also legally relevant for the Court under the category of administrative and legislative control (see paragraphs 177-181 above).

196. The Court considers that the permits issued by the Honduran Government allowing the construction of houses in Savanna Cay and the permit for the storage of fishing equipment in the same cay provided by the municipality of Puerto Lempira may also be regarded as a display, albeit modest, of the exercise of authority, and as evidence of *effectivités* with respect to the disputed islands.

197. Nicaragua for its part contends that it has exercised jurisdiction over the islands in question in connection with its turtle fishing dispute with the United Kingdom which started in the nineteenth century and extended into the beginning of the twentieth century. Nicaragua also argues that the negotiations in the 1950s with the United Kingdom for the renewal of an earlier bilateral treaty of 1916 which remained "the basis for turtle fishing of the Cayman islanders until 1960" provide further evidence of Nicaraguan title over the islands in dispute. In this connection Nicaragua provides a 1958 map produced by the United Kingdom hydrographer Commander Kennedy, which it states "includes the islets, cays and reefs claimed by Nicaragua in the area in dispute with Honduras".

198. The Court first notes that the map does not prove that Commander Kennedy viewed these islands as clearly and unquestionably appertaining to Nicaragua. The Court observes that although the map prepared by Commander Kennedy did indeed include the islands now in

dispute between Nicaragua and Honduras, he noted that the islands "might . . . be claimed to be on the continental shelf of Honduras, depending on how the boundary across the shelf be finally agreed". Further, the map work of Commander Kennedy was not undertaken on the instructions of the United Kingdom Government. Neither does the Court find persuasive the argument that the negotiations between Nicaragua and the United Kingdom in the 1950s over renewed turtle fishing rights off the Nicaraguan coast attests to Nicaraguan sovereignty over the islands in dispute. The Court accordingly cannot grant legal significance to the turtle fishing dispute between Nicaragua and the United Kingdom for the purposes of *effectivités*.

199. *Naval patrols*. Basing itself on a number of depositions, Honduras contends that it has carried out naval and other patrols since 1976 to maintain security and to enforce Honduran laws around the islands, particularly fisheries laws and immigration laws. A Honduran immigration officer and a port supervisor at Puerto Lempira, who worked with the Honduran navy in undertaking patrols to the islands, provide their testimony. There is also "documentary evidence, in the form of patrol logbooks and other materials, showing Honduran patrols around the cays, the reefs and the banks in the areas to the north of the 15th parallel". Honduras also states that two patrol boats designated for this purpose have carried out regular operations, visiting the islands as well as Rosalind and Thunder Knoll Banks.

200. Nicaragua contests the Honduran claim by emphasizing that the military and naval patrols took place after the claimed critical date of 1977, Nicaragua also states that it undertook its own military and naval patrols around the islands.

201. The Court has already indicated that the critical date for the purposes of the issue of title to the islands is not 1977 but 2001. The evidence put forward by both Parties on naval patrolling is sparse and does not clearly entail a direct relationship between either Nicaragua or Honduras and the islands in dispute. Thus the Court does not find the evidence provided by either Party on naval patrols persuasive as to the existence of *effectivités* with respect to the islands. It cannot be deduced from this evidence that the authorities of Nicaragua or Honduras considered the islands in dispute to be under their respective sovereignty (see *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment, I.C.J. Reports 2002*, p. 683, para. 139). The Court will later consider the legal significance of the evidence submitted by the Parties on naval patrols in the context of the maritime dispute between them.

202. *Oil concessions*. In the written pleadings Honduras presented evidence of oil concessions as proof of title over the islands in the disputed area. However during the oral proceedings, this argument was not developed further. In its oral argument, Honduras changed its focus by contending that "[a] number of the Honduran concessions [had given] rise to sovereign activity on the islands". Thus, according to Honduras, the islands had "supported oil exploration" and had "been used as a base for oil exploration activity since the 1960s". In the oral proceedings, Honduras concentrated on the relevance of the Parties' oil concessions in connection with the claimed existence of a tacit agreement to respect the "traditional" boundary along the 15th parallel.

203. Nicaragua states that the practice of Nicaragua and Honduras regarding the issuing of oil concessions shows that it is not consistent as far as the title to the islets is concerned. In Nicaragua's view, the practice of Nicaragua and Honduras shows that there was no agreement on the existence of a line of allocation of sovereignty, and that Nicaragua considered the islets in dispute in the present case formed part of its territory.

204. The Court finds that the evidence relating to the offshore oil exploration activities of the Parties has no bearing on the islands in dispute. Therefore in its consideration of the question of *effectivités* supporting title over the islands, the Court will concentrate on the oil concession related acts on the islands under the category of public works.

205. *Public works*. Honduras offers as further evidence of *effectivités* the construction under its authorization of an antenna on Bobel Cay in 1975 to aid Union Oil. An additional piece of evidence of *effectivités* submitted by Honduras is the triangulation markers placed on Savanna Cay, South Cay and Bobel Cay in 1980 and 1981, pursuant to an agreement with the United States reached in 1976. Honduras states that there was no protest by Nicaragua to the 1976 Agreement or to the placing of the markers, nor did Nicaragua request their removal since they were placed more than 20 years ago. Nicaragua does not contest that these activities could have the character of *effectivités* but rather observes that the markers were placed after what it conceived as the critical date in 1977.

206. In the *Qatar* v. *Bahrain* case, the Court accorded legal significance to certain public works when it found that:

> "Certain types of activities invoked by Bahrain such as drilling of artisan wells would, taken by themselves, be considered controversial as acts performed *à titre de souverain*. The construction of navigational aids, on the other hand, can be legally relevant in the case of very small islands. In the present case, taking into account the size of [the island], the activities carried out by Bahrain on that island

must be considered sufficient to support Bahrain's claim that it has sovereignty over it." (*Maritime Delimitation and Territorial Questions between Qatar and Bahrain, (Qatar* v. *Bahrain), Merits, Judgment, I.C.J. Reports 2001*, pp. 99-100, para. 197.)

207. The Court observes that the placing on Bobel Cay in 1975 of a 10 metre long antenna by Geophysical Services Inc. for the Union Oil Company was part of a local geodetic network to assist in drilling activities in the context of oil concessions granted. Honduras claims that the construction of the antenna was an integral part of the "oil exploration activity authorized by Honduras". Reports on these activities were periodically submitted by the oil company to the Honduran authorities, in which the amount of the corresponding taxes paid was also indicated. Nicaragua claims that the placement of the antenna on Bobel Cay was a private act for which no specific governmental authorization was granted.

The Court is of the view that the antenna was erected in the context of authorized oil exploration activities. Furthermore the payment of taxes in respect of such activities in general can be considered additional evidence that the placement of the antenna (which, as noted, was part of those general activities) was done with governmental authorization.

The Court thus considers that the public works referred to by Honduras constitute *effectivités* which support Honduran sovereignty over the islands in dispute.

208. Having considered the arguments and evidence put forward by the Parties, the Court finds that the *effectivités* invoked by Honduras evidenced an "intention and will to act as sovereign" and constitute a modest but real display of authority over the four islands (*Legal Status of Eastern Greenland, Judgment, 1933, P.C.I.J., Series A/B, No. 53*, p. 46; see also *Minquiers and Ecrehos (France/United Kingdom), Judgment, I.C.J. Reports 1953*, p. 71).

Although it has not been established that the four islands are of economic or strategic importance and in spite of the scarcity of acts of State authority, Honduras has shown a sufficient overall pattern of conduct to demonstrate its intention to act as sovereign in respect of Bobel Cay, Savanna Cay, Port Royal Cay and South Cay. The Court further notes that those Honduran activities qualifying as *effectivités* which can be assumed to have come to the knowledge of Nicaragua did not elicit any protest on the part of the latter.

With regard to Nicaragua, the Court has found no proof of intention or will to act as sovereign, and no proof of any actual exercise or display of authority over the islands. Thus Nicaragua has not satisfied the criteria formulated by the Permanent Court of International

Justice in the *Legal Status of Eastern Greenland* case (see paragraph 172 above).

* *

7.4. Evidentiary Value of Maps in Confirming Sovereignty over the Disputed Islands

209. In the present case, a large number of maps were presented by the Parties to illustrate their respective arguments, but both Nicaragua and Honduras acknowledged that such collection of cartographic material did not constitute of itself a territorial title or evidence of sovereignty over the islands, or that the maps would have a substantive probative value.

210. Among them, a 1982 official map of Nicaragua exhibits a large portion of the Caribbean Sea adjacent to the coasts of Nicaragua and Honduras and includes a number of maritime features (although not the four disputed islands). There is no attribution of sovereignty of the maritime features. By the same token, Honduras provides official maps that cover parts of the Atlantic Ocean in the vicinity of Honduras and Nicaragua, but with no assignation of sovereignty to either country.

211. A 1933 map of the Republic of Honduras made by the Pan-American Institute of Geography and History conveys the impression that at least Bobel Cay, Logwood Cay, Media Luna Reef and South Cay are to be considered as belonging to Honduras. However, the map includes a general disclaimer concerning the areas in dispute.

212. The official map of the Republic of Honduras published in 1994 includes, as insular possessions of Honduras in the Caribbean Sea, a series of cays, "located in the rise geographically and historically known as 'Nicaraguan Rise'" in areas which, according to Nicaragua, are "under the complete sovereignty and jurisdiction of Nicaragua". For this publication, Nicaragua expressed "its total disagreement and protests".

213. The Court, having examined the cartographic material submitted by Nicaragua and Honduras, will now examine the extent to which it can be said to support their respective claims of sovereignty over the islands north of the 15th parallel. In undertaking this task, the Court will bear in mind that maps are

> "to be considered, although such descriptive material is of slight value when it relates to territory of which little or nothing was known and in which it does not appear that any administrative control was actually exercised" (Arbitral Award rendered on 23 January 1933 by the Special Boundary Tribunal constituted by the Treaty

of Arbitration between Guatemala and Honduras, *RIAA*, Vol. II, p. 1325).

214. In the Court's view the earlier maps do not support either of the Parties in their claims. In the present case, none of the maps submitted by the Parties which include some of the islands in dispute clearly specify which State is the one exercising sovereignty over those islands. In the *Island of Palmas* case, the Arbitral Award stated that

> "only with the greatest caution can account be taken of maps in deciding a question of sovereignty . . . Any maps which do not precisely indicate the political distribution of territories . . . clearly marked as such, must be rejected forthwith . . .
>
> The first condition required of maps that are to serve as evidence on points of law is their geographical accuracy. It must here be pointed out that not only maps of ancient date, but also modern, even official or semi-official maps seem wanting in accuracy." (*Island of Palmas (Netherlands/United States of America)*, 4 April 1928, *RIAA*, Vol. II, pp. 852-853.)

215. The Court reaffirms the position it has previously taken regarding the extremely limited scope of maps as a source of sovereign title

> "of themselves, and by virtue solely of their existence, [maps] cannot constitute a territorial title, that is, a document endowed by international law with intrinsic legal force for the purpose of establishing territorial rights" (*Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986*, p. 582, para. 54).

216. The Parties have conflicting views as to the maps and the Court has pondered their probative value with great care. In the 1986 Judgment of the Chamber of the Court in the *Burkina Faso/Mali* case, it was stated *inter alia* that: "Other considerations which determine the weight of maps as evidence relate to the neutrality of their sources towards the dispute in question and the parties to that dispute." (*Ibid.*, p. 583, para. 56.)

217. In this case, the submission of cartographic material by the Parties essentially serves the purpose of buttressing their respective claims and of confirming their arguments. The Court finds that it can derive little of legal significance from the official maps submitted and the maps of geographical institutions cited; these maps will be treated with a certain reserve. Such qualification is contained in a previous pronouncement by the Chamber of the Court when it said that:

> "Since relatively distant times, judicial decisions have treated maps with a considerable degree of caution . . . maps can still have no greater legal value than that of corroborative evidence endorsing a conclusion at which a court has arrived by other means unconnected with the maps. In consequence, except when the maps are in the category of a physical expression of the will of the State, they cannot in themselves alone be treated as evidence of a frontier, since in that event they would form an irrebuttable presumption, tantamount in fact to legal title." (*Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986*, p. 583, para. 56.)

218. None of the maps submitted by the Parties was part of a legal instrument in force nor more specifically part of a boundary treaty concluded between Nicaragua and Honduras.

219. The Court concludes that the cartographic material that was presented by the Parties in the written and oral proceedings cannot of itself support their respective claims to sovereignty over islands to the north of the 15th parallel.

* *

7.5. Recognition by Third States and Bilateral Treaties; the 1998 Free Trade Agreement

220. Honduras claims that a number of States have recognized Honduran sovereignty over the islands located north of the 15th parallel and jurisdiction over the maritime areas in that zone. For example, it states that this is demonstrated by Argentina's request in 1975 for authorization for its aircraft to overfly the islands in question; by Jamaica's request in 1977 to have access to Honduran waters to rescue twelve Jamaican nationals who were shipwrecked in Savanna Cay; by the installation of triangulation markers pursuant to the 1976 Honduran/United States Arrangement on Savanna Cay, South Cay and Bobel Cay in 1980 and 1981 and by drug enforcement operations carried out jointly by Honduras and the United States in 1993. Honduras also cites a 1983 Report of the United States Board on Geographic Names which "identifies *inter alia* the following as being located in Honduras: South Cay, Bobel Cay, Media Luna Cay (which is Savanna Cay), and the Arrecifes (reefs) de la Media Luna". Honduras further states that the 1995 "Sailing Directions" for the Caribbean Sea issued by the United States Defense Mapping Agency mention among the features relating to the Honduran coastline "Arrecifes de la Media Luna (Half Moon Reef), Logwood Cay, Cayo Media Luna, Bobel Cay, Hall Rock, Savanna Reefs, South Cay, Alargate Reef (Arrecife Alargado), Main Cape Shoal, and False Cape".

221. Nicaragua disputes these Honduran contentions, asserting that in

the case of the Argentine aircraft, the flight route was not located over the cays in dispute and indeed was outside of any area of territorial sea around the islands in dispute. As to the application made by Jamaica, Nicaragua maintains "it is not clear whether the Jamaican request is actually concerned with one of the islets in dispute in the present proceedings". Nicaragua also questions the importance of the 1976 Arrangement between the United States and Honduras, because it "has no relevance for the issue of sovereignty over the islets, as it includes no reference to any of them", adding that the markers were placed after its claimed critical date. As for the joint drug enforcement operation, Nicaragua states that it "only took place in 1993 and no evidence is offered of acts in the islets in dispute". Nicaragua further argues that the description of the "Sailing Directions" of the maritime area off the mainland coast of Central America in no way concerns the recognition of the Honduran position in respect of the islets in dispute.

222. According to Honduras, further recognition is provided by the conclusion of the

> "Treaties of 1986 (between Colombia and Honduras) and 1993 (between Colombia and Jamaica). Under these, both Colombia and Jamaica recognize the Honduran sovereignty and jurisdiction over the waters and islands as far as the bank of Serranilla north of the 15th parallel, i.e., west of the Joint Administration Area established by Colombia and Jamaica around that bank."

In relation to the 1986 Treaty between Colombia and Honduras on maritime delimitation, Nicaragua contends that it claimed in 1999 before the Central American Court of Justice that, by ratifying that Treaty, Honduras had breached the Central American community rules and principles (see paragraphs 69-70 above).

As for the 1993 Treaty between Colombia and Jamaica on maritime delimitation, Nicaragua asserts that it was concluded after the dispute between Nicaragua and Honduras arose and that it has no relevance to the present case because the maritime boundary proposed by Nicaragua does not encroach upon any rights to maritime zones Jamaica may have.

223. As to recognition by third States of Nicaragua's sovereignty over the islands in dispute, Nicaragua claims that during negotiations with Jamaica on the delimitation of a maritime boundary in 1996 and 1997 a "Jamaican proposal for the delimitation of the maritime boundary recognized Media Luna Cay as part of the territory of Nicaragua".

Honduras however states that Jamaica has provided Honduras with

an *aide-memoire* dated 9 April 2003 stating that, having reviewed the documents introduced by Nicaragua in its Reply,

> "[t]he Government of Jamaica has examined its records of the above-mentioned documents, and can confirm that these documents do not in any way indicate that Jamaica has ever expressed support for Nicaraguan maritime claims against Honduras.
>
> The Government of Jamaica has not in any way expressed support for the claims of either party in this dispute.
>
> The view of the Government of Jamaica has always been that this is a dispute between two sovereign States, which is being adjudicated by the International Court of Justice, and it has therefore adopted a position of complete neutrality in the dispute, while maintaining continued friendly relations with both parties."

224. In the Court's view there is no evidence to support any of the contentions made by the Parties with respect to recognition by third States that sovereignty over the disputed islands is vested in Honduras or in Nicaragua. Some of the evidence offered by the Parties shows episodic incidents that are neither consistent nor consecutive. It is obvious that they do not signify an explicit acknowledgment of sovereignty, nor were they meant to imply any such acknowledgment.

225. The Court observes that bilateral treaties of Colombia, one with Honduras and one with Jamaica, have been invoked by Honduras as proof of recognition of sovereignty over the disputed islands (see paragraph 222 above). The Court notes that in relation to these treaties Nicaragua never acquiesced in any understanding that Honduras had sovereignty over the disputed islands. The Court does not find these bilateral treaties relevant as regards recognition by a third party of title over the disputed islands.

*

226. The Court recalls that during the oral proceedings it was apprised of the negotiating history of a Central America-Dominican Republic Free Trade Agreement which was signed on 16 April 1998 in Santo Domingo by Nicaragua, Honduras, Costa Rica, Guatemala, El Salvador and the Dominican Republic, and which entered into force on different dates for each State (for Honduras on 19 December 2001; and for Nicaragua on 3 September 2002). According to Honduras, the original text of the Agreement, which was signed by the President of Nicaragua, included an Annex to Article 2.01 giving a definition of the territory of Honduras, which referred *inter alia* to Palo de Campeche and Media Luna Cays. This was the text ratified by Honduras. Honduras claims that the term "Media Luna" was "frequently used to refer to the entire group of

islands and cays" in the area in dispute. Nicaragua points out that during the ratification process, its National Assembly approved a revised text of the Free Trade Agreement which had been agreed by the signatory States, and which did not contain the Annex to Article 2.01.

The Court has obtained the text of the above-mentioned Annex. It observes that the four islands in dispute are not mentioned by name in the Annex. Moreover, the Court notes that it has not been presented with any convincing evidence that the term "Media Luna" has the meaning advanced by Honduras. In these circumstances the Court finds that it need not further examine arguments relating to this Treaty nor its status for the purposes of these proceedings.

* *

7.6. Decision as to Sovereignty over the Islands

227. The Court, having examined all of the evidence related to the claims of the Parties as to sovereignty over the islands of Bobel Cay, Savanna Cay, Port Royal Cay and South Cay, including the issue of the evidentiary value of maps and the question of recognition by third States, concludes that Honduras has sovereignty over these islands on the basis of post-colonial *effectivités*.

* * *

8. Delimitation of Maritime Areas

228. The question of sovereignty over the four islands in the area in dispute having been resolved, the Court turns now to the delimitation of maritime areas between Nicaragua and Honduras in the Caribbean Sea. The geography of the region, so critical to the delimitation, is described in detail at paragraphs 20 to 32.

8.1. Traditional Maritime Boundary Line Claimed by Honduras

8.1.1. The principle of uti possidetis juris

229. As mentioned earlier in this judgment (see paragraph 147 above), Honduras maintains that the *uti possidetis juris* principle referred to in the Gámez-Bonilla Treaty and the 1906 Award of the King of Spain is applicable to the maritime area off the coasts of Honduras and Nicaragua, and that the line of 15th parallel constitutes the line of maritime delimitation resulting from that application. It asserts that Nicaragua

and Honduras succeeded in 1821, *inter alia*, to a maritime area extending 6 miles (see paragraphs 86 and 148 above) and that *uti possidetis juris* "gives rise to a presumption of Honduran title to the continental shelf and EEZ north of the 15th parallel".

230. Honduras argues that prior to the independence of Nicaragua and Honduras in 1821, Cape Gracias a Dios separated the jurisdictional areas of the different colonial authorities which exercised authority over the maritime areas off the coasts of present day Nicaragua and Honduras. Honduras asserts that the Royal Order of 23 August 1745 initially divided the military jurisdiction of the maritime area between the Government of Honduras and the General Command of Nicaragua, with Cape Gracias a Dios marking the separation between the two military jurisdictions. Moreover, Honduras contends that the 15th parallel marked the traditional maritime boundary between Nicaragua and Honduras because the propensity of the Spanish Empire to use parallels and meridians to identify jurisdictional divisions makes it inconceivable that the Royal Decree of 1803 would have created a maritime division along a line other than the 15th parallel.

231. In response to Honduras, Nicaragua claims that jurisdiction over the territorial sea fell to Spanish authorities in Madrid, not to local authorities, including Captaincy-Generals. Nicaragua argues that the Spanish Crown's claim to a 6-mile territorial sea "tells [us] nothing with regard to the *limit* of this territorial sea between the Provinces of Honduras and Nicaragua" (emphasis in the original). Finally, Nicaragua argues that it would be inappropriate for the Court to rely upon *uti possidetis* to establish title to the exclusive economic zone and to the continental shelf which are distinctly modern legal concepts.

232. The Court observes that the *uti possidetis juris* principle might in certain circumstances, such as in connection with historic bays and territorial seas, play a role in a maritime delimitation. However, in the present case, were the Court to accept Honduras's claim that Cape Gracias a Dios marked the separation of the respective maritime jurisdiction of the colonial provinces of Honduras and Nicaragua, no persuasive case has been made by Honduras as to why the maritime boundary should then extend from the Cape along the 15th parallel. It merely asserts that the Spanish Crown tended to use parallels and meridians to draw jurisdictional divisions, without presenting any evidence that the colonial Power did so in this particular case.

233. The Court thus cannot uphold Honduras's assertion that the *uti possidetis juris* principle provided for a maritime division along the 15th parallel "to at least six nautical miles from Cape Gracias a Dios" nor that the territorial sovereignty over the islands to the north of the 15th parallel on the basis of the *uti possidetis juris* principle "provides the traditional line which separates these Honduran islands from the Nicaraguan islands to the south" with "a rich historical basis

that contributes to its legal foundation".

234. The Court further observes that Nicaragua and Honduras as new independent States were entitled by virtue of the *uti possidetis juris* principle to such mainland and insular territories and territorial seas which constituted their provinces at independence. The Court, however, has already found that it is not possible to determine sovereignty over the islands in question on the basis of the *uti possidetis juris* principle (see paragraph 158 above). Nor has it been shown that the Spanish Crown divided its maritime jurisdiction between the colonial provinces of Nicaragua and Honduras even within the limits of the territorial sea. Although it may be accepted that all States gained their independence with an entitlement to a territorial sea, that legal fact does not determine where the maritime boundary between adjacent seas of neighbouring States will run. In the circumstances of the present case, the *uti possidetis juris* principle cannot be said to have provided a basis for a maritime division along the 15th parallel.

235. The Court notes that the 1906 Arbitral Award, which indeed was based on the *uti possidetis juris* principle, did not deal with the maritime delimitation between Nicaragua and Honduras and that it does not confirm a maritime boundary between them along the 15th parallel. First, the Award fixed "the extreme boundary points on the coast of the Atlantic" and from that point indicated the land boundary line westwards. Second, there is no indication in the Award that the 15th parallel was perceived as the boundary line.

236. The Court thus finds that the contention of Honduras that the *uti possidetis juris* principle provides a basis for an alleged "traditional" maritime boundary along the 15th parallel cannot be sustained.

* *

8.1.2. Tacit agreement

237. In addition to its claim based on *uti possidetis juris* Honduras points to a variety of elements, having come into existence both before and after the Sandinista revolution in 1979, that, according to it, demonstrate that there was a "*de facto* boundary based on the tacit agreement of the Parties" at the 15th parallel (14° 59′ 48″ N). Honduras further argues that this tacit understanding constituted an "agreement" under Articles 15, 74, and 83 of UNCLOS legally delimiting a single maritime boundary.

238. Honduras further asserts that this "traditional" arrangement has its roots in the King of Spain's rejection in his 1906 Award of Nicaragua's land and maritime claims north of the 15th parallel. Honduras concedes that there is no "formal and written bilateral treaty" governing the delimitation, but argues that ever since the Award was rendered, the

Parties' oil concession practice in respect of the 15th parallel has coincided and has even been co-ordinated along that parallel and that this evinces a tacit agreement. Honduras relies on the Court's recent statement in the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening*) that oil concessions "may . . . be taken into account" if they are "based on express or tacit agreement between the parties" (*Judgment, I.C.J. Reports 2002*, p. 448, para. 304). In this regard, Honduras points to a series of oil concessions it granted as far south as the 15th parallel which elicited no protest from Nicaragua, as well as to a series of concessions granted by Nicaragua that extended as far north as the 15th parallel. Honduras maintains that even those Nicaraguan concessions which did not explicitly identify their northern limit, nonetheless "recognized and gave effect" to that limit because the configuration and size (in hectares) of the concession area corresponded to the northern limit of the 15th parallel.

239. Honduras argues specifically that Coco Marina, a joint venture oil well straddling the 15th parallel, provides "conclusive" evidence of agreement over the boundary that was "expressly recognized" as such by Nicaragua. Honduras explains that this was a joint venture between Union Oil Company of Honduras and Union Oil Company of Central America (based in Nicaragua) that had been approved by both the Nicaraguan and Honduran Governments: the costs were to be shared equally by the two companies.

240. Honduras further contends that fishing activities in the disputed area suggest that there was a tacit agreement between the Parties on the 15th parallel as the maritime boundary. Honduras points in this regard to fishing activities it licensed in areas as far south as the 15th parallel as well as to a fishing licence initially granted in 1986 by Nicaragua covering areas north of the 15th parallel but which was revoked in 1987 after protest by Honduras. Honduras maintains that it has treated the 15th parallel as the maritime boundary for purposes of regulating and enforcing its fisheries policies and that Nicaragua has done the same. In particular, it refers to a situation in 2000 when a Honduran vessel allegedly caught fishing illegally south of the 15th parallel was apprehended by a Nicaraguan patrol, escorted to a point on the 15th parallel whereupon it was released.

241. Honduras maintains that ever since the establishment of the Honduran navy in 1976, Honduran naval patrols have carried out a number of functions north of the 15th parallel, including the enforcement of fisheries and immigration laws, in addition to maintaining Honduras's security. Honduras argues that by contrast, Nicaragua has not produced evidence to demonstrate that its naval patrols have

sought to regulate or enforce Nicaraguan laws north of the 15th parallel.

242. Honduras also contends that the practice of third Parties confirm "the existence of a tacitly agreed boundary" along the 15th parallel. Honduras presented evidence of third State recognition of its claims, stressing that many such acts of recognition support both its claim to sovereignty over the islands and its maritime claim. For example, it refers to the request by Jamaica in 1977 to access Honduran waters to rescue 12 Jamaican nationals who were shipwrecked in Savanna Cay and the formal request by Argentina in 1975 for one of its aircraft to overfly Honduras by a route of 15° 17′ N 82° E. Honduras further mentions the *Gazetteer of Geographic Features* prepared by the United States National Imagery and Mapping Agency in October 2000, which identifies the northernmost insular feature attributed to Nicaragua at 14° 59′ N. Honduras argues that the practice of international organizations, such as the Food and Agriculture Organization (FAO), the United Nations Development Programme (UNDP) and the Inter-American Development Bank shows a comparable recognition of the 15th parallel. It also points to the fact that various third States (specifically, Jamaica and the United States) and international organizations, such as the FAO, have considered fish caught in the disputed area as Honduran catches.

243. Honduras also produces sworn statements by a number of fishermen attesting to their belief that the 15th parallel represented and continues to represent the maritime boundary.

244. The Court notes, as to that latter category of evidence, that witness 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. The Court notes that in some cases evidence which is contemporaneous with the period concerned may be of special value. Affidavits sworn later by a State official for purposes of litigation as to earlier facts will carry less weight than affidavits sworn at the time when the relevant facts occurred. In other circumstances, where there would have been no reason for private persons to offer testimony earlier, affidavits prepared even for the purposes of litigation will be scrutinized by the Court both to see whether what has been testified to has been influenced by those taking the deposition and for the utility of what is said. Thus, the Court will not find it inappropriate as such to receive affidavits produced for the purposes of a litigation if they attest to personal knowledge of facts by a particular individual. The Court will also take into account a witness's capacity to attest

to certain facts, for example, a statement of a competent governmental official with regard to the boundary lines may have greater weight than sworn statements of a private person.

245. In the current case sworn statements of fishermen produced by Honduras attested to a variety of issues; for example, that Honduran vessels fished north of the 15th parallel and Nicaraguan vessels south of that parallel; that Nicaraguan patrol boats crossed the 15th parallel and captured Honduran fishing boats; others testify as to a general knowledge that the offshore border has always been aligned along the 15th parallel; that licences and permits were issued by Nicaragua south of the 15th parallel and by Honduras to the north of that parallel; that Nicaraguan patrol activity north of the 15th parallel began in the 1980s or even more recently.

Although all the affidavits were made for the purposes of the case, the Court does not put into question their credibility. However, having examined their content the Court finds that none of them can be considered as proof of the existence of a "traditional" maritime boundary along the 15th parallel recognized by Nicaragua and Honduras.

Occasional references in the affidavits to the boundary running along the 15th parallel is of the nature of a personal opinion rather than the knowledge of a fact. In this regard the Court recalls previous dicta of relevance to this question:

> "The Court has not treated as evidence any part of the testimony given which was not a statement of fact, but a mere expression of opinion as to the probability or otherwise of the existence of such facts, not directly known to the witness. Testimony of this kind, which may be highly subjective, cannot take the place of evidence. An opinion expressed by a witness is a mere personal and subjective evaluation of a possibility, which has yet to be shown to correspond to a fact; it may, in conjunction with other material, assist the Court in determining a question of fact, but is not proof in itself. Nor is testimony of matters not within the direct knowledge of the witness, but known to him only from hearsay, of much weight . . ." (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986,* p. 42, para. 68.)

246. Honduras also argues that there is a regional practice of using lines of latitude and longitude as maritime boundaries and, specifically, that the 1928, 1986 and 1993 bilateral treaties concluded separately with Colombia, while *res inter alios acta* between Nicaragua and Honduras, nonetheless confirm the 15th parallel as the maritime boundary between

Honduras and Nicaragua. Honduras suggests that the 1928 Barcenas-Esguerra Treaty between Nicaragua and Colombia set the maritime boundary between them along with 82nd meridian up to the 15th parallel. Honduras also points to the 1986 Treaty on maritime delimitation it concluded with Colombia, which, although setting the boundary along 14° 59′ 08″ N rather than 14° 59.08′ N (owing to "an error in translation"), constitutes "recognition by Colombia that the maritime area to the north of the 15th parallel forms part of Honduras . . .". Honduras asserts that the 1993 Treaty between Colombia and Jamaica, delimiting a joint economic régime area abutting a different part of the line established by the 1986 Treaty between Colombia and Honduras, is further evidence that the line claimed to be established by the 1986 Treaty is receiving wider and more general international recognition.

247. Nicaragua denies that it ever accepted or recognized the 15th parallel as the maritime boundary with Honduras. It argues that the existence of what Honduras calls a "traditional" maritime boundary is belied by the fact that Nicaragua occupied Honduran territory north of the 15th parallel until this Court in 1960 affirmed the validity and binding character of the King of Spain's 1906 Award. Nicaragua maintains that the oil concession practice similarly fails to show a settled boundary since Nicaragua actually reserved its position as to the boundary by specifying in the contracts that the northern limit would be "the border line with the Republic of Honduras [which has not been determined]". With regard to the alleged inference of a northern boundary at the 15th parallel from the specification in these agreements of an area in hectares that corresponded with a northern limit at the 15th parallel, Nicaragua responds that some concessions (for example, Union Oil) also included language specifying that they covered the "conventional area" and that the concessions would be revised and modified "following the date when the borderline is determined".

248. Nicaragua further maintains that the fact that the Coco Marina project required a joint venture arrangement between Union Oil Company of Honduras and Union Oil Company of Central America (Nicaragua), and could not be carried out by one or the other of the companies alone, indicates that there was no agreement over the boundary. If an agreement had been in effect, there would have been no need for multinational co-operation since the project could have been handled wholly by the company operating in the country with rights in the Coco Marina area. According to Nicaragua, this was at best an agreement between two Union Oil subsidiaries (to be administered, in fact, from Nicaragua), rather than between the Governments of Nicaragua and Honduras, and thus carries little if any evidentiary weight.

249. As to the third party practice proffered by Honduras to show

general recognition of a boundary at the 15th parallel, Nicaragua argues that this is self-serving and of doubtful relevance or credibility. The FAO report cited by Honduras contains a disclaimer to the effect that the report is not meant to express any opinion about maritime delimitation or boundaries. Nicaragua further contends that its negotiations with Jamaica concerning the delimitation of a maritime boundary north of the 15th parallel undermine the argument that Jamaica recognized this parallel as Nicaragua's northern maritime limit. Nicaragua also asserts that it was involved in an armed conflict with, *inter alia*, Honduras and the United States after the 1979 Sandinista revolution and that the attitude of the United States in this matter should thus be discounted.

250. Finally Nicaragua contends that Honduras only began taking an interest in areas north of the 15th parallel in 1982, when Honduran forces initiated a series of attacks on "Nicaraguan positions in the area in dispute". It also refers to a series of diplomatic correspondence in which Nicaragua protested the incursion by Honduras into Nicaraguan waters.

251. As regards the treaties cited by Honduras as evidence of an internationally recognized traditional line, Nicaragua draws attention to the fact that it is challenging the validity and interpretation of its 1928 Treaty with Colombia in a separate case pending before this Court. Nicaragua argues that, if anything, this Treaty concerned the attribution of sovereignty over various small islands (in particular the Archipelago of San Andrés and Providencia) near the 82nd meridian and that in neither letter nor spirit did the Treaty delimit a maritime boundary. The Treaty moreover could not have set a maritime boundary along the 15th parallel more than 80 miles from their shores in 1928, when maritime boundaries so far out at sea were not accepted under international law. Nicaragua also challenges the legal relevance in this regard of the 1986 Treaty between Colombia and Honduras on maritime delimitation. Nicaragua maintains that it has protested against this Treaty repeatedly since it was concluded and taken steps to challenge its legality (see paragraphs 69-70 above). With regard to the 1993 Treaty between Colombia and Jamaica on maritime delimitation, Nicaragua states that it "is concerned with insular territories and maritime areas which are part of the case between Nicaragua and Colombia before this Court". According to Nicaragua, this treaty "has no relevance for the present proceedings" as the maritime boundary with Honduras proposed by Nicaragua does not affect any right "to maritime zones Jamaica may have to the north of the maritime boundary Jamaica agreed with Colombia in 1993".

252. Nicaragua also argues that Honduras understood that no legal delimitation had been effected between the two countries. Nicaragua points in particular to an incident in 1982 arising from the capture by the Nicaraguan coastguard of four Honduran vessels fishing approximately

16 miles north of the 15th parallel in the vicinity of Bobel Cay and Media Luna Cay. This incident resulted in a diplomatic exchange in which a Note dated 23 March 1982 from the Honduran Foreign Ministry identified the 15th parallel as a delimitation line "traditionally recognised by both countries" and thus protested against what it saw as a "flagrant violation of [Honduran] sovereignty". The reply by the Foreign Minister of Nicaragua, dated 14 April 1982, rejected the 15th parallel as the boundary line and asserted that "[a]t no time has Nicaragua recognised it as such since that would imply an attempt against the territorial integrity and national sovereignty of Nicaragua". The Honduran Foreign Minister responded to this by way of a Note of 3 May 1982 in which he reasserted that there was a "traditionally accepted line", but

> "agree[d] . . . that the maritime border between Honduras and Nicaragua [had] not been legally delimited" *("Coincido . . . que la frontera marítima entre Honduras y Nicaragua no ha sido jurídicamente delimitada") [original Spanish; translation into English provided by the Parties]*.

He further proposed "[t]he temporary establishment of a line or zone . . . which, without prejudice to the rights that the two States might claim in the future, could serve as momentary indicator of their respective areas of jurisdiction". Nicaragua thus concludes that, whatever else the 15th parallel may have represented historically and in State practice, it was not regarded by either of the Parties as having actual legal value. According to Nicaragua, from the Somoza Government which ended in 1979 until the current Government of Mr. Ortega, the official position of all successive Nicaraguan administrations has been that no line of delimitation in the Caribbean Sea has existed between Nicaragua and Honduras.

253. The Court has already indicated that there was no boundary established by reference to *uti possidetis juris* (see paragraph 236 above). The Court must now determine whether there was a tacit agreement sufficient to establish a boundary. Evidence of a tacit legal agreement must be compelling. The establishment of a permanent maritime boundary is a matter of grave importance and agreement is not easily to be presumed. A *de facto* line might in certain circumstances correspond to the existence of an agreed legal boundary or might be more in the nature of a provisional line or of a line for a specific, limited purpose, such as sharing a scarce resource. Even if there had been a provisional line found convenient for a period of time, this is to be distinguished from an international boundary.

254. As regards the evidence of oil concessions proffered by Honduras, the Court considers that Nicaragua, by leaving open the northern limit to its concessions or by abstaining from mentioning the boundary with Honduras in that connection, reserved its position concerning its

maritime boundary with Honduras. As the Court has pointed out with respect to oil concession limits:

> "These limits may have been simply the manifestation of the caution exercised by the Parties in granting their concessions. This caution was all the more natural in the present case because negotiations were to commence soon afterwards between Indonesia and Malaysia with a view to delimiting the continental shelf." (*Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment, I.C.J. Reports 2002*, p. 664, para. 79.)

Moreover, the Court observes that the Nicaraguan concessions provisionally extending up to the 15th parallel were all given after Honduras had granted its concessions extending southwards to the 15th parallel.

255. The Court recalls that Nicaragua has maintained its persistent objections to the 1986 Treaty between Colombia and Honduras and the 1993 Treaty between Colombia and Jamaica. In the 1986 Treaty the parallel 14° 59′ 08″ (see paragraph 246 above) to the east of the 82nd meridian serves as the boundary line between Honduras and Colombia. As already mentioned, according to Honduras the 1993 Treaty proceeds from a recognition of the validity of the 1986 Treaty between Colombia and Honduras, thereby recognizing Honduran jurisdiction over the waters and islands to the north of the 15th parallel (see paragraphs 222 and 246 above).

256. The Court has noted that at periods in time, as the evidence shows, the 15th parallel appears to have had some relevance in the conduct of the Parties. This evidence relates to the period after 1961 when Nicaragua left areas to the north of Cape Gracias a Dios following the rendering of the Court's Judgment on the validity of the 1906 Arbitral Award and until 1977 when Nicaragua proposed negotiations with Honduras with the purpose of delimiting maritime areas in the Caribbean Sea. The Court observes that during this period several oil concessions were granted by the Parties which indicated that their northern and southern limits lay respectively at 14° 59.8′. Furthermore, regulation of fishing in the area at times seemed to suggest an understanding that the 15th parallel divided the respective fishing areas of the two States; and in addition the 15th parallel was also perceived by some fishermen as a line dividing maritime areas under the jurisdiction of Nicaragua and Honduras. However, these events, spanning a short period of time, are not sufficient for the Court to conclude that there was a legally established international maritime boundary between the two States.

257. The Court observes that the Note of the Honduran Minister for Foreign Affairs dated 3 May 1982 (see paragraph 56 above) is somewhat uncertain regarding the existence of an acknowledged boundary along

the 15th parallel. Although Honduras had agreed in an exchange of Notes in 1977 to initiate "the preliminary stages of the conversation" about "the definitive marine and sub-marine delimitation in the Caribbean Sea zone", the dispute may be said to have "crystallized" through the various incidents leading to the above-mentioned Note of 3 May 1982. In that Note, the Foreign Minister of Honduras concurred with the Nicaraguan Foreign Ministry that "the maritime border between Honduras and Nicaragua has not been legally delimited" and proposed that the Parties at least come to a "temporary" arrangement about the boundary so as to avoid further boundary incidents. The acknowledgment that there was then no legal delimitation "was not a proposal or a concession made during negotiations, but a statement of facts transmitted to the Foreign [Ministry, which] did not express any reservation in respect thereof" and should thus be taken "as evidence of the [Honduran] official view at that time" (*Minquiers and Ecrehos, Judgment, I.C.J. Reports 1953*, p. 71).

258. Having reviewed all of this practice including the diplomatic exchanges referred to in paragraphs 252 and 257, the Court concludes that there was no tacit agreement in effect between the Parties in 1982 — nor *a fortiori* at any subsequent date — of a nature to establish a legally binding maritime boundary.

* *

8.2. Determination of the Maritime Boundary

259. The Court, having found that there is no traditional boundary line along the 15th parallel, proceeds now to the maritime delimitation between Nicaragua and Honduras.

*

260. In its final submissions, Nicaragua requests the Court to adjudge and declare that:

> "The bisector of the lines representing the coastal fronts of the two Parties as described in the pleadings, drawn from a fixed point approximately 3 miles from the river mouth in the position 15° 02′ 00″ N and 83° 05′ 26″ W, constitutes the single maritime boundary for the purposes of the delimitation of the disputed areas of the territorial sea, exclusive economic zone and continental shelf in the region of the Nicaraguan Rise";

and that:

> "The starting-point of the delimitation is the thalweg of the main mouth of the River Coco such as it may be at any given moment as determined by the Award of the King of Spain of 1906."

The second and third final submissions of Honduras request the Court to adjudge and declare that:

> "2. The starting-point of the maritime boundary to be delimited by the Court shall be a point located at 14° 59.8′ N latitude, 83° 05.8′ W longitude. The boundary from the point determined by the Mixed Commission in 1962 at 14° 59.8′ N latitude, 83° 08.9′ W longitude to the starting-point of the maritime boundary to be delimited by the Court shall be agreed between the Parties to this case on the basis of the Award of the King of Spain of 23 December 1906, which is binding upon the Parties, and taking into account the changing geographical characteristics of the mouth of the River Coco (also known as the River Segovia or Wanks).
>
> 3. East of the point at 14° 59.8′ N latitude, 83° 05.8′ W longitude, the single maritime boundary which divides the respective territorial seas, exclusive economic zones and continental shelves of Honduras and Nicaragua follows 14° 59.8′ N latitude, as the existing maritime boundary, or an adjusted equidistance line, until the jurisdiction of a third State is reached."

*

8.2.1. Applicable law

261. Both Parties in their final submissions asked the Court to draw a "single maritime boundary" delimiting their respective territorial seas, exclusive economic zones, and continental shelves in the disputed area. Although Nicaragua was not party to UNCLOS at the time it filed the Application in this case, the Parties are in agreement that UNCLOS is now in force between them and that its relevant articles are applicable between them in this dispute (UNCLOS entered into force on 16 November 1994; Nicaragua ratified it on 3 May 2000 and Honduras on 5 October 1993).

*

8.2.2. Areas to be delimited and methodology

262. The "single maritime boundary" in this case will be the result of the delimitation of the various areas of jurisdiction spanning the maritime zone from the Nicaragua-Honduras mainland out to at least the 82nd meridian, where third-State interests may become relevant. In the western reaches of the area to be delimited the Parties' mainland coasts are adjacent; thus, for some distance the boundary will delimit exclusively their territorial seas (UNCLOS, Art. 2, para. 1). Both Parties also accept that the four islands in dispute north of the 15th parallel (Bobel

Cay, Savanna Cay, Port Royal Cay and South Cay), which have been attributed to Honduras (see paragraph 227 above), as well as Nicaragua's Edinburgh Cay south of the 15th parallel, are entitled to generate their own territorial seas for the coastal State. The Court recalls that as regards the islands in dispute no claim has been made by either Party for maritime areas other than the territorial sea.

263. As to the breadth of the territorial sea around the four disputed islands, Nicaragua, in response to a question put by Judge Keith, stated that if Bobel Cay, Savanna Cay, Port Royal Cay and South Cay "were to be attributed to Honduras and were thus to be located within Nicaraguan territory", then the position of Nicaragua would be that those islands "should be enclaved within a territorial sea of 3 miles". Honduras, for its part, contended that, as the breadth of the territorial sea of both Parties is 12 nautical miles, there is "no justification . . . for employing a different standard with regard to the islands".

264. The Court notes that, while the Parties disagree as to the appropriate breadth of these islands' territorial seas, according to Article 3 of UNCLOS, a State's territorial sea cannot extend beyond 12 nautical miles. These islands are all indisputably located within 24 miles of each other but more than 24 miles from the mainland that lies to the west. Thus the single maritime boundary might also include segments delimiting overlapping areas of the islands' opposite-facing territorial seas as well as segments delimiting the continental shelf and exclusive economic zones around them.

265. As regards the general task and methodology of drawing a single maritime boundary to delimit these various maritime zones, the Court observed in the case concerning *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain)* that:

> "the concept of a single maritime boundary does not stem from multilateral treaty law but from State practice, and that it finds its explanation in the wish of States to establish one uninterrupted boundary line delimiting the various — partially coincident — zones of maritime jurisdiction appertaining to them. In the case of coincident jurisdictional zones, the determination of a single boundary for the different objects of delimitation
>
> > 'can only be carried out by the application of a criterion, or combination of criteria, which does not give preferential treatment to one of these . . . objects to the detriment of the other, and at the same time is such as to be equally suitable to the division of either of them',
>
> as was stated by the Chamber of the Court in the *Gulf of Maine* case (*Judgment, I.C.J. Reports 1984*, p. 327, para. 194). In that case, the Chamber was asked to draw a single line which

would delimit both the continental shelf and the superjacent water column.

Delimitation of territorial seas does not present comparable problems, since the rights of the coastal State in the area concerned are not functional but territorial, and entail sovereignty over the sea-bed and the superjacent waters and air column. Therefore, when carrying out that part of its task, the Court has to apply first and foremost the principles and rules of international customary law which refer to the delimitation of the territorial sea, while taking into account that its ultimate task is to draw a single maritime boundary that serves other purposes as well." (*Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain), Merits, Judgment, I.C.J. Reports 2001*, p. 93, paras. 173-174.)

266. The Court considers these observations pertinent for the present case as well.

267. For the delimitation of the territorial seas, Article 15 of UNCLOS, which is binding as a treaty between the Parties, provides:

> "Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest point on the baselines from which the breadth of the territorial seas of each of the two States is measured. The above provision does not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance therewith."

As already indicated, the Court has determined that there is no existing "historic" or traditional line along the 15th parallel.

268. As this Court has observed with respect to implementing the provisions of Article 15 of UNCLOS:

> "The most logical and widely practised approach is first to draw provisionally an equidistance line and then to consider whether that line must be adjusted in the light of the existence of special circumstances." (*Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain), Merits, Judgment, I.C.J. Reports 2001*, p. 94, para. 176.)

269. The methods governing territorial sea delimitations have needed to be, and are, more clearly articulated in international law than those used for the other, more functional maritime areas. Article 15 of UNCLOS, like Article 12, paragraph 1, of the 1958 Convention on the Territorial Sea and the Contiguous Zone before it, refers specifically and expressly to the equidistance/special circumstances approach for delimiting the territorial sea. The Court noted in the cases concerning *North Sea Continental Shelf*, that

> "the distorting effects of lateral equidistance lines under certain conditions of coastal configuration are nevertheless comparatively small within the limits of territorial waters, but produce their maximum effect in the localities where the main continental shelf areas lie further out" (*Judgment, I.C.J. Reports 1969*, p. 37, para. 59).

270. For the exclusive economic zone and the continental shelf, Articles 74, paragraph 1, and 83, paragraph 1, of UNCLOS provide that they are to be delimited by "agreement on the basis of international law" to "achieve an equitable solution".

271. As to the plotting of a single maritime boundary the Court has on various occasions made it clear that, when a line covering several zones of coincident jurisdictions is to be determined, the so-called equitable principles/relevant circumstances method may usefully be applied, as in these maritime zones this method is also suited to achieving an equitable result:

> "This method, which is very similar to the equidistance/special circumstances method applicable in delimitation of the territorial sea, involves first drawing an equidistance line, then considering whether there are factors calling for the adjustment or shifting of that line in order to achieve an 'equitable result'." (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 441, para. 288.)

272. The jurisprudence of the Court sets out the reasons why the equidistance method is widely used in the practice of maritime delimitation: it has a certain intrinsic value because of its scientific character and the relative ease with which it can be applied. However, the equidistance method does not automatically have priority over other methods of delimitation and, in particular circumstances, there may be factors which make the application of the equidistance method inappropriate.

273. Nicaragua contends that the current case is not one in which the equidistance/special circumstances approach would be appropriate for the delimitation to be effected. Nicaragua asserts that the instability of the mouth of the River Coco at the Nicaragua-Honduras land boundary terminus, combined with the small and uncertain nature of the offshore islands and cays north and south of the 15th parallel, would make fixing base points and using them to construct a provisional equidistance line unduly problematic. Nicaragua urges the Court instead to account for the coastal geography by constructing the entire single maritime boundary from "the bisector of two lines representing the entire coastal front of both states", which would run as a line of constant bearing 52° 45′ 21″.

274. Honduras's principal argument with respect to the delimitation is that there was a tacit agreement on the 15th parallel as the single mari-

time boundary. Honduras has acknowledged that "geometrical methods of delimitation, such as perpendiculars and bisectors, are methods that may produce equitable delimitations in some circumstances". As regards equidistance, Honduras agrees that the mouth of the River Coco "shifts considerably, even from year to year", making it "necessary to adopt a technique so that the maritime boundary need not change as the mouth of the river changes". Honduras asserts, moreover, that the 15th parallel accurately reflects the eastward facing coastal fronts of the two countries such that it represents "both an adjustment and simplification of the equidistance line".

275. Thus neither Party has as its main argument a call for a provisional equidistance line as the most suitable method of delimitation.

276. Honduras initially referred to its version of a provisional equidistance line constructed by using the islands as base points in its Rejoinder. At the end of its oral argument, Honduras presented a provisional equidistance line (azimuth 78° 48′) constructed from one pair of base points fixed at the low-water line of the apparent easternmost endpoint of the mainland Honduran and Nicaraguan coasts at Cape Gracias a Dios, as identified from a recent satellite photograph. Honduras did not use the islands north and south of the 15th parallel as base points for constructing this line but did adjust the line both to allow a full 12-mile territorial sea for these islands where possible and to follow a median line where their opposite-facing territorial seas overlap (mostly to the south of the 15th parallel) (see also paragraph 285 below).

277. The Court observes at the outset that both Parties have raised a number of geographical and legal considerations with regard to the method to be followed by the Court for the maritime delimitation. Cape Gracias a Dios, where the Nicaragua-Honduras land boundary ends, is a sharply convex territorial projection abutting a concave coastline on either side to the north and south-west. Taking into account Article 15 of UNCLOS and given the geographical configuration described above, the pair of base points to be identified on either bank of the River Coco at the tip of the Cape would assume a considerable dominance in constructing an equidistance line, especially as it travels out from the coast. Given the close proximity of these base points to each other, any variation or error in situating them would become disproportionately magnified in the resulting equidistance line. The Parties agree, moreover, that the sediment carried to and deposited at sea by the River Coco have caused its delta, as well as the coastline to the north and south of the Cape, to exhibit a very active morpho-dynamism. Thus continued accretion at the Cape might render any equidistance line so constructed today arbitrary and unreasonable in the near future.

278. These geographical and geological difficulties are further exacerbated by the absence of viable base points claimed or accepted by the Parties themselves at Cape Gracias a Dios. In accordance with Article 16 of UNCLOS, Honduras has deposited with the Secretary-General of the United Nations a list of geographical co-ordinates for its baselines for measuring the breadth of its territorial sea (see Honduran Executive Decree No. PCM 007-2000 of 21 March 2000 (published in the *Law of the Sea Bulletin*, No. 43; also available at http://www.un.org/Depts/los/doalos_publications/LOSBulletins/bulletinpdf/bulletinE43.pdf)). The Honduran Executive Decree identifies one of the points used for its territorial sea baselines, "Point 17", as having co-ordinates 14° 59.8′ N and 83° 08.9′ W. These are the exact co-ordinates the Mixed Commission identified in 1962 as being the thalweg of the River Coco at the mouth of its main branch. This point, even if it can be said to appertain to Honduras, is no longer in the mouth of the River Coco and cannot be properly used as a base point (see UNCLOS, Art. 5.) Nicaragua has not yet deposited the geographical co-ordinates of its base points and baselines.

279. This difficulty in identifying reliable base points is compounded by the differences, addressed more fully, *infra*, that apparently still remain between the Parties as to the interpretation and application of the King of Spain's 1906 Arbitral Award in respect of sovereignty over the islets formed near the mouth of the River Coco and the establishment of "[t]he extreme common boundary point on the coast of the Atlantic" (*Arbitral Award Made by the King of Spain on 23 December 1906 (Honduras* v. *Nicaragua), Judgment, I.C.J. Reports 1960*, p. 202). The Court notes that in the case concerning *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)*, the "main reason" for the Chamber's objections to using equidistance in the first segment of the delimitation was that the Special Agreement's choice of Point A as the beginning of the line deprived the Court of an equidistance point, "derived from two basepoints of which one is in the unchallenged possession of the United States and the other in that of Canada" (*Judgment, I.C.J. Reports 1984*, p. 332, para. 211).

280. Given the set of circumstances in the current case it is impossible for the Court to identify base points and construct a provisional equidistance line for the single maritime boundary delimiting maritime areas off the Parties' mainland coasts. Even if the particular features already indicated make it impossible to draw an equidistance line as the single maritime frontier, the Court must nonetheless see if it would be possible to start the frontier line across the territorial seas as an equidistance line, as envisaged in Article 15 of UNCLOS. It may be argued that the problems associated with distortion, if the protrusions either side of Cape Gracias a Dios were used as base points, are less severe close to the coast

(*North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, pp. 17-18).

However, the Court notes first that the Parties are in disagreement as to title over the unstable islands having formed in the mouth of the River Coco, islands which the Parties suggested during the oral proceedings could be used as base points. It is recalled that because of the changing conditions of the area the Court has made no finding as to sovereignty over these islands (see paragraph 145 above). Moreover, whatever base points would be used for the drawing of an equidistance line, the configuration and unstable nature of the relevant coasts, including the disputed islands formed in the mouth of the River Coco, would make these base points (whether at Cape Gracias a Dios or elsewhere) uncertain within a short period of time.

Article 15 of UNCLOS itself envisages an exception to the drawing of a median line, namely "where it is necessary by reason of historic title or special circumstances . . .". Nothing in the wording of Article 15 suggests that geomorphological problems are *per se* precluded from being "special circumstances" within the meaning of the exception, nor that such "special circumstances" may only be used as a corrective element to a line already drawn. Indeed, the latter suggestion is plainly inconsistent with the wording of the exception described in Article 15. It is recalled that Article 15 of UNCLOS, which was adopted without any discussion as to the method of delimitation of the territorial sea, is virtually identical (save for minor editorial changes) to the text of Article 12, paragraph 1, of the 1958 Convention on the Territorial Sea and the Contiguous Zone.

The genesis of the text of Article 12 of the 1958 Convention on the Territorial Sea and the Contiguous Zone shows that it was indeed envisaged that a special configuration of the coast might require a different method of delimitation (see *Yearbook of the International Law Commission (YILC)*, 1952, Vol. II, p. 38, commentary, para. 4). Furthermore, the consideration of this matter in 1956 does not indicate otherwise. The terms of the exception to the general rule remained the same (*YILC*, 1956, Vol. I, p. 284; Vol. II, pp. 271, 272, and p. 300 where the Commentary to the draft Articles dealing with the continental shelf noted that "as in the case of the boundaries of the territorial sea, provision must be made for departures necessitated by any exceptional configuration of the coast . . ."). Additionally, the jurisprudence of the Court does not reveal an interpretation that is at variance with the ordinary meaning of the terms of Article 15 of UNCLOS. This matter has not previously been directly in issue. The Court notes however that on occasion the median line in delimiting the territorial sea has not been used, either for very par-

ticular reasons (see *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, p. 85, para. 121, where the Court worked backwards from a line of convergence of the concessions granted by each Party and reflected this in a line drawn from a defined point offshore to the endpoint of the land frontier) or because of the adverse effect of coastal configurations (see *Delimitation of the Maritime Boundary between Guinea and Guinea-Bissau, International Law Reports*, Vol. 77, p. 682, para. 104. *[English translation of French original]*).

281. For all of the above reasons, the Court finds itself within the exception provided for in Article 15 of UNCLOS, namely facing special circumstances in which it cannot apply the equidistance principle. At the same time equidistance remains the general rule.

282. The Court observes that in this case the Parties have each envisaged methods for delimiting the territorial sea other than the drawing of an equidistance line.

* *

8.2.3. Construction of a bisector line

283. Having reached the conclusion that the construction of an equidistance line from the mainland is not feasible, the Court must consider the applicability of the alternative methods put forward by the Parties.

284. Nicaragua's primary argument is that a "bisector of two lines representing the entire coastal front of both States" should be used to effect the delimitation from the mainland, while sovereignty over the maritime features in the area in dispute "could be attributed to either Party depending on the position of the feature involved with respect to the bisector line".

285. Honduras "does not deny that geometrical methods of delimitation, such as perpendiculars and bisectors, are methods that may produce equitable delimitations in some circumstances", but it disagrees with Nicaragua's construction of the angle to be bisected. Honduras, as already explained, advocates a line along the 15th parallel, no adjustment of which would be necessary in relation to the islands. In the Rejoinder, Honduras, in order to demonstrate the equitable character of its proposed boundary along the 15th parallel, refers to a provisional equidistance line constructed by using islands to the north and south of the 15th parallel as base points. In addition, during the oral proceedings, Honduras referred to a provisional equidistance line drawn from a single pair of purported mainland base points without using any of the islands as base points. The islands would be dealt with separately by overlaying on this equidistance line the 12-mile territorial seas of the islands north and south of the 15th parallel. Honduras also argues with respect to this alternative that where the islands'

territorial seas overlap an equidistance line should be drawn between them.

286. The Court notes that in Honduras's final submissions it requested the Court to declare that the single maritime boundary between Honduras and Nicaragua "follows 14° 59.8′ N latitude, as the existing maritime boundary, or an adjusted equidistance line, until the jurisdiction of a third State is reached". During the oral proceedings, Honduras explained that, "if the Court rejects its submission — that the 15th parallel is the existing maritime boundary between Honduras and Nicaragua — then an adjusted equidistance line provides the basis for an alternative boundary". The Court recalls that both of Honduras's proposals (the main one based on tacit agreement as to the 15th parallel representing the maritime frontier and the other on the use of an adjusted equidistance line) have not been accepted by the Court.

287. Thus the Court will consider whether in principle some form of bisector of the angle created by lines representing the relevant mainland coasts could be a basis for the delimitation. The Court will then consider the impact of the territorial seas of the islands. The use of a bisector — the line formed by bisecting the angle created by the linear approximations of coastlines — has proved to be a viable substitute method in certain circumstances where equidistance is not possible or appropriate. The justification for the application of the bisector method in maritime delimitation lies in the configuration of and relationship between the relevant coastal fronts and the maritime areas to be delimited. In instances where, as in the present case, any base points that could be determined by the Court are inherently unstable, the bisector method may be seen as an approximation of the equidistance method. Like equidistance, the bisector method is a geometrical approach that can be used to give legal effect to the

> "criterion long held to be as equitable as it is simple, namely that in principle, while having regard to the special circumstances of the case, one should aim at an equal division of areas where the maritime projections of the coasts of the States . . . converge and overlap" (*Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984*, p. 327, para. 195).

288. This was the situation in the case concerning the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, where equidistance could not be used for the second segment of the delimitation because the segment was to begin at a point not on any possible equidistance line. The Court there used a bisector to approximate the northerly change in direction of the Tunisian coast beginning in the Gulf of Gabes (*I.C.J. Reports 1982*, p. 94, para. 133 C (3)). The Chamber of the Court in the *Gulf of Maine*

case also used a bisector of the Gulf-facing mainland because it deemed the small islands in the Gulf unsuitable for use as base points and because the first segment of the delimitation was to begin at "Point A", which was also off any equidistance line. The Arbitral Tribunal in the 1985 *Delimitation of the Maritime Boundary between Guinea and Guinea-Bissau* case drew a perpendicular (the bisector of a 180° angle) to a line drawn from Almadies Point (Senegal) to Cape Shilling (Sierra Leone) to approximate the general direction of the coast of "the whole of West Africa". The Tribunal considered this approach, rather than equidistance, necessary in order to effect an equitable delimitation that had to be "integrated into the present or future delimitations of the region as a whole" (*International Law Reports*, Vol. 77, pp. 683-684, para. 108).

289. If it is to "be faithful to the actual geographical situation" (*Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 45, para. 57), the method of delimitation should seek a solution by reference first to the States' "relevant coasts" (see *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain), Judgment, I.C.J. Reports 2001*, p. 94 para. 178; see also the *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), I.C.J. Reports 2002*, p. 442, para. 90)). Identifying the relevant coastal geography calls for the exercise of judgment in assessing the actual coastal geography. The equidistance method approximates the relationship between two Parties' relevant coasts by taking account of the relationships between designated pairs of base points. The bisector method comparably seeks to approximate the relevant coastal relationships, but does so on the basis of the macro-geography of a coastline as represented by a line drawn between two points on the coast. Thus, where the bisector method is to be applied, care must be taken to avoid "completely refashioning nature" (*North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 49, para. 91).

290. In light of the foregoing, the Court notes that Nicaragua advanced a variety of reasons to justify the bisector method (see paragraphs 83-84 and 102 above). According to Nicaragua, the equitable character of the bisector method is confirmed by the independent criteria of an equitable result: *(a)* the method produces an effective reflection of the coastal relationships; *(b)* the bisector produces a result which constitutes an expression of the principle of equal division of the areas in dispute; *(c)* the bisector method has the virtue of compliance with the principle of non-encroachment; *(d)* it also prevents, as far as possible, any cut-off of the seaward projection of the coast of either of the States concerned; and *(e)* the bisector method ensures "the exercise of the right to development of the Parties".

291. To demonstrate the equitable character of its own proposed bisector line Nicaragua also refers to a number of relevant circumstances

and argues that the bisector method produces an equitable result in terms of the incidence of natural resources; satisfies the criterion of equitable access to the natural resources; respects the unitary character of the Nicaraguan Rise as a single geological and geomorphological feature by dividing it in approximately equal halves; in terms of security considerations produces an alignment which effectively ensures "that each State controls the maritime territories situated opposite to its coasts and in their vicinity" and ensures equitable access to the main navigable channel in the adjacent coastal areas.

292. The Court is not persuaded in the present case as to the pertinence of these factors and does not find them legally determinative for the purposes of the delimitation to be effected. Rather, the key elements are the geographical configuration of the coast, and the geomorphological features of the area where the endpoint of the land boundary is located.

293. The Parties have presented the Court with their differing versions of the relevant mainland coast for the purposes of the delimitation to be effected. Nicaragua argues that the relevant coast of each Party is its entire Caribbean coast: thus in the case of Honduras this would be a line running from Cape Gracias a Dios north and west to its land border with Guatemala, while in the case of Nicaragua it would run from the Cape south to its land border with Costa Rica. Nicaragua has also acknowledged that other coastal fronts might be considered, variously suggesting relevant coastal fronts for Honduras extending to Cape Camerón or Cape Falso, and for Nicaragua to Punta de Perlas or Punta Gorda, respectively. Honduras sees the relevant coastal front as running from Cape Falso in the north, south-easterly to Cape Gracias a Dios, and then south-westerly to Laguna Wano in a configuration that focuses exclusively on the nearly symmetrical projection of Cape Gracias a Dios.

294. The Court considers for present purposes that it will be most convenient to use the point fixed in 1962 by the Mixed Commission at Cape Gracias a Dios as the point where the Parties' coastal fronts meet. The Court adds that the co-ordinates of the endpoints of the chosen coastal fronts need not at this juncture be specified with exactitude for present purposes; one of the practical advantages of the bisector method is that a minor deviation in the exact position of endpoints, which are at a reasonable distance from the shared point, will have only a relatively minor influence on the course of the entire coastal front line. If necessary in the circumstances, the Court could adjust the line so as to achieve an equitable result (see UNCLOS, Arts. 74, para. 1, and 83, para. 1).

295. The Court will now consider the various possibilities for the other coastal fronts that could be used to define these linear approximations of

the relevant geography. Nicaragua's primary proposal for the coastal fronts, as running from Cape Gracias a Dios to the Guatemalan border for Honduras and to the Costa Rican border for Nicaragua, would cut off a significant portion of Honduran territory falling north of this line and thus would give significant weight to Honduran territory that is far removed from the area to be delimited. This would seem to present an exaggeratedly acute angle to bisect.

296. In selecting the relevant coastal fronts, the Court has considered the Cape Falso-Punta Gorda coast (generating a bisector with an azimuth of 70° 54′), which certainly faces the disputed area, but it is quite a short façade (some 100 kilometres) from which to reflect a coastal front more than 100 nautical miles out to sea, especially taking into account how quickly to the northwest the Honduran coast turns away from the area to be delimited after Cape Falso, as it continues past Punta Patuca and up to Cape Camerón. Indeed, Cape Falso is identified by Honduras as the most relevant "turn" in the mainland coastline.

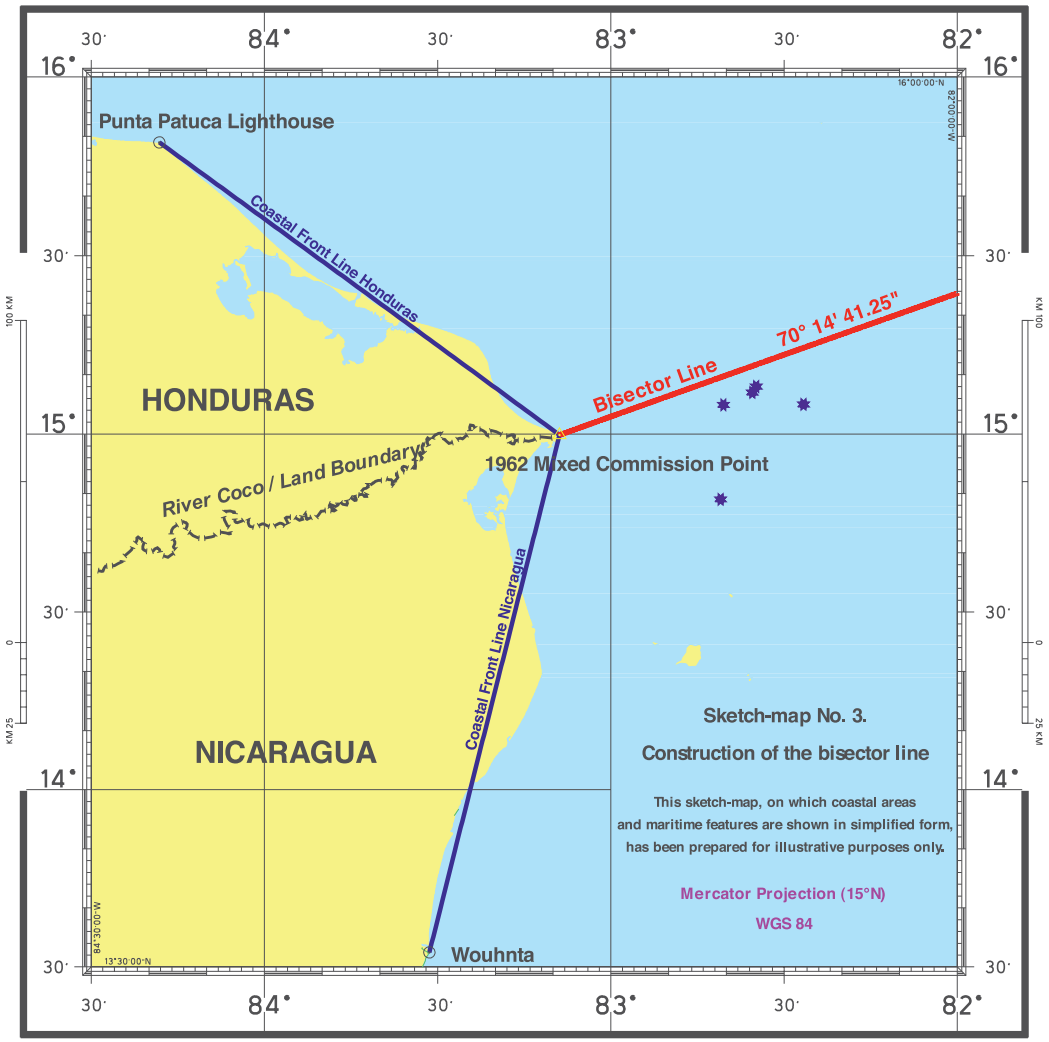
297. A coastal front extending from Cape Camerón to Rio Grande (generating a bisector with an azimuth of 64° 02′) would, like the original Nicaraguan proposal, also overcompensate in this regard since the line would run entirely over the Honduran mainland and thus would deprive the significant Honduran land mass lying between the sea and the line of any effect on the delimitation.

298. The front that extends from Punta Patuca to Wouhnta, would avoid the problem of cutting off Honduran territory and at the same time provide a coastal façade of sufficient length to account properly for the coastal configuration in the disputed area. Thus, a Honduran coastal front running to Punta Patuca and a Nicaraguan coastal front running to Wouhnta are in the Court's view the relevant coasts for purposes of drawing the bisector. This resulting bisector line has an azimuth of 70° 14′ 41.25″ (for the construction of the bisector line, see below, p. 750, sketch-map No. 3).

* *

8.2.4. Delimitation around the islands

299. The Court, having settled on the appropriate method and procedures for the delimitation from the mainland, can now turn to the separate task of delimiting the waters around and between islands north and south of the 15th parallel. Thus the Court leaves behind it the delimitation line based on the relevant mainland coast and turns to maritime delimitation between opposite-facing islands. As the Court has noted above, the Parties agree that the four islands in dispute north of the 15th parallel, as well as Edinburgh Cay south of the 15th parallel, generate territorial seas. It thus may be necessary for the Court to take


Punta Patuca Lighthouse
Coastal Front Line Honduras
HONDURAS
Bisector Line
70° 14' 41.25"
River Coco / Land Boundary
1962 Mixed Commission Point
Coastal Front Line Nicaragua
NICARAGUA
Wouhnta
Sketch-map No. 3.
Construction of the bisector line
This sketch-map, on which coastal areas and maritime features are shown in simplified form, has been prepared for illustrative purposes only.
Mercator Projection (15°N)
WGS 84
84°
83°
82°
16°
15°
14°
30'

account of equidistance and the principles of territorial sea delimitation for this portion of the area in dispute as well. The Court must consider the different solutions proposed by the Parties for delimiting this area in the light of the findings above (i) that the four islands in dispute belong to Honduras and (ii) that there was no traditional line running along the 15th parallel based on *uti possidetis juris* nor any tacit agreement according to which the 15th parallel constituted the maritime boundary.

300. Honduras argues that these islands should be recognized as having a full 12-mile territorial sea, except where this would overlap with the territorial sea of the other Party. Nicaragua does not dispute that these islands could generate a territorial sea of up to 12 nautical miles but argues that, were they to be "attributed to Honduras and were thus to be located within Nicaraguan territory", their "size" and "instability" would act as "equitable criteria" justifying their being enclaved within only a 3-mile territorial sea because, as stated in response to a question put by Judge Simma in the course of the oral proceedings regarding the reasons for the indication of a reduced territorial sea, a "full 12-mile territorial sea . . . would result in giving a disproportionate amount of the maritime areas in dispute to Honduras".

301. The Court observes that the consequence of this latter proposal is that there would be no overlapping territorial seas to delimit in this area. Thus it must determine the breadth of the territorial sea to be attributed to these islands so as to have a clear appreciation of its delimitation task in this area.

302. The Court notes that by virtue of Article 3 of UNCLOS Honduras has the right to establish the breadth of its territorial sea up to a limit of 12 nautical miles be that for its mainland or for islands under its sovereignty. In the current proceedings Honduras claims for the four islands in question a territorial sea of 12 nautical miles. The Court thus finds that, subject to any overlap between the territorial sea around Honduran islands and the territorial sea around Nicaraguan islands in the vicinity, Bobel Cay, Savanna Cay, Port Royal Cay and South Cay shall be accorded a territorial sea of 12 nautical miles.

303. As a 12-mile breadth of territorial sea has been accorded to these islands, it becomes apparent that the territorial seas attributed to the islands of Bobel Cay, Savanna Cay, Port Royal Cay and South Cay (Honduras) and Edinburgh Cay (Nicaragua) would lead to an overlap in the territorial sea of Nicaragua and Honduras in this area, both to the south and to the north of the 15th parallel. Here again, the Court would repeat its observation as to method that:

> "The most logical and widely practised approach is first to draw provisionally an equidistance line and then to consider whether that line must be adjusted in the light of the existence of special circum-

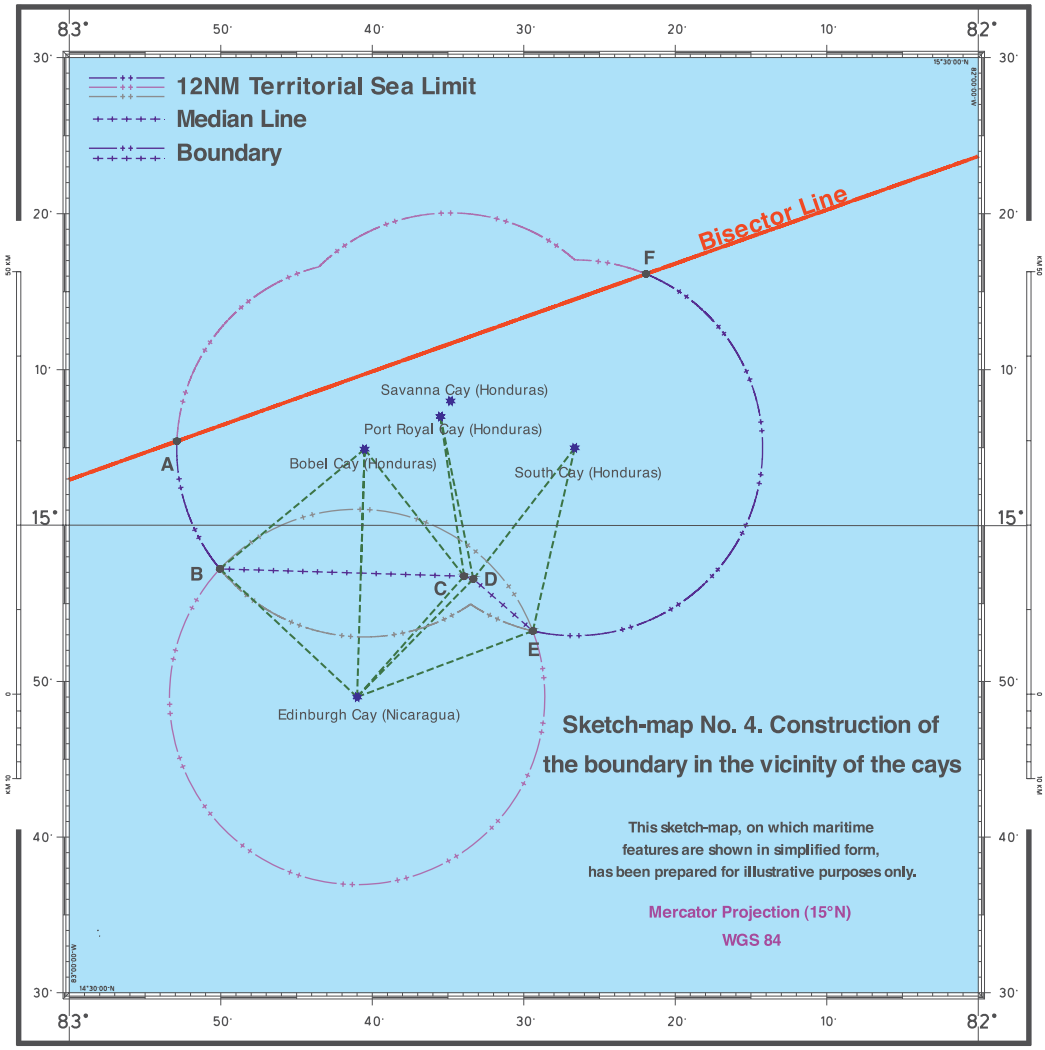
stances." (*Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain), Merits, Judgment, I.C.J. Reports 2001*, p. 94, para. 176.)

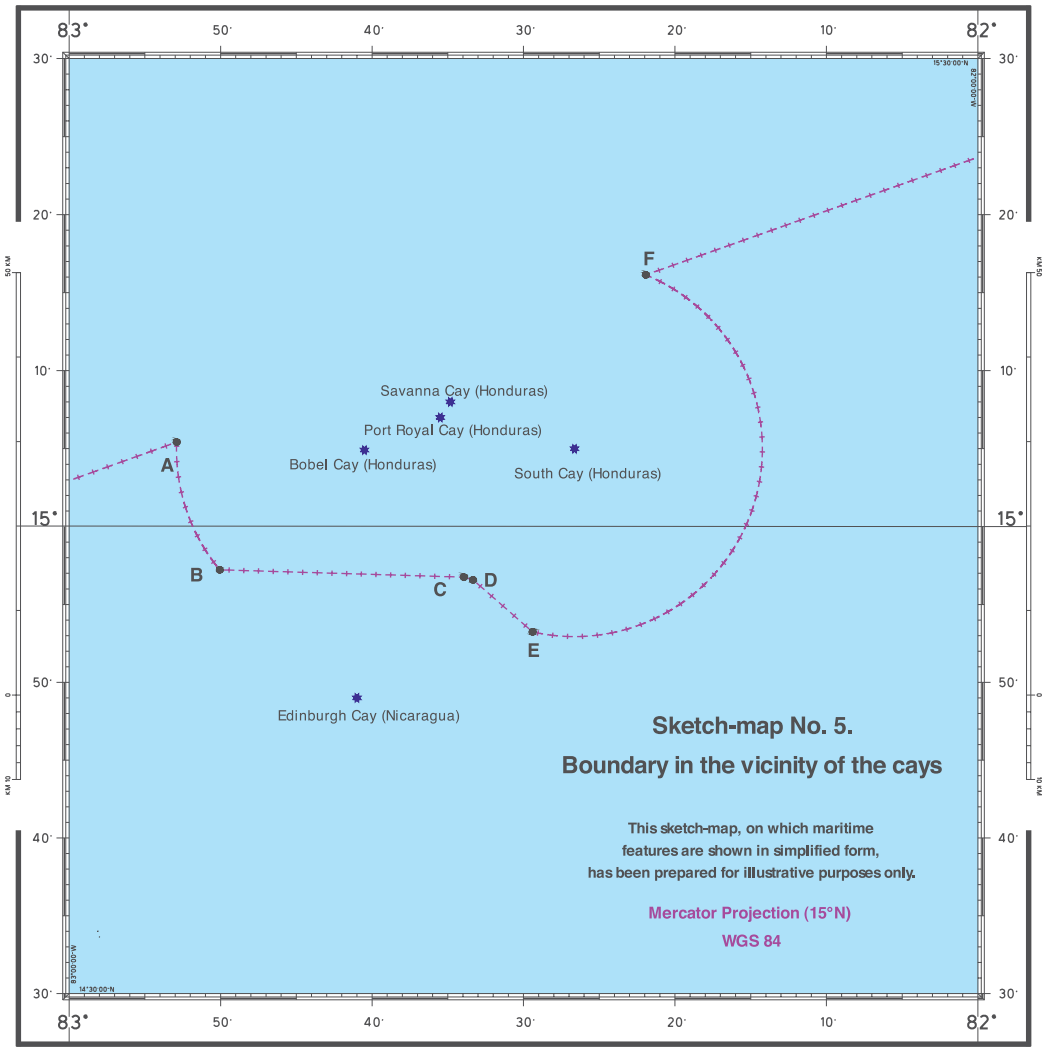
304. Drawing a provisional equidistance line for this territorial sea delimitation between the opposite-facing islands does not present the problems that would an equidistance line from the mainland. The Parties have provided the Court with co-ordinates for the four islands in dispute north of the 15th parallel and for Edinburgh Cay to the south. Delimitation of this relatively small area can be satisfactorily accomplished by drawing a provisional equidistance line, using co-ordinates for the above islands as the base points for their territorial seas, in the overlapping areas between the territorial seas of Bobel Cay, Port Royal Cay and South Cay (Honduras), and the territorial sea of Edinburgh Cay (Nicaragua), respectively. The territorial sea of Savanna Cay (Honduras) does not overlap with the territorial sea of Edinburgh Cay. The Court does not consider there to be any legally relevant "special circumstances" in this area that would warrant adjusting this provisional line.

305. The maritime boundary between Nicaragua and Honduras in the vicinity of Bobel Cay, Savanna Cay, Port Royal Cay and South Cay (Honduras) and Edinburgh Cay (Nicaragua) will thus follow the line as described below.

From the intersection of the bisector line with the 12-mile arc of the territorial sea of Bobel Cay at point A (with co-ordinates 15° 05′ 25″ N and 82° 52′ 54″ W) the boundary line follows the 12-mile arc of the territorial sea of Bobel Cay in a southerly direction until its intersection with the 12-mile arc of the territorial sea of Edinburgh Cay at point B (with co-ordinates 14° 57′ 13″ N and 82° 50′ 03″ W). From point B the boundary line continues along the median line, which is formed by the points of equidistance between Bobel Cay, Port Royal Cay and South Cay (Honduras) and Edinburgh Cay (Nicaragua), through points C (with co-ordinates 14° 56′ 45″ N and 82° 33′ 56″ W) and D (with co-ordinates 14° 56′ 35″ N and 82° 33′ 20″ W), until it meets the point of intersection of the 12-mile arcs of the territorial seas of South Cay (Honduras) and Edinburgh Cay (Nicaragua) at point E (with co-ordinates 14° 53′ 15″ N and 82° 29′ 24″ W). From point E the boundary line follows the 12-mile arc of the territorial sea of South Cay in a northerly direction until it intersects the bisector line at point F (with co-ordinates 15° 16′ 08″ N and 82° 21′ 56″ W) (see below, pp. 753-754, sketch-maps Nos. 4 and 5).

* *


12NM Territorial Sea Limit
Median Line
Boundary
Bisector Line
A
B
C
D
E
F
Savanna Cay (Honduras)
Port Royal Cay (Honduras)
Bobel Cay (Honduras)
South Cay (Honduras)
Edinburgh Cay (Nicaragua)
Sketch-map No. 4. Construction of the boundary in the vicinity of the cays
This sketch-map, on which maritime features are shown in simplified form, has been prepared for illustrative purposes only.
Mercator Projection (15°N)
WGS 84


83°
50'
40'
30'
20'
10'
82°
30'
20'
10'
15°
50'
40'
30'
15°30'00"N
14°30'00"N
A
B
C
D
E
F
Savanna Cay (Honduras)
Port Royal Cay (Honduras)
Bobel Cay (Honduras)
South Cay (Honduras)
Edinburgh Cay (Nicaragua)
Sketch-map No. 5.
Boundary in the vicinity of the cays
This sketch-map, on which maritime features are shown in simplified form, has been prepared for illustrative purposes only.
Mercator Projection (15°N)
WGS 84

8.2.5. Starting-point and endpoint of the maritime boundary

306. Having decided upon a delimitation method and its application for the mainland and for the islands, the Court must now consider two remaining matters with respect to the course of the single maritime boundary: the starting-point and the endpoint.

307. The Parties in their written pleadings agreed that the appropriate starting-point for the boundary line between them should be located some distance from the mainland coast, but disagreed on exactly where. To account for the continuing eastward accretion of Cape Gracias a Dios as a result of alluvial deposits by the River Coco, both Parties in their written pleadings expressed a preference for situating the starting-point 3 nautical miles seaward from the "mouth" of the River Coco. Both Parties agreed that for the first 3 miles a negotiated solution should be found. But two differences remained between them: (i) from where on the River Coco these 3 miles should be measured; and (ii) in what direction.

308. As regards the first of these differences, Honduras proposes a starting-point situated 3 nautical miles due east of the point identified as the mouth of the River Coco (14° 59.8′ N, 83° 08.9′ W) by the Mixed Commission in 1962. The 1906 Award set the "mouth of the main branch of the Coco River" as the "extreme common boundary point on the coast of the Atlantic" between Nicaragua and Honduras. Nicaragua, for its part, contended throughout its written pleadings that the site of the "mouth" of the river should be adjusted to better reflect what it claims is the current reality and proposes a seaward starting-point fixed at a distance of 3 miles from that site along the line of its proposed bisector.

309. In oral argument and in its final submissions Nicaragua, while leaving its suggestion made in the written pleadings open, advocates a starting-point located at the current mouth of the River Coco "such as it may be at any given moment as determined by the Award of the King of Spain of 1906" without measuring any distance out to sea (see paragraph 99 above). Nicaragua thus does not now specify the current geographical co-ordinates of the mouth. According to Nicaragua, this starting-point, wherever it may be located on any given day, would then be connected by a straight-line single maritime boundary to the start of its proposed bisector line (at "a fixed point approximately 3 miles from the river mouth in the position 15° 02′ 00″ N, 83° 05′ 26″ W").

Honduras continues to maintain that a distance measuring 3 miles from the point fixed by the Mixed Commission in 1962 should be used and that the Parties should seek a diplomatic solution for this undelimited area.

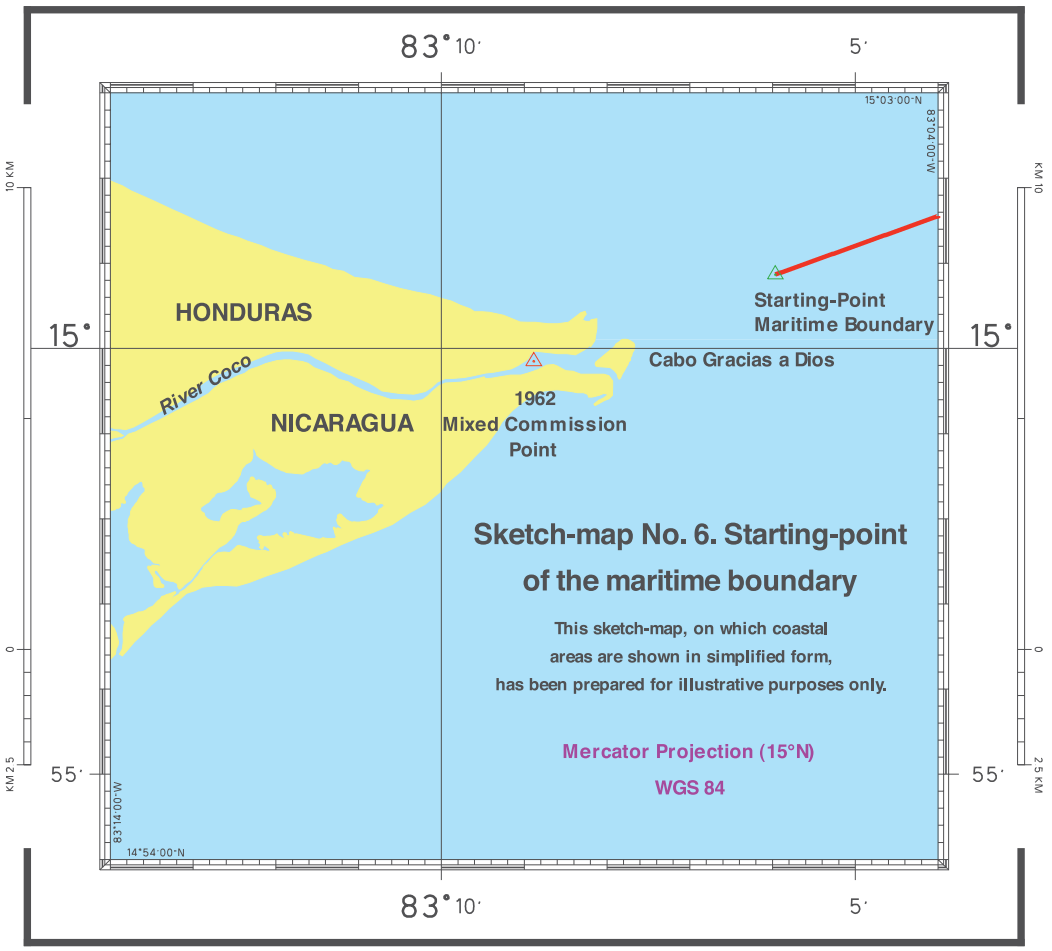
310. The Parties are now in dispute as to which of the small islands

having formed in the mouth of the River Coco belong to which country and where the actual mouth is currently situated. A starting-point at the terminus of the land boundary (as determined "at any given moment" or by reference to the point fixed in 1962 by the Mixed Commission) might cut across these contested small islands, with the attendant risk that the island might later attach itself to the mainland of one of the Parties. The Parties are in the best position to monitor the situation as the shape of Cape Gracias a Dios evolves and to arrange a solution in accordance with the 1906 Arbitral Award, which remains *res judicata* for the land boundary.

311. The Court observes that it is apparent that Nicaragua's proposal in its final submission (see paragraph 309) is problematic in certain respects and its initial suggestion to start the line some distance out to sea appears a more judicious solution. That a delimitation may begin at some distance out at sea has found support in judicial practice in cases where there is an uncertain land boundary terminus (see, for example, *Delimitation of the maritime boundary between Guinea and Guinea-Bissau*, Award of 14 February 1985). The Court considers it appropriate to uphold Honduras's submission in this regard. The Court thus sets the starting-point 3 miles out to sea (15° 00′ 52″ N and 83° 05′ 58″ W) from the point already identified by the Mixed Commission in 1962 along the azimuth of the bisector as described below (see below, p. 757, sketch-map No. 6). The Parties are to agree on a line which links the end of the land boundary as fixed by the 1906 Award and the point of departure of the maritime delimitation in accordance with this Judgment.

312. As for the endpoint, neither Nicaragua nor Honduras in each of their submissions specifies a precise seaward end to the boundary between them. The Court will not rule on an issue when in order to do so the rights of a third party that is not before it, have first to be determined (see *Monetary Gold Removed from Rome in 1943, Judgment, I.C.J. Reports 1954*, p. 19). Accordingly, it is usual in a judicial delimitation for the precise endpoint to be left undefined in order to refrain from prejudicing the rights of third States. (See for example *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, p. 91, para. 130; *Continental Shelf (Libyan Arab Jamahiriya/Malta), Application for Permission to Intervene, Judgment, I.C.J. Reports 1984*, p. 27, and *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, pp. 26-28, paras. 21-23; and *Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, paras. 238, 245 and 307.)

313. Nicaragua draws its bisector "up to the area of seabed occupied by Rosalinda Bank, in which area the claims of third states come into play". Honduras in its final submissions asks the Court to draw the boundary "until the jurisdiction of a third State is reached". Honduras in


83° 10′
5′
15° 03′ 00″ N
83° 04′ 00″ W
10 KM
0
KM 2.5
15°
55′
HONDURAS
River Coco
NICARAGUA
Starting-Point
Maritime Boundary
Cabo Gracias a Dios
1962
Mixed Commission
Point
Sketch-map No. 6. Starting-point
of the maritime boundary
This sketch-map, on which coastal
areas are shown in simplified form,
has been prepared for illustrative purposes only.
Mercator Projection (15°N)
WGS 84
83° 14′ 00″ W
14° 54′ 00″ N

its pleadings suggests that Colombia has interests under various treaties that would be affected by a delimitation continuing beyond the 82nd meridian and, indeed, all of the maps produced by Honduras seem to take the 82nd meridian as the implied endpoint to the delimitation.

314. The Court observes that there are three possibilities open to it: it could say nothing about the endpoint of the line, stating only that the line continues until the jurisdiction of a third State is reached; it could decide that the line does not extend beyond the 82nd meridian; or it could indicate that the alleged third-State rights said to exist east of the 82nd meridian do not lie in the area being delimited and thus present no obstacle to deciding that the line continues beyond that meridian.

315. In order better to understand these choices, it is necessary to analyse the potential third-State interests. Honduras contends that the 1928 Barcenas-Esguerra Treaty between Nicaragua and Colombia delimits a maritime boundary between Nicaragua and Colombia running along the 82nd meridian from approximately the 11th parallel to the 15th parallel, where it would presumably intersect with the traditional maritime boundary line along the 15th parallel (14° 59.8′ N) claimed by Honduras and thus mark the endpoint of the traditional boundary. This interpretation of the 1928 Treaty and its very validity are being challenged by Nicaragua in a separate case pending before this Court (*Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*) and the Court will avoid prejudicing those proceedings by its decision here. However, even if Honduras's interpretation of the 1928 Treaty is correct, Honduras maintains only that, at most, the line set by this Treaty continues along the 82nd meridian up to the 15th parallel. The delimitation line described above will lie well north of the 15th parallel when it reaches the 82nd meridian. Thus, contrary to Honduras's argument, the line drawn above would not cross the 1928 Treaty line and therefore could not affect Colombia's rights.

316. The Court recalls that Honduras also cites the potential third-State claim of Colombia pursuant to the 1986 Treaty between Colombia and Honduras on maritime delimitation. This Treaty purports to establish a maritime boundary commencing at the 82nd meridian and running due east along 14° 59′ 08″ N past the 80th meridian after which it eventually veers north. Thus, it might be argued, any extension of the delimitation line in this case past the 82nd meridian could be interpreted as indicating that Honduras negotiated a treaty involving maritime areas that did not actually appertain to it and could thereby prejudice Colombia's rights under that treaty. The Court places no reliance on the 1986 Treaty to establish an appropriate endpoint for the maritime delimitation between Nicaragua and Honduras. The Court nevertheless observes that any delimitation between Honduras and Nicaragua extending east

beyond the 82nd meridian and north of the 15th parallel (as the bisector adopted by the Court would do) would not actually prejudice Colombia's rights because Colombia's rights under this Treaty do not extend north of the 15th parallel.

317. Another possible source of third-State interests, is the joint jurisdictional régime established by Jamaica and Colombia in an area south of Rosalind Bank near the 80th meridian pursuant to their 1993 bilateral Treaty on maritime delimitation. The Court will not draw a delimitation line that would intersect with this line because of the possible prejudice to the rights of both Parties to that Treaty.

318. The Court has thus considered certain interests of third States which result from some bilateral treaties between countries in the region and which may be of possible relevance to the limits to the maritime boundary drawn between Nicaragua and Honduras. The Court adds that its consideration of these interests is without prejudice to any other legitimate third party interests which may also exist in the area.

319. The Court may accordingly, without specifying a precise endpoint, delimit the maritime boundary and state that it extends beyond the 82nd meridian without affecting third-State rights. It should also be noted in this regard that in no case may the line be interpreted as extending more than 200 nautical miles from the baselines from which the breadth of the territorial sea is measured; any claim of continental shelf rights beyond 200 miles must be in accordance with Article 76 of UNCLOS and reviewed by the Commission on the Limits of the Continental Shelf established thereunder.

* *

8.2.6. Course of the maritime boundary

320. The line of delimitation is to begin at the starting-point 3 nautical miles offshore on the bisector (see paragraph 311 above). From there it continues along the bisector until it reaches the outer limit of the 12-nautical-mile territorial sea of Bobel Cay. It then traces this territorial sea round to the south until it reaches the median line in the overlapping territorial seas of Bobel Cay, Port Royal Cay and South Cay (Honduras) and Edinburgh Cay (Nicaragua). The delimitation line continues along this median line until it reaches the territorial sea of South Cay, which for the most part does not overlap with the territorial sea of Edinburgh Cay. The line then traces the arc of the outer limit of the 12-nautical-mile territorial sea of South Cay round to the north until it again connects with the bisector, whereafter the line continues along that azimuth until it reaches the area where the rights of certain

third States may be affected (see below, pp. 761-762, sketch-maps Nos. 7 and 8).

* * *

9. Operative Clause

321. For these reasons,

THE COURT,

(1) Unanimously,

Finds that the Republic of Honduras has sovereignty over Bobel Cay, Savanna Cay, Port Royal Cay and South Cay;

(2) By fifteen votes to two,

Decides that the starting-point of the single maritime boundary that divides the territorial sea, continental shelf and exclusive economic zones of the Republic of Nicaragua and the Republic of Honduras shall be located at a point with the co-ordinates 15° 00′ 52″ N and 83° 05′ 58″ W;

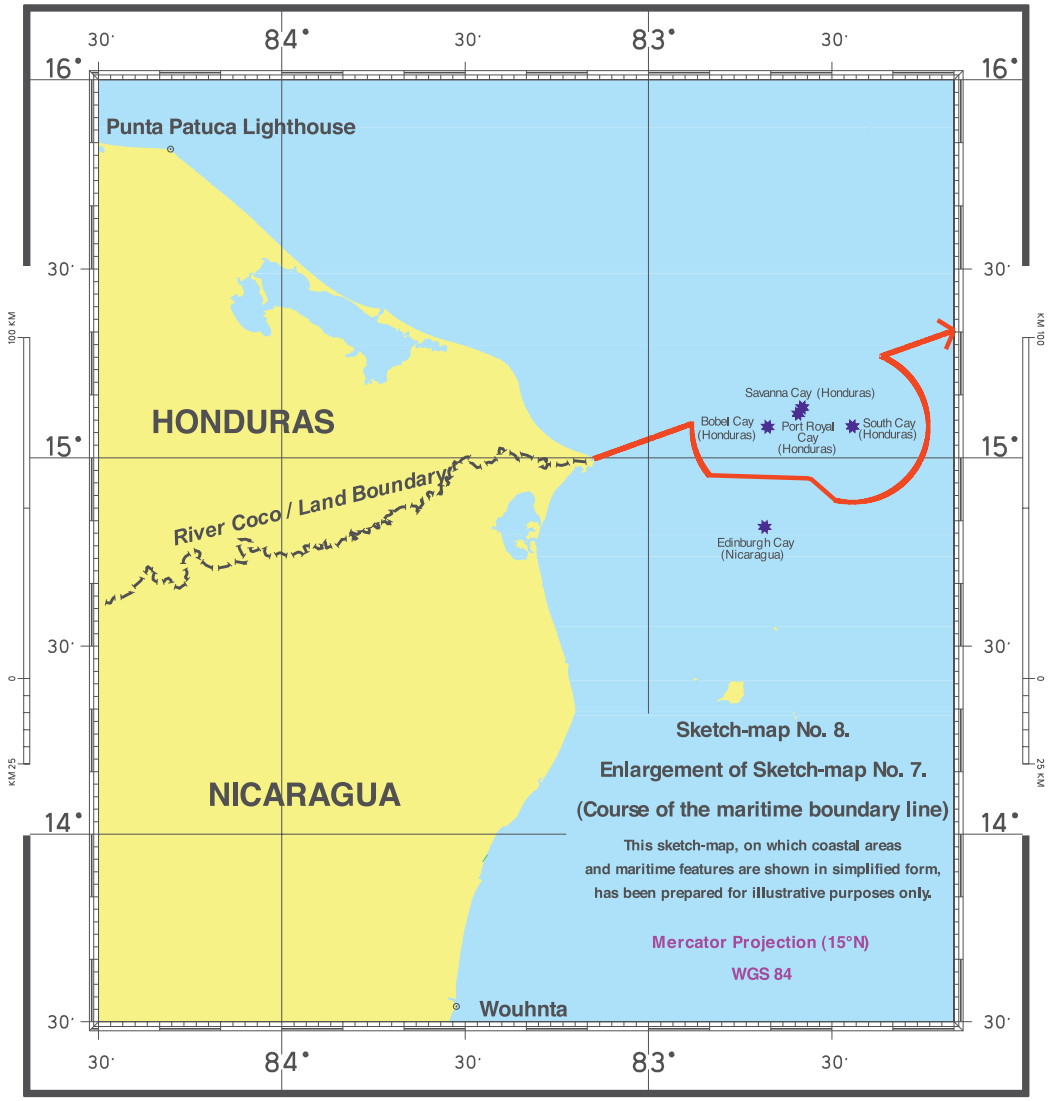
IN FAVOUR: *President* Higgins; *Vice-President* Al-Khasawneh; *Judges* Ranjeva, Shi, Koroma, Buergenthal, Owada, Simma, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov; *Judge* ad hoc Gaja;

AGAINST: *Judge* Parra-Aranguren, *Judge* ad hoc Torres Bernárdez;

(3) By fourteen votes to three,

Decides that starting from the point with the co-ordinates 15° 00′ 52″ N and 83° 05′ 58″ W the line of the single maritime boundary shall follow the azimuth 70° 14′ 41.25″ until its intersection with the 12-nautical-mile arc of the territorial sea of Bobel Cay at point A (with co-ordinates 15° 05′ 25″ N and 82° 52′ 54″ W). From point A the boundary line shall follow the 12-nautical-mile arc of the territorial sea of Bobel Cay in a southerly direction until its intersection with the 12-nautical-mile arc of the territorial sea of Edinburgh Cay at point B (with co-ordinates 14° 57′ 13″ N and 82° 50′ 03″ W). From point B the boundary line shall continue along the median line which is formed by the points of equidistance between Bobel Cay, Port Royal Cay and South Cay (Honduras) and Edinburgh Cay (Nicaragua), through point C (with co-ordinates 14° 56′ 45″ N and 82° 33′ 56″ W) and D (with co-ordinates 14° 56′ 35″ N and 82° 33′ 20″ W), until it meets the point of intersection of the 12-nautical-mile arcs of the territorial seas of South Cay (Honduras) and Edinburgh Cay (Nicaragua) at point E (with co-ordinates 14° 53′ 15″ N and 82° 29′ 24″ W). From point E the boundary line shall follow the 12-nautical-mile arc of the territorial sea of South Cay in a northerly direction until it meets the line of the azimuth at point F (with co-ordinates


Sketch-map No. 7. Course of the maritime boundary line
This sketch-map, on which coastal areas and maritime features are shown in simplified form, has been prepared for illustrative purposes only.
Mercator Projection (15°N)
WGS 84
JAMAICA
HONDURAS
NICARAGUA
EL SALVADOR
BELIZE
15°
80°
85°


30'
84°
30'
83°
30'
16°
15°
14°
Punta Patuca Lighthouse
HONDURAS
NICARAGUA
River Coco / Land Boundary
Savanna Cay (Honduras)
Bobel Cay (Honduras)
Port Royal Cay (Honduras)
South Cay (Honduras)
Edinburgh Cay (Nicaragua)
Wouhnta
100 KM
0
KM 25
KM 100
25 KM
Sketch-map No. 8.
Enlargement of Sketch-map No. 7.
(Course of the maritime boundary line)
This sketch-map, on which coastal areas and maritime features are shown in simplified form, has been prepared for illustrative purposes only.
Mercator Projection (15°N)
WGS 84

15° 16′ 08″ N and 82° 21′ 56″ W). From point F, it shall continue along the line having the azimuth of 70° 14′ 41.25″ until it reaches the area where the rights of third States may be affected;

IN FAVOUR: *President* Higgins; *Vice-President* Al-Khasawneh; *Judges* Shi, Koroma, Buergenthal, Owada, Simma, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov; *Judge* ad hoc Gaja;

AGAINST: *Judges* Ranjeva, Parra-Aranguren, *Judge* ad hoc Torres Bernárdez;

(4) By sixteen votes to one,

Finds that the Parties must negotiate in good faith with a view to agreeing on the course of the delimitation line of that portion of the territorial sea located between the endpoint of the land boundary as established by the 1906 Arbitral Award and the starting-point of the single maritime boundary determined by the Court to be located at the point with the co-ordinates 15° 00′ 52″ N and 83° 05′ 58″ W.

IN FAVOUR: *President* Higgins; *Vice-President* Al-Khasawneh; *Judges* Ranjeva, Shi, Koroma, Buergenthal, Owada, Simma, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov; *Judges* ad hoc Torres Bernárdez, Gaja;

AGAINST: *Judge* Parra-Aranguren.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this eighth day of October, two thousand and seven, 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 Honduras, respectively.

(Signed) Rosalyn HIGGINS,
President.

(Signed) Philippe COUVREUR,
Registrar.

Judge RANJEVA appends a separate opinion to the Judgment of the Court; Judge KOROMA appends a separate opinion to the Judgment of the Court; Judge PARRA-ARANGUREN appends a declaration to the Judgment of the Court; Judge *ad hoc* TORRES BERNÁRDEZ appends a dissent-

ing opinion to the Judgment of the Court; Judge *ad hoc* GAJA appends a declaration to the Judgment of the Court.

(Initialled) R.H.

(Initialled) Ph.C.

Annex 674

Elettronica Sicula S.p.A. (ELSI) (United States of America v Italy), Judgment of 20 July 1989, I.C.J. Reports 1989, p. 15

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

CASE CONCERNING ELETTRONICA SICULA S.p.A. (ELSI)

(UNITED STATES OF AMERICA *v.* ITALY)

JUDGMENT OF 20 JULY 1989

1989

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRE DE L'ELETTRONICA SICULA S.p.A. (ELSI)

(ÉTATS-UNIS D'AMÉRIQUE c. ITALIE)

ARRÊT DU 20 JUILLET 1989

Official citation :
Elettronica Sicula S.p.A. (ELSI), Judgment,
I.C.J. Reports 1989, p. 15.

Mode officiel de citation :
Elettronica Sicula S.p.A. (ELSI), arrêt,
C.I.J. Recueil 1989, p. 15.

Sales number
N° de vente : **562**

INTERNATIONAL COURT OF JUSTICE

1989
20 July
General List
No. 76

YEAR 1989

20 July 1989

CASE CONCERNING ELETTRONICA SICULA S.p.A. (ELSI)

(UNITED STATES OF AMERICA *v.* ITALY)

Diplomatic protection — Rule of exhaustion of local remedies — Applicability to claim under treaty which does not mention the rule — Applicability to claim for declaratory judgment — Allegation that objection barred by estoppel — Conditions required for the satisfaction of the rule.

Alleged breaches of 1948 Treaty of Friendship, Commerce and Navigation between Italy and United States, the Protocol and the 1951 Supplementary Agreement thereto.

Article III of FCN Treaty — Alleged interference with shareholders' right to "control and manage" company, by requisition of its plant and equipment — Meaning of qualifying phrase "in conformity with the applicable laws and regulations" of Party — Relevance of municipal law — Possibility of disturbance of normal exercise of rights during public emergencies and the like.

Article V, paragraphs 1 and 3, of FCN Treaty — "Constant protection and security" of nationals of each Party "for their persons and property" — Standard of protection required — Identification of "property" to be protected — Complaint of occupation of property — Treaty provision not equivalent to a warranty that property shall never in any circumstances be occupied or disturbed — Complaint of delay in ruling an appeal against requisition.

Article V, paragraph 2, of FCN Treaty — Paragraph 1 of Protocol to FCN Treaty — "The property of nationals . . . of either . . . Party shall not be taken . . ." — Difference between English text ("taken") and Italian text ("espropriati") *— Disguised expropriation — Relevance of company's financial situation.*

Article I of Supplementary Agreement to FCN Treaty — Prohibition of "arbitrary or discriminatory measures . . . resulting particularly in" preventing effective control and management of enterprises or impairing legally acquired rights — Effect of word "particularly" — Definition of arbitrariness in international law — Relevance of finding of municipal court to question whether act was to be classed

as arbitrary in international law — Whether order made in context of operating system of law and remedies may be arbitrary measure.

Article VII of FCN Treaty — Right "to acquire, own and dispose of immovable property or interests therein" — Difference between English text ("interests") and Italian text ("diritti reali") *— Standards of protection laid down by treaty.*

JUDGMENT

Present: President RUDA; *Judges* ODA, AGO, SCHWEBEL, Sir Robert JENNINGS; *Registrar* VALENCIA-OSPINA.

In the case concerning Elettronica Sicula S.p.A. (ELSI),

between

the United States of America,

represented by

The Honorable Abraham D. Sofaer, Legal Adviser, Department of State,
Mr. Michael J. Matheson, Deputy Legal Adviser, Department of State,

as Co-Agents;

Mr. Timothy E. Ramish,

as Deputy Agent;

Ms Melinda P. Chandler, Attorney/Adviser, Department of State,
Mr. Sean D. Murphy, Attorney/Adviser, Department of State,
The Honorable Richard N. Gardner, Ambassador to Italy (1977-1981); Henry L. Moses Professor of Law and International Diplomacy, Columbia University; Counsel to the Law Firm of Coudert Brothers,

as Counsel and Advocates;

Mr. Giuseppe Bisconti, Studio Legale Bisconti, Rome,
Mr. Franco Bonelli, Professor of Law, Genoa University; Partner, Studio Legale Bonelli,
Mr. Elio Fazzalari, Professor of Civil Procedure, Rome University; Partner, Studio Legale Fazzalari,
Mr. Shabtai Rosenne, Member of the Israel Bar; Member of the Institute of International Law; Honorary Member of the American Society of International Law,

as Advisers,

and

the Republic of Italy

represented by

Mr. Luigi Ferrari Bravo, Professor of International Law at the University of Rome; Head of the Legal Service of the Ministry of Foreign Affairs,

as Agent and Counsel;

Mr. Riccardo Monaco, Professor Emeritus at the University of Rome,

as Co-Agent and Counsel;

Mr. Ignazio Caramazza, State Advocate; Secretary-General of the Avvocatura Generale dello Stato,

as Co-Agent and Advocate;

Mr. Michael Joachim Bonell, Professor of Comparative Law at the University of Rome,
Mr. Francesco Capotorti, Professor of International Law at the University of Rome,
Mr. Giorgio Gaja, Professor of International Law at the University of Florence,
Mr. Keith Highet, Member of the Bars of New York and the District of Columbia,
Mr. Berardino Libonati, Professor of Commercial Law at the University of Rome,

as Counsel and Advocates;

assisted by

Mr. David Clark, Ll.B. (Hons), Member of the Law Society of Scotland,
Mr. Alberto Colella, Assistant Legal Adviser to the Ministry of Foreign Affairs,
Mr. Alan Derek Hayward, Fellow of the Institute of Chartered Accountants in England and Wales,
Mr. Pier Giusto Jaeger, Professor of Commercial Law at the University of Milan,
Mr. Attila Tanzi, Assistant Legal Adviser to the Ministry of Foreign Affairs,

Mr. Eric Wyler, Maître assistant of Public International Law at the Faculty of Law of the University of Lausanne,

as Advisers,

THE CHAMBER OF THE INTERNATIONAL COURT OF JUSTICE formed to deal with the case above mentioned,

composed as above,

after deliberation,

delivers the following Judgment:

1. By a letter dated 6 February 1987, filed in the Registry of the Court the same day, the Secretary of State of the United States of America transmitted to the Court an Application instituting proceedings against the Republic of Italy in respect of a dispute arising out of the requisition by the Government of Italy of the plant and related assets of Raytheon-Elsi S.p.A., previously known as Elettronica Sicula S.p.A. (ELSI), an Italian company which was stated to have been 100 per cent owned by two United States corporations. By the same letter, the Secretary of State informed the Court that the Government of the United States requested, pursuant to Article 26 of the Statute of the Court, that the dispute be resolved by a Chamber of the Court.

2. Pursuant to Article 40, paragraph 2, of the Statute, the Application was at once communicated to the Government of the Republic of Italy. In accordance with paragraph 3 of that Article, all other States entitled to appear before the Court were notified of the Application.

3. By a telegram dated 13 February 1987 the Minister for Foreign Affairs of Italy informed the Court that his Government accepted the proposal put forward by the Government of the United States that the case be heard by a Chamber composed in accordance with Article 26 of the Statute; this acceptance was confirmed by a letter dated 13 February 1987 from the Agent of Italy.

4. By an Order dated 2 March 1987, the Court, after recalling the request for a Chamber and reciting that the Parties had been duly consulted as to the composition of the proposed Chamber in accordance with Article 26, paragraph 2, of the Statute and Article 17, paragraph 2, of the Rules of Court, decided to accede to the request of the Governments of the United States of America and Italy to form a special Chamber of five judges to deal with the case, declared that at an election held on that day President Nagendra Singh and Judges Oda, Ago, Schwebel and Sir Robert Jennings had been elected to the Chamber, and declared a Chamber to deal with the case to have been duly constituted by the Order, with the composition indicated.

5. The Court further fixed time-limits, by the said Order, for the filing of a Memorial by the United States of America and a Counter-Memorial by Italy, which were duly filed within the time-limits. In its Counter-Memorial, Italy presented an objection to the admissibility of the Application; by letters addressed to the Registrar on 16 November 1987, the Parties agreed, with reference to Article 79, paragraph 8, of the Rules of Court, that the objection should "be heard and determined within the framework of the merits". By an Order dated 17 November 1987, the Chamber took note of that agreement, found that the filing of further pleadings by the Parties was necessary, authorized the filing of a Reply by the United States of America and a Rejoinder by Italy, and fixed time-limits for these; the Reply and Rejoinder were duly filed within those time-limits.

6. On 11 December 1988 Judge Nagendra Singh, President of the Chamber, died. Following further consultations with the Parties with regard to the composition of the Chamber in accordance with Article 17, paragraph 2, of the Rules of Court, the Court, by Order dated 20 December 1988, declared that Judge Ruda, President of the Court, had that day been elected a Member of the Chamber to fill the vacancy left by the death of Judge Nagendra Singh. In accordance with Article 18, paragraph 2, of the Rules of Court, President Ruda became President of the Chamber.

7. At 12 public sittings held between 13 February and 2 March 1989, the Chamber was addressed by the following representatives of the Parties:

For the United States of America: The Honorable A. D. Sofaer
Mr. M. J. Matheson
Mr. T. E. Ramish
Ms M. P. Chandler
Mr. S. D. Murphy
The Honorable R. N. Gardner
Mr. G. Bisconti
Professor F. Bonelli
Professor E. Fazzalari

For Italy:

Professor L. Ferrari Bravo
Professor R. Monaco
Mr. I. Caramazza
Professor M. J. Bonell
Professor F. Capotorti
Professor G. Gaja
Mr. K. Highet
Professor B. Libonati

8. The United States called as witnesses Mr. Charles Francis Adams (who was examined by Mr. Sofaer and cross-examined by Mr. Highet) and Mr. John Dickens Clare (who was examined by Ms Chandler and cross-examined by Mr. Highet). The United States called as expert Mr. Timothy Lawrence (who was cross-examined by Professor Bonell). Mr. Giuseppe Bisconti also addressed the Court on behalf of the United States; since he had occasion to refer to matters of fact within his knowledge as a lawyer acting for Raytheon Company, the President of the Chamber acceded to a request by the Agent of Italy that Mr. Bisconti be treated *pro tanto* as a witness. Mr. Bisconti, who informed the Chamber that both Raytheon Company and Mr. Bisconti himself waived any relevant privilege, was cross-examined by Mr. Highet. Italy called as expert Mr. Alan Derek Hayward.

9. During the hearings questions were put to the Parties, and to the witnesses and experts, by the President and Members of the Chamber; replies were given orally or in writing prior to the close of the oral proceedings, with documents in support. The Chamber decided further that each Party might comment in writing on the replies of the other Party to a series of questions, put at a late stage of the oral proceedings, and a time-limit was fixed for that purpose; written comments were duly filed within that time-limit. A further question was put to one Party after the close of the hearings and answered in writing; the other Party was given an opportunity to comment on the answer.

10. In the course of the written proceedings the following submissions were presented by the Parties:

On behalf of the United States of America,

in the Application:

> "while reserving the right to supplement and amend this submission as appropriate in the course of further proceedings, the United States requests the Court to adjudge and declare as follows:
>
> *(a)* that the Government of Italy has violated the Treaty of Friendship, Commerce and Navigation between the United States of America and the Italian Republic of 1948, in particular, Articles II, III, V and VII of the Treaty, and Articles I and V of the 1951 Supplement; and
> *(b)* that the Government of Italy is responsible to pay compensation to the United States, in an amount to be determined by the Court, as measured by the injuries suffered by United States nationals as a result of these violations, including the additional financial losses which Raytheon suffered in repaying the guaranteed loans and in not

recovering amounts due on open accounts, as well as expenses incurred in defending against Italian bank lawsuits, in mitigating the damage to its reputation and credit, and in pursuing its claim for redress";

in the Memorial:

"the United States submits to the Court that it is entitled to a declaration and judgment that:

(a) Italy — by engaging in the acts and omissions described above, which prevented Raytheon and Machlett, United States corporations, from liquidating the assets of their wholly-owned Italian corporation ELSI and caused the latter's bankruptcy, and by its subsequent actions and omissions — violated the international legal obligations which it undertook by the Treaty of Friendship, Commerce and Navigation between the two countries, and the Supplement thereto, and in particular, violated:

- Article III (2), in that Italy's actions and omissions prevented Raytheon and Machlett from exercising their right to manage and control an Italian corporation;
- Article V (1) and (3), in that Italy's actions and omissions constituted a failure to provide the full protection and security as required by the Treaty and by international law;
- Article V (2), in that Italy's actions and omissions constituted a taking of Raytheon's and Machlett's interests in property without just compensation and due process of law;
- Article VII, in that these actions and omissions denied Raytheon and Machlett the right to dispose of their interests in immovable property on terms no less favorable than an Italian corporation would enjoy on a reciprocal basis;
- Article I of the Supplement, in that the treatment afforded Raytheon and Machlett was both arbitrary and discriminatory, prevented their effective control and management of ELSI, and also impaired their other legally acquired rights and interests;

(b) that, owing to these violations of the Treaty and Supplement, singly and in combination, the United States is entitled to compensation in an amount equal to the full amount of the damage suffered by Raytheon and Machlett as a consequence, including their losses on investment, guaranteed loans, and open accounts, the legal expenses incurred by Raytheon in connection with the bankruptcy, in defending against related litigation and in pursuing its claim, and interest on such amounts computed at the United States prime rate from the date of loss to the date of payment of the award, compounded on an annual basis; and

(c) that Italy accordingly should pay to the United States the amount of US$12,679,000, plus interest, computed as described above";

in the Reply:

"the United States submits to the Court that it is entitled to a declaration and judgment that:

(a) the claims brought by the United States are admissible before the Court since all reasonable local remedies have been exhausted;

(b) Italy — by engaging in the acts and omissions described above and in the Memorial, which prevented Raytheon and Machlett, United States corporations, from liquidating the assets of their wholly-owned Italian corporation ELSI and caused the latter's bankruptcy, and by its subsequent actions and omissions — violated the international legal obligations which it undertook by the Treaty of Friendship, Commerce and Navigation between the two countries, and the Supplement thereto, and in particular, violated:

- Article III (2), in that Italy's actions and omissions prevented Raytheon and Machlett from exercising their right to manage and control an Italian corporation;
- Article V (1) and (3), in that Italy's actions and omissions constituted a failure to provide the full protection and security as required by the Treaty and by international law;
- Article V (2), in that Italy's actions and omissions constituted a taking of Raytheon's and Machlett's interests in property without just compensation and due process of law;
- Article VII, in that these actions and omissions denied Raytheon and Machlett the right to dispose of their interests in immovable property on terms no less favorable than an Italian corporation would enjoy on a reciprocal basis;
- Article I of the Supplement, in that the treatment afforded Raytheon and Machlett was both arbitrary and discriminatory, prevented their effective control and management of ELSI, and also impaired their other legally acquired rights and interests;

(c) that, owing to these violations of the Treaty and Supplement, singly and in combination, the United States is entitled to compensation in an amount equal to the full amount of the damage suffered by Raytheon and Machlett as a consequence, including their losses on investment, guaranteed loans, and open accounts, the legal expenses incurred by Raytheon in connection with the bankruptcy, in defending against related litigation and in pursuing its claim, and interest on such amounts computed at the United States prime rate from the date of loss to the date of payment of the award, compounded on an annual basis; and

(d) that Italy accordingly should pay to the United States the amount of US$12,679,000, plus interest, computed as described above and in the Memorial."

On behalf of the Republic of Italy,

in the Counter-Memorial and in the Rejoinder:

"May it please the Court,

To adjudge and declare that the Application filed on 6 February 1987 by the United States Government is inadmissible because local remedies have not been exhausted.

If not, to adjudge and declare:

(1) that Article III (2) of the Treaty of Friendship, Commerce and Navigation of 2 February 1948 has not been violated;
(2) that Article V (l) and (3) of the Treaty has not been violated;
(3) that Article V (2) of the Treaty has not been violated;
(4) that Article VII of the Treaty has not been violated;
(5) that Article I of the Supplementary Agreement of 26 September 1951 has not been violated;

and, accordingly, to dismiss the claim."

11. In the course of the oral proceedings the following submissions were presented by the Parties:

On behalf of the United States of America,

at the hearing of 16 February 1989:

"The United States requests that the objection of the Respondent be dismissed and submits to the Court that it is entitled to a declaration and judgment that:

(1) the Respondent violated the international legal obligations which it undertook by the Treaty of Friendship, Commerce and Navigation between the two countries, and the Supplement thereto, and in particular, violated Articles III, V, and VII of the Treaty and Article I of the Supplement; and
(2) that, owing to these violations of the Treaty and Supplement, singly and in combination, the United States is entitled to reparation in an amount equal to the full amount of the damage suffered by Raytheon and Machlett as a consequence, including their losses on investment, guaranteed loans, and open accounts, the legal expenses incurred by Raytheon in connection with the bankruptcy, in defending against related litigation and in pursuing its claim, and interest on such amounts computed at the United States prime rate from the date of loss to the date of payment of the award, compounded on an annual basis; and

(3) that Italy accordingly should pay to the United States the amount of $12,679,000 plus interest."

At the hearing of 27 February 1989 (afternoon) the Agent of the United States confirmed that these were the final submissions of the United States.

On behalf of the Republic of Italy,

at the hearing of 23 February 1989, repeated as final submissions at the hearing of 2 March 1989 (afternoon):

"May it please the Court,

A. To adjudge and declare that the Application filed on 6 February

1987 by the United States Government is inadmissible because local remedies have not been exhausted.

B. If not, to adjudge and declare:

(1) that Article III of the Treaty of Friendship, Commerce and Navigation of 2 February 1948 has not been violated;
(2) that Article V, paragraphs 1 and 3, of the Treaty has not been violated;
(3) that Article V, paragraph 2, of the Treaty, and the related provisions of the Protocol to the Treaty, have not been violated;
(4) that Article VII of the Treaty has not been violated;
(5) that Article I of the Supplementary Agreement of 26 September 1951 has not been violated; and
(6) that no other Article of the Treaty or the Supplementary Agreement has been violated.

C. On a subsidiary and alternative basis only: to adjudge and declare that, even if there had been a violation of obligations under the Treaty or the Supplementary Agreement, such violation caused no injury for which the payment of any indemnity would be justified.

And, accordingly, to dismiss the claim."

* *

12. The claim of the United States in the present case is that Italy has violated the international legal obligations which it undertook by the Treaty of Friendship, Commerce and Navigation between the two countries concluded on 2 February 1948 ("the FCN Treaty") and the Supplementary Agreement thereto concluded on 26 September 1951, by reason of its acts and omissions in relation to, and its treatment of, two United States corporations, the Raytheon Company ("Raytheon") and The Machlett Laboratories Incorporated ("Machlett"), in relation to the Italian corporation Raytheon-Elsi S.p.A. (previously Elettronica Sicula S.p.A. (ELSI)), which was wholly owned by the two United States corporations. Italy contests certain of the facts alleged by the United States, denies that there has been any violation of the FCN Treaty, and contends, on a subsidiary and alternative basis, that if there was any such violation, no injury was caused for which payment of any indemnity would be justified.

13. In 1955, Raytheon (then known as Raytheon Manufacturing Company) agreed to subscribe for 14 per cent of the shares in Elettronica Sicula S.p.A. Over the period 1956-1967, Raytheon successively increased its holding of ELSI shares (as well as investing capital in the company in other ways) to a total holding of 99.16 per cent of its shares. In April 1963 the name of the company was changed from Elettronica Sicula S.p.A. to "Raytheon-Elsi S.p.A."; it will however be referred to hereafter as "ELSI". The remaining shares (0.84 per cent) in ELSI were acquired in April 1967 by Machlett, which was a wholly-owned subsidiary of Raytheon. ELSI was established in Palermo, Sicily, where it had a plant for the production of electronic components; in 1967 it had a workforce of

slightly under 900 employees. Its five major product lines were microwave tubes, cathode-ray tubes, semiconductor rectifiers, X-ray tubes and surge arresters.

14. During the fiscal years 1964 to 1966 inclusive, ELSI made an operating profit, but this profit was insufficient to offset its debt expense or accumulated losses, and no dividends were ever paid to its shareholders. In June 1964, the accumulated losses exceeded one-third of the company's share capital, and ELSI was thus required by Article 2446 of the Italian Civil Code to reduce its equity from 4,300 million lire to 2,000 million lire. The capital stock was therefore devalued by 2,300 million lire and recapitalized by an equal amount subscribed by Raytheon. A similar operation was necessary in March 1967. In February 1967, according to the United States, Raytheon began taking steps to endeavour to make ELSI self-sufficient. Raytheon and Machlett designated a number of highly-qualified personnel to provide financial, managerial and technical expertise, and Raytheon provided a total of over 4,000 million lire in recapitalization and guaranteed credit. By December 1967, according to the United States, major steps had been taken to upgrade plant facilities and operations.

15. At the same time, however, the Chairman of ELSI, and other senior Raytheon officials, held numerous meetings, between February 1967 and March 1968, with cabinet-level officials of the Italian Government and of the Sicilian region, as well as representatives of the Istituto per la Ricostruzione Industriale ("IRI"), the Ente Siciliano per la Produzione Industriale ("ESPI"), and the private sector. IRI was a holding company controlled by Italy with extensive commercial interests, and dominated at this time the telecommunications, electronics and engineering markets. ESPI was the Sicilian Government industrial organization responsible for the promotion of local development. The purpose of these meetings was stated to be to find for ELSI an Italian partner with economic power and influence and to explore the possibilities of other governmental support. The management of Raytheon had formed the view that, "without a partnership with IRI or other equivalent Italian Governmental entity, ELSI would continue to be an outsider to the Italian industrial community"; such a partnership would, it was thought, "positively influence government decision-making in economic planning", and enable ELSI also to secure benefits and incentives under Italian legislation designed to favour industrial development in the southern region, the Mezzogiorno. Evidence has been given that the management of ELSI was advised that the company was entitled to such Mezzogiorno benefits, but the Chamber has been told by Italy that it was not so entitled. The support of the national and regional governments was regarded as particularly important because in numerous markets crucial to ELSI's operations and success

the Italian Government, through IRI or otherwise, played a dominant role as a customer. A detailed "Project for the Financing and Reorganization of the Company" was prepared and submitted to ESPI in May 1967.

16. The management of ELSI took the view that one of the reasons for its lack of success was that it had trained and was employing an excessively large labour force. In June 1967 it was decided to dismiss some 300 employees; under an Italian union agreement this involved a procedure of notifications and negotiations. On the intervention of ESPI, an alternative plan was agreed to whereby 168 workers would be suspended from 10 July 1967, with limited pay by ELSI for a period not exceeding six weeks. After a training programme during which the workers were paid by the Sicilian Government, it was contemplated that ELSI would endeavour to re-employ the suspended employees. The necessary additional business to make this possible was not forthcoming, and the suspended employees were dismissed early in March 1968. A number of random strikes had occurred in early 1968, and as a result of the dismissals a complete strike of the plant occurred on 4 March 1968. According to the Government of Italy, this strike also involved an occupation of the plant by the workforce, which occupation was still continuing when the plant was requisitioned on 1 April 1968 (paragraph 30 below). The United States claims however that strikes and "sit-ins" prior to the requisition were only sporadic and that only after the filing of a petition in bankruptcy on 26 April 1968 (paragraph 36 below) did the workers actually occupy the plant for a sustained period.

17. When it became apparent that the discussions with Italian officials and companies were unlikely to lead to a mutually satisfactory arrangement to resolve ELSI's difficulties, Raytheon and Machlett, as shareholders in ELSI, began seriously to plan to close and liquidate ELSI to minimize their losses. General planning for the potential liquidation of ELSI began in the latter part of 1967, and in early 1968 detailed plans were made for a shut-down and liquidation at any time after 16 March 1968. On 2 March 1968, the company's books and accounting records, and, according to a witness at the hearings, "quite a lot of inventory", were transferred from its offices in Palermo to a regional office in Milan. On 7 March 1968, Raytheon formally notified ELSI that, notwithstanding ELSI's need for further capital, Raytheon would not "subscribe to any further stock which might be issued by Raytheon-Elsi or to guarantee any additional loans which might be made by others to Raytheon-Elsi".

18. This decision was stated to have been taken, *inter alia*, on review of the proposed balance sheet showing the position on 30 September 1967; that balance sheet showed the book value of the assets of ELSI as 17,956.3 million lire, its total debt as 13,123.9 million lire; the accumulated losses of 2,681.3 million lire had reduced the value of the equity (capital stock and capital subscription account) from 4,000 million lire to 1,318.7 million lire. The total debt included a number of liabilities to one United States bank and several Italian banks, some (but not all) of which were guaranteed by Raytheon. For the purposes of a possible liquidation, an asset analysis was prepared by the Chief Financial Officer of Raytheon showing the expected position on 31 March 1968. This showed the book value of ELSI's assets as 18,640 million lire; as explained in his affidavit filed in these proceedings, it also showed "the minimum prospects of recovery of values which we could be sure of, in order to ensure an orderly liquidation process", and the total realizable value of the assets on this basis (the "quick-sale value") was calculated to be 10,838.8 million lire. A balance sheet subsequently prepared to show the position at 31 March 1968, extrapolated from the balance sheet at 30 September 1967, showed the book value of total assets as 17,053.5 million lire and total debt of 12,970.6 million lire.

19. During the hearings, at the request of the Agent of Italy, the Chamber asked the Government of the United States to produce the financial report showing ELSI's financial position at 30 September 1967, from which the figures for the book value of its assets had been derived. The report, prepared by Raytheon's Italian auditors, and dated 22 March 1968, was produced in evidence. The balance sheet attached thereto showed two sets of figures; the first of these, corresponding to the figures for assets and liabilities set out in paragraph 18 above, gave the figures as recorded in the company's books of account. The second set of figures was based on the first set, but a number of adjustments had been made in accordance with the financial accounting policy of Raytheon "In order to assure comparability of the financial information reported from abroad" by its subsidiary companies. According to the Co-Agent of the United States, the major difference between the accounts on the Italian basis and the Raytheon basis was

> "the item of Deferred Charges, which for the most part represented the cost of developing new lines and improving product quality. This asset is carried on the Italian books but is routinely written off by Raytheon Company."

The adjustment of the item for "Deferred Charges" reduced the total assets figure by 1,653 million lire. Taking all adjustments into account,

the second set of figures gave a value of 14,893.9 million lire for the assets, and 15,775.2 million lire for the liabilities. The auditors stated in their covering letter to Raytheon accountants that

> "The adjustments made by the company in preparing the above mentioned balance sheet and statement of income and accumulated losses have not, at the date of this report, been recorded in the books, essentially for tax reasons. Accordingly, the accompanying financial statements are not in agreement with the company's books of account."

Among the "Notes on Financial Statements" attached to the accounts by the auditors was the following:

> "10. The adjusted accumulated losses at September 30, 1967 exceeded the total of the paid up capital stock, capital reserve and Stockholders subscription account by an amount of 881.3 million lire. Should this become 'officially' the case (e.g. should the adjustments made in arriving at this total of accumulated losses be entered in the company's books of account), under Articles 2447 and 2448 of the Italian Civil Code the directors would be obliged to convene a Stockholders' Meeting forthwith to take measures either to cover the losses by providing new capital or to put the company into liquidation."

The auditors also expressed reservations on two other items totalling 1,168.5 million lire.

20. The officials of Raytheon and ELSI were nevertheless advised by their Italian counsel in March 1968 that "ELSI's capital, after taking into account losses to date at that time, was well in excess of the minimum statutory requirement" (1 million lire) under Articles 2447 and 2448 of the Italian Civil Code, which provide that if action is not taken to restore the capital to the required minimum, the company is dissolved as a matter of law. In the view of ELSI's counsel, "it was therefore possible under Italian law for ELSI's shareholders to plan an orderly liquidation of the company".

21. Throughout this Judgment this phrase "orderly liquidation" is used solely in the sense in which it was employed by the officers of ELSI and by the representatives of the United States, i.e., to denote the operation planned in 1967-1968 by ELSI's management for the sale of the business or of its assets, en bloc or separately, and the discharge of ELSI's debts, fully or otherwise, out of the proceeds, the whole operation being under the control of ELSI's own management.

22. According to the United States, the chief objectives in the planned orderly liquidation were to conserve the assets and preserve as many of the

characteristics of a going concern as possible in order to attract and interest prospective buyers; it was planned to advertise ELSI's assets widely, offering them both as a total package and as separate items — the distinct manufacturing lines of the plant. The intention was, if the sums realized by the sale of the assets were sufficient, to pay all creditors in full. Planning had however also proceeded on the basis of the "quick-sale" valuation of the assets (paragraph 18 above), which, it was recognized, was less than the total liabilities of the company. It was not considered possible to continue normal production; the personnel was to be dismissed, with the exception of some 120 key employees needed for the wind-up operation and for continuing limited production for a time to meet (in particular) military contracts and maintain customer contact.

23. The intended treatment of creditors in the planned liquidation, in the event of only the "quick-sale" value being realized, was stated by the Financial Controller of Raytheon to have been as follows:

> "Ideally, we would settle first with the small creditors, subject, of course, to the agreement of the major creditors, in order to minimize the administrative effort during liquidation. Secured and preferred creditors would take priority and would be paid when the assets used for collateral were sold. Major unsecured creditors were to be paid on a pro rata basis from within the funds realized from the sale of assets. Then Raytheon would be called upon to satisfy any guaranteed creditor to the extent not already paid from asset sale proceeds. We calculated that the secured and preferred creditors would receive 100 per cent of their outstanding claims, while the unsecured major creditors who were not covered by Raytheon guarantees would realize about 50 per cent of their claims. The latter creditors were certain banks and Raytheon and its subsidiaries. We were confident that an orderly liquidation of this type would be acceptable to the creditors as it was much more favorable than could be expected through bankruptcy."

According to the United States, settlement with all the smaller creditors was regarded as a priority

> "to reduce the creditors to a manageable number and also to eliminate the risk that a small irresponsible creditor would take precipitous action which would raise formidable obstacles in the way of orderly liquidation".

Appended to one of the affidavits by officers of Raytheon and ELSI annexed to the United States Memorial were detailed calculations showing *(inter alia)* various valuations of ELSI's assets, analysis of the company's

liabilities and their priority in liquidation, and estimated distribution of the proceeds of disposal of assets calculated both on book value and alternatively on a "minimum liquidation value".

24. It is contended by the United States that notwithstanding Raytheon's formal notification on 7 March 1968 that it would not subscribe to any further stock or guarantee any additional loans (paragraph 17 above, *in fine*), Raytheon was ready to give certain financial support and guarantees to enable the orderly liquidation to proceed, as distinct from making more funds available to ELSI for continued operations. According to officials of ELSI, if Raytheon had handled the liquidation as planned, it would have guaranteed the settlements outlined in the previous paragraph; they stated that

> "Demonstrating its support of the liquidation plan, Raytheon organized to provide funds to ELSI in advance of the sale of its assets so that disbursements could easily be made to the small creditors and, as a first step, transferred 150 million lire to the First National City Bank branch in Milan specifically for that purpose."

Evidence was given at the hearing that payment of small creditors out of these funds was begun, but then stopped by the creditor banks because this was "showing preference". It was contemplated that Raytheon would take over ELSI's accounts receivable (subsequently valued at some 2,879 million lire) at face value, thus supplying immediate cash resources.

25. In the view of ELSI's legal counsel at the time (paragraph 20 above) and of Italian lawyers consulted by the United States, ELSI was in March 1968 entitled to engage in orderly liquidation of its assets, was under no obligation to file a petition in bankruptcy, and was never in jeopardy of compulsory dissolution under Article 2447 of the Italian Civil Code, and was at all times in compliance with Article 2446 of the Code. It has however been contended by Italy that ELSI was in March 1968 unable to pay its debts, and its capital of 4,000 million lire was completely lost; accordingly, an orderly liquidation was not available to it, but as an insolvent debtor it was under an obligation to file a petition in bankruptcy. The disagreement turns on the value of ELSI's assets for this purpose at 31 March 1968: the Parties have made conflicting statements of what is correct accounting practice for the purposes of compliance with the relevant requirements of Italian law. It has also been observed by Italy that, whether or not ELSI was insolvent, the procedure contemplated did not correspond to a voluntary liquidation as provided for in Article 2450 of the Italian Civil Code; under that procedure a liquidator has to be appointed by the shareholders, or if they fail to do so, by the Tribunal. According to one expert appearing on behalf of Italy, ELSI being insolvent the only

course open to it in order to avoid the duty of filing a petition in bankruptcy was to request to the tribunal to be admitted to the procedure of judicial settlement *("concordato preventivo")* under Articles 160 *et seq.* of the Italian Bankruptcy Act; this would have required proof that at least 40 per cent of the unsecured claims would be met. The expert appearing on behalf of the United States however stated that apparent inability to pay all creditors at 100 per cent is not fatal to voluntary and orderly liquidation. In this context he mentioned in particular the practice of "private settlement" *("concordato stragiudiziale").*

26. The management of ELSI was conscious that a financial crisis was imminent, and during the period from September 1967, the responsible officers of the company were keeping a close watch on the declining funds to ensure that the company did not reach a point where continued operation would be contrary to Italian law. At a meeting held on 21 February 1968 between representatives of Raytheon and ELSI and the President of the Sicilian region, the Chairman of ELSI "drew a precise time chart showing: *(a)* February 23 — Board Meeting; *(b)* February 26 to 29 — inevitable bank crisis; *(c)* March 8 — we run out of money and shut the plant"; the hand-written minutes of that meeting record also that "the date of March 8 was stressed repeatedly as the absolute limit for the shut-down due to a total financial crisis".

27. On 16 March 1968, the Board of Directors of ELSI met to consider a report on the financial situation, and concluded "that there is no alternative to the discontinuation of the company's activities"; the Board

> "decided the cessation of the company's operations, to be carried out as follows:
> (1) production will be discontinued immediately;
> (2) commercial activities and employment contracts will be terminated on March 29, 1968".

This decision was notified to the employees of ELSI by a letter of 16 March 1968. On 28 March 1968, a meeting of shareholders of ELSI was held, at which it was decided *(inter alia)* "to ratify the resolutions adopted by the Board of Directors at the meeting of March 16, 1968, and hence to agree that the Company cease operations". Meetings with Italian officials however continued up to 29 March 1968; the Italian authorities continued to give broad assurances of an intervention by ESPI, and vigorously pressed ELSI not to close the plant and not to dismiss the workforce, but the officials of the company insisted that this was inevitable unless more capital was forthcoming. On 29 March 1968 letters of dismissal were mailed to the employees of ELSI.

28. The Managing Director of ELSI had a meeting early on the morning of 31 March 1968 with the President of the Sicilian region, Mr. Carollo, at which the latter stated that the Italian Prime Minister had said that a company would be formed by ESPI and IMI (Istituto Mobiliare Italiano) to deal with the acquisition of ELSI's assets, and that a holding company would be formed which would eventually own ELSI. Mr. Carollo continued by saying that "to keep the people in Palermo and avoid an exodus to other jobs, and to protect the plant and machinery, the plant would be requisitioned . . .". On 1 April 1968 representatives of the company met representatives of the bank creditors of ELSI to discuss the company's plans for an orderly liquidation. According to the United States, ELSI's representatives stated that Raytheon was not prepared to provide any further financial support to ELSI either by way of capital, loans, advances, or guarantees, but also informed the banks of the arrangement (referred to in paragraph 24 above) which would provide for ELSI's immediate cash needs in such an orderly liquidation through the sale to Raytheon of ELSI's accounts receivable at 100 per cent of face value, the proceeds being used to pay off the small creditors and to meet payroll and severance pay claims as well as other pressing priority obligations.

29. No agreement was reached at that meeting; certain of the banks requested more information, and another meeting was to be held later with an agreed agenda. Subsequently ELSI's representatives learnt that the plant had been requisitioned. According to the United States, and in the view of the officers of Raytheon and ELSI, there was reason to believe that in a liquidation the creditor banks would have accepted a settlement of their claims on payment of 40 to 50 per cent of each, but no independent evidence is available that such was the banks' attitude at that time. It does not appear from the evidence that the banks were asked specifically at the meeting of 1 April 1968 whether they would co-operate on the basis of a guaranteed 50 per cent of their claims; on the contrary, it was contended on behalf of the United States by ELSI's then legal adviser that

> "There is no evidence of bank negotiations at the time of the requisition because at the time the stockholders were fully confident that ELSI's assets would have recovered book value, and there was no need at the time to start any such negotiations. What the stockholders and ELSI's Board were seeking at the time was an understanding with the banks on the manner and timing of an orderly liquidation."

According to the same legal adviser, the banks were ready, during negotiations in September-October 1968, after ELSI had been declared bankrupt, to accept settlement on the basis of 40 per cent or 50 per cent payment (see paragraph 37 below).

30. On 1 April 1968 the Mayor of Palermo issued an order, effective immediately, requisitioning ELSI's plant and related assets for a period of six months. The text of this order, in the translation supplied by the United States, was as follows:

"The Mayor of the Municipality of Palermo,

Taking into consideration that Raytheon-Elsi of Palermo has decided to close its plant located in this city at Via Villagrazia, 79, because of market difficulties and lack of orders;

That the company has furthermore decided to send dismissal letters to the personnel consisting of about 1,000 persons;

Taking notice that ELSI's actions, beside provoking the reaction of the workers and of the unions giving rise to strikes (both general and sectional) has caused a wide and general movement of solidarity of all public opinion which has strongly stigmatized the action taken considering that about 1,000 families are suddenly destituted;

That, considering the fact that ELSI is the second firm in order of importance in the District, because of the shutdown of the plant a serious damage will be caused to the District, which has been so severely tried by the earthquakes had during the month of January 1968;

Considering also that the local press is taking a great interest in the situation and that the press is being very critical toward the authorities and is accusing them of indifference to this serious civic problem;

That, furthermore, the present situation is particularly touchy and unforeseeable disturbances of public order could take place;

Taking into consideration that in this particular instance there is sufficient ground for holding that there is a grave public necessity and urgency to protect the general economic public interest (already seriously compromised) and public order, and that these reasons justify requisitioning the plant and all equipment owned by Raytheon-Elsi located here at Via Villagrazia 79;

Having noted Article 7 of the law of 20 March 1865 No. 2248 enclosure *e*;

Having noted Article 69 of the Basic Regional Law EE.LL.,

the requisition, with immediate effect and for the duration of six months, except as may be necessary to extend such period, and without prejudice for the rights of the parties and of third parties, of the plant and relative equipment owned by Raytheon-Elsi of Palermo.

With a subsequent decree, the indemnification to be paid to said company for the requisition will be established."

The order was served on the company on 2 April 1968.

31. On 6 April 1968 the Mayor issued an order entrusting the management of the requisitioned plant to Mr. Aldo Profumo, the Managing Director of ELSI, for the purpose, *inter alia*, of "avoiding any damage to the equipment and machinery due to the abandoning of all activity, including maintenance". Mr. Profumo declined to accept this appointment, and on 16 April 1968 the Mayor wrote to Mr. Silvio Laurin, the senior director, appointing him temporarily to replace Mr. Profumo "in the same capacity, with the same powers, functions and limitations", and Mr. Laurin accepted this appointment. The company management requested another of its directors, Mr. Rico Merluzzo, to stay at the plant night and day "to preclude local authorities from somehow asserting that the plant had been 'abandoned' by ELSI".

32. On 9 April 1968 ELSI addressed a telegram to the Mayor of Palermo, with copies to other Government authorities, claiming *(inter alia)* that the requisition was illegal and expressing the company's intention to take all legal steps to have it revoked and to claim damages. On 12 April 1968 the company served on the Mayor a formal document dated 11 April 1968 inviting him to revoke the requisition order. The Mayor did not respond and the order was not revoked, and on 19 April 1968 ELSI brought an administrative appeal against it to the Prefect of Palermo, who was empowered to hear appeals against decisions by local governmental officials. The decision on that appeal was not given until 22 August 1969 (paragraph 41 below); in the meantime however the requisition was not formally prolonged, and therefore ceased to have legal effect after six months, more than four months after the bankruptcy of ELSI had been declared (paragraph 36 below).

33. As noted above (paragraph 16) the Parties disagree over whether, immediately prior to the requisition order, there had been any occupation of ELSI's plant by the employees, but it is common ground that the plant was so occupied during the period immediately following the requisition. On 19 April 1968 the representatives of the company stated, in an appeal against the requisition addressed to the Prefect of Palermo, that there had at that time been no occupation of the plant as a consequence of the dismissal of the employees on 29 March 1968, but that on 30 March 1968 a group of representatives of the personnel went to the plant to talk to the

company executives and "peacefully remained thereafter all day on the premises", and on subsequent days a small group of employees wandered about on the premises. The Mayor of Palermo, in an affidavit, has stated that

> "The occupation of the plant by the employees (which started well before the requisition) turned out to be of a 'cooperative' nature after the requisition and was no obstacle to the continuation of those activities which were possible under the circumstances",

and an official of the Municipality of Palermo has stated, in an affidavit, that "there were no problems such as 'hard' picketing" and that one of the production lines was re-activated and "we proceeded regularly with the contracts in hand". According to an affidavit filed by the United States "the plant sat idle for the remainder of 1968", but Italy has produced evidence showing that some work in progress was continued and completed in the months following the requisition, in particular for the Nato Hawk programme.

34. On 19 and 20 April 1968 meetings were held between officials of Raytheon and the President of the Sicilian region, Mr. Carollo, who stated that "the Regional and Central Governments had reached agreement to form a management company with IRI participation to operate ELSI" and invited Raytheon to join the management company. The proposal would have entailed the contribution by ELSI of new capital and its assuming complete responsibility for past debts; in the discussion Mr. Carollo stated that "the Region now has a single goal, to keep the workers employed". At the request of Raytheon, Mr. Carollo, on 20 April 1968 supplied Raytheon with a memorandum to provide the company with "some fundamental elements of judgment". In that memorandum he explained that it was impossible for the time being for Raytheon to liquidate ELSI, for the following reasons:

> "1. Nobody in Italy will purchase *[Nessuno in Italia comprerà]*, that is to say IRI will not purchase, neither for a low nor for a high price, the Region will not purchase, private enterprise will not purchase. Let me add that the Region and IRI and anybody else who has any possibility to influence the market will refuse in the most absolute manner to favor any sale while the plant is closed.
>
> 2. The Banks, which have outstanding credits for approximately 16 billion Lire, cannot and will not accept any settlement even at the cost of dragging the Company into litigation on an international level. I mean to refer to Raytheon and not to ELSI because the distinction between ELSI and Raytheon is not found to be admissible, since any and all financing was granted to ELSI based on the moral

guarantee of Raytheon, whose executives have always negotiated said financing.

3. Anyway, it is known in Italy that one can enforce the claims directly against Raytheon because it has interests and revenues in our country also outside ELSI.

It is obvious that every attempt will be made (even at the cost of long litigation) to obtain from Raytheon what is owed by ELSI.

4. In the event that the plant will be kept closed, waiting for Italian buyers who will never materialize, the requisition will be maintained at least until the courts will have resolved the case. Months will go by . . ."

35. On 26 April 1968 the Chairman of the Board of ELSI wrote to Mr. Carollo formally rejecting the proposal for participation in the new management company; in his view the proposal "was a temporary caretaker measure which would not solve the fundamental problem, namely keeping ELSI in Sicily and making it a viable and vital industry", and that it "would only aggravate ELSI's critical financial condition". The letter continued: "We are therefore forced to file [a] voluntary petition for bankruptcy, as required by Italian law."

36. In view of what had been said by Mr. Carollo that the requisition of the plant would be maintained for months, "at least until the courts will have resolved the case", ELSI's Italian counsel advised as follows:

"The disposability of ELSI's assets was a fundamental prerequisite to ELSI's shareholders' ability to take ELSI through an orderly liquidation; they were relying on the proceeds of these sales in large part to pay ELSI's creditors in an orderly manner. Without the ability to dispose of its assets, ELSI would not have the liquidity needed to pay its debts as they came due and therefore would soon become technically insolvent under Italian law.

. . . . . .

I advised ELSI's directors that they had an obligation to file a petition for a declaration of bankruptcy, failing which they could be held personally liable pursuant to Article 217 of the Bankruptcy Law, Royal Decree of March 16, 1942, No. 267."

On 25 April 1968 the Board of Directors voted to file a voluntary petition in bankruptcy, and the bankruptcy petition was filed on 26 April 1968. The petition referred to the requisition order of 1 April 1968 and stated *(inter alia)*:

"Because of the order of requisition, against which the Company

has in due time filed an appeal, the Company has lost the control of the plant and cannot avail itself of an immediate source of liquid funds; in the meanwhile payments have become due (as for instance instalments of long-term loans; an instalment of Lit. 800,000,000 to Banca Nazionale del Lavoro became due on April 18, 1968 and the note therefor has been or will be protested, etc.); it is acknowledged that it is impossible for the Company to pay such sums with the funds existing or available such impossibility being due to the events of these last weeks . . ."

A decree of bankruptcy was issued by the *Tribunale di Palermo* on 16 May 1968, and a Palermo lawyer was appointed *curatore* (trustee in bankruptcy). A creditors' committee of five members was appointed, composed of two representatives of ELSI's employees, two representatives of bank creditors, and a representative of Raytheon Europe International Company ("Raytheon Europe") (the European management subsidiary of, and wholly owned by, Raytheon), which had submitted a claim as creditor in the bankruptcy. Raytheon itself and another of its subsidiaries, Raytheon Service Company, had unsecured claims against ELSI of some 1,140 million lire for goods and services they had advanced to ELSI on unsecured open accounts. On advice of Italian counsel, however, Raytheon and Raytheon Service Company did not file claims in the bankruptcy proceedings because it was clear that they would not receive enough in the bankruptcy to justify their filing costs.

37. From April 1968 onwards discussions were held between Raytheon's Italian counsel, representatives of the creditor banks and officials of the Italian Government, with a view to the takeover of ELSI by a company owned by the Italian Government and a settlement with the ELSI creditors. This proposed settlement involved the grant to the new company by Raytheon of a technical license (to use Raytheon patents and know-how) of the same scope as ELSI had; the payment by Raytheon of the debts of ELSI which it had guaranteed, but no others, and a formal release and indemnity of Raytheon in this latter respect; and a waiver by Raytheon of its rights of subrogation resulting from payment of the guaranteed debts. According to Raytheon's Italian counsel, he was told by Italian Government officials in October 1968 that the majority of the Italian creditor banks were agreeable to a settlement on payment of 40 per cent of their claims, and that only one bank was holding out for 50 per cent. In July, a statement had been made in the Italian Parliament by the Minister of Industry, Commerce and Crafts, which has been subject to differing interpretations, but which put forward as a fact the establishment by the Sicilian region and other public agencies of a management company, which would allow productive activities to be resumed until such time as the financial problems of ELSI could be

finally resolved, if possible through settlement out of court. On 13 November 1968 the Italian Government issued a press communiqué which stated that

> "while the STET Group [Società finanziaria telefonica, an affiliate or subsidiary of IRI] remains committed to build a new plant in Palermo for the production of telecommunication products, the IRI-STET Group, urged by the Government, after the examination of alternative solutions which proved unfeasible, stated its willingness to intervene in the take-over of the [ELSI] plant in the organization of new lines of production".

According to the communiqué, the conditions of STET's intervention were to be agreed between the STET Group and the authorities of the Sicilian region.

38. The court dealing with the bankruptcy ordered an auction of ELSI's premises, plant and equipment to be held on 18 January 1969, and set a minimum bid of 5,000 million lire. This auction, and the subsequent auctions mentioned below, were advertised in leading newspapers both in Italy and in Belgium, Japan, the Netherlands, the United Kingdom and the United States. No bids were received at this auction, and a second auction was set for 22 March 1969, this time with the inclusion also of the entire inventory at the plant and elsewhere, the minimum bid being set at 6,223,293,258 lire. In the meantime negotiations were being carried on for a takeover of the plant by an IRI subsidiary and the re-employment of most of ELSI's former staff. It was reported in the Sicilian press, first that on 18 March 1969 it had been agreed that IRI would acquire ELSI's assets, beginning with a lease of the plant for 150 million lire, and secondly that the former President of Sicily, Mr. Carollo, had stated at a public meeting on 5 April 1969 that there had been a written agreement with IRI in October 1968 that

> "entailed the acquisition of the [ELSI] factory by IRI for the sum of four billion lire. It was even agreed that IRI would be absent from the first auction, participating instead in the second one, where the basic price was precisely four billion lire".

39. No bids were received at the second auction. A week later a proposal to lease and re-open the plant was made to the trustee in bankruptcy by ELTEL (Industria Elettronica Telecommunicazioni S.p.A.), a subsidiary of IRI set up in December 1968. The terms proposed for the lease were not acceptable as such to the creditors' committee, which did however recom-

mend *(inter alia)* that it should be granted if ELTEL agreed to purchase all ELSI's inventorial raw material for 1,800 million lire; the representative of Raytheon Europe on the committee vigorously opposed the lease. The trustee in bankruptcy however recommended that the lease be granted on the terms requested, and on 8 April 1969 the bankruptcy judge so directed. Raytheon Europe appealed against this decision but without success. A third auction was scheduled for May 1969; in April ELTEL proposed to buy the work in progress — the material left on ELSI's production lines when the plant was requisitioned — for 105 million lire; this had been valued in the course of the bankruptcy proceedings at 217 million lire. Raytheon Europe's representative on the creditors' committee opposed this sale, but was outvoted.

40. The third auction of ELSI's premises, plant and equipment and inventory was held on 3 May 1969, the minimum bid being set at 5,000 million lire, but again no bids were received. ELTEL had informed the bankruptcy court on 16 April 1969 that it was willing to offer 3,205 million lire for the premises, plant and equipment, excluding the supplies — "merchandise, raw materials and semifinished goods" — which it did not regard as indispensable. On 3 May 1969, the trustee in bankruptcy requested the bankruptcy court to approve a sale of the work in progress to ELTEL on the terms proposed by ELTEL and approved by the creditors' committee. On 9 May 1969, Raytheon Europe's appeal against the decision authorizing the lease of the premises and plant to ELTEL was rejected. On 27 May 1969 ELTEL made an offer to the bankruptcy court to buy the remaining plant, equipment and supplies for 4,000 million lire. The trustee in bankruptcy proposed acceptance (subject to minor changes in the terms), and the creditors' committee decided on 6 June 1969 to approve the proposal, the Raytheon Europe representative voting against. On 7 June 1969 the bankruptcy judge set 12 July 1969 as date for an auction on the terms approved by the creditors' committee. On 9 June 1969 Raytheon Europe appealed against this decision, but the appeal was rejected on 20 June 1969. The auction was held on 12 July 1969, and ELTEL purchased the auctioned property at the total price of 4,006 million lire.

41. The appeal filed by ELSI on 19 April 1968 (paragraph 32 above) against the requisition order of 1 April 1968 was determined by the Prefect of Palermo by a decision given on 22 August 1969. The Parties are at issue on the question whether this period of time was or was not normal for an appeal of this character. The decision on the appeal was given following a request to that effect by the trustee in bankruptcy made on 9 July 1969, in exercise of a right to request a decision conferred by an Italian Law of 3 March 1934. That Law provides that if the appeal has not been heard 120 days after it has been filed (i.e., in this case by 17 August 1968), a request

may be served on the Prefect requiring him to render a decision within 60 days thereafter; if he fails to do so, this is treated as a dismissal of the appeal. The decision of the Prefect was to uphold the appeal and thus to annul the requisition order made by the Mayor of Palermo; the precise terms of the decision will be considered later in this Judgment (paragraphs 75, 96, 125 and 126). The Mayor of Palermo appealed against the Prefect's decision to the President of Italy who, having been advised by the Council of State that the Mayor's appeal was inadmissible, so ruled on 22 April 1972.

42. In the meantime, on 16 June 1970 the trustee in bankruptcy had brought proceedings in the *Tribunale di Palermo* ("the Court of Palermo") against the Minister of the Interior of Italy and the Mayor of Palermo for damages resulting from the requisition. The damages claimed were identified as

> "the considerable decrease in value of the plant and the electronic equipment existing in Palermo at 79 Via Villagrazia, which results from the difference between the book value at the date of the bankruptcy of Raytheon-Elsi, of Lire 6,623,000,000 and the evaluation made on October 11, 1968 (that is, immediately after the six-month period of requisition had elapsed) by the Court Appraiser, Prof. Mario Puglisi, appointed by the Judge by Decree of September 19, 1968, of Lire 4,560,588,400, with a real loss of value of Lire 2,062,411,600 and as the lack of disposability of the plant and relative equipment for six months which, on the basis of the amortization rate for the industrial plants, equal to 10% per year, can be determined in Lire 33,150,000, and, therefore, in the aggregate amount of Lire 2,395,561,600, plus the interests at the legal rate from October 1, 1968 to the payment."

43. On 2 February 1973, the Court of Palermo, in a decision to be examined more fully below (paragraphs 57, 58, 97 and 127), ruled that the trustee was not entitled to compensation for the requisition, either in respect of the alleged decrease in value of the plant and equipment, or of the alleged lack of disposability thereof. On appeal, the *Corte di Appello di Palermo* ("the Court of Appeal of Palermo"), in its decision of 24 January 1974, upheld the conclusion of the lower court as regards the damages claimed for the alleged decrease in value of the plant and equipment. It however reversed the finding of the lower court on the second head of damage, and found that the trustee was entitled to compensation from the Minister of the Interior for loss of use and possession of ELSI's plant and assets during the six-month requisition period. It therefore awarded, in effect, a "rental" payment of some 114 million lire, computed as half the annual rate of 5 per cent of the total value of the assets. This decision, which will be examined in more detail below (paragraphs 97, 98 and 127), was upheld by the Court of Cassation on 26 April 1975. The amount of

the judgment was ultimately received by the trustee and, less costs and expenses, distributed to ELSI's creditors.

44. In the bankruptcy proceedings, creditors presented claims against ELSI totalling some 13,000 million lire; these did not include amounts due to Raytheon and Raytheon Service Company (see paragraph 36 above). The bankruptcy proceedings closed in November 1985. According to the bankruptcy reports, the bankruptcy realized only some 6,370 million lire for ELSI's assets, as compared with the minimum liquidation value estimated by ELSI's management in March 1968 at 10,840 million lire. Of the amount realized, some 6,080 million lire went to pay banks, employees, and other creditors. The remainder went to pay bankruptcy administration, tax, registry, and customs charges. All of the secured and preferred creditors who filed claims in the bankruptcy were paid in full. The unsecured creditors received less than one per cent of their claims; accordingly no surplus remained for distribution to the shareholders, Raytheon and Machlett.

45. Raytheon had guaranteed the indebtedness of ELSI to a number of banks, and on the bankruptcy of ELSI it was accordingly liable for, and paid, the sum of 5,787.6 million lire to the banks in accordance with the terms of the guarantees. Five of the seven banks which had also made unguaranteed loans to ELSI brought proceedings in the Italian courts seeking payment of these loans by Raytheon, on the basis primarily of Article 2362 of the Italian Civil Code, which renders a sole shareholder liable for the debts of the company. It was argued that Raytheon was in effect sole shareholder, since Machlett was its wholly-owned subsidiary. Three of these cases were ultimately resolved by the Italian Court of Cassation in favour of Raytheon, and two were discontinued by the plaintiffs.

* *

46. On 7 February 1974, the Embassy in Rome of the United States transmitted to the Italian Ministry of Foreign Affairs a note enclosing the "claim of the Government of the United States of America on behalf of Raytheon Company and Machlett Laboratories, Incorporated". That claim, which was based not only on the FCN Treaty but also on customary international law, incorporated a Memorandum of Law, Chapter VI of which was devoted to "Exhaustion of Local Remedies". It was there noted that it was "generally recognized that local remedies must be exhausted before a claim may be formally espoused under principles of international law"; an account was given of the relevant litigation in Italy (some of which was at the time still pending) and, in the light of annexed opinions

of two Italian legal experts, it was concluded that "Raytheon and Machlett have exhausted every meaningful legal remedy available to them in Italy". At the time this claim was submitted, the Court of Appeal of Palermo had ruled on the action by the trustee in bankruptcy, but the case was thereafter brought before the Court of Cassation (paragraph 43 above); it is recognized by both Parties that any other action arising out of the requisition would by then have been barred by limitation of time. It appears that the United States received no formal response from Italy to the claim until 13 June 1978, when Italy denied the claim in a written aide-mémoire, the text of which has been supplied to the Chamber. The aide-mémoire contained no suggestion that local remedies had not been exhausted, and indeed stated that "the claim is juridically groundless, both from the international and domestic point of view". During the oral proceedings in the present case, counsel for Italy asserted that at an unspecified date prior to the institution of the present proceedings the Italian Government "had made it clear to the United States Government that as a Respondent it would raise the objection of non-exhaustion of local remedies in judicial proceedings". No evidence to that effect has however been supplied to the Chamber.

* *

47. Many of the documents constituting evidence submitted to the Chamber are in the Italian language. Where the Chamber relies in the present Judgment on passages in these documents, it will, for the sake of clarity, set out the original Italian together with an English translation, which is not always the translation supplied by one of the Parties pursuant to Article 51, paragraph 3, of the Rules of Court.

* * *

48. It is common ground between the Parties that the Court has jurisdiction in the present case, under Article 36, paragraph 1, of its Statute, and Article XXVI of the Treaty of Friendship, Commerce and Navigation, of 2 June 1948 ("the FCN Treaty"), between Italy and the United States; which Article reads:

> "Any dispute between the High Contracting Parties as to the interpretation or the application of this Treaty, which the High Contracting Parties shall not satisfactorily adjust by diplomacy, shall be submitted to the International Court of Justice, unless the High Contracting Parties shall agree to settlement by some other pacific means."

The jurisdiction is thus confined to questions of "the interpretation or the application" of the FCN Treaty and Protocols and of the Agreement Supplementing the Treaty between the United States of America and the Italian Republic, of 26 September 1951 (which Agreement is hereinafter called "the Supplementary Agreement"), Article IX of which provides that it is to "constitute an integral part" of the FCN Treaty. This same jurisdiction may accordingly be exercised by this Chamber, created by the Court to deal with this case by virtue of Article 26, paragraph 2, of its Statute, and Articles 17 and 18 of its Rules, at the request of and after consultation with the Parties.

49. While the jurisdiction of the Chamber is not in doubt, an objection to the admissibility of the present case was entered by Italy in its Counter-Memorial, on the ground of an alleged failure of the two United States corporations, Raytheon and Machlett, on whose behalf the United States claim is brought, to exhaust the local remedies available to them in Italy. This objection, which the Parties agreed should be heard and determined in the framework of the merits, must, therefore, be considered at the outset.

50. The United States questioned whether the rule of the exhaustion of local remedies could apply at all to a case brought under Article XXVI of the FCN Treaty. That Article, it was pointed out, is categorical in its terms, and unqualified by any reference to the local remedies rule; and it seemed right, therefore, to conclude that the parties to the FCN Treaty, had they intended the jurisdiction conferred upon the Court to be qualified by the local remedies rule in cases of diplomatic protection, would have used express words to that effect; as was done in an Economic Co-operation Agreement between Italy and the United States of America also concluded in 1948. The Chamber has no doubt that the parties to a treaty can therein either agree that the local remedies rule shall not apply to claims based on alleged breaches of that treaty; or confirm that it shall apply. Yet the Chamber finds itself unable to accept that an important principle of customary international law should be held to have been tacitly dispensed with, in the absence of any words making clear an intention to do so. This part of the United States response to the Italian objection must therefore be rejected.

51. The United States further argued that the local remedies rule would not apply in any event to the part of the United States claim which requested a declaratory judgment finding that the FCN Treaty had been violated. The argument of the United States is that such a judgment would declare that the United States own rights under the FCN Treaty had been infringed; and that to such a direct injury the local remedies rule, which is a rule of customary international law developed in the context of the espousal by a State of the claim of one of its nationals, would not apply. The Chamber, however, has not found it possible in the present case to

find a dispute over alleged violation of the FCN Treaty resulting in direct injury to the United States, that is both distinct from, and independent of, the dispute over the alleged violation in respect of Raytheon and Machlett. The case arises from a dispute which the Parties did not "satisfactorily adjust by diplomacy"; and that dispute was described in the 1974 United States claim made at the diplomatic level as a "claim of the Government of the United States of America on behalf of Raytheon Company and Machlett Laboratories, Incorporated". The Agent of the United States told the Chamber in the oral proceedings that "the United States seeks reparation for injuries suffered by Raytheon and Machlett". And indeed, as will appear later, the question whether there has been a breach of the FCN Treaty is itself much involved with the financial position of the Italian company, ELSI, which was controlled by Raytheon and Machlett.

52. Moreover, when the Court was, in the *Interhandel* case, faced with a not dissimilar argument by Switzerland that in that case its "principal submission" was in respect of a "direct breach of international law" and therefore not subject to the local remedies rule, the Court, having analysed that "principal submission", found that it was bound up with the diplomatic protection claim, and that the Applicant's arguments "do not deprive the dispute ... of the character of a dispute in which the Swiss Government appears as having adopted the cause of its national ..." (*Interhandel, Judgment, I.C.J. Reports 1959,* p. 28). In the present case, likewise, the Chamber has no doubt that the matter which colours and pervades the United States claim as a whole, is the alleged damage to Raytheon and Machlett, said to have resulted from the actions of the Respondent. Accordingly, the Chamber rejects the argument that in the present case there is a part of the Applicant's claim which can be severed so as to render the local remedies rule inapplicable to that part.

53. There was a further argument of the Applicant, based on estoppel in relation to the application of the local remedies rule, which should be examined. In the "Memorandum of Law" elaborating the United States claim on the diplomatic plane, transmitted to the Italian Government by Note Verbale of 7 February 1974, one finds that the whole of Part VI (pp. 53 *et seq.*) deals generally and at some length with the "Exhaustion of Local Remedies". There were also annexed the opinions of the lawyers advising the Applicant, which dealt directly with the position of Raytheon and Machlett in relation to the local remedies rule. The Memorandum concluded that Raytheon and Machlett had indeed exhausted "every meaningful legal remedy available to them in Italy" (paragraph 46 above). In view of this evidence that the United States was very much aware that it must satisfy the local remedies rule, that it evidently believed that the rule had been satisfied, and that it had been advised that the shareholders of

ELSI had no direct action against the Italian Government under Italian law, it was argued by the Applicant that Italy, if it was indeed at that time of the opinion that the local remedies had not been exhausted, should have apprised the United States of its opinion. According to the United States, however, at no time until the filing of the Respondent's Counter-Memorial in the present proceedings did Italy suggest that Raytheon and Machlett should sue in the Italian courts on the basis of the Treaty. The written aide-mémoire of 13 June 1978, by which Italy rejected the 1974 claim, had contained no suggestion that the local remedies had not been exhausted, nor indeed any mention of the matter.

54. It was argued by the Applicant that this absence of riposte from Italy amounts to an estoppel. There are however difficulties about drawing any such conclusion from the exchanges of correspondence when the matter was still being pursued on the diplomatic level. In the *Interhandel* case, when Switzerland argued that the United States had at one time actually "admitted that Interhandel had exhausted the remedies available in the United States courts", the Court, far from seeing in this admission an estoppel, dismissed the argument by merely observing that "This opinion was based upon a view which has proved unfounded" (*Interhandel, Judgment, I.C.J. Reports 1959,* p. 27). Furthermore, although it cannot be excluded that an estoppel could in certain circumstances arise from a silence when something ought to have been said, there are obvious difficulties in constructing an estoppel from a mere failure to mention a matter at a particular point in somewhat desultory diplomatic exchanges.

55. On the basis that the local remedies rule does apply in this case, this Judgment may now turn to the question whether local remedies were, or were not, exhausted by Raytheon and Machlett.

* *

56. The damage claimed in this case to have been caused to Raytheon and Machlett is said to have resulted from the "losses incurred by ELSI's owners as a result of the involuntary change in the manner of disposing of ELSI's assets": and it is the requisition order that is said to have caused this change, and which is therefore at the core of the United States complaint. It was, therefore, right that any local remedy against the Italian authorities, calling in question the validity of the requisition of ELSI's plant and related assets, and raising the matter of the losses said to result from it, should be pursued by ELSI itself. In any event, both in order to attempt to recover control of ELSI's plant and assets, and to mitigate any damage flowing from the alleged frustration of the liquidation plan, the first step was for ELSI — and only ELSI could do this — to appeal to

the Prefect against the requisition order. After the bankruptcy, however, the pursuit of local remedies was no longer a matter for ELSI's management but for the trustee in bankruptcy (Raytheon could, even after the bankruptcy, have influenced decisions of the committee of creditors, had it not decided against claiming in bankruptcy in respect of sums due to it as creditor; it did exercise some influence however through its subsidiary company, Raytheon Europe, which did claim as a creditor).

57. After the trustee in bankruptcy was appointed, he, acting for ELSI, by no means left the Italian authorities and courts unoccupied with ELSI's affairs. It was he who, under an Italian law of 1934, formally requested the Prefect to make his decision within 60 days of that request; which decision was itself the subject of an unsuccessful appeal by the Mayor to the President of Italy. On 16 June 1970, the trustee, acting for the bankrupt ELSI, brought a suit against the Acting Minister of the Interior and the Acting Mayor of Palermo, asking the court to adjudge that the defendants should

> "pay to the bankrupt estate of Raytheon-Elsi ... damages for the illegal requisition of the plant machinery and equipment ... for the period from April 1 to September 30, 1968, in the aggregate amount of Lire 2,395,561,600 plus interests ..."

On 2 February 1973, the Court of Palermo, as indicated above (paragraph 43), rejected the claim. The trustee in bankruptcy then appealed to the Court of Appeal of Palermo; which Court gave a judgment on 24 January 1974 which "partly revising the judgment of the Court of Palermo" ordered payment by the Ministry of the Interior of damages of 114,014,711 lire with interest. Appeal was taken finally to the Court of Cassation which upheld the decision of the Court of Appeal, by a decision of 26 April 1975.

58. It is pertinent to note that this claim for damages (paragraph 42 above), as it came before the Court of Palermo in the action brought by the trustee, was described by that Court as being based *(inter alia)* upon the argument of the trustee in bankruptcy

> "that the requisition order caused an economic situation of such gravity that it immediately and directly triggered the bankruptcy of the company"
>
> *("il provvedimento di requisizione avrebbe determinato una situazione economica di tale pesantezza da farne scaturire immediatamente e direttamente il fallimento della società").*

Similarly the Court of Appeal of Palermo had to consider whether there was a "causal link between the requisition order and the company's bankruptcy". It is thus apparent that the substance of the claim brought to the

adjudication of the Italian courts is essentially the claim which the United States now brings before this Chamber. The arguments were different, because the municipal court was applying Italian law, whereas this Chamber applies international law; and, of course, the parties were different. Yet it would seem that the municipal courts had been fully seized of the matter which is the substance of the Applicant's claim before the Chamber. For both claims turn on the allegation that the requisition, by frustrating the orderly liquidation, triggered the bankruptcy, and so caused the alleged losses.

59. With such a deal of litigation in the municipal courts about what is in substance the claim now before the Chamber, it was for Italy to demonstrate that there was nevertheless some local remedy that had not been tried; or at least, not exhausted. This burden Italy never sought to deny. It contended that it was possible for the matter to have been brought before the municipal courts, citing the provisions of the treaties themselves, and alleging their violation. This was never done. In the actions brought before the Court of Palermo, and subsequently the Court of Appeal of Palermo, and the Court of Cassation, the FCN Treaty and its Supplementary Agreement were never mentioned. This is not surprising, for, as Italy recognizes, the way in which the matter was pleaded before the courts of Palermo was not for Raytheon and Machlett to decide but for the trustee. Furthermore, the local remedies rule does not, indeed cannot, require that a claim be presented to the municipal courts in a form, and with arguments, suited to an international tribunal, applying different law to different parties: for an international claim to be admissible, it is sufficient if the essence of the claim has been brought before the competent tribunals and pursued as far as permitted by local law and procedures, and without success.

60. The question, therefore, reduces itself to this: ought Raytheon and Machlett, suing in their own right, as United States corporations allegedly injured by the requisition of property of an Italian company whose shares they held, have brought an action in the Italian courts, within the general limitation-period (five years), alleging violation of certain provisions of the FCN Treaty between Italy and the United States; this mindful of the fact that the very question of the consequences of the requisition was already in issue in the action brought by its trustee in bankruptcy, and that any damages that might there be awarded would pass into the pool of realized assets, for an appropriate part of which Raytheon and Machlett had the right to claim as creditors?

61. Italy contends that Raytheon and Machlett could have based such an action before the Italian courts on Article 2043 of the Italian Civil Code, which provides that "Any act committed either wilfully or through fault which causes wrongful damages to another person implies that the wrongdoer is under an obligation to pay compensation for those dam-

ages." According to Italy, this provision is frequently invoked by individuals against the Italian State, and substantial sums have been awarded to claimants where appropriate. If Raytheon and Machlett suffered damage caused by violations by Italian public authorities of the FCN Treaty and the Supplementary Agreement, an Italian court would, it was contended, have been bound to conclude that the relevant acts of the public authorities were wrongful acts for the purposes of Article 2043. It is common ground between the Parties that implementing legislation *("ordini di esecuzione")* was enacted (Law No. 385 of 15 June 1949 and Law No. 910 of 1 August 1960), to give effect in Italy to the FCN Treaty and Supplementary Agreement, but that their provisions cannot be invoked in protection of individual rights before the Italian courts unless those provisions are regarded by the courts as self-executing. In order to show that the relevant provisions would be so regarded, decisions of the Court of Cassation have been cited by Italy in which provisions of the FCN Treaty (not the provisions relied on in the present case) have been applied for the benefit of United States nationals who have invoked them before Italian courts, and a provision of a treaty between Italy and the Federal Republic of Germany, said to be comparable with Article V of the FCN Treaty, was given effect.

62. However, those decisions were not based on Article 2043 of the Italian Civil Code; and the treaty provisions applied were given effect in conjunction with municipal legislation or the provisions of other treaties, through the mechanism of a most-favoured-nation provision. In none of the cases cited was the FCN Treaty provision relied on to establish the wrongfulness of conduct of Italian public officials. When in 1971 Raytheon consulted two Italian jurists on the question of local remedies for the purposes of a diplomatic claim, it apparently did not occur to either of them to refer even as a possibility to action under Article 2043 in conjunction with the FCN Treaty. It thus appears to the Chamber to be impossible to deduce, from the recent jurisprudence cited, what the attitude of the Italian courts would have been had Raytheon and Machlett brought an action, some 20 years ago, in reliance on Article 2043 of the Civil Code in conjunction with the provisions of the FCN Treaty and the Supplementary Agreement. Where the determination of a question of municipal law is essential to the Court's decision in a case, the Court will have to weigh the jurisprudence of the municipal courts, and "If this is uncertain or divided, it will rest with the Court to select the interpretation which it considers most in conformity with the law" (*Brazilian Loans, P.C.I.J., Series A, Nos. 20/21,* p. 124). In the present case, however, it was for Italy to show, as a matter of fact, the existence of a remedy which was open to the United States stockholders and which they failed to employ. The Chamber does not consider that Italy has discharged that burden.

63. It is never easy to decide, in a case where there has in fact been much resort to the municipal courts, whether local remedies have truly been "exhausted". But in this case Italy has not been able to satisfy the

Chamber that there clearly remained some remedy which Raytheon and Machlett, independently of ELSI, and of ELSI's trustee in bankruptcy, ought to have pursued and exhausted. Accordingly, the Chamber will now proceed to consider the merits of the case.

* * *

64. Paragraph 1 of the United States final submissions claims that:

> "(1) the Respondent violated the international legal obligations which it undertook by the Treaty of Friendship, Commerce and Navigation between the two countries, and the Supplement thereto, and in particular, violated Articles III, V, and VII of the Treaty and Article I of the Supplement".

It is necessary therefore to examine these Articles of the FCN Treaty and the Supplementary Agreement, against the conduct which is said to have been a violation of the obligations set out in these Articles. In doing so, it will be kept in mind that although the stated purposes of the FCN Treaty were those normally to be found in treaties of that kind, nevertheless a purpose of the Supplementary Agreement, which is to "constitute an integral part" of the FCN Treaty, was to give "added encouragement to investments of the one country in useful undertakings in the other country".

65. The acts of the Respondent which are thus alleged to violate its treaty obligations were described by the Applicant's counsel in terms which it is convenient to cite here:

> "First, the Respondent violated its legal obligations when it unlawfully requisitioned the ELSI plant on 1 April 1968 which denied the ELSI stockholders their direct right to liquidate the ELSI assets in an orderly fashion. Second, the Respondent violated its obligations when it allowed ELSI workers to occupy the plant. Third, the Respondent violated its obligations when it unreasonably delayed ruling on the lawfulness of the requisition for 16 months until immediately after the ELSI plant, equipment and work-in-process had all been acquired by ELTEL. Fourth and finally, the Respondent violated its obligations when it interfered with the ELSI bankruptcy proceedings, which allowed the Respondent to realize its previously expressed intention of acquiring ELSI for a price far less than its fair market value."

66. The most important of these acts of the Respondent which the Applicant claims to have been in violation of the FCN Treaty is the requisition of the ELSI plant by the Mayor of Palermo on 1 April 1968, which is claimed to have frustrated the plan for what the Applicant terms an "orderly liquidation" of the company as set out in paragraphs 22-25

above. It is fair to describe the other impugned acts of the Respondent, to be explained more fully below (paragraph 115), as ancillary to this core claim based on the requisition and its effects.

67. The Chamber is faced with a situation of mixed fact and law of considerable complexity, wherein several different strands of fact and law have to be examined both separately and for their effect on each other: the meaning and effect of the relevant Articles of the FCN Treaty and Supplementary Agreement; the legal status of the Mayor's requisition of ELSI's plant and assets; and the legal and practical significance of the financial position of ELSI at material times, and its effect, if any, upon ELSI's plan for orderly liquidation of the company. It will be convenient to begin by examining these considerations in relation to the Applicant's claim that the requisition order was a violation of Article III of the FCN Treaty.

* *

68. Article III of the FCN Treaty is in two paragraphs. Paragraph 1 provides for rights of participation of nationals of one High Contracting Party, in corporations and associations of the other High Contracting Party, and for the exercise by such corporations and associations of their functions. Since there is no allegation of treatment less favourable than is required according to the standards set by this paragraph, it need not detain the Chamber. Paragraph 2 of Article III is however important for the Applicant's claim; it provides:

> "The nationals, corporations and associations of either High Contracting Party shall be permitted, in conformity with the applicable laws and regulations within the territories of the other High Contracting Party, to organize, control and manage corporations and associations of such other High Contracting Party for engaging in commercial, manufacturing, processing, mining, educational, philanthropic, religious and scientific activities. Corporations and associations, controlled by nationals, corporations and associations of either High Contracting Party and created or organized under the applicable laws and regulations within the territories of the other High Contracting Party, shall be permitted to engage in the aforementioned activities therein, in conformity with the applicable laws and regulations, upon terms no less favorable than those now or hereafter accorded to corporations and associations of such other High Contracting Party controlled by its own nationals, corporations and associations."

Again there is no allegation of treatment of ELSI according to standards less favourable than those laid down in the second sentence of the para-

graph: the allegation by the United States of a violation of this paragraph by Italy relates to the first sentence.

69. In terms of the present case, the effect of the first sentence of this paragraph is that Raytheon and Machlett are to be permitted, in conformity with the applicable laws and regulations within the territory of Italy, to organize, control and manage ELSI. The claim of the United States focuses on the right to "control and manage"; the right to "organize", apparently in the sense of the creation of a corporation, is not in question in this case. Is there, then, a violation of this Article if, as the United States alleges, the requisition had the effect of depriving ELSI of both the right and practical possibility of selling off its plant and assets for satisfaction of its liabilities to its creditors and satisfaction of its shareholders?

70. It is undeniable that the requisition of a firm's "plant and relative equipment" must normally amount to a deprivation, at least in important part, of the right to control and manage. It was objected by Italy that the requisition in no way affected "control by the shareholders over the company", but merely concerned the management by the company of property belonging to the company. It is true that the direct impact of the requisition was only on control of the property requisitioned. It is however also undeniable that this requisition, which remained in effect until 30 September 1968, was issued to avoid the closure of ELSI's plant, the dismissal of its workforce, and as a consequence the probable dispersal of the assets, all of which were integral to ELSI's plan for orderly liquidation. Since the requisition thus had the design of preventing Raytheon from exercising, for six critical months, what was at that time a most important part of its right to control and manage ELSI, there exists a question whether the requisition was in conformity with the requirements of Article III, paragraph 2, of the FCN Treaty. Before coming to a conclusion on that question it is necessary now to take into consideration certain other matters.

71. Article III of the FCN Treaty, both in paragraph 1 concerning rights to be enjoyed by the nationals of one party in the territory of the other, and in paragraph 2, concerning rights of nationals of one party to "organize, control and manage" corporations of the other party, contains the qualifying phrase, "in conformity with the applicable laws and regulations" of the latter party. It was argued by Italy that this clause confirms that the correct interpretation of that paragraph is that it was not intended to confer upon United States nationals any rights of control and management more extensive, or more extensively protected, than those enjoyed by other stockholders, of whatever nationality, in Italian companies. Therefore, it was said, the requisition was no breach of the rights conferred by the FCN Treaty, because its "invalidity . . . as ascertained by the decision of the Prefect of Palermo, does not alter the fact that it was issued by the competent authority on a regular legal basis". But, in the Chamber's view, the reference to conformity with "the applicable laws and regu-

lations" cannot mean that, if an act is in conformity with the municipal law and regulations, that would of itself exclude any possibility that it was an act in breach of the FCN Treaty.

72. The reference to conformity with "the applicable laws and regulations" surely means no more than that Italian corporations and associations controlled by United States nationals must conform to the local applicable laws and regulations; moreover, they must do so even if they believe a law or regulation to be in breach of the FCN Treaty, and, indeed, even if it were in breach of the FCN Treaty. This the Applicant has never denied. Raytheon and Machlett did conform to the terms of the requisition. Indeed they had no other choice.

73. The question still remains, therefore, whether the requisition was or was not a violation of Article III, paragraph 2. This question arises irrespective of the position in municipal law. Compliance with municipal law and compliance with the provisions of a treaty are different questions. What is a breach of treaty may be lawful in the municipal law and what is unlawful in the municipal law may be wholly innocent of violation of a treaty provision. Even had the Prefect held the requisition to be entirely justified in Italian law, this would not exclude the possibility that it was a violation of the FCN Treaty.

74. This question whether or not certain acts could constitute a breach of the treaty right to be permitted to control and manage is one which must be appreciated in each case having regard to the meaning and purpose of the FCN Treaty. Clearly the right cannot be interpreted as a sort of warranty that the normal exercise of control and management shall never be disturbed. Every system of law must provide, for example, for interferences with the normal exercise of rights during public emergencies and the like. In this respect considerable interest must attach to the reasons given by the Prefect in his decision, and to the legal analysis of that decision by the Court of Appeal of Palermo.

75. The Prefect took note in his decision of the fact that the Mayor had relied on legislative authority empowering him to act in cases of "grave public necessity and unforeseen urgency". He did not find that those conditions were absent; he however annulled the requisition on the basis primarily of the following considerations:

> *"Non v'ha dubbio che anche se possono considerarsi, in linea del tutto teorica, sussistenti, nella fattispecie, gli estremi della grave necessità pubblica e della contingibilità ed urgenza che determinarono l'adozione del provvedimento, il fine cui tendeva la requisizione non poteva trovare pratica realizzazione con il provvedimento stesso, tanto è vero che nessuna ripresa di attività dell'azienda vi è stata a seguito della requisizione, nè avrebbe potuto esserci. Manca, pertanto, nel provvedimento, genericamente, la causa giuridica che possa giustificarlo e renderlo operante."*

There has been some controversy between the Parties as to the translation

of this passage (see paragraph 123 below); in the view of the Chamber it may be translated as follows:

> "There is no doubt that, even though, from the purely theoretical standpoint, the conditions of grave public necessity and of unforeseen urgency warranting adoption of the measure may be considered to exist in the case in point, the intended purpose of the requisition could not in practice be achieved by the order itself, since in fact there was no resumption of the company's activity following the requisition, nor could there have been such resumption. The order therefore lacks, generically, the juridical cause which might justify it and make it operative."

The Court of Appeal of Palermo, for reasons to be examined more fully below (paragraph 127), considered that the Prefect's finding had been one of

> *"un tipico caso di eccesso di potere, che è, come è noto, un vizio di legittimità dell'atto amministrativo"*
>
> ("a typical case of excess of power, which is of course a defect of lawfulness of an administrative act").

The requisition was thus found not to have been justified in the applicable local law; if therefore, as seems to be the case, it deprived Raytheon and Machlett of what were at the moment their most crucial rights to control and manage, it might appear prima facie a violation of Article III, paragraph 2.

76. There remains however a crucial question to be considered. According to the Respondent, Raytheon and Machlett were, because of ELSI's financial position, already naked of those very rights of control and management of which they claim to have been deprived. It is necessary now, therefore, to consider what effect, if any, the financial position of ELSI may have had in that respect, first as a practical matter, and then also as a question of Italian law.

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77. The essence of the Applicant's claim has been throughout that Raytheon and Machlett, which controlled ELSI, were by the requisition deprived of the right, and of the practical possibility, of conducting an orderly liquidation of ELSI's assets. This plan for an orderly liquidation was however very much bound up with the financial state of ELSI, and the two need to be considered together.

78. ELSI's lack of success was attributed by its management at least in part to the fact that it was over-manned in relation to its order book; it had needed repeated injections of fresh capital, and was never able to produce an operating profit sufficient to offset its debt expense and its accumulat-

ing losses. No dividends were ever paid to its shareholders. The 30 September 1966 balance sheet already showed accumulated losses of some 2,000 million lire.

79. The position was worsening, moreover, as the balance sheet for 30 September 1967 (above at paragraphs 18-19) showed. Raytheon's Italian auditors pointed out that the balance sheet, when "adjusted" to Raytheon's own accounting requirements for internal purposes (the unadjusted statement, however, appears to have satisfied Italian legal requirements), then showed adjusted accumulated losses, actually exceeding "the total of the paid up capital stock, capital reserve and Stockholders' subscription account" by 881.3 million lire; and warned that if these adjustments to the total of accumulated losses were entered in the company's books of account,

> "under Articles 2447 and 2448 of the Italian Civil Code, the directors would be obliged to convene a Stockholders' meeting forthwith to take measures either to cover the losses by providing new capital or to put the company into liquidation".

80. On 7 March 1968, Raytheon formally notified ELSI of its decision that Raytheon would not provide any further capital, whether in the form of subscribing to new stock or guaranteeing additional loans. At a board meeting of ELSI held in Rome on 16 March 1968, it was decided on the "cessation of the company's operations"; that production would be "discontinued immediately"; that "commercial activities and employment contracts" would be terminated on 29 March 1968; and that "a shareholders' meeting be called for 28 March 1968, to adopt the necessary resolutions". This was not, however, in ELSI's plans, to involve a liquidation under Article 2450 of the Italian Civil Code, which requires a liquidator to be appointed. The plan for an orderly liquidation, as conceived by the ELSI management, was to be managed by them. At a special meeting of shareholders, held on 28 March 1968, in Palermo, it was resolved to ratify the resolutions adopted by the Board of Directors at the meeting of 16 March 1968; and

> "to empower the Board of Directors to make contacts with the banks and principal creditors of the company to reach an agreement on procedures to be followed in the interest of all the creditors for the orderly disposal of the company's assets at their highest realizable value . . ."
>
> *("di dare mandato al Consiglio di Amministrazione di prendere contatti con gli istituti di credito e con i maggiori creditori della Società per concordare procedure che consentano nell'interesse di tutti i creditori una ordinata alienazione delle attività sociali al massimo valore di realizzazione").*

81. This policy of the ELSI management during the months prior to the requisition had, however, a Janus-like character. Although the orderly liquidation contemplated closure of the plant, and dismissal of the workforce, an alternative aim of the management and of Raytheon was to keep the place going, the hope being that the threat of closure and dismissal of the workforce might bring such pressures to bear on the Italian authorities as to persuade them to provide what Raytheon had long hoped for: an influential Italian partner, new capital, and Mezzogiorno benefits. The "Project for the Financing and Reorganization of the Company" prepared in May 1967 spelled out the need for additional capital, new products from Italian Government sources, and financial help for transport costs, capital investment and training; the Project made it clear that the alternative was that Raytheon would decline to invest more funds, over 300 people would become redundant forthwith, and dwindling markets would reduce the employment level still further; as stated in that Project, "The alternative is really the actual destruction of the existing asset with the undesirable social effects which must follow."

82. Right up to the eve of the requisition the company's representatives went on talking to Italian officials; but at the same time the company's management, according to an affidavit by one of its officials,

> "were aware of the need to have back-up plans in case these efforts were not successful. In the latter part of 1967, we reluctantly began to plan in general for the potential liquidation of ELSI."

In the words of the affidavit of another company official, Raytheon had

> "developed a plan for the orderly disposal of ELSI over about six months during 1968. While this plan was being developed, Raytheon and ELSI representatives continued to meet with Italian Government representatives in an ongoing attempt to find a way for the company to continue to operate."

The company no doubt wished to postpone liquidation as long as possible, both in the hope of avoiding it, and because the threat of closure of the plant would be a means of pressure on the Italian authorities so long as it remained only a threat. The risk, of which the company was well aware, was that to carry on too long might topple the company into insolvency under Italian law. In the event the Italian authorities did not come to the rescue, at least not with terms acceptable to ELSI's management; and the management was left at the last minute with the orderly liquidation plan to be put into effect as seemingly the only way of avoiding bankruptcy or liquidation under the supervision of the Italian court; and the

bankruptcy of its subsidiary was undoubtedly a most unwelcome prospect for Raytheon.

83. The crucial question is whether Raytheon, on the eve of the requisition, and after the closure of the plant and the dismissal, on 29 March 1968, of the majority of the employees, was in a position to carry out its orderly liquidation plan, even apart from its alleged frustration by the requisition. That plan, as originally conceived, contemplated that the disposal of plant and assets might produce enough to pay all creditors 100 per cent of their dues, with a modest residue for the shareholders. In one of the affidavits quoted above it is stated: "If the assets had been disposed of at book value all liabilities, including the payables to Raytheon Company, would have been paid in full." And, indeed, the trustee in bankruptcy, in his report of 28 October 1968 to the bankruptcy judge, explained that in March 1968:

> "the management of Raytheon-Elsi decided, and publicly stated their intention (which was later adopted by the Board of Directors), to suggest to the shareholders the liquidation of the company. The intention was to proceed with an orderly liquidation of all assets in order to pay all the Company's creditors 100 per cent."

This must have seemed a reasonable aim, for the "book value" may well have been a conservative figure. It has not been demonstrated that ELSI was, until shortly before the bankruptcy petition, ever actually in default. Moreover, Raytheon had opened an account in Milan for the payment at 100 per cent of small creditors.

84. Nevertheless since no new investment capital was forthcoming, the possibility of paying creditors in full depended upon putting the orderly liquidation plan into operation in good time. Time was running out because money was running out. As the position worsened daily, the moment might at any time arrive when liabilities exceeded assets, or default resulted from lack of liquidity. ELSI's management had prepared the assessment of the "quick-sale value" (see paragraph 18 above), which was markedly less than book value, being aware that the sale of the company's assets might fail to provide sums approximating to book value. There were plans also to approach the large bank creditors in the hope of securing their agreement to settlements of 50 per cent.

85. Did ELSI, in this precarious position at the end of March 1968, still have the practical possibility to proceed with an orderly liquidation plan? The successful implementation of a plan of orderly liquidation would have depended upon a number of factors not under the control of ELSI's management. Since the company's coffers were dangerously low, funds had to be forthcoming to maintain the cash flow necessary while the plan

was being carried out. Evidence has been produced by the Applicant that Raytheon was prepared to supply cash flow and other assistance necessary to effect the orderly liquidation, and the Chamber sees no reason to question that Raytheon had entered or was ready to enter into such a commitment. Other factors governing the matter however give rise to some doubt.

86. First, for the success of the plan it was necessary that the major creditors (i.e., the banks) would be willing to wait for payment of their claims until the sale of the assets released funds to settle them: and this applied not only to the capital sums outstanding, which may not at the time have yet been legally due for repayment, but also the agreed payments of interest or instalments of capital. Though the Chamber has been given no specific information on the point, this is of the essence of such a liquidation plan: the creditors had to be asked to give the company time. If ELSI had been confident of continuing to meet all its obligations promptly and regularly while seeking a buyer for its assets, no negotiations with creditors, and no elaborate calculations of division of the proceeds, on different hypotheses, such as have been produced to the Chamber, would have been needed.

87. Secondly, the management were by no means certain that the sale of the assets would realize enough to pay all creditors in full; in fact, the existence of the calculation of a "quick-sale value" suggests perhaps more than uncertainty. Thus the creditors had to be asked to give time in return for an assurance, not that 100 per cent would be paid, but that a minimum of 50 per cent would be paid. While in general it might be in the creditors' interest to agree to such a proposal, this does not mean in this case that ELSI could count on such agreement. At the date of the requisition, it seems apparent that the banks, while informed of the financial position, had not yet even been consulted on whether they would accept a guaranteed 50 per cent (see paragraphs 28-29 above), so their reaction remains a matter of speculation.

88. Nor should it be overlooked that the dismissed employees of ELSI ranked as preferential creditors for such sums as might be due to them for severance pay or arrears. In this respect Italy has drawn attention to the Sicilian regional law of 13 May 1968, providing for the payment

> "for the months of March, April and May 1968, to the dismissed employees of Raytheon-Elsi of Palermo of a special monthly indemnity equal to the actual monthly pay received until the month of February 1968".

From this it could be inferred, said Italy, that ELSI did not pay its employees for the month of March 1968. Further it was conceded by the former

Chairman of ELSI, when he appeared as a witness and was cross-examined, that the cash available at 31 March 1968 ("22 million in the kitty"), would have been insufficient to meet the payroll of the full staff even for the first week of April ("at least 25 million"). The suggestion that ELSI did not meet its March 1968 payroll was not put to the witness; and counsel for the United States later stated that the assertion that "ELSI could not make its March payroll", was "simply wrong". It is in any event certain that when the company ceased activity there were still severance payments due to the dismissed staff; those, the Applicant suggested, would have been covered by funds to be provided by Raytheon (paragraph 28 above). They could not have been met from the money still remaining in ELSI's coffers at the time.

89. Thirdly, the plan as formulated by ELSI's management involved a potential inequality among creditors: unless enough was realized to cover the liabilities fully, the major creditors were to be content with some 50 per cent of their claims; but the smaller creditors were still to be paid in full. Whether or not this would have been legally objectionable as a breach of the rule of *par condicio creditorum* (it appears that Raytheon contemplated accepting a smaller share in the eventual distribution so that the small creditors could receive 100 per cent without affecting the share attributed to the banks), it was an additional factor which might have caused a major creditor to hesitate to agree. According to the evidence, when in late March 1968 ELSI started using funds made available by Raytheon to pay off the small creditors in full, "the banks intervened and said that they did not want that to happen as that was showing preference". Once the banks adopted this attitude, the whole orderly liquidation plan was jeopardized, because a purpose of the settlement with small creditors was, according to the 1974 diplomatic claim, "to eliminate the risk that a small irresponsible creditor would take precipitous action which would raise formidable obstacles in the way of orderly liquidation".

90. Fourthly, the assets of the company had to be sold with the minimum delay and at the best price obtainable — desiderata which are often in practice irreconcilable. The United States has emphasized the damaging effect of the requisition on attempts to realize the assets; after the requisition it was no longer possible for prospective buyers to view the plant, nor to assure them that if they bought they would obtain immediate possession. It is however not at all certain that the company could have counted on unfettered access to its premises and plant, and the opportunity of showing it to buyers without disturbance, even if the requisition had not been made. There has been argument between the Parties on the question whether and to what extent the plant was occupied by employees of ELSI both before and after the requisition; but what is clear is that the company was expecting trouble at the plant when its closure plans became

known: the books had been removed to Milan, according to the evidence given at the hearings, "so that if we did have problems we could at least control the books" and "we had moved quite a lot of inventory [to Milan] so that we could sell it from there if we had to".

91. Fifthly, there was the attitude of the Sicilian administration: the company was well aware that the administration was strongly opposed to a closure of the plant, or more specifically, to a dismissal of the workers. True, the measure used to try to prevent this — the requisition order — was found by the Prefect to have lacked the "juridical cause which might justify it and make it operative" (paragraph 75 above). But ELSI's management in March 1968 could not have been certain that the hostility of the local authorities to their plan of closure and dismissals would not take practical form in a legal manner. The company's management had been told before the staff dismissal letters were sent out that such dismissals would lead to a requisition of the plant.

92. All these factors point towards a conclusion that the feasibility at 31 March 1968 of a plan of orderly liquidation, an essential link in the chain of reasoning upon which the United States claim rests, has not been sufficiently established.

93. Finally there was, beside the practicalities, the position in Italian bankruptcy law. Article 5 of the Italian Bankruptcy Act of 1942 provides that

> "An entrepreneur who is in a state of insolvency shall be declared bankrupt.
>
> The state of insolvency, moreover, becomes apparent not only by default but also by other external acts which show that the debtor is no longer in a position regularly to discharge his obligations."
>
> *("L'imprenditore che si trova in stato d'insolvenza è dichiarato fallito.*
>
> *Lo stato d'insolvenza si manifesta con inadempimenti od altri fatti esteriori, i quali dimostrino che il debitore non è più in grado di soddisfare regolarmente le proprie obbligazioni.")*

This formula excludes a merely momentary or temporary disability, and refers to one which shows every sign of going on. "Regular" payment *("regolarmente")* apparently refers to payment in full at the due time. Given this definition it is apparent that ELSI could have been "insolvent" in the sense of Italian bankruptcy law, at the end of March, even though not actually in default. The Chamber has been given conflicting evidence on the question whether a debtor in such a position is bound under Italian law to go into bankruptcy, or whether he may still enter into voluntary composition with his creditors outside the supervision of the bankruptcy court (paragraph 25 above).

94. If however ELSI was in a state of legal insolvency at 31 March 1968, and if, as contended by Italy, a state of insolvency entailed an obligation on the company to petition for its own bankruptcy, then the relevant rights of control and management would not have existed to be protected by the FCN Treaty. While not essential to the Chamber's conclusion, already stated in paragraph 92 above, an assessment of ELSI's solvency as a matter of Italian law is thus highly material.

95. Italy has argued that even before the requisition, ELSI was insolvent in the sense that its liabilities exceeded the value of its assets, and in support of this has pointed to, first, the "quick-sale value" calculated for the purposes of the liquidation plan, and secondly the observations of the auditors on the September 1967 balance sheet. The Chamber does not however consider that it has to conclude from this that ELSI was insolvent as early as 1967. The value of assets of this kind, until they are actually sold, must be a matter for assessment by informed opinion, and different views, and the use of different accounting conventions, may lead to different results. The company's management was clearly of the view that it could legally continue trading up to the end of March 1968, since its former Chairman has told the Chamber that the company's legal and financial advisers were keeping a close and continuous watch on the position to ensure that Italian legal requirements were respected. But there is no doubt that ELSI was indeed in a state of insolvency when on 25 April 1968 its Board of Directors voted to file a petition in bankruptcy. The conclusion then made that "The company's financial situation has worsened and has now reached a state of insolvency" was based, according to the minutes of the board meeting, on the fact that "There are payments on long-term loans that fell due a few days ago, and other payments which the company cannot make as a result of lack of liquidity . . ." In the bankruptcy petition, it was specified that "an instalment of Lit. 800,000,000 to Banca Nazionale del Lavoro became due on 18 April 1968 and the note therefor has been or will be protested, etc." In other words, the company had by then committed a default *("inadempimento")*, by failing to meet its debts as they became due.

96. On this matter of insolvency in Italian law, consideration must also be given to the reasons employed by the Prefect of Palermo for his decision to annul the requisition order, and the findings of the Court of Palermo and the Court of Appeal of Palermo on the action brought by ELSI's trustee in bankruptcy, for damages following the decision of the Prefect annulling the requisition order. As indicated above (paragraph 75), the Prefect considered that the purpose of the requisition could not be achieved, since the company's activity could not be resumed. He explained that

> *"lo stato dell'azienda era tale, per circostanze di carattere economico-funzionale e di mercato, da non consentire la prosecuzione dell'atti-*

vità . . . La requisizione, quindi, nulla ha mutato nella situazione aziendale . . . La situazione di dissesto ha, anzi, determinato la dichiarazione di fallimento dell'azienda . . ."

("the situation of the company, due to functional-economic and market factors, was such as not to permit of the pursuance of its activity . . . The requisition consequently changed nothing in the situation of the company . . . On the contrary, the situation of insolvency determined the declaration of bankruptcy of the company . . .")

97. The Court of Palermo was faced with the argument, mentioned in paragraph 58 above, that "the requisition order caused an economic situation of such gravity that it immediately and directly triggered the bankruptcy of the company". It dealt with this by pointing to the situation of the company on the eve of the requisition:

"A 31 marzo 1968, in sostanza, lo stabilimento dell'Elsi non era più in fase produttiva, fermata per deliberazione dell'organo sociale competente che . . . aveva . . . opinato, non potendo trovare altro rimedio, per la soluzione più drastica, evidentemente reputandola più confacente agli interessi della società e che aveva come oggetto preciso l'arresto totale della produzione . . . Devesi a ciò aggiungere . . . che proprio dai primi dell'anno 1968 vi era stato un notevole peggioramento della situazione generale dell'azienda, che via via si andava aggravando per le sfavorevoli condizioni del mercato, avversata, altresì, dai fatti sismici del gennaio e da una serie di scioperi che, per l'appunto, nel mese di marzo ebbero a carattere ora di continuità ora di intermittenza, con la conseguenza della perdita di un considerevole numero di ore lavorative . . ."

("On March 31, 1968, the Elsi plant was for all practical purposes no longer in operation, stopped in accordance with a decision of the competent organ of the company which . . . had decided, in the absence of any other solution, to go for the most drastic solution, evidently considering it most conducive to the interests of the company, a solution which meant the total shutdown of production . . . To this must be added . . . that in the early part of 1968, there was a notable deterioration of the general situation of the company, which was further aggravated by unfavourable market conditions as well as the January earthquakes and a series of strikes which in March were sometimes continuous and sometimes intermittent, causing the loss of a considerable amount of production hours . . .")

From this the Court was able to conclude that

"Dalle condizioni premesse discende che l'aggancio del fallimento della società all'intervenuta requisizione non ha fondamento, siccome, esattamente, è stato sostenuto coll'amministrazione convenuta, essendo la situazione economica della Raytheon-Elsi già gravemente compromessa da anni per esplicito riconoscimento dei suoi stessi dirigenti."

("It is clear from these conditions that the connection between the company's bankruptcy and the requisition is unfounded, as the defendant administration correctly maintained, since Raytheon-Elsi's economic situation had for years already been seriously compromised, as its own management explicitly admitted.")

The Court of Palermo did not however go so far as to state that ELSI was legally insolvent prior to the requisition.

98. However the Court of Appeal of Palermo, in its judgment, states that ELSI was insolvent before the requisition order was made. The salient passage on this point in the Court of Appeal's judgment states:

"per quanto riguarda i danni che si fanno consistere nell'avere la requisizione provocato il fallimento della società, la conclusione negativa del tribunale è ampiamente e convincentemente motivata e . . . le considerazioni critiche dell'appellante non valgono a provocare un convincimento diverso; . . . La circostanza certa della insolvenza della società in tempo immediatamente anteriore allo intervento del Sindaco . . . è sufficiente per escludere il collegamento causale fra il successivo provvedimento di requisizione e il fallimento della società, per il quale ultimo quello stato di insolvenza è causa determinante e sufficiente (Art. 5 legge fallim.)."

("as regards the damages consisting in the fact that the order triggered the company's bankruptcy, the negative conclusion arrived at by the court below is amply and convincingly motivated and the critical considerations of the appellant are not sufficient to lead to a different determination . . . The certain circumstance that the company was insolvent during the time immediately prior to the Mayor's intervention . . . is sufficient to rule out any causal link between the subsequent requisition order and the company's bankruptcy of which the company's state of insolvency was the decisive and sufficient cause (Art. 5, Bankruptcy Law).")

The Court of Appeal also refers to the "prior insolvency" *("precedente insolvenza")* of the company, and to "the decisive effect of the state of insolvency" *("la efficacia determinante dello stato di insolvenza").*

99. Whether these findings by the municipal courts are to be regarded as determinations as a matter of Italian law that ELSI had been insolvent, within the meaning of the relevant legislative provisions, on 31 March 1968, or whether they are no more than findings that the financial position of ELSI on that date was so desperate that it was past saving, so that it was not the requisition which "caused an economic situation of such gravity that it immediately and directly triggered the bankruptcy of the company" makes no difference to the conclusion to be drawn. If ELSI was legally insolvent, then even if the liquidation plan could in fact have been implemented with co-operation from the creditors, the stockholders no longer had rights of control and management to be protected by the FCN Treaty. If, as the Prefect of Palermo stated, and the courts of Palermo certainly thought, the factual situation at least was such that the requisition

changed nothing, then the United States has failed to prove that there was any interference with control and management in any real sense. The Chamber has no need to go into the question of the extent to which it could or should question the validity of a finding of Italian law, the law governing the matter, by the appropriate Italian courts. It is sufficient to note that the conclusion above, that the feasibility of an orderly liquidation plan is not sufficiently established, is reinforced by reference to the decision of the courts of Palermo on the claim by the trustee in bankruptcy for damages for the injury caused by the requisition. Whether regarded as findings of Italian law or as findings of fact, the decisions of the courts of Palermo simply constitute additional evidence of the situation which the Chamber has to assess.

100. It is important, in the consideration of so much detail, not to get the matter out of perspective: given an under-capitalized, consistently loss-making company, crippled by the need to service large loans, which company its stockholders had themselves decided not to finance further but to close and sell off because, as they were anxious to make clear to everybody concerned, the money was running out fast, it cannot be a matter of surprise if, several days after the date at which the management itself had predicted that the money would run out, the company should be considered to have been actually or virtually in a state of insolvency for the purposes of Italian bankruptcy law.

101. If, therefore, the management of ELSI, at the material time, had no practical possibility of carrying out successfully a scheme of orderly liquidation under its own management, and may indeed already have forfeited any right to do so under Italian law, it cannot be said that it was the requisition that deprived it of this faculty of control and management. Furthermore, one feature of ELSI's position stands out: the uncertain and speculative character of the causal connection, on which the Applicant's case relies, between the requisition and the results attributed to it by the Applicant. There were several causes acting together that led to the disaster to ELSI. No doubt the effects of the requisition might have been one of the factors involved. But the underlying cause was ELSI's headlong course towards insolvency; which state of affairs it seems to have attained even prior to the requisition. There was the warning loudly proclaimed about its precarious position; there was the socially damaging decision to terminate the business, close the plant, and dismiss the workforce; there was the position of the banks as major creditors. In short, the possibility of that solution of orderly liquidation, which Raytheon and Machlett claim to have been deprived of as a result of the requisition, is purely a matter of speculation. The Chamber is therefore unable to see here anything which can be said to amount to a violation by Italy of Article III, paragraph 2, of the FCN Treaty.

* *

102. There are two claims of the Applicant that are based upon the provisions of Article V of the FCN Treaty: one relates to paragraphs 1 and 3, and is concerned with protection and security of nationals and their property; another relates to paragraph 2, and is concerned with the taking or expropriation of property. No claim is based upon paragraph 4 of Article V. The Applicant's claim under paragraphs 1 and 3 will be dealt with first.

103. Paragraph 1 of Article V provides as follows:

> "1. The nationals of each High Contracting Party shall receive, within the territories of the other High Contracting Party, the most constant protection and security for their persons and property, and shall enjoy in this respect the full protection and security required by international law. To these ends, persons accused of crime shall be brought to trial promptly, and shall enjoy all the rights and privileges which are or may hereafter be accorded by the applicable laws and regulations; and nationals of either High Contracting Party, while within the custody of the authorities of the other High Contracting Party, shall receive reasonable and humane treatment. In so far as the term 'nationals' where used in this paragraph is applicable in relation to property it shall be construed to include corporations and associations."

Paragraph 2 of this Article is not relevant here, but is set out in paragraph 113 of this Judgment. Paragraph 3 provides as follows:

> "3. The nationals, corporations and associations of either High Contracting Party shall within the territories of the other High Contracting Party receive protection and security with respect to the matters enumerated in paragraphs 1 and 2 of this Article, upon compliance with the applicable laws and regulations, no less than the protection and security which is or may hereafter be accorded to the nationals, corporations and associations of such other High Contracting Party and no less than that which is or may hereafter be accorded to the nationals, corporations and associations of any third country. Moreover, in all matters relating to the taking of privately owned enterprises into public ownership and the placing of such enterprises under public control, enterprises in which nationals, corporations and associations of either High Contracting Party have a substantial interest shall be accorded, within the territories of the other High Contracting Party, treatment no less favorable than that which is or may hereafter be accorded to similar enterprises in which nationals, corporations and associations of such other High Contracting Party have a substantial interest, and no less favorable than that which is or may hereafter be accorded to similar enterprises in which nationals, corporations and associations of any third country have a substantial interest."

104. Paragraph 1 thus provides for "the most constant protection and security" for nationals of each High Contracting Party, both "for their persons and property"; and also that, in relation to property, the term "nationals" shall be construed to "include corporations and associations"; and in defining the nature of the protection, the required standard is established by a reference to "the full protection and security required by international law". Paragraph 3 elaborates this notion of protection and security further, by requiring no less than the standard accorded to the nationals, corporations and associations of the other High Contracting Party; and no less than that accorded to the nationals, corporations and associations of any third country. There are, accordingly, three different standards of protection, all of which have to be satisfied.

105. A breach of these provisions is seen by the Applicant to have been committed when the Respondent "allowed ELSI workers to occupy the plant" (see paragraph 65 above). It is the contention of the United States that once the plant had been requisitioned, ELSI's employees began an occupation of the premises which continued, so far as the United States was aware, up to the re-opening of the plant by ELTEL; and that this occupation had the tacit approval of local authorities, who made no effort to prevent or to end it, or otherwise to protect the premises. To this occupation the United States attributes as injurious consequences, first a deterioration of the plant and related material and equipment, and secondly that it impeded the efforts of the trustee in bankruptcy to dispose of the plant.

106. Italy has objected that Article V, paragraphs 1 and 3, guarantees the protection and security of property belonging to United States companies in Italy, but the plant in Palermo which, according to the United States, should have been protected under the FCN Treaty belonged to the Italian company ELSI. The United States replies that the "property of Raytheon and Machlett in Italy" was ELSI itself, and Italy was obligated to protect the entire entity of ELSI from the deleterious effects of the requisition. While there may be doubts whether the word "property" in Article V, paragraph 1, extends, in the case of shareholders, beyond the shares themselves, to the company or its assets, the Chamber will nevertheless examine the matter on the basis argued by the United States that the "property" to be protected under this provision of the FCN Treaty was not the plant and equipment the subject of the requisition, but the entity of ELSI itself.

107. That there was some occupation of the plant by the workers after the requisition is something that Italy has not sought to deny, and the Court of Appeal of Palermo referred in passing to the circumstance of the requisitioning authority having tolerated the "unlawful" act of occupation of the plant by the workers *("la autorità requirente avesse tollerato l'illecito penale di una occupazione dei reparti di lavorazione da parte delle maestranze").* It appears, nevertheless, to have been a peaceful occupation, as may be learned from ELSI's own administrative appeal of 19 April 1968 to

the Prefect against the requisition, and the affidavits of the Mayor of Palermo and one of his officials (see paragraph 33 above). It is difficult to accept that the occupation seriously harmed the interests of ELSI in view of the evidence produced by Italy that measures taken by the Mayor of Palermo for the temporary management of the plant permitted the continuation and completion of work in progress in the months following the requisition. The United States has asserted that the continued production was very limited, and cannot be equated with resumption of full production in the plant, and continues to contend that the plant and machinery fell into disuse following the requisition and deteriorated rapidly in value. The Court of Palermo however found itself unable to establish that any damage to the plant had been caused by the occupying workers.

108. The reference in Article V to the provision of "constant protection and security" cannot be construed as the giving of a warranty that property shall never in any circumstances be occupied or disturbed. The dismissal of some 800 workers could not reasonably be expected to pass without some protest. Indeed, the management of ELSI seems to have been very much aware that the closure of the plant and dismissal of the workforce could not be expected to pass without disturbance; as is apparent from the removal of the company's books and "quite a lot of inventory" to Milan (paragraph 17 above). In any event, considering that it is not established that any deterioration in the plant and machinery was due to the presence of the workers, and that the authorities were able not merely to protect the plant but even in some measure to continue production, the protection provided by the authorities could not be regarded as falling below "the full protection and security required by international law"; or indeed as less than the national or third-State standards. The mere fact that the occupation was referred to by the Court of Appeal of Palermo as unlawful does not, in the Chamber's view, necessarily mean that the protection afforded fell short of the national standard to which the FCN Treaty refers. The essential question is whether the local law, either in its terms or its application, has treated United States nationals less well than Italian nationals. This, in the opinion of the Chamber, has not been shown. The Chamber must, therefore, reject the charge of any violation of Article V, paragraphs 1 and 3.

*

109. The Applicant sees a further breach of Article V, paragraphs 1 and 3, of the FCN Treaty, in the time taken — 16 months — before the Prefect ruled on ELSI's administrative appeal against the Mayor's requi-

sition order, or, to cite the words of counsel for the Applicant (paragraph 65 above),

> "the Respondent violated its obligations when it unreasonably delayed ruling on the lawfulness of the requisition for 16 months until immediately after the ELSI plant, equipment and work-in-process had all been acquired by ELTEL".

The time taken by the Prefect was undoubtedly long; and the Chamber was not entirely convinced by the Respondent's suggestion that such lengthy delays by Prefects were quite usual. Yet it must be remembered that the requisition in fact lapsed after six months and that Italian law did provide a safeguard against delays by the Prefect. It was possible after 120 days from the filing of the appeal to serve on the Prefect a request requiring him to render a decision within 60 days (paragraph 41 above). Raytheon and Machlett were never in a position to take advantage of this procedure, because by the time the 120 days had elapsed the trustee in bankruptcy was in control of the company; on the other hand, the trustee in bankruptcy did employ this procedure, and the Prefect shortly afterwards gave his decision on the appeal.

110. Counsel for the Applicant has referred to this delay as "a denial of the level of procedural justice accorded by international law". Its claim in this respect is however not founded on the rules of customary international law concerning denial of justice, nor on the text of the FCN Treaty (Article V, paragraph 4) which provides for access to justice. The relevance of the delay of the Prefect's ruling has been expressed in two ways. First, it is said, had there been a speedy decision by the Prefect, the bankruptcy of ELSI could have been avoided; the Chamber is unable to accept this argument, for the reasons already explained in connection with the claim under Article III, paragraph 2, of the FCN Treaty. Secondly, it is contended that once the requisition occurred, the Respondent had an obligation to protect ELSI from its deleterious effects, and one of the ways in which it fell short of this obligation was by failing to provide an adequate method of overturning the requisition.

111. The primary standard laid down by Article V is "the full protection and security required by international law", in short the "protection and security" must conform to the minimum international standard. As noted above, this is supplemented by the criteria of national treatment and most-favoured-nation treatment. The Chamber is here called upon to apply the provisions of a treaty which sets standards — in addition to the reference to general international law — which may go further in protecting nationals of the High Contracting Parties than general international law requires; but the United States has not — save in one respect — suggested that these requirements do in this respect set higher standards than the international standard. It must be doubted whether in all the circumstances, the delay in the Prefect's ruling in this case can be regarded as falling below that standard. Certainly, the Applicant's use

of so serious a charge as to call it a "denial of procedural justice" might be thought exaggerated.

112. The United States has also alleged that the delay in ELSI's case was far in excess of the delay experienced in prior suits involving companies owned by Italian nationals, and that it therefore constituted a failure to accord a national standard of protection. As already stated, the Chamber was not entirely convinced by the contention that such a lengthy delay was quite usual (paragraph 109 above); nevertheless, it is not satisfied that a "national standard" of more rapid determination of administrative appeals has been shown to have existed. The Chamber is therefore unable to see in this delay a violation of paragraphs 1 and 3 of Article V of the FCN Treaty.

* *

113. The Chamber now turns to the United States claim based on Article V, paragraph 2, of the FCN Treaty, which provides as follows:

> "2. The property of nationals, corporations and associations of either High Contracting Party shall not be taken within the territories of the other High Contracting Party without due process of law and without the prompt payment of just and effective compensation. The recipient of such compensation shall, in conformity with such applicable laws and regulations as are not inconsistent with paragraph 3 of Article XVII of this Treaty, be permitted without interference to withdraw the compensation by obtaining foreign exchange, in the currency of the High Contracting Party of which such recipient is a national, corporation or association, upon the most favorable terms applicable to such currency at the time of the taking of the property, and exempt from any transfer or remittance tax, provided application for such exchange is made within one year after receipt of the compensation to which it relates."

This is a most important paragraph, of a kind that is central to many investment treaties. Where the English version begins by providing that

> "The property of nationals, corporations and associations of either High Contracting Party shall not be taken within the territories of the other High Contracting Party without due process of law and without the prompt payment of just and effective compensation",

the corresponding Italian text reads as follows:

> *"I beni dei cittadini e delle persone giuridiche ed associazioni di ciascuna Alta Parte Contraente non saranno espropriati entro i territori dell'altra Alta Parte Contraente, senza una debita procedura legale e senza il pronto pagamento di giusto ed effettivo indennizzo."*

There was considerable argument before the Chamber over the difference between the English version of the provision, which uses the word "taken", and the Italian, which uses the word *"espropriati"*. Both versions are authentic. Obviously there is some difference between the two versions. The word "taking" is wider and looser than *"espropriazione"*.

114. The United States argued that, however the provision is read, the result is the same in this case; which is not the same as arguing that the two versions mean the same thing; and if one looks at the acts and conduct which the Applicant claims to constitute a violation of Article V, paragraph 2, one finds this claim expressed in the following terms. In the contention of the United States, both the Respondent's act of requisitioning the ELSI plant and its subsequent acts in acquiring the plant, assets, and work in progress, singly and in combination, constitute takings of property without due process of law and just compensation. The requisition in itself is, in the view of the United States, such a taking, because Italy physically seized ELSI's property with the object and effect of ending Raytheon and Machlett's control and management, in order to prevent them from conducting the planned liquidation; and according to the United States, in international law a "taking" is generally recognized as including not merely outright expropriation of property, but also unreasonable interference with its use, enjoyment or disposal. Secondly, the United States claims that the Respondent, after the requisition and before the Prefect ruled on the administrative appeal, proceeded through ELTEL to acquire the ELSI plant and assets for less than fair market value. The matter was summed up by counsel at the hearings as follows:

> "The requisition and the delay in overturning the requisition not only interfered with Raytheon and Machlett's management and control of ELSI, not only impaired Raytheon and Machlett's legally acquired interests in ELSI, but also resulted in what can only be described as the taking of the property."

115. The specific United States allegations of interference by the Italian Government with the ELSI bankruptcy proceedings may be summarized as follows. The object in view is said to have been to secure ELSI's facilities for IRI, on the terms and at the below-market price which IRI desired, while responding to the political pressure brought by ELSI's former workers. Having requisitioned the plant and caused ELSI's bank-

ruptcy, the Government of Italy discouraged private bidders at the auctions held to dispose of ELSI's assets, by informing the public at large that the Government would be taking over ELSI's facilities. While proceeding with plans to take over ELSI, for example by negotiating agreements for rehiring the staff, IRI is said to have "boycotted" the first three auctions of the assets, at which the terms set by the bankruptcy judge were not to its liking. ELTEL proposed to the trustee in bankruptcy that it be permitted to lease the plant, and to purchase the work in progress, and this was agreed to by the bankruptcy authorities on terms which, it is claimed, were adverse to ELSI's interests, both because the sums involved were too low and because ELTEL was placed in a position to dictate the terms of the final sale. At the final auction, ELTEL, already in possession under the lease, acquired the plant and related equipment for 4,000 million lire, the figure reported in the press to have been previously agreed on between IRI and the Italian authorities. As a result of the arrangements made with the bankruptcy authorities for a piecemeal take-over, the total amount received for ELSI's assets was slightly over 4,000 million lire, as compared with the company's book valuation of over 12,000 million lire.

116. Thus, the charge based on the combination of the requisition and subsequent acts is really that the requisition was the beginning of a process that led to the acquisition of the bulk of the assets of ELSI (which was wholly owned by Raytheon and Machlett) for far less than market value. That is a charge, not of mere temporary taking — though the United States also contended that a temporary requisition can constitute an indirect taking — but of a process by which title to ELSI's assets itself was in the end transferred. So far as the requisition is concerned, counsel put the United States argument this way:

> "the fact that the requisition was for an extendable six-month period does not make this any less of an expropriation of interests in property, given the fact that the requisition drove ELSI into bankruptcy".

What is thus alleged by the Applicant, if not an overt expropriation, might be regarded as a disguised expropriation; because, at the end of the process, it is indeed title to property itself that is at stake. The argument is that if a series of acts or omissions of the Italian authorities had the end result, whether intended or not and whether the result of collusion or not, of causing United States property in Italy to be ultimately transferred into the ownership of Italy, without proper compensation, there would be a violation of Article V, paragraph 2, of the FCN Treaty.

117. It must immediately be added that the United States, in the course of the oral proceedings, in response to an Italian assertion that it was attempting to establish a conspiracy to bring about the change of ownership, made it very clear that this part of its case did not depend upon, or in any way involve, any allegation that the Italian authorities were parties to such a conspiracy. The United States stated formally that it "has never argued and does not now argue that the acts and omissions of the Respondent that violated the Treaty amount to a 'conspiracy'". Moreover, it was added that whilst the relief sought was "based on the acts and omissions of the Respondent's agents and officials at the federal and local levels (including IRI), without any allegation that these officials were working in conspiracy", the United States did not "speculate as to why these agents and officials of the Respondent acted in the manner they did"; or, as the United States Agent put it in his argument:

> "These acts and omissions constituted Treaty violations ... whether or not the Italian Government entities involved knew of each other's actions, and whether or not they were acting in concert or at cross purposes."

118. The argument that there was a "taking" involving transfer of title gives rise to a number of difficulties. Even assuming, though without deciding, that *"espropriazione"* might be wide enough to include not only formal and open expropriation, but also a disguised expropriation, there would still be a question whether the paragraph can be extended to include even a "taking" of an Italian corporation in Italy, of which, strictly speaking, Raytheon and Machlett only held the shares. This, however, is where account must also be taken of the first paragraph of the Protocol appended to the FCN Treaty, which provides:

> "1. The provisions of paragraph 2 of Article V, providing for the payment of compensation, shall extend to interests held directly or indirectly *[si estenderanno ai diritti spettanti direttamente od indirettamente ai cittadini . . .]* by nationals, corporations and associations of either High Contracting Party in property which is taken within the territories of the other High Contracting Party."

The English text of this provision suggests that it was designed precisely to resolve the doubts just described. The interests of shareholders in the assets of a company, and in their residuary value on liquidation, would appear to fall in the category of the "interests" to be protected by Article V, paragraph 2, and the Protocol. Italy has however drawn attention to the use in the Italian text — which is equally authentic — of the narrower term

"diritti" (rights), and has argued that, on the basis of the principle expressed in Article 33, paragraph 4, of the Vienna Convention on the Law of Treaties, the correct interpretation of the Protocol must be in the more restrictive sense of the Italian text.

119. In the view of the Chamber, however, neither this question of interpretation of the two texts of the Protocol, nor the questions raised as to the possibilities of disguised expropriation or of a "taking" amounting ultimately to expropriation, have to be resolved in the present case, because it is simply not possible to say that the ultimate result was the consequence of the acts or omissions of the Italian authorities, yet at the same time to ignore the most important factor, namely ELSI's financial situation, and the consequent decision of its shareholders to close the plant and put an end to the company's activities. As explained above (paragraphs 96-98), the municipal courts considered that ELSI, if not already insolvent in Italian law before the requisition, was in so precarious a state that bankruptcy was inevitable. The Chamber cannot regard any of the acts complained of which occurred subsequent to the bankruptcy as breaches of Article V, paragraph 2, in the absence of any evidence of collusion, which is now no longer even alleged. Even if it were possible to see the requisition as having been designed to bring about bankruptcy, as a step towards disguised expropriation, then, if ELSI was already under an obligation to file a petition of bankruptcy, or in such a financial state that such a petition could not be long delayed, the requisition was an act of supererogation. Furthermore this requisition, independently of the motives which allegedly inspired it, being by its terms for a limited period, and liable to be overturned by administrative appeal, could not, in the Chamber's view, amount to a "taking" contrary to Article V unless it constituted a significant deprivation of Raytheon and Machlett's interest in ELSI's plant; as might have been the case if, while ELSI remained solvent, the requisition had been extended and the hearing of the administrative appeal delayed. In fact the bankruptcy of ELSI transformed the situation less than a month after the requisition. The requisition could therefore only be regarded as significant for this purpose if it caused or triggered the bankruptcy. This is precisely the proposition which is irreconcilable with the findings of the municipal courts, and with the Chamber's conclusions in paragraphs 99-100 above.

* *

120. Article I of the Supplementary Agreement to the FCN Treaty, which confers rights not qualified by national or most-favoured-nation standards, provides as follows:

"The nationals, corporations and associations of either High Contracting Party shall not be subjected to arbitrary or discriminatory measures within the territories of the other High Contracting Party resulting particularly in: *(a)* preventing their effective control and management of enterprises which they have been permitted to establish or acquire therein; or, *(b)* impairing their other legally acquired rights and interests in such enterprises or in the investments which they have made, whether in the form of funds (loans, shares or otherwise), materials, equipment, services, processes, patents, techniques or otherwise. Each High Contracting Party undertakes not to discriminate against nationals, corporations and associations of the other High Contracting Party as to their obtaining under normal terms the capital, manufacturing processes, skills and technology which may be needed for economic development."

The United States bases its claims upon allegations that measures were taken which were both "arbitrary" and "discriminatory" in the sense of this text.

121. The Applicant pressed strongly the claim that the requisition was an arbitrary or discriminatory act which violated both the *"(a)"* and the *"(b)"* clauses of the Article. The requisition, it is said, clearly prevented Raytheon and Machlett from exercising their control and management of ELSI and also resulted in an impairment of their legally acquired rights and interests in ELSI, inasmuch as it prevented the voluntary liquidation of ELSI and caused it to file for bankruptcy. To the claim as it is presented in those terms, however, the Chamber has already given its answer: the absence of a sufficiently palpable connection between the effects of the requisition and the failure of ELSI to carry out its planned orderly liquidation (paragraph 101 above). Accordingly, it cannot be said that it was the requisition *per se* which either prevented Raytheon's effective control and management of ELSI, or which resulted in impairing legally acquired rights, in the sense of the clauses called *"(a)"* and *"(b)"* in Article I of the Supplementary Agreement. Yet, although this is an answer to the claim as it is presented in terms of those clauses of Article I, it is not the end of the matter. The effect of the word "particularly", introducing the clauses *"(a)"* and *"(b)"*, suggests that the prohibition of arbitrary (and discriminatory) acts is not confined to those resulting in the situations described in *"(a)"* and *"(b)"*, but is in effect a prohibition of such acts whether or not they produce such results. It is necessary, therefore, to examine whether the requisition was, or was not, an arbitrary or discriminatory act of itself.

122. The allegation of the United States that Raytheon and Machlett were subjected to "discriminatory" measures can be dealt with shortly. It is common ground that the requisition order was not made because of the nationality of the shareholders; there have been many cases of requisition

orders made in similar circumstances against wholly Italian-owned companies. But the United States claims that there was "discrimination" in favour of IRI, an entity controlled by Italy; and this was, in the view of the United States, contrary to the FCN Treaty and Supplementary Agreement. It is contended that the interests of IRI were directly contrary to those of Raytheon and Machlett, and the Italian Government intervened to advance its own commercial interests at the latter's expense. However, the requisition order in itself did not serve any interest of IRI; it is only if the requisition is regarded as a step in a process destined to transfer ELSI's assets to IRI that the factual situation would afford any basis for the argument now under examination. As indicated above, the United States stated formally during the oral proceedings that it was not arguing that the acts and omissions complained of amount to a "conspiracy", and did not speculate as to why the relevant agents and officials of the Respondent acted as they did (see paragraph 117 above). There is no sufficient evidence before the Chamber to support the suggestion that there was a plan to favour IRI at the expense of ELSI, and the claim of "discriminatory measures" in the sense of Article I of the Supplementary Agreement must therefore be rejected.

123. In order to show that the requisition order was an "arbitrary" act in the sense of the Supplementary Agreement to the FCN Treaty, the Applicant has relied *(inter alia)* upon the status of that order in Italian law. It contends that the requisition "was precisely the sort of arbitrary action which was prohibited" by Article I of the Supplementary Agreement, in that "under both the Treaty and Italian law, the requisition was unreasonable and improperly motivated"; it was "found to be illegal under Italian domestic law for precisely this reason". Relying on its own English translation of the decision of the Prefect of Palermo of 22 August 1969, the Applicant concludes that the Prefect found that the order was "destitute of any juridical cause which may justify it or make it enforceable". Italy first contended that the word "or" in the translation of this passage should be replaced by "and", and subsequently put forward the alternative translation that "the order, generically speaking, lacks the proper motivation that could justify it and make it effective". It may be noted in passing that when ELSI, immediately after the making of the requisition order, formally invited the Mayor of Palermo to revoke the order, it referred to it throughout as "the said illegal and arbitrary order" *("detto illegale ed arbitrario provvedimento")*; but the appeal submitted to the Prefect, while citing numerous legal grounds for annulment, including *"eccesso di potere per sviamento del fine"* ("excess of power by deviation from the purpose"), contained no claim that the order had been "arbitrary". It is therefore appropriate for the Chamber to examine the legal grounds given by the Prefect of Palermo for his decision, as well as what was said by the Court of Appeal of Palermo on the legal impact of the Prefect's decision on the requisition order, and consider whether the findings of the

Prefect or of the Court of Appeal are equivalent to, or suggest, a conclusion that the requisition was an "arbitrary" action.

124. Yet it must be borne in mind that the fact that an act of a public authority may have been unlawful in municipal law does not necessarily mean that that act was unlawful in international law, as a breach of treaty or otherwise. A finding of the local courts that an act was unlawful may well be relevant to an argument that it was also arbitrary; but by itself, and without more, unlawfulness cannot be said to amount to arbitrariness. It would be absurd if measures later quashed by higher authority or a superior court could, for that reason, be said to have been arbitrary in the sense of international law. To identify arbitrariness with mere unlawfulness would be to deprive it of any useful meaning in its own right. Nor does it follow from a finding by a municipal court that an act was unjustified, or unreasonable, or arbitrary, that that act is necessarily to be classed as arbitrary in international law, though the qualification given to the impugned act by a municipal authority may be a valuable indication.

125. The principal passage from the decision of the Prefect which is relevant here has already been quoted (paragraph 75 above), but it is convenient to set it out again here:

> *"Non v'ha dubbio che anche se possono considerarsi, in linea del tutto teorica, sussistenti, nella fattispecie, gli estremi della grave necessità pubblica e della contingibilità ed urgenza che determinarono l'adozione del provvedimento, il fine cui tendeva la requisizione non poteva trovare pratica realizzazione con il provvedimento stesso, tanto è vero che nessuna ripresa di attività dell'azienda vi è stata a seguito della requisizione, nè avrebbe potuto esserci. Manca, pertanto, nel provvedimento, genericamente, la causa giuridica che possa giustificarlo e renderlo operante."*

The differing translations offered by the Parties of the sentence upon which the Applicant places considerable reliance are set out in paragraph 123 above. In the Chamber's translation, the passage reads:

> "There is no doubt that, even though, from the purely theoretical standpoint, the conditions of grave public necessity and of unforeseen urgency warranting adoption of the measure may be considered to exist in the case in point, the intended purpose of the requisition could not in practice be achieved by the order itself, since in fact there was no resumption of the company's activity following the requisition, nor could there have been such resumption. The order therefore

lacks, generically, the juridical cause which might justify it and make it operative."

126. In support of this conclusion, the Prefect explained that the Mayor had believed that he could deal with the situation by means of a requisition, without appreciating that

> "the state of the company as a result of circumstances of a functional-economic and market nature, was such as not to permit of the continuation of its activity".

He also emphasized the shutdown of the plant and the protest actions of the staff, and the fact that the requisition had not succeeded in preserving public order. Finally the Prefect also observed that the order had been adopted

> *"anche sotto l'influsso delle pressioni e dei rilievi formulati dalla stampa cittadina, per cui è da ritenere che il Sindaco, anche per sottrarvisi e dimostrare l'intendimento della Pubblica Amministrazione di intervenire in qualche modo, addivenne alla requisizione quale provvedimento diretto più che altro a porre in evidenza la sua intenzione di affrontare comunque il problema".*

In the translation of the Prefect's decision supplied by the Applicant:

> "also under the influence of the pressure created by, and of the remarks made by the local press; therefore we have to hold that the Mayor, also in order to get out of the above and to show the intent of the Public Administration to intervene in one way or another, issued the order of requisition as a measure mainly directed to emphasize his intent to face the problem in some way [or, as quoted in the judgment of the Court of Appeal of Palermo, in the translation supplied by the Applicant: 'his intention to tackle the problem just the same']".

It was of course understandable that the Mayor, as a public official, should have made his order, in some measure, as a response to local public pressures; and the Chamber does not see, in this passage of the Prefect's decision, any ground on which it might be suggested that the order was therefore arbitrary.

127. In the action brought by the trustee in bankruptcy for damages on account of the requisition, the Court of Palermo and subsequently the Court of Appeal of Palermo had to consider the legal significance of the decision of the Prefect. The Court of Palermo accepted the argument of the respondent administration that *"il provvedimento prefettizio è sostanzialmente di revoca dell'atto richiamato essendo stati ritenuti irrealizzabili gli scopi cui lo stesso miravano"*, i.e., that "the Prefect's order is in substance a revocation of the act in question, the objectives which were contemplated by it having been adjudged to have been impossible to achieve". When the matter came before the Court of Appeal, it observed that this argument was contrary to the argument of the trustee in bankruptcy *"che ravvisa in*

detto decreto una dichiarazione di illegittimità del provvedimento di requisizione", i.e., "who regarded the [Prefect's] decree as a declaration of the unlawfulness of the requisition order". The Court of Appeal understood the lower court as meaning simply that *"i vizi del provvedimento di requisizione, rilevati dal Prefetto, sono vizi di merito e non vizi di legittimità"*, i.e., "the defects found by the Prefect in the requisition order were defects in respect of the merits and not defects in respect of lawfulness"; it found that this finding was incorrect because the reasoning of the Prefect was, in its view, a clear finding of *"un tipico caso di eccesso di potere, che è, come è noto, un vizio di legittimità dell'atto amministrativo"*, i.e., "a typical case of excess of power, which is of course a defect in respect of lawfulness of an administrative act". Having reached this conclusion, the Court of Appeal refers later in its judgment to the requisition as having been "unlawful" *("illecito")*. The analysis of the Prefect's decision as a finding of excess of power, with the result that the order was subject to a defect of lawfulness does not, in the Chamber's view, necessarily and in itself signify any view by the Prefect, or by the Court of Appeal of Palermo, that the Mayor's act was unreasonable or arbitrary.

128. Arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law. This idea was expressed by the Court in the *Asylum* case, when it spoke of "arbitrary action" being "substituted for the rule of law" (*Asylum, Judgment, I.C.J. Reports 1950*, p. 284). It is a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety. Nothing in the decision of the Prefect, or in the judgment of the Court of Appeal of Palermo, conveys any indication that the requisition order of the Mayor was to be regarded in that light.

129. The United States argument is not of course based solely on the findings of the Prefect or of the local courts. United States counsel felt able to describe the requisition generally as being an "unreasonable or capricious exercise of authority". Yet one must remember the situation in Palermo at the moment of the requisition, with the threatened sudden unemployment of some 800 workers at one factory. It cannot be said to have been unreasonable or merely capricious for the Mayor to seek to use the powers conferred on him by the law in an attempt to do something about a difficult and distressing situation. Moreover, if one looks at the requisition order itself, one finds an instrument which in its terms recites not only the reasons for its being made but also the provisions of the law on which it is based: one finds that, although later annulled by the Prefect because "the intended purpose of the requisition could not in practice be achieved by the order itself" (paragraph 125 above), it was nonetheless within the competence of the Mayor of Palermo, according to the very provisions of the law cited in it; one finds the Court of Appeal of Palermo, which did not differ from the conclusion that the requisition was *intra vires*, ruling that it was unlawful as falling into the recognized category of administrative law of acts of *"eccesso di potere"*. Furthermore, here was an act belong-

ing to a category of public acts from which appeal on juridical grounds was provided in law (and indeed in the event used, not without success). Thus, the Mayor's order was consciously made in the context of an operating system of law and of appropriate remedies of appeal, and treated as such by the superior administrative authority and the local courts. These are not at all the marks of an "arbitrary" act.

130. The Chamber does not, therefore, see in the requisition a measure which could reasonably be said to earn the qualification "arbitrary", as it is employed in Article I of the Supplementary Agreement. Accordingly, there was no violation of that Article.

* *

131. Finally, the United States claims that there has been a violation by Italy of Article VII of the FCN Treaty. This long and elaborately drafted Article, in four paragraphs, is principally concerned with ensuring the right "to acquire, own and dispose of immovable property or interests therein within the territories of the other High Contracting Party". The full text is as follows:

> "1. The nationals, corporations and associations of either High Contracting Party shall be permitted to acquire, own and dispose of immovable property or interests therein within the territories of the other High Contracting Party upon the following terms:
>
> *(a)* in the case of nationals, corporations and associations of the Italian Republic, the right to acquire, own and dispose of such property and interests shall be dependent upon the laws and regulations which are or may hereafter be in force within the state, territory or possession of the United States of America wherein such property or interests are situated; and
>
> *(b)* in the case of nationals, corporations and associations of the United States of America, the right to acquire, own and dispose of such property and interests shall be upon terms no less favorable than those which are or may hereafter be accorded by the state, territory or possession of the United States of America in which such national is domiciled, or under the laws of which such corporation or association is created or organized, to nationals, corporations and associations of the Italian Republic; provided that the Italian Republic shall not be obligated to accord to nationals, corporations and associations of the United States of America rights in this connection more extensive than those which are or may hereafter be accorded within the territories of such Republic to nationals, corporations and associations of such Republic.

2. If a national, corporation or association of either High Contracting Party, whether or not resident and whether or not engaged in business or other activities within the territories of the other High Contracting Party, is on account of alienage prevented by the applicable laws and regulations within such territories from succeeding as devisee, or as heir in the case of a national, to immovable property situated therein, or to interests in such property, then such national, corporation or association shall be allowed a term of three years in which to sell or otherwise dispose of such property or interests, this term to be reasonably prolonged if circumstances render it necessary. The transmission or receipt of such property or interests shall be exempt from the payment of any estate, succession, probate or administrative taxes or charges higher than those now or hereafter imposed in like cases of nationals, corporations or associations of the High Contracting Party in whose territory the property is or the interests therein are situated.

3. The nationals of either High Contracting Party shall have full power to dispose of personal property of every kind within the territories of the other High Contracting Party, by testament, donation or otherwise and their heirs, legatees or donees, being persons of whatever nationality or corporations or associations wherever created or organized, whether resident or non-resident and whether or not engaged in business within the territories of the High Contracting Party where such property is situated, shall succeed to such property, and shall themselves or by their agents be permitted to take possession thereof, and to retain or dispose of it at their pleasure. Such disposition, succession and retention shall be subject to the provisions of Article IX and exempt from any other charges higher, and from any restrictions more burdensome, than those applicable in like cases of nationals, corporations and associations of such other High Contracting Party. The nationals, corporations and associations of either High Contracting Party, shall be permitted to succeed, as heirs, legatees and donees, to personal property of every kind within the territories of the other High Contracting Party, left or given to them by nationals of either High Contracting Party or by nationals of any third country, and shall themselves or by their agents be permitted to take possession thereof, and to retain or dispose of it at their pleasure. Such disposition, succession and retention shall be subject to the provisions of Article IX and exempt from any other charges, and from any restrictions, other or higher than those applicable in like cases of nationals, corporations and associations of such other High Contracting Party. Nothing in this paragraph shall be construed to affect the laws and regulations of either High Contracting Party prohibiting or restricting the direct or indirect ownership by

aliens or foreign corporations and associations of the shares in, or instruments of indebtedness of, corporations and associations of such High Contracting Party carrying on particular types of activities.

4. The nationals, corporations and associations of either High Contracting Party shall, subject to the exceptions in paragraph 3 of Article IX, receive treatment in respect of all matters which relate to the acquisition, ownership, lease, possession or disposition of personal property, no less favorable than the treatment which is or may hereafter be accorded to nationals, corporations and associations of any third country."

The Italian text of the opening sentence of paragraph 1 is as follows:

"I cittadini e le persone giuridiche ed associazioni di ciascuna Alta Parte Contraente avranno facoltà di acquistare, possedere e disporre di beni immobili o di altri diritti reali nei territori dell'altra Alta Parte Contraente alle seguenti condizioni . . ."

132. It was objected by Italy that this Article does not apply at all to Raytheon and Machlett because their own property rights *("diritti reali")* were limited to shares in ELSI, and the immovable property in question (the plant in Palermo) was owned by ELSI, an Italian company. The United States contended that "immovable property or interests therein" is a phrase sufficiently broad to include indirect ownership of property rights held through a subsidiary that is not a United States corporation. The argument turned to a considerable extent on the difference in meaning between the English, "interests" and the Italian, *"diritti reali"*. "Interest" in English no doubt has several possible meanings. But since it is in English usage a term commonly used to denote different kinds of rights in land (for example rights such as charges, or easements, and many kinds of "future interests"), it is possible to interpret the English and Italian versions of Article VII as meaning much the same thing; especially as the clause in question is in any event limited to immovable property. The Chamber however has some sympathy with the contention of the United States, as being more in accord with the general purpose of the FCN Treaty. The United States argument is further that Raytheon and Machlett, being the owners of all the shares, were in practice the persons who alone could decide (before the bankruptcy), whether to dispose of the immovable property of the company; accordingly, if the requisition

did, by triggering the bankruptcy, deprive ELSI of the possibility of disposing of its immovable property, it was really Raytheon and Machlett who were deprived; and allegedly in violation of Article VII.

133. There are however problems in any attempt to apply the provisions of Article VII to the actual facts of this case. First, the protection which paragraph 1 of Article VII affords to this group of rights is not unqualified. The qualification designated *"(a)"* refers to the rights enjoyed by Italian nationals in the territory of the United States of America, which in effect simply subjects Italian nationals to the municipal laws in the United States, and does not concern us. Qualification *"(b)"* does, for this applies to the rights enjoyed by United States nationals in the territory of the Republic of Italy. It is a convoluted qualification because it lays down alternative standards, which standards are themselves then both qualified by the same proviso. The terms governing the rights are to be no less favourable than those which are or may hereafter be accorded by the "state, territory or possession of the United States of America in which such national is domiciled, or under the laws of which such corporation or association is created or organized" — which in the case of Raytheon is the State of Delaware and in the case of Machlett the State of Connecticut — "to nationals, corporations and associations of the Italian Republic". The proviso is:

> "that the Italian Republic shall not be obligated to accord to nationals, corporations and associations of the United States of America rights in this connection more extensive than those which are or may hereafter be accorded within the territories of such Republic to nationals, corporations and associations of such Republic".

134. The Chamber has thus to make the somewhat elaborate juridical calculus which this provision in the FCN Treaty appears to demand for its application. No very cogent evidence was put before the Chamber to show that the application of Italian law in this matter was less favourable than the treatment accorded by Italy to its own nationals, corporations and associations, in Italy. Indeed it appeared that, particularly during the troubled times of 1968, requisitions of Italian companies by the local Mayors had happened rather frequently. The claim must therefore be taken to be that ELSI was given less favourable treatment than might have been enjoyed by an Italian company under the laws of Delaware and Connecticut in similar circumstances. The United States drew attention to texts showing that

> "Under the laws of both Delaware and Connecticut, corporations may be dissolved and their assets sold pursuant to determinations by their boards of directors and shareholders",

and that if those States were to take the immovable property of a corporation for a lawful public use, they would have to make compensation; Italy has not disputed these legislative provisions.

135. Secondly, however, even so there remains precisely the same difficulty as in trying to apply Article III, paragraph 2, of the FCN Treaty: what really deprived Raytheon and Machlett, as shareholders, of their right to dispose of ELSI's real property, was not the requisition but the precarious financial state of ELSI, ultimately leading inescapably to bankruptcy. In bankruptcy the right to dispose of the property of a corporation no longer belongs even to the company, but to the trustee acting for it; and the Chamber has already decided that ELSI was on a course to bankruptcy even before the requisition. The Chamber therefore does not find that Article VII of the FCN Treaty has been violated.

* *

136. Having found that the Respondent has not violated the FCN Treaty in the manner asserted by the Applicant, it follows that the Chamber rejects also the claim for reparation made in the submissions of the Applicant.

* * *

137. For these reasons,

THE CHAMBER,

(1) Unanimously,

Rejects the objection presented by the Italian Republic to the admissibility of the Application filed in this case by the United States of America on 6 February 1987;

(2) By four votes to one,

Finds that the Italian Republic has not committed any of the breaches, alleged in the said Application, of the Treaty of Friendship, Commerce and Navigation between the Parties signed at Rome on 2 February 1948, or of the Agreement Supplementing that Treaty signed by the Parties at Washington on 26 September 1951.

IN FAVOUR: *President* Ruda; *Judges* Oda, Ago and Sir Robert Jennings;
AGAINST: *Judge* Schwebel.

(3) By four votes to one,

Rejects, accordingly, the claim for reparation made against the Republic of Italy by the United States of America.

IN FAVOUR: *President* Ruda; *Judges* Oda, Ago and Sir Robert Jennings;
AGAINST: *Judge* Schwebel.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this twentieth day of July, one thousand nine hundred and eighty-nine, 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 Republic of Italy, respectively.

(Signed) José María RUDA,
President.

(Signed) Eduardo VALENCIA-OSPINA,
Registrar.

Judge ODA appends a separate opinion to the Judgment of the Chamber.

Judge SCHWEBEL appends a dissenting opinion to the Judgment of the Chamber.

(Initialled) J.M.R.
(Initialled) E.V.O.

Annex 675

Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion of 21 June 1971, I.C.J. Reports 1971, p.16

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

LEGAL CONSEQUENCES FOR STATES OF THE CONTINUED PRESENCE OF SOUTH AFRICA IN NAMIBIA (SOUTH WEST AFRICA) NOTWITHSTANDING SECURITY COUNCIL RESOLUTION 276 (1970)

ADVISORY OPINION OF 21 JUNE 1971

1971

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

CONSÉQUENCES JURIDIQUES POUR LES ÉTATS DE LA PRÉSENCE CONTINUE DE L'AFRIQUE DU SUD EN NAMIBIE (SUD-OUEST AFRICAIN) NONOBSTANT LA RÉSOLUTION 276 (1970) DU CONSEIL DE SÉCURITÉ

AVIS CONSULTATIF DU 21 JUIN 1971

Official citation:

Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p. 16.

Mode officiel de citation:

Conséquences juridiques pour les Etats de la présence continue de l'Afrique du Sud en Namibie (Sud-Ouest africain) nonobstant la résolution 276 (1970) du Conseil de sécurité, avis consultatif, C.I.J. Recueil 1971, p. 16.

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INTERNATIONAL COURT OF JUSTICE

YEAR 1971

1971
21 June
General List
No. 53

21 June 1971

LEGAL CONSEQUENCES FOR STATES OF THE CONTINUED PRESENCE OF SOUTH AFRICA IN NAMIBIA (SOUTH WEST AFRICA) NOTWITHSTANDING SECURITY COUNCIL RESOLUTION 276 (1970)

Composition and competence of the Court—Propriety of the Court's giving the Opinion—Concept of mandates—Characteristics of the League of Nations Mandate for South West Africa—Situation on the dissolution of the League of Nations and the setting-up of the United Nations: survival of the Mandate and transference of supervision and accountability to the United Nations—Developments in the United Nations prior to the termination of the Mandate—Revocability of the Mandate—Termination of the Mandate by the General Assembly—Action in the Security Council and effect of Security Council resolutions leading to the request for Opinion—Requests by South Africa to supply further factual information and for the holding of a plebiscite—Legal consequences for States

ADVISORY OPINION

Present: *President* Sir Muhammad ZAFRULLA KHAN; *Vice-President* AMMOUN; *Judges* Sir Gerald FITZMAURICE, PADILLA NERVO, FORSTER, GROS, BENGZON, PETRÉN, LACHS, ONYEAMA, DILLARD, IGNACIO-PINTO, DE CASTRO, MOROZOV, JIMÉNEZ DE ARÉCHAGA; *Registrar* AQUARONE.

Concerning the legal consequences for States of the continued presence of South Africa in Namibia (South West Africa), notwithstanding Security Council resolution 276 (1970),

THE COURT,

composed as above,

gives the following Advisory Opinion:

1. The question upon which the advisory opinion of the Court has been asked was laid before the Court by a letter dated 29 July 1970, filed in the Registry on 10 August, and addressed by the Secretary-General of the United Nations to the President of the Court. In his letter the Secretary-General informed the Court that, by resolution 284 (1970) adopted on 29 July 1970, certified true copies of the English and French texts of which were transmitted with his letter, the Security Council of the United Nations had decided to submit to the Court, with the request for an advisory opinion to be transmitted to the Security Council at an early date, the question set out in the resolution, which was in the following terms:

> "*The Security Council,*
>
> *Reaffirming* the special responsibility of the United Nations with regard to the territory and the people of Namibia,
>
> *Recalling* Security Council resolution 276 (1970) on the question of Namibia,
>
> *Taking note* of the report and recommendations submitted by the *Ad Hoc* Sub-Committee established in pursuance of Security Council resolution 276 (1970),
>
> *Taking further note* of the recommendation of the *Ad Hoc* Sub-Committee on the possibility of requesting an advisory opinion from the International Court of Justice,
>
> *Considering* that an advisory opinion from the International Court of Justice would be useful for the Security Council in its further consideration of the question of Namibia and in furtherance of the objectives the Council is seeking
>
> 1. *Decides* to submit in accordance with Article 96 (1) of the Charter, the following question to the International Court of Justice with the request for an advisory opinion which shall be transmitted to the Security Council at an early date:
>
> 'What are the legal consequences for States of the continued presence of South Africa in Namibia, notwithstanding Security Council resolution 276 (1970)?'
>
> 2. *Requests* the Secretary-General to transmit the present resolution to the International Court of Justice, in accordance with Article 65 of the Statute of the Court, accompanied by all documents likely to throw light upon the question."

2. On 5 August 1970, that is to say, after the despatch of the Secretary-General's letter but before its receipt by the Registry, the English and French texts of resolution 284 (1970) of the Security Council were communicated to the President of the Court by telegram from the United Nations Secretariat. The President thereupon decided that the States Members of the United Nations were likely to be able to furnish information on the question, in accordance with Article 66, paragraph 2, of the Statute, and by an Order dated 5 August 1970, the President fixed 23 September 1970 as the time-limit within which the

Court would be prepared to receive written statements from them. The same day, the Registrar sent to the States Members of the United Nations the special and direct communication provided for in Article 66 of the Statute.

3. The notice of the request for advisory opinion, prescribed by Article 66, paragraph 1, of the Statute, was given by the Registrar to all States entitled to appear before the Court by letter of 14 August 1970.

4. On 21 August 1970, the President decided that in addition to the States Members of the United Nations, the non-member States entitled to appear before the Court were also likely to be able to furnish information on the question. The same day the Registrar sent to those States the special and direct communication provided for in Article 66 of the Statute.

5. On 24 August 1970, a letter was received by the Registrar from the Secretary for Foreign Affairs of South Africa, whereby the Government of South Africa, for the reasons therein set out, requested the extension to 31 January 1971 of the time-limit for the submission of a written statement. The President of the Court, by an Order dated 28 August 1970, extended the time-limit for the submission of written statements to 19 November 1970.

6. The Secretary-General of the United Nations, in two instalments, and the following States submitted to the Court written statements or letters setting forth their views: Czechoslovakia, Finland, France, Hungary, India, the Netherlands, Nigeria, Pakistan, Poland, South Africa, the United States of America, Yugoslavia. Copies of these communications were transmitted to all States entitled to appear before the Court, and to the Secretary-General of the United Nations, and, in pursuance of Articles 44, paragraph 3, and 82, paragraph 1, of the Rules of Court, they were made accessible to the public as from 5 February 1971.

7. The Secretary-General of the United Nations, in pursuance of Article 65, paragraph 2, of the Statute transmitted to the Court a dossier of documents likely to throw light upon the question, together with an Introductory Note; these documents were received in the Registry in instalments between 5 November and 29 December 1970.

8. Before holding public sittings to hear oral statements in accordance with Article 66, paragraph 2, of the Statute, the Court had first to resolve two questions relating to its composition for the further proceedings.

9. In its written statement, filed on 19 November 1970, the Government of South Africa had taken objection to the participation of three Members of the Court in the proceedings. Its objections were based on statements made or other participation by the Members concerned, in their former capacity as representatives of their Governments, in United Nations organs which were dealing with matters concerning South West Africa. The Court gave careful consideration to the objections raised by the Government of South Africa, examining each case separately. In each of them the Court reached the conclusion that the participation of the Member concerned in his former capacity as representative of his Government, to which objection was taken in the South African Government's written statement, did not attract the application of Article 17, paragraph 2, of the Statute of the Court. In making Order No. 2 of 26 January 1971, the Court found no reason to depart in the present advisory proceedings from the decision adopted by the Court in the Order of 18 March 1965 in the *South West Africa* cases (Ethiopia *v.* South Africa; Liberia *v.* South Africa) after hearing the same contentions as have now been advanced by the Government of South Africa. In deciding the other two objections, the

Court took into consideration that the activities in United Nations organs of the Members concerned, prior to their election to the Court, and which are referred to in the written statement of the Government of South Africa, do not furnish grounds for treating these objections differently from those raised in the application to which the Court decided not to accede in 1965, a decision confirmed by its Order No. 2 of 26 January 1971. With reference to Order No. 3 of the same date, the Court also took into consideration a circumstance to which its attention was drawn, although it was not mentioned in the written statement of the Government of South Africa, namely the participation of the Member concerned, prior to his election to the Court, in the formulation of Security Council resolution 246 (1968), which concerned the trial at Pretoria of thirty-seven South West Africans and which in its preamble took into account General Assembly resolution 2145 (XXI). The Court considered that this participation of the Member concerned in the work of the United Nations, as a representative of his Government, did not justify a conclusion different from that already reached with regard to the objections raised by the Government of South Africa. Account must also be taken in this respect of precedents established by the present Court and the Permanent Court wherein judges sat in certain cases even though they had taken part in the formulation of texts the Court was asked to interpret. (*P.C.I.J., Series A, No. 1*, p. 11; *P.C.I.J., Series C, No. 84*, p. 535; *P.C.I.J., Series E, No. 4*, p. 270; *P.C.I.J., Series E, No. 8*, p. 251.) After deliberation, the Court decided, by three Orders dated 26 January 1971, and made public on that date, not to accede to the objections which had been raised.

10. By a letter from the Secretary for Foreign Affairs dated 13 November 1970, the Government of South Africa made an application for the appointment of a judge *ad hoc* to sit in the proceedings, in terms of Article 31, paragraph 2, of the Statute of the Court. The Court decided, in accordance with the terms of Article 46 of the Statute of the Court, to hear the contentions of South Africa on this point in camera, and a closed hearing, at which representatives of India, the Netherlands, Nigeria and the United States of America were also present, was held for the purpose on 27 January 1971.

11. By an Order dated 29 January 1971, the Court decided to reject the application of the Government of South Africa. The Court thereafter decided that the record of the closed hearing should be made accessible to the public.

12. On 29 January 1971, the Court decided, upon the application of the Organization of African Unity, that that Organization was also likely to be able to furnish information on the question before the Court, and that the Court would therefore be prepared to hear an oral statement on behalf of the Organization.

13. The States entitled to appear before the Court had been informed by the Registrar on 27 November 1970 that oral proceedings in the case would be likely to open at the beginning of February 1971. On 4 February 1971, notification was given to those States which had expressed an intention to make oral statements, and to the Secretary-General of the United Nations and the Organization of African Unity, that 8 February had been fixed as the opening date. At 23 public sittings held between 8 February and 17 March 1971, oral statements were made to the Court by the following representatives:

for the Secretary-General of the United Nations:	Mr. C. A. Stavropoulos, Under-Secretary-General, Legal Counsel of the United Nations, and Mr. D. B. H. Vickers, Senior Legal Officer, Office of Legal Affairs;
for Finland:	Mr. E. J. S. Castrén, Professor of International Law in the University of Helsinki;
for the Organization of African Unity:	Mr. T. O. Elias, Attorney-General and Commissioner for Justice of Nigeria;
for India:	Mr. M. C. Chagla, M.P., Former Minister for Foreign Affairs in the Government of India;
for the Netherlands:	Mr. W. Riphagen, Legal Adviser to the Ministry of Foreign Affairs;
for Nigeria:	Mr. T. O. Elias, Attorney-General and Commissioner for Justice;
for Pakistan:	Mr. S. S. Pirzada, S.Pk., Attorney-General of Pakistan;
for South Africa:	Mr. J. D. Viall, Legal Adviser to the Department of Foreign Affairs, Mr. D. P. de Villiers, S.C., Advocate of the Supreme Court of South Africa, Mr. E. M. Grosskopf, S.C., Member of the South African Bar, Mr. H. J. O. van Heerden, Member of the South African Bar, Mr. R. F. Botha, Member of the South African Bar, Mr. M. Wiechers, Professor of Law in the University of South Africa;
for the Republic of Viet-Nam:	Mr. Le Tai Trien, Attorney-General, Supreme Court of Viet-Nam;
for the United States of America:	Mr. J. R. Stevenson, The Legal Adviser, Department of State.

14. Prior to the opening of the public sittings, the Court decided to examine first of all certain observations made by the Government of South Africa in its written statement, and in a letter dated 14 January 1971, in support of its submission that the Court should decline to give an advisory opinion.

15. At the opening of the public sittings on 8 February 1971, the President of the Court announced that the Court had reached a unanimous decision thereon. The substance of the submission of the Government of South Africa and the decision of the Court are dealt with in paragraphs 28 and 29 of the Advisory Opinion, below.

16. By a letter of 27 January 1971, the Government of South Africa had submitted a proposal to the Court regarding the holding of a plebiscite in the Territory of Namibia (South West Africa), and this proposal was elaborated in a further letter of 6 February 1971, which explained that the plebiscite was to determine whether it was the wish of the inhabitants "that the Territory should continue to be administered by the South African Government or should henceforth be administered by the United Nations".

17. At the hearing of 5 March 1971, the representative of South Africa explained further the position of his Government with regard to the proposed plebiscite, and indicated that his Government considered it necessary to adduce considerable evidence on the factual issues which it regarded as underlying the question before the Court. At the close of the hearing, on 17 March 1971, the President made the following statement:

> "The Court has considered the request submitted by the representative of South Africa in his letter of 6 February 1971 that a plebiscite should be held in the Territory of Namibia (South West Africa) under the joint supervision of the Court and the Government of the Republic of South Africa.
>
> The Court cannot prónounce upon this request at the present stage without anticipating, or appearing to anticipate, its decision on one or more of the main issues now before it. Consequently, the Court must defer its answer to this request until a later date.
>
> The Court has also had under consideration the desire of the Government of the Republic to supply the Court with further factual material concerning the situation in Namibia (South West Africa). However, until the Court has been able first to examine some of the legal issues which must, in any event, be dealt with, it will not be in a position to determine whether it requires additional material on the facts. The Court must accordingly defer its decision on this matter as well.
>
> If, at any time, the Court should find itself in need of further arguments or information, on these or any other matters, it will notify the governments and organizations whose representatives have participated in the oral hearings."

18. On 14 May 1971 the President sent the following letter to the representatives of the Secretary-General, of the Organization of African Unity and of the States which had participated in the oral proceedings:

> "I have the honour to refer to the statement which I made at the end of the oral hearing on the advisory proceedings relating to the Territory of Namibia (South West Africa) on 17 March last . . . , to the effect that the Court considered it appropriate to defer until a later date its decision regarding the requests of the Government of the Republic of South Africa *(a)* for the holding in that Territory of a plebiscite under the joint supervision of the Court and the Government of the Republic; and *(b)* to be allowed to supply the Court with further factual material concerning the situation there.
>
> I now have the honour to inform you that the Court, having examined the matter, does not find itself in need of further arguments or information, and has decided to refuse both these requests."

* * *

19. Before examining the merits of the question submitted to it the Court must consider the objections that have been raised to its doing so.

20. The Government of South Africa has contended that for several reasons resolution 284 (1970) of the Security Council, which requested

the advisory opinion of the Court, is invalid, and that, therefore, the Court is not competent to deliver the opinion. A resolution of a properly constituted organ of the United Nations which is passed in accordance with that organ's rules of procedure, and is declared by its President to have been so passed, must be presumed to have been validly adopted. However, since in this instance the objections made concern the competence of the Court, the Court will proceed to examine them.

21. The first objection is that in the voting on the resolution two permanent members of the Security Council abstained. It is contended that the resolution was consequently not adopted by an affirmative vote of nine members, including the concurring votes of the permanent members, as required by Article 27, paragraph 3, of the Charter of the United Nations.

22. However, the proceedings of the Security Council extending over a long period supply abundant evidence that presidential rulings and the positions taken by members of the Council, in particular its permanent members, have consistently and uniformly interpreted the practice of voluntary abstention by a permanent member as not constituting a bar to the adoption of resolutions. By abstaining, a member does not signify its objection to the approval of what is being proposed; in order to prevent the adoption of a resolution requiring unanimity of the permanent members, a permanent member has only to cast a negative vote. This procedure followed by the Security Council, which has continued unchanged after the amendment in 1965 of Article 27 of the Charter, has been generally accepted by Members of the United Nations and evidences a general practice of that Organization.

23. The Government of South Africa has also argued that as the question relates to a dispute between South Africa and other Members of the United Nations, South Africa, as a Member of the United Nations, not a member of the Security Council and a party to a dispute, should have been invited under Article 32 of the Charter to participate, without vote, in the discussion relating to it. It further contended that the proviso at the end of Article 27, paragraph 3, of the Charter, requiring members of the Security Council which are parties to a dispute to abstain from voting, should have been complied with.

24. The language of Article 32 of the Charter is mandatory, but the question whether the Security Council must extend an invitation in accordance with that provision depends on whether it has made a determination that the matter under its consideration is in the nature of a dispute. In the absence of such a determination Article 32 of the Charter does not apply.

25. The question of Namibia was placed on the agenda of the Security Council as a "situation" and not as a "dispute". No member State made any suggestion or proposal that the matter should be examined as a dispute, although due notice was given of the placing of the question

on the Security Council's agenda under the title "Situation in Namibia". Had the Government of South Africa considered that the question should have been treated in the Security Council as a dispute, it should have drawn the Council's attention to that aspect of the matter. Having failed to raise the question at the appropriate time in the proper forum, it is not open to it to raise it before the Court at this stage.

26. A similar answer must be given to the related objection based on the proviso to paragraph 3 of Article 27 of the Charter. This proviso also requires for its application the prior determination by the Security Council that a dispute exists and that certain members of the Council are involved as parties to such a dispute.

* * *

27. In the alternative the Government of South Africa has contended that even if the Court had competence to give the opinion requested, it should nevertheless, as a matter of judicial propriety, refuse to exercise its competence.

28. The first reason invoked in support of this contention is the supposed disability of the Court to give the opinion requested by the Security Council, because of political pressure to which the Court, according to the Government of South Africa, has been or might be subjected.

29. It would not be proper for the Court to entertain these observations, bearing as they do on the very nature of the Court as the principal judicial organ of the United Nations, an organ which, in that capacity, acts only on the basis of the law, independently of all outside influence or interventions whatsoever, in the exercise of the judicial function entrusted to it alone by the Charter and its Statute. A court functioning as a court of law can act in no other way.

30. The second reason advanced on behalf of the Government of South Africa in support of its contention that the Court should refuse to accede to the request of the Security Council is that the relevant legal question relates to an existing dispute between South Africa and other States. In this context it relies on the case of *Eastern Carelia* and argues that the Permanent Court of International Justice declined to rule upon the question referred to it because it was directly related to the main point of a dispute actually pending between two States.

31. However, that case is not relevant, as it differs from the present one. For instance one of the States concerned in that case was not at the time a Member of the League of Nations and did not appear before the Permanent Court. South Africa, as a Member of the United Nations, is bound by Article 96 of the Charter, which empowers the Security Council to request advisory opinions on any legal question. It has appeared before the Court, participated in both the written and oral pro-

ceedings and, while raising specific objections against the competence of the Court, has addressed itself to the merits of the question.

32. Nor does the Court find that in this case the Security Council's request relates to a legal dispute actually pending between two or more States. It is not the purpose of the request to obtain the assistance of the Court in the exercise of the Security Council's functions relating to the pacific settlement of a dispute pending before it between two or more States. The request is put forward by a United Nations organ with reference to its own decisions and it seeks legal advice from the Court on the consequences and implications of these decisions. This objective is stressed by the preamble to the resolution requesting the opinion, in which the Security Council has stated "that an advisory opinion from the International Court of Justice would be useful for the Security Council in its further consideration of the question of Namibia and in furtherance of the objectives the Council is seeking". It is worth recalling that in its Advisory Opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, the Court stated: "The object of this request for an Opinion is to guide the United Nations in respect of its own action" (*I.C.J. Reports 1951*, p. 19).

33. The Court does not find either that in this case the advisory opinion concerns a dispute between South Africa and the United Nations. In the course of the oral proceedings Counsel for the Government of South Africa stated:

> "... our submission is not that the question is a dispute, but that in order to answer the question the Court will have to decide legal and factual issues which are actually in dispute between South Africa and other States"

34. The fact that, in the course of its reasoning, and in order to answer the question submitted to it, the Court may have to pronounce on legal issues upon which radically divergent views exist between South Africa and the United Nations, does not convert the present case into a dispute nor bring it within the compass of Articles 82 and 83 of the Rules of Court. A similar position existed in the three previous advisory proceedings concerning South West Africa: in none of them did South Africa claim that there was a dispute, nor did the Court feel it necessary to apply the Rules of Court concerning "a legal question actually pending between two or more States". Differences of views among States on legal issues have existed in practically every advisory proceeding; if all were agreed, the need to resort to the Court for advice would not arise.

35. In accordance with Article 83 of the Rules of Court, the question whether the advisory opinion had been requested "upon a legal question actually pending between two or more States" was also of decisive im-

portance in the Court's consideration of the request made by the Government of South Africa for the appointment of a judge *ad hoc*. As already indicated, the Court heard argument in support of that request and, after due deliberation, decided, by an Order of 29 January 1971, not to accede to it. This decision was based on the conclusion that the terms of the request for advisory opinion, the circumstances in which it had been submitted (which are described in para. 32 above), as well as the considerations set forth in paragraphs 33 and 34 above, were such as to preclude the interpretation that an opinion had been "requested upon a legal question actually pending between two or more States". Thus, in the opinion of the Court, South Africa was not entitled under Article 83 of the Rules of Court to the appointment of a judge *ad hoc*.

36. It has been urged that the possible existence of a dispute was a point of substance which was prematurely disposed of by the Order of 29 January 1971. Now the question whether a judge *ad hoc* should be appointed is of course a matter concerning the composition of the Bench and possesses, as the Government of South Africa recognized, absolute logical priority. It has to be settled prior to the opening of the oral proceedings, and indeed before any further issues, even of procedure, can be decided. Until it is disposed of the Court cannot proceed with the case. It is thus a logical necessity that any request for the appointment of a judge *ad hoc* must be treated as a preliminary matter on the basis of a prima facie appreciation of the facts and the law. This cannot be construed as meaning that the Court's decision thereon may involve the irrevocable disposal of a point of substance or of one related to the Court's competence. Thus, in a contentious case, when preliminary objections have been raised, the appointment of judges *ad hoc* must be decided before the hearing of those objections. That decision, however, does not prejudge the Court's competence if, for instance, it is claimed that no dispute exists. Conversely, to assert that the question of the judge *ad hoc* could not be validly settled until the Court had been able to analyse substantive issues is tantamount to suggesting that the composition of the Court could be left in suspense, and thus the validity of its proceedings left in doubt, until an advanced stage in the case.

37. The only question which was in fact settled with finality by the Order of 29 January 1971 was the one relating to the Court's composition for the purpose of the present case. That decision was adopted on the authority of Article 3, paragraph 1, of the Rules of Court and in accordance with Article 55, paragraph 1, of the Statute. Consequently, after the adoption of that decision, while differing views might still be held as to the applicability of Article 83 of the Rules of Court in the present case, the regularity of the composition of the Court for the

purposes of delivering the present Advisory Opinion, in accordance with the Statute and the Rules of Court, is no longer open to question.

38. In connection with the possible appointment of judges *ad hoc*, it has further been suggested that the final clause in paragraph 1 of Article 82 of the Rules of Court obliges the Court to determine as a preliminary question whether the request relates to a legal question actually pending between two or more States. The Court cannot accept this reading, which overstrains the literal meaning of the words "*avant tout*". It is difficult to conceive that an Article providing general guidelines in the relatively unschematic context of advisory proceedings should prescribe a rigid sequence in the action of the Court. This is confirmed by the practice of the Court, which in no previous advisory proceedings has found it necessary to make an independent preliminary determination of this question or of its own competence, even when specifically requested to do so. Likewise, the interpretation of the Rules of Court as imposing a procedure *in limine litis*, which has been suggested, corresponds neither to the text of the Article nor to its purpose, which is to regulate advisory proceedings without impairing the flexibility which Articles 66, paragraph 4, and 68 of the Statute allow the Court so that it may adjust its procedure to the requirements of each particular case. The phrase in question merely indicates that the test of legal pendency is to be considered "above all" by the Court for the purpose of exercising the latitude granted by Article 68 of the Statute to be guided by the provisions which apply in contentious cases to the extent to which the Court recognizes them to be applicable. From a practical point of view it may be added that the procedure suggested, analogous to that followed in contentious procedure with respect to preliminary objections, would not have dispensed with the need to decide on the request for the appointment of a judge *ad hoc* as a previous, independent decision, just as in contentious cases the question of judges *ad hoc* must be settled before any hearings on the preliminary objections may be proceeded with. Finally, it must be observed that such proposed preliminary decision under Article 82 of the Rules of Court would not necessarily have predetermined the decision which it is suggested should have been taken subsequently under Article 83, since the latter provision envisages a more restricted hypothesis: that the advisory opinion is requested *upon* a legal question actually pending and not that it *relates* to such a question.

39. The view has also been expressed that even if South Africa is not entitled to a judge *ad hoc* as a matter of right, the Court should, in the exercise of the discretion granted by Article 68 of the Statute, have allowed such an appointment, in recognition of the fact that South Africa's interests are specially affected in the present case. In this connection the Court wishes to recall a decision taken by the Permanent Court at a time when the Statute did not include any provision concerning advisory opinions, the entire regulation of the procedure in the matter being thus left to the Court (*P.C.I.J., Series E, No. 4*, p. 76). Confronted with a

request for the appointment of a judge *ad hoc* in a case in which it found there was no dispute, the Court, in rejecting the request, stated that "the decision of the Court must be in accordance with its Statute and with the Rules duly framed by it in pursuance of Article 30 of the Statute" (Order of 31 October 1935, *P.C.I.J.*, *Series A/B*, *No. 65*, Annex 1, p. 69 at p. 70). It found further that the "exception cannot be given a wider application than is provided for by the Rules" (*ibid.*, p. 71). In the present case the Court, having regard to the Rules of Court adopted under Article 30 of the Statute, came to the conclusion that it was unable to exercise discretion in this respect.

40. The Government of South Africa has also expressed doubts as to whether the Court is competent to, or should, give an opinion, if, in order to do so, it should have to make findings as to extensive factual issues. In the view of the Court, the contingency that there may be factual issues underlying the question posed does not alter its character as a "legal question" as envisaged in Article 96 of the Charter. The reference in this provision to legal questions cannot be interpreted as opposing legal to factual issues. Normally, to enable a court to pronounce on legal questions, it must also be acquainted with, take into account and, if necessary, make findings as to the relevant factual issues. The limitation of the powers of the Court contended for by the Government of South Africa has no basis in the Charter or the Statute.

41. The Court could, of course, acting on its own, exercise the discretion vested in it by Article 65, paragraph 1, of the Statute and decline to accede to the request for an advisory opinion. In considering this possibility the Court must bear in mind that: "A reply to a request for an Opinion should not, in principle, be refused." (*I.C.J. Reports 1951*, p. 19.) The Court has considered whether there are any "compelling reasons", as referred to in the past practice of the Court, which would justify such a refusal. It has found no such reasons. Moreover, it feels that by replying to the request it would not only "remain faithful to the requirements of its judicial character" (*I.C.J. Reports 1960*, p. 153), but also discharge its functions as "the principal judicial organ of the United Nations" (Art. 92 of the Charter).

* * *

42. Having established that it is properly seised of a request for an advisory opinion, the Court will now proceed to an analysis of the question placed before it: "What are the legal consequences for States of the continued presence of South Africa in Namibia, notwithstanding Security Council resolution 276 (1970)?"

43. The Government of South Africa in both its written and oral statements has covered a wide field of history, going back to the origin and functioning of the Mandate. The same and similar problems were

dealt with by other governments, the Secretary-General of the United Nations and the Organization of African Unity in their written and oral statements.

44. A series of important issues is involved: the nature of the Mandate, its working under the League of Nations, the consequences of the demise of the League and of the establishment of the United Nations and the impact of further developments within the new organization. While the Court is aware that this is the sixth time it has had to deal with the issues involved in the Mandate for South West Africa, it has nonetheless reached the conclusion that it is necessary for it to consider and summarize some of the issues underlying the question addressed to it. In particular, the Court will examine the substance and scope of Article 22 of the League Covenant and the nature of "C" mandates.

45. The Government of South Africa, in its written statement, presented a detailed analysis of the intentions of some of the participants in the Paris Peace Conference, who approved a resolution which, with some alterations and additions, eventually became Article 22 of the Covenant. At the conclusion and in the light of this analysis it suggested that it was quite natural for commentators to refer to "'C' mandates as being in their practical effect not far removed from annexation". This view, which the Government of South Africa appears to have adopted, would be tantamount to admitting that the relevant provisions of the Covenant were of a purely nominal character and that the rights they enshrined were of their very nature imperfect and unenforceable. It puts too much emphasis on the intentions of some of the parties and too little on the instrument which emerged from those negotiations. It is thus necessary to refer to the actual text of Article 22 of the Covenant, paragraph 1 of which declares:

> "1. To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilisation and that securities for the performance of this trust should be embodied in this Covenant."

As the Court recalled in its 1950 Advisory Opinion on the *International Status of South-West Africa*, in the setting-up of the mandates system "two principles were considered to be of paramount importance: the principle of non-annexation and the principle that the well-being and development of such peoples form 'a sacred trust of civilization'" (*I.C.J. Reports 1950*, p. 131).

46. It is self-evident that the "trust" had to be exercised for the benefit of the peoples concerned, who were admitted to have interests of their

own and to possess a potentiality for independent existence on the attainment of a certain stage of development: the mandates system was designed to provide peoples "not yet" able to manage their own affairs with the help and guidance necessary to enable them to arrive at the stage where they would be "able to stand by themselves". The requisite means of assistance to that end is dealt with in paragraph 2 of Article 22:

> "2. The best method of giving practical effect to this principle is that the tutelage of such peoples should be entrusted to advanced nations who by reason of their resources, their experience or their geographical position can best undertake this responsibility, and who are willing to accept it, and that this tutelage should be exercised by them as Mandatories on behalf of the League."

This made it clear that those Powers which were to undertake the task envisaged would be acting exclusively as mandatories on behalf of the League. As to the position of the League, the Court found in its 1950 Advisory Opinion that: "The League was not, as alleged by [the South African] Government, a 'mandator' in the sense in which this term is used in the national law of certain States." The Court pointed out that: "The Mandate was created, in the interest of the inhabitants of the territory, and of humanity in general, as an international institution with an international object—a sacred trust of civilisation." Therefore, the Court found, the League "had only assumed an international function of supervision and control" (*I.C.J. Reports 1950*, p. 132).

47. The acceptance of a mandate on these terms connoted the assumption of obligations not only of a moral but also of a binding legal character; and, as a corollary of the trust, "securities for [its] performance" were instituted (para. 7 of Art. 22) in the form of legal accountability for its discharge and fulfilment:

> "7. In every case of mandate, the Mandatory shall render to the Council an annual report in reference to the territory committed to its charge."

48. A further security for the performance of the trust was embodied in paragraph 9 of Article 22:

> "9. A permanent Commission shall be constituted to receive and examine the annual reports of the Mandatories and to advise the Council on all matters relating to the observance of the mandates."

Thus the reply to the essential question, *quis custodiet ipsos custodes?*, was given in terms of the mandatory's accountability to international

organs. An additional measure of supervision was introduced by a resolution of the Council of the League of Nations, adopted on 31 January 1923. Under this resolution the mandatory Governments were to transmit to the League petitions from communities or sections of the populations of mandated territories.

49. Paragraph 8 of Article 22 of the Covenant gave the following directive:

> "8. The degree of authority, control or administration to be exercised by the Mandatory shall, if not previously agreed upon by the Members of the League, be explicitly defined in each case by the Council."

In pursuance of this directive, a Mandate for German South West Africa was drawn up which defined the terms of the Mandatory's administration in seven articles. Of these, Article 6 made explicit the obligation of the Mandatory under paragraph 7 of Article 22 of the Covenant by providing that "The Mandatory shall make to the Council of the League of Nations an annual report to the satisfaction of the Council, containing full information with regard to the territory, and indicating the measures taken to carry out the obligations assumed under Articles 2, 3, 4 and 5" of the Mandate. As the Court said in 1950: "the Mandatory was to observe a number of obligations, and the Council of the League was to supervise the administration and see to it that these obligations were fulfilled" (*I.C.J. Reports 1950*, p. 132). In sum the relevant provisions of the Covenant and those of the Mandate itself preclude any doubt as to the establishment of definite legal obligations designed for the attainment of the object and purpose of the Mandate.

50. As indicated in paragraph 45 above, the Government of South Africa has dwelt at some length on the negotiations which preceded the adoption of the final version of Article 22 of the League Covenant, and has suggested that they lead to a different reading of its provisions. It is true that as that Government points out, there had been a strong tendency to annex former enemy colonial territories. Be that as it may, the final outcome of the negotiations, however difficult of achievement, was a rejection of the notion of annexation. It cannot tenably be argued that the clear meaning of the mandate institution could be ignored by placing upon the explicit provisions embodying its principles a construction at variance with its object and purpose.

51. Events subsequent to the adoption of the instruments in question should also be considered. The Allied and Associated Powers, in their Reply to Observations of the German Delegation, referred in 1919 to "the mandatory Powers, which in so far as they may be appointed trustees by the League of Nations will derive no benefit from such trusteeship". As to the Mandate for South West Africa, its preamble

recited that "His Britannic Majesty, for and on behalf of the Government of the Union of South Africa, has agreed to accept the Mandate in respect of the said territory and has undertaken to exercise it on behalf of the League of Nations".

52. Furthermore, the subsequent development of international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all of them. The concept of the sacred trust was confirmed and expanded to all "territories whose peoples have not yet attained a full measure of self-government" (Art. 73). Thus it clearly embraced territories under a colonial régime. Obviously the sacred trust continued to apply to League of Nations mandated territories on which an international status had been conferred earlier. A further important stage in this development was the Declaration on the Granting of Independence to Colonial Countries and Peoples (General Assembly resolution 1514 (XV) of 14 December 1960), which embraces all peoples and territories which "have not yet attained independence". Nor is it possible to leave out of account the political history of mandated territories in general. All those which did not acquire independence, excluding Namibia, were placed under trusteeship. Today, only two out of fifteen, excluding Namibia, remain under United Nations tutelage. This is but a manifestation of the general development which has led to the birth of so many new States.

53. All these considerations are germane to the Court's evaluation of the present case. Mindful as it is of the primary necessity of interpreting an instrument in accordance with the intentions of the parties at the time of its conclusion, the Court is bound to take into account the fact that the concepts embodied in Article 22 of the Covenant—"the strenuous conditions of the modern world" and "the well-being and development" of the peoples concerned—were not static, but were by definition evolutionary, as also, therefore, was the concept of the "sacred trust". The parties to the Covenant must consequently be deemed to have accepted them as such. That is why, viewing the institutions of 1919, the Court must take into consideration the changes which have occurred in the supervening half-century, and its interpretation cannot remain unaffected by the subsequent development of law, through the Charter of the United Nations and by way of customary law. Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation. In the domain to which the present proceedings relate, the last fifty years, as indicated above, have brought important developments. These developments leave little doubt that the ultimate objective of the sacred trust was the self-determination and independence of the peoples concerned. In this domain, as elsewhere, the *corpus iuris gentium* has been

considerably enriched, and this the Court, if it is faithfully to discharge its functions, may not ignore.

54. In the light of the foregoing, the Court is unable to accept any construction which would attach to "C" mandates an object and purpose different from those of "A" or "B" mandates. The only differences were those appearing from the language of Article 22 of the Covenant, and from the particular mandate instruments, but the objective and safeguards remained the same, with no exceptions such as considerations of geographical contiguity. To hold otherwise would mean that territories under "C" mandate belonged to the family of mandates only in name, being in fact the objects of disguised cessions, as if the affirmation that they could "be best administered under the laws of the Mandatory as integral portions of its territory" (Art. 22, para. 6) conferred upon the administering Power a special title not vested in States entrusted with "A" or "B" mandates. The Court would recall in this respect what was stated in the 1962 Judgment in the *South West Africa* cases as applying to all categories of mandate:

> "The rights of the Mandatory in relation to the mandated territory and the inhabitants have their foundation in the obligations of the Mandatory and they are, so to speak, mere tools given to enable it to fulfil its obligations." (*I.C.J. Reports 1962*, p. 329.)

* * *

55. The Court will now turn to the situation which arose on the demise of the League and with the birth of the United Nations. As already recalled, the League of Nations was the international organization entrusted with the exercise of the supervisory functions of the Mandate. Those functions were an indispensable element of the Mandate. But that does not mean that the mandates institution was to collapse with the disappearance of the original supervisory machinery. To the question whether the continuance of a mandate was inseparably linked with the existence of the League, the answer must be that an institution established for the fulfilment of a sacred trust cannot be presumed to lapse before the achievement of its purpose. The responsibilities of both mandatory and supervisor resulting from the mandates institution were complementary, and the disappearance of one or the other could not affect the survival of the institution. That is why, in 1950, the Court remarked, in connection with the obligations corresponding to the sacred trust:

> "Their *raison d'être* and original object remain. Since their fulfilment did not depend on the existence of the League of Nations, they could not be brought to an end merely because this supervisory

> organ ceased to exist. Nor could the right of the population to have the Territory administered in accordance with these rules depend thereon." (*I.C.J. Reports 1950*, p. 133.)

In the particular case, specific provisions were made and decisions taken for the transfer of functions from the organization which was to be wound up to that which came into being.

56. Within the framework of the United Nations an international trusteeship system was established and it was clearly contemplated that mandated territories considered as not yet ready for independence would be converted into trust territories under the United Nations international trusteeship system. This system established a wider and more effective international supervision than had been the case under the mandates of the League of Nations.

57. It would have been contrary to the overriding purpose of the mandates system to assume that difficulties in the way of the replacement of one régime by another designed to improve international supervision should have been permitted to bring about, on the dissolution of the League, a complete disappearance of international supervision. To accept the contention of the Government of South Africa on this point would have entailed the reversion of mandated territories to colonial status, and the virtual replacement of the mandates régime by annexation, so determinedly excluded in 1920.

58. These compelling considerations brought about the insertion in the Charter of the United Nations of the safeguarding clause contained in Article 80, paragraph 1, of the Charter, which reads as follows:

> "1. Except as may be agreed upon in individual trusteeship agreements, made under Articles 77, 79 and 81, placing each territory under the trusteeship system, and until such agreements have been concluded, nothing in this Chapter shall be construed in or of itself to alter in any manner the rights whatsoever of any States or any peoples or the terms of existing international instruments to which Members of the United Nations may respectively be parties."

59. A striking feature of this provision is the stipulation in favour of the preservation of the rights of "any peoples", thus clearly including the inhabitants of the mandated territories and, in particular, their indigenous populations. These rights were thus confirmed to have an existence independent of that of the League of Nations. The Court, in the 1950 Advisory Opinion on the *International Status of South-West Africa*, relied on this provision to reach the conclusion that "no such rights of the peoples could be effectively safeguarded without inter-

national supervision and a duty to render reports to a supervisory organ" (*I.C.J. Reports 1950*, p. 137). In 1956 the Court confirmed the conclusion that "the effect of Article 80 (1) of the Charter" was that of "preserving the rights of States and peoples" (*I.C.J. Reports 1956*, p. 27).

60. Article 80, paragraph 1, of the Charter was thus interpreted by the Court as providing that the system of replacement of mandates by trusteeship agreements, resulting from Chapter XII of the Charter, shall not "be construed in or of itself to alter in any manner the rights whatsoever of any States or any peoples".

61. The exception made in the initial words of the provision, "Except as may be agreed upon in individual trusteeship agreements, made under Articles 77, 79 and 81, placing each territory under the trusteeship system, and until such agreements have been concluded", established a particular method for changing the status quo of a mandate régime. This could be achieved only by means of a trusteeship agreement, unless the "sacred trust" had come to an end by the implementation of its objective, that is, the attainment of independent existence. In this way, by the use of the expression "until such agreements have been concluded", a legal hiatus between the two systems was obviated.

62. The final words of Article 80, paragraph 1, refer to "the terms of existing international instruments to which Members of the United Nations may respectively be parties". The records of the San Francisco Conference show that these words were inserted in replacement of the words "any mandate" in an earlier draft in order to preserve "any rights set forth in paragraph 4 of Article 22 of the Covenant of the League of Nations".

63. In approving this amendment and inserting these words in the report of Committee II/4, the States participating at the San Francisco Conference obviously took into account the fact that the adoption of the Charter of the United Nations would render the disappearance of the League of Nations inevitable. This shows the common understanding and intention at San Francisco that Article 80, paragraph 1, of the Charter had the purpose and effect of keeping in force all rights whatsoever, including those contained in the Covenant itself, against any claim as to their possible lapse with the dissolution of the League.

64. The demise of the League could thus not be considered as an unexpected supervening event entailing a possible termination of those rights, entirely alien to Chapter XII of the Charter and not foreseen by the safeguarding provisions of Article 80, paragraph 1. The Members of the League, upon effecting the dissolution of that organization, did not declare, or accept even by implication, that the mandates would be cancelled or lapse with the dissolution of the League. On the contrary,

paragraph 4 of the resolution on mandates of 18 April 1946 clearly assumed their continuation.

65. The Government of South Africa, in asking the Court to reappraise the 1950 Advisory Opinion, has argued that Article 80, paragraph 1, must be interpreted as a mere saving clause having a purely negative effect.

66. If Article 80, paragraph 1, were to be understood as a mere interpretative provision preventing the operation of Chapter XII from affecting any rights, then it would be deprived of all practical effect. There is nothing in Chapter XII—which, as interpreted by the Court in 1950, constitutes a framework for future agreements—susceptible of affecting existing rights of States or of peoples under the mandates system. Likewise, if paragraph 1 of Article 80 were to be understood as a mere saving clause, paragraph 2 of the same Article would have no purpose. This paragraph provides as follows:

> "2. Paragraph 1 of this Article shall not be interpreted as giving grounds for delay or postponement of the negotiation and conclusion of agreements for placing mandated and other territories under the trusteeship system as provided for in Article 77."

This provision was obviously intended to prevent a mandatory Power from invoking the preservation of its rights resulting from paragraph 1 as a ground for delaying or postponing what the Court described as "the normal course indicated by the Charter, namely, conclude Trusteeship Agreements" (*I.C.J. Reports 1950*, p. 140). No method of interpretation would warrant the conclusion that Article 80 as a whole is meaningless.

67. In considering whether negative effects only may be attributed to Article 80, paragraph 1, as contended by South Africa, account must be taken of the words at the end of Article 76 *(d)* of the Charter, which, as one of the basic objectives of the trusteeship system, ensures equal treatment in commercial matters for all Members of the United Nations and their nationals. The proviso "subject to the provisions of Article 80" was included at the San Francisco Conference in order to preserve the existing right of preference of the mandatory Powers in "C" mandates. The delegate of the Union of South Africa at the Conference had pointed out earlier that "the 'open door' had not previously applied to the 'C' mandates", adding that "his Government could not contemplate its application to their mandated territory". If Article 80, paragraph 1, had no conservatory and positive effects, and if the rights therein preserved could have been extinguished with the disappearance of the League of Nations, then the proviso in Article 76 *(d) in fine* would be deprived of any practical meaning.

68. The Government of South Africa has invoked as "new facts" not fully before the Court in 1950 a proposal introduced by the Chinese delegation at the final Assembly of the League of Nations and another submitted by the Executive Committee to the United Nations Preparatory Commission, both providing in explicit terms for the transfer of supervisory functions over mandates from the League of Nations to United Nations organs. It is argued that, since neither of these two proposals was adopted, no such transfer was envisaged.

69. The Court is unable to accept the argument advanced. The fact that a particular proposal is not adopted by an international organ does not necessarily carry with it the inference that a collective pronouncement is made in a sense opposite to that proposed. There can be many reasons determining rejection or non-approval. For instance, the Chinese proposal, which was never considered but was ruled out of order, would have subjected mandated territories to a form of supervision which went beyond the scope of the existing supervisory authority in respect of mandates, and could have raised difficulties with respect to Article 82 of the Charter. As to the establishment of a Temporary Trusteeship Committee, it was opposed because it was felt that the setting up of such an organ might delay the negotiation and conclusion of trusteeship agreements. Consequently two United States proposals, intended to authorize this Committee to undertake the functions previously performed by the Mandates Commission, could not be acted upon. The non-establishment of a temporary subsidiary body empowered to assist the General Assembly in the exercise of its supervisory functions over mandates cannot be interpreted as implying that the General Assembly lacked competence or could not itself exercise its functions in that field. On the contrary, the general assumption appeared to be that the supervisory functions over mandates previously performed by the League were to be exercised by the United Nations. Thus, in the discussions concerning the proposed setting-up of the Temporary Trusteeship Committee, no observation was made to the effect that the League's supervisory functions had not been transferred to the United Nations. Indeed, the South African representative at the United Nations Preparatory Commission declared on 29 November 1945 that "it seemed reasonable to create an interim body as the Mandates Commission was now in abeyance and countries holding mandates should have a body to which they could report".

70. The Government of South Africa has further contended that the provision in Article 80, paragraph 1, that the terms of "existing international instruments" shall not be construed as altered by anything in Chapter XII of the Charter, cannot justify the conclusion that the duty to report under the Mandate was transferred from the Council of the

League to the United Nations.

71. This objection fails to take into consideration Article 10 in Chapter IV of the Charter, a provision which was relied upon in the 1950 Opinion to justify the transference of supervisory powers from the League Council to the General Assembly of the United Nations. The Court then said:

> "The competence of the General Assembly of the United Nations to exercise such supervision and to receive and examine reports is derived from the provisions of Article 10 of the Charter, which authorizes the General Assembly to discuss any questions or any matters within the scope of the Charter and to make recommendations on these questions or matters to the Members of the United Nations." (*I.C.J. Reports 1950*, p. 137.)

72. Since a provision of the Charter—Article 80, paragraph 1—had maintained the obligations of the Mandatory, the United Nations had become the appropriate forum for supervising the fulfilment of those obligations. Thus, by virtue of Article 10 of the Charter, South Africa agreed to submit its administration of South West Africa to the scrutiny of the General Assembly, on the basis of the information furnished by the Mandatory or obtained from other sources. The transfer of the obligation to report, from the League Council to the General Assembly, was merely a corollary of the powers granted to the General Assembly. These powers were in fact exercised by it, as found by the Court in the 1950 Advisory Opinion. The Court rightly concluded in 1950 that—

> "... the General Assembly of the United Nations is legally qualified to exercise the supervisory functions previously exercised by the League of Nations with regard to the administration of the Territory, and that the Union of South Africa is under an obligation to submit to supervision and control of the General Assembly and to render annual reports to it" (*I.C.J. Reports 1950*, p. 137).

In its 1955 Advisory Opinion on *Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South-West Africa*, after recalling some passages from the 1950 Advisory Opinion, the Court stated:

> "Thus, the authority of the General Assembly to exercise supervision over the administration of South-West Africa as a mandated Territory is based on the provisions of the Charter." (*I.C.J. Reports 1955*, p. 76.)

In the 1956 Advisory Opinion on *Admissibility of Hearings of Petitioners by the Committee on South West Africa*, again after referring to certain passages from the 1950 Advisory Opinion, the Court stated:

"Accordingly, the obligations of the Mandatory continue unimpaired with this difference, that the supervisory functions exercised by the Council of the League of Nations are now to be exercised by the United Nations." (*I.C.J. Reports 1956*, p. 27.)

In the same Opinion the Court further stated:

"... the paramount purpose underlying the taking over by the General Assembly of the United Nations of the supervisory functions in respect of the Mandate for South West Africa formerly exercised by the Council of the League of Nations was to safeguard the sacred trust of civilization through the maintenance of effective international supervision of the administration of the Mandated Territory" (*ibid.*, p. 28).

* * *

73. With regard to the intention of the League, it is essential to recall that, at its last session, the Assembly of the League, by a resolution adopted on 12 April 1946, attributed to itself the responsibilities of the Council in the following terms:

"The Assembly, with the concurrence of all the Members of the Council which are represented at its present session: Decides that, so far as required, it will, during the present session, assume the functions falling within the competence of the Council."

Thereupon, before finally dissolving the League, the Assembly on 18 April 1946, adopted a resolution providing as follows for the continuation of the mandates and the mandates system:

"The Assembly . . .

. . . . . .

3. Recognises that, on the termination of the League's existence, its functions with respect to the mandated territories will come to an end, but notes that Chapters XI, XII and XIII of the Charter of the United Nations embody principles corresponding to those declared in Article 22 of the Covenant of the League;

4. Takes note of the expressed intentions of the Members of the League now administering territories under mandate to continue to administer them for the well-being and development of the peoples concerned in accordance with the obligations contained in the respective Mandates, until other arrangements have been agreed between the United Nations and the respective mandatory Powers."

As stated in the Court's 1962 Judgment:

> "... the League of Nations in ending its own existence did not terminate the Mandates but ... definitely intended to continue them by its resolution of 18 April 1946" (*I.C.J. Reports 1962*, p. 334).

74. That the Mandate had not lapsed was also admitted by the Government of South Africa on several occasions during the early period of transition, when the United Nations was being formed and the League dissolved. In particular, on 9 April 1946, the representative of South Africa, after announcing his Government's intention to transform South West Africa into an integral part of the Union, declared before the Assembly of the League:

> "In the meantime, the Union will continue to administer the territory scrupulously in accordance with the obligations of the Mandate, for the advancement and promotion of the interests of the inhabitants, as she has done during the past six years when meetings of the Mandates Commission could not be held.
>
> The disappearance of those organs of the League concerned with the supervision of mandates, primarily the Mandates Commission and the League Council, will necessarily preclude complete compliance with the letter of the Mandate. The Union Government will nevertheless regard the dissolution of the League as in no way diminishing its obligations under the Mandate, which it will continue to discharge with the full and proper appreciation of its responsibilities until such time as other arrangements are agreed upon concerning the future status of the territory."

The Court referred to this statement in its Judgment of 1962, finding that "there could be no clearer recognition on the part of the Government of South Africa of the continuance of its obligations under the Mandate after the dissolution of the League of Nations" (*I.C.J. Reports 1962*, p. 340).

75. Similar assurances were given on behalf of South Africa in a memorandum transmitted on 17 October 1946 to the Secretary-General of the United Nations, and in statements to the Fourth Committee of the General Assembly on 4 November and 13 November 1946. Referring to some of these and other assurances the Court stated in 1950: "These declarations constitute recognition by the Union Government of the continuance of its obligations under the Mandate and not a mere indication of the future conduct of that Government." (*I.C.J. Reports 1950*, p. 135.)

76. Even before the dissolution of the League, on 22 January 1946, the Government of the Union of South Africa had announced to the General Assembly of the United Nations its intention to ascertain the

views of the population of South West Africa, stating that "when that had been done, the decision of the Union would be submitted to the General Assembly for judgment". Thereafter, the representative of the Union of South Africa submitted a proposal to the Second Part of the First Session of the General Assembly in 1946, requesting the approval of the incorporation of South West Africa into the Union. On 14 December 1946 the General Assembly adopted resolution 65 (I) noting—

> ". . . *with satisfaction* that the Union of South Africa, by presenting this matter to the United Nations, recognizes the interest and concern of the United Nations in the matter of the future status of territories now held under mandate"

and declared that it was—

> ". . . *unable to accede* to the incorporation of the territory of South West Africa in the Union of South Africa".

The General Assembly, the resolution went on,

> "*Recommends* that the mandated territory of South West Africa be placed under the international trusteeship system and invites the Government of the Union of South Africa to propose for the consideration of the General Assembly a trusteeship agreement for the aforesaid Territory."

A year later the General Assembly, by resolution 141 (II) of 1 November 1947, took note of the South African Government's decision not to proceed with its plan for the incorporation of the Territory. As the Court stated in 1950:

> "By thus submitting the question of the future international status of the Territory to the 'judgment' of the General Assembly as the 'competent international organ', the Union Government recognized the competence of the General Assembly in the matter." (*I.C.J. Reports 1950*, p. 142.)

77. In the course of the following years South Africa's acts and declarations made in the United Nations in regard to South West Africa were characterized by contradictions. Some of these acts and declarations confirmed the recognition of the supervisory authority of the United Nations and South Africa's obligations towards it, while others clearly signified an intention to withdraw such recognition. It was only on 11 July 1949 that the South African Government addressed to the Secretary-General a letter in which it stated that it could "no longer see that any

real benefit is to be derived from the submission of special reports on South West Africa to the United Nations and [had] regretfully come to the conclusion that in the interests of efficient administration no further reports should be forwarded".

78. In the light of the foregoing review, there can be no doubt that, as consistently recognized by this Court, the Mandate survived the demise of the League, and that South Africa admitted as much for a number of years. Thus the supervisory element, an integral part of the Mandate, was bound to survive, and the Mandatory continued to be accountable for the performance of the sacred trust. To restrict the responsibility of the Mandatory to the sphere of conscience or of moral obligation would amount to conferring upon that Power rights to which it was not entitled, and at the same time to depriving the peoples of the Territory of rights which they had been guaranteed. It would mean that the Mandatory would be unilaterally entitled to decide the destiny of the people of South West Africa at its discretion. As the Court, referring to its Advisory Opinion of 1950, stated in 1962:

> "The findings of the Court on the obligation of the Union Government to submit to international supervision are thus crystal clear. Indeed, to exclude the obligations connected with the Mandate would be to exclude the very essence of the Mandate." (*I.C.J. Reports 1962*, p. 334.)

79. The cogency of this finding is well illustrated by the views presented on behalf of South Africa, which, in its final submissions in the *South West Africa* cases, presented as an alternative submission, "in the event of it being held that the Mandate as such continued in existence despite the dissolution of the League of Nations",

> ". . . that the Respondent's former obligations under the Mandate to report and account to, and to submit to the supervision, of the Council of the League of Nations, lapsed upon the dissolution of the League, and have not been replaced by any similar obligations relative to supervision by any organ of the United Nations or any other organization or body" (*I.C.J. Reports 1966*, p. 16).

The principal submission, however, had been:

> "That the whole Mandate for South West Africa lapsed on the dissolution of the League of Nations and that Respondent is, in consequence thereof, no longer subject to any legal obligations thereunder." *(Ibid.)*

80. In the present proceedings, at the public sitting of 15 March 1971, the representative of South Africa summed up his Government's position in the following terms:

> "Our contentions concerning the falling away of supervisory and accountability provisions are, accordingly, absolute and unqualified. On the other hand, our contentions concerning the possible lapse of the Mandate as a whole are secondary and consequential and depend on our primary contention that the supervision and the accountability provisions fell away on the dissolution of the League.
>
> In the present proceedings we accordingly make the formal submission that the Mandate has lapsed as a whole by reason of the falling away of supervision by the League, but for the rest we assume that the Mandate still continued . . .
>
> . . . on either hypothesis we contend that after dissolution of the League there no longer was any obligation to report and account under the Mandate."

He thus placed the emphasis on the "falling-away" of the "supervisory and accountability provisions" and treated "the possible lapse of the Mandate as a whole" as a "secondary and consequential" consideration.

81. Thus, by South Africa's own admission, "supervision and accountability" were of the essence of the Mandate, as the Court had consistently maintained. The theory of the lapse of the Mandate on the demise of the League of Nations is in fact inseparable from the claim that there is no obligation to submit to the supervision of the United Nations, and vice versa. Consequently, both or either of the claims advanced, namely that the Mandate has lapsed and/or that there is no obligation to submit to international supervision by the United Nations, are destructive of the very institution upon which the presence of South Africa in Namibia rests, for:

> "The authority which the Union Government exercises over the Territory is based on the Mandate. If the Mandate lapsed, as the Union Government contends, the latter's authority would equally have lapsed. To retain the rights derived from the Mandate and to deny the obligations thereunder could not be justified." (*I.C.J. Reports 1950*, p. 133; cited in *I.C.J. Reports 1962*, p. 333.)

82. Of this South Africa would appear to be aware, as is evidenced by its assertion at various times of other titles to justify its continued presence in Namibia, for example before the General Assembly on 5 October 1966:

"South Africa has for a long time contended that the Mandate is no longer legally in force, and that South Africa's right to administer the Territory is not derived from the Mandate but from military conquest, together with South Africa's openly declared and consistent practice of continuing to administer the Territory as a sacred trust towards the inhabitants."

In the present proceedings the representative of South Africa maintained on 15 March 1971:

". . . if it is accepted that the Mandate has lapsed, the South African Government would have the right to administer the Territory by reason of a combination of factors, being *(a)* its original conquest; *(b)* its long occupation; *(c)* the continuation of the sacred trust basis agreed upon in 1920; and, finally *(d)* because its administration is to the benefit of the inhabitants of the Territory and is desired by them. In these circumstances the South African Government cannot accept that any State or organization can have a better title to the Territory."

83. These claims of title, which apart from other considerations are inadmissible in regard to a mandated territory, lead by South Africa's own admission to a situation which vitiates the object and purpose of the Mandate. Their significance in the context of the sacred trust has best been revealed by a statement made by the representative of South Africa in the present proceedings on 15 March 1971: "it is the view of the South African Government that no legal provision prevents its annexing South West Africa." As the Court pointed out in its Advisory Opinion on the *International Status of South-West Africa*, "the principle of non-annexation" was "considered to be of paramount importance" when the future of South West Africa and other territories was the subject of decision after the First World War (*I.C.J. Reports 1950*, p. 131). What was in consequence excluded by Article 22 of the League Covenant is even less acceptable today.

* * *

84. Where the United Nations is concerned, the records show that, throughout a period of twenty years, the General Assembly, by virtue of the powers vested in it by the Charter, called upon the South African Government to perform its obligations arising out of the Mandate. On 9 February 1946 the General Assembly, by resolution 9 (I), invited all States administering territories held under mandate to submit trusteeship agreements. All, with the exception of South Africa, responded by placing the respective territories under the trusteeship system or offering

them independence. The General Assembly further made a special recommendation to this effect in resolution 65 (I) of 14 December 1946; on 1 November 1947, in resolution 141 (II), it "urged" the Government of the Union of South Africa to propose a trusteeship agreement; by resolution 227 (III) of 26 November 1948 it maintained its earlier recommendations. A year later, in resolution 337 (IV) of 6 December 1949, it expressed "regret that the Government of the Union of South Africa has withdrawn its previous undertaking to submit reports on its administration of the Territory of South West Africa for the information of the United Nations", reiterated its previous resolutions and invited South Africa "to resume the submission of such reports to the General Assembly". At the same time, in resolution 338 (IV), it addressed specific questions concerning the international status of South West Africa to this Court. In 1950, by resolution 449 (V) of 13 December, it accepted the resultant Advisory Opinion and urged the Government of the Union of South Africa "to take the necessary steps to give effect to the Opinion of the International Court of Justice". By the same resolution, it established a committee "to confer with the Union of South Africa concerning the procedural measures necessary for implementing the Advisory Opinion . . .". In the course of the ensuing negotiations South Africa continued to maintain that neither the United Nations nor any other international organization had succeeded to the supervisory functions of the League. The Committee, for its part, presented a proposal closely following the terms of the Mandate and providing for implementation "through the United Nations by a procedure as nearly as possible analogous to that which existed under the League of Nations, thus providing terms no more extensive or onerous than those which existed before". This procedure would have involved the submission by South Africa of reports to a General Assembly committee, which would further set up a special commission to take over the functions of the Permanent Mandates Commission. Thus the United Nations, which undoubtedly conducted the negotiations in good faith, did not insist on the conclusion of a trusteeship agreement; it suggested a system of supervision which "should not exceed that which applied under the Mandates System . . .". These proposals were rejected by South Africa, which refused to accept the principle of the supervision of its administration of the Territory by the United Nations.

85. Further fruitless negotiations were held from 1952 to 1959. In total, negotiations extended over a period of thirteen years, from 1946 to 1959. In practice the actual length of negotiations is no test of whether the possibilities of agreement have been exhausted; it may be sufficient to show that an early deadlock was reached and that one side adamantly refused compromise. In the case of Namibia (South West Africa) this

stage had patently been reached long before the United Nations finally abandoned its efforts to reach agreement. Even so, for so long as South Africa was the mandatory Power the way was still open for it to seek an arrangement. But that chapter came to an end with the termination of the Mandate.

86. To complete this brief summary of the events preceding the present request for advisory opinion, it must be recalled that in 1955 and 1956 the Court gave at the request of the General Assembly two further advisory opinions on matters concerning the Territory. Eventually the General Assembly adopted resolution 2145 (XXI) on the termination of the Mandate for South West Africa. Subsequently the Security Council adopted resolution 276 (1970), which declared the continued presence of South Africa in Namibia to be illegal and called upon States to act accordingly.

* * *

87. The Government of France in its written statement and the Government of South Africa throughout the present proceedings have raised the objection that the General Assembly, in adopting resolution 2145 (XXI), acted *ultra vires*.

88. Before considering this objection, it is necessary for the Court to examine the observations made and the contentions advanced as to whether the Court should go into this question. It was suggested that though the request was not directed to the question of the validity of the General Assembly resolution and of the related Security Council resolutions, this did not preclude the Court from making such an enquiry. On the other hand it was contended that the Court was not authorized by the terms of the request, in the light of the discussions preceding it, to go into the validity of these resolutions. It was argued that the Court should not assume powers of judicial review of the action taken by the other principal organs of the United Nations without specific request to that effect, nor act as a court of appeal from their decisions.

89. Undoubtedly, the Court does not possess powers of judicial review or appeal in respect of the decisions taken by the United Nations organs concerned. The question of the validity or conformity with the Charter of General Assembly resolution 2145 (XXI) or of related Security Council resolutions does not form the subject of the request for advisory opinion. However, in the exercise of its judicial function and since objections have been advanced the Court, in the course of its reasoning, will consider these objections before determining any legal consequences arising from those resolutions.

90. As indicated earlier, with the entry into force of the Charter of the United Nations a relationship was established between all Members of the United Nations on the one side, and each mandatory Power on the other. The mandatory Powers while retaining their mandates assumed,

under Article 80 of the Charter, vis-à-vis all United Nations Members, the obligation to keep intact and preserve, until trusteeship agreements were executed, the rights of other States and of the peoples of mandated territories, which resulted from the existing mandate agreements and related instruments, such as Article 22 of the Covenant and the League Council's resolution of 31 January 1923 concerning petitions. The mandatory Powers also bound themselves to exercise their functions of administration in conformity with the relevant obligations emanating from the United Nations Charter, which member States have undertaken to fulfil in good faith in all their international relations.

91. One of the fundamental principles governing the international relationship thus established is that a party which disowns or does not fulfil its own obligations cannot be recognized as retaining the rights which it claims to derive from the relationship.

92. The terms of the preamble and operative part of resolution 2145 (XXI) leave no doubt as to the character of the resolution. In the preamble the General Assembly declares itself "*Convinced* that the administration of the Mandated Territory by South Africa has been conducted in a manner contrary" to the two basic international instruments directly imposing obligations upon South Africa, the Mandate and the Charter of the United Nations, as well as to the Universal Declaration of Human Rights. In another paragraph of the preamble the conclusion is reached that, after having insisted with no avail upon performance for more than twenty years, the moment has arrived for the General Assembly to exercise the right to treat such violation as a ground for termination.

93. In paragraph 3 of the operative part of the resolution the General Assembly "*Declares* that South Africa has failed to fulfil its obligations in respect of the administration of the Mandated Territory and to ensure the moral and material well-being and security of the indigenous inhabitants of South West Africa and has, in fact, disavowed the Mandate". In paragraph 4 the decision is reached, as a consequence of the previous declaration "that the Mandate conferred upon His Britannic Majesty to be exercised on his behalf by the Government of the Union of South Africa is *therefore* terminated . . .". (Emphasis added.) It is this part of the resolution which is relevant in the present proceedings.

94. In examining this action of the General Assembly it is appropriate to have regard to the general principles of international law regulating termination of a treaty relationship on account of breach. For even if the mandate is viewed as having the character of an institution, as is maintained, it depends on those international agreements which created the system and regulated its application. As the Court indicated in 1962 "this Mandate, like practically all other similar Mandates" was "a special type of instrument composite in nature and instituting a novel international régime. It incorporates a definite agreement . . ." (*I.C.J. Reports 1962*, p. 331). The Court stated conclusively in that Judgment that the

Mandate ". . . in fact and in law, is an international agreement having the character of a treaty or convention" (*I.C.J. Reports 1962*, p. 330). The rules laid down by the Vienna Convention on the Law of Treaties concerning termination of a treaty relationship on account of breach (adopted without a dissenting vote) may in many respects be considered as a codification of existing customary law on the subject. In the light of these rules, only a material breach of a treaty justifies termination, such breach being defined as:

"*(a)* a repudiation of the treaty not sanctioned by the present Convention; or

(b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty" (Art. 60, para. 3).

95. General Assembly resolution 2145 (XXI) determines that both forms of material breach had occurred in this case. By stressing that South Africa "has, in fact, disavowed the Mandate", the General Assembly declared in fact that it had repudiated it. The resolution in question is therefore to be viewed as the exercise of the right to terminate a relationship in case of a deliberate and persistent violation of obligations which destroys the very object and purpose of that relationship.

* * *

96. It has been contended that the Covenant of the League of Nations did not confer on the Council of the League power to terminate a mandate for misconduct of the mandatory and that no such power could therefore be exercised by the United Nations, since it could not derive from the League greater powers than the latter itself had. For this objection to prevail it would be necessary to show that the mandates system, as established under the League, excluded the application of the general principle of law that a right of termination on account of breach must be presumed to exist in respect of all treaties, except as regards provisions relating to the protection of the human person contained in treaties of a humanitarian character (as indicated in Art. 60, para. 5, of the Vienna Convention). The silence of a treaty as to the existence of such a right cannot be interpreted as implying the exclusion of a right which has its source outside of the treaty, in general international law, and is dependent on the occurrence of circumstances which are not normally envisaged when a treaty is concluded.

97. The Government of South Africa has contended that it was the intention of the drafters of the mandates that they should not be revocable even in cases of serious breach of obligation or gross misconduct on the part of the mandatory. This contention seeks to draw support from the fact that at the Paris Peace Conference a resolution was adopted in which the proposal contained in President Wilson's draft of the Covenant regarding a right of appeal for the substitution of the mandatory was not

included. It should be recalled that the discussions at the Paris Peace Conference relied upon by South Africa were not directly addressed to an examination of President Wilson's proposals concerning the regulation of the mandates system in the League Covenant, and the participants were not contesting these particular proposals. What took place was a general exchange of views, on a political plane, regarding the questions of the disposal of the former German colonies and whether the principle of annexation or the mandatory principle should apply to them.

98. President Wilson's proposed draft did not include a specific provision for revocation, on the assumption that mandates were revocable. What was proposed was a special procedure reserving "to the people of any such territory or governmental unit the right to appeal to the League for the redress or correction of any breach of the mandate by the mandatory State or agency or for the substitution of some other State or agency, as mandatory". That this special right of appeal was not inserted in the Covenant cannot be interpreted as excluding the application of the general principle of law according to which a power of termination on account of breach, even if unexpressed, must be presumed to exist as inherent in any mandate, as indeed in any agreement.

99. As indicated earlier, at the Paris Peace Conference there was opposition to the institution of the mandates since a mandate would be inherently revocable, so that there would be no guarantee of long-term continuance of administration by the mandatory Power. The difficulties thus arising were eventually resolved by the assurance that the Council of the League would not interfere with the day-to-day administration of the territories and that the Council would intervene only in case of a fundamental breach of its obligations by the mandatory Power.

100. The revocability of a mandate was envisaged by the first proposal which was made concerning a mandates system:

> "In case of any flagrant and prolonged abuse of this trust the population concerned should be able to appeal for redress to the League, who should in a proper case assert its authority to the full, even to the extent of removing the mandate and entrusting it to some other State if necessary." (J. C. Smuts, *The League of Nations: A Practical Suggestion*, 1918, pp. 21-22.)

Although this proposal referred to different territories, the principle remains the same. The possibility of revocation in the event of gross violation of the mandate was subsequently confirmed by authorities on international law and members of the Permanent Mandates Commission

who interpreted and applied the mandates system under the League of Nations.

101. It has been suggested that, even if the Council of the League had possessed the power of revocation of the Mandate in an extreme case, it could not have been exercised unilaterally but only in co-operation with the mandatory Power. However, revocation could only result from a situation in which the Mandatory had committed a serious breach of the obligations it had undertaken. To contend, on the basis of the principle of unanimity which applied in the League of Nations, that in this case revocation could only take place with the concurrence of the Mandatory, would not only run contrary to the general principle of law governing termination on account of breach, but also postulate an impossibility. For obvious reasons, the consent of the wrongdoer to such a form of termination cannot be required.

102. In a further objection to General Assembly resolution 2145 (XXI) it is contended that it made pronouncements which the Assembly, not being a judicial organ, and not having previously referred the matter to any such organ, was not competent to make. Without dwelling on the conclusions reached in the 1966 Judgment in the *South West Africa* contentious cases, it is worth recalling that in those cases the applicant States, which complained of material breaches of substantive provisions of the Mandate, were held not to "possess any separate self-contained right which they could assert ... to require the due performance of the Mandate in discharge of the 'sacred trust' " (*I.C.J. Reports 1966*, pp. 29 and 51). On the other hand, the Court declared that: "... any divergences of view concerning the conduct of a mandate were regarded as being matters that had their place in the political field, the settlement of which lay between the mandatory and the competent organs of the League" (*ibid.*, p. 45). To deny to a political organ of the United Nations which is a successor of the League in this respect the right to act, on the argument that it lacks competence to render what is described as a judicial decision, would not only be inconsistent but would amount to a complete denial of the remedies available against fundamental breaches of an international undertaking.

103. The Court is unable to appreciate the view that the General Assembly acted unilaterally as party and judge in its own cause. In the 1966 Judgment in the *South West Africa* cases, referred to above, it was found that the function to call for the due execution of the relevant provisions of the mandate instruments appertained to the League acting as an entity through its appropriate organs. The right of the League "in the pursuit of its collective, institutional activity, to require the due performance of the Mandate in discharge of the 'sacred trust' ", was specifically recognized (*ibid.*, p. 29). Having regard to this finding, the United Nations as a successor to the League, acting through its competent organs, must be seen above all as the supervisory institution, competent to pronounce, in that capacity, on the conduct of the man-

datory with respect to its international obligations, and competent to act accordingly.

* * *

104. It is argued on behalf of South Africa that the consideration set forth in paragraph 3 of resolution 2145 (XXI) of the General Assembly, relating to the failure of South Africa to fulfil its obligations in respect of the administration of the mandated territory, called for a detailed factual investigation before the General Assembly could adopt resolution 2145 (XXI) or the Court pronounce upon its validity. The failure of South Africa to comply with the obligation to submit to supervision and to render reports, an essential part of the Mandate, cannot be disputed in the light of determinations made by this Court on more occasions than one. In relying on these, as on other findings of the Court in previous proceedings concerning South West Africa, the Court adheres to its own jurisprudence.

* * *

105. General Assembly resolution 2145 (XXI), after declaring the termination of the Mandate, added in operative paragraph 4 "that South Africa has no other right to administer the Territory". This part of the resolution has been objected to as deciding a transfer of territory. That in fact is not so. The pronouncement made by the General Assembly is based on a conclusion, referred to earlier, reached by the Court in 1950:

> "The authority which the Union Government exercises over the Territory is based on the Mandate. If the Mandate lapsed, as the Union Government contends, the latter's authority would equally have lapsed." (*I.C.J. Reports 1950*, p. 133.)

This was confirmed by the Court in its Judgment of 21 December 1962 in the *South West Africa* cases (Ethiopia *v.* South Africa; Liberia *v.* South Africa) (*I.C.J. Reports 1962*, p. 333). Relying on these decisions of the Court, the General Assembly declared that the Mandate having been terminated "South Africa has no other right to administer the Territory". This is not a finding on facts, but the formulation of a legal situation. For it would not be correct to assume that, because the General Assembly is in principle vested with recommendatory powers, it is debarred from adopting, in specific cases within the framework of its competence, resolutions which make determinations or have operative design.

* * *

106. By resolution 2145 (XXI) the General Assembly terminated the Mandate. However, lacking the necessary powers to ensure the withdrawal of South Africa from the Territory, it enlisted the co-operation of the Security Council by calling the latter's attention to the resolution, thus acting in accordance with Article 11, paragraph 2, of the Charter.

107. The Security Council responded to the call of the General Assembly. It "took note" of General Assembly resolution 2145 (XXI) in the preamble of its resolution 245 (1968); it took it "into account" in resolution 246 (1968); in resolutions 264 (1969) and 269 (1969) it adopted certain measures directed towards the implementation of General Assembly resolution 2145 (XXI) and, finally, in resolution 276 (1970), it reaffirmed resolution 264 (1969) and recalled resolution 269 (1969).

108. Resolution 276 (1970) of the Security Council, specifically mentioned in the text of the request, is the one essential for the purposes of the present advisory opinion. Before analysing it, however, it is necessary to refer briefly to resolutions 264 (1969) and 269 (1969), since these two resolutions have, together with resolution 276 (1970), a combined and a cumulative effect. Resolution 264 (1969), in paragraph 3 of its operative part, calls upon South Africa to withdraw its administration from Namibia immediately. Resolution 269 (1969), in view of South Africa's lack of compliance, after recalling the obligations of Members under Article 25 of the Charter, calls upon the Government of South Africa, in paragraph 5 of its operative part, "to withdraw its administration from the territory immediately and in any case before 4 October 1969". The preamble of resolution 276 (1970) reaffirms General Assembly resolution 2145 (XXI) and espouses it, by referring to the decision, not merely of the General Assembly, but of the United Nations "that the Mandate of South-West Africa was terminated". In the operative part, after condemning the non-compliance by South Africa with General Assembly and Security Council resolutions pertaining to Namibia, the Security Council declares, in paragraph 2, that "the continued presence of the South African authorities in Namibia is illegal" and that consequently all acts taken by the Government of South Africa "on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid". In paragraph 5 the Security Council "*Calls upon* all States, particularly those which have economic and other interests in Namibia, to refrain from any dealings with the Government of South Africa which are inconsistent with operative paragraph 2 of this resolution".

109. It emerges from the communications bringing the matter to the Security Council's attention, from the discussions held and particularly from the text of the resolutions themselves, that the Security Council, when it adopted these resolutions, was acting in the exercise of what it deemed to be its primary responsibility, the maintenance of peace and security, which, under the Charter, embraces situations which might

lead to a breach of the peace. (Art. 1, para. 1.) In the preamble of resolution 264 (1969) the Security Council was "*Mindful* of the grave consequences of South Africa's continued occupation of Namibia" and in paragraph 4 of that resolution it declared "that the actions of the Government of South Africa designed to destroy the national unity and territorial integrity of Namibia through the establishment of Bantustans are contrary to the provisions of the United Nations Charter". In operative paragraph 3 of resolution 269 (1969) the Security Council decided "that the continued occupation of the territory of Namibia by the South African authorities constitutes an aggressive encroachment on the authority of the United Nations, . . .". In operative paragraph 3 of resolution 276 (1970) the Security Council declared further "that the defiant attitude of the Government of South Africa towards the Council's decisions undermines the authority of the United Nations".

110. As to the legal basis of the resolution, Article 24 of the Charter vests in the Security Council the necessary authority to take action such as that taken in the present case. The reference in paragraph 2 of this Article to specific powers of the Security Council under certain chapters of the Charter does not exclude the existence of general powers to discharge the responsibilities conferred in paragraph 1. Reference may be made in this respect to the Secretary-General's Statement, presented to the Security Council on 10 January 1947, to the effect that "the powers of the Council under Article 24 are not restricted to the specific grants of authority contained in Chapters VI, VII, VIII and XII ... the Members of the United Nations have conferred upon the Security Council powers commensurate with its responsibility for the maintenance of peace and security. The only limitations are the fundamental principles and purposes found in Chapter I of the Charter."

111. As to the effect to be attributed to the declaration contained in paragraph 2 of resolution 276 (1970), the Court considers that the qualification of a situation as illegal does not by itself put an end to it. It can only be the first, necessary step in an endeavour to bring the illegal situation to an end.

112. It would be an untenable interpretation to maintain that, once such a declaration had been made by the Security Council under Article 24 of the Charter, on behalf of all member States, those Members would be free to act in disregard of such illegality or even to recognize violations of law resulting from it. When confronted with such an internationally unlawful situation, Members of the United Nations would be expected to act in consequence of the declaration made on their behalf. The question therefore arises as to the effect of this decision of the Security Council for States Members of the United Nations in accordance with Article 25 of the Charter.

113. It has been contended that Article 25 of the Charter applies only

to enforcement measures adopted under Chapter VII of the Charter. It is not possible to find in the Charter any support for this view. Article 25 is not confined to decisions in regard to enforcement action but applies to "the decisions of the Security Council" adopted in accordance with the Charter. Moreover, that Article is placed, not in Chapter VII, but immediately after Article 24 in that part of the Charter which deals with the functions and powers of the Security Council. If Article 25 had reference solely to decisions of the Security Council concerning enforcement action under Articles 41 and 42 of the Charter, that is to say, if it were only such decisions which had binding effect, then Article 25 would be superfluous, since this effect is secured by Articles 48 and 49 of the Charter.

114. It has also been contended that the relevant Security Council resolutions are couched in exhortatory rather than mandatory language and that, therefore, they do not purport to impose any legal duty on any State nor to affect legally any right of any State. The language of a resolution of the Security Council should be carefully analysed before a conclusion can be made as to its binding effect. In view of the nature of the powers under Article 25, the question whether they have been in fact exercised is to be determined in each case, having regard to the terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution of the Security Council.

115. Applying these tests, the Court recalls that in the preamble of resolution 269 (1969), the Security Council was "*Mindful* of its responsibility to take necessary action to secure strict compliance with the obligations entered into by States Members of the United Nations under the provisions of Article 25 of the Charter of the United Nations". The Court has therefore reached the conclusion that the decisions made by the Security Council in paragraphs 2 and 5 of resolutions 276 (1970), as related to paragraph 3 of resolution 264 (1969) and paragraph 5 of resolution 269 (1969), were adopted in conformity with the purposes and principles of the Charter and in accordance with its Articles 24 and 25. The decisions are consequently binding on all States Members of the United Nations, which are thus under obligation to accept and carry them out.

116. In pronouncing upon the binding nature of the Security Council decisions in question, the Court would recall the following passage in its Advisory Opinion of 11 April 1949 on *Reparation for Injuries Suffered in the Service of the United Nations*:

> "The Charter has not been content to make the Organization created by it merely a centre 'for harmonizing the actions of nations in the attainment of these common ends' (Article 1, para. 4). It has equipped that centre with organs, and has given it special tasks. It has defined the position of the Members in relation to the Organization

by requiring them to give it every assistance in any action undertaken by it (Article 2, para. 5), and to accept and carry out the decisions of the Security Council." (*I.C.J. Reports 1949*, p. 178.)

Thus when the Security Council adopts a decision under Article 25 in accordance with the Charter, it is for member States to comply with that decision, including those members of the Security Council which voted against it and those Members of the United Nations who are not members of the Council. To hold otherwise would be to deprive this principal organ of its essential functions and powers under the Charter.

* * *

117. Having reached these conclusions, the Court will now address itself to the legal consequences arising for States from the continued presence of South Africa in Namibia, notwithstanding Security Council resolution 276 (1970). A binding determination made by a competent organ of the United Nations to the effect that a situation is illegal cannot remain without consequence. Once the Court is faced with such a situation, it would be failing in the discharge of its judicial functions if it did not declare that there is an obligation, especially upon Members of the United Nations, to bring that situation to an end. As this Court has held, referring to one of its decisions declaring a situation as contrary to a rule of international law: "This decision entails a legal consequence, namely that of putting an end to an illegal situation" (*I.C.J. Reports 1951*, p. 82).

118. South Africa, being responsible for having created and maintained a situation which the Court has found to have been validly declared illegal, has the obligation to put an end to it. It is therefore under obligation to withdraw its administration from the Territory of Namibia. By maintaining the present illegal situation, and occupying the Territory without title, South Africa incurs international responsibilities arising from a continuing violation of an international obligation. It also remains accountable for any violations of its international obligations, or of the rights of the people of Namibia. The fact that South Africa no longer has any title to administer the Territory does not release it from its obligations and responsibilities under international law towards other States in respect of the exercise of its powers in relation to this Territory. Physical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States.

119. The member States of the United Nations are, for the reasons given in paragraph 115 above, under obligation to recognize the illegality and invalidity of South Africa's continued presence in Namibia. They are also under obligation to refrain from lending any support or any form of assistance to South Africa with reference to its occupation of Namibia, subject to paragraph 125 below.

120. The precise determination of the acts permitted or allowed—what measures are available and practicable, which of them should be selected, what scope they should be given and by whom they should be applied—is a matter which lies within the competence of the appropriate political organs of the United Nations acting within their authority under the Charter. Thus it is for the Security Council to determine any further measures consequent upon the decisions already taken by it on the question of Namibia. In this context the Court notes that at the same meeting of the Security Council in which the request for advisory opinion was made, the Security Council also adopted resolution 283 (1970) which defined some of the steps to be taken. The Court has not been called upon to advise on the legal effects of that resolution.

121. The Court will in consequence confine itself to giving advice on those dealings with the Government of South Africa which, under the Charter of the United Nations and general international law, should be considered as inconsistent with the declaration of illegality and invalidity made in paragraph 2 of resolution 276 (1970), because they may imply a recognition that South Africa's presence in Namibia is legal.

122. For the reasons given above, and subject to the observations contained in paragraph 125 below, member States are under obligation to abstain from entering into treaty relations with South Africa in all cases in which the Government of South Africa purports to act on behalf of or concerning Namibia. With respect to existing bilateral treaties, member States must abstain from invoking or applying those treaties or provisions of treaties concluded by South Africa on behalf of or concerning Namibia which involve active intergovernmental co-operation. With respect to multilateral treaties, however, the same rule cannot be applied to certain general conventions such as those of a humanitarian character, the non-performance of which may adversely affect the people of Namibia. It will be for the competent international organs to take specific measures in this respect.

123. Member States, in compliance with the duty of non-recognition imposed by paragraphs 2 and 5 of resolution 276 (1970), are under obligation to abstain from sending diplomatic or special missions to South Africa including in their jurisdiction the Territory of Namibia, to abstain from sending consular agents to Namibia, and to withdraw any such agents already there. They should also make it clear to the South African authorities that the maintenance of diplomatic or consular relations with South Africa does not imply any recognition of its authority with regard to Namibia.

124. The restraints which are implicit in the non-recognition of South Africa's presence in Namibia and the explicit provisions of paragraph 5 of resolution 276 (1970) impose upon member States the obligation to abstain from entering into economic and other forms of relationship

or dealings with South Africa on behalf of or concerning Namibia which may entrench its authority over the Territory.

125. In general, the non-recognition of South Africa's administration of the Territory should not result in depriving the people of Namibia of any advantages derived from international co-operation. In particular, while official acts performed by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid, this invalidity cannot be extended to those acts, such as, for instance, the registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the Territory.

126. As to non-member States, although not bound by Articles 24 and 25 of the Charter, they have been called upon in paragraphs 2 and 5 of resolution 276 (1970) to give assistance in the action which has been taken by the United Nations with regard to Namibia. In the view of the Court, the termination of the Mandate and the declaration of the illegality of South Africa's presence in Namibia are opposable to all States in the sense of barring *erga omnes* the legality of a situation which is maintained in violation of international law: in particular, no State which enters into relations with South Africa concerning Namibia may expect the United Nations or its Members to recognize the validity or effects of such relationship, or of the consequences thereof. The Mandate having been terminated by decision of the international organization in which the supervisory authority over its administration was vested, and South Africa's continued presence in Namibia having been declared illegal, it is for non-member States to act in accordance with those decisions.

127. As to the general consequences resulting from the illegal presence of South Africa in Namibia, all States should bear in mind that the injured entity is a people which must look to the international community for assistance in its progress towards the goals for which the sacred trust was instituted.

* * *

128. In its oral statement and in written communications to the Court, the Government of South Africa expressed the desire to supply the Court with further factual information concerning the purposes and objectives of South Africa's policy of separate development or *apartheid*, contending that to establish a breach of South Africa's substantive international obligations under the Mandate it would be necessary to prove that a particular exercise of South Africa's legislative or administrative powers was not directed in good faith towards the purpose of promoting to the utmost the well-being and progress of the inhabitants. It is claimed by the Government of South Africa that no act or omission on its part would constitute a violation of its international obligations unless it is

shown that such act or omission was actuated by a motive, or directed towards a purpose other than one to promote the interests of the inhabitants of the Territory.

129. The Government of South Africa having made this request, the Court finds that no factual evidence is needed for the purpose of determining whether the policy of *apartheid* as applied by South Africa in Namibia is in conformity with the international obligations assumed by South Africa under the Charter of the United Nations. In order to determine whether the laws and decrees applied by South Africa in Namibia, which are a matter of public record, constitute a violation of the purposes and principles of the Charter of the United Nations, the question of intent or governmental discretion is not relevant; nor is it necessary to investigate or determine the effects of those measures upon the welfare of the inhabitants.

130. It is undisputed, and is amply supported by documents annexed to South Africa's written statement in these proceedings, that the official governmental policy pursued by South Africa in Namibia is to achieve a complete physical separation of races and ethnic groups in separate areas within the Territory. The application of this policy has required, as has been conceded by South Africa, restrictive measures of control officially adopted and enforced in the Territory by the coercive power of the former Mandatory. These measures establish limitations, exclusions or restrictions for the members of the indigenous population groups in respect of their participation in certain types of activities, fields of study or of training, labour or employment and also submit them to restrictions or exclusions of residence and movement in large parts of the Territory.

131. Under the Charter of the United Nations, the former Mandatory had pledged itself to observe and respect, in a territory having an international status, human rights and fundamental freedoms for all without distinction as to race. To establish instead, and to enforce, distinctions, exclusions, restrictions and limitations exclusively based on grounds of race, colour, descent or national or ethnic origin which constitute a denial of fundamental human rights is a flagrant violation of the purposes and principles of the Charter.

* * *

132. The Government of South Africa also submitted a request that a plebiscite should be held in the Territory of Namibia under the joint supervision of the Court and the Government of South Africa (para. 16 above). This proposal was presented in connection with the request to submit additional factual evidence and as a means of bringing evidence before the Court. The Court having concluded that no further evidence

was required, that the Mandate was validly terminated and that in consequence South Africa's presence in Namibia is illegal and its acts on behalf of or concerning Namibia are illegal and invalid, it follows that it cannot entertain this proposal.

* * *

133. For these reasons,

THE COURT IS OF OPINION,

in reply to the question:

> "What are the legal consequences for States of the continued presence of South Africa in Namibia, notwithstanding Security Council resolution 276 (1970)?"

by 13 votes to 2,

(1) that, the continued presence of South Africa in Namibia being illegal, South Africa is under obligation to withdraw its administration from Namibia immediately and thus put an end to its occupation of the Territory;

by 11 votes to 4,

(2) that States Members of the United Nations are under obligation to recognize the illegality of South Africa's presence in Namibia and the invalidity of its acts on behalf of or concerning Namibia, and to refrain from any acts and in particular any dealings with the Government of South Africa implying recognition of the legality of, or lending support or assistance to, such presence and administration;

(3) that it is incumbent upon States which are not Members of the United Nations to give assistance, within the scope of subparagraph (2) above, in the action which has been taken by the United Nations with regard to Namibia.

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

(Signed) ZAFRULLA KHAN,
President.

(Signed) S. AQUARONE,
Registrar.

President Sir Muhammad ZAFRULLA KHAN makes the following declaration:

I am in entire agreement with the Opinion of the Court but would wish to add some observations on two or three aspects of the presentation made to the Court on behalf of South Africa.

It was contended that under the supervisory system as devised in the Covenant of the League and the different mandate agreements, the mandatory could, in the last resort, flout the wishes of the Council of the League by casting its vote in opposition to the directions which the Council might propose to give to the mandatory. The argument runs that this system was deliberately so devised, with open eyes, as to leave the Council powerless in face of the veto of the mandatory if the latter chose to exercise it. In support of this contention reliance was placed on paragraph 5 of Article 4 of the Covenant of the League by virtue of which any Member of the League not represented on the Council was to be invited to send a representative to sit as a member at any meeting of the Council during the consideration of matters specially affecting the interests of that Member. This entitled the mandatory to sit as a member at any meeting of the Council in which a matter affecting its interests as a mandatory came under consideration. Under paragraph 1 of Article 5 of the Covenant decisions of the Council required the agreement of all the Members of the League represented at the meeting. This is known as the unanimity rule and by virtue thereof it was claimed that a mandatory possessed a right of veto when attending a meeting of the Council in pursuance of paragraph 5 of Article 4 and consequently the last word on the manner and method of the administration of the mandate rested with the mandatory. This contention is untenable. Were it well founded it would reduce the whole system of mandates to mockery. As the Court, in its Judgment of 1966, observed:

> "In practice, the unanimity rule was frequently not insisted upon, or its impact was mitigated by a process of give-and-take, and by various procedural devices to which both the Council and the mandatories lent themselves. So far as the Court's information goes, there never occurred any case in which a mandatory 'vetoed' what would otherwise have been a Council decision. Equally, however, much trouble was taken to avoid situations in which the mandatory would have been forced to acquiesce in the views of the rest of the Council short of casting an adverse vote. The occasional deliberate absence of the mandatory from a meeting, enabled decisions to be taken that the mandatory might have felt obliged to vote against if it had been present. This was part of the above-mentioned process for arriving at generally acceptable conclusions." (*I.C.J. Reports 1966*, pp. 44-45.)

The representative of South Africa, in answer to a question by a Member of the Court, confessed that there was not a single case on record in which the representative of a mandatory Power ever cast a negative vote in a meeting of the Council so as to block a decision of the Council. It is thus established that in practice the last word always rested with the Council of the League and not with the mandatory.

The Covenant of the League made ample provision to secure the effectiveness of the Covenant and conformity to its provisions in respect of the obligations entailed by membership of the League. A Member of the League which had violated any covenant of the League could be declared to be no longer a Member of the League by a vote of the Council concurred in by the representatives of all the other Members of the League represented thereon (para. 4, Art. 16, of the Covenant).

The representative of South Africa conceded that:

> ". . . if a conflict between a mandatory and the Council occurred and if all the Members of the Council were of the opinion that the mandatory had violated a covenant of the League, it would have been legally possible for the Council to expel the mandatory from the League and thereafter decisions of the Council could no longer be thwarted by the particular mandatory—for instance, a decision to revoke the mandate. The mandatory would then no longer be a Member of the League and would then accordingly no longer be entitled to attend and vote in Council meetings.
> . . . we agree that by expelling a mandatory the Council could have overcome the practical or mechanical difficulties created by the unanimity requirement." (Hearing of 15 March 1971.)

It was no doubt the consciousness of this position which prompted the deliberate absence of a mandatory from a meeting of the Council of the League which enabled the Council to take decisions that the mandatory might have felt obliged to vote against if it had been present.

If a mandatory ceased to be a Member of the League and the Council felt that the presence of its representative in a meeting of the Council dealing with matters affecting the mandate would be helpful, it could still be invited to attend as happened in the case of Japan after it ceased to be a Member of the League. But it could not attend as of right under paragraph 5 of Article 4 of the Covenant.

In addition, if need arose the Covenant could be amended under Article 26 of the Covenant. In fact no such need arose but the authority was provided in the Covenant. It would thus be idle to contend that the mandates system was deliberately devised, with open eyes, so as to leave the Council of the League powerless against the veto of the mandatory if the latter chose to exercise it.

Those responsible for the Covenant were anxious and worked hard

to institute a system which would be effective in carrying out to the full the sacred trust of civilization. Had they deliberately devised a framework which might enable a mandatory so inclined to defy the system with impunity, they would have been guilty of defeating the declared purpose of the mandates system and this is not to be thought of; nor is it to be imagined that these wise statesmen, despite all the care that they took and the reasoning and persuasion that they brought into play, were finally persuaded into accepting as reality that which could so easily be turned into a fiction.

* * *

In my view the supervisory authority of the General Assembly of the United Nations in respect of the mandated territory, being derived from the Covenant of the League and the Mandate Agreement, is not restricted by any provision of the Charter of the United Nations. The extent of that authority must be determined by reference to the relevant provisions of the Covenant of the League and the Mandate Agreement. The General Assembly was entitled to exercise the same authority in respect of the administration of the Territory by the Mandatory as was possessed by the Council of the League and its decisions and determinations in that respect had the same force and effect as the decisions and determinations of the Council of the League. This was well illustrated in the case of General Assembly resolution 289 (IV), adopted on 21 November 1949 recommending that Libya shall become independent as soon as possible and in any case not later than 1 January 1952. A detailed procedure for the achievement of this objective was laid down, including the appointment by the General Assembly of a United Nations Commissioner in Libya and a Council to aid and advise him, etc. All the recommendations contained in this resolution constituted binding decisions; decisions which had been adopted in accordance with the provisions of the Charter but whose binding character was derived from Annex XI to the Treaty of Peace with Italy.

* * *

The representative of South Africa, during the course of his oral submission, refrained from using the expression "*apartheid*" but urged:

> "... South Africa is in the position that its conduct would be unlawful if the differentiation which it admittedly practises should be directed at, and have the result of subordinating the interests of one or certain groups on a racial or ethnic basis to those of others, ... If that can be established in fact, then South Africa would be guilty of violation of its obligations in that respect, otherwise not." (Hearing of 17 March 1971.)

The policy of *apartheid* was initiated by Prime Minister Malan and was then vigorously put into effect by his successors, Strijdom and Verwoerd. It has been continuously proclaimed that the purpose and object of the policy are the maintenance of White domination. Speaking to the South African House of Assembly, as late as 1963, Dr. Verwoerd said:

> "Reduced to its simplest form the problem is nothing else than this: We want to keep South Africa White . . . Keeping it White can only mean one thing, namely, White domination, not leadership, not guidance, but control, supremacy. If we are agreed that it is the desire of the people that the White man should be able to continue to protect himself by White domination . . . we say that it can be achieved by separate development." (*I.C.J. Pleadings, South West Africa*, Vol. IV, p. 264.)

South Africa's reply to this in its Rejoinder in the 1966 cases was in effect that these and other similar pronouncements were qualified by "the promise to provide separate homelands for the Bantu groups" wherein the Bantu would be free to develop his capacities to the same degree as the White could do in the rest of the country. But this promise itself was always subject to the qualification that the Bantu homelands would develop under the guardianship of the White. In this connection it was urged that in 1961 the "Prime Minister spoke of a greater degree of ultimate independence for Bantu homelands than he had mentioned a decade earlier". This makes little difference in respect of the main purpose of the policy which continued to be the domination of the White.

It needs to be remembered, however, that the Court is not concerned in these proceedings with conditions in South Africa. The Court is concerned with the administration of South West Africa as carried on by the Mandatory in discharge of his obligations under the Mandate which prescribed that the well-being and development of people who were not yet able to stand by themselves under the strenuous conditions of the modern world constituted a sacred trust of civilization and that the best method of giving effect to this principle was that the tutelage of such peoples should be entrusted to advanced nations who, by reason of their resources, their experience and their geographical position could best undertake this responsibility (Art. 22, paras. 1 and 2, of the Covenant of the League of Nations).

The administration was to be carried on "in the interests of the indigenous population" (para. 6, Art. 22). For the discharge of this obligation it is not enough that the administration should believe in good faith that the policy it proposes to follow is in the best interests of all sections of the population. The supervisory authority must be satisfied that it is in the

best interests of the indigenous population of the Territory. This follows from Article 6 of the Mandate Agreement for South West Africa, read with paragraph 6 of Article 22 of the Covenant.

The representative of South Africa, while admitting the right of the people of South West Africa to self-determination, urged in his oral statement that the exercise of that right must take into full account the limitations imposed, according to him, on such exercise by the tribal and cultural divisions in the Territory. He concluded that in the case of South West Africa self-determination "may well find itself practically restricted to some kind of autonomy and local self-government within a larger arrangement of co-operation" (hearing of 17 March 1971). This in effect means a denial of self-determination as envisaged in the Charter of the United Nations.

Whatever may have been the conditions in South Africa calling for special measures, those conditions did not exist in the case of South West Africa at the time when South Africa assumed the obligation of a mandatory in respect of the Territory, nor have they come into existence since. In South West Africa the small White element was not and is not indigenous to the Territory. There can be no excuse in the case of South West Africa for the application of the policy of *apartheid* so far as the interests of the White population are concerned. It is claimed, however, that the various indigenous groups of the population have reached different stages of development and that there are serious ethnic considerations which call for the application of the policy of separate development of each group. The following observations of the Director of the Institute of Race Relations, London, are apposite in this context:

> "... White South African arguments are based on the different stages of development reached by various groups of people. It is undisputed fact that groups have developed at different paces in respect of the control of environment (although understanding of other aspects of life has not always grown at the same pace). But the aspect of South African thought which is widely questioned elsewhere is the assumption that an individual is permanently limited by the limitations of his group. His ties with it may be strong; indeed, when considering politics and national survival, the assumption that they will be strong is altogether reasonable. Again, as a matter of choice, people may prefer to mix socially with those of their own group, but to say that by law people of one group must mix with no others can really only proceed from a conviction not only that the other groups are inferior but that every member of each of the other groups is permanently and irremediably inferior. It is this that rankles. 'Separate but equal' is possible so long as it is a matter of choice by both parties; legally imposed by one, it must be regarded by the other as a humiliation, and far more so if it applies not only

to the group as a whole but to individuals. In fact, of course, what separate development has meant has been anything but equal.

These are some reasons why it will be hard to find natives of Africa who believe that to extend the policy of separate development to South West Africa even more completely than at present is in the interest of any but the White inhabitants." (Quoted in *I.C.J. Pleadings, South West Africa*, Vol. IV, p. 339.)

* * *

Towards the close of his oral presentation the representative of South Africa made a plea to the Court in the following terms:

"In our submission, the general requirement placed by the Charter on all United Nations activities is that they must further peace, friendly relations, and co-operation between nations, and especially between member States. South Africa, as a member State, is under a duty to contribute towards those ends, and she desires to do so, although she has no intention of abdicating what she regards as her responsibilities on the sub-continent of southern Africa.

If there are to be genuine efforts at achieving a peaceful solution, they will have to satisfy certain criteria. They will have to respect the will of the self-determining peoples of South West Africa. They will have to take into account the facts of geography, of economics, of budgetary requirements, of the ethnic conditions and of the state of development.

If this Court, even in an opinion on legal questions, could indicate the road towards a peaceful and constructive solution along these lines, then the Court would have made a great contribution, in our respectful submission, to the cause of international peace and security and, more, to the cause of friendly relations amongst not only the nations but amongst all men." (Hearing of 5 March 1971.)

The representative of the United States of America, in his oral presentation, observed that:

". . . the question of holding a free and proper plebiscite under appropriate auspices and with conditions and arrangements which would ensure a fair and informed expression of the will of the people of Namibia deserves study. It is a matter which might be properly submitted to the competent political organs of the United Nations, which have consistently manifested their concern that the

Namibians achieve self-determination. The Court may wish to so indicate in its opinion to the Security Council." (Hearing of 9 March 1971.)

The Court having arrived at the conclusion that the Mandate has been terminated and that the presence of South Africa in South West Africa is illegal, I would, in response to the plea made by the representative of South Africa, suggest that South Africa should offer to withdraw its administration from South West Africa in consultation with the United Nations so that a process of withdrawal and substitution in its place of United Nations' control may be agreed upon and carried into effect with the minimum disturbance of present administrative arrangements. It should also be agreed upon that, after the expiry of a certain period but not later than a reasonable time-limit thereafter, a plebiscite may be held under the supervision of the United Nations, which should ensure the freedom and impartiality of the plebiscite, to ascertain the wishes of the inhabitants of the Territory with regard to their political future. If the result of the plebiscite should reveal a clear preponderance of views in support of a particular course and objective, that course should be adopted so that the desired objective may be achieved as early as possible.

South Africa's insistence upon giving effect to the will of the peoples of South West Africa proceeds presumably from the conviction that an overwhelming majority of the peoples of the Territory desire closer political integration with the Republic of South Africa. Should that prove in fact to be the case the United Nations, being wholly committed to the principle of self-determination of peoples, would be expected to readily give effect to the clearly expressed wishes of the peoples of the Territory. Should the result of the plebiscite disclose their preference for a different solution, South Africa should equally readily accept and respect such manifestation of the will of the peoples concerned and should co-operate with the United Nations in giving effect to it.

The Government of South Africa, being convinced that an overwhelming majority of the peoples of South West Africa truly desire incorporation with the Republic, would run little risk of a contrary decision through the adoption of the procedure here suggested. If some such procedure is adopted and the conclusion that may emerge therefrom, whatever it may prove to be, is put into effect, South Africa would have vindicated itself in the eyes of the world and in the estimation of the peoples of South West Africa, whose freely expressed wishes must be supreme. There would still remain the possibility, and, if South Africa's estimation of the situation is close enough to reality, the strong probability, that once the peoples of South West Africa have been put in a position to manage their own affairs without any outside influence or control and they have had greater experience of the difficulties and problems with which they would be confronted, they may freely decide, in the exercise of their sovereignty, to establish a closer political relationship with South Africa. The adoption

of the course here suggested would indeed make a great contribution "to the cause of international peace and security and, more, to the cause of friendly relations amongst not only the nations but amongst all men".

Vice-President AMMOUN and Judges PADILLA NERVO, PETRÉN, ONYEAMA, DILLARD and DE CASTRO append separate opinions to the Opinion of the Court.

Judges Sir Gerald FITZMAURICE and GROS append dissenting opinions to the Opinion of the Court.

(Initialled) Z.K.
(Initialled) S.A.

Annex 676

The Territorial Dispute (Libya Arab Jamahiriya/Chad), Judgment of 3 February 1994, I.C.J. Reports 1994, p. 6

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRE
DU DIFFÉREND TERRITORIAL

(JAMAHIRIYA ARABE LIBYENNE/TCHAD)

ARRÊT DU 3 FÉVRIER 1994

1994

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

CASE CONCERNING
THE TERRITORIAL DISPUTE

(LIBYAN ARAB JAMAHIRIYA/CHAD)

JUDGMENT OF 3 FEBRUARY 1994

Mode officiel de citation:
Différend territorial (Jamahiriya arabe libyenne/Tchad), arrêt, C.I.J. Recueil 1994, p. 6

Official citation:
Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994, p. 6

ISSN 0074-4441
ISBN 92-1-070707-9

N° de vente:
Sales number **648**

3 FÉVRIER 1994

ARRÊT

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(JAMAHIRIYA ARABE LIBYENNE/TCHAD)

TERRITORIAL DISPUTE
(LIBYAN ARAB JAMAHIRIYA/CHAD)

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JUDGMENT

INTERNATIONAL COURT OF JUSTICE

YEAR 1994

1994
3 February
General List
No. 83

3 February 1994

CASE CONCERNING THE TERRITORIAL DISPUTE

(LIBYAN ARAB JAMAHIRIYA/CHAD)

Jurisdiction of the Court — Alternative grounds of jurisdiction.

Boundary dispute or territorial dispute.

Boundary claimed on the basis of 1955 Treaty between one Party and predecessor of other Party — Background to 1955 Treaty — Previous international instruments — Interpretation of Treaty — Applicable principles of interpretation — Natural and ordinary meaning of terms — Significance of the term "recognize" in relation to frontiers — Interpretation of conventions designed to establish frontiers — Principle of effectiveness — Object and purpose of Treaty — Context of Treaty — Conventions concluded simultaneously with Treaty — Reference to travaux préparatoires.

Boundary which "results" from international instruments "en vigueur" *listed in Annex to Treaty — Interpretation of 1899 Anglo-French joint declaration — Determination of the course of the boundary.*

Subsequent attitudes of Parties — Treaties — International fora.

Duration of boundary established by treaty — Stability of boundaries — Continued existence of boundary independently of life of the treaty under which it was agreed.

JUDGMENT

Present: *President* Sir ROBERT JENNINGS; *Vice-President* ODA; *Judges* AGO, SCHWEBEL, BEDJAOUI, NI, EVENSEN, TARASSOV, GUILLAUME, SHAHABUDDEEN, AGUILAR MAWDSLEY, WEERAMANTRY, RANJEVA, AJIBOLA, HERCZEGH; *Judges* ad hoc SETTE-CAMARA, ABI-SAAB; *Registrar* VALENCIA-OSPINA.

In the case concerning the territorial dispute,

between

the Great Socialist People's Libyan Arab Jamahiriya,

represented by

H.E. Mr. Abdulati Ibrahim El-Obeidi, Ambassador,

as Agent;

Mr. Kamel H. El Maghur, Member of the Bar of Libya,
Mr. Derek W. Bowett, C.B.E., Q.C., F.B.A., Whewell Professor emeritus, University of Cambridge,
Mr. Philippe Cahier, Professor of International Law, Graduate Institute of International Studies, University of Geneva,
Mr. Luigi Condorelli, Professor of International Law, University of Geneva,
Mr. James R. Crawford, Whewell Professor of International Law, University of Cambridge,
Mr. Rudolf Dolzer, Professor of International Law, University of Mannheim,
Sir Ian Sinclair, K.C.M.G., Q.C.,
Mr. Walter D. Sohier, Member of the Bar of the State of New York and of the District of Columbia,

as Counsel and Advocates;

Mr. Timm T. Riedinger, Rechtsanwalt, Frere Cholmeley, Paris,
Mr. Rodman R. Bundy, avocat à la Cour, Frere Cholmeley, Paris,
Mr. Richard Meese, avocat à la Cour, Frere Cholmeley, Paris,
Miss Loretta Malintoppi, avocat à la Cour, Frere Cholmeley, Paris,
Miss Azza Maghur, Member of the Bar of Libya,

as Counsel;

Mr. Scott B. Edmonds, Cartographer, Maryland Cartographics, Inc.,
Mr. Bennet A. Moe, Cartographer, Maryland Cartographics, Inc.,
Mr. Robert C. Rizzutti, Cartographer, Maryland Cartographics, Inc.,

as Experts,

and

the Republic of Chad,

represented by

Rector Abderahman Dadi, Director of the Ecole nationale d'administration et de magistrature de N'Djamena,

as Agent;

H.E. Mr. Mahamat Ali-Adoum, formerly Minister for Foreign Affairs of the Republic of Chad,

as Co-Agent;

H.E. Mr. Ahmad Allam-Mi, Ambassador of the Republic of Chad to France,
H.E. Mr. Ramadane Barma, Ambassador of the Republic of Chad to Belgium and the Netherlands,

as Advisers;

Mr. Alain Pellet, Professor at the University of Paris X-Nanterre and at the Institut d'études politiques of Paris,

as Deputy-Agent, Counsel and Advocate;

Mr. Antonio Cassese, Professor of International Law at the European University Institute, Florence,
Mr. Jean-Pierre Cot, Professor at the University of Paris I (Panthéon-Sorbonne),
Mr. Thomas M. Franck, Becker Professor of International Law and Director, Center for International Studies, New York University,
Mrs. Rosalyn Higgins, Q.C., Professor of International Law, University of London,

as Counsel and Advocates;

Mr. Malcolm N. Shaw, Ironsides Ray and Vials Professor of Law, University of Leicester, Member of the English Bar,
Mr. Jean-Marc Sorel, Professor at the University of Rennes,

as Advocates;

Mr. Jean Gateaud, ingénieur général géographe honoraire,

as Counsel and Cartographer;

Mr. Jean-Pierre Mignard, Advocate at the Court of Appeal of Paris,
Mr. Marc Sassen, Advocate and Legal Adviser, The Hague,

as Counsel;

Mrs. Margo Baender, Research Assistant, Center for International Studies, New York University,
Mr. Olivier Corten, Assistant at the Faculty of Law of the Université libre de Bruxelles,
Mr. Renaud Dehousse, Senior Assistant at the European University Institute, Florence,
Mr. Jean-Marc Thouvenin, attaché temporaire d'enseignement et de recherche at the University of Paris X-Nanterre,
Mr. Joseph Tjop, attaché temporaire d'enseignement et de recherche at the University of Paris X-Nanterre,

as Advisers and Research Assistants;

Mrs. Rochelle Fenchel,
Mrs. Susan Hunt,
Miss Florence Jovis,
Mrs. Mireille Jung,
Mrs. Martine Soulier-Moroni,

THE COURT,

composed as above,

after deliberation,

delivers the following Judgment:

1. On 31 August 1990, the Government of the Great Socialist People's Libyan Arab Jamahiriya (hereinafter called "Libya"), referring to Article 40, paragraph 1, of the Statute of the Court, filed in the Registry a notification of an agreement entitled "Framework Agreement [Accord-Cadre] on the Peaceful

Settlement of the Territorial Dispute between the Great Socialist People's Libyan Arab Jamahiriya and the Republic of Chad" (hereinafter referred to as the "Accord-Cadre"), done in the Arabic and French languages at Algiers on 31 August 1989. A certified copy of the Accord-Cadre was annexed to that notification.

2. The text of the Accord-Cadre, registered with the Secretariat of the United Nations under Article 102 of the Charter, and notified to the Organization of African Unity, is as follows:

"The great Socialist People's Libyan Arab Jamahiriya and the Republic of Chad,

On the basis, on the one hand, of the resolutions of the Organization of African Unity (OAU), in particular resolution AHG/Res.6 (XXV) on the Libya/Chad territorial dispute and, on the other hand, of the fundamental principles of the United Nations, namely:

— the peaceful settlement of international disputes;
— the sovereign equality of all States;
— non-use of force or threat of force in relations between States;
— respect for the national sovereignty and territorial integrity of each State;
— non-interference in internal affairs;

Resolved to settle their territorial dispute peacefully,

HEREBY DECIDE TO CONCLUDE THIS AGREEMENT:

Article 1. The two Parties undertake to settle first their territorial dispute by all political means, including conciliation, within a period of approximately one year, unless the Heads of State otherwise decide.

Article 2. In the absence of a political settlement of their territorial dispute, the two Parties undertake:

(a) to submit the dispute to the International Court of Jusfice;

(b) to take measures concomitant with the judicial settlement by withdrawing the forces of the two countries from the positions which they currently occupy on 25 August 1989 in the disputed region, under the supervision of a commission of African observers, and to refrain from establishing any new presence in any form in the said region;

(c) to proceed to the said withdrawal to distances to be agreed on;

(d) to observe the said concomitant measures until the International Court of Justice hands down a final judgment on the territorial dispute.

Article 3. All prisoners of war shall be released.

Article 4. The great Socialist People's Libyan Arab Jamahiriya and the Republic of Chad reiterate their decisions concerning the cease-fire established between them and undertake further to desist from any kind of hostility and, in particular, to:

(a) desist from any hostile media campaign;

(b) abstain from interfering directly or indirectly, in any way, on any pretext and in any circumstance, in the internal and external affairs of their respective countries;

(c) refrain from giving any political, material, financial or military support to the hostile forces of either of the two countries;

(d) proceed to the signature of a treaty of friendship, good-neighbourliness and economic and financial co-operation between the two countries.

Article 5. The two Parties decide to establish a Mixed Commission to be entrusted with the task of making the necessary arrangements for the implementation of this Agreement and ensuring that all necessary measures are taken to this end.

Article 6. The *Ad Hoc* Committee of the Organization of African Unity on the Libya/Chad dispute shall be requested to monitor the implementation of the provisions of this Agreement.

Article 7. The great Socialist People's Libyan Arab Jamahiriya and the Republic of Chad undertake to give notice of this Agreement to the United Nations and the Organization of African Unity.

Article 8. This Agreement shall enter into force on the date of its signature."

3. In its notification to the Court, the Libyan Government stated, *inter alia*, the following:

"The negotiations referred to in Article 1 of the Accord-Cadre have failed to resolve the territorial dispute between the Parties . . . and no decision by the respective Heads of State has been reached to vary the procedures established by the Accord.

Accordingly Libya is bound, following the expiry of the year referred to in Article 1, to implement its obligation under Article 2 *(a)* '. . . à soumettre le différend au jugement de la Cour internationale de Justice'.

For the purposes of the Rules of Court, the dispute ('différend') submitted to the Court is their territorial dispute ('leur différend territorial') referred to in the Accord-Cadre, and the question put to the Court may be defined in the following terms:

'In further implementation of the Accord-Cadre, and taking into account the territorial dispute between the Parties, to decide upon the limits of their respective territories in accordance with the rules of international law applicable in the matter.'"

4. Pursuant to Article 39, paragraph 1, of the Rules of Court, a certified copy of the notification and its annex was communicated forthwith to the Government of the Republic of Chad (hereinafter referred to as "Chad") by the Deputy-Registrar.

5. On 3 September 1990, the Government of Chad filed in the Registry of the Court an Application instituting proceedings against Libya, the text of which had previously been communicated to the Registry by facsimile on 1 September 1990 and to which was attached a copy of the Accord-Cadre. In its Application, Chad stated, *inter alia*, that the Heads of State of the two Parties had, "during the summit meeting held in Rabat on 22-23 August 1990, decided to seise the International Court of Justice immediately" and that the Application had been "drawn up pursuant to that decision and to Article 2 *(a)* of the Accord-Cadre of 31 August 1989"; it relied, as a basis for the Court's jurisdic-

tion, principally on Article 2 *(a)* of the Accord-Cadre and, subsidiarily, on Article 8 of a Franco-Libyan Treaty of Friendship and Good Neighbourliness of 10 August 1955; and it requested the Court to

> "determine the course of the frontier between the Republic of Chad and the Libyan Arab Jamahiriya, in accordance with the principles and rules of international law applicable in the matter as between the Parties".

6. Pursuant to Article 40, paragraph 2, of the Statute and Article 38, paragraph 4, of the Rules of Court, the Registrar transmitted forthwith to the Libyan Government a certified copy of the Application.

7. By a letter dated 28 September 1990, received in the Registry the same day by facsimile, and the original of which was received on 5 October 1990, the Agent of Chad informed the Court, *inter alia*, that his Government had noted that "its claim coincides with that contained in the notification addressed to the Court on 31 August 1990 by the Libyan Arab Jamahiriya" and considered that

> "those two notifications relate to one single case, referred to the Court in application of the Algiers Agreement, which constitutes the Special Agreement, the principal basis of the Court's jurisdiction to deal with the matter";

a copy of this letter was addressed to the Agent of Libya by the Deputy-Registrar on 1 October 1990.

8. At a meeting held by the President of the Court on 24 October 1990 with the Agents of the Parties, pursuant to Article 31 of the Rules of Court, it was agreed between the Agents, first that the proceedings had in effect been instituted by two successive notifications of the Special Agreement constituted by the Accord-Cadre of 31 August 1989 — that filed by Libya on 31 August 1990, and the communication from Chad filed on 3 September 1990, read in conjunction with the letter from the Agent of Chad of 28 September 1990 — and secondly that the procedure in this case should be determined by the Court on that basis, pursuant to Article 46, paragraph 2, of the Rules of Court.

9. By an Order dated 26 October 1990, the Court decided accordingly that each Party would file a Memorial and Counter-Memorial, within the same time-limits, and fixed 26 August 1991 as the time-limit for the Memorials.

10. Pursuant to Article 40, paragraph 3, of the Statute and Article 42 of the Rules of Court, copies of the notifications and of the Special Agreement were transmitted to the Secretary-General of the United Nations, the Members of the United Nations and other States entitled to appear before the Court; a copy of the Order dated 26 October 1990 was also communicated to them.

11. Since the Court included upon the Bench no judge of the nationality of the Parties, each of them exercised its right under Article 31, paragraph 3, of the Statute to choose a judge *ad hoc* to sit in the case: Chad designated Mr. Georges Abi-Saab, and Libya designated Mr. José Sette-Camara.

12. The Memorials of the Parties having been duly filed within the time-limit fixed for that purpose, the President, by an Order dated 26 August 1991, fixed 27 March 1992 as the time-limit for the filing, by each of the Parties, of a Counter-Memorial; the Counter-Memorials were duly filed within the time-limit so fixed.

13. By an Order dated 14 April 1992, the Court decided to authorize the pres-

entation by each of the Parties of a Reply, within the same time-limit, namely 14 September 1992; the Replies were duly filed within the time-limit so fixed.

14. On 9 February 1993, after the closure of the written proceedings, the Deputy-Agent of Chad communicated to the Registry new documents under cover of a letter in which he requested the Court, if Libya did not give its consent to the presentation of these documents, to authorize their presentation under Article 56, paragraph 2, of the Rules of Court; Libya did not object to the production of the documents.

15. In accordance with Article 53, paragraph 2, of the Rules, the Court decided to make the pleadings and annexed documents accessible to the public as from the date of the oral proceedings.

16. The Parties having been duly consulted pursuant to Articles 31 and 58, paragraph 2, of the Rules of Court, public hearings were held between 14 June and 14 July 1993, in the course of which the Court heard the oral arguments and replies of the following:

For Libya: H.E. Mr. Abdulati Ibrahim El-Obeidi,
Mr. Derek W. Bowett, C.B.E., Q.C., F.B.A.,
Mr. Kamel H. El Maghur,
Sir Ian Sinclair, K.C.M.G., Q.C.,
Mr. Walter D. Sohier,
Mr. Luigi Condorelli,
Mr. Philippe Cahier,
Mr. James R. Crawford,
Mr. Rudolf Dolzer.

For Chad: Mr. Abderahman Dadi,
Mr. Alain Pellet,
Mrs. Rosalyn Higgins, Q.C.,
Mr. Jean-Pierre Cot,
Mr. Thomas M. Franck,
Mr. Antonio Cassese,
Mr. Malcolm N. Shaw,
Mr. Jean-Marc Sorel.

At the hearings, a Member of the Court put a question to one Party who answered in writing; this reply having reached the Registry at the close of the oral proceedings, the other Party submitted written comments upon it in accordance with Article 72 of the Rules of Court.

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

On behalf of Libya,

in the Memorial, the Counter-Memorial and Reply and at the hearing of 8 July 1993 (*mutatis mutandis* identical texts):

"*Having regard to* the various international treaties, agreements, accords and understandings and their effect or lack of effect on the present dispute, as set out in Libya's Memorial, Counter-Memorial, Reply and oral pleadings;

In view of the other facts and circumstances having a bearing on this case, as discussed above, and in Libya's pleadings;

In the light of the conduct of the Parties, of the conduct of other States

or political, secular or religious forces, whose conduct bears on the rights and titles claimed by the Parties, and of the conduct of the indigenous peoples whose territories are the subject of this dispute;

In application of the principles and rules of international law of relevance to this dispute;

May it please the Court, rejecting all contrary claims and submissions:

To adjudge and declare, as follows:

1. That there exists no boundary, east of Toummo, between Libya and Chad by virtue of any existing international agreement.

2. That in the circumstances, therefore, in deciding upon the attribution of the respective territories as between Libya and Chad in accordance with the rules of international law applicable in this matter, the following factors are relevant:

(i) that the territory in question, at all relevant times, was not *terra nullius*;

(ii) that title to the territory was, at all relevant times, vested in the peoples inhabiting the territory, who were tribes, confederations of tribes or other peoples owing allegiance to the Senoussi Order who had accepted Senoussi leadership in their fight against the encroachments of France and Italy on their lands;

(iii) that these indigenous peoples were, at all relevant times, religiously, culturally, economically and politically part of the Libyan peoples;

(iv) that, on the international plane, there existed a community of title between the title of the indigenous peoples, and the rights and titles of the Ottoman Empire, passed on to Italy in 1912 and inherited by Libya in 1951;

(v) that any claim of Chad rests on the claim inherited from France;

(vi) that the French claim to the area in dispute rested on 'actes internationaux' that did not create a territorial boundary east of Toummo, and that there is no valid alternative basis to support the French claim to the area in dispute.

3. That, in the light of the above factors, Libya has clear title to all the territory north of the line shown on Map 105 in Libya's Memorial, on Map LC-M 55 in Libya's Counter-Memorial and on Map LR 32 in Libya's Reply, that is to say the area bounded by a line that starts at the intersection of the eastern boundary of Niger and 18° N latitude, continues in a strict south-east direction until it reaches 15° N latitude, and then follows this parallel eastwards to its junction with the existing boundary between Chad and Sudan."

On behalf of Chad,

in the Memorial, the Counter-Memorial and the Reply, and at the hearing of 14 July 1993 (identical texts):

"The Republic of Chad respectfully requests the International Court of Justice to adjudge and declare that its frontier with the Libyan Arab Jamahiriya is constituted by the following line:

— from the point of intersection of the 24° of longitude east of Greenwich

with the parallel of 19° 30′ of latitude north, the frontier shall run as far as the point of intersection of the Tropic of Cancer with the 16° of longitude east of Greenwich;

— from that latter point it shall follow a line running towards the well of Toummo as far as the fifteenth degree east of Greenwich."

* * *

18. The Court has been seised of the present dispute between Libya and Chad by the notifications of the special agreement constituted by the Accord-Cadre of 31 August 1989, the text of which is set out in paragraph 2 above. The Accord-Cadre described the dispute between the Parties as "their territorial dispute" but gave no further particularization of it, and it has become apparent from the Parties' pleadings and oral arguments that they disagree as to the nature of the dispute. Libya, in its notification of the Accord-Cadre to the Court filed on 31 August 1990, explained the "territorial dispute" by stating as follows:

> "The determination of the limits of the respective territories of the Parties in this region involves, *inter alia*, a consideration of a series of international agreements although, in the view of Libya, none of these agreements finally fixed the boundary between the Parties which, accordingly, remains to be established in accordance with the applicable principles of international law."

On this basis, Libya defined the question put to the Court by requesting it:

> "In further implementation of the Accord-Cadre, and taking into account the territorial dispute between the Parties, to decide upon the limits of their respective territories in accordance with the rules of international law applicable in the matter."

Chad, on the other hand, in its initial communication to the Court filed on 3 September 1990, indicated that in its view there was a frontier between Chad and Libya, the course of which "was not the subject of any dispute until the 1970s", and stated that

> "The object of the present case is to arrive at a firm definition of that frontier, in application of the principles and rules applicable in the matter as between the Parties."

On this basis, Chad requested the Court:

> "to determine the course of the frontier between the Republic of Chad and the Libyan Arab Jamahiriya, in accordance with the principles and rules of international law applicable in the matter as between the Parties".

19. Thus Libya proceeds on the basis that there is no existing boundary, and asks the Court to determine one. Chad proceeds on the basis that there is an existing boundary, and asks the Court to declare what that boundary is. Libya considers that the case concerns a dispute regard-

ing attribution of territory, while in Chad's view it concerns a dispute over the location of a boundary.

20. Chad in its submissions has indicated the position of the line which it claims constitutes its frontier with Libya. Libya, while maintaining in its submissions that in the region in question "there exists no boundary . . . between Libya and Chad by virtue of any existing international agreement", also submits that it "has clear title to all the territory" north of a specified line, constituted for much of its length by the 15th parallel of north latitude. Sketch-map No. 1 on page 16 hereof shows the line claimed by Chad and the line claimed by Libya. The area now in dispute, between those two lines, has been referred to by Libya in this case as the Libya-Chad "Borderlands".

21. Libya bases its claim to the Borderlands on a coalescence of rights and titles: those of the indigenous inhabitants, those of the Senoussi Order (a religious confraternity, founded some time during the early part of the nineteenth century which wielded great influence and a certain amount of authority in the north and north-east of Africa), and those of a succession of sovereign States, namely the Ottoman Empire, Italy, and finally Libya itself. Chad claims a boundary on the basis of a Treaty of Friendship and Good Neighbourliness concluded by the French Republic and the United Kingdom of Libya on 10 August 1955 (hereinafter referred to as "the 1955 Treaty"). In the alternative, Chad claims that the lines delimiting the zones of influence in earlier treaties, referred to in the 1955 Treaty, had acquired the character of boundaries through French *effectivités*; it claims finally that, even irrespective of treaty provisions, Chad can rely on those *effectivités* in regard to the area claimed by it.

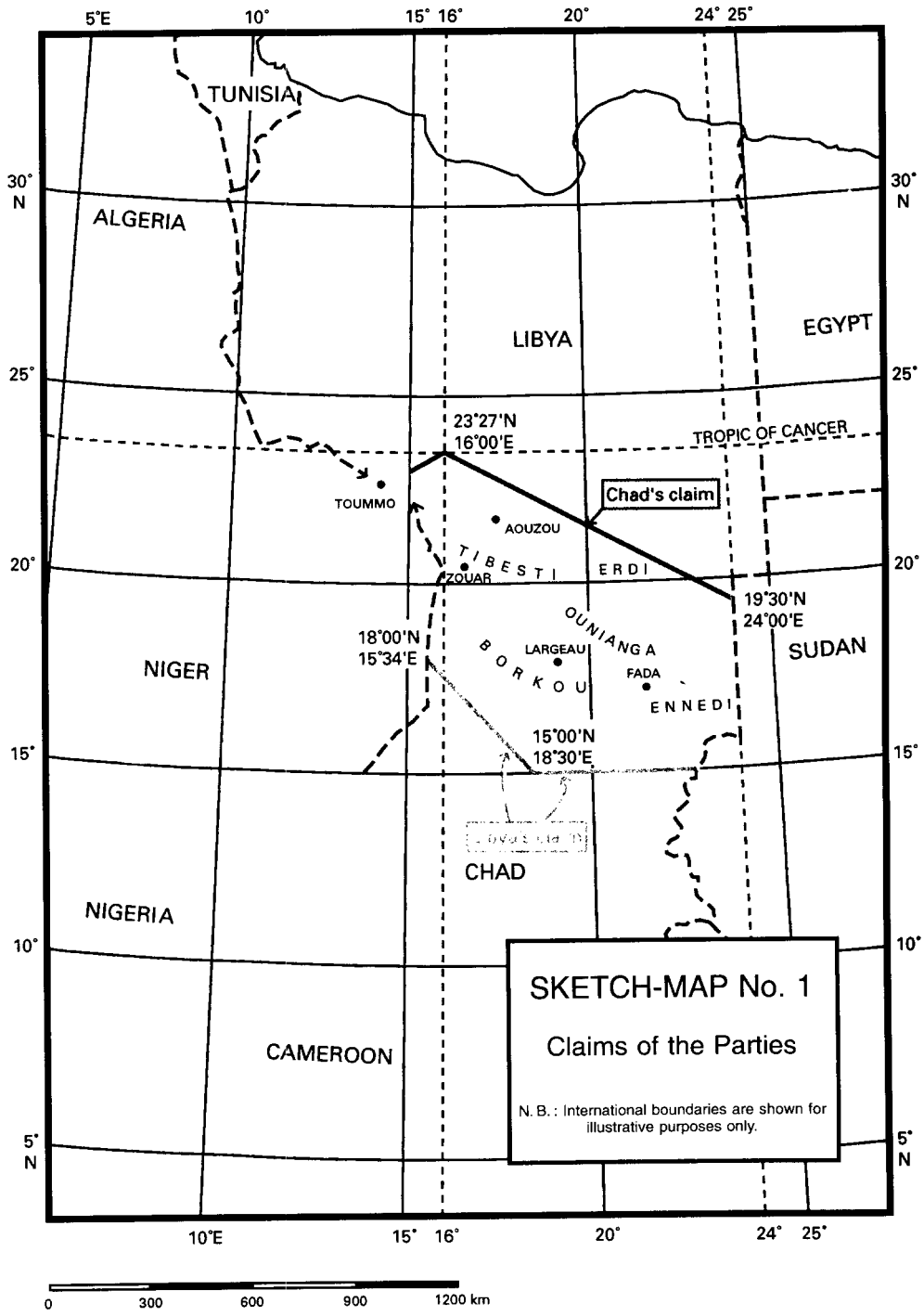
*

22. Both Parties accepted the jurisdiction of the Court on the basis of the Accord-Cadre. However, Chad has added that, subsidiarily, the jurisdiction of the Court is also based upon Article 8 of the 1955 Treaty which provides that

> "Such disputes as may arise from the interpretation and application of the present Treaty and which may prove impossible to settle by direct negotiations shall be referred to the International Court of Justice at the request of either Party, unless the High Contracting Parties agree upon some other method of settlement."

Since however the jurisdiction to deal with the present dispute conferred by the Accord-Cadre has not been disputed, there is no need to consider the question of an additional ground of jurisdiction under the Treaty.

*


5°E
10°
15° 16°
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24° 25°
TUNISIA
30° N
ALGERIA
LIBYA
EGYPT
25°
23°27'N
16°00'E
TROPIC OF CANCER
TOUMMO
Chad's claim
AOUZOU
TIBESTI
ERDI
ZOUAR
20°
19°30'N
24°00'E
OUNIANGA
18°00'N
15°34'E
LARGEAU
BORKOU
FADA
ENNEDI
SUDAN
NIGER
15°00'N
18°30'E
15°
CHAD
NIGERIA
10°
CAMEROON
5° N
SKETCH-MAP No. 1
Claims of the Parties
N. B. : International boundaries are shown for illustrative purposes only.
10°E
0
300
600
900
1200 km

23. Libya, which had been a colonial territory of Italy, was, after the termination of hostilities in World War II, administered by the Four Allied Powers (France, the United Kingdom, the United States and the Union of Soviet Socialist Republics), and became a sovereign State on 24 December 1951 pursuant to resolution 289 (IV) of the General Assembly of 21 November 1949. Chad had been a French colony, then a *"territoire d'outre-mer"*, appertaining in both cases to French Equatorial Africa. It became a member of the French Community from 1958 to 1960. Chad acceded to independence on 11 August 1960.

24. The dispute between the Parties is set against the background of a long and complex history of military, diplomatic and administrative activity on the part of the Ottoman Empire, France, Great Britain and Italy, as well as the Senoussi Order. This history is reflected in a number of conventions, numerous diplomatic exchanges, certain contemporary maps and various archival records, which have been furnished to the Court. The Court will first consider this documentation, and will enumerate those of the conventional instruments which appear to it to be relevant.

25. At the end of the nineteenth and beginning of the twentieth century, various agreements were entered into between France, Great Britain and, later, Italy, by which the parties purported to divide large tracts of Africa into mutually recognized spheres or zones of influence. The agreements described the limits of the areas in question, with reference to points on the ground, where such points were known and identifiable, and to lines of latitude and longitude. With the increasing influence and presence of these Powers in the region, they also entered into treaties regarding the boundaries of the territories they claimed, both between themselves and with the Ottoman Empire, already present in the region.

26. Alongside that Ottoman presence was the Senoussi Order, already referred to. The Senoussi established at many points within the region a series of *zawiyas* which, *inter alia*, fostered trade, regulated caravan traffic, arbitrated disputes and functioned as religious centres. These centres comprised mosques, schools and guesthouses for travellers, and also sometimes had in residence a *qadi* or judge. The sheikhs of the *zawiyas* were confirmed in their positions by the Grand Senoussi, the head of the Order.

27. French colonial expansion into the Chad area took place from the south, the west and the north. There was an expedition from the south in the direction of Lake Chad during the period from 1875 to 1897. From the west, another moved towards Lake Chad in the period from 1879 to 1899; and from Algiers in the north a further expedition advanced on the Lake from 1898 to 1900. Consequent on this expansion, large tracts of African territory were later grouped together in what were designated as French West Africa and French Equatorial Africa.

28. Towards the end of the nineteenth century France and Great Britain entered into two successive agreements, in the form of an Exchange of Declarations signed at London on 5 August 1890, and a Convention

concluded at Paris on 14 June 1898, as a result of which *(inter alia)* each party recognized certain territories in Africa as falling within the "sphere" of the other (1898 Convention, Art. IV). By a subsequent Declaration signed at London on 21 March 1899, it was agreed that the fourth article of the 1898 Convention should be completed by certain provisions, and in particular it was recorded that "it is understood, in principle, that to the north of the 15th parallel the French zone shall be limited by" a specified line, described in the text. No map was attached to the Declaration, but a few days after its adoption the French authorities published a *Livre jaune* including a map, a copy of which is attached to this Judgment (see paragraph 58 below).

29. Exchanges of letters took place between the French and Italian Governments, relating to their interests in Africa, on 14-16 December 1900, and 1-2 November 1902, in the course of which Italy was reassured that "the limit to French expansion in North Africa . . . is to be taken as corresponding to the frontier of Tripolitania as shown on the map annexed to the Declaration of 21 March 1899". As indicated below (paragraph 61), the reference could only have been to the *Livre jaune* map. Similar assurances were given to Italy by the British Government in an exchange of letters of 11-12 March 1902.

30. On 19 May 1910, a Convention was concluded between the Tunisian Government and the Ottoman Empire defining the frontier between the Regency of Tunis and the Vilayet of Tripoli. In 1912 Italian sovereignty was established over the Turkish provinces of Tripolitania and Cyrenaica (Treaties of Ouchy and Lausanne, 15 and 18 October 1912). Certain rights and privileges were however reserved to the Sultan by the Treaty of Lausanne.

31. On 8 September 1919, France and Great Britain concluded a Convention expressed to be supplementary to the Declaration of 21 March 1899 additional to the Convention of 14 June 1898 (paragraph 28 above), recording *(inter alia)* an interpretation of the 1899 Declaration defining the limits of the French zone. On 12 September 1919 an arrangement in the form of an exchange of letters was concluded between France and Italy for the fixing of the boundary between Tripolitania and the French possessions in Africa west of Toummo.

32. The Treaty of Lausanne of 24 July 1923 re-established peace between Turkey and the other signatory parties (including France, Great Britain and Italy); it included a provision that Turkey recognized the definitive abolition of all rights and privileges which it maintained in Libya under the 1912 Treaty of Lausanne. By a Protocol dated 10 January 1924, approved by an Exchange of Notes of 21 January 1924, France and Great Britain defined the boundary between French Equatorial Africa and the Anglo-Egyptian Sudan. Similarly, an Exchange of Notes of 20 July 1934 between Egypt, Great Britain and Italy defined the boundary between Libya and the Sudan.

33. On 7 January 1935 a Treaty was concluded between France and Italy for the settlement of questions pending between them in Africa. That Treaty included a definition of a boundary between Libya and the adjacent French colonies east of Toummo. Although ratification of the treaty was authorized by the parliaments of both parties, instruments of ratification were never exchanged, and the treaty never came into force; for convenience, it will be referred to hereafter as "the non-ratified Treaty of 1935".

34. After the conclusion of World War II, the Treaty of Peace with Italy was signed on 10 February 1947. By Article 23 of this Treaty, Italy renounced all right and title to its territorial possessions in Africa, i.e., Libya, Eritrea and Italian Somaliland. The final disposal of these possessions was to be determined jointly by the Governments of the Four Allied Powers; if those Powers were unable to agree within one year on the final disposal of the territories the matter was to be referred to the General Assembly of the United Nations for a recommendation. The four Powers undertook in advance to accept that recommendation. There being no agreement between the four Powers, the General Assembly was seised and, by resolution 289 (IV) of 21 November 1949, recommended that "Libya, comprising Cyrenaica, Tripolitania and the Fezzan, shall be constituted an independent and sovereign State". The independence of Libya was proclaimed on 24 December 1951, and recognized on 1 February 1952 by General Assembly resolution 515 (VI). With independence, Libya entered into treaties with the United Kingdom and the United States, which provided *inter alia* for a military presence in Libya.

* *

35. Negotiations opened at the beginning of 1955 between Libya and France, and led to the conclusion of the 1955 Treaty, i.e., the Treaty of Friendship and Good Neighbourliness between the French Republic and the United Kingdom of Libya of 10 August 1955. In the preceding November, Libya had informed France that it did not intend to renew a provisional military arrangement of 24 December 1951 under which French forces remained stationed on Libyan territory, in the Fezzan. The French Government wished to maintain its military presence there, but the Libyan Parliament had made it clear that it had no intention of accepting an agreement leaving French forces in the Fezzan. Among other matters which were the subject of negotiation were military matters (including the non-substitution of other foreign troops for the French troops, and French access to airstrips and certain caravan routes), and the question of boundaries. France possessed extensive territories in Africa which bordered Libya on the west and on the south. French authority in parts of those territories had been challenged and a settled border was essential. This was so particularly to the west of Toummo.

East of Toummo, on the other hand, there was, in France's view, an existing frontier resulting from the Anglo-French Agreements of 1898, 1899 and 1919 (paragraphs 28, 31 above), but there had been long-standing disagreement between France and Italy in that respect. Obtaining Libyan acceptance of those agreements, which entailed recognition of the inapplicability of the non-ratified Treaty of 1935, was important to the French.

36. It is recognized by both Parties that the 1955 Treaty is the logical starting-point for consideration of the issues before the Court. Neither Party questions the validity of the 1955 Treaty, nor does Libya question Chad's right to invoke against Libya any such provisions thereof as relate to the frontiers of Chad. However, although the Treaty states that it has been entered into "on the basis of complete equality, independence and liberty", Libya has contended that, at the time of the Treaty's conclusion, it lacked the experience to engage in difficult negotiations with a Power enjoying the benefit of long international experience. On this ground, Libya has suggested that there was an attempt by the French negotiators to take advantage of Libya's lack of knowledge of the relevant facts, that Libya was consequently placed at a disadvantage in relation to the provisions concerning the boundaries, and that the Court should take this into account when interpreting the Treaty; it has not however taken this argument so far as to suggest it as a ground for invalidity of the Treaty itself.

37. The 1955 Treaty, a complex treaty, comprised, in addition to the Treaty itself, four appended Conventions and eight Annexes; it dealt with a broad range of issues concerning the future relationship between the two parties. It was provided by Article 9 of the Treaty that the Conventions and Annexes appended to it formed an integral part of the Treaty. One of the matters specifically addressed was the question of frontiers, dealt with in Article 3 and Annex I. The appended Conventions were a Convention of Good Neighbourliness, a Convention on Economic Co-operation, a Cultural Convention, and a "Particular Convention" dealing with the withdrawal of French forces from the Fezzan.

38. The Court will first consider Article 3 of the 1955 Treaty, together with the Annex to which that Article refers, in order to decide whether or not that Treaty resulted in a conventional boundary between the territories of the Parties. If the 1955 Treaty did result in a boundary, this furnishes the answer to the issues raised by the Parties: it would be a response at one and the same time to the Libyan request to determine the limits of the respective territories of the Parties and to the request of Chad to determine the course of the frontier. The Court's initial task must therefore be to interpret the relevant provisions of the 1955 Treaty, on which the Parties have taken divergent positions.

39. Article 3 of the Treaty reads as follows:

[Translation by the Registry]

"The two High Contracting Parties recognize that the frontiers between the territories of Tunisia, Algeria, French West Africa and

French Equatorial Africa on the one hand, and the territory of Libya on the other, are those that result from the international instruments in force on the date of the constitution of the United Kingdom of Libya as listed in the attached Exchange of Letters (Ann. I)."

The Treaty was concluded in French and Arabic, both texts being authentic; the Parties in this case have not suggested that there is any divergence between the French and Arabic texts, save that the words in Arabic corresponding to "sont celles qui résultent" (are those that result) might rather be rendered "sont les frontières qui résultent" (are the frontiers that result). The Court will base its interpretation of the Treaty on the authoritative French text.

40. Annex I to the Treaty comprises an exchange of letters which, after quoting Article 3, reads as follows:

"The reference is to *[Il s'agit de]* the following texts:

— the Franco-British Convention of 14 June 1898;
— the Declaration completing the same, of 21 March 1899;

— the Franco-Italian Agreements of 1 November 1902;
— the Convention between the French Republic and the Sublime Porte, of 12 May 1910;
— the Franco-British Convention of 8 September 1919;
— the Franco-Italian Arrangement of 12 September 1919.

With respect to this latter arrangement and in conformity with the principles set forth therein, it was recognized by the two delegations that, between Ghat and Toummo, the frontier traverses the following three points, viz., the Takharkhouri Gap, the Col d'Anai and Landmark 1010 (Garet Derouet el Djemel).

The Government of France is ready to appoint experts who might become part of a Joint Franco-Libyan Commission entrusted with the task of marking out the frontier, wherever that work has not yet been done and where either Government may consider it to be necessary.

In the event of a disagreement in the course of the demarcation, the two Parties shall each designate a neutral arbitrator and, in the event of a disagreement between the arbitrators, they shall designate a neutral referee to settle the dispute."

It has been recognized throughout the proceedings that the Convention referred to as of 12 May 1910 is actually that of 19 May 1910 mentioned in paragraph 30 above.

41. The Court would recall that, in accordance with customary international law, reflected in Article 31 of the 1969 Vienna Convention on the Law of Treaties, a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context

and in the light of its object and purpose. Interpretation must be based above all upon the text of the treaty. As a supplementary measure recourse may be had to means of interpretation such as the preparatory work of the treaty and the circumstances of its conclusion.

42. According to Article 3 of the 1955 Treaty, the parties "recognize *[reconnaissent]* that the frontiers . . . are those that result" from certain international instruments. The word "recognize" used in the Treaty indicates that a legal obligation is undertaken. To recognize a frontier is essentially to "accept" that frontier, that is, to draw legal consequences from its existence, to respect it and to renounce the right to contest it in future.

43. In the contention of Libya, the parties to the 1955 Treaty intended to recognize only the frontiers that had previously been fixed by the international instruments: where frontiers already existed (as between Tunisia and Libya), they were confirmed by the 1955 Treaty, but where there was no frontier (as in the south), the treaty did not create one. The Court is unable to accept this view; it has no difficulty either in ascertaining the natural and ordinary meaning of the relevant terms of the 1955 Treaty, or in giving effect to them. In the view of the Court, the terms of the Treaty signified that the parties thereby recognized complete frontiers between their respective territories as resulting from the combined effect of all the instruments listed in Annex I; no relevant frontier was to be left undefined and no instrument listed in Annex I was superfluous. It would be incompatible with a recognition couched in such terms to contend that only some of the specified instruments contributed to the definition of the frontier, or that a particular frontier remained unsettled. So to contend would be to deprive Article 3 of the Treaty and Annex I of their ordinary meaning. By entering into the Treaty, the parties recognized the frontiers to which the text of the Treaty referred; the task of the Court is thus to determine the exact content of the undertaking entered into.

44. Libya's argument is that, of the international instruments listed in Annex I to the 1955 Treaty, only the Franco-Ottoman Convention of 1910 and the Franco-Italian arrangement of 1919 had produced frontiers binding on Libya at the time of independence, and that such frontiers related to territories other than those in issue in this case. In the view of Libya, the 1899 Franco-British Declaration merely defined, north of the 15th parallel, a line delimiting spheres of influence, as distinct from a territorial frontier; neither the 1919 Franco-British Convention nor French *effectivités* conferred on that line any other status; furthermore the latter instrument was never opposable to Italy. The 1902 Franco-Italian exchange of letters, in Libya's view, was no longer in force, either because Italy renounced all rights to its African territories by the 1947 Peace Treaty (paragraph 34 above), or for lack of notification under Article 44 of that Treaty.

45. The Court does not consider that it is called upon to determine these questions. The fixing of a frontier depends on the will of the sovereign States directly concerned. There is nothing to prevent the parties from deciding by mutual agreement to consider a certain line as a frontier, whatever the previous status of that line. If it was already a territorial boundary, it is confirmed purely and simply. If it was not previously a territorial boundary, the agreement of the parties to "recognize" it as such invests it with a legal force which it had previously lacked. International conventions and case-law evidence a variety of ways in which such recognition can be expressed. In the case concerning the *Temple of Preah Vihear*, a map had been invoked on which a line had been drawn purporting to represent the frontier determined by a delimitation commission under a treaty which provided that the frontier should follow a watershed; in fact the line drawn did not follow the watershed. The Court based its decision upholding the "map line" on the fact that "both Parties, by their conduct, recognized the line and thereby in effect agreed to regard it as being the frontier line" (*Temple of Preah Vihear, Merits, I.C.J. Reports 1962*, p. 33).

46. In support of its interpretation of the Treaty, Libya has drawn attention to the fact that Article 3 of the Treaty mentions "the frontiers" in the plural. It argues from this that the parties had in view delimitation of some of their frontiers, not that of the whole of the frontier. The use of the plural is, in the view of the Court, to be explained by the fact that there were differences of legal status between the various territories bordering on Libya for whose international relations France was at the time responsible, and their respective frontiers had been delimited by different agreements. Tunisia was a protectorate at the time; Algeria was a *groupe de départements*; and French West Africa and French Equatorial Africa were both *groupes de territoires d'outre-mer*. In this context the use of the plural is clearly appropriate, and does not have the significance attributed to it by Libya. Moreover, it is to be noted that the parties referred to a frontier between French Equatorial Africa and Libya.

47. The fact that Article 3 of the Treaty specifies that the frontiers recognized are "those that result from the international instruments" defined in Annex I means that all of the frontiers result from those instruments. Any other construction would be contrary to the actual terms of Article 3 and would render completely ineffective the reference to one or other of those instruments in Annex I. As the Permanent Court of International Justice observed, in its Advisory Opinion of 21 November 1925, dealing with a provision of the Treaty of Lausanne "intended to *lay down* the frontier of Turkey" (emphasis in original),

> "the very nature of a frontier and of any convention designed to establish frontiers between two countries imports that a frontier must constitute a definite boundary line *throughout its length*" (*Inter-*

pretation of Article 3, Paragraph 2, of the Treaty of Lausanne, Advisory Opinion, 1925, P.C.I.J., Series B, No. 12, p. 20, emphasis added).

It went on to say that

> "It is . . . natural that any article designed to fix a frontier should, if possible, be so interpreted that the result of the application of its provisions in their entirety should be the establishment of a precise, complete and definitive frontier." *(Ibid.)*

Similarly, in 1959 in the case concerning *Sovereignty over Certain Frontier Land*, the Court took note of the Preamble to a Boundary Convention as recording the common intention of the parties to "fix and regulate all that relates to the demarcation of the frontier" and held that

> "Any interpretation under which the Boundary Convention is regarded as leaving in suspense and abandoning for a subsequent appreciation of the *status quo* the determination of the right of one State or the other to the disputed plots would be incompatible with that common intention." (*I.C.J. Reports 1959*, pp. 221-222.)

48. The Court considers that Article 3 of the 1955 Treaty was aimed at settling all the frontier questions, and not just some of them. The manifest intention of the parties was that the instruments referred to in Annex I would indicate, cumulatively, all the frontiers between the parties, and that no frontier taken in isolation would be left out of that arrangement. In the expression "the frontiers between the territories . . .", the use of the definite article is to be explained by the intention to refer to all the frontiers between Libya and those neighbouring territories for whose international relations France was then responsible. Article 3 does not itself define the frontiers, but refers to the instruments mentioned in Annex I. The list in Annex I was taken by the parties as exhaustive as regards delimitation of their frontiers.

49. Article 3 of the 1955 Treaty refers to the international instruments *"en vigueur"* (in force) on the date of the constitution of the United Kingdom of Libya, *"tels qu'ils sont définis"* (as listed) in the attached exchange of letters. These terms have been interpreted differently by the Parties. Libya stresses that only the international instruments in force on the date of the independence of Libya can be taken into account for the determination of the frontiers; and that, as the agreements mentioned in Annex I and relied on by Chad were, according to Libya, no longer in force on 24 December 1951, they could not be taken into consideration. It argues also that account could be taken of other instruments, relevant and in force, which were not listed in Annex I.

50. The Court is unable to accept these contentions. Article 3 does not refer merely to the international instruments *"en vigueur"* (in force) on the date of the constitution of the United Kingdom of Libya, but to the international instruments *"en vigueur"* on that date *"tels qu'ils sont définis"*

(as listed) in Annex I. To draw up a list of governing instruments while leaving to subsequent scrutiny the question whether they were in force would have been pointless. It is clear to the Court that the parties agreed to consider the instruments listed as being in force for the purposes of Article 3, since otherwise they would not have referred to them in the Annex. The contracting parties took the precaution to determine by mutual agreement which were the instruments in force for their purposes. According to the restrictive formulation employed in Annex I, *"il s'agit des textes"* enumerated in that Annex. This drafting of Article 3 and Annex I excludes any other international instrument *en vigueur*, not included in the Annex, which might have concerned the territory of Libya. *A fortiori* is this the case of the non-ratified Treaty of 1935, which was never *en vigueur* and is not mentioned in the Annex. The Court may confine itself to taking account of the instruments listed in the Annex, without having to enquire whether those instruments, listed by agreement between France and Libya, were in force at the date of Libya's independence, or opposable to it.

51. The parties could have indicated the frontiers by specifying in words the course of the boundary, or by indicating it on a map, by way of illustration or otherwise; or they could have done both. They chose to proceed in a different manner and to establish, by agreement, the list of international instruments from which the frontiers resulted, but the course for which they elected presents no difficulties of interpretation. That being so, the Court's task is clear:

> "Having before it a clause which leaves little to be desired in the nature of clearness, it is bound to apply this clause as it stands, without considering whether other provisions might with advantage have been added to or substituted for it." (*Acquisition of Polish Nationality, Advisory Opinion, 1923, P.C.I.J., Series B, No. 7*, p. 20.)

The text of Article 3 clearly conveys the intention of the parties to reach a definitive settlement of the question of their common frontiers. Article 3 and Annex I are intended to define frontiers by reference to legal instruments which would yield the course of such frontiers. Any other construction would be contrary to one of the fundamental principles of interpretation of treaties, consistently upheld by international jurisprudence, namely that of effectiveness (see, for example, the *Lighthouses Case between France and Greece, Judgment, 1934, P.C.I.J., Series A/B, No. 62*, p. 27; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), I.C.J. Reports 1971*, p. 35, para. 66; and *Aegean Sea Continental Shelf, I.C.J. Reports 1978*, p. 22, para. 52).

52. Reading the 1955 Treaty in the light of its object and purpose one observes that it is a treaty of friendship and good neighbourliness concluded, according to its Preamble, "in a spirit of mutual understanding and on the basis of complete equality, independence and liberty". The parties stated in that Preamble their conviction that the signature of the

treaty would "serve to facilitate the settlement of all such questions as arise for the two countries from their geographical location and interests in Africa and the Mediterranean", and that they were "Prompted by a will to strengthen economic, cultural and good-neighbourly relations between the two countries". The object and purpose of the Treaty thus recalled confirm the interpretation of the Treaty given above, inasmuch as that object and purpose led naturally to the definition of the territory of Libya, and thus the definition of its boundaries. Furthermore the presupposition that the Treaty did define the frontier underlies Article 4 of the Treaty, in which the parties undertake to take "all such measures as may be necessary for the maintenance of peace and security in the areas bordering on the frontiers". It also underlies Article 5 relating to consultations between the parties concerning "the defence of their respective territories". More particularly Article 5 adds that "With regard to Libya, this shall apply to the Libyan territory as defined in Article 3 of the present Treaty". To "define" a territory is to define its frontiers. Thus, in Article 5 of the Treaty, the parties stated their own understanding of Article 3 as being a provision which itself defines the territory of Libya.

53. The conclusions which the Court has reached are reinforced by an examination of the context of the Treaty, and, in particular, of the Convention of Good Neighbourliness between France and Libya, concluded between the parties at the same time as the Treaty. The Convention refers, in Article 1, to the "frontiers, as defined in Article 3 of the Treaty of Friendship and Good Neighbourliness". Title III of the Convention concerns "Caravan traffic and trans-frontier movements", and it begins with Article 9, which reads as follows:

> "The Government of France and the Government of Libya undertake to grant freedom of movement to nomads from tribes that traditionally trade on either side of the frontier between Algeria, French West Africa and French Equatorial Africa, on the one hand, and Libya, on the other, so as to maintain the traditional caravan links between the regions of Tibesti, Ennedi, Borkou, Bilma and the Ajjers, on the one hand, and those of Koufra, Mourzouk, Oubari, Ghat, Edri and Ghadamès, on the other."

This provision refers specifically to *(inter alia)* the frontier between French Equatorial Africa and Libya; and it is clear from its terms that, according to the parties to the Treaty, that frontier separates the French-ruled regions of Tibesti, Ennedi and Borkou (indicated on sketch-map No. 1 at p. 16 above), which are sometimes referred to as "the BET", on the one hand, and the Libyan regions of Koufra, Mourzouk, etc. on the other.

54. Article 10 of the Convention of Good Neighbourliness establishes a zone open to caravan traffic "on both sides of the frontier". This zone is bounded as follows:

> "On French territory: by a line which, leaving the frontier to the west of Ghadamès, runs through Tinfouchaye, Timellouline, Ohanet, Fort-Polignac, Fort-Gardel, Bilma, Zouar, Largeau, Fada and continues in a straight line as far as the Franco-Sudanese frontier.
>
> On Libyan territory: by a line which, leaving Sinaouen, runs through Derj, Edri, El Abiod, Ghoddoua, Zouila, Ouaou En Namous, Koufra, and continues in a straight line as far as the Libyo-Egyptian frontier."

Libya has therefore expressly recognized that Zouar, Largeau and Fada lie in French territory. The position of those places is indicated on sketch-map No. 1, on page 16 above. Article 11 of the Convention stipulates that "caravan traffic permits shall be issued . . . [in] French territory [by the] administrative authorities of . . . Zouar, Largeau, Fada"; and in "Libyan territory [by the] administrative authorities of . . . Mourzouk, Koufra and the Oraghen Touareg". According to Article 13, nomads bearing a caravan traffic permit may "move freely across the frontier". The following expressions are also found in the Convention: "on either side of the frontier", "frontier zone" (Art. 15); "cross the frontier" (Art. 16); "the French and Libyan frontier authorities" (Arts. 17 and 20); "cross-border transit" (Art. 18). The use of these expressions is consistent with the existence of a frontier. In the view of the Court, it is difficult to deny that the 1955 Treaty provided for a frontier between Libya and French Equatorial Africa, when one of the appended Conventions contained such provisions governing the details of the trans-frontier movements of the inhabitants of the region.

55. The Court considers that it is not necessary to refer to the *travaux préparatoires* to elucidate the content of the 1955 Treaty; but, as in previous cases, it finds it possible by reference to the *travaux* to confirm its reading of the text, namely, that the Treaty constitutes an agreement between the parties which, *inter alia*, defines the frontiers. It is true that the Libyan negotiators wished at the outset to leave aside the question of frontiers, but Ambassador Dejean, Head of the French Delegation at the negotiations held in Tripoli in July-August 1955, insisted "that it was not possible to conclude the treaty without an agreement on the frontiers". On 28 July 1955, according to the Libyan minutes of the negotiations, the Libyan Prime Minister stated:

> "that the question [of the frontiers] was not free from difficulty since the Italians had occupied many centres behind the existing frontier".

Ambassador Dejean stated "that Italy had exploited France's weakness during the last war" and "that it [Italy] had crossed over the borders which had been agreed upon under the Agreement of 1919 which were still valid . . .". The Libyan Prime Minister then proposed

"that the question of the frontiers be deferred at the present time until the Libyan side had had time to study the subject, and then experts could be despatched to work with French experts to reach an agreement on demarcation and he asked that it be considered sufficient to say that the Agreement of 1919 was acceptable and that the implementation of it be left to the near future".

56. It is clear from these minutes that the Libyan Prime Minister expressly accepted the agreement of 1919, the "implementation" of the agreement to be left "to the near future"; and in this context, the term "implementation" can only mean operations to demarcate the frontier on the ground. The Prime Minister spoke also of an agreement on "demarcation", which presupposes the prior delimitation — in other words definition — of the frontier. Use of the term "demarcation" creates a presumption that the parties considered the definition of the frontiers as already effected, to be followed if necessary by a demarcation, the ways and means of which were defined in Annex I.

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57. Having concluded that the contracting parties wished, by the 1955 Treaty, and particularly by its Article 3, to define their common frontier, the Court must now examine what is the frontier between Libya and Chad (in 1955, between Libya and French Equatorial Africa) which results from the international instruments listed in Annex I, the text of which is set out in paragraph 40 above. It should however first be noted that, as already indicated (paragraph 50 above), the list in Annex I does not include the non-ratified Treaty of 1935. That Treaty provided in detail for a frontier made up of nine sectors (straight lines/crest lines, etc.) from Toummo to the intersection of the line of longitude 24° east of Greenwich with the line of latitude 18° 45′ north; this line is shown on sketch-map No. 2 on page 29 hereof, together with the 1919 Anglo-French Convention line (paragraph 59 below). Of the treaties prior to 1955 bearing upon a boundary line in this region, the non-ratified Treaty of 1935 was thus the most detailed. Yet it was not mentioned in Annex I. The omission is all the more significant inasmuch as, in February 1955, a few months before the execution of the 1955 Treaty in August, a Franco-Libyan incident which occurred at Aouzou had focused attention on the area lying to the south of the line of the 1919 Anglo-French Convention and to the north of the line of the non-ratified Treaty of 1935.

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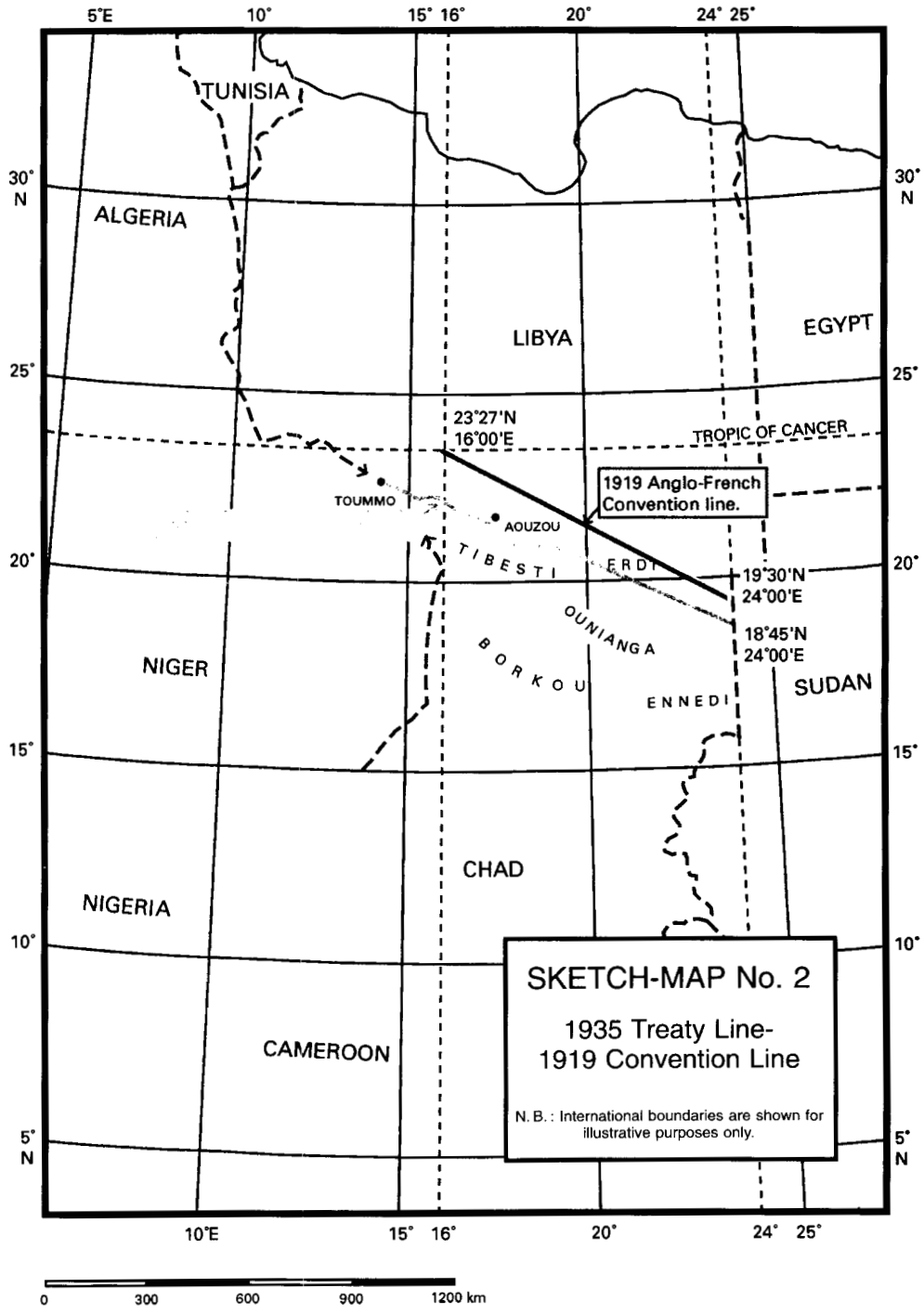
5°E
10°
15° 16°
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24° 25°
30° N
25°
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TUNISIA
ALGERIA
LIBYA
EGYPT
NIGER
NIGERIA
CHAD
CAMEROON
SUDAN
23°27'N
16°00'E
TROPIC OF CANCER
1919 Anglo-French Convention line.
TOUMMO
AOUZOU
TIBESTI
ERDI
19°30'N
24°00'E
OUNIANGA
18°45'N
24°00'E
BORKOU
ENNEDI
SKETCH-MAP No. 2
1935 Treaty Line-
1919 Convention Line
N. B.: International boundaries are shown for illustrative purposes only.
0
300
600
900
1200 km

58. The first instrument mentioned in Annex I, the Franco-British Convention of 14 June 1898, bears no direct relation to the present dispute; it is mentioned in Annex I on account of the Additional Declaration of 21 March 1899. This Declaration of 1899, which complements the Convention of 1898, defines a line limiting the French zone (or sphere of influence) to the north-east in the direction of Egypt and the Nile Valley, already under British control, and is therefore relevant. The 1899 Declaration recites that "The IVth Article of the Convention of 14 June 1898 shall be completed by the following provisions, which shall be considered as forming an integral part of it". Among these provisions is paragraph 3:

> "It is understood, in principle, that to the north of the 15th parallel the French zone shall be limited to the north-east and east by a line which shall start from the point of intersection of the Tropic of Cancer with the 16th degree of longitude east of Greenwich (13° 40′ east of Paris), shall run thence to the south-east until it meets the 24th degree of longitude east of Greenwich (21° 40′ east of Paris), and shall then follow the 24th degree until it meets, to the north of the 15th parallel of latitude, the frontier of Darfur as it shall eventually be fixed."

The text of this provision is not free from ambiguities, since the use of the words "in principle" raises some question whether the line was to be strictly south-east or whether some leeway was possible in establishing the course of the line. Different interpretations were possible, since the point of intersection of the line with the 24th degree of longitude east was not specified, and the original text of the Declaration was not accompanied by a map showing the course of the line agreed. As noted above (paragraph 28), a few days after the adoption of that Declaration, the French authorities published its text in a *Livre jaune* including a map; a copy of that map is attached to this Judgment. On that map, a red line, solid or interrupted, coupled with red shading, indicated, according to the map legend, the *"limite des possessions françaises, d'après la convention du 21 mars 1899"*. The red line was continuous where it reflected boundaries defined in that Convention, and a pecked line where it indicated the limit of the "French zone" defined in paragraph 3 of the Convention. The pecked line was shown as running, not directly south-east, but rather in an east-south-east direction, so as to terminate at approximately the intersection of the 24° meridian east with the parallel 19° of latitude north. The direct south-east line and the *Livre jaune* map line are shown for purposes of comparison on sketch-map No. 3 on page 32 hereof (together with the line defined in the Convention of 8 September 1919, dealt with below).

59. For the purposes of the present Judgment, the question of the position of the limit of the French zone may be regarded as resolved by

the Convention of 8 September 1919 signed at Paris between Great Britain and France. As stated in the Convention itself, this Convention was

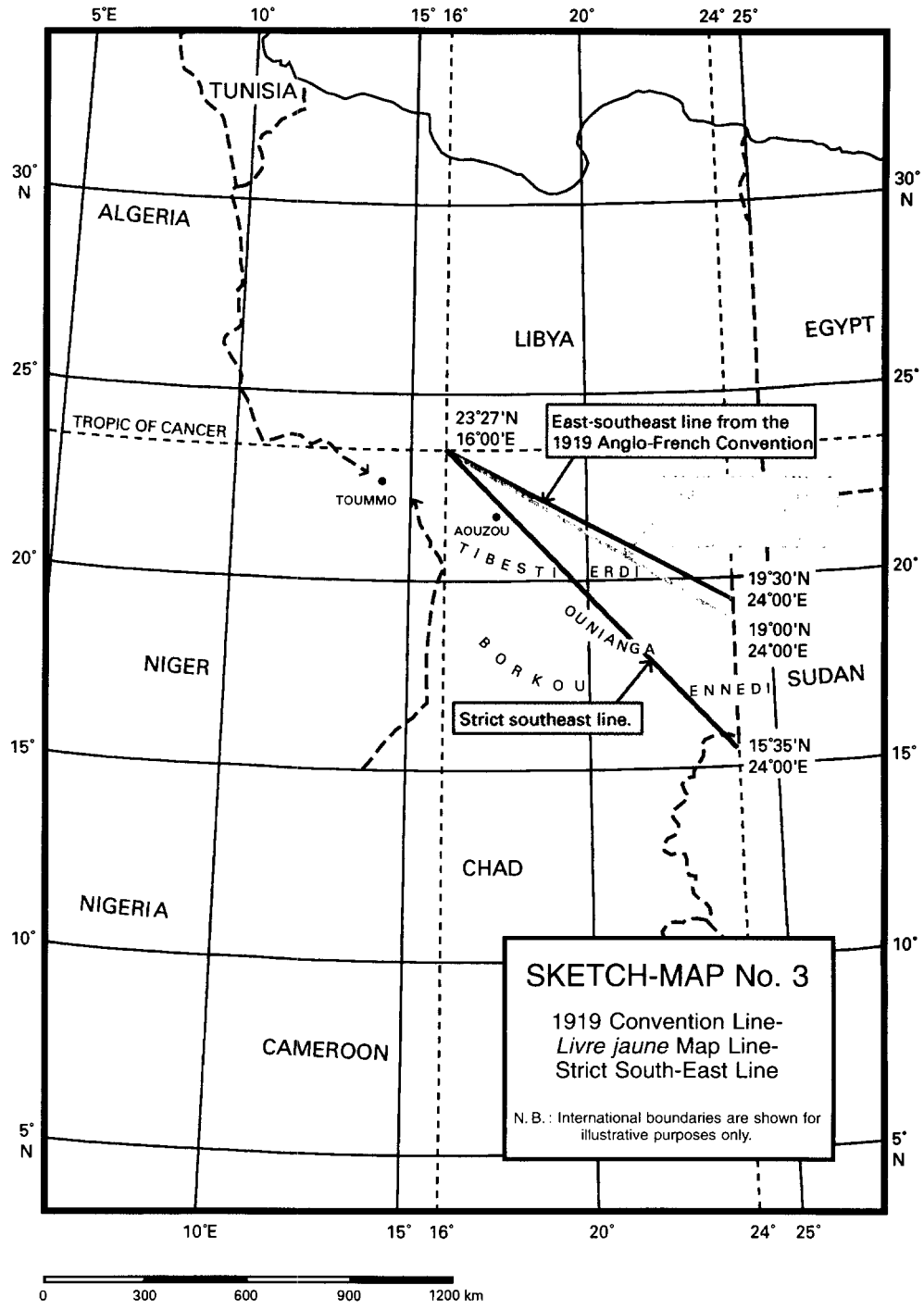
> "Supplementary to the Declaration signed at London on March 21, 1899, as an addition to the Convention of June 14, 1898, which regulated the Boundaries between the British and French Colonial Possessions and Spheres of Influence to the West and East of the Niger."

It specified the boundary between Darfour and French Equatorial Africa, and contained various provisions relating to the possible extension eastwards of the French sphere, beyond the 24th degree of longitude. However, its concluding paragraph provided:

> "It is understood that nothing in this Convention prejudices the interpretation of the Declaration of the 21st March, 1899, according to which the words in Article 3 '. . . shall run thence to the south-east until it meets the 24th degree of longitude east of Greenwich (21° 40′ east of Paris)' are accepted as meaning '. . . shall run thence in a south-easterly direction until it meets the 24th degree of longitude east of Greenwich at the intersection of that degree of longitude with parallel 19° 30′ degrees of latitude'."

This provision meant that the south-easterly line specified by the 1899 Declaration was not to run directly south-east but in an east-south-east direction so as to intersect with the 24th degree of longitude at a point more to the north than would a direct south-easterly line. This Convention, in thus accepting an east-south-east line rather than a strict south-east line, was in effect confirming the earlier French view that the 1899 Declaration did not provide for a strict south-east line, and was in fact, as to the eastern end-point, stipulating a line even further north than the line shown on the *Livre jaune* map. Sketch-map No. 3, attached below, shows, for ease of comparison, the relative positions of the three lines — the strict south-east line, the *Livre jaune* line and the 1919 line.

60. There is thus little point in considering what was the pre-1919 situation, in view of the fact that the Anglo-French Convention of 8 September 1919 determined the precise end-point of the line in question, by adopting the point of intersection of the 24th degree of longitude east with the parallel 19° 30′ of latitude north. The text of the 1919 Convention presents this line as an interpretation of the Declaration of 1899; in the view of the Court, for the purposes of the present Judgment, there is no reason to categorize it either as a confirmation or as a modification of the Declaration. Inasmuch as the two States parties to the Convention are those that concluded the Declaration of 1899, there can be no doubt that the "interpretation" in question constituted, from 1919 onwards,


5°E
10°
15° 16°
20°
24° 25°
TUNISIA
30° N
ALGERIA
LIBYA
EGYPT
25°
TROPIC OF CANCER
23°27'N
16°00'E
East-southeast line from the
1919 Anglo-French Convention
TOUMMO
AOUZOU
TIBESTI
ERDI
20°
19°30'N
24°00'E
19°00'N
24°00'E
OUNIANGA
BORKOU
ENNEDI
SUDAN
NIGER
Strict southeast line.
15°35'N
24°00'E
15°
CHAD
NIGERIA
10°
SKETCH-MAP No. 3
1919 Convention Line-
Livre jaune Map Line-
Strict South-East Line
N. B.: International boundaries are shown for illustrative purposes only.
CAMEROON
5° N
10°E
0
300
600
900
1200 km

and as between them, the correct and binding interpretation of the Declaration of 1899. It is opposable to Libya by virtue of the 1955 Treaty. For these reasons, the Court concludes that the line described in the 1919 Convention represents the frontier between Chad and Libya to the east of the meridian 16° east.

61. The Court now turns to the frontier west of that meridian. The Franco-Italian exchange of letters of 1 November 1902 refers both to the Anglo-French Declaration of 1899 and to the Franco-Italian exchange of letters of 1900 (paragraph 29 above). It states that

> "the limit to French expansion in North Africa, as referred to in the above mentioned letter . . . dated 14 December 1900, is to be taken as corresponding to the frontier of Tripolitania as shown on the map annexed to the Declaration of 21 March 1899".

The map referred to could only be the map in the *Livre jaune* which showed a pecked line indicating the frontier of Tripolitania. That line must therefore be examined by the Court in determining the course of the frontier between Libya and Chad, to the extent that it does not result from the Anglo-French agreements of 1898, 1899 and 1919.

62. The Convention between the Tunisian Government and the Ottoman Government of 19 May 1910 (paragraph 30 above) concerns only the frontier between the Vilayet of Tripoli (which is now a part of Libya) and the Regency of Tunis (i.e., present-day Tunisia); and consequently, while appropriate for inclusion in Annex I to the 1955 Treaty, it has no bearing on the dispute between Libya and Chad. Similarly, since the Franco-Italian Arrangement of 12 September 1919 governs only the sector between Ghadamès and Toummo, and thus does not directly concern the frontier between Chad and Libya, the Court finds it unnecessary to take it further into consideration here.

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63. The Court will now indicate how the line which results from the combined effect of the instruments listed in Annex I to the 1955 Treaty is made up, as far as the territories of Chad and Libya are concerned. It is clear that the eastern end-point of the frontier will lie on the meridian 24° east, which is here the boundary of the Sudan. To the west, the Court is not asked to determine the tripoint Libya-Niger-Chad; Chad in its submissions merely asks the Court to declare the course of the frontier "as far as the fifteenth degree east of Greenwich". In any event the Court's decision in this respect, as in the *Frontier Dispute* case, "will . . . not be opposable to Niger as regards the course of that country's frontiers" (*I.C.J. Reports 1986*, p. 580, para. 50). Between 24° and 16° east of Greenwich, the line is determined by the Anglo-French Convention of 8 September 1919: i.e., the boundary is a straight line from the point of intersection of the meridian 24° east with the parallel 19° 30′ north to the

point of intersection of the meridian 16° east with the Tropic of Cancer. From the latter point, the line is determined by the Franco-Italian exchange of letters of 1 November 1902, by reference to the *Livre jaune* map: i.e., this line, as shown on that map, runs towards a point immediately to the south of Toummo; before it reaches that point, however, it crosses the meridian 15° east, at some point on which, from 1930 onward, was situated the commencement of the boundary between French West Africa and French Equatorial Africa.

64. Confirmation of the line just described may be found in the Particular Convention annexed to the 1955 Treaty, which makes provision for the withdrawal of the French forces stationed in the Fezzan. Among the matters dealt with are the routes to be followed by the military convoys of French forces proceeding to or from Chad. Article 3 of the Particular Convention deals with the passage along Piste No. 5 of military convoys, and Annex III to the Treaty defines Piste No. 5 as the itinerary which, coming from the region of Ramada in Tunisia, passes certain specified points "and penetrates into territory of Chad in the area of Muri Idie". The available maps of the area reveal at least four different places with names which, while varying from one map to another, resemble Muri Idie, but two of these are situated well within undisputed Libyan territory, nowhere near what might in 1955 have been regarded as "territory of Chad". The other two are located to the south of the relevant part of the line on the *Livre jaune* map, west of the 16° meridian east. One, the Mouri Idié water-hole *(guelta)*, is immediately to the south of that line; the other, the Mouri Idié area (deriving its name from the water-hole), is around 30 kilometres to the south. What is called Muri Idie in Annex III must therefore be identified as being either of these two places, thus confirming that the parties to the 1955 Treaty regarded the *Livre jaune* map line as being, west of the 16° meridian east, the boundary of "territory of Chad".

65. Chad, which in its submissions asks the Court to define the frontier as far west as the 15° meridian east, has not defined the point at which, in its contention, the frontier intersects that meridian. Nor have the Parties indicated to the Court the exact co-ordinates of Toummo in Libya. However, on the basis of the information available, and in particular the maps produced by the Parties, the Court has come to the conclusion that the line of the *Livre jaune* map crosses the 15° meridian east at the point of intersection of that meridian with the parallel 23° of north latitude. In this sector, the frontier is thus constituted by a straight line from the latter point to the point of intersection of the meridian 16° east with the Tropic of Cancer.

*

66. Having concluded that a frontier resulted from the 1955 Treaty, and having established where that frontier lay, the Court is in a position to consider the subsequent attitudes of the Parties to the question of fron-

tiers. No subsequent agreement, either between France and Libya, or between Chad and Libya, has called in question the frontier in this region deriving from the 1955 Treaty. On the contrary, if one considers treaties subsequent to the entry into force of the 1955 Treaty, there is support for the proposition that after 1955, the existence of a determined frontier was accepted and acted upon by the Parties. The Treaty between Libya and Chad of 2 March 1966, like the Treaty of 1955, refers to friendship and neighbourly relations between the Parties, and deals with frontier questions. Articles 1 and 2 mention "the frontier" between the two countries, with no suggestion of there being any uncertainty about it. Article 1 deals with order and security "along the frontier" and Article 2 with the movement of people living "on each side of the frontier". Article 4 deals with frontier permits and Article 7 with frontier authorities. If a serious dispute had indeed existed regarding frontiers, eleven years after the conclusion of the 1955 Treaty, one would expect it to have been reflected in the 1966 Treaty.

67. The Agreement on Friendship, Co-operation and Mutual Assistance concluded between Chad and Libya on 23 December 1972 again speaks in terms of good relations and neighbourliness, and stresses adherence to the principles and objectives of the Organization of African Unity, and in Article 6 the parties undertake to make every effort to avoid disputes that may arise between them. They also pledge themselves to work towards the peaceful resolution of any problems that may arise between them, so as to accord with the spirit of the Charters of the Organization of African Unity and the United Nations. A further agreement was concluded between the two States on 12 August 1974, at a time when the present dispute had reached the international arena, with complaints having been made by Chad to the United Nations. While friendship and neighbourliness are again mentioned, Article 2 states that the

> "frontiers between the two countries are a colonial conception in which the two peoples and nations had no hand, and this matter should not obstruct their co-operation and fraternal relations".

The Treaty of Friendship and Alliance that the Parties concluded on 15 June 1980 is one of mutual assistance in the event of external aggression: Libya agrees to make its economic potential available for the economic and military rehabilitation of Chad. The Accord between Libya and Chad of 6 January 1981 also implies the existence of a frontier between those States, since it provides in Article 11 that:

> "The two Parties have decided that the frontiers between the Socialist People's Libyan Arab Jamahiriya and the Republic of Chad shall be opened to permit the unhindered and unimpeded freedom of movement of Libyan and Chadian nationals, and to weld together the two fraternal peoples."

68. The Court now turns to the attitudes of the Parties, subsequent to the 1955 Treaty, on occasions when matters pertinent to the frontiers came up before international fora. Libya achieved its independence nearly nine years before Chad; during that period, France submitted reports on this territory to the United Nations General Assembly. The report for 1955 (United Nations doc. ST/TRI/SER.A/12, p. 66) shows the area of Chad's territory as 1,284,000 square kilometres, which expressly includes 538,000 square kilometres for the BET. Moreover United Nations publications from 1960 onward continued to state the area of Chad as 1,284,000 square kilometres (see for example *Yearbook 1960*, p. 693, App. 1). As will be clear from the indications above as to the frontier resulting from the 1955 Treaty (paragraph 63), the BET is part of the territory of Chad on the basis of that frontier, but would not be so on the basis of Libya's claim. Libya did not challenge the territorial dimensions of Chad as set out by France.

69. As for Chad, it has consistently adopted the position that it does have a boundary with Libya, and that the territory of Chad includes the "Aouzou strip", i.e., the area between the 1919 and 1935 lines shown on sketch-map No. 2 on page 29 hereof. In 1977 Chad submitted a complaint to the Organization of African Unity regarding the occupation by Libya of the Aouzou strip. The OAU established an *ad hoc* committee to resolve the dispute (AHG/Dec. 108 (XIV)). Chad's complaint was kept before it for 12 years prior to the referral of the matter to this Court. Before the OAU, Libya's position was, *inter alia*, that the frontier defined by the Treaty of 1935 was valid.

70. In 1971, Chad complained in a statement to the United Nations General Assembly that Libya was interfering in its internal and external affairs. In 1977 it complained that the Aouzou strip had been under Libyan occupation since 1973. At the General Assembly's thirty-third session, in 1978, Chad complained to the Assembly of "the occupation by Libya of Aouzou, an integral part of our territory". In 1977 and 1978, and in each year from 1982 to 1987, Chad protested to the General Assembly about the encroachment which it alleged that Libya had made into its territory.

71. By a communication of 9 February 1978, the Head of State of Chad informed the Security Council that Libya had "to this day supplied no documentation to the OAU to justify its claims to Aouzou" and had in January 1978 failed to participate at the Committee of Experts (the *Ad Hoc* Committee) set up by the OAU. The Permanent Representative of Chad requested the President of the Security Council to convene a meeting as a matter of urgency to consider the extremely serious situation then prevailing. Chad repeated its complaints to the Security Council in 1983, 1985 and 1986. Libya has explained that, since it considered that the Security Council, being a political forum, was not in a position to judge the merits of the legal problems surrounding the territorial dispute,

it did not attempt to plead its case before the Council. All of these instances indicate the consistency of Chad's conduct in relation to the location of its boundary.

*

72. Article 11 of the 1955 Treaty provides that:

> "The present Treaty is concluded for a period of 20 years.
>
> The High Contracting Parties shall be able at all times to enter into consultations with a view to its revision.
>
> Such consultations shall be compulsory at the end of the ten-year period following its entry into force.
>
> The present Treaty can be terminated by either Party 20 years after its entry into force, or at any later time, provided that one year's notice is given to the other Party."

These provisions notwithstanding, the Treaty must, in the view of the Court, be taken to have determined a permanent frontier. There is nothing in the 1955 Treaty to indicate that the boundary agreed was to be provisional or temporary; on the contrary it bears all the hallmarks of finality. The establishment of this boundary is a fact which, from the outset, has had a legal life of its own, independently of the fate of the 1955 Treaty. Once agreed, the boundary stands, for any other approach would vitiate the fundamental principle of the stability of boundaries, the importance of which has been repeatedly emphasized by the Court (*Temple of Preah Vihear, I.C.J. Reports 1962*, p. 34; *Aegean Sea Continental Shelf, I.C.J. Reports 1978*, p. 36).

73. A boundary established by treaty thus achieves a permanence which the treaty itself does not necessarily enjoy. The treaty can cease to be in force without in any way affecting the continuance of the boundary. In this instance the Parties have not exercised their option to terminate the Treaty, but whether or not the option be exercised, the boundary remains. This is not to say that two States may not by mutual agreement vary the border between them; such a result can of course be achieved by mutual consent, but when a boundary has been the subject of agreement, the continued existence of that boundary is not dependent upon the continuing life of the treaty under which the boundary is agreed.

* *

74. The Court concludes that the 15° line claimed by Libya as the boundary is unsupported by the 1955 Treaty or any of its associated instruments. The effect of the instruments listed in Annex I to the 1955 Treaty may be summed up as follows:

— A composite boundary results from these instruments; it comprises two sectors which are separately dealt with in instruments listed in

Annex I: a sector to the east of the point of intersection of the Tropic of Cancer with the 16th degree of longitude east of Greenwich, and a sector to the west of that point. This point is hereinafter referred to for convenience as point X, and indicated as such on sketch-map No. 4 on page 39 hereof.

— The eastern sector of the boundary is provided by the Anglo-French Convention of 8 September 1919: a straight line between point X and the point of intersection of the 24th degree of longitude east of Greenwich with parallel 19° 30′ of latitude north; this latter point is indicated on sketch-map No. 4 on page 39 hereof as point Y.

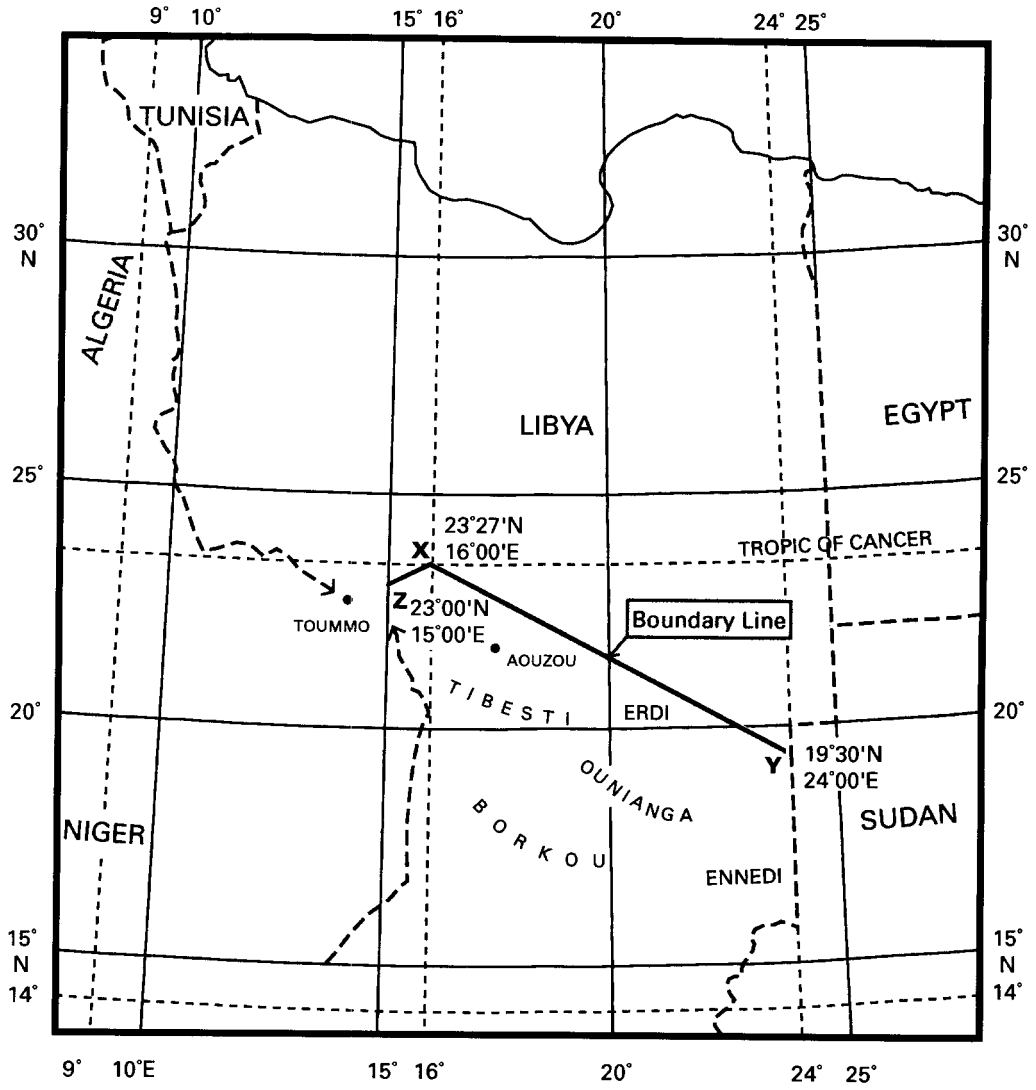
— The western sector of the boundary, from point X in the direction of Toummo, is provided by the Franco-Italian Accord of 1 November 1902. This sector is a straight line following the frontier of Tripolitania as indicated on the *Livre jaune* map, from point X to the point of intersection of the 15° meridian east and the parallel 23° north; this latter point is indicated on sketch-map No. 4 on page 39 hereof as point Z.

— Four instruments listed in Annex I — the Convention of 14 June 1898 coupled with the Declaration of 21 March 1899, the Accord of 1 November 1902 and the Convention of 8 September 1919 — thus provide a complete frontier between Libya and Chad.

* *

75. It will be evident from the preceding discussion that the dispute before the Court, whether described as a territorial dispute or a boundary dispute, is conclusively determined by a Treaty to which Libya is an original party and Chad a party in succession to France. The Court's conclusion that the Treaty contains an agreed boundary renders it unnecessary to consider the history of the "Borderlands" claimed by Libya on the basis of title inherited from the indigenous people, the Senoussi Order, the Ottoman Empire and Italy. Moreover, in this case, it is Libya, an original party to the Treaty, rather than a successor State, that contests its resolution of the territorial or boundary question. Hence there is no need for the Court to explore matters which have been discussed at length before it such as the principle of *uti possidetis* and the applicability of the Declaration adopted by the Organization of African Unity at Cairo in 1964.

76. Likewise, the effectiveness of occupation of the relevant areas in the past, and the question whether it was constant, peaceful and acknowledged, are not matters for determination in this case. So, also, the question whether the 1955 Treaty was declaratory or constitutive does not call for consideration. The concept of *terra nullius* and the nature of Senoussi, Ottoman or French administration are likewise not germane to the issue. For the same reason, the concepts of spheres of influence and of the hinterland doctrine do not come within the ambit of the Court's enquiry in



SKETCH-MAP No. 4
Boundary Line
Determined by the
Court's Judgment

N. B. : International boundaries indicated by pecked lines are shown for illustrative purposes only.

this case. Similarly, the Court does not need to consider the rules of intertemporal law. This Judgment also does not need to deal with the history of the dispute as argued before the United Nations and the Organization of African Unity. The 1955 Treaty completely determined the boundary between Libya and Chad.

* * *

77. For these reasons,

THE COURT,

By 16 votes to 1,

(1) *Finds* that the boundary between the Great Socialist People's Libyan Arab Jamahiriya and the Republic of Chad is defined by the Treaty of Friendship and Good Neighbourliness concluded on 10 August 1955 between the French Republic and the United Kingdom of Libya;

(2) *Finds* that the course of that boundary is as follows:

> From the point of intersection of the 24th meridian east with the parallel 19° 30′ of latitude north, a straight line to the point of intersection of the Tropic of Cancer with the 16th meridian east; and from that point a straight line to the point of intersection of the 15th meridian east and the parallel 23° of latitude north;

these lines are indicated, for the purpose of illustration, on sketch-map No. 4 on page 39 of this Judgment.

IN FAVOUR: *President* Sir Robert Jennings; *Vice-President* Oda; *Judges* Ago, Schwebel, Bedjaoui, Ni, Evensen, Tarassov, Guillaume, Shahabuddeen, Aguilar Mawdsley, Weeramantry, Ranjeva, Ajibola, Herczegh; *Judge* ad hoc Abi-Saab.

AGAINST: *Judge* ad hoc Sette-Camara.

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this third day of February, one thousand nine hundred and ninety-four, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Great Socialist People's Libyan Arab Jamahiriya and the Government of the Republic of Chad, respectively.

(Signed) R. Y. JENNINGS,
President.

(Signed) Eduardo VALENCIA-OSPINA,
Registrar.

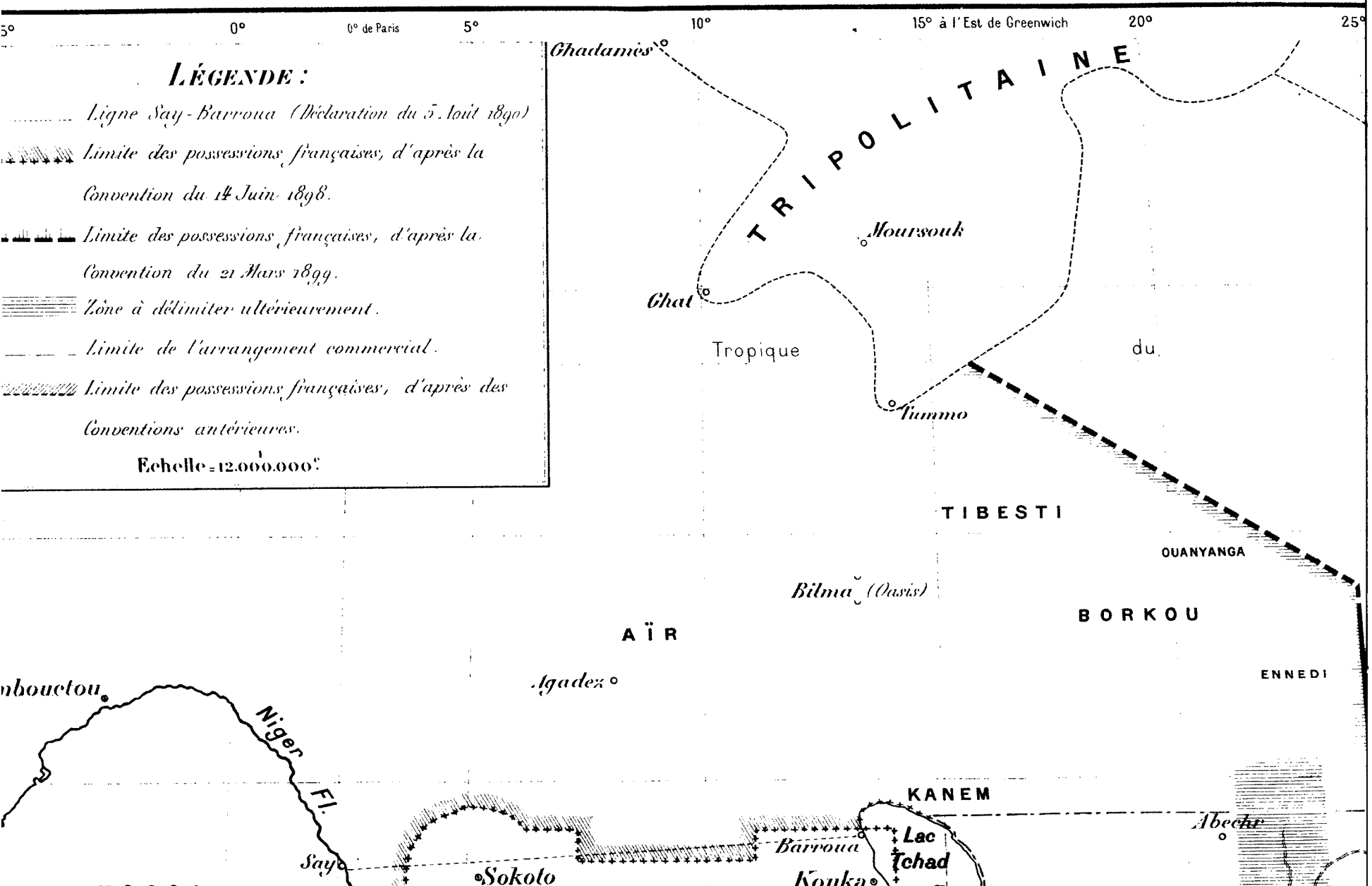
Judge AGO appends a declaration to the Judgment of the Court.

Judges SHAHABUDDEEN and AJIBOLA append separate opinions to the Judgment of the Court.

Judge *ad hoc* SETTE-CAMARA appends a dissenting opinion to the Judgment of the Court.

(Initialled) R.Y.J.

(Initialled) E.V.O.


5°
0°
0° de Paris
5°
10°
15° à l'Est de Greenwich
20°
25°
LÉGENDE :
Ligne Say-Barroua (Déclaration du 5 Août 1890)
Limite des possessions françaises, d'après la Convention du 14 Juin 1898.
Limite des possessions françaises, d'après la Convention du 21 Mars 1899.
Zône à délimiter ultérieurement.
Limite de l'arrangement commercial.
Limite des possessions françaises, d'après des Conventions antérieures.
Echelle = 12.000.000e
Ghadamès
TRIPOLITAINE
Moursouk
Ghat
Tropique
du
Tummo
TIBESTI
OUANYANGA
Bilma (Oasis)
BORKOU
AÏR
ENNEDI
Agadez
nbouctou
Niger Fl.
KANEM
Abéchr
Lac Tchad
Barroua
Say
Sokoto
Kouka

Annex 677

Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/ Malaysia), Judgement of 17 December 2002, I.C.J. Reports 2002, p. 625

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

CASE CONCERNING SOVEREIGNTY OVER PULAU LIGITAN AND PULAU SIPADAN

(INDONESIA/MALAYSIA)

JUDGMENT OF 17 DECEMBER 2002

2002

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRE RELATIVE À LA SOUVERAINETÉ SUR PULAU LIGITAN ET PULAU SIPADAN

(INDONÉSIE/MALAISIE)

ARRÊT DU 17 DÉCEMBRE 2002

PRINTED IN THE NETHERLANDS

ISSN 0074-4441
ISBN 92-1-070964-0

Official citation:
Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment, I.C.J. Reports 2002, p. 625

Mode officiel de citation:
Souveraineté sur Pulau Ligitan et Pulau Sipadan (Indonésie/Malaisie), arrêt, C.I.J. Recueil 2002, p. 625

ISSN 0074-4441
ISBN 92-1-070964-0

Sales number
N° de vente: 858

17 DECEMBER 2002

JUDGMENT

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SOUVERAINETÉ SUR PULAU LIGITAN ET PULAU SIPADAN

(INDONÉSIE/MALAISIE)

17 DÉCEMBRE 2002

ARRÊT

INTERNATIONAL COURT OF JUSTICE

2002
17 December
General List
No. 102

YEAR 2002

17 December 2002

CASE CONCERNING SOVEREIGNTY OVER PULAU LIGITAN AND PULAU SIPADAN

(INDONESIA/MALAYSIA)

Geographical context — Historical background — Bases on which the Parties found their claims to the islands of Ligitan and Sipadan.

* *

Conventional title asserted by Indonesia (1891 Convention between Great Britain and the Netherlands).

Indonesia's argument that the 1891 Convention established the 4° 10′ north parallel of latitude as the dividing line between the respective possessions of Great Britain and the Netherlands in the area of the disputed islands and that those islands therefore belong to it as successor to the Netherlands.

Disagreement of the Parties on the interpretation to be given to Article IV of the 1891 Convention — Articles 31 and 32 of the Vienna Convention on the Law of Treaties reflect international customary law on the subject.

Text of Article IV of the 1891 Convention — Clause providing "From 4° 10′ north latitude on the east coast the boundary-line shall be continued eastward along that parallel, across the Island of Sebittik . . ." — Ambiguity of the terms "shall be continued" and "across" — Ambiguity which could have been avoided had the Convention expressly stipulated that the 4° 10′ north parallel constituted the line separating the islands under British sovereignty from those under Dutch sovereignty — Ordinary meaning of the term "boundary".

Context of the 1891 Convention — Explanatory Memorandum appended to the draft Law submitted to the Netherlands States-General with a view to ratification of the Convention — Map appended to the Memorandum shows a red line continuing out to sea along the 4° 10′ north parallel — Line cannot be considered to have been extended in order to settle any dispute in the waters beyond Sebatik — Explanatory Memorandum and map never transmitted by the Dutch Government to the British Government but simply forwarded to the latter by its

diplomatic agent in The Hague — Lack of reaction by the British Government to the line cannot be deemed to constitute acquiescence.

Object and purpose of the Convention — Delimitation solely of the parties' possessions within the island of Borneo.

Article IV of the Convention, when read in context and in the light of the Convention's object and purpose, cannot be interpreted as establishing an allocation line determining sovereignty over the islands out to sea, to the east of Sebatik.

Recourse to supplementary means of interpretation in order to seek a possible confirmation of the Court's interpretation of the text of the Convention — Neither travaux préparatoires *of the Convention nor circumstances of its conclusion support the position of Indonesia.*

Subsequent practice of the parties — 1915 Agreement between Great Britain and the Netherlands concerning the boundary between the State of North Borneo and the Dutch possessions on Borneo reinforces the Court's interpretation of the 1891 Convention — Court cannot draw any conclusion from the other documents cited.

Maps produced by the Parties — With the exception of the map annexed to the 1915 Agreement, cartographic material inconclusive in respect of the interpretation of Article IV.

Court ultimately comes to the conclusion that Article IV determines the boundary between the two Parties up to the eastern extremity of Sebatik Island and does not establish any allocation line further eastwards.

* *

Question whether Indonesia or Malaysia obtained title to Ligitan and Sipadan by succession.

Indonesia's argument that it was successor to the Sultan of Bulungan, the original title-holder to the disputed islands, through contracts which stated that the Sultanate as described in the contracts formed part of the Netherlands Indies — Indonesia's contention cannot be accepted.

Disputed islands not mentioned by name in any of the international legal instruments cited — Islands not included in the 1878 grant by which the Sultan of Sulu ceded all his rights and powers over his possessions in Borneo to Alfred Dent and Baron von Overbeck — Court observes that, while the Parties both maintain that Ligitan and Sipadan were not terrae nullius *during the period in question in the present case, they do so on the basis of diametrically opposed reasoning, each of them claiming to hold title to those islands.*

Malaysia's argument that it was successor to the Sultan of Sulu, the original title-holder to the disputed islands, further to a series of alleged transfers of that title to Spain, the United States, Great Britain on behalf of the State of North Borneo, the United Kingdom, and Malaysia cannot be upheld.

* *

Consideration of the effectivités *relied on by the Parties.*

Effectivités *generally scarce in the case of very small islands which are uninhabited or not permanently inhabited, like Ligitan and Sipadan — Court*

primarily to analyse the effectivités *which date from the period before 1969, the year in which the Parties asserted conflicting claims to Ligitan and Sipadan — Nature of the activities to be taken into account by the Court in the present case.*

Effectivités *relied on by Indonesia — Activities which do not constitute acts* à titre de souverain *reflecting the intention and will to act in that capacity.*

Effectivités *relied on by Malaysia — Activities modest in number but diverse in character, covering a considerable period of time and revealing an intention to exercise State functions in respect of the two islands — Neither the Netherlands nor Indonesia ever expressed its disagreement or protest at the time when these activities were carried out — Malaysia has title to Ligitan and Sipadan on the basis of the* effectivités *thus mentioned.*

JUDGMENT

Present: *President* GUILLAUME; *Vice-President* SHI; *Judges* ODA, RANJEVA, HERCZEGH, FLEISCHHAUER, KOROMA, VERESHCHETIN, HIGGINS, PARRA-ARANGUREN, KOOIJMANS, REZEK, AL-KHASAWNEH, BUERGENTHAL, ELARABY; *Judges* ad hoc WEERAMANTRY, FRANCK; *Registrar* COUVREUR.

In the case concerning sovereignty over Pulau Ligitan and Pulau Sipadan,

between

the Republic of Indonesia,

represented by

H.E. Mr. Hassan Wirajuda, Minister for Foreign Affairs,

as Agent;

H.E. Mr. Abdul Irsan, Ambassador of the Republic of Indonesia to the Netherlands,

as Co-Agent;

Mr. Alain Pellet, Professor at the University of Paris X-Nanterre, member and former Chairman of the International Law Commission,

Mr. Alfred H. A. Soons, Professor of Public International Law, Utrecht University,

Sir Arthur Watts, K.C.M.G., Q.C., member of the English Bar, member of the Institute of International Law,

Mr. Rodman R. Bundy, avocat à la cour d'appel de Paris, member of the New York Bar, Frere Cholmeley/Eversheds, Paris,

Ms Loretta Malintoppi, avocat à la cour d'appel de Paris, member of the Rome Bar, Frere Cholmeley/Eversheds, Paris,

as Counsel and Advocates;

Mr. Charles Claypoole, Solicitor of the Supreme Court of England and Wales, Frere Cholmeley/Eversheds, Paris,

Mr. Mathias Forteau, Lecturer and Researcher at the University of Paris X-

Nanterre, Researcher at the Centre de droit international de Nanterre (CEDIN), University of Paris X-Nanterre,

as Counsel;

Mr. Hasyim Saleh, Deputy Chief of Mission, Embassy of the Republic of Indonesia, The Hague,
Mr. Rachmat Soedibyo, Director General for Oil & Natural Resources, Department of Energy & Mining,
Major General S. N. Suwisma, Territorial Assistance to Chief of Staff for General Affairs, Indonesian Armed Forces Headquarters,

Mr. Donnilo Anwar, Director for International Treaties for Politics, Security & Territorial Affairs, Department of Foreign Affairs,
Mr. Eddy Pratomo, Director for International Treaties for Economic, Social & Cultural Affairs, Department of Foreign Affairs,
Mr. Bey M. Rana, Director for Territorial Defence, Department of Defence,

Mr. Suwarno, Director for Boundary Affairs, Department of Internal Affairs,
Mr. Subiyanto, Director for Exploration & Exploitation, Department of Energy & Mining,
Mr. A. B. Lapian, Expert on Borneo History,
Mr. Kria Fahmi Pasaribu, Minister Counsellor, Embassy of the Republic of Indonesia, The Hague,
Mr. Moenir Ari Soenanda, Minister Counsellor, Embassy of the Republic of Indonesia, Paris,
Mr. Rachmat Budiman, Department of Foreign Affairs,
Mr. Abdul Havied Achmad, Head of District, East Kalimantan Province,
Mr. Adam Mulawarman T., Department of Foreign Affairs,
Mr. Ibnu Wahyutomo, Department of Foreign Affairs,
Capt. Wahyudi, Indonesian Armed Forces Headquarters,
Capt. Fanani Tedjakusuma, Indonesian Armed Forces Headquarters,

Group Capt. Arief Budiman, Survey & Mapping, Indonesian Armed Forces Headquarters,
Mr. Abdulkadir Jaelani, Second Secretary, Embassy of the Republic of Indonesia, The Hague,
Mr. Daniel T. Simandjuntak, Third Secretary, Embassy of the Republic of Indonesia, The Hague,
Mr. Soleman B. Ponto, Military Attaché, Embassy of the Republic of Indonesia, The Hague,
Mr. Ishak Latuconsina, Member of the House of Representatives of the Republic of Indonesia,
Mr. Amris Hasan, Member of the House of Representatives of the Republic of Indonesia,

as Advisers;

Mr. Martin Pratt, International Boundaries Research Unit, University of Durham,
Mr. Robert C. Rizzutti, Senior Mapping Specialist, International Mapping Associates,
Mr. Thomas Frogh, Cartographer, International Mapping Associates,

as Technical Advisers,

and

Malaysia

represented by

H.E. Mr. Tan Sri Abdul Kadir Mohamad, Ambassador-at-Large, Ministry of Foreign Affairs,

as Agent;

H.E. Dato' Noor Farida Ariffin, Ambassador of Malaysia to the Netherlands,

as Co-Agent;

Sir Elihu Lauterpacht, Q.C., C.B.E., Honorary Professor of International Law, University of Cambridge, member of the Institute of International Law,
Mr. Jean-Pierre Cot, Emeritus Professor, University of Paris I (Panthéon-Sorbonne), Former Minister,
Mr. James Crawford, S.C., F.B.A., Whewell Professor of International Law, University of Cambridge, member of the English and Australian Bars, member of the Institute of International Law,
Mr. Nico Schrijver, Professor of International Law, Free University, Amsterdam, and Institute of Social Studies, The Hague; member of the Permanent Court of Arbitration,

as Counsel and Advocates;

Dato' Zaitun Zawiyah Puteh, Solicitor-General of Malaysia,
Mrs. Halima Hj. Nawab Khan, Senior Legal Officer, Sabah State Attorney-General's Chambers,
Mr. Athmat Hassan, Legal Officer, Sabah State Attorney-General's Chambers,
Mrs. Farahana Rabidin, Federal Counsel, Attorney-General's Chambers,

as Counsel;

Datuk Nik Mohd. Zain Hj. Nik Yusof, Secretary General, Ministry of Land and Co-operative Development,
Datuk Jaafar Ismail, Director-General, National Security Division, Prime Minister's Department,
H.E. Mr. Hussin Nayan, Ambassador, Under-Secretary, Territorial and Maritime Affairs Division, Ministry of Foreign Affairs,
Mr. Ab. Rahim Hussin, Director, Maritime Security Policy, National Security Division, Prime Minister's Department,
Mr. Raja Aznam Nazrin, Principal Assistant Secretary, Territorial and Maritime Affairs Division, Ministry of Foreign Affairs,
Mr. Zulkifli Adnan, Counsellor of the Embassy of Malaysia in the Netherlands,
Ms Haznah Md. Hashim, Assistant Secretary, Territorial and Maritime Affairs Division, Ministry of Foreign Affairs,
Mr. Azfar Mohamad Mustafar, Assistant Secretary, Territorial and Maritime Affairs Division, Ministry of Foreign Affairs,

as Advisers;

Mr. Hasan Jamil, Director of Survey, Geodetic Survey Division, Department of Survey and Mapping,

Mr. Tan Ah Bah, Principal Assistant Director of Survey, Boundary Affairs, Department of Survey and Mapping,
Mr. Hasnan Hussin, Senior Technical Assistant, Boundary Affairs, Department of Survey and Mapping,

as Technical Advisers,

THE COURT,

composed as above,

after deliberation,

delivers the following Judgment:

1. By joint letter dated 30 September 1998, filed in the Registry of the Court on 2 November 1998, the Ministers for Foreign Affairs of the Republic of Indonesia (hereinafter "Indonesia") and of Malaysia notified to the Registrar a Special Agreement between the two States, signed at Kuala Lumpur on 31 May 1997 and having entered into force on 14 May 1998, the date of the exchange of instruments of ratification.

2. The text of the Special Agreement reads as follows:

"The Government of the Republic of Indonesia and the Government of Malaysia, hereinafter referred to as 'the Parties';

Considering that a dispute has arisen between them regarding sovereignty over Pulau Ligitan and Pulau Sipadan;

Desiring that this dispute should be settled in the spirit of friendly relations existing between the Parties as enunciated in the 1976 Treaty of Amity and Co-operation in Southeast Asia; and

Desiring further, that this dispute should be settled by the International Court of Justice (the Court),

Have agreed as follows:

Article 1

Submission of Dispute

The Parties agree to submit the dispute to the Court under the terms of Article 36, paragraph 1, of its Statute.

Article 2

Subject of the Litigation

The Court is requested to determine on the basis of the treaties, agreements and any other evidence furnished by the Parties, whether sovereignty over Pulau Ligitan and Pulau Sipadan belongs to the Republic of Indonesia or to Malaysia.

Article 3

Procedure

1. Subject to the time-limits referred to in paragraph 2 of this Article, the proceedings shall consist of written pleadings and oral hearings in accordance with Article 43 of the Statute of the Court.

2. Without prejudice to any question as to the burden of proof and having regard to Article 46 of the Rules of Court, the written pleadings should consist of:

(a) a Memorial presented simultaneously by each of the Parties not later than 12 months after the notification of this Special Agreement to the Registry of the Court;

(b) a Counter-Memorial presented by each of the Parties not later than 4 months after the date on which each has received the certified copy of the Memorial of the other Party;

(c) a Reply presented by each of the Parties not later than 4 months after the date on which each has received the certified copy of the Counter-Memorial of the other Party; and

(d) a Rejoinder, if the Parties so agree or if the Court decides ex officio or at the request of one of the Parties that this part of the proceedings is necessary and the Court authorizes or prescribes the presentation of a Rejoinder.

3. The above-mentioned written pleadings and their annexes presented to the Registrar will not be transmitted to the other Party until the Registrar has received the part of the written pleadings corresponding to the said Party.

4. The question of the order of speaking at the oral hearings shall be decided by mutual agreement between the Parties or, in the absence of that agreement, by the Court. In all cases, however, the order of speaking adopted shall be without prejudice to any question regarding the burden of proof.

Article 4

Applicable Law

The principles and rules of international law applicable to the dispute shall be those recognized in the provisions of Article 38 of the Statute of the Court.

Article 5

Judgment of the Court

The Parties agree to accept the Judgment of the Court given pursuant to this Special Agreement as final and binding upon them.

Article 6

Entry into Force

1. This Agreement shall enter into force upon the exchange of instruments of ratification. The date of exchange of the said instruments shall be determined through diplomatic channels.

2. This Agreement shall be registered with the Secretariat of the United Nations pursuant to Article 102 of the Charter of the United Nations, jointly or by either of the Parties.

Article 7

Notification

In accordance with Article 40 of the Statute of the Court, this Special Agreement shall be notified to the Registrar of the Court by a joint letter from the Parties as soon as possible after it has entered into force.

In witness whereof the undersigned, being duly authorized thereto by their respective Governments, have signed the present Agreement."

3. Pursuant to Article 40, paragraph 3, of the Statute of the Court, copies of the joint notification and of the Special Agreement were transmitted by the Registrar to the Secretary-General of the United Nations, the Members of the United Nations and other States entitled to appear before the Court.

4. By an Order dated 10 November 1998, the Court, having regard to the provisions of the Special Agreement concerning the written pleadings, fixed 2 November 1999 and 2 March 2000 as the respective time-limits for the filing by each of the Parties of a Memorial and then a Counter-Memorial. The Memorials were filed within the prescribed time-limit. By joint letter of 18 August 1999, the Parties asked the Court to extend to 2 July 2000 the time-limit for the filing of their Counter-Memorials. By an Order dated 14 September 1999, the Court agreed to that request. By joint letter of 8 May 2000, the Parties asked the Court for a further extension of one month to the time-limit for the filing of their Counter-Memorials. By Order of 11 May 2000, the President of the Court also agreed to that request. The Parties' Counter-Memorials were filed within the time-limit as thus extended.

5. Under the terms of the Special Agreement, the two Parties were to file a Reply not later than four months after the date on which each had received the certified copy of the Counter-Memorial of the other Party. By joint letter dated 14 October 2000, the Parties asked the Court to extend this time-limit by three months. By an Order dated 19 October 2000, the President of the Court fixed 2 March 2001 as the time-limit for the filing by each of the Parties of a Reply. The Replies were filed within the prescribed time-limit. In view of the fact that the Special Agreement provided for the possible filing of a fourth pleading by each of the Parties, the latter informed the Court by joint letter of 28 March 2001 that they did not wish to produce any further pleadings. Nor did the Court itself ask for such pleadings.

6. Since the Court included upon the Bench no judge of the nationality of either of the Parties, each Party proceeded to exercise the right conferred by Article 31, paragraph 3, of the Statute to choose a judge *ad hoc* to sit in the case: Indonesia chose Mr. Mohamed Shahabuddeen and Malaysia Mr. Christopher Gregory Weeramantry.

7. Mr. Shahabuddeen, judge *ad hoc*, having resigned from that function on 20 March 2001, Indonesia informed the Court, by letter received in the Registry on 17 May 2001, that its Government had chosen Mr. Thomas Franck to replace him.

8. On 13 March 2001, the Republic of the Philippines filed in the Registry of the Court an Application for permission to intervene in the case, invoking Article 62 of the Statute of the Court. By a Judgment rendered on 23 October 2001, the Court found that the Application of the Philippines could not be granted.

9. During a meeting which the President of the Court held on 6 March 2002 with the Agents of the Parties, in accordance with Article 31 of the Rules of Court, the Agents made known the views of their Governments with regard to various aspects relating to the organization of the oral proceedings. In particular, they stated that the Parties had agreed to suggest to the Court that Indonesia should present its oral arguments first, it being understood that this in no way implied that Indonesia could be considered the applicant State or Malaysia the respondent State, nor would it have any effect on questions concerning the burden of proof.

Further to this meeting, the Court, taking account of the views of the Parties, fixed Monday 3 June 2002, at 10 a.m., as the date for the opening of the hear-

ings, and set a timetable for them. By letters dated 7 March 2002, the Registrar informed the Agents of the Parties accordingly.

10. Pursuant to Article 53, paragraph 2, of the Rules of Court, the Court, after ascertaining the views of the Parties, decided that copies of the pleadings and documents annexed would be made accessible to the public on the opening of the oral proceedings.

11. Public hearings were held from 3 to 12 June 2002, at which the Court heard the oral arguments and replies of:

For Indonesia: H.E. Mr. Hassan Wirajuda,
Sir Arthur Watts,
Mr. Alfred H. A. Soons,
Mr. Alain Pellet,
Mr. Rodman R. Bundy,
Ms Loretta Malintoppi.

For Malaysia: H.E. Mr. Tan Sri Abdul Kadir Mohamad,
H.E. Dato' Noor Farida Ariffin,
Sir Elihu Lauterpacht,
Mr. Nico Schrijver,
Mr. James Crawford,
Mr. Jean-Pierre Cot.

*

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

On behalf of the Government of Indonesia,

in the Memorial, Counter-Memorial and Reply:

> "On the basis of the considerations set out in this [Reply], the Government of the Republic of Indonesia requests the Court to adjudge and declare that:
>
> *(a)* sovereignty over Pulau Ligitan belongs to the Republic of Indonesia; and
>
> *(b)* sovereignty over Pulau Sipadan belongs to the Republic of Indonesia."

On behalf of the Government of Malaysia,

in the Memorial, Counter-Memorial and Reply:

> "In the light of the considerations set out above, Malaysia respectfully requests the Court to adjudge and declare that sovereignty over Pulau Ligitan and Pulau Sipadan belongs to Malaysia."

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

On behalf of the Government of Indonesia,

> "On the basis of the facts and legal considerations presented in Indonesia's written pleadings and in its oral presentation, the Government of the Republic of Indonesia respectfully requests the Court to adjudge and declare that:
>
> (i) sovereignty over Pulau Ligitan belongs to the Republic of Indonesia; and

(ii) sovereignty over Pulau Sipadan belongs to the Republic of Indonesia."

On behalf of the Government of Malaysia,

"The Government of Malaysia respectfully requests the Court to adjudge and declare that sovereignty over Pulau Ligitan and Pulau Sipadan belongs to Malaysia."

* * *

14. The islands of Ligitan and Sipadan (Pulau Ligitan and Pulau Sipadan) are both located in the Celebes Sea, off the north-east coast of the island of Borneo, and lie approximately 15.5 nautical miles apart (see below, pp. 635 and 636, sketch-maps Nos. 1 and 2).

Ligitan is a very small island lying at the southern extremity of a large star-shaped reef extending southwards from the islands of Danawan and Si Amil. Its co-ordinates are 4° 09′ latitude north and 118° 53′ longitude east. The island is situated some 21 nautical miles from Tanjung Tutop, on the Semporna Peninsula, the nearest area on Borneo. Permanently above sea level and mostly sand, Ligitan is an island with low-lying vegetation and some trees. It is not permanently inhabited.

Although bigger than Ligitan, Sipadan is also a small island, having an area of approximately 0.13 sq. km. Its co-ordinates are 4° 06′ latitude north and 118° 37′ longitude east. It is situated some 15 nautical miles from Tanjung Tutop, and 42 nautical miles from the east coast of the island of Sebatik. Sipadan is a densely wooded island of volcanic origin and the top of a submarine mountain some 600 to 700 m in height, around which a coral atoll has formed. It was not inhabited on a permanent basis until the 1980s, when it was developed into a tourist resort for scuba-diving.

*

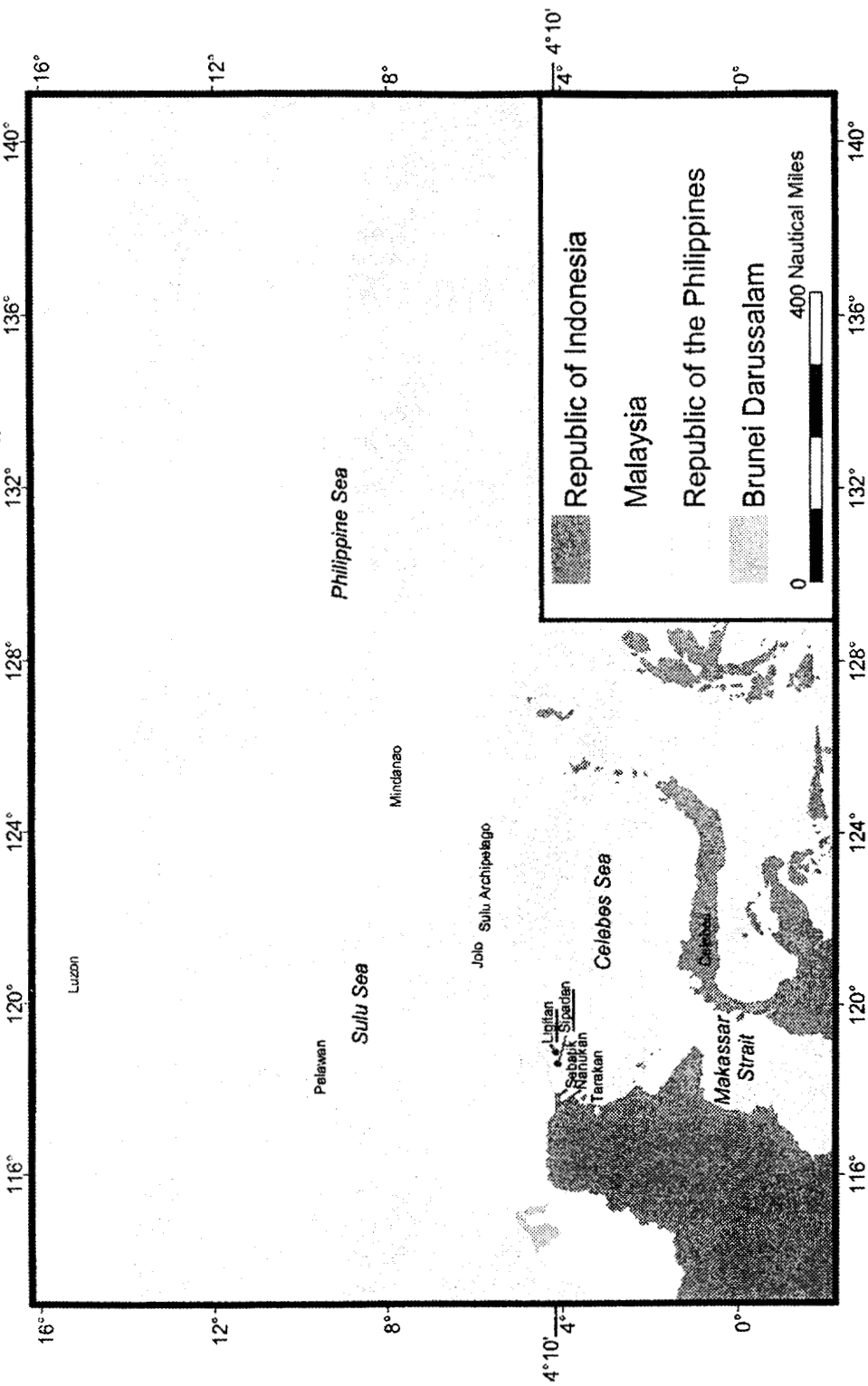
15. The dispute between the Parties has a complex historical background, of which an overview will now be given by the Court.

In the sixteenth century Spain established itself in the Philippines and sought to extend its influence to the islands lying further to the south. Towards the end of the sixteenth century it began to exercise its influence over the Sultanate of Sulu.

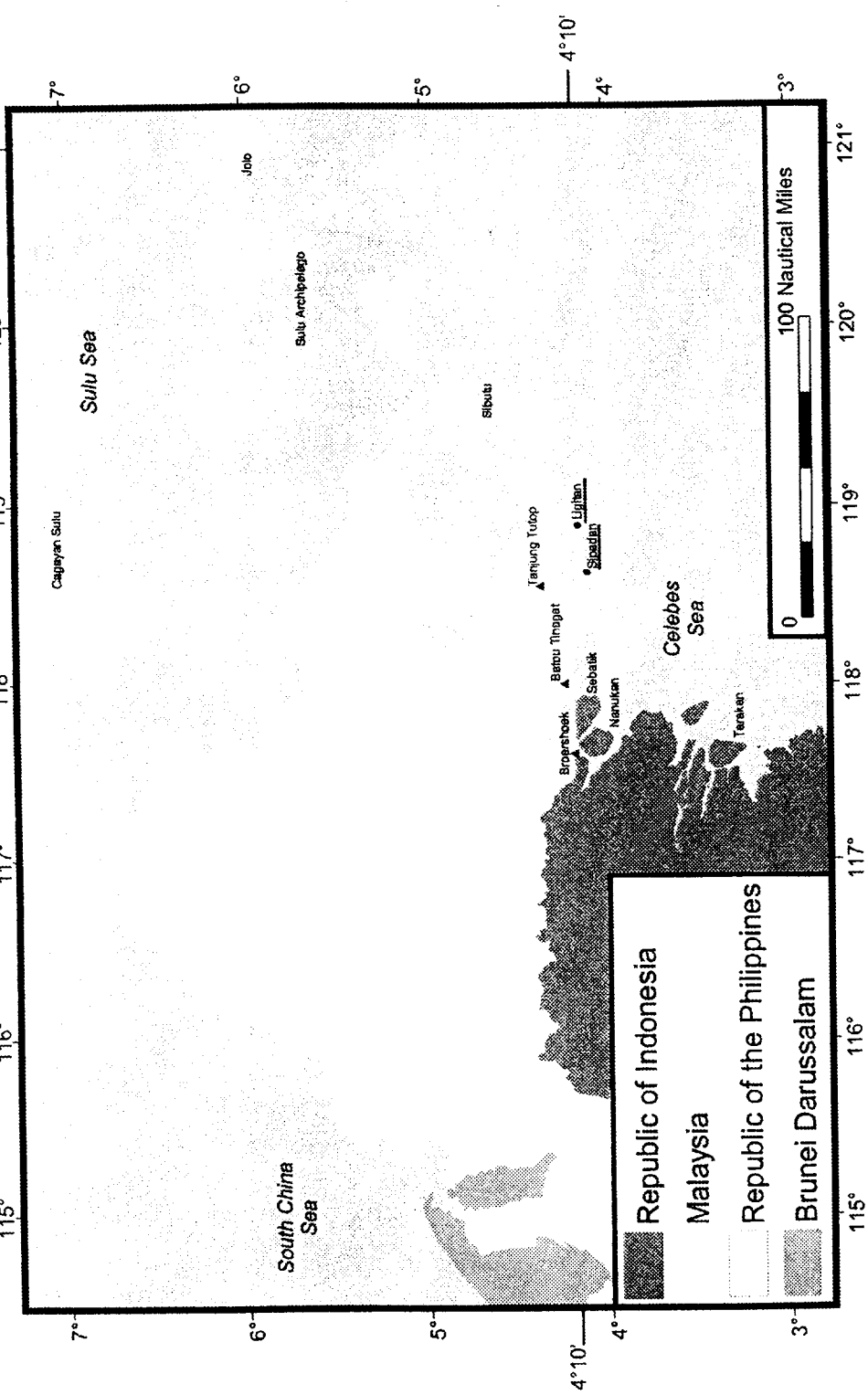
On 23 September 1836 Spain concluded Capitulations of peace, protection and commerce with the Sultan of Sulu. In these Capitulations, Spain guaranteed its protection to the Sultan

"in any of the islands situated within the limits of the Spanish jurisdiction, and which extend from the western point of Mindanao (Magindanao) to Borneo and Paragua (Palawan), with the exception of Sandakan and the other territories tributary to the Sultan on the island of Borneo".

SKETCH-MAP NO. 1. GENERAL GEOGRAPHICAL SETTING
(N.B. This sketch-map has been prepared for illustrative purposes only.)



SKETCH-MAP NO. 2. LOCATION OF LIGITAN AND SIPADAN ISLANDS
(N.B. This sketch-map has been prepared for illustrative purposes only.)



On 19 April 1851, Spain and the Sultan of Sulu concluded an "Act of Re-Submission" whereby the island of Sulu and its dependencies were annexed by the Spanish Crown. That Act was confirmed on 22 July 1878 by a Protocol whereby the Sultan recognized "as beyond discussion the sovereignty of Spain over all the Archipelago of Sulu and the dependencies thereof".

16. For its part, the Netherlands established itself on the island of Borneo at the beginning of the seventeenth century. The Netherlands East India Company, which possessed considerable commercial interests in the region, exercised public rights in South-East Asia under a charter granted to it in 1602 by the Netherlands United Provinces. Under the Charter, the Company was authorized to "conclude conventions with Princes and Powers" of the region in the name of the States-General of the Netherlands. Those conventions mainly involved trade issues, but they also provided for the acceptance of the Company's suzerainty or even the cession to it by local sovereigns of all or part of their territories.

When the Netherlands East India Company established itself on Borneo in the seventeenth and eighteenth centuries, the influence of the Sultan of Banjermasin extended over large portions of southern and eastern Borneo. On the east coast, the territory under the control of Banjermasin included the "Kingdom of Berou", composed of three "States": Sambaliung, Gunungtabur and Bulungan. The Sultans of Brunei and Sulu exercised their influence over the northern part of Borneo.

Upon the demise of the Netherlands East India Company at the end of the eighteenth century, all of its territorial possessions were transferred to the Netherlands United Provinces. During the Napoleonic wars, Great Britain took control of the Dutch possessions in Asia. Pursuant to the London Convention of 13 August 1814, the newly formed Kingdom of the Netherlands recovered most of the former Dutch possessions.

17. A Contract was concluded by the Netherlands with the Sultan of Banjermasin on 3 January 1817. Article 5 of this Contract provided for *inter alia* the cession to the Netherlands of Berou ("Barrau") and of all its dependencies. On 13 September 1823, an addendum was concluded, amending Article 5 of the 1817 Contract.

On 4 May 1826 a new Contract was concluded. Article 4 thereof reconfirmed the cession to the Netherlands of Berou ("Barou") and of its dependencies.

Over the following years, the three territories that formed the Kingdom of Berou, Sambaliung, Gunungtabur and Bulungan, were separated. By a Declaration of 27 September 1834, the Sultan of Bulungan submitted directly to the authority of the Netherlands East Indies Government. In 1844 the three territories were each recognized by the Government of the Netherlands as separate Kingdoms. Their chiefs were officially accorded the title of Sultan.

18. In 1850 the Government of the Netherlands East Indies concluded with the sultans of the three kingdoms "contracts of vassalage", under which the territory of their respective kingdoms was granted to them as a fief. The Contract concluded with the Sultan of Bulungan is dated 12 November 1850.

A description of the geographical area constituting the Sultanate of Bulungan appeared for the first time in the Contract of 12 November 1850. Article 2 of that Contract described the territory of Bulungan as follows:

> "The territory of Boeloengan is located within the following boundaries:
>
> — with Goenoeng-Teboer: from the seashore landwards, the Karangtiegau River from its mouth up to its origin; in addition, the Batoe Beokkier and Mount Palpakh;
> — with the Sulu possessions: at sea the cape named Batoe Tinagat, as well as the Tawau River.
>
> The following islands shall belong to Boeloengan: Terakkan, Nenoekkan and Sebittikh, with the small islands belonging thereto.
>
> This delimitation is established provisionally, and shall be completely examined and determined again."

A new Contract of Vassalage was concluded on 2 June 1878. It was approved and ratified by the Governor-General of the Netherlands East Indies on 18 October 1878.

Article 2 of the 1878 Contract of Vassalage described the territory of Bulungan as follows: "The territory of the realm of Boeloengan is deemed to be constituted by the lands and islands as described in the statement annexed to this contract." The text of the statement annexed to the contract is virtually identical to that of Article 2 of the 1850 Contract.

This statement was amended in 1893 to bring it into line with the 1891 Convention between Great Britain and the Netherlands (see paragraph 23 below). The new statement provided that:

> "The Islands of Tarakan and Nanoekan and that portion of the Island of Sebitik, situated to the south of the above boundary-line, described in the 'Indisch Staatsblad' of 1892, No. 114, belong to Boeloengan, as well as the small islands belonging to the above islands, so far as they are situated to the south of the boundary-line . . ."

19. Great Britain, for its part, possessed commercial interests in the area but had no established settlements on Borneo until the nineteenth century. After the Anglo-Dutch Convention of 13 August 1814, the commercial and territorial claims of Great Britain and the Netherlands on Borneo began to overlap.

On 17 March 1824 Great Britain and the Netherlands signed a new

Treaty in an attempt to settle their commercial and territorial disputes in the region.

20. In 1877, the Sultan of Brunei made three separate instruments in which he "granted" Mr. Alfred Dent and Baron von Overbeck a large area of North Borneo. Since these grants included a portion of territory along the north coast of Borneo which was also claimed by the Sultan of Sulu, Alfred Dent and Baron von Overbeck decided to enter into an agreement with the latter Sultan.

On 22 January 1878 the Sultan of Sulu agreed to "grant and cede" to Alfred Dent and Baron von Overbeck, as representatives of a British company, all his rights and powers over:

> "all the territories and lands being tributary to [him] on the mainland of the Island of Borneo, commencing from the Pandassan River on the west coast to Maludu Bay, and extending along the whole east coast as far as the Sibuco River in the south, comprising all the provinces bordering on Maludu Bay, also the States of Pietan, Sugut, Bangaya, Labuk, Sandakan, Kinabatangan, Mamiang, and all the other territories and states to the southward thereof bordering on Darvel Bay and as far as the Sibuco River, with all the islands belonging thereto within three marine leagues [9 nautical miles] of the coast".

On the same day, the Sultan of Sulu signed a commission whereby he appointed Baron von Overbeck "Dato' Bĕndahara and Rajah of Sandakan" with "the fullest power of life and death" over all the inhabitants of the territories which had been granted to him and made him master of "all matters . . . and [of] the revenues or 'products' " belonging to the Sultan in those territories. The Sultan of Sulu asked the "foreign nations" with which he had concluded "friendly treaties and alliances" to accept "the said Dato' Bĕndahara as supreme ruler over the said dominions".

Baron von Overbeck subsequently relinquished all his rights and interests in the British company referred to above. Alfred Dent later applied for a Royal Charter from the British Government to administer the territory and exploit its resources. This Charter was granted in November 1881. In May 1882 a chartered company was officially incorporated under the name of the "British North Borneo Company" (hereinafter the "BNBC").

The BNBC began at that time to extend its administration to certain islands situated beyond the 3-marine-league limit referred to in the 1878 grant.

21. On 11 March 1877 Spain, Germany and Great Britain concluded a Protocol establishing free commerce and navigation in the Sulu (Joló) Sea with a view to settling a commercial dispute which had arisen between them. Under this Protocol, Spain undertook to guarantee and ensure the liberty of commerce, of fishing and of navigation for ships and subjects of Great Britain, Germany and the other Powers in "the Archi-

pelago of Sulu (Joló) and in all parts there[of]", without prejudice to the rights recognized to Spain in the Protocol.

On 7 March 1885 Spain, Germany and Great Britain concluded a new Protocol of which the first three articles read as follows:

> "*Article 1*
>
> The Governments of Germany and Great Britain recognize the sovereignty of Spain over the places effectively occupied, as well as over those places not yet so occupied, of the archipelago of Sulu (Joló), of which the boundaries are determined in Article 2.
>
> *Article 2*
>
> The Archipelago of Sulu (Joló), conformably to the definition contained in Article 1 of the Treaty signed the 23rd of September 1836, between the Spanish Government and the Sultan of Sulu (Joló), comprises all the islands which are found between the western extremity of the island of Mindanao, on the one side, and the continent of Borneo and the island of Paragua, on the other side, with the exception of those which are indicated in Article 3.
>
> It is understood that the islands of Balabac and of Cagayan-Joló form part of the Archipelago.
>
> *Article 3*
>
> The Spanish Government relinquishes as far as regards the British Government, all claim of sovereignty over the territories of the continent of Borneo which belong, or which have belonged in the past, to the Sultan of Sulu (Joló), including therein the neighboring islands of Balambangan, Banguey and Malawali, as well as all those islands lying within a zone of three marine leagues along the coasts and which form part of the territories administered by the Company styled the 'British North Borneo Company'."

22. On 12 May 1888 the British Government entered into an Agreement with the BNBC for the creation of the State of North Borneo. This Agreement made North Borneo a British Protectorate, with the British Government assuming responsibility for its foreign relations.

23. On 20 June 1891 the Netherlands and Great Britain concluded a Convention (hereinafter the "1891 Convention") for the purpose of "defining the boundaries between the Netherland possessions in the Island of Borneo and the States in that island which [were] under British protection" (see paragraph 36 below).

24. At the end of the Spanish-American War, Spain ceded the Philippine Archipelago (see paragraph 115 below) to the United States of America (hereinafter the "United States") through the Treaty of Peace of Paris of 10 December 1898 (hereinafter the "1898 Treaty of Peace"). Article III of the Treaty defined the Archipelago by means of certain lines. Under the Treaty of 7 November 1900 (hereinafter the "1900

Treaty"), Spain ceded to the United States "all islands belonging to the Philippine Archipelago, lying outside the lines described in Article III" of the 1898 Treaty of Peace (see paragraph 115 below).

25. On 22 April 1903 the Sultan of Sulu concluded a "Confirmation of Cession" with the Government of British North Borneo, in which were specified the names of a certain number of islands which were to be treated as having been included in the original cession granted to Alfred Dent and Baron von Overbeck in 1878. The islands mentioned were as follows: Muliangin, Muliangin Kechil, Malawali, Tegabu, Bilian, Tegaypil, Lang Kayen, Boan, Lehiman, Bakungan, Bakungan Kechil, Libaran, Taganack, Beguan, Mantanbuan, Gaya, Omadal, Si Amil, Mabol, Kepalai and Dinawan. The instrument further provided that "other islands near, or round, or lying between the said islands named above" were included in the cession of 1878. All those islands were situated beyond the 3-marine-league limit.

26. Following a visit in 1903 by the United States Navy vessel USS *Quiros* to the area of the islands disputed in the present proceedings, the BNBC lodged protests with the Foreign Office, on the ground that some of the islands visited, on which the US Navy had placed flags and tablets, were, according to the BNBC, under its authority. The question was dealt with in particular in a memorandum dated 23 June 1906 from Sir H. M. Durand, British Ambassador to the United States, to the United States Secretary of State, with which a map showing "the limits within which the [BNBC] desire[d] to carry on the administration" was enclosed. Under an Exchange of Notes dated 3 and 10 July 1907, the United States temporarily waived the right of administration in respect of "all the islands to the westward and southwestward of the line traced on the map which accompanied Sir H. M. Durand's memorandum".

27. On 28 September 1915 Great Britain and the Netherlands, acting pursuant to Article V of the 1891 Convention, signed an Agreement relating to "the Boundary between the State of North Borneo and the Netherland Possessions in Borneo" (hereinafter the "1915 Agreement"), whereby the two States confirmed a report and accompanying map prepared by a mixed commission set up for the purpose (see paragraphs 70, 71 and 72 below).

On 26 March 1928 Great Britain and the Netherlands signed another agreement (hereinafter the "1928 Agreement") pursuant to Article V of the 1891 Convention, for the purpose of "further delimiting part of the frontier established in article III of the Convention signed at London on the 20th June, 1891" ("between the summits of the Gunong Api and of the Gunong Raya"); a map was attached to that agreement (see paragraph 73 below).

28. On 2 January 1930 the United States and Great Britain concluded a Convention (hereinafter the "1930 Convention") "delimiting . . . the boundary between the Philippine Archipelago . . . and the State of North Borneo" (see paragraph 119 below). This Convention contained five

articles, of which the first and third are the most relevant for the purposes of the present case. Article I defined the line separating the islands which belonged to the Philippine Archipelago and those which belonged to the State of North Borneo; Article III stipulated as follows:

> "All islands to the north and east of the said line and all islands and rocks traversed by the said line, should there be any such, shall belong to the Philippine Archipelago and all islands to the south and west of the said line shall belong to the State of North Borneo."

29. On 26 June 1946 the BNBC entered into an agreement with the British Government whereby the Company transferred its interests, powers and rights in respect of the State of North Borneo to the British Crown. The State of North Borneo then became a British colony.

30. On 9 July 1963 the Federation of Malaya, the United Kingdom of Great Britain and Northern Ireland, North Borneo, Sarawak and Singapore concluded an Agreement relating to Malaysia. Under Article I of this Agreement, which entered into force on 16 September 1963, the colony of North Borneo was to be "federated with the existing States of the Federation of Malaya as the [State] of Sabah".

31. After their independence, Indonesia and Malaysia began to grant oil prospecting licences in waters off the east coast of Borneo during the 1960s. The first oil licence granted by Indonesia to a foreign company in the relevant area took the form of a production sharing agreement concluded on 6 October 1966 between the Indonesian State-owned company P. N. Pertambangan Minjak Nasional ("Permina") and the Japan Petroleum Exploration Company Limited ("Japex"). The northern boundary of one of the areas covered by the agreement ran eastwards in a straight line from the east coast of Sebatik Island, following the parallel 4° 09′ 30″ latitude north for some 27 nautical miles out to sea. In 1968 Malaysia in turn granted various oil prospecting licences to Sabah Teiseki Oil Company ("Teiseki"). The southern boundary of the maritime concession granted to Teiseki was located at 4° 10′ 30″ latitude north.

The present dispute crystallized in 1969 in the context of discussions concerning the delimitation of the respective continental shelves of the two States. Following those negotiations a delimitation agreement was reached on 27 October 1969. It entered into force on 7 November 1969. However, it did not cover the area lying to the east of Borneo.

In October 1991 the two Parties set up a joint working group to study the situation of the islands of Ligitan and Sipadan. They did not however reach any agreement and the issue was entrusted to special emissaries of the two Parties who, in June 1996, recommended by mutual agreement that the dispute should be referred to the International Court of Justice. The Special Agreement was signed on 31 May 1997.

* * *

32. Indonesia's claim to sovereignty over the islands of Ligitan and Sipadan rests primarily on the 1891 Convention between Great Britain and the Netherlands. It also relies on a series of *effectivités*, both Dutch and Indonesian, which it claims confirm its conventional title. At the oral proceedings Indonesia further contended, by way of alternative argument, that if the Court were to reject its title based on the 1891 Convention, it could still claim sovereignty over the disputed islands as successor to the Sultan of Bulungan, because he had possessed authority over the islands.

33. For its part, Malaysia contends that it acquired sovereignty over the islands of Ligitan and Sipadan following a series of alleged transmissions of the title originally held by the former sovereign, the Sultan of Sulu. Malaysia claims that the title subsequently passed, in succession, to Spain, to the United States, to Great Britain on behalf of the State of North Borneo, to the United Kingdom of Great Britain and Northern Ireland, and finally to Malaysia itself. It argues that its title, based on this series of legal instruments, is confirmed by a certain number of British and Malaysian *effectivités* over the islands. It argues in the alternative that, if the Court were to conclude that the disputed islands had originally belonged to the Netherlands, its *effectivités* would in any event have displaced any such Netherlands title.

* * *

34. As the Court has just noted, Indonesia's main claim is that sovereignty over the islands of Ligitan and Sipadan belongs to it by virtue of the 1891 Convention. Indonesia maintains that "[t]he Convention, by its terms, its context, and its object and purpose, established the 4° 10′ N parallel of latitude as the dividing line between the Parties' respective possessions in the area now in question". It states in this connection that its position is not that "the 1891 Convention line was from the outset intended also to be, or in effect was, a maritime boundary. . . east of Sebatik island" but that "the line must be considered an allocation line: land areas, including islands located to the north of 4° 10′ N latitude were. . . considered to be British, and those lying to the south were Dutch". As the disputed islands lie to the south of that parallel, "[i]t therefore follows that under the Convention title to those islands vested in the Netherlands, and now vests in Indonesia".

Indonesia contends that the two States parties to the 1891 Convention clearly assumed that they were the only actors in the area. It adds in this regard that Spain had no title to the islands in dispute and had shown no interest in what was going on to the south of the Sulu Archipelago.

In Indonesia's view, the Convention did not involve territorial cessions; rather, each party's intention was to recognize the other party's title to territories on Borneo and islands lying "on that party's side" of

the line, and to relinquish any claim in respect of them. According to Indonesia, "both parties no doubt considered that [the] territories. . . on their side of the agreed line were *already* theirs, rather than that they had *become* theirs by virtue of a treaty cession". It maintains that in any case, whatever may have been the position before 1891, the Convention between the two colonial Powers is an indisputable title which takes precedence over any other pre-existing title.

35. For its part, Malaysia considers that Indonesia's claim to Ligitan and Sipadan finds no support in either the text of the 1891 Convention or in its *travaux préparatoires*, or in any other document that may be used to interpret the Convention. Malaysia points out that the 1891 Convention, when seen as a whole, clearly shows that the parties sought to clarify the boundary between their respective land possessions on the islands of Borneo and Sebatik, since the line of delimitation stops at the easternmost point of the latter island. It contends that "the ordinary and natural interpretation of the Treaty, and relevant rules of law, plainly refute" Indonesia's argument and adds that the ratification of the 1891 Convention and its implementation, notably through the 1915 Agreement, do not support Indonesia's position.

Malaysia additionally argues that, even if the 1891 Convention were construed so as to allocate possessions to the east of Sebatik, that allocation could not have any consequence in respect of islands which belonged to Spain at the time. In Malaysia's view, Great Britain could not have envisioned ceding to the Netherlands islands which lay beyond the 3-marine-league line referred to in the 1878 grant, a line said to have been expressly recognized by Great Britain and Spain in the Protocol of 1885.

* *

36. On 20 June 1891, the Netherlands and Great Britain signed a Convention for the purpose of "defining the boundaries between the Netherland possessions in the Island of Borneo and the States in that island which [were] under British protection". The Convention was drawn up in Dutch and in English, the two texts being equally authentic. It consists of eight articles. Article I stipulates that "[t]he boundary between the Netherland possessions in Borneo and those of the British-protected States in the same island, shall start from 4° 10′ north latitude on the east coast of Borneo". Article II, after stipulating "[t]he boundary-line shall be continued westward", then describes the course of the first part of that line. Article III describes the further westward course of the boundary line from the point where Article II stops and as far as Tandjong-Datoe, on the west coast of Borneo. Article V provides that "[t]he exact positions of the boundary-line, as described in the four preceding Articles, shall be

determined hereafter by mutual agreement, at such times as the Netherland and the British Governments may think fit". Article VI guarantees the parties free navigation on all rivers flowing into the sea between Batoe-Tinagat and the River Siboekoe. Article VII grants certain rights to the population of the Sultanate of Bulungan to the north of the boundary. Lastly, Article VIII stipulates the conditions in which the Convention would come into force.

Indonesia relies essentially on Article IV of the 1891 Convention in support of its claim to the islands of Ligitan and Sipadan. That provision reads as follows:

> "From 4° 10′ north latitude on the east coast the boundary-line shall be continued eastward along that parallel, across the Island of Sebittik: that portion of the island situated to the north of that parallel shall belong unreservedly to the British North Borneo Company, and the portion south of that parallel to the Netherlands."

The Parties disagree over the interpretation to be given to that provision.

*

37. The Court notes that Indonesia is not a party to the Vienna Convention of 23 May 1969 on the Law of Treaties; the Court would nevertheless recall that, in accordance with customary international law, reflected in Articles 31 and 32 of that Convention:

> "a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose. Interpretation must be based above all upon the text of the treaty. As a supplementary measure recourse may be had to means of interpretation such as the preparatory work of the treaty and the circumstances of its conclusion." (*Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, pp. 21-22, para. 41; see also *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1995*, p. 18, para. 33; *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, p. 812, para. 23; *Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Reports 1999 (II)*, p. 1059, para. 18.)

Moreover, with respect to Article 31, paragraph 3, the Court has had occasion to state that this provision also reflects customary law, stipulating that there shall be taken into account, together with the context, the subsequent conduct of the parties to the treaty, i.e., "any subsequent agreement" (subpara. *(a)*) and "any subsequent practice" (subpara. *(b)*) (see in particular *Legality of the Use by a State of Nuclear Weapons in*

Armed Conflict, Advisory Opinion, I.C.J. Reports 1996 (I), p. 75, para. 19; *Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Reports 1999 (II)*, p. 1075, para. 48).

Indonesia does not dispute that these are the applicable rules. Nor is the applicability of the rule contained in Article 31, paragraph 2, contested by the Parties.

38. The Court will now proceed to the interpretation of Article IV of the 1891 Convention in the light of these rules.

* *

39. With respect to the terms of Article IV, Indonesia maintains that this Article contains nothing to suggest that the line stops at the east coast of Sebatik Island. On the contrary, it contends that "the stipulation that the line was to be 'continued' eastward along the prescribed parallel[, across the island of Sebatik,] requires a prolongation of the line so far as was necessary to achieve the Convention's purposes". In this respect, Indonesia points out that had the parties to the Convention intended not to draw an allocation line out to sea to the east of Sebatik (see paragraph 34 above) but to end the line at a point on the coast, they would have stipulated this expressly, as was the case in Article III.

Moreover, Indonesia notes a difference in punctuation between the Dutch and English texts of Article IV of the Convention, both texts being authentic (see paragraph 36 above), and bases itself on the English text, which reads as follows:

> "From 4° 10′ north latitude on the east coast the boundary-line shall be continued eastward along that parallel, across the Island of Sebittik: that portion of the island situated to the north of that parallel shall belong unreservedly to the British North Borneo Company, and the portion south of that parallel to the Netherlands."

Indonesia emphasizes the colon in the English text, claiming that it is used to separate two provisions of which the second develops or illustrates the first. It thus contends that the second part of the sentence, preceded by the colon, "is essentially a subsidiary part of the sentence, filling out part of its meaning, but not distorting the clear sense of the main clause, which takes the line out to sea along the 4° 10′ N parallel".

40. Malaysia, for its part, contends that when Article IV of the 1891 Convention provides that the boundary line continues eastward along the parallel of 4° 10′ north, this simply means "that the extension starts from the east coast of Borneo and runs eastward across Sebatik, in contrast with the main part of the boundary line, which starts at the same point, but runs westwards". According to Malaysia, the plain and ordinary meaning of the words "across the Island of Sebittik" is to describe, "in English and in Dutch, a line that crosses Sebatik from the west coast

to the east coast and goes no further". Malaysia moreover rejects the idea that the parties to the 1891 Convention intended to establish an "allocation perimeter", that is to say a "theoretical line drawn in the high seas under a convention which enables sovereignty over the islands lying within the area in question to be apportioned between the parties". Malaysia adds that "allocation perimeters" cannot be presumed where the text of a treaty remains silent in such respect, as in the case of the 1891 Convention, which contains no such indication.

In regard to the difference in punctuation between the Dutch and English texts of Article IV of the Convention, Malaysia, for its part, relies on the Dutch text, which reads as follows:

> "Van 4° 10′ noorder breedte ter oostkust zal de grenslijn oostwaarts vervolgd worden langs die parallel over het eiland Sebittik; het gedeelte van dat eiland dat gelegen is ten noorden van die parallel zal onvoorwaardelijk toebehooren aan de Britsche Noord Borneo Maatschappij, en het gedeelte ten zuiden van die parallel aan Nederland."

Malaysia contends that the drafting of this provision as "a single sentence divided into two parts only by a semi-colon indicates the close grammatical and functional connection between the two parts". Thus, in Malaysia's view, the second clause of the sentence, which relates exclusively to the division of the island of Sebatik, confirms that the words "across the Island of Sebittik" refer solely to that island.

41. The Court notes that the Parties differ as to how the preposition "across" (in the English) or *"over"* (in the Dutch) in the first sentence of Article IV of the 1891 Convention should be interpreted. It acknowledges that the word is not devoid of ambiguity and is capable of bearing either of the meanings given to it by the Parties. A line established by treaty may indeed pass "across" an island and terminate on the shores of such island or continue beyond it.

The Parties also disagree on the interpretation of the part of the same sentence which reads "the boundary-line shall be continued eastward along that parallel [4° 10′ north]". In the Court's view, the phrase "shall be continued" is also not devoid of ambiguity. Article I of the Convention defines the starting point of the boundary between the two States, whilst Articles II and III describe how that boundary continues from one part to the next. Therefore, when Article IV provides that "the boundary-line shall be continued" again from the east coast of Borneo along the 4° 10′ N parallel and across the island of Sebatik, this does not, contrary to Indonesia's contention, necessarily mean that the line continues as an allocation line beyond Sebatik.

The Court moreover considers that the difference in punctuation in the two versions of Article IV of the 1891 Convention does not as such help

elucidate the meaning of the text with respect to a possible extension of the line out to sea, to the east of Sebatik Island (see also paragraph 56 below).

42. The Court observes that any ambiguity could have been avoided had the Convention expressly stipulated that the 4° 10′ N parallel constituted, beyond the east coast of Sebatik, the line separating the islands under British sovereignty from those under Dutch sovereignty. In these circumstances, the silence in the text cannot be ignored. It supports the position of Malaysia.

43. It should moreover be observed that a "boundary", in the ordinary meaning of the term, does not have the function that Indonesia attributes to the allocation line that was supposedly established by Article IV out to sea beyond the island of Sebatik, that is to say allocating to the parties sovereignty over the islands in the area. The Court considers that, in the absence of an express provision to this effect in the text of a treaty, it is difficult to envisage that the States parties could seek to attribute an additional function to a boundary line.

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44. Indonesia asserts that the context of the 1891 Convention supports its interpretation of Article IV of that instrument. In this regard, Indonesia refers to the "interaction" between the British Government and the Dutch Government concerning the map accompanying the Explanatory Memorandum annexed by the latter to the draft Law submitted to the States-General of the Netherlands with a view to the ratification of the 1891 Convention and the "purpose of [which] was to explain to the States-General the significance of a proposed treaty, and why its conclusion was in the interests of The Netherlands". Indonesia contends that this map, showing the prolongation out to sea to the east of Sebatik of the line drawn on land along the 4° 10′ north parallel, was forwarded to the British Government by its own diplomatic agent and that it was known to that Government. In support of this Indonesia points out that "Sir Horace Rumbold, the British Minister at The Hague, sent an official despatch back to the Foreign Office on 26 January 1892 with which he sent two copies of the map: and he drew specific attention to it". According to Indonesia, this official transmission did not elicit any reaction from the Foreign Office. Indonesia accordingly concludes that this implies Great Britain's "irrefutable acquiescence in the depiction of the Convention line", and thereby its acceptance that the 1891 Convention divided up the islands to the east of Borneo between Great Britain and the Netherlands. In this respect, Indonesia first maintains that this "interaction", in terms of Article 31, paragraph 2 *(a)*, of the Vienna Convention on the Law of Treaties, "establishes an agreement between the two governments regarding the seaward course of the Anglo-Dutch boundary east of Sebatik". It also considers that this "interaction" shows that the map in question was, within the meaning of Article 31, paragraph 2 *(b)*, of the

Vienna Convention, an instrument made by the Dutch Government in connection with the conclusion of the 1891 Convention, particularly its Articles IV and VIII, and was accepted by the British Government as an instrument related to the treaty. In support of this twofold argument, Indonesia states *inter alia* that "[the map] was officially prepared by the Dutch Government immediately after the conclusion of the 1891 Convention and in connection with its approval by the Netherlands States-General as specifically required by Article VIII of the Convention", that "it was publicly and officially available at the time", and that "the British Government, in the face of its official knowledge of the map, remained silent".

45. For its part, Malaysia contends that the map attached to the Dutch Government's Explanatory Memorandum cannot be regarded as an element of the context of the 1891 Convention. In Malaysia's view, that map was prepared exclusively for internal purposes. Malaysia notes in this respect that the map was never promulgated by the Dutch authorities and that neither the Government nor the Parliament of the Netherlands sought to incorporate it into the Convention; the Dutch act of ratification says nothing to such effect.

Malaysia moreover argues that the map in question was never the subject of negotiations between the two Governments and was never officially communicated by the Dutch Government to the British Government. Malaysia adds that, even if the British Government had been made aware of this map through the intermediary of its Minister in The Hague, the circumstances "did not call for any particular reaction, as the map had not been mentioned in the parliamentary debate and no one had noted the extension of the boundary-line out to sea". Malaysia concludes from this that the map in question was not "an Agreement or an Instrument 'accepted by the other party and related to the treaty' ".

46. The Court considers that the Explanatory Memorandum appended to the draft Law submitted to the Netherlands States-General with a view to ratification of the 1891 Convention, the only document relating to the Convention to have been published during the period when the latter was concluded, provides useful information on a certain number of points.

First, the Memorandum refers to the fact that, in the course of the prior negotiations, the British delegation had proposed that the boundary line should run eastwards from the east coast of North Borneo, passing between the islands of Sebatik and East Nanukan. It further indicates that the Sultan of Bulungan, to whom, according to the Netherlands, the mainland areas of Borneo then in issue between Great Britain and the Netherlands belonged, had been consulted by the latter before the Convention was concluded. Following this consultation, the Sultan had asked for his people to be given the right to gather jungle produce free of tax within the area of the island to be attributed to the State of North Borneo; such right was accorded for a 15-year period by Article VII of the

Convention. As regards Sebatik, the Memorandum explains that the island's partition had been agreed following a proposal by the Dutch Government and was considered necessary in order to provide access to the coastal regions allocated to each party. The Memorandum contains no reference to the disposition of other islands lying further to the east, and in particular there is no mention of Ligitan or Sipadan.

47. As regards the map appended to the Explanatory Memorandum, the Court notes that this shows four differently coloured lines. The blue line represents the boundary initially claimed by the Netherlands, the yellow line the boundary initially claimed by the BNBC, the green line the boundary proposed by the British Government and the red line the boundary eventually agreed. The blue and yellow lines stop at the coast; the green line continues for a short distance out to sea, whilst the red line continues out to sea along parallel 4° 10′ N to the south of Mabul Island. In the Explanatory Memorandum there is no comment whatever on this extension of the red line out to sea; nor was it discussed in the Dutch Parliament.

The Court notes that the map shows only a number of islands situated to the north of parallel 4° 10′; apart from a few reefs, no island is shown to the south of that line. The Court accordingly concludes that the Members of the Dutch Parliament were almost certainly unaware that two tiny islands lay to the south of the parallel and that the red line might be taken for an allocation line. In this regard, the Court notes that there is nothing in the case file to suggest that Ligitan and Sipadan, or other islands such as Mabul, were territories disputed between Great Britain and the Netherlands at the time when the Convention was concluded. The Court cannot therefore accept that the red line was extended in order to settle any dispute in the waters beyond Sebatik, with the consequence that Ligitan and Sipadan were attributed to the Netherlands.

48. Nor can the Court accept Indonesia's argument regarding the legal value of the map appended to the Explanatory Memorandum of the Dutch Government.

The Court observes that the Explanatory Memorandum and map were never transmitted by the Dutch Government to the British Government, but were simply forwarded to the latter by its diplomatic agent in The Hague, Sir Horace Rumbold. This agent specified that the map had been published in the Official Journal of the Netherlands and formed part of a Report presented to the Second Chamber of the States-General. He added that "the map seems to be the only interesting feature of a document which does not otherwise call for special comment". However, Sir Horace Rumbold did not draw the attention of his authorities to the red line drawn on the map among other lines. The British Government did not react to this internal transmission. In these circumstances, such a lack of reaction to this line on the map appended to the Memorandum cannot be deemed to constitute acquiescence in this line.

It follows from the foregoing that the map cannot be considered either an "agreement relating to [a] treaty which was made between all the parties in connection with the conclusion of the treaty", within the meaning of Article 31, paragraph 2 *(a)*, of the Vienna Convention, or an "instrument which was made by [a] part[y] in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to that treaty", within the meaning of Article 31, paragraph 2 *(b)*, of the Vienna Convention.

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49. Turning to the object and purpose of the 1891 Convention, Indonesia argues that the parties' intention was to draw an allocation line between their island possessions in the north-eastern region of Borneo, including the islands out at sea.

It stresses that the main aim of the Convention was "to resolve the uncertainties once and for all so as to avoid future disputes". In this respect, Indonesia invokes the case law of the Court and that of its predecessor, the Permanent Court of International Justice. According to Indonesia, the finality and completeness of boundary settlements were relied on by both Courts, on several occasions, as a criterion for the interpretation of treaty provisions. In particular, Indonesia cites the Advisory Opinion of the Permanent Court on the *Interpretation of Article 3, Paragraph 2, of the Treaty of Lausanne* (1925), which states:

> "It is . . . natural that any article designed to fix a frontier should, if possible, be so interpreted that the result of the application of its provisions in their entirety should be the establishment of a precise, complete and definitive frontier." (*Interpretation of Article 3, Paragraph 2, of the Treaty of Lausanne, Advisory Opinion, 1925, P.C.I.J., Series B, No. 12*, p. 20.)

Indonesia puts forward a number of other arguments to justify its interpretation of the Convention's object and purpose. It points out that "in the preamble to the 1891 Convention the parties stated that they were 'desirous of defining the boundaries' (in the plural) between the Dutch and British possessions in Borneo" and argues that this must be taken to mean not only the island of Borneo itself but also other island territories. Indonesia thus contends that the line established by Article IV of the Convention concerned not only the islands which are the subject of the dispute now before the Court but also other islands in the area. Moreover, Indonesia notes that, while Article IV did not establish an endpoint for the line — providing for the line to extend eastward of the island of Sebatik —, that does not mean that the line extends indefinitely eastward. In Indonesia's opinion, the limit to its eastward extent was determined by the purpose of the Convention,

"the settlement, once and for all, of possible Anglo-Dutch territorial differences in the region".

50. Malaysia, on the other hand, maintains that the object and purpose of the 1891 Convention, as shown by its preamble, were to "defin[e] the boundaries between the Netherlands possessions in the island of Borneo and the States in that island which are under British protection". Referring to the provisions concerning the island of Sebatik, Malaysia moreover adds that one of the concerns of the negotiators of the Convention was also to ensure access to the rivers — the only possible means at the time of penetrating the interior of Borneo — and freedom of navigation. Malaysia thus concludes that the 1891 Convention, when read as a whole, reveals unambiguously that "it was intended to be a land boundary treaty", as nothing in it suggests that it was intended to divide sea areas or to allocate distant offshore islands.

51. The Court considers that the object and purpose of the 1891 Convention was the delimitation of boundaries between the parties' possessions within the island of Borneo itself, as shown by the preamble to the Convention, which provides that the parties were "desirous of defining the boundaries between the Netherland possessions *in* the Island of Borneo and the States *in that island* which are under British protection" (emphasis added by the Court). This interpretation is, in the Court's view, supported by the very scheme of the 1891 Convention. Article I expressly provides that "*[t]he boundary. . . shall start* from 4° 10′ north latitude on the east coast of Borneo" (emphasis added by the Court). Articles II and III then continue the description of the boundary line westward, with its endpoint on the west coast being fixed by Article III. Since difficulties had been encountered concerning the status of the island of Sebatik, which was located directly opposite the starting point of the boundary line and controlled access to the rivers, the parties incorporated an additional provision to settle this issue. The Court does not find anything in the Convention to suggest that the parties intended to delimit the boundary between their possessions to the east of the islands of Borneo and Sebatik or to attribute sovereignty over any other islands. As far as the islands of Ligitan and Sipadan are concerned, the Court also observes that the terms of the preamble to the 1891 Convention are difficult to apply to these islands as they were little known at the time, as both Indonesia and Malaysia have acknowledged, and were not the subject of any dispute between Great Britain and the Netherlands.

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52. The Court accordingly concludes that the text of Article IV of the 1891 Convention, when read in context and in the light of the Convention's object and purpose, cannot be interpreted as establishing an alloca-

tion line determining sovereignty over the islands out to sea, to the east of the island of Sebatik.

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53. In view of the foregoing, the Court does not consider it necessary to resort to supplementary means of interpretation, such as the *travaux préparatoires* of the 1891 Convention and the circumstances of its conclusion, to determine the meaning of that Convention; however, as in other cases, it considers that it can have recourse to such supplementary means in order to seek a possible confirmation of its interpretation of the text of the Convention (see for example *Territorial Dispute (Libyan Arab Jamahiriyal Chad), I.C.J. Reports 1994*, p. 27, para. 55; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1995*, p. 21, para. 40).

54. Indonesia begins by recalling that prior to the conclusion of the 1891 Convention the Sultan of Bulungan had

> "clear claims . . . to inland areas north of the Tawau coast and well to the north of 4° 10′ N, which were acknowledged by Great Britain in agreeing, in Article VII of the 1891 Convention, to the Sultan having certain continuing transitional rights to jungle produce".

It adds that the Netherlands engaged in "activity in the area evidencing Dutch claims to sovereignty extending to the north of the eventual 4° 10′ N line". It further notes "the prevailing uncertainty at the time as to the precise extent of the territories belonging to the two parties" and mentions "the occurrence of occasional Anglo-Dutch confrontations as a result of these uncertainties".

Indonesia moreover maintains that the *travaux préparatoires* of the 1891 Convention, though containing no express indication as to whether Ligitan and Sipadan were British or Dutch, confirm its interpretation of Article IV.

In Indonesia's view, there can be no doubt that during the negotiations leading up to the signature of the Convention the two parties, and in particular Great Britain, envisaged a line continuing out to sea to the east of the island of Borneo. In support of this argument, Indonesia submits several maps used by the parties' delegations during the negotiations. It considers that these maps "show a consistent pattern of the line of proposed settlement, wherever it might finally run, being extended out to sea along a relevant parallel of latitude".

55. Malaysia rejects Indonesia's analysis of the *travaux préparatoires*. In its view, "the consideration of the boundary on the coast never extended to cover the islands east of Batu Tinagat". Malaysia further

considers that the *travaux préparatoires* of the 1891 Convention make clear that the line proposed to divide Sebatik Island "was a boundary line, not an allocation line", that the line "was adopted as a compromise only *after* the 4° 10′ N line was agreed as a boundary line for the mainland of Borneo", and that the line in question "related only to the island of Sebatik and not to other islands well to the east". Malaysia points out that in any event this could not have been a matter of drawing a "boundary line" in the open seas because at the time in question maritime delimitation could not extend beyond territorial waters.

56. The Court observes that following its formation, the BNBC asserted rights which it believed it had acquired from Alfred Dent and Baron von Overbeck to territories situated on the north-eastern coast of the island of Borneo (in the State of Tidoeng "as far south as the Sibuco River"); confrontations then occurred between the Company and the Netherlands, the latter asserting its rights to the Sultan of Bulungan's possessions, "with inclusion of the Tidoeng *territories*" (emphasis in the original). These were the circumstances in which Great Britain and the Netherlands set up a Joint Commission in 1889 to discuss the bases for an agreement to settle the dispute. Specifically, the Commission was appointed "to take into consideration the question of the disputed boundary between the Netherland Indian possessions on the *north-east coast* of the Island of Borneo and the territory belonging to the British North Borneo Company" (emphasis added by the Court). It was moreover provided that "in the event of a satisfactory understanding", the two governments would define the "*inland boundary-lines* which separate the Netherland possessions in Borneo from the territories belonging to the States of Sarawak, Brunei, and the British North Borneo Company respectively" (emphasis added by the Court). The Joint Commission's task was thus confined to the area in dispute, on the north-eastern coast of Borneo. Accordingly, it was agreed that, once *this* dispute had been settled, the inland boundary could be determined completely, as there was clearly no other point of disagreement between the parties.

The Joint Commission met three times and devoted itself almost exclusively to questions relating to the disputed area of the north-east coast. It was only at the last meeting, held on 27 July 1889, that the British delegation proposed that the boundary should pass between the islands of Sebatik and East Nanukan. This was the first proposal of any prolongation of the inland boundary out to sea. The Court however notes from the diplomatic correspondence exchanged after the Commission was dissolved that it follows that the Netherlands had rejected the British proposal. The specific idea of Sebatik Island being divided along the 4° 10′ N parallel was only introduced later. In a letter of 2 February 1891 to the British Secretary for Foreign Affairs from the Dutch Minister in London, the latter stated that the Netherlands agreed with this partition. The Sec-

retary for Foreign Affairs, in his reply dated 11 February 1891, acknowledged this understanding and enclosed a draft agreement. Article 4 of the draft is practically identical in its wording to Article IV of the 1891 Convention. In the draft agreement (proposed by Great Britain) the two sentences of Article 4 are separated by a semicolon. In the final English text, the semicolon was replaced by a colon without the *travaux préparatoires* shedding any light on the reasons for this change. Consequently, no firm inference can be drawn from the change. There were no further difficulties and the Convention was signed on 20 June 1891.

57. During the negotiations, the parties used various sketch-maps to illustrate their proposals and opinions. Some of these sketch-maps showed lines drawn in pencil along certain parallels and continuing as far as the margin. Since the reports accompanying the sketch-maps do not provide any further explanation, the Court considers that it is impossible to deduce anything at all from the length of these lines.

There is however one exception. In an internal Foreign Office memorandum, drafted in preparation for the meeting of the Joint Commission, the following suggestion was made:

> "Starting eastward from a point A on the coast near Broers Hoek on parallel 4° 10′ of North Latitude, the line should follow that parallel until it is intersected by . . . the Meridian 117° 50′ East Longitude, opposite the Southernmost point of the Island of Sebattik at the point marked C. The line would continue thence in an Easterly direction along the 4th parallel, until it should meet the point of intersection of the Meridian of 118° 44′ 30″ marked D."

This suggestion was illustrated on a map that is reproduced as map No. 4 of Indonesia's map atlas. Sipadan is to the west of point D and Ligitan to the east of this point. Neither of the two islands appears on the map. The Court observes that there is nothing in the case file to prove that the suggestion was ever brought to the attention of the Dutch Government or that the line between points C and D had ever been the subject of discussion between the parties. Although put forward in one of the many British internal documents drawn up during the negotiations, the suggestion was never actually adopted. Once the parties arrived at an agreement on the partition of Sebatik, they were only interested in the boundary on the island of Borneo itself and exchanged no views on an allocation of the islands in the open seas to the east of Sebatik.

58. The Court concludes from the foregoing that neither the *travaux préparatoires* of the Convention nor the circumstances of its conclusion can be regarded as supporting the position of Indonesia when it contends that the parties to the Convention agreed not only on the course of the

land boundary but also on an allocation line beyond the east coast of Sebatik.

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59. Concerning the subsequent practice of the parties to the 1891 Convention, Indonesia refers once again to the Dutch Government's Explanatory Memorandum map accompanying the draft of the Law authorizing the ratification of the Convention (see paragraphs 47 and 48 above). Indonesia considers that this map can also be seen as "a subsequent agreement or as subsequent practice for the purposes of Article 31.3 *(a)* and *(b)* of the Vienna Convention" on the Law of Treaties.

60. Malaysia points out that the Explanatory Memorandum map submitted by the Dutch Government to the two Chambers of the States-General, on which Indonesia bases its argument, was not annexed to the 1891 Convention, which made no mention of it. Malaysia concludes that this is not a map to which the parties to the Convention agreed. It further notes that "[t]he internal Dutch map attached to the Explanatory Memorandum was the object of no specific comment during the [parliamentary] debate and did not call for any particular reaction". Thus, according to Malaysia, this map cannot be seen as "a subsequent agreement or as subsequent practice for the purposes of Article 31.3 *(a)* and *(b)* of the Vienna Convention" on the Law of Treaties.

61. The Court has already given consideration (see paragraph 48 above) to the legal force of the map annexed to the Dutch Government's Explanatory Memorandum accompanying the draft Law submitted by it for the ratification of the 1891 Convention. For the same reasons as those on which it based its previous findings, the Court considers that this map cannot be seen as "a subsequent agreement or as subsequent practice for the purposes of Article 31.3 *(a)* and *(b)* of the Vienna Convention".

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62. In Indonesia's view, the 1893 amendment to the 1850 and 1878 Contracts of Vassalage with the Sultan of Bulungan provides a further indication of the interpretation given by the Netherlands Government to the 1891 Convention. It asserts that the aim of the amendment was to redefine the territorial extent of the Sultanate of Bulungan to take into account the provisions of the 1891 Convention. According to the new definition of 1893, "[t]he Islands of Tarakan and Nanoekan and that portion of the Island of Sebitik, situated to the south of the above boundary-line . . . belong to Boeloengan, as well as the small islands belonging to the above islands, so far as they are situated to the south of

the boundary-line . . .". According to Indonesia, this text indicates that the Netherlands Government considered in 1893 that the purpose of the 1891 Convention was to establish, in relation to islands, a line of territorial attribution extending out to sea. Indonesia adds that the British Government showed acquiescence in this interpretation, because the text of the 1893 amendment was officially communicated to the British Government on 26 February 1895 without meeting with any reaction.

63. Malaysia observes that the small islands referred to in the 1893 amendment are those which "belong" to the three expressly designated islands, namely Tarakan, Nanukan and Sebatik, and which are situated to the south of the boundary thus determined. Malaysia stresses that it would be fanciful "to see this as establishing an allocation perimeter projected 50 miles out to sea".

64. The Court observes that the relations between the Netherlands and the Sultanate of Bulungan were governed by a series of contracts entered into between them. The Contracts of 12 November 1850 and 2 June 1878 laid down the limits of the Sultanate. These limits extended to the north of the land boundary that was finally agreed in 1891 between the Netherlands and Great Britain. For this reason the Netherlands had consulted the Sultan before concluding the Convention with Great Britain and was moreover obliged in 1893 to amend the 1878 Contract in order to take into account the delimitation of 1891. The new text stipulated that the islands of Tarakan and Nanukan, and that portion of the island of Sebatik situated to the south of the boundary line, belonged to Bulungan, together with "the small islands belonging to the above islands, so far as they are situated to the south of the boundary-line". The Court observes that these three islands are surrounded by many smaller islands that could be said to "belong" to them geographically. The Court, however, considers that this cannot apply to Ligitan and Sipadan, which are situated more than 40 nautical miles away from the three islands in question. The Court observes that in any event this instrument, whatever its true scope may have been, was *res inter alios acta* for Great Britain and therefore it could not be invoked by the Netherlands in its treaty relations with Great Britain.

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65. Indonesia also cites the Agreement concluded between Great Britain and the Netherlands on 28 September 1915, pursuant to Article V of the 1891 Convention, concerning the boundary between the State of North Borneo and the Dutch possessions on Borneo. It stresses that this was a demarcation agreement which, by definition, could only concern the inland part of the boundary. According to Indonesia, the fact that this Agreement does not mention the boundary eastward of the island of Sebatik does not imply that the 1891 Convention did not establish an eastward boundary out to sea. It states that, unlike in the case of the islands of Borneo and Sebatik, where demarcation was

physically possible, such an operation was not possible in the sea east of Sebatik.

Finally, Indonesia asserts that the fact that the Commissioners' work started at the east coast of Sebatik does not mean that the 1891 Convention line began there, any more than the fact that their work ended after covering some 20 per cent of the boundary can be interpreted to mean that the boundary did not continue any further. It states that, contrary to what Malaysia suggests, the Commissioners' report did not say that the boundary started on the east coast of Sebatik but indicated only that "[t]raversing the island of Sibetik, the frontier line follows the parallel of 4° 10′ north latitude . . .".

66. Indonesia contends that the same applies to the 1928 Agreement, whereby the parties to the 1891 Convention agreed on a more precise delimitation of the boundary, as defined in Article III of the Convention, between the summits of the Gunong Api and of the Gunong Raya.

67. With respect to the maps attached to the 1915 and 1928 Agreements, Indonesia acknowledges that they showed no seaward extension of the line along the 4° 10′ N parallel referred to in Article IV of the 1891 Convention. It further recognizes that these maps formed an integral part of the agreements and that as such they therefore had the same binding legal force as those agreements for the parties. Indonesia nevertheless stresses that the maps attached to the 1915 and 1928 Agreements should in no sense be considered as prevailing over the Dutch Explanatory Memorandum map of 1891 in relation to stretches of the 1891 Convention line which were beyond the reach of the 1915 and 1928 Agreements.

68. Malaysia does not share Indonesia's interpretation of the 1915 and 1928 Agreements between Great Britain and the Netherlands. On the contrary, it considers that these Agreements contradict Indonesia's interpretation of Article IV of the 1891 Convention.

With respect to the 1915 Agreement, Malaysia points out that the Agreement "starts by stating that the frontier line traverses the island of Sebatik following the parallel of 4° 10′ N latitude marked on the east and west coasts by boundary pillars, then follows the parallel westward". In Malaysia's view, this wording "is exclusive of any prolongation of the line eastward". Further, Malaysia maintains that the map referred to in the preamble to the Agreement and annexed to it confirms that the boundary line started on the east coast of Sebatik Island and did not concern Ligitan or Sipadan. In this respect, it observes that on this map the eastern extremity of the boundary line is situated on the east coast of Sebatik and that the map shows no sign of the line being extended out to sea. Malaysia points out, however, that from the western endpoint of the boundary the map shows the beginning of a continuation due south. Malaysia concludes from this that "[i]f the Commissioners had thought the [1891 Convention] provided for an extension of the boundary line

eastwards by an allocation line, they would have likewise indicated the beginning of such a line" as they had done at the other end of the boundary. Malaysia stresses that the Commissioners not only chose not to extend the line on the map but they even indicated the end of the boundary line on the map by a red cross. Malaysia adds that the evidentiary value of the map annexed to the 1915 Agreement is all the greater because it is "the only official map agreed by the Parties".

At the hearings, Malaysia further contended that the 1915 Agreement could not be considered exclusively as a demarcation agreement. It explained that the Commissioners did not perform an exercise of demarcation *stricto sensu*, as they took liberties with the text of the 1891 Convention at a number of points on the land boundary, and these liberties were subsequently endorsed by the signatories of the 1915 Agreement. As an example, Malaysia referred to the change made by the Commissioners to the boundary line in the channel between the west coast of Sebatik and mainland Borneo, for the purpose of reaching the middle of the mouth of the River Troesan Tamboe.

69. With respect to the 1928 Agreement, which pertains to an inland sector of the boundary between the summits of the Gunong Api and the Gunong Raya, Malaysia considers that this instrument confirms the 1915 Agreement, since the Netherlands Government could have taken the opportunity to correct the 1915 map and Agreement if it had so wished.

70. The Court will recall that the 1891 Convention included a clause providing that the parties would in the future be able to define the course of the boundary line more exactly. Thus, Article V of the Convention states: "The exact positions of the boundary-line, as described in the four preceding Articles, shall be determined hereafter by mutual agreement, at such times as the Netherland and the British Governments may think fit."

The first such agreement was the one signed at London by Great Britain and the Netherlands on 28 September 1915 relating to "the boundary between the State of North Borneo and the Netherland possessions in Borneo". As explained in an exchange of letters of 16 March and 3 October 1905 between Baron Gericke, Netherlands Minister in London, and the Marquess of Lansdowne, British Foreign Secretary, and in a communication dated 19 November 1910 from the Netherlands Chargé d'affaires, the origin of that agreement was a difference of opinion between the Netherlands and Great Britain in respect of the course of the boundary line. The difference concerned the manner in which Article II of the 1891 Convention should be interpreted. That provision was, by way of the 1905 exchange of letters, given an interpretation agreed by the two Governments. In 1910, the Netherlands Minister for the Colonies made known to the Foreign Office, by way of the above-mentioned communication from the Netherlands Chargé d'affaires, his view that "the time

[had] come to open the negotiations with the British Government mentioned in the [Convention] of June 20, 1891, concerning the indication of the frontier between British North Borneo and the Netherland Territory". He stated in particular that the uncertainty as to the actual course of the boundary made itself felt "along the whole" boundary. For that purpose, he proposed that "a mixed Commission . . . be appointed to indicate the frontier on the ground, to describe it and to prepare a map of same". As the proposal was accepted, a mixed Commission carried out the prescribed task between 8 June 1912 and 30 January 1913.

71. By the 1915 Agreement, the two States approved and confirmed a joint report, incorporated into that Agreement, and the map annexed thereto, which had been drawn up by the mixed Commission. The Commissioners started their work on the east coast of Sebatik and, from east to west, undertook to "delimitate on the spot the frontier" agreed in 1891, as indicated in the preamble to the Agreement. In the Court's view, the Commissioners' assignment was not simply a demarcation exercise, the task of the parties being to clarify the course of a line which could only be imprecise in view of the somewhat general wording of the 1891 Convention and the line's considerable length. The Court finds that the intention of the parties to clarify the 1891 delimitation and the complementary nature of the demarcation operations become very clear when the text of the Agreement is examined carefully. Thus the Agreement indicates that "[w]here physical features did not present natural boundaries conformable with the provisions of the Boundary Treaty of the 20th June, 1891, [the Commissioners] erected the following pillars".

Moreover, the Court observes that the course of the boundary line finally adopted in the 1915 Agreement does not totally correspond to that of the 1891 Convention. Thus, as Malaysia points out, whereas the sector of the boundary between Sebatik Island and Borneo under Article IV of the 1891 Convention was to follow a straight line along the parallel of 4° 10′ latitude north (see paragraph 36 above), the 1915 Agreement stipulates that:

> "(2) Starting from the boundary pillar on the west coast of the island of Sibetik, the boundary follows the parallel of 4° 10′ north latitude westward until it reaches the middle of the channel, thence keeping a mid-channel course until it reaches the middle of the mouth of Troesan Tamboe.
>
> (3) From the mouth of Troesan Tamboe the boundary line is continued up the middle of this Troesan until it is intersected by a similar line running through the middle of Troesan Sikapal; it then follows this line through Troesan Sikapal as far as the point where the latter meets the watershed between the Simengaris and Seroedong Rivers (Sikapal hill), and is connected finally with this watershed by a line taken perpendicular to the centre line of Troesan Sikapal."

In view of the foregoing, the Court cannot accept Indonesia's argu-

ment that the 1915 Agreement was purely a demarcation agreement; nor can it accept the conclusion drawn therefrom by Indonesia that the very nature of this Agreement shows that the parties were not required to concern themselves therein with the course of the line out to sea to the east of Sebatik Island.

72. In connection with this agreement, the Court further notes a number of elements which, when taken as a whole, suggest that the line established in 1891 terminated at the east coast of Sebatik.

It first observes that the title of the 1915 Agreement is very general in nature ("Agreement between the United Kingdom and the Netherlands relating to the Boundary between the State of North Borneo and the Netherland Possessions in Borneo"), as is its wording. Thus, the preamble to the Agreement refers to the joint report incorporated into the Agreement and to the map accompanying it as "relating to the boundary between the State of North Borneo and the Netherland possessions in the island", without any further indication. Similarly, paragraphs 1 and 3 of the joint report state that the Commissioners had "travelled in the neighbourhood of the frontier from the 8th June, 1912, to the 30th January, 1913" and had

> "determined the boundary between the Netherland territory and the State of British North Borneo, *as described in the Boundary Treaty supplemented by the interpretation of Article 2 of the Treaty mutually accepted by the Netherland and British Governments in 1905*" (emphasis added by the Court).

For their part, the Commissioners, far from confining their examination to the specific problem which had arisen in connection with the interpretation of Article II of the 1891 Convention (see paragraph 70 above), also considered the situation in respect of the boundary from Sebatik westward. Thus, they began their task at the point where the 4° 10′ latitude north parallel crosses the east coast of Sebatik; they then simply proceeded from east to west.

Moreover, subparagraph (1) of paragraph 3 of the joint report describes the boundary line fixed by Article IV of the 1891 Convention as follows:

> "Traversing the island of Sibetik, the frontier line follows the parallel of 4° 10′ north latitude, *as already fixed by Article 4 of the Boundary Treaty and marked on the east and west coasts by boundary pillars*" (emphasis added by the Court).

In sum, the 1915 Agreement covered *a priori* the entire boundary "between the Netherland territory and the State of British North Borneo" and the Commissioners performed their task beginning at the eastern end of Sebatik. In the opinion of the Court, if the boundary had continued in any way to the east of Sebatik, at the very least some mention of that could have been expected in the Agreement.

The Court considers that an examination of the map annexed to the

1915 Agreement reinforces the Court's interpretation of that Agreement. The Court observes that the map, together with the map annexed to the 1928 Agreement, is the only one which was agreed between the parties to the 1891 Convention. The Court notes on this map that an initial southward extension of the line indicating the boundary between the Netherlands possessions and the other States under British protection is shown beyond the western endpoint of the boundary defined in 1915, while a similar extension does not appear beyond the point situated on the east coast of Sebatik; that latter point was, in all probability, meant to indicate the spot where the boundary ended.

73. A new agreement was concluded by the parties to the 1891 Convention on 26 March 1928. Although also bearing a title worded in general terms ("Convention between Great Britain and Northern Ireland and the Netherlands respecting the Further Delimitation of the Frontier between the States in Borneo under British Protection and the Netherlands Territory in that Island"), that agreement had a much more limited object than the 1915 Agreement, as its Article 1 indicates:

> "The boundary as defined in article III of the Convention signed at London on the 20th June, 1891, is further delimited between the summits of the Gunong Api and of the Gunong Raya as described in the following article and as shown on the map attached to this Convention."

The Court considers this too to be an agreement providing for both a more exact delimitation of the boundary in the sector in question and its demarcation, not solely a demarcation treaty. However, the Court finds that in 1928 it was a matter of carrying out the detailed delimitation and demarcation of only a limited inland boundary sector. Accordingly, the Court cannot draw any conclusions, for the purpose of interpreting Article IV of the 1891 Convention, from the fact that the 1928 Agreement fails to make any reference to the question of the boundary line being extended, as an allocation line, out to sea east of Sebatik.

74. The Court lastly observes that no other agreement was concluded subsequently by Great Britain and the Netherlands with respect to the course of the line established by the 1891 Convention.

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75. However, Indonesia refers to a debate that took place within the Dutch Government between 1922 and 1926 over whether the issue of the delimitation of the territorial waters off the east coast of the island of Sebatik should be raised with the British Government. Indonesia sets out the various options that had been envisaged in this respect: one of these options consisted in considering that the 1891 Convention also established a boundary for the territorial sea at 3 nautical miles from the coast. The other option consisted in drawing a line perpendicular to the coast at

the terminus of the land boundary, as recommended by the rules of general international law that were applicable at the time. Indonesia adds that the final view expressed in September 1926 by the Minister for Foreign Affairs of the Netherlands, who had opted for the perpendicular line, was that it was not opportune to raise the matter with the British Government. According to Indonesia, this internal debate shows that the Dutch authorities took the same position as Indonesia in the present case and saw the 1891 line as an allocation line rather than a maritime boundary. Indonesia further points out that the internal Dutch discussions were entirely restricted to the delimitation of the territorial waters off Sebatik Island and did not involve the islands of Ligitan and Sipadan.

76. Malaysia considers the proposal by certain Dutch authorities to delimit the territorial waters by a line perpendicular to the coast from the endpoint of the land boundary as particularly significant as this would have made it more difficult for the Dutch Government to make any subsequent claim to sovereignty over distant islands situated to the south of an allocation line along the 4° 10′ N parallel. Malaysia accordingly asserts that, in view of this debate, it is difficult to argue that in 1926 the Dutch authorities considered that any delimitation of territorial waters or the course of an allocation line had been provided for by an agreement between Great Britain and the Netherlands in 1891 or later. It further concludes from this debate that the Dutch authorities were clearly of the view that no rule of international law called for the prolongation, beyond the east coast of Sebatik, of the 4° 10′ N land boundary, and that in any event the authorities did not favour such a solution, considering it to be contrary to Dutch interests.

77. The Court notes that this internal debate sheds light on the views of various Dutch authorities at the time as to the legal situation of the territories to the east of Sebatik Island.

In a letter of 10 December 1922 to the Minister for the Colonies, the Governor-General of the Dutch East Indies proposed certain solutions for the delimitation of the territorial waters off the coast of Sebatik. One of these solutions was to draw "a line which is an extension of the land border". The Ministry of Foreign Affairs was also consulted. In a Memorandum of 8 August 1923, it also mentioned the "extension of the land boundary" dividing Sebatik Island as the possible boundary between Dutch territorial waters and the territorial waters of the State of North Borneo. In support of this solution, the Ministry of Foreign Affairs invoked the map annexed to the Explanatory Memorandum, "on which the border between the areas under Dutch and British jurisdiction on land and sea is extended along the parallel 4° 10′ N". The Ministry however added that "this map [did] not result from actual consultation" between the parties, although it was probably known to the British Government. Nevertheless, in his letter of 27 September 1926 to the Minister

for the Colonies, the Minister for Foreign Affairs, whilst not considering it desirable to raise the question with the British Government, put forward the perpendicular line as being the best solution. In the end this issue was not pursued and the Dutch Government never drew it to the attention of the British Government.

In the Court's view, the above-mentioned correspondence suggests that, in the 1920s, the best informed Dutch authorities did not consider that there had been agreement in 1891 on the extension out to sea of the line drawn on land along the 4° 10′ north parallel.

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78. Finally, Indonesia maintains that, in granting oil concessions in the area, both Parties always respected the 4° 10′ North latitude as forming the limit of their respective jurisdiction. Accordingly, in Indonesia's view, its grant of a licence to Japex/Total demonstrates that it considered that its jurisdictional rights extended up to the 4° 10′ N line. Indonesia goes on to indicate that Malaysia acted in similar fashion in 1968 when it granted an oil concession to Teiseki, pointing out that the southern limit of this concession virtually coincides with that parallel. Thus, according to Indonesia, the Parties recognized and respected the 4° 10′ N parallel as a separation line between Indonesia's and Malaysia's respective zones.

For its part, Malaysia notes that the oil concessions in the 1960s did not concern territorial delimitation and that the islands of Ligitan and Sipadan were never included in the concession perimeters. It adds that "[n]o activity pursuant to the Indonesian concessions had any relation to the islands".

79. The Court notes that the limits of the oil concessions granted by the Parties in the area to the east of Borneo did not encompass the islands of Ligitan and Sipadan. Further, the northern limit of the exploration concession granted in 1966 by Indonesia and the southern limit of that granted in 1968 by Malaysia did not coincide with the 4° 10′ north parallel but were fixed at 30″ to either side of that parallel. These limits may have been simply the manifestation of the caution exercised by the Parties in granting their concessions. This caution was all the more natural in the present case because negotiations were to commence soon afterwards between Indonesia and Malaysia with a view to delimiting the continental shelf.

The Court cannot therefore draw any conclusion for purposes of interpreting Article IV of the 1891 Convention from the practice of the Parties in awarding oil concessions.

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80. In view of all the foregoing, the Court considers that an examination of the subsequent practice of the parties to the 1891 Convention confirms the conclusions at which the Court has arrived in paragraph 52 above as to the interpretation of Article IV of that Convention.

* *

81. Lastly, both Parties have produced a series of maps of various natures and origins in support of their respective interpretations of Article IV of the 1891 Convention.

82. Indonesia produces maps of "Dutch" or "Indonesian" origin, such as the map annexed to the Dutch Explanatory Memorandum of 1891 and a map of Borneo taken from an Indonesian atlas of 1953. Secondly, it produces "British" or "Malaysian" maps, such as three maps published by Stanford in 1894, 1903 and 1904 respectively, a map of Tawau "produced by Great Britain in 1965", two "maps of Malaysia of 1966 of Malaysian origin", a "Malaysian map of Semporna published in 1967", the "official Malaysian map of the 1968 oil concessions showing the international boundary", another map of Malaysia "published by the Malaysian Directorate of National Mapping in 1972", etc. Thirdly, Indonesia relies on a map from an American atlas of 1897 annexed by the United States to its Memorial in the *Island of Palmas* Arbitration.

83. Indonesia contends that the maps it has produced "are consistent in depicting the boundary line as extending offshore to the north of the known locations of the islands of Ligitan and Sipadan, thus leaving them on what is now the Indonesian side of the line". Indonesia stresses that "[i]t was only in 1979, well after the dispute had arisen, that Malaysia's maps began to change in a self-serving fashion".

As regards the legal value of the maps it has produced, Indonesia considers that a number of these maps fall into the category of the "physical expressions of the will of the State or the States concerned" and that, while "these maps do not constitute a territorial title by themselves, they command significant weight in the light of their consistent depiction of the 1891 Treaty line as separating the territorial possessions, including the islands, of the Parties".

84. In regard to the evidentiary value of the maps presented by Indonesia, Malaysia states that "Indonesia has produced not a single Dutch or Indonesian map, on any scale, which shows the islands and attributes them to Indonesia". In Malaysia's view, contrary to what Indonesia contends, the Dutch maps of 1897-1904 and of 1914 clearly show the boundary terminating at the east coast of Sebatik. Malaysia emphasizes, moreover, that the Indonesian official archipelagic claim map of 1960 clearly does not treat the islands as Indonesian. Malaysia asserts that even Indonesian maps published since 1969 do not show the islands as Indonesian.

It does, however, recognize that some modern maps might be interpreted in a contrary sense, but it contends that these are relatively few in number and that their legal force is reduced by the fact that each of them contains a disclaimer in regard to the accuracy of the boundaries. Malaysia moreover argues that on the majority of these latter maps the islands of Ligitan and Sipadan are not shown at all, are in the wrong place, or are not shown as belonging to Malaysia or to Indonesia.

85. In support of its interpretation of Article IV of the 1891 Convention, Malaysia relies in particular on the map annexed to the 1915 Agreement between the British and Netherlands Governments relating to the boundary between the State of North Borneo and the Netherland possessions in Borneo: according to Malaysia, this is the only official map agreed by the parties. Malaysia also relies on a series of other maps of various origins. It first presents a certain number of Dutch maps, including *inter alia* the map entitled "East coast of Borneo: Island of Tarakan up to Dutch-English boundary" dated 1905, two maps of 1913 showing the "administrative structure of the Southern and Eastern Borneo Residence", the map made in 1917 "by the Dutch official, Kaltofen", which, according to Malaysia, "is a hand-drawn ethnographic map of Borneo", a map of "Dutch East Borneo" dated 1935, and the 1941 map of "North Borneo". Secondly, it relies on certain maps of British origin, that is to say the map published in 1952 by the "Colony of North Borneo", the "schematic map" of administrative districts of the colony of North Borneo dated 1953, and the map of "the Semporna police district of 1958, by S. M. Ross". Thirdly, it cites an Indonesian map: "Indonesia's continental shelf map of 1960". Lastly, it also relies on a 1976 map of Malaysian origin, entitled "Bandar Seri Begawan".

86. Malaysia considers that all of these maps clearly show that the boundary line between the Dutch and British possessions in the area did not extend into the sea east of Sebatik and that Ligitan and Sipadan were both regarded, depending on the period, as being British or Malaysian islands.

87. In regard to the evidentiary value of the maps produced by Malaysia, Indonesia contends, first, that virtually none of them actually shows Ligitan and Sipadan as Malaysian possessions. It points out that the only map which depicts the disputed islands as Malaysian possessions "is a map prepared in 1979 to illustrate Malaysia's claim to the area". Indonesia argues in this respect that this map, having been published ten years after the dispute over the islands crystallized in 1969, is without legal relevance in the case. Secondly, Indonesia points out that the maps relied on by Malaysia, which do not depict the 1891 line as extending out to sea, "are entirely neutral with respect to the territorial attribution of the

islands of Sipadan or Ligitan". As regards in particular the map attached to the 1915 Agreement, Indonesia considers it logical that this map should not show the line extending eastward of the island of Sebatik along the 4° 10′ N parallel, since it was concerned only with the territorial situation on the island of Borneo. Finally, with reference to the maps produced by Malaysia in its Memorial under the head of "Other Maps", Indonesia asserts that none of these supports Malaysia's contentions as to sovereignty over the two islands.

88. The Court would begin by recalling, as regards the legal value of maps, that it has already had occasion to state the following:

> "maps merely constitute information which varies in accuracy from case to case; of themselves, and by virtue solely of their existence, they cannot constitute a territorial title, that is, a document endowed by international law with intrinsic legal force for the purpose of establishing territorial rights. Of course, in some cases maps may acquire such legal force, but where this is so the legal force does not arise solely from their intrinsic merits: it is because such maps fall into the category of physical expressions of the will of the State or States concerned. This is the case, for example, when maps are annexed to an official text of which they form an integral part. Except in this clearly defined case, maps are only extrinsic evidence of varying reliability or unreliability which may be used, along with other evidence of a circumstantial kind, to establish or reconstitute the real facts." (*Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986*, p. 582, para. 54; *Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Reports 1999 (II)*, p. 1098, para. 84.)

In the present case, the Court observes that no map reflecting the agreed views of the parties was appended to the 1891 Convention, which would have officially expressed the will of Great Britain and the Netherlands as to the prolongation of the boundary line, as an allocation line, out to sea to the east of Sebatik Island.

89. In the course of the proceedings, the Parties made particular reference to two maps: the map annexed to the Explanatory Memorandum appended by the Netherlands Government to the draft Law submitted to the States-General for the ratification of the 1891 Convention, and the map annexed to the 1915 Agreement. The Court has already set out its findings as to the legal value of these maps (see paragraphs 47, 48 and 72 above).

90. Turning now to the other maps produced by the Parties, the Court observes that Indonesia has submitted a certain number of maps published after the 1891 Convention showing a line continuing out to sea off the eastern coast of Sebatik Island, along the parallel of 4° 10′ latitude north. These maps include, for example, those of Borneo made by Stanford in 1894, in 1903 and in 1904, and that of 1968 published by the

Malaysian Ministry of Lands and Mines to illustrate oil-prospecting licences.

The Court notes that the manner in which these maps represent the continuation out to sea of the line forming the land boundary varies from one map to another. Moreover, the length of the line extending out to sea varies considerably: on some maps it continues for several miles before stopping approximately halfway to the meridians of Ligitan and Sipadan, whilst on others it extends almost to the boundary between the Philippines and Malaysia.

For its part, Malaysia has produced various maps on which the boundary line between the British and Dutch possessions in the region stops on the eastern coast of Sebatik Island. These maps include the map of British North Borneo annexed to the 1907 Exchange of Notes between Great Britain and the United States, the Dutch map of 1913 representing the Administrative Structure of the Southern and Eastern Borneo Residence, and the map showing the 1915 boundary line published in the Official Gazette of the Dutch Colonies in 1916.

The Court however considers that each of these maps was produced for specific purposes and it is therefore unable to draw from those maps any clear and final conclusion as to whether or not the line defined in Article IV of the 1891 Convention extended to the east of Sebatik Island. Moreover, Malaysia was not always able to justify its criticism of the maps submitted by Indonesia. Malaysia thus contended that the line shown on the Stanford maps of 1894, 1903 and 1904, extending out to sea along the parallel of 4° 10′ latitude north, corresponded to an administrative boundary of North Borneo, but could not cite any basis other than the 1891 Convention as support for the continuation of that State's administrative boundary along the parallel in question.

91. In sum, with the exception of the map annexed to the 1915 Agreement (see paragraph 72 above), the cartographic material submitted by the Parties is inconclusive in respect of the interpretation of Article IV of the 1891 Convention.

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92. The Court ultimately comes to the conclusion that Article IV, interpreted in its context and in the light of the object and purpose of the Convention, determines the boundary between the two Parties up to the eastern extremity of Sebatik Island and does not establish any allocation line further eastwards. That conclusion is confirmed both by the *travaux préparatoires* and by the subsequent conduct of the parties to the 1891 Convention.

* * *

93. The Court will now turn to the question whether Indonesia or Malaysia obtained title to Ligitan and Sipadan by succession.

* *

94. Indonesia contended during the second round of the oral proceedings that, if the Court were to dismiss its claim to the islands in dispute on the basis of the 1891 Convention, it would nevertheless have title as successor to the Netherlands, which in turn acquired its title through contracts with the Sultan of Bulungan, the original title-holder.

95. Malaysia contends that Ligitan and Sipadan never belonged to the possessions of the Sultan of Bulungan.

96. The Court observes that it has already dealt with the various contracts of vassalage concluded between the Netherlands and the Sultan of Bulungan when it considered the 1891 Convention (see paragraphs 18 and 64 above). It recalls that in the 1878 Contract the island possessions of the Sultan were described as "Terekkan [Tarakan], Nanoekan [Nanukan] and Sebittikh [Sebatik], with the islets belonging thereto". As amended in 1893, this list refers to the three islands and surrounding islets in similar terms while taking into account the division of Sebatik on the basis of the 1891 Convention. The Court further recalls that it stated above that the words "the islets belonging thereto" can only be interpreted as referring to the small islands lying in the immediate vicinity of the three islands which are mentioned by name, and not to islands which are located at a distance of more than 40 nautical miles. The Court therefore cannot accept Indonesia's contention that it inherited title to the disputed islands from the Netherlands through these contracts, which stated that the Sultanate of Bulungan as described in the contracts formed part of the Netherlands Indies.

97. For its part, Malaysia maintains that it acquired sovereignty over the islands of Ligitan and Sipadan further to a series of alleged transfers of the title originally held by the former sovereign, the Sultan of Sulu, that title having allegedly passed in turn to Spain, the United States, Great Britain on behalf of the State of North Borneo, the United Kingdom of Great Britain and Northern Ireland and finally to Malaysia.

It is this "chain of title" which, according to Malaysia, provides it with a treaty-based title to Ligitan and Sipadan.

98. Malaysia asserts, in respect of the original title, that "[i]n the eighteenth and throughout the nineteenth century until 1878, the coastal territory of north-east Borneo and its adjacent islands was a dependency of the Sultanate of Sulu".

It states that "[t]his control resulted from the allegiance of the local people and the appointment of their local chiefs by the Sultan", but that

his authority over the area in question was also recognized by other States, notably Spain and the Netherlands.

Malaysia further states that during the nineteenth and twentieth centuries, the islands and reefs along the north-east coast of Borneo were inhabited and used by the Bajau Laut, or Sea Gypsies, people who live mostly on boats or in settlements of stilt houses above water and devote themselves in particular to fishing, collecting forest products and trade. In respect specifically of Ligitan and Sipadan, Malaysia notes that, even though these islands were not permanently inhabited at the time of the main decisive events in respect of sovereignty over them, that is, the latter part of the nineteenth century and the twentieth century, they were nevertheless frequently visited and were an integral part of the marine economy of the Bajau Laut.

99. Indonesia observes in the first place that if the title to the islands in dispute of only one of the entities mentioned in the chain of alleged title-holders cannot be proven to have been "demonstrably valid", the legal foundation of Malaysia's "chain of title" argument disappears.

In this respect, Indonesia states that the disputed islands cannot be regarded as falling at the time in question within the area controlled by the Sultan of Sulu, as he was never present south of Darvel Bay except through some commercial influence which in any event was receding when the 1891 Convention between Great Britain and the Netherlands was concluded. Indonesia admits that there may have been alliances between the Sultan of Sulu and some Bajau Laut groups, but argues that those ties were personal in nature and are not sufficient in any event to establish territorial sovereignty over the disputed islands.

100. Concerning the transfer of sovereignty over the islands of Ligitan and Sipadan by the Sultan of Sulu to Spain, Malaysia asserts that "Article I of the Protocol [confirming the Bases of Peace and Capitulation] of 22 July 1878 declared 'as beyond discussion the sovereignty of Spain over all the Archipelago of Sulu and the dependencies thereof'". Malaysia further holds that, pursuant to the Protocol concluded on 7 March 1885 between Spain, Germany and Great Britain, the latter two Powers recognized Spain's sovereignty over the entire Sulu Archipelago as defined in Article 2 of that instrument. According to that provision, the Archipelago included "all the islands which are found between the western extremity of the island of Mindanao, on the one side, and the continent of Borneo and the island of Paragua, on the other side, with the exception of those which are indicated in Article 3". Malaysia points out that this definition of the Archipelago is in conformity with that set out in Article I of the Treaty signed on 23 September 1836 between the Spanish Government and the Sultan of Sulu. It adds that "[w]hatever the position may have been in 1878, the sovereignty of Spain over the Sulu Archipelago [and the dependencies thereof] was clearly established in 1885".

101. Indonesia responds that there is no evidence to show that Ligitan and Sipadan were ever Spanish possessions. In support of this assertion, Indonesia maintains that the disputed islands were not identified in any of the agreements concluded between Spain and the Sultan. It further cites the 1885 Protocol concluded by Spain, Germany and Great Britain, Article 1 of which provided: "The Governments of Germany and Great Britain recognize the sovereignty of Spain over the places effectively occupied, as well as over those places not yet so occupied, of the archipelago of Sulu (Joló)." In Indonesia's view, this reflected the spirit of the 1877 Protocol concluded by those same States, which required Spain to give Germany and Great Britain notice of any further occupation of the islands of the Sulu Archipelago before being entitled to extend to those new territories the agreed régime for the territories already occupied by it. This provision was repeated in Article 4 of the 1885 Protocol. According to Indonesia, Spain however never actually occupied the islands of Ligitan and Sipadan after the conclusion of the 1885 Protocol and, accordingly, was never in a position to give such notice to the other contracting parties.

102. Concerning the transfer by Spain to the United States of Ligitan and Sipadan, Malaysia maintains that it was generally recognized that those islands were not covered by the allocation lines laid down in the 1898 Treaty of Peace; Malaysia claims that the Sultan of Sulu nevertheless expressly recognized United States sovereignty over the whole Sulu Archipelago and its dependencies by an Agreement dated 20 August 1899. According to Malaysia, that omission from the 1898 Treaty of Peace was remedied by the 1900 Treaty between Spain and the United States ceding to the latter "any and all islands belonging to the Philippine Archipelago . . . *and particularly* . . . the islands of Cagayan Sulú and Sibutú and their dependencies". In Malaysia's view, the intent of the parties to the 1900 Treaty was to bring within the scope of application of the Treaty all Spanish islands in the region which were not within the lines laid down in the 1898 Treaty of Peace.

In support of its interpretation of the 1900 Treaty, Malaysia notes that in 1903, after a visit of the USS *Quiros* to the region, the United States Hydrographic Office published a chart of the "Northern Shore of Sibuko Bay", showing the disputed islands on the American side of a line separating British territory from United States territory. Malaysia concludes from this that the 1903 chart represented a public assertion by the United States of its sovereignty over the additional islands ceded to it under the 1900 Treaty, adding that this assertion of sovereignty occasioned no reaction from the Netherlands.

103. Malaysia also observes that after the voyage of the *Quiros* the Chairman of the BNBC sent a letter of protest to the British Foreign Office, stating that the Company had been peacefully administering the islands off North Borneo beyond the line of 3 marine leagues without any opposition from Spain. According to Malaysia, the BNBC at the same

time took steps to obtain confirmation from the Sultan of Sulu of its authority over the islands lying beyond 3 marine leagues. The Sultan provided that confirmation by a certificate signed on 22 April 1903. Malaysia states that the Foreign Office nevertheless had doubts about the international legal effect of the Sultan of Sulu's 1903 certificate and, faced with the United States claims to the islands under the 1900 Treaty, the British Government "rather sought an arrangement with the United States that would ensure the continuity of the Company's administration".

Malaysia considers that the United States and Great Britain attempted to settle the questions concerning sovereignty over the islands and their administration by an Exchange of Notes of 3 and 10 July 1907. Great Britain is said to have recognized the continuing sovereignty of the United States, as successor to Spain, over the islands beyond the 3-marine-league limit; for its part, the United States is said to have accepted that these islands had in fact been administered by the BNBC and to have agreed to allow that situation to continue, subject to a right on both parts to terminate the agreement on 12 months' notice. Malaysia asserts that all relevant documents clearly show that the islands covered by the 1907 Exchange of Notes included all those adjacent to the North Borneo coast beyond the 3-marine-league line and that Ligitan and Sipadan were among those islands. Malaysia relies in particular on the 1907 Exchange of Notes and the map to which it referred and which depicts Ligitan and Sipadan as lying on the British side of the line which separates the islands under British and American administration. It further points out that the 1907 Exchange of Notes was published at the time by the United States and by Great Britain and that it attracted no protest on the part of the Netherlands Government.

104. Indonesia responds that the 1900 Treaty only concerned those islands belonging to the Philippine Archipelago lying outside the line agreed to in the 1898 Treaty of Peace and that the 1900 Treaty provided that in particular the islands of Cagayan Sulu, Sibutu and their dependencies were amongst the territories ceded by Spain to the United States. However, according to Indonesia, Ligitan and Sipadan cannot be considered part of the Philippine Archipelago, nor can they be viewed as dependencies of Cagayan Sulu and Sibutu, which lie far to the north. Thus, the disputed islands could not have figured among the territories which Spain allegedly ceded to the United States under the 1898 and 1900 Treaties.

Indonesia adds that its position is supported by subsequent events. According to it, the United States was uncertain as to the precise extent of the possessions it had obtained from Spain.

To illustrate the uncertainties felt by the United States, Indonesia observes that in October 1903 the United States Navy Department had recommended, after consultation with the State Department, that the

boundary line shown on certain United States charts be omitted. According to Indonesia, it is significant that this recommendation concerned in particular the chart of the "Northern Shore of Sibuko Bay" issued by the United States Hydrographic Office in June 1903, after the voyage of the *Quiros*. In Indonesia's view it is thus "clear that the 1903 Hydrographic Office Chart, far from being a 'public assertion' of US sovereignty, as suggested by Malaysia, was a tentative internal position which was subsequently withdrawn after more careful consideration"; the 1903 chart can therefore not be seen as an official document, and nothing can be made of the fact that it provoked no reaction from the Netherlands.

As regards the United States-British Exchange of Notes of 1907, Indonesia considers that this consisted only of a temporary arrangement whereby the United States waived in favour of the BNBC the administration of certain islands located "to the westward and southwestward of the line traced on the [accompanying] map. . . [This], however, was without prejudice to the issue of sovereignty" over the islands in question.

105. As regards the transfer of sovereignty over Ligitan and Sipadan from the United States to Great Britain on behalf of North Borneo, Malaysia argues that the 1907 Exchange of Notes had not totally settled the issue of sovereignty over the islands situated beyond the line of three marine leagues, laid down in the 1878 Dent-von Overbeck grant. It states that the question was finally settled by the Convention of 2 January 1930, which entered into force on 13 December 1932. Under that Convention, it was agreed that the islands belonging to the Philippine Archipelago and those belonging to the State of North Borneo were to be separated by a line running through ten specific points. Malaysia points out that under the 1930 Convention "all islands to the north and east of the line were to belong to the Philippine Archipelago and all islands to the south and west were to belong to the State of Borneo". In Malaysia's view, since Ligitan and Sipadan clearly lie to the south and west of the 1930 line, it follows that they were formally transferred to North Borneo under British protection.

Malaysia makes the further point that the 1930 Convention was published both by the United States and by Great Britain and also in the League of Nations *Treaty Series*, and that it evoked "no reaction from the Netherlands, though one might have been expected if the islands disposed of by it were claimed by the Netherlands".

Finally, Malaysia observes that, by an agreement concluded on 26 June 1946 between the British Government and the BNBC, "the latter ceded to the Crown all its sovereign rights and its assets in North Borneo". According to Malaysia, the disappearance of the State of North Borneo and its replacement by the British Colony of North Borneo had no effect on the extent of the territory belonging to North Borneo.

106. For its part, Indonesia claims that the documents relating to the negotiation of the 1930 Convention show clearly that the United States

deemed that it had title to islands lying more than 3 marine leagues from the North Borneo coast only in areas lying to the north of Sibutu and its immediate dependencies. Hence, Indonesia contends that the negotiations leading up to the conclusion of the 1930 Convention focused solely on the status of the Turtle Islands and the Mangsee Islands. It observes that, in any event, the southern limits of the boundary fixed by the 1930 Convention lay well to the north of latitude 4° 10′ north and thus well to the north of Ligitan and Sipadan.

107. As regards transmission of the United Kingdom's title to Malaysia, the latter states that, by the Agreement of 9 July 1963 between the Governments of the Federation of Malaya, the United Kingdom of Great Britain and Northern Ireland, North Borneo, Sarawak and Singapore, which came into effect on 16 September 1963, North Borneo became a State within Malaysia under the name of Sabah.

* *

108. The Court notes at the outset that the islands in dispute are not mentioned by name in any of the international legal instruments presented by Malaysia to prove the alleged consecutive transfers of title.

The Court further notes that the two islands were not included in the grant by which the Sultan of Sulu ceded all his rights and powers over his possessions in Borneo, including the islands within a limit of 3 marine leagues, to Alfred Dent and Baron von Overbeck on 22 January 1878, a fact not contested by the Parties.

Finally, the Court observes that, while the Parties both maintain that the islands of Ligitan and Sipadan were not *terrae nullius* during the period in question in the present case, they do so on the basis of diametrically opposed reasoning, each of them claiming to hold title to those islands.

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109. The Court will first deal with the question whether Ligitan and Sipadan were part of the possessions of the Sultan of Sulu. It is not contested by the Parties that geographically these islands do not belong to the Sulu Archipelago proper. In all relevant documents, however, the Sultanate is invariably described as "the Archipelago of Sulu and the dependencies thereof" or "the Island of Sooloo with all its dependencies". In a number of these documents its territorial extent is rather vaguely defined as "compris[ing] all the islands which are found between the western extremity of the island of Mindanao, on the one side, and the continent of Borneo and the island of Paragua, on the other side" (Protocol between Spain, Germany and Great Britain, 7 March 1885; see also

the Capitulations concluded between Spain and the Sultan of Sulu, 23 September 1836). These documents, therefore, provide no answer to the question whether Ligitan and Sipadan, which are located at a considerable distance from the main island of Sulu, were part of the Sultanate's dependencies.

110. Malaysia relies on the ties of allegiance which allegedly existed between the Sultan of Sulu and the Bajau Laut who inhabited the islands off the coast of North Borneo and who from time to time may have made use of the two uninhabited islands. The Court is of the opinion that such ties may well have existed but that they are in themselves not sufficient to provide evidence that the Sultan of Sulu claimed territorial title to these two small islands or considered them part of his possessions. Nor is there any evidence that the Sultan actually exercised authority over Ligitan and Sipadan.

111. Turning now to the alleged transfer of title over Ligitan and Sipadan to Spain, the Court notes that in the Protocol between Spain and Sulu Confirming the Bases of Peace and Capitulation of 22 July 1878 the Sultan of Sulu definitively ceded the "Archipelago of Sulu and the dependencies thereof" to Spain. In the Protocol of 7 March 1885 concluded between Spain, Germany and Great Britain, the Spanish Government relinquished, as far as regarded the British Government, all claims of sovereignty over the territory of North Borneo and the neighbouring islands within a zone of 3 marine leagues, mentioned in the 1878 Dent-von Overbeck grant, whereas Great Britain and Germany recognized Spanish sovereignty over "the places effectively occupied, as well over those places not yet so occupied, of the Archipelago of Sulu (Joló), of which the boundaries are determined in Article 2". Article 2 contains the rather vague definition mentioned in paragraph 109 above.

112. It is not contested between the Parties that Spain at no time showed an interest in the islands in dispute or the neighbouring islands and that it did not extend its authority to these islands. Nor is there any indication in the case file that Spain gave notice of its occupation of these islands, in accordance with the procedure provided for in Article 4 of the 1885 Protocol. Nor is it contested that, in the years after 1878, the BNBC gradually extended its administration to islands lying beyond the 3-marine-league limit without, however, claiming title to them and without protest from Spain.

113. The Court therefore cannot but conclude that there is no evidence that Spain considered Ligitan and Sipadan as covered by the 1878 Protocol between Spain and the Sultan of Sulu or that Germany and Great Britain recognized Spanish sovereignty over them in the 1885 Protocol.

It cannot be disputed, however, that the Sultan of Sulu relinquished the sovereign rights over all his possessions in favour of Spain, thus losing any title he may have had over islands located beyond the 3-marine-league limit from the coast of North Borneo. He was therefore

not in a position to declare in 1903 that such islands had been included in the 1878 grant to Alfred Dent and Baron von Overbeck.

114. The Court, therefore, is of the opinion that Spain was the only State which could have laid claim to Ligitan and Sipadan by virtue of the relevant instruments but that there is no evidence that it actually did so. It further observes that at the time neither Great Britain, on behalf of the State of North Borneo, nor the Netherlands explicitly or implicitly laid claim to Ligitan and Sipadan.

115. The next link in the chain of transfers of title is the Treaty of 7 November 1900 between the United States and Spain, by which Spain "relinquish[ed] to the United States all title and claim of title . . . to any and all islands belonging to the Philippine Archipelago" which had not been covered by the Treaty of Peace of 10 December 1898. Mention was made in particular of the islands of Cagayan Sulu and Sibutu, but no other islands which were situated closer to the coast of North Borneo were mentioned by name.

116. The Court first notes that, although it is undisputed that Ligitan and Sipadan were not within the scope of the 1898 Treaty of Peace, the 1900 Treaty does not specify islands, apart from Cagayan Sulu and Sibutu and their dependencies, that Spain ceded to the United States. Spain nevertheless relinquished by that Treaty any claim it may have had to Ligitan and Sipadan or other islands beyond the 3-marine-league limit from the coast of North Borneo.

117. Subsequent events show that the United States itself was uncertain to which islands it had acquired title under the 1900 Treaty. The correspondence between the United States Secretary of State and the United States Secretaries of War and of the Navy in the aftermath of the voyage of the USS *Quiros* and the re-edition of a map of the United States Hydrographic Office, the first version of which had contained a line of separation between United States and British possessions attributing Ligitan and Sipadan to the United States, demonstrate that the State Department had no clear idea of the territorial and maritime extent of the Philippine Archipelago, title to which it had obtained from Spain. In this respect the Court notes that the United States Secretary of State in his letter of 23 October 1903 to the Acting Secretary of War wrote that a bilateral arrangement with Great Britain was necessary "to trace the line demarking [their] respective jurisdictions", whereas with regard to Sipadan he explicitly stated that he was not in a position to determine whether "Sipadan and the included keys and rocks had been recognized as lying within the dominions of Sulu".

118. A temporary arrangement between Great Britain and the United States was made in 1907 by an Exchange of Notes. This Exchange of Notes, which did not involve a transfer of territorial sovereignty, pro-

vided for a continuation of the administration by the BNBC of the islands situated more than 3 marine leagues from the coast of North Borneo but left unresolved the issue to which of the parties these islands belonged. There was no indication to which of the islands administered by the BNBC the United States claimed title and the question of sovereignty was therefore left in abeyance. No conclusion therefore can be drawn from the 1907 Exchange of Notes as regards sovereignty over Ligitan and Sipadan.

119. This temporary arrangement lasted until 2 January 1930, when a Convention was concluded between Great Britain and the United States in which a line was drawn separating the islands belonging to the Philippine Archipelago on the one hand and the islands belonging to the State of North Borneo on the other hand. Article III of that Convention stated that all islands to the south and west of the line should belong to the State of North Borneo. From a point well to the north-east of Ligitan and Sipadan, the line extended to the north and to the east. The Convention did not mention any island by name apart from the Turtle and Mangsee Islands, which were declared to be under United States sovereignty.

120. By concluding the 1930 Convention, the United States relinquished any claim it might have had to Ligitan and Sipadan and to the neighbouring islands. But the Court cannot conclude either from the 1907 Exchange of Notes or from the 1930 Convention or from any document emanating from the United States Administration in the intervening period that the United States did claim sovereignty over these islands. It can, therefore, not be said with any degree of certainty that by the 1930 Convention the United States transferred title to Ligitan and Sipadan to Great Britain, as Malaysia asserts.

121. On the other hand, the Court cannot let go unnoticed that Great Britain was of the opinion that as a result of the 1930 Convention it acquired, on behalf of the BNBC, title to all the islands beyond the 3-marine-league zone which had been administered by the Company, with the exception of the Turtle and the Mangsee Islands. To none of the islands lying beyond the 3-marine-league zone had it ever before laid a formal claim. Whether such title in the case of Ligitan and Sipadan and the neighbouring islands was indeed acquired as a result of the 1930 Convention is less relevant than the fact that Great Britain's position on the effect of this Convention was not contested by any other State.

122. The State of North Borneo was transformed into a colony in 1946. Subsequently, by virtue of Article IV of the Agreement of 9 July 1963, the Government of the United Kingdom agreed to take "such steps as [might] be appropriate and available to them to secure the enactment by the Parliament of the United Kingdom of an Act providing for the relinquishment. . . of Her Britannic Majesty's sovereignty and jurisdiction in respect of North Borneo, Sarawak and Singapore" in favour of Malaysia.

123. In 1969 Indonesia challenged Malaysia's title to Ligitan and Sipadan and claimed to have title to the two islands on the basis of the 1891 Convention.

124. In view of the foregoing, the Court concludes that it cannot accept Malaysia's contention that there is an uninterrupted series of transfers of title from the alleged original title-holder, the Sultan of Sulu, to Malaysia as the present one. It has not been established with certainty that Ligitan and Sipadan belonged to the possessions of the Sultan of Sulu nor that any of the alleged subsequent title-holders had a treaty-based title to these two islands. The Court can therefore not find that Malaysia has inherited a treaty-based title from its predecessor, the United Kingdom of Great Britain and Northern Ireland.

125. The Court has already found that the 1891 Convention does not provide Indonesia with a treaty-based title and that title to the islands did not pass to Indonesia as successor to the Netherlands and the Sultan of Bulungan (see paragraphs 94 and 96 above).

126. The Court will therefore now consider whether evidence furnished by the Parties with respect to *"effectivités"* relied upon by them provides the basis for a decision — as requested in the Special Agreement — on the question to whom sovereignty over Ligitan and Sipadan belongs. The Court recalls that it has already ruled in a number of cases on the legal relationship between *"effectivités"* and title. The relevant passage for the present case can be found in the Judgment in the *Frontier Dispute (Burkina Faso/Republic of Mali)* case, where the Chamber of the Court stated after having said that "a distinction must be drawn among several eventualities": "[i]n the event that the *effectivité* does not co-exist with any legal title, it must invariably be taken into consideration" (*I.C.J. Reports 1986*, p. 587, para. 63; see also *Territorial Dispute (Libyan Arab Jamahiriya/Chad), I.C.J. Reports 1994*, p. 38, paras. 75-76; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, Merits, I.C.J. Reports 2002*, pp. 353-354, para. 68).

* * *

127. Both Parties claim that the *effectivités* on which they rely merely confirm a treaty-based title. On an alternative basis, Malaysia claims that it acquired title to Ligitan and Sipadan by virtue of continuous peaceful possession and administration, without objection from Indonesia or its predecessors in title.

The Court, having found that neither of the Parties has a treaty-based title to Ligitan and Sipadan (see paragraphs 92 and 124 above), will consider these *effectivités* as an independent and separate issue.

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128. Indonesia points out that, during the 1969 negotiations on the delimitation of the respective continental shelves of the two States, Malaysia raised a claim to sovereignty over Ligitan and Sipadan Islands. According to Indonesia, it was thus at that time that the "critical date" arose in the present dispute. It contends that the two Parties undertook, in an exchange of letters of 22 September 1969, to refrain from any action which might alter the status quo in respect of the disputed islands. It asserts that from 1969 the respective claims of the Parties therefore find themselves "legally neutralized", and that, for this reason, their subsequent statements or actions are not relevant to the present proceedings.

Indonesia adds that Malaysia, from 1979 onwards, nevertheless took a series of unilateral measures that were fundamentally incompatible with the undertaking thus given to respect the situation as it existed in 1969. By way of example Indonesia mentions the publication of maps by Malaysia showing, unlike earlier maps, the disputed islands as Malaysian and the establishment of a number of tourist facilities on Sipadan. Indonesia adds that it always protested whenever Malaysia took such unilateral steps.

129. With respect to the critical date, Malaysia begins by asserting that prior to the 1969 discussions on the delimitation of the continental shelves of the Parties, neither Indonesia nor its predecessors had expressed any interest in or claim to these islands. It however emphasizes the importance of the critical date, not so much in relation to the admissibility of evidence but rather to "the weight to be given to it". Malaysia therefore asserts that a tribunal may always take into account post-critical date activity if the party submitting it shows that the activity in question started at a time prior to the critical date and simply continued thereafter. As for scuba-diving activities on Sipadan, Malaysia observes that the tourist trade, generated by this sport, emerged from the time when it became popular, and that it had itself accepted the responsibilities of sovereignty to ensure the protection of the island's environment as well as to meet the basic needs of the visitors.

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130. In support of its arguments relating to *effectivités*, Indonesia cites patrols in the area by vessels of the Dutch Royal Navy. It refers to a list of Dutch ships present in the area between 1895 and 1928, prepared on the basis of the reports on the colonies presented each year to Parliament by the Dutch Government (*"Koloniale Verslagen"*), and relies in particular on the presence in the area of the Dutch destroyer *Lynx* in November and December 1921. Indonesia refers to the fact that a patrol team of the *Lynx* went ashore on Sipadan and that the plane carried aboard the *Lynx* traversed the air space of Ligitan and its waters, whereas the 3-mile

zones of Si Amil and other islands under British authority were respected. Indonesia considers that the report submitted by the commander of the *Lynx* to the Commander Naval Forces Netherlands Indies after the voyage shows that the Dutch authorities regarded Ligitan and Sipadan Islands as being under Dutch sovereignty, whereas other islands situated to the north of the 1891 line were considered to be British. Indonesia also mentions the hydrographic surveys carried out by the Dutch, in particular the surveying activities of the vessel *Macasser* throughout the region, including the area around Ligitan and Sipadan, in October and November 1903.

As regards its own activities, Indonesia notes that "[p]rior to the emergence of the dispute in 1969, the Indonesian Navy was also active in the area, visiting Sipadan on several occasions".

As regards fishing activities, Indonesia states that Indonesian fishermen have traditionally plied their trade around the islands of Ligitan and Sipadan. It has submitted a series of affidavits which provide a record of occasional visits to the islands dating back to the 1950s and early 1960s, and even to the early 1970s, after the dispute between the Parties had emerged.

Finally, in regard to its Act No. 4 concerning Indonesian Waters, promulgated on 18 February 1960, in which its archipelagic baselines are defined, Indonesia recognizes that it did not at that time include Ligitan or Sipadan as base points for the purpose of drawing baselines and defining its archipelagic waters and territorial sea. But it argues that this cannot be interpreted as demonstrating that Indonesia regarded the islands as not belonging to its territory. It points out in this connection that the Act of 1960 was prepared in some haste, which can be explained by the need to create a precedent for the recognition of the concept of archipelagic waters just before the Second United Nations Conference on the Law of the Sea, which was due to be held from 17 March to 26 April 1960. Indonesia adds that it moreover sought to diverge as little as possible from the existing law of the sea, one of the principles of which was that the drawing of baselines could not depart to any appreciable extent from the general direction of the coast.

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131. Malaysia argues that the alleged Dutch and Indonesian naval activities are very limited in number. Malaysia contends that these activities cannot be regarded as evidence of the continuous exercise of governmental activity in and in relation to Ligitan and Sipadan that may be indicative of any claim of title to the islands.

As regards post-colonial practice, Malaysia observes that, for the first 25 years of its independence, Indonesia showed no interest in Ligitan and

Sipadan. Malaysia claims that Indonesia "did not manifest any presence in the area, did not try to administer the islands, enacted no legislation and made no ordinances or regulations concerning the two islands or their surrounding waters".

Malaysia further observes that Indonesian Act No. 4 of 18 February 1960, to which a map was attached, defined the outer limits of the Indonesian national waters by a list of baseline co-ordinates. However, Indonesia did not use the disputed islands as reference points for the baselines. Malaysia argues that, in light of the said Act and of the map attached thereto, Ligitan and Sipadan Islands cannot be regarded as belonging to Indonesia. Malaysia admits that it has still not published a detailed map of its own baselines. It points out that it did, however, publish its continental shelf boundaries in 1979, in a way which takes full account of the two islands in question.

132. As regards its *effectivités* on the islands of Ligitan and Sipadan, Malaysia mentions control over the taking of turtles and the collection of turtle eggs; it states that collecting turtle eggs was the most important economic activity on Sipadan for many years. As early as 1914, Great Britain took steps to regulate and control the collection of turtle eggs on Ligitan and Sipadan. Malaysia stresses the fact that it was to British North Borneo officials that the resolution of disputes concerning the collection of turtle eggs was referred. It notes that a licensing system was established for boats used to fish the waters around the islands. Malaysia also relies on the establishment in 1933 of a bird sanctuary on Sipadan. Malaysia further points out that the British North Borneo colonial authorities constructed lighthouses on Ligitan and Sipadan Islands in the early 1960s and that these exist to this day and are maintained by the Malaysian authorities. Finally, Malaysia cites Malaysian Government regulation of tourism on Sipadan and the fact that, from 25 September 1997, Ligitan and Sipadan became protected areas under Malaysia's Protected Areas Order of that year.

133. Indonesia denies that the acts relied upon by Malaysia, whether considered in isolation or taken as a whole, are sufficient to establish the existence of a continuous peaceful possession and administration of the islands capable of creating a territorial title in the latter's favour.

As regards the collection of turtle eggs, Indonesia does not contest the facts as stated by Malaysia but argues that the regulations issued by the British and the rules established for the resolution of disputes between the inhabitants of the area were evidence of the exercise of personal rather than territorial jurisdiction. Indonesia also contests the evidentiary value of the establishment of a bird sanctuary by the British authorities as an act *à titre de souverain* in relation to Sipadan. Similarly, in Indonesia's view, Malaysia's construction and maintenance of lighthouses do

not constitute proof of acts *à titre de souverain*. It observes in any event that it did not object to these activities by Malaysia because they were of general interest for navigation.

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134. The Court first recalls the statement by the Permanent Court of International Justice in the *Legal Status of Eastern Greenland (Denmark* v. *Norway)* case:

> "a claim to sovereignty based not upon some particular act or title such as a treaty of cession but merely upon continued display of authority, involves two elements each of which must be shown to exist: the intention and will to act as sovereign, and some actual exercise or display of such authority.
>
> Another circumstance which must be taken into account by any tribunal which has to adjudicate upon a claim to sovereignty over a particular territory, is the extent to which the sovereignty is also claimed by some other Power."

The Permanent Court continued:

> "It is impossible to read the records of the decisions in cases as to territorial sovereignty without observing that in many cases the tribunal has been satisfied with very little in the way of the actual exercise of sovereign rights, provided that the other State could not make out a superior claim. This is particularly true in the case of claims to sovereignty over areas in thinly populated or unsettled countries." (*P.C.I.J., Series A/B, No. 53*, pp. 45-46.)

In particular in the case of very small islands which are uninhabited or not permanently inhabited — like Ligitan and Sipadan, which have been of little economic importance (at least until recently) — *effectivités* will indeed generally be scarce.

135. The Court further observes that it cannot take into consideration acts having taken place after the date on which the dispute between the Parties crystallized unless such acts are a normal continuation of prior acts and are not undertaken for the purpose of improving the legal position of the Party which relies on them (see the Arbitral Award in the *Palena* case, 38 *International Law Reports (ILR)*, pp. 79-80). The Court will, therefore, primarily, analyse the *effectivités* which date from the period before 1969, the year in which the Parties asserted conflicting claims to Ligitan and Sipadan.

136. The Court finally observes that it can only consider those acts as

constituting a relevant display of authority which leave no doubt as to their specific reference to the islands in dispute as such. Regulations or administrative acts of a general nature can therefore be taken as *effectivités* with regard to Ligitan and Sipadan only if it is clear from their terms or their effects that they pertained to these two islands.

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137. Turning now to the *effectivités* relied on by Indonesia, the Court will begin by pointing out that none of them is of a legislative or regulatory character. Moreover, the Court cannot ignore the fact that Indonesian Act No. 4 of 8 February 1960, which draws Indonesia's archipelagic baselines, and its accompanying map do not mention or indicate Ligitan and Sipadan as relevant base points or turning points.

138. Indonesia cites in the first place a continuous presence of the Dutch and Indonesian navies in the waters around Ligitan and Sipadan. It relies in particular on the voyage of the Dutch destroyer *Lynx* in November 1921. This voyage was part of a joint action of the British and Dutch navies to combat piracy in the waters east of Borneo. According to the report by the commander of the *Lynx*, an armed sloop was despatched to Sipadan to gather information about pirate activities and a seaplane flew a reconnaissance flight through the island's airspace and subsequently flew over Ligitan. Indonesia concludes from this operation that the Netherlands considered the airspace, and thus also the islands, as Dutch territory.

139. In the opinion of the Court, it cannot be deduced either from the report of the commanding officer of the *Lynx* or from any other document presented by Indonesia in connection with Dutch or Indonesian naval surveillance and patrol activities that the naval authorities concerned considered Ligitan and Sipadan and the surrounding waters to be under the sovereignty of the Netherlands or Indonesia.

140. Finally, Indonesia states that the waters around Ligitan and Sipadan have traditionally been used by Indonesian fishermen. The Court observes, however, that activities by private persons cannot be seen as *effectivités* if they do not take place on the basis of official regulations or under governmental authority.

141. The Court concludes that the activities relied upon by Indonesia do not constitute acts *à titre de souverain* reflecting the intention and will to act in that capacity.

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142. With regard to the *effectivités* relied upon by Malaysia, the Court

first observes that pursuant to the 1930 Convention, the United States relinquished any claim it might have had to Ligitan and Sipadan and that no other State asserted its sovereignty over those islands at that time or objected to their continued administration by the State of North Borneo. The Court further observes that those activities which took place before the conclusion of that Convention cannot be seen as acts *"à titre de souverain"*, as Great Britain did not at that time claim sovereignty on behalf of the State of North Borneo over the islands beyond the 3-marine-league limit. Since it, however, took the position that the BNBC was entitled to administer the islands, a position which after 1907 was formally recognized by the United States, these administrative activities cannot be ignored either.

143. As evidence of such effective administration over the islands, Malaysia cites the measures taken by the North Borneo authorities to regulate and control the collecting of turtle eggs on Ligitan and Sipadan, an activity of some economic significance in the area at the time. It refers in particular to the Turtle Preservation Ordinance of 1917, the purpose of which was to limit the capture of turtles and the collection of turtle eggs "within the State [of North Borneo] or the territorial waters thereof". The Court notes that the Ordinance provided in this respect for a licensing system and for the creation of native reserves for the collection of turtle eggs and listed Sipadan among the islands included in one of those reserves.

Malaysia adduces several documents showing that the 1917 Turtle Preservation Ordinance was applied until the 1950s at least. In this regard, it cites, for example, the licence issued on 28 April 1954 by the District Officer of Tawau permitting the capture of turtles pursuant to Section 2 of the Ordinance. The Court observes that this licence covered an area including "the islands of Sipadan, Ligitan, Kapalat, Mabul, Dinawan and Si-Amil".

Further, Malaysia mentions certain cases both before and after 1930 in which it has been shown that administrative authorities settled disputes about the collection of turtle eggs on Sipadan.

144. Malaysia also refers to the fact that in 1933 Sipadan, under Section 28 of the Land Ordinance, 1930, was declared to be "a reserve for the purpose of bird sanctuaries".

145. The Court is of the opinion that both the measures taken to regulate and control the collecting of turtle eggs and the establishment of a bird reserve must be seen as regulatory and administrative assertions of authority over territory which is specified by name.

146. Malaysia further invokes the fact that the authorities of the colony of North Borneo constructed a lighthouse on Sipadan in 1962 and another on Ligitan in 1963, that those lighthouses exist to this day and

that they have been maintained by Malaysian authorities since its independence. It contends that the construction and maintenance of such lighthouses is "part of a pattern of exercise of State authority appropriate in kind and degree to the character of the places involved".

147. The Court observes that the construction and operation of lighthouses and navigational aids are not normally considered manifestations of State authority (*Minquiers and Ecrehos, Judgment, I.C.J. Reports 1953*, p. 71). The Court, however, recalls that in its Judgment in the case concerning *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain)* it stated as follows:

> "Certain types of activities invoked by Bahrain such as the drilling of artesian wells would, taken by themselves, be considered controversial as acts performed *à titre de souverain.* The construction of navigational aids, on the other hand, can be legally relevant in the case of very small islands. In the present case, taking into account the size of Qit'at Jaradah, the activities carried out by Bahrain on that island must be considered sufficient to support Bahrain's claim that it has sovereignty over it." (*Judgment, Merits, I.C.J. Reports 2001*, pp. 99-100, para. 197.)

The Court is of the view that the same considerations apply in the present case.

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148. The Court notes that the activities relied upon by Malaysia, both in its own name and as successor State of Great Britain, are modest in number but that they are diverse in character and include legislative, administrative and quasi-judicial acts. They cover a considerable period of time and show a pattern revealing an intention to exercise State functions in respect of the two islands in the context of the administration of a wider range of islands.

The Court moreover cannot disregard the fact that at the time when these activities were carried out, neither Indonesia nor its predecessor, the Netherlands, ever expressed its disagreement or protest. In this regard, the Court notes that in 1962 and 1963 the Indonesian authorities did not even remind the authorities of the colony of North Borneo, or Malaysia after its independence, that the construction of the lighthouses at those times had taken place on territory which they considered Indonesian; even if they regarded these lighthouses as merely destined for safe navigation in an area which was of particular importance for navigation in the waters off North Borneo, such behaviour is unusual.

149. Given the circumstances of the case, and in particular in view of the evidence furnished by the Parties, the Court concludes that Malaysia

has title to Ligitan and Sipadan on the basis of the *effectivités* referred to above.

* * *

150. For these reasons,

THE COURT,

By sixteen votes to one,

Finds that sovereignty over Pulau Ligitan and Pulau Sipadan belongs to Malaysia.

IN FAVOUR: *President* Guillaume; *Vice-President* Shi; *Judges* Oda, Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal, Elaraby; *Judge* ad hoc Weeramantry;

AGAINST: *Judge* ad hoc Franck.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this seventeenth day of December, two thousand and 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 Indonesia and the Government of Malaysia, respectively.

(Signed) Gilbert GUILLAUME,
President.

(Signed) Philippe COUVREUR,
Registrar.

Judge ODA appends a declaration to the Judgment of the Court; Judge *ad hoc* FRANCK appends a dissenting opinion to the Judgment of the Court.

(Initialled) G.G.

(Initialled) Ph.C.

Annex 678

Case of Golder v the United Kingdom [1975] ECHR 1

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

COURT (PLENARY)

CASE OF GOLDER v. THE UNITED KINGDOM

(Application no. 4451/70)

JUDGMENT

STRASBOURG

21 February 1975

In the Golder case,

The European Court of Human Rights, taking its decision in plenary session in application of Rule 48 of the Rules of Court and composed of the following judges:

Mr. G. BALLADORE PALLIERI, *President*,
Mr. H. MOSLER,
Mr. A. VERDROSS,
Mr. E. RODENBOURG,
Mr. M. ZEKIA,
Mr. J. CREMONA,
Mrs. I. H. PEDERSEN,
Mr. T. VILHJÁLMSSON,
Mr. R. RYSSDAL,
Mr. A. BOZER,
Mr. W. J. GANSHOF VAN DER MEERSCH,
Sir Gerald FITZMAURICE,

and also Mr. M.-A. EISSEN, *Registrar* and Mr. J.F. SMYTH, *Deputy Registrar,*

Having deliberated in private,

Decides as follows:

PROCEDURE

1. The Golder case was referred to the Court by the Government of the United Kingdom of Great Britain and Northern Ireland (hereinafter called "the Government"). The case has its origin in an application against the United Kingdom lodged with the European Commission of Human Rights (hereinafter called "the Commission") under Article 25 (art. 25) of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as "the Convention"), by a United Kingdom citizen, Mr. Sidney Elmer Golder. The application was first submitted in 1969; it was supplemented in April 1970 and registered under no. 4451/70. The Commission's report in the case, drawn up in accordance with Article 31 (art. 31) of the Convention, was transmitted to the Committee of Ministers of the Council of Europe on 5 July 1973.

2. The Government's application, which was made under Article 48 (art. 48) of the Convention, was lodged with the registry of the Court on 27 September 1973 within the period of three months laid down in Articles 32 para. 1 and 47 (art. 32-1, art. 47). The purpose of the application is to submit the case for judgment by the Court. The Government therein express their disagreement with the opinion stated by the Commission in their report

and with the Commission's approach to the interpretation of the Convention.

3. On 4 October 1973, the Registrar received from the Secretary of the Commission twenty-five copies of their report.

4. On 9 October 1973, the then President of the Court drew by lot, in the presence of the Registrar, the names of five of the seven judges called upon to sit as members of the Chamber, Sir Humphrey Waldock, the elected judge of British nationality, and Mr. G. Balladore Pallieri, Vice-President of the Court, being ex officio members under Article 43 (art. 43) of the Convention and Rule 21 para. 3 (b) of the Rules of Court respectively. The five judges chosen were MM. R. Cassin, R. Rodenbourg, A. Favre, T. Vilhjálmsson and W. Ganshof van der Meersch, (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43). The President also drew by lot the names of substitute judges (Rule 2l para. 4).

Mr. G. Balladore Pallieri assumed the office of President of the Chamber in accordance with Rule 21 para. 5.

5. The President of the Chamber ascertained, through the Registrar, the views of the Agent of the Government and of the Delegates of the Commission on the procedure to be followed. By Order of 12 October 1973, he decided that the Government should file a memorial within a time-limit expiring on 3l January 1974 and that the Delegates should be entitled to file a memorial in reply within two months of the receipt of the Government's memorial. The President of the Chamber also instructed the Registrar to request the Delegates to communicate to the Court the main documents listed in the report. These documents were received at the registry on 17 October.

The President later granted extensions of the times allowed, until 6 March 1974 for the Agent of the Government, and until 6 June and then 26 July for the Delegates (Orders of 21 January, 9 April and 5 June 1974). The Government's memorial was received at the registry on 6 March 1974 and that of the Commission - with observations by the applicant's counsel annexed - on 26 July.

6. The Chamber met in private on 7 May 1974. Sir Gerald Fitzmaurice, who had been elected a member of the Court in January 1974 in place of Sir Humphrey Waldock, took his seat in the Court as the elected judge of British nationality (Article 43 of the Convention and Rule 2 para. 3) (art. 43).

On the same day the Chamber, "considering that the case raise(d) serious questions affecting the interpretation of the Convention", decided under Rule 48 to relinquish jurisdiction forthwith in favour of the plenary Court.

The new President of the Court, Mr. Balladore Pallieri, assumed the office of President.

7. After consulting the Agent of the Government and the Delegates of the Commission, the President decided, by Order of 6 August 1974, that the oral hearings should open on 11 October.

8. The public hearings took place on 11 and 12 October 1974 in the Human Rights Building at Strasbourg.

There appeared before the Court:

- for the Government:

Mr. P. FIFOOT, Legal Counsellor,
Foreign and Commonwealth Office, Barrister-at-Law,
Agent and *Counsel*,

Sir Francis VALLAT, K.C.M.G., Q.C., Professor of International Law,
King's College, London; formerly Legal Adviser to the
Foreign Office,

Mr. G. SLYNN, Q.C., Recorder of Hereford, *Counsel*,

and

Sir William DALE, K.C.M.G., formerly Legal Adviser
to the Commonwealth Office,

Mr. R. M. MORRIS, Principal, Home Office, *Advisers*;

- for the Commission:

Mr. G. SPERDUTI, *Principal Delegate*,

MM. T. OPSAHL and K. MANGAN, *Delegates*, and

Mr. N. TAPP, Q.C., who had represented the applicant
before the Commission, assisting the Delegates under
Rule 29 para. 1, second sentence.

The Court heard the addresses and submissions of Mr. Fifoot, Sir Francis Vallat and Mr. Slynn for the Government and of Mr. Sperduti, Mr. Opsahl and Mr. Tapp for the Commission, as well as their replies to questions put by the Court and by several judges.

At the hearings, the Government produced certain documents to the Court

AS TO THE FACTS

9. The facts of the case may be summarised as follows.

10. In 1965, Mr. Sidney Elmer Golder, a United Kingdom citizen born in 1923, was convicted in the United Kingdom of robbery with violence and was sentenced to fifteen years' imprisonment. In 1969, Golder was serving his sentence in Parkhurst Prison on the Isle of Wight.

11. On the evening of 24 October 1969, a serious disturbance occurred in a recreation area of the prison where Golder happened to be.

On 25 October, a prison officer, Mr. Laird, who had taken part and been injured in quelling the disturbance, made a statement identifying his

assailants, in the course of which he declared: "Frazer was screaming ... and Frape, Noonan and another prisoner whom I know by sight, I think his name is Golder ... were swinging vicious blows at me."

12. On 26 October Golder, together with other prisoners suspected of having participated in the disturbance, was segregated from the main body of prisoners. On 28 and 30 October, Golder was interviewed by police officers. At the second of these interviews he was informed that it had been alleged that he had assaulted a prison officer; he was warned that "the facts would be reported in order that consideration could be given whether or not he would be prosecuted for assaulting a prison officer causing bodily harm".

13. Golder wrote to his Member of Parliament on 25 October and 1 November, and to a Chief Constable on 4 November 1969, about the disturbance of 24 October and the ensuing hardships it had entailed for him; the prison governor stopped these letters since Golder had failed to raise the subject-matter thereof through the authorised channels beforehand.

14. In a second statement, made on 5 November 1969, Laird qualified as follows what he had said earlier:

> "When I mentioned the prisoner Golder, I said 'I think it was Golder', who was present with Frazer, Frape and Noonan, when the three latter were attacking me.
>
> "If it was Golder and I certainly remember seeing him in the immediate group who were screaming abuse and generally making a nuisance of themselves, I am not certain that he made an attack on me.
>
> "Later when Noonan and Frape grabbed me, Frazer was also present but I cannot remember who the other inmate was, but there were several there one of whom stood out in particular but I cannot put a name to him."

On 7 November, another prison officer reported that:

> "... during the riot of that night I spent the majority of the time in the T.V. room with the prisoners who were not participating in the disturbance.
>
> 740007, Golder was in this room with me and to the best of my knowledge took no part in the riot.
>
> His presence with me can be borne out by officer ... who observed us both from the outside."

Golder was returned to his ordinary cell the same day.

15. Meanwhile, the prison authorities had been considering the various statements, and on 10 November prepared a list of charges which might be preferred against prisoners, including Golder, for offences against prison discipline. Entries relating thereto were made in Golder's prison record. No such charge was eventually preferred against him and the entries in his prison record were marked "charges not proceeded with". Those entries were expunged from the prison record in 1971 during the examination of the applicant's case by the Commission.

16. On 20 March 1970, Golder addressed a petition to the Secretary of State for the Home Department, that is, the Home Secretary. He requested a transfer to some other prison and added:

> "I understand that a statement wrongly accusing me of participation in the events of 24th October last, made by Officer Laird, is lodged in my prison record. I suspect that it is this wrong statement that has recently prevented my being recommended by the local parole board for parole.
>
> "I would respectfully request permission to consult a solicitor with a view to taking civil action for libel in respect of this statement .... Alternatively, I would request that an independent examination of my record be allowed by Mrs. G.M. Bishop who is magistrate. I would accept her assurance that this statement is not part of my record and be willing to accept then that the libel against me has not materially harmed me except for the two weeks I spent in the separate cells and so civil action would not be then necessary, providing that an apology was given to me for the libel ...."

17. In England the matter of contacts of convicted prisoners with persons outside their place of detention is governed by the Prison Act 1952, as amended and subordinate legislation made under that Act.

Section 47, sub-section I, of the Prison Act provides that "the Secretary of State may make rules for the regulation and management of prisoners ... and for the ... treatment ... discipline and control of persons required to be detained ...."

The rules made by the Home Secretary in the exercise of this power are the Prison Rules 1964, which were laid before Parliament and have the status of a Statutory Instrument. The relevant provisions concerning communications between prisoners and persons outside prison are contained in Rules 33, 34 and 37 as follows:

> "Letters and visits generally
>
> Rule 33
>
> (1) The Secretary of State may, with a view to securing discipline and good order or the prevention of crime in the interests of any persons, impose restrictions, either generally or in a particular case, upon the communications to be permitted between a prisoner and other persons.
>
> (2) Except as provided by statute or these Rules, a prisoner shall not be permitted to communicate with any outside person, or that person with him, without the leave of the Secretary of State.
>
> ...
>
> Personal letters and visits
>
> Rule 34
>
> ...

(8) A prisoner shall not be entitled under this Rule to communicate with any person in connection with any legal or other business, or with any person other than a relative or friend, except with the leave of the Secretary of State.

...

Legal advisers

Rule 37

(1) The legal adviser of a prisoner in any legal proceedings, civil or criminal, to which the prisoner is a party shall be afforded reasonable facilities for interviewing him in connection with those proceedings, and may do so out of hearing but in the sight of an officer.

(2) A prisoner's legal adviser may, with the leave of the Secretary of State, interview the prisoner in connection with any other legal business in the sight and hearing of an officer."

18. On 6 April 1970, the Home Office directed the prison governor to notify Golder of the reply to his petition of 20 March as follows:

"The Secretary of State has fully considered your petition but is not prepared to grant your request for transfer, nor can he find grounds for taking any action in regard to the other matters raised in your petition."

19. Before the Commission, Golder submitted two complaints relating respectively to the stopping of his letters (as mentioned above at paragraph 13) and to the refusal of the Home Secretary to permit him to consult a solicitor. On 30 March 1971, the Commission declared the first complaint inadmissible, as all domestic remedies had not been exhausted, but accepted the second for consideration of the merits under Articles 6 para. 1 and 8 (art. 6-1, art. 8) of the Convention.

20. Golder was released from prison on parole on 12 July 1972.

21. In their report, the Commission expressed the opinion:

- unanimously, that Article 6 para. 1 (art. 6-1) guarantees a right of access to the courts;

- unanimously, that in Article 6 para. 1 (art. 6-1), whether read alone or together with other Articles of the Convention, there are no inherent limitations on the right of a convicted prisoner to institute proceedings and for this purpose to have unrestricted access to a lawyer; and that consequently the restrictions imposed by the present practice of the United Kingdom authorities are inconsistent with Article 6 para. 1 (art. 6-1);

- by seven votes to two, that Article 8 para. 1 (art. 8-1) is applicable to the facts of the present case;

- that the same facts which constitute a violation of Article 6 para. 1 (art. 6-1) constitute also a violation of Article 8 (art. 8) (by eight votes to one, as explained to the Court by the Principal Delegate on 12 October 1974).

The Commission furthermore expressed the opinion that the right of access to the courts guaranteed by Article 6 para. 1 (art. 6-1) is not qualified by the requirement "within a reasonable time". In the application bringing the case before the Court, the Government made objection to this opinion of the Commission but stated in their memorial that they no longer wished to argue the issue.

22. The following final submissions were made to the Court at the oral hearing on 12 October 1974 in the afternoon.

- for the Government:

"The United Kingdom Government respectfully submit to the Court that Article 6 para. 1 (art. 6-1) of the Convention does not confer on the applicant a right of access to the courts, but confers only a right in any proceedings he may institute to a hearing that is fair and in accordance with the other requirements of the paragraph. The Government submit that in consequence the refusal of the United Kingdom Government to allow the applicant in this case to consult a lawyer was not a violation of Article 6 (art. 6). In the alternative, if the Court finds that the rights conferred by Article 6 (art. 6) include in general a right of access to courts, then the United Kingdom Government submit that the right of access to the courts is not unlimited in the case of persons under detention, and that accordingly the imposing of a reasonable restraint on recourse to the courts by the applicant was permissible in the interest of prison order and discipline, and that the refusal of the United Kingdom Government to allow the applicant to consult a lawyer was within the degree of restraint permitted, and therefore did not constitute a violation of Article 6 (art. 6) of the Convention.

The United Kingdom Government further submit that control over the applicant's correspondence while he was in prison was a necessary consequence of the deprivation of his liberty, and that the action of the United Kingdom Government was therefore not a violation of Article 8 para. 1 (art. 8-1), and that the action of the United Kingdom Government in any event fell within the exceptions provided by Article 8 para. 2 (art. 8-2), since the restriction imposed was in accordance with law, and it was within the power of appreciation of the Government to judge that the restriction was necessary in a democratic society for the prevention of disorder or crime.

In the light of these submissions, Mr. President, I respectfully ask this honourable Court, on behalf of the United Kingdom Government, to hold that the United Kingdom Government have not in this case committed a breach of Article 6 (art. 6) or Article 8 (art. 8) of the European Convention on Human Rights and Fundamental Freedoms."

- for the Commission:

"The questions to which the Court is requested to reply are the following:

(1) Does Article 6 para. 1 (art. 6-1) of the European Convention on Human Rights secure to persons desiring to institute civil proceedings a right of access to the courts?

(2) If Article 6 para. 1 (art. 6-1) secures such a right of access, are there inherent limitations relating to this right, or its exercise, which apply to the facts of the present case?

(3) Can a convicted prisoner who wishes to write to his lawyer in order to institute civil proceedings rely on the protection given in Article 8 (art. 8) of the Convention to respect for correspondence?

(4) According to the answers given to the foregoing questions, do the facts of the present case disclose the existence of a violation of Article 6 and of Article 8 (art. 6, art. 8) of the European Convention on Human Rights?"

AS TO THE LAW

I. ON THE ALLEGED VIOLATION OF ARTICLE 6 PARA. 1 (art. 6-1)

23. Paragraphs 73, 99 and 110 of the Commission's report indicate that the Commission consider unanimously that there was a violation of Article 6 para. 1 (art. 6-1). The Government disagree with this opinion.

24. Article 6 para. 1 (art. 6-1) provides:

"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

25. In the present case the Court is called upon to decide two distinct questions arising on the text cited above:

(i) Is Article 6 para. 1 (art. 6-1) limited to guaranteeing in substance the right to a fair trial in legal proceedings which are already pending, or does it in addition secure a right of access to the courts for every person wishing to commence an action in order to have his civil rights and obligations determined?

(ii) In the latter eventuality, are there any implied limitations on the right of access or on the exercise of that right which are applicable in the present case?

A. On the "right of access"

26. The Court recalls that on 20 March 1970 Golder petitioned the Home Secretary for permission to consult a solicitor with a view to bringing a civil action for libel against prison officer Laird and that his petition was refused on 6 April (paragraphs 16 and 18 above).

While the refusal of the Home Secretary had the immediate effect of preventing Golder from contacting a solicitor, it does not at all follow from this that the only issue which can arise in the present case relates to correspondence, to the exclusion of all matters of access to the courts.

Clearly, no one knows whether Golder would have persisted in carrying out his intention to sue Laird if he had been permitted to consult a solicitor. Furthermore, the information supplied to the Court by the Government gives reason to think that a court in England would not dismiss an action brought by a convicted prisoner on the sole ground that he had managed to cause the writ to be issued - through an attorney for instance - without obtaining leave from the Home Secretary under Rules 33 para. 2 and 34 para. 8 of the Prison Rules 1964, which in any event did not happen in the present case.

The fact nonetheless remains that Golder had made it most clear that he intended "taking civil action for libel"; it was for this purpose that he wished to contact a solicitor, which was a normal preliminary step in itself and in Golder's case probably essential on account of his imprisonment. By forbidding Golder to make such contact, the Home Secretary actually impeded the launching of the contemplated action. Without formally denying Golder his right to institute proceedings before a court, the Home Secretary did in fact prevent him from commencing an action at that time, 1970. Hindrance in fact can contravene the Convention just like a legal impediment.

It is true that - as the Government have emphasised - on obtaining his release Golder would have been in a position to have recourse to the courts at will, but in March and April 1970 this was still rather remote and hindering the effective exercise of a right may amount to a breach of that right, even if the hindrance is of a temporary character.

The Court accordingly has to examine whether the hindrance thus established violated a right guaranteed by the Convention and more particularly by Article 6 (art. 6), on which Golder relied in this respect.

27. One point has not been put in issue and the Court takes it for granted: the "right" which Golder wished, rightly or wrongly, to invoke against Laird before an English court was a "civil right" within the meaning of Article 6 para. 1 (art. 6-1).

28. Again, Article 6 para. 1 (art. 6-1) does not state a right of access to the courts or tribunals in express terms. It enunciates rights which are distinct but stem from the same basic idea and which, taken together, make up a single right not specifically defined in the narrower sense of the term. It is the duty of the Court to ascertain, by means of interpretation, whether access to the courts constitutes one factor or aspect of this right.

29. The submissions made to the Court were in the first place directed to the manner in which the Convention, and particularly Article 6 para. 1 (art. 6-1), should be interpreted. The Court is prepared to consider, as do the

Government and the Commission, that it should be guided by Articles 31 to 33 of the Vienna Convention of 23 May 1969 on the Law of Treaties. That Convention has not yet entered into force and it specifies, at Article 4, that it will not be retroactive, but its Articles 31 to 33 enunciate in essence generally accepted principles of international law to which the Court has already referred on occasion. In this respect, for the interpretation of the European Convention account is to be taken of those Articles subject, where appropriate, to "any relevant rules of the organization" - the Council of Europe - within which it has been adopted (Article 5 of the Vienna Convention).

30. In the way in which it is presented in the "general rule" in Article 3l of the Vienna Convention, the process of interpretation of a treaty is a unity, a single combined operation; this rule, closely integrated, places on the same footing the various elements enumerated in the four paragraphs of the Article.

31. The terms of Article 6 para. 1 (art. 6-1) of the European Convention, taken in their context, provide reason to think that this right is included among the guarantees set forth.

32. The clearest indications are to be found in the French text, first sentence. In the field of "contestations civiles" (civil claims) everyone has a right to proceedings instituted by or against him being conducted in a certain way - "équitablement" (fairly), "publiquement" (publicly), "dans un délai raisonnable" (within a reasonable time), etc. - but also and primarily "à ce que sa cause soit entendue" (that his case be heard) not by any authority whatever but "par un tribunal" (by a court or tribunal) within the meaning of Article 6 para. 1 (art. 6-1) (Ringeisen judgment of 16 July 1971, Series A no. 13, p. 39, para. 95). The Government have emphasised rightly that in French "cause" may mean "procès qui se plaide" (Littré, Dictionnaire de la langue française, tome I, p. 509, 5°). This, however, is not the sole ordinary sense of this noun; it serves also to indicate by extension "l'ensemble des intérêts à soutenir, à faire prévaloir" (Paul Robert, Dictionnaire alphabétique et analogique de la langue française, tome I, p. 666, II-2°). Similarly, the "contestation" (claim) generally exists prior to the legal proceedings and is a concept independent of them. As regards the phrase "tribunal indépendant et impartial établi par la loi" (independent and impartial tribunal established by law), it conjures up the idea of organisation rather than that of functioning, of institutions rather than of procedure.

The English text, for its part, speaks of an "independent and impartial tribunal established by law". Moreover, the phrase "in the determination of his civil rights and obligations", on which the Government have relied in support of their contention, does not necessarily refer only to judicial proceedings already pending; as the Commission have observed, it may be taken as synonymous with "wherever his civil rights and obligations are being determined" (paragraph 52 of the report). It too would then imply the

right to have the determination of disputes relating to civil rights and obligations made by a court or "tribunal".

The Government have submitted that the expressions "fair and public hearing" and "within a reasonable time", the second sentence in paragraph 1 ("judgment", "trial"), and paragraph 3 of Article 6 (art. 6-1, art. 6-3) clearly presuppose proceedings pending before a court.

While the right to a fair, public and expeditious judicial procedure can assuredly apply only to proceedings in being, it does not, however, necessarily follow that a right to the very institution of such proceedings is thereby excluded; the Delegates of the Commission rightly underlined this at paragraph 21 of their memorial. Besides, in criminal matters, the "reasonable time" may start to run from a date prior to the seisin of the trial court, of the "tribunal" competent for the "determination ... of (the) criminal charge" (Wemhoff judgment of 27 June 1968, Series A no. 7, pp. 26-27, para. 19; Neumeister judgment of 27 June l968, Series A no. 8, p. 41, para. 18; Ringeisen judgment of 16 July 1971, Series A no. 13, p. 45, para. 110). It is conceivable also that in civil matters the reasonable time may begin to run, in certain circumstances, even before the issue of the writ commencing proceedings before the court to which the plaintiff submits the dispute.

33. The Government have furthermore argued the necessity of relating Article 6 para. 1 (art. 6-1) to Articles 5 para. 4 and 13 (art. 5-4, art. 13). They have observed that the latter provide expressly or a right of access to the courts; the omission of any corresponding clause in Article 6 para. 1 (art. 6-1) seems to them to be only the more striking. The Government have also submitted that if Article 6 para. 1 (art. 6-1) were interpreted as providing such a right of access, Articles 5 para. 4 and 13 (art. 5-4, art. 13) would become superfluous.

The Commission’s Delegates replied in substance that Articles 5 para. 4 and 13 (art. 5-4, art. 13), as opposed to Article 6 para. 1 (art. 6-1), are "accessory" to other provisions. Those Articles, they say, do not state a specific right but are designed to afford procedural guarantees, "based on recourse", the former for the "right to liberty", as stated in Article 5 para. 1 (art. 5-1), the second for the whole of the "rights and freedoms as set forth in this Convention". Article 6 para. 1 (art. 6-1), they continue, is intended to protect "in itself" the "right to a good administration of justice", of which "the right that justice should be administered" constitutes "an essential and inherent element". This would serve to explain the contrast between the wording of Article 6 para. 1 (art. 6-1) and that of Articles 5 para. 4 and 13 (art. 5-4, art. 13).

This reasoning is not without force even though the expression "right to a fair (or good) administration of justice", which sometimes is used on account of its conciseness and convenience (for example, in the Delcourt judgment of 17 January 1970, Series A no. 11, p. 15, para. 25), does not

appear in the text of Article 6 para. 1 (art. 6-1), and can also be understood as referring only to the working and not to the organisation of justice.

The Court finds in particular that the interpretation which the Government have contested does not lead to confounding Article 6 para. 1 (art. 6-1) with Articles 5 para. 4 and 13 (art. 5-4, art. 13), nor making these latter provisions superfluous. Article 13 (art. 13) speaks of an effective remedy before a "national authority" ("instance nationale") which may not be a "tribunal" or "court" within the meaning of Articles 6 para. 1 and 5 para. 4 (art. 6-1, art. 5-4). Furthermore, the effective remedy deals with the violation of a right guaranteed by the Convention, while Articles 6 para. 1 and 5 para. 4 (art. 6-1, art. 5-4) cover claims relating in the first case to the existence or scope of civil rights and in the second to the lawfulness of arrest or detention. What is more, the three provisions do not operate in the same field. The concept of "civil rights and obligations" (Article 6 para. 1) (art. 6-1) is not co-extensive with that of "rights and freedoms as set forth in this Convention" (Article 13) (art. 13), even if there may be some overlapping. As to the "right to liberty" (Article 5) (art. 5), its "civil" character is at any rate open to argument (Neumeister judgment of 27 June 1968, Series A no. 8, p. 43, para. 23; Matznetter judgment of 10 November 1969, Series A no. 10, p. 35, para. 13; De Wilde, Ooms and Versyp judgment of 18 June 1971, Series A no. 12, p. 44, para. 86). Besides, the requirements of Article 5 para. 4 (art. 5-4) in certain respects appear stricter than those of Article 6 para. 1 (art. 6-1), particularly as regards the element of "time".

34. As stated in Article 31 para. 2 of the Vienna Convention, the preamble to a treaty forms an integral part of the context. Furthermore, the preamble is generally very useful for the determination of the "object" and "purpose" of the instrument to be construed.

In the present case, the most significant passage in the Preamble to the European Convention is the signatory Governments declaring that they are "resolved, as the Governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the Rights stated in the Universal Declaration" of 10 December 1948.

In the Government’s view, that recital illustrates the "selective process" adopted by the draftsmen: that the Convention does not seek to protect Human Rights in general but merely "certain of the Rights stated in the Universal Declaration". Articles 1 and 19 (art. 1, art. 19) are, in their submission, directed to the same end.

The Commission, for their part, attach great importance to the expression "rule of law" which, in their view, elucidates Article 6 para. 1 (art. 6-1).

The "selective" nature of the Convention cannot be put in question. It may also be accepted, as the Government have submitted, that the Preamble does not include the rule of law in the object and purpose of the Convention,

but points to it as being one of the features of the common spiritual heritage of the member States of the Council of Europe. The Court however considers, like the Commission, that it would be a mistake to see in this reference a merely "more or less rhetorical reference", devoid of relevance for those interpreting the Convention. One reason why the signatory Governments decided to "take the first steps for the collective enforcement of certain of the Rights stated in the Universal Declaration" was their profound belief in the rule of law. It seems both natural and in conformity with the principle of good faith (Article 31 para. 1 of the Vienna Convention) to bear in mind this widely proclaimed consideration when interpreting the terms of Article 6 para. 1 (art. 6-1) according to their context and in the light of the object and purpose of the Convention.

This is all the more so since the Statute of the Council of Europe, an organisation of which each of the States Parties to the Convention is a Member (Article 66 of the Convention) (art. 66), refers in two places to the rule of law: first in the Preamble, where the signatory Governments affirm their devotion to this principle, and secondly in Article 3 (art. 3) which provides that "every Member of the Council of Europe must accept the principle of the rule of law ..."

And in civil matters one can scarcely conceive of the rule of law without there being a possibility of having access to the courts.

35. Article 31 para. 3 (c) of the Vienna Convention indicates that account is to be taken, together with the context, of "any relevant rules of international law applicable in the relations between the parties". Among those rules are general principles of law and especially "general principles of law recognized by civilized nations" (Article 38 para. 1 (c) of the Statute of the International Court of Justice). Incidentally, the Legal Committee of the Consultative Assembly of the Council of Europe foresaw in August 1950 that "the Commission and the Court must necessarily apply such principles" in the execution of their duties and thus considered it to be "unnecessary" to insert a specific clause to this effect in the Convention (Documents of the Consultative Assembly, working papers of the 1950 session, Vol. III, no. 93, p. 982, para. 5).

The principle whereby a civil claim must be capable of being submitted to a judge ranks as one of the universally "recognised" fundamental principles of law; the same is true of the principle of international law which forbids the denial of justice. Article 6 para. 1 (art. 6-1) must be read in the light of these principles.

Were Article 6 para. 1 (art. 6-1) to be understood as concerning exclusively the conduct of an action which had already been initiated before a court, a Contracting State could, without acting in breach of that text, do away with its courts, or take away their jurisdiction to determine certain classes of civil actions and entrust it to organs dependent on the Government. Such assumptions, indissociable from a danger of arbitrary

power, would have serious consequences which are repugnant to the aforementioned principles and which the Court cannot overlook (Lawless judgment of 1 July 1961, Series A no. 3, p. 52, and Delcourt judgment of 17 January 1970, Series A no. 11, pp. 14-15).

It would be inconceivable, in the opinion of the Court, that Article 6 para. 1 (art. 6-1) should describe in detail the procedural guarantees afforded to parties in a pending lawsuit and should not first protect that which alone makes it in fact possible to benefit from such guarantees, that is, access to a court. The fair, public and expeditious characteristics of judicial proceedings are of no value at all if there are no judicial proceedings.

36. Taking all the preceding considerations together, it follows that the right of access constitutes an element which is inherent in the right stated by Article 6 para. 1 (art. 6-1). This is not an extensive interpretation forcing new obligations on the Contracting States: it is based on the very terms of the first sentence of Article 6 para. 1 (art. 6-1) read in its context and having regard to the object and purpose of the Convention, a lawmaking treaty (see the Wemhoff judgment of 27 June 1968, Series A no. 7, p. 23, para. 8), and to general principles of law.

The Court thus reaches the conclusion, without needing to resort to "supplementary means of interpretation" as envisaged at Article 32 of the Vienna Convention, that Article 6 para. 1 (art. 6-1) secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. In this way the Article embodies the "right to a court", of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect only. To this are added the guarantees laid down by Article 6 para. 1 (art. 6-1) as regards both the organisation and composition of the court, and the conduct of the proceedings. In sum, the whole makes up the right to a fair hearing. The Court has no need to ascertain in the present case whether and to what extent Article 6 para. 1 (art. 6-1) further requires a decision on the very substance of the dispute (English "determination", French "décidera").

B. On the "Implied Limitations"

37. Since the impediment to access to the courts, mentioned in paragraph 26 above, affected a right guaranteed by Article 6 para. 1 (art. 6-1), it remains to determine whether it was nonetheless justifiable by virtue of some legitimate limitation on the enjoyment or exercise of that right.

38. The Court considers, accepting the views of the Commission and the alternative submission of the Government, that the right of access to the courts is not absolute. As this is a right which the Convention sets forth (see Articles 13, 14, 17 and 25) (art. 13, art. 14, art. 17, art. 25) without, in the narrower sense of the term, defining, there is room, apart from the bounds

delimiting the very content of any right, for limitations permitted by implication.

The first sentence of Article 2 of the Protocol (P1-2) of 20 March 1952, which is limited to providing that "no person shall be denied the right to education", raises a comparable problem. In its judgment of 23 July 1968 on the merits of the case relating to certain aspects of the laws on the use of languages in education in Belgium, the Court ruled that:

> "The right to education ... by its very nature calls for regulation by the State, regulation which may vary in time and place according to the needs and resources of the community and of individuals. It goes without saying that such regulation must never injure the substance of the right to education nor conflict with other rights enshrined in the Convention." (Series A no. 6, p. 32, para. 5).

These considerations are all the more valid in regard to a right which, unlike the right to education, is not mentioned in express terms.

39. The Government and the Commission have cited examples of regulations, and especially of limitations, which are to be found in the national law of states in matters of access to the courts, for instance regulations relating to minors and persons of unsound mind. Although it is of less frequent occurrence and of a very different kind, the restriction complained of by Golder constitutes a further example of such a limitation.

It is not the function of the Court to elaborate a general theory of the limitations admissible in the case of convicted prisoners, nor even to rule in abstracto on the compatibility of Rules 33 para. 2, 34 para. 8 and 37 para. 2 of the Prison Rules 1964 with the Convention. Seised of a case which has its origin in a petition presented by an individual, the Court is called upon to pronounce itself only on the point whether or not the application of those Rules in the present case violated the Convention to the prejudice of Golder (De Becker judgment of 27 March 1962, Series A no. 4, p. 26).

40. In this connection, the Court confines itself to noting what follows.

In petitioning the Home Secretary for leave to consult a solicitor with a view to suing Laird for libel, Golder was seeking to exculpate himself of the charge made against him by that prison officer on 25 October 1969 and which had entailed for him unpleasant consequences, some of which still subsisted by 20 March 1970 (paragraphs 12, 15 and 16 above). Furthermore, the contemplated legal proceedings would have concerned an incident which was connected with prison life and had occurred while the applicant was imprisoned. Finally, those proceedings would have been directed against a member of the prison staff who had made the charge in the course of his duties and who was subject to the Home Secretary’s authority.

In these circumstances, Golder could justifiably wish to consult a solicitor with a view to instituting legal proceedings. It was not for the Home Secretary himself to appraise the prospects of the action contemplated; it was for an independent and impartial court to rule on any

claim that might be brought. In declining to accord the leave which had been requested, the Home Secretary failed to respect, in the person of Golder, the right to go before a court as guaranteed by Article 6 para. 1 (art. 6-1).

II. ON THE ALLEGED VIOLATION OF ARTICLE 8 (art. 8)

41. In the opinion of the majority of the Commission (paragraph 123 of the report) "the same facts which constitute a violation of Article 6 para. 1 (art. 6-1) constitute also a violation of Article 8 (art. 8)". The Government disagree with this opinion.

42. Article 8 (art. 8) of the Convention reads as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

43. The Home Secretary's refusal of the petition of 20 March 1970 had the direct and immediate effect of preventing Golder from contacting a solicitor by any means whatever, including that which in the ordinary way he would have used to begin with, correspondence. While there was certainly neither stopping nor censorship of any message, such as a letter, which Golder would have written to a solicitor – or vice-versa - and which would have been a piece of correspondence within the meaning of paragraph 1 of Article 8 (art. 8-1), it would be wrong to conclude therefrom, as do the Government, that this text is inapplicable. Impeding someone from even initiating correspondence constitutes the most far-reaching form of "interference" (paragraph 2 of Article 8) (art. 8-2) with the exercise of the "right to respect for correspondence"; it is inconceivable that that should fall outside the scope of Article 8 (art. 8) while mere supervision indisputably falls within it. In any event, if Golder had attempted to write to a solicitor notwithstanding the Home Secretary's decision or without requesting the required permission, that correspondence would have been stopped and he could have invoked Article 8 (art. 8); one would arrive at a paradoxical and hardly equitable result, if it were considered that in complying with the requirements of the Prison Rules 1964 he lost the benefit of the protection of Article 8 (art. 8).

The Court accordingly finds itself called upon to ascertain whether or not the refusal of the applicant's petition violated Article 8 (art. 8).

44. In the submission of the Government, the right to respect for correspondence is subject, apart from interference covered by paragraph 2

of Article 8 (art. 8-2), to implied limitations resulting, inter alia, from the terms of Article 5 para. 1 (a) (art. 5-1-a): a sentence of imprisonment passed after conviction by a competent court inevitably entails consequences affecting the operation of other Articles of the Convention, including Article 8 (art. 8).

As the Commission have emphasised, that submission is not in keeping with the manner in which the Court dealt with the issue raised under Article 8 (art. 8) in the "Vagrancy" cases (De Wilde, Ooms and Versyp judgment of 18 June 1971, Series A no. 12, pp. 45-46, para. 93). In addition and more particularly, that submission conflicts with the explicit text of Article 8 (art. 8). The restrictive formulation used at paragraph 2 (art. 8-2) ("There shall be no interference ... except such as ...") leaves no room for the concept of implied limitations. In this regard, the legal status of the right to respect for correspondence, which is defined by Article 8 (art. 8) with some precision, provides a clear contrast to that of the right to a court (paragraph 38 above).

45. The Government have submitted in the alternative that the interference complained of satisfied the explicit conditions laid down in paragraph 2 of Article 8 (art. 8-2).

It is beyond doubt that the interference was "in accordance with the law", that is Rules 33 para. 2 and 34 para. 8 of the Prison Rules 1964 (paragraph 17 above).

The Court accepts, moreover, that the "necessity" for interference with the exercise of the right of a convicted prisoner to respect for his correspondence must be appreciated having regard to the ordinary and reasonable requirements of imprisonment. The "prevention of disorder or crime", for example, may justify wider measures of interference in the case of such a prisoner than in that of a person at liberty. To this extent, but to this extent only, lawful deprivation of liberty within the meaning of Article 5 (art. 5) does not fail to impinge on the application of Article 8 (art. 8).

In its judgment of l8 June 1971 cited above, the Court held that "even in cases of persons detained for vagrancy" (paragraph 1 (e) of Article 5) (art. 5-1-e) - and not imprisoned after conviction by a court – the competent national authorities may have "sufficient reason to believe that it (is) ‘necessary’ to impose restrictions for the purpose of the prevention of disorder or crime, the protection of health or morals, and the protection of the rights and freedoms of others". However, in those particular cases there was no question of preventing the applicants from even initiating correspondence; there was only supervision which in any event did not apply in a series of instances, including in particular correspondence between detained vagrants and the counsel of their choice (Series A no. 12, p. 26, para. 39, and p. 45, para. 93).

In order to show why the interference complained of by Golder was "necessary", the Government advanced the prevention of disorder or crime and, up to a certain point, the interests of public safety and the protection of

the rights and freedoms of others. Even having regard to the power of appreciation left to the Contracting States, the Court cannot discern how these considerations, as they are understood "in a democratic society", could oblige the Home Secretary to prevent Golder from corresponding with a solicitor with a view to suing Laird for libel. The Court again lays stress on the fact that Golder was seeking to exculpate himself of a charge made against him by that prison officer acting in the course of his duties and relating to an incident in prison. In these circumstances, Golder could justifiably wish to write to a solicitor. It was not for the Home Secretary himself to appraise - no more than it is for the Court today - the prospects of the action contemplated; it was for a solicitor to advise the applicant on his rights and then for a court to rule on any action that might be brought.

The Home Secretary's decision proves to be all the less "necessary in a democratic society" in that the applicant's correspondence with a solicitor would have been a preparatory step to the institution of civil legal proceedings and, therefore, to the exercise of a right embodied in another Article of the Convention, that is, Article 6 (art. 6).

The Court thus reaches the conclusion that there has been a violation of Article 8 (art. 8).

III. AS TO THE APPLICATION OF ARTICLE 50 (art. 50) OF THE CONVENTION

46. Article 50 (art. 50) of the Convention provides that if the Court finds, as in the present case, "that a decision ... taken" by some authority of a Contracting State "is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of (that State) allows only partial reparation to be made for the consequences of this decision", the Court "shall, if necessary, afford just satisfaction to the injured party".

The Rules of Court state that when the Court "finds that there is a breach of the Convention, it shall give in the same judgment a decision on the application of Article 50 (art. 50) of the Convention if that question, after being raised under Rule 47 bis, is ready for decision; if the question is not ready for decision", the Court "shall reserve it in whole or in part and shall fix the further procedure" (Rule 50 para. 3, first sentence, read together with Rule 48 para. 3).

At the hearing in the afternoon of 11 October 1974, the Court invited the representatives, under Rule 47 bis, to present their observations on the question of the application of Article 50 (art. 50) of the Convention in this case. Those observations were submitted at the hearing on the following day.

Furthermore, in reply to a question from the President of the Court immediately following the reading of the Commission's final submissions, the Principal Delegate confirmed that the Commission were not presenting,

nor making any reservation as to the presentation of, a request for just satisfaction on the part of the applicant.

The Court considers accordingly that the above question, which was duly raised by the Court, is ready for decision and should therefore be decided without further delay. The Court is of opinion that in the circumstances of the case it is not necessary to afford to the applicant any just satisfaction other than that resulting from the finding of a violation of his rights.

FOR THESE REASONS, THE COURT,

1. Holds by nine votes to three that there has been a breach of Article 6 para. 1 (art. 6-1);

2. Holds unanimously that there has been a breach of Article 8 (art. 8);

3. Holds unanimously that the preceding findings amount in themselves to adequate just satisfaction under Article 50 (art. 50).

Done in French and English, the French text being authentic, at the Human Rights Building, Strasbourg, this twenty-first day of February one thousand nine hundred and seventy five.

Giorgio BALLADORE PALLIERI
President

Marc-André EISSEN
Registrar

Judges Verdross, Zekia and Sir Gerald Fitzmaurice have annexed their separate opinions to the present judgment, in accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 50 para. 2 of the Rules of Court.

G.B.P.
M.-A.E.

SEPARATE OPINION OF JUDGE VERDROSS

(Translation)

I have voted in favour of the parts of the judgment which relate to the violation of Article 8 (art. 8) and the application of Article 50 (art. 50) of the Convention, but much to my regret I am unable to join the majority in their interpretation of Article 6 para. 1 (art. 6-1) for the following reasons.

The Convention makes a clear distinction between the rights and freedoms it secures itself (Article 1) (art. 1) and those which have their basis in the internal law of the Contracting States (Article 60) (art. 60). In the last recital in the Preamble, the Contracting States resolved to take steps for the collective enforcement of "certain of the Rights stated in the Universal Declaration" (certains des droits énoncés dans la Déclaration Universelle) and, according to Article 1 (art. 1), the category of rights guaranteed comprises only "the rights and freedoms defined in Section I" of the Convention. It thus seems that the words "stated" and "defined" are synonymous. As "to define" means to state precisely, it results, in my view, from Article 1 (art. 1) that among such rights and freedoms can only be numbered those which the Convention states in express terms or which are included in one or other of them. But in neither of these cases does one find the alleged "right of access to the courts".

It is true that the majority of the Court go to great lengths to trace that right in an assortment of clues detected in Article 6 para. 1 (art. 6-1) and other provisions of the Convention.

However, such an interpretation runs counter, in my opinion, to the fact that the provisions of the Convention relating to the rights and freedoms guaranteed by that instrument constitute also limits on the jurisdiction of the Court. This is a special jurisdiction, for it confers on the Court power to decide disputes arising in the course of the internal life of the Contracting States. The norms delimiting the bounds of that jurisdiction must therefore be interpreted strictly. In consequence, I do not consider it permissible to extend, by means of an interpretation depending on clues, the framework of the clearly stated rights and freedoms. Considerations of legal certainty too make this conclusion mandatory: the States which have submitted to supervision by the Commission and Court in respect of "certain" rights and freedoms "defined" (définis) in the Convention ought to be sure that those bounds will be strictly observed.

The above conclusion is not upset by the argument, sound in itself, whereby the right to a fair hearing before an independent and impartial tribunal, secured to everyone by Article 6 para. 1 (art. 6-1), assumes the existence of a right of access to the courts. The Convention in fact appears to set out from the idea that such a right has, with some exceptions, been so well implanted for a long time in the national legal order of the civilised

States that there is absolutely no need to guarantee it further by the procedures which the Convention has instituted. There can be no other reason to explain why the Convention has refrained from writing in this right formally. In my opinion, therefore, a distinction must be drawn between the legal institutions whose existence the Convention presupposes and the rights guaranteed by the Convention. Just as the Convention presupposes the existence of courts, as well as legislative and administrative bodies, so does it also presupposes, in principle, the existence of the right of access to the courts in civil matters; for without such a right no civil court could begin to operate.

Nor is my reasoning refuted by contending that, if the right of access had its basis solely in their national legal order, the member States of the Council of Europe could, by abolishing the right, reduce to nothing all the Convention's provisions relating to judicial protection in civil matters. For if these States were really determined on destroying one of the foundations of Human Rights, they would be committing an act contrary to their own will to create a system based on "a common understanding and observance of the Human Rights upon which they depend" (fourth recital in the Preamble).

SEPARATE OPINION OF JUDGE ZEKIA

I adopt, with respect, the introductory part of the judgment dealing with procedure and facts and also the concluding part dealing with the application of Article 50 (art. 50) of the Convention to the present case. I agree also with the conclusion reached regarding the violation of Article 8 (art. 8) of the Convention subject to some variation in the reasoning.

I have felt unable, however, to agree with my eminent colleagues in the way Article 6 para. 1 (art. 6-1) of the Convention has been interpreted by them and with their conclusion that a right of access to the courts ought to be read into Article 6 para. 1 (art. 6-1) and that such right is to be considered as being embodied therein. The outcome of their interpretation is that the United Kingdom has committed a contravention of Article 6 para. 1 (art. 6-1) of the Convention by disallowing prisoner Golder to exercise his right of access to the courts.

I proceed to give hereunder, as briefly as I can, the main reasons for my dissenting opinion on this part of the judgment.

There is no doubt that the answer to the question whether right of access to courts is provided in Article 6 para. 1 (art. 6-1), depends on the construction of the said Article. We have been assisted immensely by the representatives of both sides in the fulfilment of our duties in this respect.

There appears to be a virtual consensus of opinion that Articles 31, 32 and 33 of the Vienna Convention on the Law of Treaties, although with no retroactive effect, contain the guiding principles of interpretation of a treaty. There remains the application of the rules of interpretation formulated in the aforesaid Convention to Article 6 para. 1 (art. 6-1) of the European Convention.

Article 31 para. 1 of the Vienna Convention reads "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". No question arises as to good faith, therefore what remains for consideration is (a) text, (b) context, (c) object and purpose. The last two elements might very well overlap on one another.

A. Text

Article 6 para. 1 (art. 6-1) of the European Convention on Human Rights reads:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the

parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

The above Article (art. 6-1), read in its plain and ordinary meaning, refers to criminal charges brought against a person and to the civil rights and obligations of a person when such rights and obligations are sub judice in a court of law. The very fact that the words immediately following the opening words of the paragraph, that is, the words following the phrase "In the determination of his civil rights and obligations or of any criminal charge against him" deal exclusively with the conduct of proceedings, i.e., public hearings within a reasonable time before an impartial court and pronouncement of judgment in public, plus the further fact that exceptions and/or limitations given in detail in the same paragraph again exclusively relate to the publicity of the court proceedings and to nothing else, strongly indicate that Article 6 para. 1 (art. 6-1) deals only with court proceedings already instituted before a court and not with a right of access to the courts. In other words Article 6 para. 1 (art. 6-1) is directed to the incidents and attributes of a just and fair trial only.

Reference was made to the French version of Article 6 para. 1 (art. 6-1) and specifically to the words "contestations sur ses droits" in the said Article (art. 6-1). It has been maintained that the above quoted words convey a wider meaning than the corresponding English words in the English text. The words in the French text embrace, it is argued, claims which have not reached the stage of trial.

The English and French text are both equally authentic. If the words used in one text are capable only of a narrower meaning, the result is that both texts are reconcilable by attaching to them the less extensive meaning. Even if we apply Article 33 of the Vienna Convention in order to find which of the two texts is to prevail, we have to look to the preceding Articles 31 and 32 of the same Convention for guidance. Having done this I did not find sufficient reason to alter the view just expressed. So much for the reading of the text which no doubt constitutes "the primary source of its own interpretation".

B. Context

I pass now to the contextual aspect of Article 6 para. 1 (art. 6-1). As I said earlier, the examination of this aspect is bound to overlap with considerations appertaining to the object and purpose of a treaty. There is no doubt, however, that interpretation is a single combined operation which takes into account all relevant facts as a whole.

Article 6 para. 1 (art. 6-1) occurs in Section I of the European Convention on Human Rights and Fundamental Freedoms which section comprises Articles 2-18 (art. 2, art. 3, art. 4, art. 5, art. 6, art. 7, art. 8, art. 9, art. 10, art. 11, art. 12, art. 13, art. 14, art. 15, art. 16, art. 17, art. 18)

defining rights and freedoms conferred on people within the jurisdiction of the Contracting States. Article 1 (art. 1) requires the Contracting Parties to "secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention". The obligations undertaken under this Convention by Contracting States relate to the rights and freedoms defined. It seems almost impossible for anyone to contend that Article 6 para. 1 (art. 6-1) defines a right of access to courts.

A study of Section I discloses: Article 5, paras. 4 and 5 (art. 5-4, art. 5-5), deals with proceedings to be taken before a court for deciding the lawfulness or otherwise of detention and gives to the victim of unlawful detention an enforceable right to compensation.

Articles 9, 10 and 11 (art. 9, art. 10, art. 11) deal with rights or freedoms in respect of thought, expression, religion, peaceful assembly and association, etc. What is significant about these Articles (art. 9, art. 10, art. 11) is the fact that each Article prescribes in detail the restrictions and limitations attached to such right.

Article 13 (art. 13) reads:

> "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

This Article (art. 13) indicates a right of access to the courts in respect of violations of rights and freedoms set forth in the Convention. In my view courts come within the ambit of "national authority" mentioned in the Article (art. 13).

Article 17 (art. 17) provides, inter alia, that no limitation to a greater extent than is provided for in the Convention is allowed to the rights and freedoms set forth therein.

The relevance of this Article (art. 17) lies in the fact that, if right of access is to be read into Article 6 para. 1 (art. 6-1), such right of access will have to be an absolute one because no restrictions or limitations are mentioned in regard to this right. No one can seriously argue that the Convention contemplates an absolute and unfettered right of access to courts.

It is common knowledge and it may be taken for granted that right of access to the national courts, as a rule, does exist in all civilised democratic societies. Such right, and its exercise, usually is regulated by constitution, legislation, custom and by subsidiary laws such as orders and court rules.

Article 60 (art. 60) of the Convention keeps intact such human rights as are provided by national legislation. Right of access being a human right is no doubt included in the human rights referred to in Article 60 (art. 60). This in a way fills up the gap for claims in respect of which no specific provision for right of access is made in the Convention.

The competence of the courts, as well as the right of the persons entitled to initiate proceedings before a court, are regulated by laws and rules as

above indicated. One commences proceedings by filing an action, petition or application in the registry of the court of first instance or of the superior court. One has to pay the prescribed fees (unless entitled to legal aid) and cause the issue of writs of summons or other notices. Persons might be debarred unconditionally or conditionally from instituting proceedings on account of age, mental condition, bankruptcy, frivolous and vexatious litigation. One may have to make provision for security of costs and so on.

After the institution of proceedings and before a case comes up for hearing there are many intervening procedural steps. A master, or a judge in chambers and not in open court, is empowered in a certain category of cases to deal summarily and finally with a claim in an action, petition or application. Such is the case for instance when claim as endorsed on a writ, or as stated in the pleadings, does not disclose any cause of action or, in the case of a defendant or respondent, his reply or points of defence do not disclose a valid defence in law.

All this, digression, is simply to emphasise the fact that if in the Convention it was intended to make the right of access an integral part of Article 6 para. 1 (art. 6-1), those responsible for drafting the Convention would, no doubt, have followed their invariable practice, after defining a human right and freedom, to prescribe therein the restrictions and limitations attached to such right and freedom.

Surely if a right of access, independently of those expressly referred to in the Convention, was to be recognised to everybody within the jurisdictions of the High Contracting Parties, unrestricted by laws and regulations imposed by national legislation, one would expect such right to be expressly provided in the Convention. The care and pains taken in defining human rights and freedoms in the Convention and minutely prescribing the restrictions, indicate strongly that right of access is neither expressly nor by necessary implication or intendment embodied in Article 6 para. 1 (art. 6-1).

One might also remark: if there is no right of access to courts, what is the use of making copious provisions for the conduct of proceedings before a court?

If, indeed, provisions relating to the right of access were altogether lacking in the Convention - although this is not the case - I would concede that by necessary implication and intendment such a right is to be read as being incorporated in the Convention, though not necessarily in the Article in question. I would have acted on the assumption that the Contracting Parties took the existence of such right of access for granted.

C. Object and purpose

Article 6 para. 1 (art. 6-1) could by no means be under-estimated, when it is read with its ordinary meaning, without any right of access being integrated into it. Public hearing within reasonable time before an impartial

tribunal, with delivery of judgment in open court, - although one might describe them as procedural matters – nevertheless are fundamentals in the administration of justice, and therefore Article 6 para. 1 (art. 6-1) has and deserves its raison d'être in the Charter of Human Rights, without grafting the right of access onto it. Its scope of operation will still be very wide.

The Preamble of the European Convention on Human Rights and Fundamental Freedoms in its concluding paragraph declares: "Being resolved, as the Governments of European countries which are like- minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first step for the collective enforcement of certain of the Rights stated in the Universal Declaration." I think the United Kingdom Government was not unjustified in drawing our attention to the words "to take the first steps" and to the words "enforcement of certain of the Rights", occurring in that paragraph.

As to the references made to the travaux préparatoires of the Convention, the Universal Declaration of Human Rights, the European Convention on Establishment, the International Covenant on Civil and Political Rights and other international instruments, I am content to make only very short observations. In the travaux préparatoires of the Declaration, the early drafts included expressly the words "right of access" but these words were dropped before the text took its final form.

Article 8 of the Universal Declaration contains a right of access to courts for violations of fundamental rights granted by constitution or by law.

Article 10 of the Universal Declaration more or less corresponds to the main part of Article 6 para. 1 (art. 6-1) of the European Convention and it does not refer to a right of access. It seems the main part of Article 6 para. 1 (art. 6-1) followed the pattern of Article 10 of the Universal Declaration. And so too does Article 14 para. 1 of the International Covenant.

Article 7 of the European Convention on Establishment provides expressly a "right of access to the competent judicial and administrative authorities". The same applies to Article 2 para. 3 of the International Covenant.

The above supports the view that when right of access to courts was intended to be incorporated in a treaty, this was done in express terms.

I have already endeavoured to touch the main elements of interpretation in some order. When all elements are put together and considered compositively, to my mind the combined effect lends greater force to the correctness of the opinion submitted.

As to Article 8 (art. 8)

The Home Secretary, by not allowing prisoner Golder to communicate with his solicitor with a view to bringing an action for libel against the prison officer, Mr. Laird, was depriving the former of obtaining independent legal advice.

In the circumstances of the case I find that Golder was denied right of respect for his correspondence and such denial amounts to a breach of the Article (art. 8) in question.

In an action for libel Mr. Laird might succeed in a plea of privilege and prove non-existence of malice. The Home Secretary or the Governor of Prisons might reasonably believe that Golder had no chance of sustaining an action, but in principle I am inclined to the view that unless there are overriding considerations of security a prisoner should be allowed to communicate with, and consult, a solicitor or a lawyer and obtain independent legal advice.

SEPARATE OPINION OF JUDGE SIR GERALD FITZMAURICE

Introduction

1. For the reasons given in Part I of this Opinion, I have – though with some misgivings - participated in the unanimous affirmative vote of the Court on the question of Article 8 (art. 8) of the European Convention on Human Rights. To that extent therefore, I must hold the United Kingdom to have been in breach of the Convention in the present case.

2. On the other hand I am quite unable to agree with the Court on what has been the principle issue of law in these proceedings, - namely that of the applicability, and interpretation, of Article 6, paragraph 1 (art. 6-1), of the Convention - the question of the alleged right of access to the courts - the point here being, not whether the Convention ought to provide for such a right, but whether it actually does. This is something that affects the whole question of what is legitimate by way of the interpretation of an international treaty while keeping within the confines of a genuinely interpretative process, and not trespassing on the area of what may border on judicial legislation. I deal with it in Part II below.

3. I need not set out what the facts in this case were as I agree with the statement of them contained in the Court's Judgment.

PART I. Article 8 (art. 8) of the Convention

4. The issue that arises on Article 8 (art. 8) of the Convention is whether the United Kingdom Home Secretary, by refusing Golder (then under penal detention in Parkhurst Prison) permission to consult a solicitor, infringed the provisions of that Article (art. 8) which read as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or the protection of the rights and freedoms of others."

Two principal categories of questions - or doubts - arise with regard to this provision: is it applicable at all to the circumstances of the present case? - and secondly, if it is applicable in principle, does the case fall within any limitations on, or exceptions to, the rule it embodies?

A. The question of applicability

5. The doubts about applicability coalesce around the meaning of the term "correspondence", and the notion of what constitutes an "interference" with the "exercise of the right of respect for ... correspondence". The term "correspondence", in this sort of context, denotes, according to its ordinarily received and virtually universal dictionary[1] meaning, something that is less wide than "communication" - or rather, is one of several possible forms of communication. It denotes in fact written correspondence, possibly including telegrams or telex messages, but not communication by person to person by word of mouth, by telephone[2] or signs or signals. It would therefore be wrong to equate the notion of "correspondence" with that of "communication". However, as there does not seem to have been any question of Golder telephoning to a solicitor, that point does not arise. What does arise is that, even as regards a letter, Golder never wrote at all to any solicitor. There was no letter, so none was stopped. In that sense therefore there was no interference with his correspondence because, as between himself and the solicitor he would have consulted, there was no correspondence to interfere with, such as there was in the case of his attempts to write to his Member of Parliament[3]. But the reason for this was that, having enquired whether he would be allowed to consult a solicitor "with a view to taking civil action for libel" - which I think one must assume would have meant (at least initially) writing to him[4] - he was informed that he would not be, - which meant, in effect, that any letter would be stopped - and so he did not write one. There was, accordingly, no literal or actual interference with his correspondence in this respect; - but in my view there was what amounted, in English terminology, to a "constructive" stoppage or interference; and I consider that it would be placing an undue and formalistic restriction on the concept of interference

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[1] Significantly the Oxford English Dictionary does admit an older meaning, in the sense of "intercourse, communication" or (the verb) "to hold communication or intercourse [with]", but pronounces these usages to be obsolete now except in the context of letters or other written communications.

[2] In his masterly work The Application of the European Convention on Human Rights, Mr. J.E.S. Fawcett draws attention to the practice of the German Courts of treating "conversation, whether direct or by telephone, as being part of private life" (op. cit., p. 194), respect for private life being another of the categories protected by Article 8 (art. 8) of the Convention.

[3] See paragraphs 13 and 19 of the Court's Judgment. Golder's claim under this head was found inadmissible by the European Commission of Human Rights because he had a right of appeal in the United Kingdom which he had failed to exercise. Thus he had not exhausted his local legal remedies.

[4] It would seem to be a matter of common sense to suppose that any attempt by Golder to telephone a solicitor from prison (of which there is no evidence) would have proved abortive, though no interference with his correspondence, contrary to Article 8 (art. 8), would have been involved, - but see the private life theory, note 2 above.

with correspondence not to regard it as covering the case of correspondence that has not taken place only because the competent authority, with power to enforce its ruling, has ruled that it will not be allowed. One must similarly I think reject the equally restrictive view that even if permission had been given, Golder might not in practice have availed himself of it, which is beside the real point.

6. The very important fact that this refusal would not in the long run have prevented Golder from bringing his claim, had he been advised to do so - because he would still have been in time for that after his release from prison - is not material on the question of Article 8 (art. 8). It is highly material on the question of the alleged right of access under Article 6.1 (art. 6-1), and I shall deal with it in that connexion.)

7. A point similar to those discussed in paragraph 5 above arises over what exactly is the "right" referred to in the phrase "There shall be no interference by a public authority with the exercise of this right", which appears at the beginning of the second paragraph of the Article (art. 8-2), - the right itself being stated in the first paragraph (art. 8-1) to be the right of the individual to "respect for his private and family life, his home and his correspondence". It would be easy to close the argument at once by saying that correspondence is not "respected" if it is not allowed to take place at all. But the matter is not so simple as that. It could undoubtedly be contended that correspondence is respected so long as there is no physical interference with whatever correspondence there is, but that the words used neither convey nor imply any guarantee that there will be any correspondence; so that, for instance, a total prohibition of correspondence would not amount to an interference with the right. Some colour would be lent to this argument by the context in which the word "correspondence" appears, viz. "private and family life", "home and ... correspondence", which does suggest the motion of something domiciliary and, in consequence, the type of interference that might take place if someone's private papers in his home or hotel or on his person were searched, and actual letters were seized and removed. But is the notion confined to that sort of thing? This seems too narrow. The right which is not to be interfered with by the public authority, is the "right to respect" for correspondence, and it seems to me that, constructively at least, correspondence is not respected where, in order to avoid the seizure or stoppage of it that would otherwise take place, the public authority interdicts it a priori[5]. Hence, the Judgment of the Court makes the essential point when it suggests that it would be inadmissible to consider that Article 8 (art. 8) would have been applicable if Golder had

[5] This is perhaps not quite fair to the prison authorities, who acted entirely correctly within the scope of the Prison Rules. There was no general interdiction of correspondence. But when Golder asked for permission to consult a solicitor it was refused. It must therefore be assumed that had he attempted to effect a consultation in the only way practicable for him - at least initially - viz. by letter, the letter would have been stopped - and see note 4 supra.

actually consulted his solicitor by letter, and the letter had been stopped, but inapplicable because he was merely told (in effect) that it would be stopped if he wrote it, and so he did not write it.

B. Limitations and exceptions

8. I cannot agree with the view expressed in the Judgmnent of the Court that the structure of Article 8 (art. 8) rules out even the possibility of any unexpressed but inherent limitations on the operation of the rule stated in paragraph 1 and the first fifteen words of paragraph 2 of the Article (art. 8-1, art. 8-2). Since "respect" for correspondence - which is what (and also all that) paragraph 1 of Article 8 (art. 8-1) enjoins - is not to be equated with the notion of complete freedom of correspondence[6] (6), it would follow, even without the exceptions listed in the second paragraph (art. 8-2), that the first paragraph (art. 8-1) could legitimately be read as conferring something less than complete freedom in all cases, and in all circumstances. It would in my view have to be read subject to the understanding that the degree of respect required must to some extent be a function of the situation in general and of that of the individual concerned in particular. Hence - and not to stray beyond the confines of the present case - control of a lawfully detained prisoner’s correspondence is not incompatible with respect for it, even though control must, in order to be effective, carry the power in the last resort to prevent the correspondence, or particular pieces of it, from taking place. This must, in the true meaning of the term, be "inherent" in the notion of control of correspondence which, otherwise, would be a dead letter in all senses of that expression. The crucial question naturally remains whether, in the particular circumstances and in the particular case, the degree of control exercised was justifiable - that is, strictly, was compatible with the concept of "respect", as reasonable to be understood, - more especially when it involved a prohibition or implied threat of a stoppage.

9. It was doubtless because the originators of the Convention realised that the rule embodied in Article 8 (art. 8) would have to be understood in a very qualified way, if it was to be practicable at all, that they subjected it to a number of specific exceptions; - and although these do not in my opinion - for the reasons just given - necessarily exhaust all the possible limitations on the rule, they are sufficiently wide and general to cover most of the cases likely to arise. The drafting of these exceptions is unsatisfactory in one important respect: six heads or categories are mentioned, but they are placed in two groups of three, - and what is not clear is whether it is necessary for

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[6] I am glad to be fortified in this view by no less an authority than that of the President of the European Commission of Human Rights, who says (op. cit. in note 2 supra, p. 196) that "'respect' for correspondence in Article 8 (1) (art. 8-1) does not, quite apart from Article 8 (2) (art. 8-2), involve an unlimited freedom in the matter".

an alleged case of exception to fall under one of the three heads in both groups, or whether it suffices for it to fall under any one of the three heads in either the one or the other group. This ambiguity, which certainly exists in the English text of the Article (art. 8) (see paragraph 4 supra)[7] (7), I fortunately do not need to resolve, because I am satisfied that, considered on a category basis, control of a prisoner's correspondence is capable of coming under the heads both of "public safety" and "the prevention of disorder or crime", thus ranking as an excepted category whichever of the two above described methods of interpreting this provision might be adopted.

10. There is however a further element of ambiguity or failure of clarity. What paragraph 2 of the Article (art. 8-2) requires is that there shall be "no interference [in effect with correspondence] except such as is ... necessary ... for [e.g.] the prevention of disorder and crime". The natural meaning of this would seem to be that, in order to justify interference in any particular case, the interference must be "necessary" in that case "for the prevention of crime" etc. On this basis, even though some control of correspondence might in principle be needed for the prevention etc. (e.g. prisoners could otherwise arrange their own escapes, or plan further crimes), the particular interference (here constructive stoppage) would still require to be justified as necessary in the case itself "for the prevention ..." etc. On behalf of the United Kingdom Government however, although at one point it seemed to be admitted that the necessity must be related to the particular case, a somewhat different view was also put forward, - on the face of it a not at all unreasonable, and quite tenable, view, - which came to this, namely that, provided the type of restriction involved could be justified in the light of, and as coming fairly within, one of the excepted categories specified in paragraph 2 of Article 8 (art. 8-2), the application of the restriction in the particular case must be left to the discretion of the prison authorities, or at least they must be allowed a certain latitude of appreciation, so long as they appeared to be acting responsibly and in good faith, - and of course there has never been any suggestion of anything else in the present case. If the matter is regarded in this way, so it was urged, the Court ought not to go behind the action of the prison authorities and sit in judgment upon the manner in which this discretion had been exercised. Another and more lapidary version of the same contention would be to say that it seeks to justify the act complained of by reference to the character of the restriction involved, rather than the character of what was done in the exercise of that restriction. Therefore, so long as the restriction belongs in principle to the class or category of exception invoked, and has been imposed in good faith, the enquiry should stop there.

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[7] The point arises because it is not clear whether the categories beginning with the words "for the prevention of", etc., are governed by and relate directly back to the words "is necessary", or whether they relate only to the words "in the interests of".

11. I regret that I cannot accept this argument, despite its considerable persuasiveness. The matter seems to me to turn on the effect of the word "interference" in the phrase "There shall be no interference ... with ... except such as is ... necessary ... for the prevention ... etc." I think the better view is that this contemplates the act itself that is carried out in the exercise of the restriction, rather than the restriction or type of control from which it derives. It is the act - in this case the refusal of permission – that constitutes the interference, rather than the taking of power to do so under a regulation which, theoretically, might never be made use of. In other words, it does not suffice to show that in general some control over the correspondence of prisoners - and even on occasion a stoppage of it - is "necessary ... in the interests of ... public safety" or "for the prevention of disorder or crime". If that were all, it could be admitted at once that in principle such a necessity exists, - subject to questions of degree and particular application. But it has to be shown in addition that the particular act of interference involved was as such "necessary" on those grounds.

12. Accordingly, what has to be enquired into in the present case is the concrete refusal to allow Golder to consult a solicitor (regarding this, for reasons already given, as a constructive interference with his correspondence, - or rather - to use the cumbrous verbiage of Article 8 (art. 8) - with his "right to respect" for his correspondence). The question then is, whether this refusal was "necessary" on grounds of public safety, prevention of crime, etc. Put in that way, it seems to me that there can only be one answer: it was not, - and in saying this I have not overlooked the United Kingdom argument to the effect that if Golder had been allowed access to a solicitor over what was considered (by the authorities) as an entirely unmeritorious claim, the same facilities could not in fairness have been refused to other prisoners because, in the application of any rule, there must be consistency and adherence to some well defined and understood working principle. That is no doubt true, but it does not dispose of the need to show that refusing any one at all - that the practice itself of refusal on those particular grounds - is justified as being "necessary ... in the interests of public safety" or "for the prevention of disorder" etc. This brings me to what has to be regarded as the crucial question: - with whom does it properly lie to decide whether, as I have put it in recapitulation of the United Kingdom argument, claims such as Golder’s - in respect of which he wanted to consult a solicitor - was a "wholly unmeritorious one"? Is not such a matter one for judicial rather than executive determination?

13. Actually, the United Kingdom Home Secretary did not, in point of fact, make use of this form of words in replying to Golder, or indeed express any opinion as to the merits or otherwise of his claim: the language

employed was of the vaguest and most general kind[8]. However, the United Kingdom case has been argued throughout on the basis that the underlying reason for the refusal was the belief of the authorities that Golder had no good claim in law, and could not succeed in any libel action brought against the prison officer who had originally complained about him but had subsequently withdrawn the complaint. It must therefore be assumed that the rejection of Golder's request was de facto based on these grounds, and the alleged necessity of the rejection in the interests of public safety, prevention of disorder, etc., must be evaluated accordingly.

14. In the particular case of Golder it is imppossible to see how a refusal so based could be justified as necessary on any of the grounds specified in paragraph 2 of Article 8 (art. 8-2), even if it was in accordance with normal prison practice, as doubtless it was, - because then it would be the practice as such that was at fault. Even if the matter is looked at from the standpoint of the United Kingdom contention that the practice is justified because prisoners are, by definition as it were, litigious, and only too ready to start up frivolous, vexatious or unfounded actions if not prevented, the point remains that, however inconvenient this may be for the prison authorities, it is still difficult to see how many necessity in the interests of public safety or the prevention of disorder or crime can be involved. But even if, theoretically, it could be, none seems to have been satisfactorily established in Golder's case.

l5. More important however, is the fact that the real reason for the refusal in Golder's case does not seem to have been "necessity" at all, but the character of his claim; and here the true underlying issue is reached. A practice whereby contact with a solicitor about possible legal proceedings is refused because the executive authority has determined that the prisoner has no good legal ground of claim, not only cannot be justified as "necessary" etc. (does not even pretend so to be), - it cannot be justified at all, because it involves the usurpation of what is essentially a judicial function. To say this is not, even for a moment, to throw any doubt on the perfect good faith of the authorities in taking the view they did about Golder's claims. But that is not the point. The point is that it was motivated by what was in effect a judicial finding, - not, however, one emanating from any judicial authority, but from an executive one. Yet it is precisely one of the functions of a judicial system to provide, through judicial action, and after hearing argument if necessary, means for doing what the prison authorities, acting executively, and without hearing any argument - at least from Golder

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[8] Golder had made two requests: to be transferred to another prison, and to be allowed either to consult a solicitor about the possibility of taking legal action or alternatively to obtain the advice of a certain named magistrate, in whose views he would have confidence. In reply, he was told that the Secretry of State had fully considered his petition "but is not prepared to grant your request for a transfer, nor can he find grounds for taking any action in regard to the other matters raised in your petition".

himself or his representative - did in the present case. All normal legal systems - including most certainly the English one – have procedures whereby, at a very early stage of the proceedings, a case can (to use English terminology) be "struck out" as frivolous or vexatious or as disclosing no cause of action - (grounds roughly analogous to the "abuse of the right of petition", or "manifestly illfounded" petition, in human rights terminology)[9]. This can be done, and usually is, long before the case would otherwise have reached the trial judge, had it gone forward for trial; but nevertheless it is done by a judicial authority, or one acting judicially. It may be a minor or lesser authority, but the judicial character both of the authority and of the proceedings remains.

16. It is difficult to see why - or at least it is difficult to see why as a matter of necessity under Article 8, paragraph 2 (art. 8-2), prisoners, just because they have that status, should be liable to be deprived of the right to have these preliminary objections to their claims (whether good or bad) judicially determined, especially as they are objections of a kind which it is for the defendant in an action to take, not a third party stranger to it. But here of course a further underlying element is reached. The Home Secretary was not a stranger to Golder's potential claim, even if he was not directly a prospective party to it, - for it was his own prison officer and the conduct of that officer which would be in issue in the claim, if it went forward. Again, there is, and can be, no suggestion that the Home Secretary was influenced by the fact that he was technically in interest. It is simply the principle of the thing that counts: nemo in re sua judex esse potest. Of course, both in logic and in law, this could not operate per se to cancel out any necessity that genuinely existed on the basis of one of the exceptions specified in paragraph 2 of the Article 8 (art. 8-2). If such necessity really did exist, then the interference would not be contrary to Article 8 (art. 8) as such. What the element of nemo in re sua does do however, is to make it incumbent on the authorities to justify the interference by reference to very clear and cogent considerations of necessity indeed, - and these were certainly not present in this case.

17. In concluding therefore, as I feel bound to do, that there has been a breach of Article 8 (art. 8), though clearly an involuntary one, I should like to add that having regard to the perplexing drafting of Article 8 (art. 8), of which I hope to have afforded some demonstration - (nor is it unique in that respect in this Convention) - it can cause no surprise if governments are uncertain as to what their obligations under it are. This applies a fortiori to the interpretation of Article 6, paragraph 1 (art. 6-1), of the Convention to which I now come.

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[9] These are amongst the grounds, specified in Article 27 (art. 27) of the European Convention, on which the Commission of Human Rights must refuse to deal with a petition.

PART II. Article 6, paragraph 1 (art. 6-1)

A. The applicability aspect

18. In the present case the chief issue that has arisen and been the subject of argument, is whether the Convention provides in favour of private persons and entities a right of access to the courts of law in the various countries parties to it. It is agreed - and admitted in the Court's Judgment (paragraph 28) - that the only provision that could have any relevance for this purpose - Article 6, paragraph 1 (art. 6-1) - does not directly or in terms give expression to such a right. Nevertheless this right is read into the Convention on the basis partly of general considerations external to Article 6.1 (art. 6-1) as such, partly of inferences said to be required by its provisions themselves. But before entering upon this matter there arises first an important preliminary issue upon which the question of the very applicability of this Article (art. 6-1) and of the relevance of the whole problem of access depends. There exists also another preliminary point of this order, consideration of which is however more conveniently postponed until later - see paragraphs 26-31 below.

19. Clearly, it would be futile to discuss whether or not Article 6.1 (art. 6-1) of the Convention afforded a right of access to the English courts unless Golder had in fact been denied such access, - and in my opinion he had not. He had, in the manner already described, been prevented from consulting a solicitor with a view - possibly – to having recourse to those courts; but this was not in itself a denial of access to them, and could not be since the Home Secretary and the prison authorities had no power de jure to forbid it. It might nevertheless be prepared to hold, as the Court evidently does, that there had been a "constructive" denial if, de facto, the act of refusing to allow Golder to consult a solicitor had had the effect of permanently and finally cutting him off from all chances of recourse to the courts for the purpose of the proceedings he wanted to bring. But this was not the case: he would still have been in time to act even if he had served his full term, which he did not do, being soon released on parole.

20. I of course appreciate the force of the point that the lapse of time could have been prejudicial in certain ways, - but it could not have amounted to a bar. The fact that the access might have been in less favourable circumstances does not amount to a denial of it. Access, provided it is allowed, or possible, does not mean access at precisely the litigant's own time or on his own terms. In the present case there was at the most a factual impediment of a temporary character to action then and there, but no denial of the right because there could not be, in law. The element of "remoteness", of which the English legal system takes considerable account, also enters into this. Some distance, conceptually, has to be travelled before

it can be said that a refusal to allow communication with a solicitor "now", amounts to a denial of access to the courts - either "now", or still less "then". In no reasonable sense can it be regarded as a proximate cause or determining factor. Golder was not prevented from bringing proceedings: he was only delayed, and then, in the end, himself failed to do so. A charge of this character cannot be substantiated on the basis of a series of contingencies. Either the action of the authorities once and for all prevented Golder's recourse or it did not. In my opinion it did not.

21. Just as the Court's Judgment (so it will be seen later) completely fails to distinguish between the quite separate concept of access to the courts and a fair hearing after access has been had, so also does it fail to distinguish between the even more clearly separate notions of a refusal of access to the courts and a refusal of access to a solicitor, which may - or may not - result in an eventual seeking of access to the courts. To say that a thing cannot be done now, is not to say it cannot be done at all, - especially when what is withheld "now" does not even constitute that which (possibly) might be sought "then". The way in which these two distinct matters are run together, almost as if they were synonymous, in, for instance, the last part of the fourth section of paragraph 26 of the Judgment, constitutes a gratuitous piece of elliptical reasoning that distorts normal concepts.

22. In consequence, even assuming that Article 6.1 (art. 6-1) of the Convention involves an obligation to afford access to the courts, the present case does not, in my view, fall under the head of a denial of access contrary to that provision. It is not an Article 6.1(art. 6-1) case at all, but a case of interference with correspondence contrary to Article 8 (art. 8); and the whole argument about the effect of Article 6.1 (art. 6-1) is misconceived; for, access not having been denied, there is no room for the application of that Article (art. 6-1). Logically therefore, this part of the case must, for me, and so far as its actual ratio decidendi is concerned, end at this point: but, because the question of whether Article 6.1 (art. 6-1) is to be understood as comprising a right of access to the courts involves an issue of treaty interpretation that is of fundamental importance, not only in itself, but also as opening windows on wider vistas of principle, philosophy and attitude, I feel it incumbent on me to state my views about it.

B. The interpretational aspect

23. It was a former President of this Court, Sir Humphrey Waldock who, when appearing as Counsel in a case before the International Court of Justice at the Hague[10] pointed out the difficulties that must arise over the

[10] This was either in the first (jurisdictional) phase of the Barcelona Traction Company case (1964), or in the North Sea Continental Shelf case; but I have lost track of the reference.

interpretational process when what basically divides the parties is not so much a disagreement about the meaning of terms as a difference of attitude or frame of mind. The parties will then be working to different co-ordinates; they will be travelling along parallel tracks that never meet - at least in Euclidean space or outside the geometries of a Lobachevsky, a Riemann or a Bolyai; or again, as Sir Humphrey put it, they are speaking on different wavelengths, - with the result that they do not so much fail to understand each other, as fail to hear each other at all. Both parties may, within their own frames of reference, be able to present a self-consistent and valid argument, but since these frames of reference are different, neither argument can, as such, override the other. There is no solution to the problem unless the correct – or rather acceptable - frame of reference can first be determined; but since matters of acceptability depend on approach, feeling, attitude, or even policy, rather than correct legal or logical argument, there is scarcely a solution along those lines either.

24. These are the kind of considerations which, it seems to me, account for the almost total irreconcilability that has characterized the arguments of the participants about the interpretation of Article 6.1 (art. 6-1); - on the one side chiefly the Commission, on the other the United Kingdom Government. Their approaches have been made from opposite ends of the spectrum. One has only to read the views and contentions of the Commission as set forth in, for instance, its Report for transmission to the Committee of Ministers[11], to find these seemingly convincing - given the premises on which they are based and the approach that underlies them. Equally convincing however are those advanced on behalf of the United Kingdom Government in its written memorial[12] and oral arguments[13] before the Court, on the basis of another approach and a quite different set of premises. The conclusion embodied in the Judgment of the Court, after taking into account the arguments of the United Kingdom, is to the same effect as that of the Commission. My own conclusion will be a different one, partly because I think a different approach is required, but partly also because I believe that the Court has proceeded on the footing of methods of interpretation that I regard as contrary to sound principle, and furthermore has given insufficient weight to certain features of the case that are very difficult to reconcile with the conclusion it reaches.

1. The question of approach

25. The significance of the question of approach or attitude in the present case lies in the fact that, as already mentioned, and as was generally

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[11] Dated 1 June 1973: Convention, Article 31, paragraphs 1 and 2 (art. 31-1, art. 31-2).
[12] Document CDH (74) 6 of 26 March 1974.*
[13] Documents CDH/Misc (74) 63 and 64 of 12 October 1974.*
* Note by the Registry: These documents are reproduced in volume No 16 of Series B.

admitted, neither in the Convention as a whole nor in Article 6.1 (art. 6-1) in particular, is any provision expressly made for a specific general substantive right[14] (14) of access to the courts. It is in fact common ground that if the principle of such a right is provided for, or even recognized at all by any Article of the Convention, this can only result from an inference drawn from the first sentence of Article 6.1 (art. 6-1) - which reads as follows:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

It is evident on the face of it that the direct (and the only direct right) right conveyed by this provision is a right to (i) "a fair and public hearing", (ii) "within a reasonable time", and (iii) by a tribunal which is "independent", "impartial", and "established by law". Naturally the question of these several matters, viz. of a not unduly delayed fair and public hearing before an impartial tribunal, etc., can only arise if some proceedings, civil or criminal, have actually been commenced and are currently going through their normal course of development. But that is not the point. The point is that this says nothing whatever in terms as to whether there shall be any proceedings. The Article (art. 6-1) assumes the factual existence of proceedings, in the sense (but no further) that, if there were none, questions of fair trial, etc. would have no relevance because they could not arise. The Article (art. 6-1) can therefore only come into play if there are proceedings. It is framed on the basis that there is a litigation which, as my colleague Judge Zekia puts it, is sub judice. But that is as far as its actual language goes. It does not say that there must be proceedings whenever anyone wants to bring them. To put the matter in another way, the Article simply assumes the existence of a fact, viz. that there are proceedings, and then, on the basis of that fact, conveys a right which is to operate in the postulated event (of proceedings), - namely a right to a fair trial, etc. But it makes no direct provision for the happening of the event itself - that is to say for any right to bring the event about. In short, so far as its actual terms go, it conveys no substantive right of access independently of and additional to the procedural guarantees for a fair trial, etc., which are clearly its primary object. The question is therefore, must it be regarded as doing so by a process of implication?

Digression: Article 1 (art. 1) of the Convention

26. However, before going on to consider the question of implication as it arises in connection with Article 6.1 (art. 6-1), a parenthesis of some

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[14] Although I agree with the Judgment (paragraph 33) that provisions such as those in Article 5.4 and Article 13 (art. 5-4, art. 13) only confer procedural rights to a remedy in case a substantive right under the Convention is infringed, and not any substantive rights themselves, this finding, though correct in se, does not exhaust the point of the United Kingdom argument based on those Articles (art. 5-4, art. 13). I shall return to this matter later.

importance must be opened, concerning another factor that calls for a short-circuiting of the whole issue of Article 6.1 (art. 6-1). This concerns the effect to be given to Article 1 (art. 1) of the Convention which runs as follows:

> "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in ... this Convention."

The operative word here, in the present context, is "defined"; and in consequence, the effect of this provision - (since it is rights and freedoms "defined" in the Convention that the States parties to it are to secure to everyone within their jurisdiction) - is to exclude from that obligation anything not so defined. Therefore, even if, in order to avoid relying on what might be regarded as a technicality, one refrains from attempting a "definition of defining", as compared with, say, mentioning, indicating, or specifying[15], the question necessarily arises whether a right or freedom that is not even mentioned, indicated or specified, but merely - at the most - implied, can be said to be one that is "defined" in the Convention in any sense that can reasonably be attributed to the term "defined"? In my opinion, not; and on this question I am in entire agreement with the views expressed by my colleague Judge von Verdross.

27. This conclusion does not turn on a mere technicality. In the first place, even if one accepts the view that, as has been said[16], "the word 'defined' in this provision is not very apt" and that in the Convention "none of the rights or freedoms are defined in the strict sense", they are at least mentioned, indicated or specified - in short named. This is not so with the right of access which, as such, finds no mention in the Convention. Secondly, a large part of the proceedings in the case, and of the arguments of the participants - those relating to inherent or other limitations on the right of access, if considered to be implied by Article 6.1 (art. 6-1) - was taken up, precisely, with the question of how that right was to be understood, what it amounted to, - in short how it was to be defined, - conclusively establishing the need for a definition, even if only by limitation or circumscription; - and definitions must be expressed - they cannot rest on implication.

28. The necessary conclusion therefore seems to be that it is impossible - or would be inadmissible - to regard as falling under the obligation imposed by Article 1 (art. 1) of the Convention – an obligation that governs its whole application - a right or freedom which the Convention does not trouble to name, but at the most implies, and which cannot even usefully be implied without at the same time proceeding to a rather careful definition of it, or of

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[15] Clearly anything defined must ipso facto be mentioned, indicated, specified or at least named, etc. The reverse does not follow. A definition involves more than any of these, and a fortiori much more than something not specified at all, but merely inferred.

[16] J.E.S. Fawcett, op. cit., in note 2 supra, p.33.

the conditions subject to which it operates, and which, by circumscribing it, define it[17].

29. In this connexion it must also be noticed that the very notion of a right of access to the courts is itself an ambiguous one, unless defined. The need to define, or at least circumscribe, is indeed expressly recognized in paragraph 38 of the Court's judgment, and again by implication, at the end of paragraph 44. For instance does a right of access mean simply such right as the domestic law of the State concerned provides, or at any time may provide for? If so, would the Convention, in providing for a right of access, be doing anything more than would already be done if the Convention did not exist? If on the other hand the Convention, supposing it to provide for a right of access at all, must be deemed to impose an obligation to afford a degree of access that the domestic law of the contracting States, or of some of them, might not necessarily contemplate, then what degree? - an absolute right, or one conditioned in various ways, and if so how? More specifically, does a right of access mean a right both to bring a claim and also to have it determined on its substantive merits regardless of any preliminary question affecting the character or admissibility of the claim, the status or capacity of the parties to it, etc.? - and if not, then, since the laws of different countries vary considerably in these respects, would not some definition of the degree of derogation from the absolute, considered to be acceptable from a human rights standpoint, be requisite in a Convention on human rights? The fact that the European Convention contains no such (nor any) definition could only mean that if a right of access is to be implied by virtue of Article 6.1 (art. 6-1), the right would need to be defined separately, ad hoc, by the Court for the purposes of each individual case. This would be inadmissible since governments would never know beforehand where they stood.

30. The foregoing questions may be rhetorical in their form: they are not rhetorical in substance. They serve to show the need for a definition of access to the courts as a right or freedom, and hence that, the Convention containing none, this particular right or freedom is not amongst those which its Article 1 (art. 1) obliges the contracting States to secure to those within

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[17] It was common ground in the proceedings that a right of access cannot mean that the courts must have unlimited jurisdiction (e.g. the case of diplomatic or parliamentary immunity); or that the right must be wholly uncontrolled (e.g. the case of lunatics, minors, etc.). Or again that lawful imprisonment does not have some effect on rights of access. But there was more than enough argument about the precise nature or extent of such curbs to make it abundantly clear that an implied right of access without specification or definition could not be viable, in the sense that its character and incidence would be the subject of continual controversy. Here, my colleague Judge Zekia makes an excellent point when he draws attention to the effect of Article 17 (art. 17) of the Convention, which prohibits the contracting States from engaging in anything aimed at limiting any rights or freedoms "to a greater extent than is provided for in the Convention", - the significance being that if any right of access were to be implied by Article 6.1 (art. 6-1), it would have to be an absolute one, since that Article provides for no restrictions.

their respective jurisdictions. To put the matter in another way, the parties cannot be expected to implement what would be an important international obligation when it is not defined sufficiently to enable them to know exactly what it involves - indeed is not defined at all because (in so far as it exists) it rests on an implication that is never particularized or spelt out. The fleeting, and scarcely comprehensible[18], references contained in paragraphs 28 and 38 (first section) of the Court's Judgment to the question of a definition, as it arises by virtue of Article 1 (art. 1) of the Convention, are in no way an adequate substitute for a considered discussion of the matter, which the Judgment wholly fails to provide.

3l. In consequence, there is here a further point at which, as in the case of what was discussed in paragraphs 19-22 of this Opinion, a term could, so far as I am concerned, logically be put to the question of the effect of Article 6.1 (art. 6-1) - for since that provision does not define, then whatever is the right or freedom it might imply, that right or freedom would not come within the scope of Article 1 (art. 1) and its overall governing obligation. This is also precisely Judge von Verdross' view. That this conclusion may legitimately suggest the deduction that Article 6.1 (art. 6-1) does not in fact imply any such right or freedom, but deals only with the modalities of litigation, leads naturally to a resumption of the discussion broken off at the end of paragraph 25 above where, it having emerged quite clearly from the analysis previously made, that Article 6.1 (art. 6-1), while assuming the existence of proceedings, did not in terms give expression to any positive right to bring them, the question was asked whether the Article (art. 6-1) must nevertheless be regarded as doing so by a process of implication or inference. Also raised was the further question of what it would be proper and legitimate to imply by means of such a process.

Resumption on the question of approach

i. The Court's approach

32. It is an understandable, reasonable and legitimate point of view that access to the courts of law is, or should be, regarded as an important human right. Yet it is an equally justifiable view to say that the very importance of the right requires (more especially in a convention based on inter-State agreement, not sovereign legislative power) that it should be given explicit expression, not left to be deduced as a matter of inference. This leads up to an essential point. There is a considerable difference between the case of "law-giver's law" edicted in the exercise of sovereign power, and law based on convention, itself the outcome of a process of agreement, and limited to what has been agreed, or can properly be assumed to have been agreed. Far

[18] For instance, what is meant by the allusions to a definition "in the narrower sense of the term"? Narrower than what? - and what would be the "broader" sense? Such vagueness can only give rise to "confusion worse confounded": Milton, Paradise Lost, Book I, 1, 995, - (lost indeed!).

greater interpretational restraint is requisite in the latter case, in which, accordingly, the convention should not be construed as providing for more than it contains, or than is necessarily to be inferred from what it contains. The whole balance tilts from (in the case of law-giver's law) the negatively orientated principle of an interpretation that seems reasonable and does not run counter to any definite contra-indication, and an interpretation that needs to have a positive foundation in the convention that alone represents what the parties have agreed to, - a positive foundation either in the actual terms of the convention or in inferences necessarily to be drawn from these; - and the word "necessarily" is the decisive one.

33. That word is significant because the attitude of the Commission to this case and, though more guardedly, that of the Court, seems to me to have amounted to this, - that it is inconceivable, or at least inadmissible, that a convention on human rights should fail in some form or other to provide for a right of access to the courts: therefore it must be presumed to do so if such an inference is at all possible from any of its terms. This attitude clearly underlies what is said in the last section of paragraph 35 of the Court's Judgment, that it would, in the opinion of the Court "be inconceivable ... that Article 6.1 (art. 6-1) should describe in detail the procedural guarantees afforded to parties in a pending lawsuit and should not first protect that which alone makes it possible to benefit from such guarantees, that is, access to a court". As a matter of logical reasoning however, this is a complete non-sequitur. It might perhaps seem natural that procedural guarantees of this kind should "first" be preceded by a protection of the right of access: the fact remains that, in terms, they are not, and that the inference that they must be deemed so to be is at best a possible and in no way a necessary one; - for it is a perfectly conceivable situation that a right of access to the courts should not necessarily always be afforded, or should be limited to certain cases, or excluded in certain cases, but that where it is afforded there should be safeguards as to the character of the ensuing proceedings.

34. Generally speaking, at least in this type of provision, an inference or implication can only be regarded as a "necessary" one if the provision cannot operate, or will not function, without it. As has already been indicated (supra, paragraph 25), in Article 6.1 (art. 6-1) the necessary, and the only necessary inferential element lies in the assumption (without which the provision makes no sense but more than which it does not require in order to make sense) that legal proceedings of some kind have been started and are in progress. It is in no way necessary, either to the operation of this text, or to give it significant meaning and scope, that the further and quite gratuitous assumption should be made that the text implies not only the existence of proceedings but an a priori right to bring them, - which is to enter upon a distinct order or category of concept, for doing which there is no warrant, since the Article (art. 6-1) has ample scope without that. To

quote my colleague Judge Zekia, it "has ... its raison d'être ... without grafting the right of access onto it". May I be permitted in the general context of the process of implication to refer to what I wrote more than a dozen years ago in an article on treaty interpretation having no specific connexion with any case such as the present one[19].

35. So compelling do these considerations seem to me to be that I am obliged to look to other factors in order to account for the line taken by the Court. A number of them, such as the rules of treaty interpretation embodied in the 1966 Vienna Convention on the Law of Treaties; the Statute of the Council of Europe - an instrument quite separate from the European Convention on Human Rights; the principle of the rule of law; and the "general principles of law recognized by civilized nations" mentioned in Article 38, paragraph 1 (c), of the Statute of the International Court of Justice; - all these are factors external to Article 6.1 (art. 6-1) of the Human Rights Convention, and having little or no direct bearing on the precise point of interpretation involved, which is that discussed in paragraphs 25 and 33-34 of the present Opinion. They might be useful as straws to clutch at, or as confirmatory of a view arrive at aliter, - they are in no way determining in themselves, even taken cumulatively[20].

36. The really determining element in the conclusion arrived at by the Court seems to have been fear of the supposed consequences that might result from any failure to read a right of access into Article 6.1 (art. 6-1). This can clearly be seen from the following passages, the first of which completes that already quoted in paragraph 33 above by stating that the "fair, public and expeditious characteristics of judicial proceedings are of no value at all if there are no judicial proceedings". Still more significant is the second passage (Judgment, paragraph 35, penultimate section), the first sentence of which reads as follows:

> "Were Article 6.1 (art. 6-1) to be understood as concerning exclusively the conduct of an action which had already been initiated before a court, a contracting State could, without acting in breach of that text, do away with its courts, or take away their jurisdiction to determine certain classes of civil actions and entrust it to organs dependent on the Government."

37. These motivations, as embodying what is clearly the real ratio decidendi of this part of the Judgment, seem to me to call for comment under three heads, - those of probability, the logic of the argument, and the nature of the operation they denote.

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[19] See a footnote entitled "The philosophy of the inference" in the British Year Book of International Law for 1963, p. 154.

[20] The importance attributed to the factor of the "rule of law" in paragraph 34 of the Court's Judgment is much exaggerated. That element, weighty though it is, is mentioned only incidentally in the Preamble to the Convention. What chiefly actuated the contracting States was not concern for the rule of law but humanitarian considerations.

(a) The consequences foreshadowed are completely unrealistic or at the best highly exaggerated.

(b) The argument embodies a well known logical fallacy, in so far as it proceeds on the basis that without a right of access the safeguards for a trial provided for by Article 6.1 (art. 6-1) would be rendered nugatory and objectless, - so that the one must necessarily entail the other. This is merely to perpetuate the type of fallacy arising out of what is known to philosophers as the "King of France" paradox, - the paradox of a sentence which, linguistically, makes sense, but actually is absurd, namely the assertion "the King of France is bald". The paradox vanishes however when it is seen that the assertion in no way logically implies that there is a King of France, but merely that, rightly or wrongly, if there is one, he is bald. But that there is one must be independently established; and, as is well known, there is in fact no King of France. Similarly, one could provide all the safeguards in the world for the well being of the King of France, did he exist, yet the fact that these would all be rendered nugatory and objectless did he not do so, would in no way establish, or be compelling ground for saying that he did, or must be assumed to. In the same way, the safeguards for a fair trial provided by Article 6.1 (art. 6-1) will operate if there is a trial, and if not, not. They in no way entail that there must be one, or that a right of access must be postulated in order to bring one about. The Judgment also abounds in the type of logical fallacy that derives B from A because A does not in terms exclude B. But non-exclusion is not ipso facto inclusion. The latter still remains to be demonstrated.

(c) Finally, it must be said that the above quoted passages from the Judgment of the Court are typical of the cry of the judicial legislator all down the ages - a cry which, whatever justification it may have on the internal or national plane[21], has little or none in the domain of the inter-State treaty or convention based on agreement and governed by that essential fact[22]. It may, or it may not be true that a failure to see the Human Rights

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[21] It is one thing for a national constitution to allow part of its legislative processes to be effected by means of judge-made "case law": quite another for this method to be imposed ab extra on States parties to an international convention supposed to be based on agreement. It so happens however, that even in England, a country in which "case law", and hence - though to a diminishing extent – a certain element of judicial legislation has always been part of the legal system, a recent case led to severe criticism of this element, and another decision given by the highest appellate tribunal went far to endorse this criticism in the course of which it had been pointed out that the role of the judge is jus dicere not jus dare, and that the correct course for the judge faced with defective law was to draw the attention of the legislature to that fact, and not deal with it by judicial action. It was also pointed out that no good answer lay in saying that a big step in the right direction had been taken, - for when judges took big steps that meant that they were making new law. Such remarks as these are peculiarly applicable to the present case in my opinion.

[22] That is to say unless it can be shown that the treaty or convention itself concedes some legislative role to the tribunal called upon to apply it, or that the parties to it intended to delegate in some degree the function (otherwise exclusively to them pertaining) of

Convention as comprising a right of access to the courts would have untoward consequences - just as one can imagine such consequences possibly resulting from various other defects or lacunae in this Convention. But this is not the point. The point is that it is for the States upon whose consent the Convention rests, and from which consent alone it derives its obligatory force, to close the gap or put the defect right by an amendment, - not for a judicial tribunal to substitute itself for the convention-makers, to do their work for them. Once wide interpretations of the kind now in question are adopted by a court, without the clearest justification for them based solidly on the language of the text or on necessary inferences drawn from it, and not, as here, on a questionable interpretation of an enigmatic provision, considerations of consistency will, thereafter, make it difficult to refuse extensive interpretations in other contexts where good sense might dictate differently: freedom of action will have been impaired.

ii. A different approach

38. In my view, the correct approach to the interpretation of Article 6.1 (art. 6-1) is to bear in mind not only that it is a provision embodied in an instrument depending for its force upon the agreement - and indeed the continuing support - of governments, but also that it is an instrument of a very special kind[23], emulated in the field of human rights only by the Inter-American Convention on Human Rights signed at San José nearly twenty years later. This was in considerable measure founded on the European one, particularly as regards its "enforcement" machinery. But it has not been brought into force. Such machinery is not to be found in the United Nations Covenants on Human rights, which in any case also do not seem to be in force. Speaking generally, the various conventions and covenants on human rights, but more particularly the European Convention, have broken entirely new ground internationally, making heavy inroads on some of the most cherished preserves of governments in the sphere of their domestic jurisdiction or domaine réservé. Most especially, and most strikingly, is this the case as regards what is often known as the "right of individual petition", whereby private persons or entities are enabled to (in effect) sue their own governments before an international commission or tribunal, - something

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changing or enhancing its effects, - or again that they must be held to have agreed a priori to an extensive interpretation of its terms, possibly exceeding the original intention. In the present context none of these elements, but the reverse rather, are present, as I shall show later.

[23] The European Convention, signed in 1950 and in force since 1953, is unique as being the only one that both is operative and provides for the judicial determination of disputes arising under it. In any event it is the oldest, having been preceded (by two years) only by the U.N. Universal Declaration of Human Rights which was not, and is not, a binding instrument. There are only three others of the same general order as the European Convention, and only one that is comparable in respect of "enforcement machinery" - the American Convention of San José - which was signed only in 1969 and is not in force.

that, even as recently as thirty years ago, would have been regarded as internationally inconceivable. For these reasons governments have been hesitant to become parties to instruments most of which, apart from the European Convention, have apparently not so far attracted a sufficient number of ratifications to bring them into force. Other governments, that have ratified the European Convention, have hesitated long before accepting the compulsory jurisdiction of the Court of Human Rights set up under it. Similar delays have occurred in subscribing to the right of individual petition which, like the jurisdiction of the Court, has to be separately accepted. This right moreover, may require not only an initial, but a continuing acceptance, since it may be, and in several instances has been given only for a fixed, though renewable, period. It is indeed solely by reason of an acceptance of this kind that it has been possible for the present (Golder) case to be brought before the European Commission and Court of Human Rights at all.

39. These various factors could justify even a somewhat restrictive interpretation of the Convention but, without going as far as that, they must be said, unquestionably, not only to justify, but positively to demand, a cautious and conservative interpretation, particularly as regards any provisions the meaning of which may be uncertain, and where extensive constructions might have the effect of imposing upon the contracting States obligations they had not really meant to assume, or would not have understood themselves to be assuming. (In this connexion the passage quoted in the footnote below[24] from the oral argument of Counsel for the United Kingdom before the Commission should be carefully noted.) Any serious doubt must therefore be resolved in favour of, rather than against, the government concerned, - and if it were true, as the Judgment of the Court seeks to suggest, that there is no serious doubt in the present case, then one must wonder what it is the participants have been arguing about over approximately the last five years!

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[24] "As regards the question of access to the courts, this is not a case of a Government trying to repudiate obligations freely undertaken. That much is quite clear. If one thing has emerged from all the discussion in the case of Mr. Knechtl and the pleadings so far in the case of Mr. Golder, it is that the Government of the United Kingdom had no idea when it was accepting Article 6 (art. 6) of the Convention that it was accepting an obligation to accord a right of access to the courts without qualification. Whether we are right on the interpretation or whether we are wrong, I submit that that much is absolutely clear. I am not going to review in detail all the evidence or the views of the United Kingdom in this respect which have been placed before the Commission. But I submit that it is perfectly clear from all the constitutional material that has been submitted, from its part in the drafting of the European Establishment Convention, that the United Kingdom had no intention of assuming, and did not know that it was expected to assume, any such obligation." - (CDH (73) 33, at p. 36: Document no. 5 communicated by the Commission to the Court)*

* Note by the Registry: Verbatim record of the oral hearing on the merits held in Strasbourg before the Commission on 16-17 December 1971.

iii. Intentions and drafting method

40. It is hardly possible to establish what really were the intentions of the contracting States under this head; but that of course is all the more reason for not subjecting them to obligations which do not result clearly from the Convention, or at least in a manner free from reasonable doubt. The obligation now under discussion does not have that character. Moreover, speaking from a very long former experience as a practitioner in the field of treaty drafting, it is to me quite inconceivable that governments intending to assume an international[25] obligation to afford access to their courts, should have set about doing so in this roundabout way, - that is to say should, without stating the right explicitly, have left it to be deduced by a side-wind from a provision (Article 6.1) (art. 6-1) the immediate and primary purpose of which (whatever its other possible implications might be) - no one who gives an objective reading can doubt – was something basically distinct as a matter of category, namely to secure that legal proceedings were fairly and expeditiously conducted. No competent draftsman would ever have handled such a matter in this way.

41. I do not therefore propose to go into the drafting history of Article 6.1 (art. 6-1), which would be both tedious and unrewarding because, like so many drafting histories, the essential points are often obscure and inconclusive. But it is worth looking at the provisions comparable or parallel to Article 6.1 (art. 6-1) that figure in other major human rights instruments. In the only previous one of a similar order, the Universal Declaration (see footnote 23 supra) there was a provision (its Article 8) which read:

> "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."

This, it will be seen, gave no general right of access, and was really a procedural article of the same basic type as Article 5, paragraph 4, and Article 13 (art. 5-4, art. 13), of the European Convention, to which I shall come later (see footnote 14 supra), - and which the Court's Judgment itself holds not to comprise the sort of right of access it professes to find in Article 6.1 (art. 6-1). Article 8 of the Universal Declaration was followed almost immediately by another provision (Article 10)[26] which simply says:

> "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" - (my italics).

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[25] A right of access under domestic law such as, at least in a general way, the legal systems of most countries doubtless do in fact provide, is one thing. It is quite another matter to assume an international treaty obligation to do so - especially without the smallest attempt to define or condition it (see supra, paragraphs 27-30).

[26] The intervening provision (Article 9) is irrelevant here, forbiding arbitrary arrest, detention or exile.

I have italicized the last phrase of this Article in the Universal Declaration because it makes it quite clear that, subject to the change of order, which has no effect on the meaning, this was the source from which the first sentence of Article 6.1 (art. 6-1) of the European Convention was derived (see text set out in paragraph 25 supra). It no more expresses in terms any substantive right of access to the courts independently of, and over and above the purely procedural guarantee of a fair trial, etc., which is all its actual terms specify, than does the parallel passage in Article 6.1 (art. 6-1) of the European Convention.

42. These provisions (Articles 8 and 10) of the Universal Declaration deserve to be specially noted because, in the Preamble to the European Convention, what is recited is that the Parties were resolved collectively to enforce "certain of the Rights stated in the Universal Declaration". They were not therefore purporting to provide for any rights not so stated - i.e. stated in that Declaration.

43. The next comparable instrument, the International Covenant on Civil and Political Rights, adopted in the United Nations in 1966, but not yet in force, has an Article 14 clearly founded on Article 10 of the Universal Declaration, and therefore on Article 6.1 (art. 6-1) of the European Convention; but there is no need to quote its terms because, apart from an initial phrase about the equality of all before the courts, and a few minor and insubstantial changes of wording and order, plus the omission of the reference to a hearing "within a reasonable time", it is exactly to the same effect as Article 6.1 (art. 6-1). Finally, the Inter-American Convention of San José (1969 - also not in force) has a provision (Article 8, paragraph 1) which at first sight seems to get nearer to conveying an express right of access, but in fact does not do so. To begin with, it comes under the headed rubric "Right to a Fair Trial" (garanties judiciaires), which labels it as falling into the procedural guarantee category. Secondly, its language clearly shows it to be of the same family and origin as the other comparable clauses in earlier instruments. It reads:

> "Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature."

If, in this provision, a full stop occurred after the word "hearing" in the opening line, and it then resumed separately with the rest of the text, it could be said that a general right of access was expressly formulated. It is quite clear however (omitting as irrelevant for present purposes the parenthetical phrase "with due guarantees and within a reasonable time") that the word "hearing" links up directly with (and is qualified by) the requirement of a hearing by a "competent ... tribunal". The emphasis, as in Article 6.1 (art. 6-

1) of the European Convention, is on the character of the hearing rather than on an a priori and independent right to have a hearing.

44. But the significant fact is that all the provisions above reviewed seem to have had their origin in a proposal of a much stronger and more explicit character. The point is succinctly made in the following passage from the statement made by counsel for the United Kingdom before the Commission when, speaking in particular of Article 8 of the Universal Declaration, he said[27]:

> "The text of Art. 8 was based upon an amendment introduced by the Mexican representative in the Third Committee of the General Assembly on 23 October 1948. The representative stated that his amendment only repeated the text of the Bogota Declaration which had recently been adopted unanimously by 21 Latin American Deputations. The relevant provision of the Bogota Declaration was Art. XVIII. This says: 'Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights'.
>
> The source of Art. 8 of the Universal Declaration in Art. XVIII of the Bogota Declaration is very interesting because Art. XVIII of the Bogota Declaration is in the first sentence talking about the right of every person to resort to the courts to ensure respect for his legal rights, and in Art. 8 of the Universal Declaration this has been inverted and narrowed to read: 'Everyone has a right to an effective remedy by the competent national tribunals'."

Counsel then subsequently[28] drew the following conclusion, which is also mine, namely that "if one looks at this history as a whole, what it amounts to is this: that what started in the Declaration of Bogota as a broad right of access has been narrowed down to a right of access related to the rights secured by the Convention".

45. Thus, over a period of some twenty years, there seems to have been what it would not be unfair to call a deliberate policy on the part of governments of avoiding coming to grips with the question of access, purely as such. This view is strengthened by the existence of evidence (see Document CDH (73) 33, at p. 45)* that Article 6.1 (art. 6-1) of the European Convention did at one stage of its drafting contain terms that might have been regarded as making provision for a right of access as such, but these subsequently disappeared, - the clearest possible indication of an intention not to proceed on those lines, especially as the concept equally never figured in terms in any of the human rights instruments drawn up subsequent to the European Convention (vide supra). In the technique of treaty interpretation there can never be a better demonstration of an

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[27] Loc. cit. in note 24 supra, at p. 47.
[28] Ibid. at p. 50.
* See note by the Registry on Page 53.

intention not to provide for something than first including, and then dropping it.

46. The conclusion I draw from the nature of the successive texts, combined with the considerations to which I have drawn attention in paragraph 38 above, is that the contracting States were content to rely de facto on the situation whereby, in practice, in all European countries a very wide measure of access to the courts was afforded; but without any definite intention on their part to convert this into, or commit themselves to the extent of, a binding international obligation on the matter (and see footnote 25 supra), - and more especially an obligation of the character which the Court, in the present case, has found to exist, - an obligation which, as the present case equally shows, is of a far more rigorous and far-reaching kind than the United Kingdom Government (obviously - see footnote 24 above) and a number of other governments parties to the Convention (most probably) had never anticipated as being mandatory[29]. This type of obligation cannot, for reasons already stated, be internationally acceptable unless it is defined and particularized, and its incidence and modalities specified. The Convention does not do this; and the Court, with good reason, does not compound the misconceptions of the Judgment by attempting a task that lies primarily within the competence of governments. As the Judgment itself in terms recognizes (paragraph 39, second section) - "It is not the function of the Court to elaborate a general theory of the limitations admissible in the case of convicted prisoners, nor even to rule in abstracto on the compatibility of ... the [United Kingdom] Prison Rules ... with the Convention". But if it is not the function of the Court to elaborate restrictions on the right, then a fortiori can it not be its function to postulate the right itself which is one that cannot operate in practice without the very restrictions the Court declines to elaborate.

2. Particular texts and terms

47. On the basis of the foregoing approach, the various relevant provisions of the Convention give rise to no difficulties of interpretation or necessity for vindicatory explanations, as they certainly do on the basis of the Court's approach. I will list and comment on these provisions, broadly in the order in which they occur: -

(a) The Preamble - This (as has already been mentioned in paragraph 42) recites specifically that the signatory Governments are resolved "to take the

[29] The United Kingdom argument based on the purely national treatment in the matter of access to the courts afforded by ordinary commercial treaties and by such multilateral conventions as the modern European Convention on Establishment, points to the probability that, squarely faced with having to do something about the question of access, governments would not have been willing to go beyond providing for national treatment in the matter; and of course Golder, a United Kingdom national, did receive treatment which was correct under the local national law and regulations.

first steps" for the collective enforcement of "certain of the Rights" stated in the Universal Declaration of Human Rights which, as has been seen (paragraph 41 supra) makes no provision for any independent right of access as such, so that such a right does not even enter into the category of those that the European Convention might cover. But even if it figured in that category as a right possibly to be covered - as, so to speak, a "qualifying right" – it would be a compelling implication of the language used in the Preamble, that it would not necessarily be included. Only "certain" of the qualifying rights were to figure, and a general right of access was not, on the basis of the Universal Declaration, even a qualifying right. In addition, the Parties were only proposing to take "the first steps", and to cover only "certain" of the rights. Thus, so far from it being "inconceivable" that provision for a right of access should not be found in the European Convention, that result becomes a fully conceivable one that need cause no surprises nor seizures.

(b) Article 1 (art. 1) of the Convention (see paragraphs 26-31 supra) has the effect of requiring that before it becomes incumbent on the contracting States to "secure to everyone within their jurisdiction" the rights and freedoms figuring in that part of the Convention that comprises Article 6.1 (art. 6-1), such rights and freedoms shall be "defined". No right of access however is there even mentioned, let alone "defined". Definitions must necessarily be express. No undefined right of access can therefore result by simple inference or implication from Article 6.1 (art. 6-1). The effect of Article 17 (art. 17) of the Convention (see footnote 17 supra) confirms and fortifies this view.

(c) Article 5, paragraph 4, and Article 13 (art. 5-4, art. 13)

(i) The Court's Judgment is correct in taking the view of these provisions described in footnote 14 above; but it is a view that, though correct, is incomplete, and misses an important part of what the United Kingdom was seeking to contend.

(ii) What these two Articles (art. 5-4, art. 13) provide is that the contracting States must furnish a remedy in their courts for contraventions of substantive rights or freedoms embodied in the Convention (this description is somewhat of a paraphrase of Article 5, paragraph 4 (art. 5-4), but basically true, and literally true of Article 13 (art. 13)). I agree with the Court that these provisions do not themselves embody any substantive rights or freedoms, or any general right of access, and therefore would not render any provision that did have that effect superfluous, as the United Kingdom Government contended. However, that Government also put forward what might be called the complement of this proposition, namely, that if a general right of access must, as the Court held, be deemed to be implied by Article 6.1 (art. 6-1) then Article 5, paragraph 4, and Article 13 (art. 5-4, art. 13), would in their turn be rendered superfluous because the right of access under Article 6.1 (art. 6-1) would provide all that was

needed. Hence the existence of these other two provisions tended to show that no right of access was comprised by Article 6.1 (art. 6-1). This argument is logically correct, but is not completely watertight since Articles 5.4 and 13 (art. 5-4, art. 13) speak of affording a remedy; and mere access does not necessarily entail a remedy: there can be access but no remedy available upon access. Nevertheless, if one were prepared to take a leaf out of the Court's book and employ the kind, or order, of argument the Court employs, one might say that since access without a remedy is of no avail, a right of access implies a right to a remedy - which is patently absurd. This would however precisely parallel the Court's conclusion that because right to a fair trial is of no avail without a trial, therefore a right to bring proceedings resulting in a trial must be implied. It would be difficult to make the non-sequitur clearer.

(d) The provisions of Article 6, paragraph 1 (art. 6-1) - The vital first sentence of this paragraph has already been quoted in paragraph 25 of the present Opinion, and the remaining sentence will be found set out in paragraph 24 of the Court's Judgment. It need not be quoted here because all it does, with obvious reference to the requirement of a "public hearing" stated in the first sentence, is to specify that judgment also must be "pronounced publicly", but that the press and the public may be excluded from all or part of the trial in certain circumstances which are then particularized in some detail. This sentence is therefore irrelevant for present purposes except that it is entirely of the same order as the first, and is linked to it, ejusdem generis, as an essentially procedural provision concerned solely with the incidents and modalities of trial in court. On the first sentence, and generally, the following comments are supplementary to those already made in paragraphs 25 and 33-34 supra (and see also paragraph 40 in fine):

(i) The "ejusdem generis" rule - The previous paragraphs of this Opinion just referred to, were directed to showing that Article 6.1 (art. 6-1) is a self-contained provision, complete in itself and needing no importations, supplements or elucidations in order to make its effect clear; and belonging to a particular order or category of clause, procedural in character and concerned exclusively with the modalities of trial in court. Its whole tenour is to that effect, and that effect only, as was eloquently pointed out in argument (CDH (73) 33 at p. 51)*. The ejusdem generis rule therefore requires that, if any implictions are to be drawn from the text for the purpose of importing into it, or supplementing it by, something that is not actually expressed there (and it is common ground that the right of access does not find expression in this text), these implications should be, or should relate to, something of the same order, or be in the same category of concept, as figures in the text itself. This would not be the case here. Any

* See note by the Registry on page 53.

right of access as such, while it has a procedural aspect, is basically a substantive right of a fundamental character. Even in its procedural aspects it is quite distinct from matters relating to the modalities of trial. As has already been pointed out, the concept of the incidents of a trial has only one necessary implication, viz. that a trial is taking place - that proceedings are in progress. It implies nothing in itself about the right to initiate them, which belongs to a different order of concept. Consequently it is not a legitimate process, and it contravenes accepted canons of interpretation, to imply the one from the other.

(ii) The rule "expressio unius est exclusio alterius" - This rule also is infringed by the conclusion arrived at in the Court's Judgment. This occurs more than once, but is best illustrated by the manner in which Article 6. 1 (art. 6-1) is dealt with at the beginning of paragraph 28 of the Judgment, where it is said that although the Article "does not state a right of access ... in express terms", it "enunciates rights which are distinct but stem from the same basic idea and which, taken together, make up a single right not specifically defined in the narrower sense of the term" - (actually, not defined at all[30]). What is conveniently overlooked here is that the only rights in fact "enunciated" in Article 6.1 (art. 6-1) (and ex hypothesi "enunciation" means expressed in terms) are not "distinct" rights, but rights all of the same order or category, viz. rights relating to the timing, conduct and course of a trial. There is nothing in this with which to constitute the pretended "single right" that is said to include a right of access in addition to the actually specified procedural rights. The latter, on the other hand, are explicitly stated in such a way as to call for the application of the expressio unius rule, - and since, for the reasons already given (paragraphs 25 and 34 supra), there is nothing in the Article that necessitates a right of access apart from the fact of access already had, this rule should be applied. At the risk of repetition, let the true position be stated once more, namely that the provisions of Article 6.1 (art. 6-1) will operate perfectly well as they are, whenever proceedings are in fact brought, without postulating any inherent right to bring them. The Article will operate automatically when, and if, there are proceedings. If for whatever reason – absence of right or other - they are not brought, then cadit quaestio: the occasion that would have brought the Article into play has simply not arisen. In consequence, there is no justification in this case for the failure to apply the expressio unius rule.

(iii) Equal treatment of civil and criminal proceedings - there is a further compelling, and perhaps more concrete, reason why no right of access, as opposed to a right to a fair trial, etc., can be implied in Article 6.1 (art. 6-1). This Article (art. 6-1) manifestly places civil and criminal proceedings on the same footing, - it deals with the matter of a fair trial in both contexts.

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[30] This is one of the places where the Court recognizes the undefined character of the right - see supra paragraphs 26-31, especially 29 and 30 and appurtenant footnotes.

Yet the question of a right of access as such must arise chiefly in connexion with civil proceedings where it is the plaintiff or claimant who initiates the action. Apart from the very limited and special class of case in which the private citizen can originate proceedings of a penal character, it is the authorities who start criminal proceedings; and in that context it would be manifestly absurd to speak of a right of access. It is no real answer to this to say that the right inheres only when it is needed and it is needed in the one case but not the other (or in any event the authorities can look after themselves). This is not the point. The point is that the Article (art. 6-1) is as much concerned with the criminal as with the civil field - indeed its importance probably lies chiefly in the former field, - yet this, the criminal field, is one in relation to which it is totally inapt in the vast majority of cases to speak of a right of access for the authorities who will be initiating the proceedings. This is a strong pointer to, or confirmation of, the conclusion that the Article (art. 6-1) is concerned solely with the proceedings themselves, not the right to bring them.

(iv) A public hearing "within a reasonable time" - There are other pointers in the same direction, which also involve the principle of maintaining a due congruity between the civil and criminal aspects of Article 6.1 (art. 6-1). One such pointer is afforded by the United Kingdom argument (only referred to in the Judgment (paragraph 32) in a manner that fails to bring out its relevance - indeed seems wholly to misunderstand it[31]) concerning the implications of the requirement in the Article (art. 6-1) that trial shall take place within a reasonable time. "Within a reasonable time" of what? The Article does not say. In the case of criminal proceedings there can be no room for doubt that the starting point must be the time of arrest or of formal charge. It is only common sense to suppose that it could not lie in an indeterminate preceding period when the authorities were perhaps considering whether they would make a charge, and were taking legal advice about that - or were trying to find the accused in order to arrest him. In my view exactly the same principle must apply mutatis mutandis to civil proceedings, not only because otherwise a serious degree of incommensurate treatment would be introduced between the two types of proceedings, but for practical reasons also. In civil proceedings, the period of reasonable time must begin to run from the moment the complaint is formalized by the issue of a writ, summons or other official instrument under, or in accordance with, which the defendant is notified of the action. This again is only common sense. Any period previous to that, while the plaintiff is considering whether to act, is taking legal advice, or is gathering evidence, is irrelevant or too indeterminate to serve, since no fixed moment could be found within it to act as a starting point for the lapse of a

[31] It is of course the trial that has to take place within a reasonable time after access has been had, not the access that has to be afforded within a reasonable time.

"reasonable time". If this were not so, the starting point could be "related back" for months or even, in some cases, years, thus making nonsense of the whole requirement of trial "within a reasonable time", the sole real object of which is to prevent undue delay in bringing causes to trial. But the effect of the Court's view is that since Article 6.1 (art. 6-1) itself does not specify any starting point; the Court would have to determine this ad hoc for, and in, each particular case. In consequence, governments could never know in advance within what precise period causes must be brought to trial in order to satisfy the requirements of the Article (art. 6-1), - a wholly unacceptable situation.

(v) The significance of all this is of course that anything relating to a right of access must concern the period prior to the formal initiation of proceedings, for once these have been started, access to the courts has been had, and therefore cadit quaestio. In consequence, any occurences relating to the right of access as such - in particular any alleged interference with or denial of it - must relate exclusively to the period before access is actually had by the initiation of proceedings, - i.e. before the period of a fair and public hearing within a reasonable time to which alone Article 6.1 (art. 6-1) refers; - and this again points directly to the conclusion that the Article does not purport to deal with access at all, since that matter relates to an antecedent period or stage.

(vi) The term "public hearing" also gives rise to difficulties if Article 6.1 (art. 6-1) is to be understood as providing for a right of access. Confining myself here to the case of civil proceedings, the term "public" suggests a hearing on the merits in open court such as will ordinarily occur if the proceedings run their normal course. But as has been seen (supra, paragraph 15), they may not do so, they may be stopped on various grounds at an earlier stage. The point is that if they are, this will very often not be at any public hearing, but before a minor judicial officer or a judge sitting in private (anglice "in chambers"), at which, usually, only the parties and their legal advisers will be present. If therefore a right of access were held to be implied by Article 6.1 (art. 6-1), this might, on the language of the Article have to be held to involve a sort of indefeasible right to a public hearing in all circumstances, anything less not being "access". This view is strongly confirmed by the tenour of the second sentence of Article 6.1 (art. 6-1) – see sub-paragraph (d) above. Here therefore is one of the connexions in which the correct meaning and scope of a right of access has not been thought out (see paragraphs 28 and 29 supra), - failing which the concept lacks both clarity and certainty. It is also the connexion in which Article 17 (art. 17) of the Convention is relevant – see footnote 17 supra, and sub-paragraph (b) of the present paragraph (47).

48. Conclusion on the question of right of access - I omit other points in order not further to overload this Opinion. But I have to conclude that - like it or not, so to speak - a right of access is not to be implied as being

comprehended by Article 6.1 (art. 6-1) of the Convention, except by a process of interpretation that I do not regard as sound or as being in the best interests of international treaty law. If the right does not find a place in Article 6.1 (art. 6-1), it clearly does not find a place anywhere in the Convention. This is no doubt a serious deficiency that ought to be put right. But it is a task for the contracting States to accomplish, and for the Court to refer to them, not seek to carry out itself.

Annex 679

Interpretation of the Convention of 1919 Concerning Employment of Women During the Night, Advisory Opinion of 1932, Permanent Court of International Justice, Dissenting Opinion of Judge Anzilotti

OPINION DISSIDENTE DE M. ANZILOTTI

1. — Je regrette de ne pouvoir être d'accord avec l'avis que la Cour vient de donner.

Selon moi, la question n'est pas de savoir s'il est possible de trouver un motif valable pour donner à l'article 3 de la Convention concernant le travail de nuit des femmes une interprétation autre que celle qui est conforme au sens naturel de ses termes ; et ceci bien que l'article soit parfaitement clair.

Si vraiment l'article 3, d'après le sens naturel des termes, était parfaitement clair, il ne serait guère admissible de chercher une interprétation autre que celle qui répond au sens naturel desdits termes.

Mais je ne vois pas comment il est possible de dire qu'un article d'une convention est clair avant d'avoir déterminé l'objet et le but de la convention, car c'est seulement dans cette convention et par rapport à cette convention que l'article assume sa véritable signification. Ce n'est que lorsqu'on connaît ce que les Parties contractantes se sont proposées de faire, le but qu'elles ont voulu atteindre, que l'on peut constater, soit que le sens naturel des termes employés dans tel ou tel article cadre avec la véritable intention des Parties, soit que le sens naturel des termes employés reste en deçà ou va au delà de ladite intention. Dans le premier cas, on dit avec raison que le texte est clair et qu'on ne saurait, sous couleur d'interprétation, lui donner une signification différente de celle qui répond au sens naturel des mots. Dans les autres cas, puisque les mots n'ont de valeur qu'en tant qu'expression de la volonté des Parties, on constatera, soit que les termes ont été employés dans un sens plus large que celui qui leur revient normalement (interprétation dite extensive), soit que les termes ont été employés dans un sens plus étroit que celui qui leur revient normalement (interprétation restrictive).

La première question qui se pose est donc celle de savoir quels sont l'objet et le but de la convention dans laquelle trouve place l'article qu'il s'agit d'interpréter.

DISSENTING OPINION BY M. ANZILOTTI.

[*Translation.*]

1.—I regret that I am unable to concur in the opinion given by the Court.

In my view the question is not whether it is possible to find a valid ground for placing upon Article 3 of the Convention concerning the employment of women during the night an interpretation other than that which is consistent with the natural meaning of its terms; notwithstanding the fact that the Article is perfectly clear.

If Article 3, according to the natural meaning of its terms, were really perfectly clear, it would be hardly admissible to endeavour to find an interpretation other than that which flows from the natural meaning of its terms.

But I do not see how it is possible to say that an article of a convention is clear until the subject and aim of the convention have been ascertained, for the article only assumes its true import in this convention and in relation thereto. Only when it is known what the Contracting Parties intended to do and the aim they had in view is it possible to say either that the natural meaning of terms used in a particular article corresponds with the real intention of the Parties, or that the natural meaning of the terms used falls short of or goes further than such intention. In the first alternative it may rightly be said that the text is clear and that it is impossible, on the pretext of interpretation, to endow it with an import other than that which is consistent with the natural meaning of the words. In the other alternative, since the words have no value save as an expression of the intention of the Parties, it will be found either that the words have been used in a wider sense than normally attaches to them (broad interpretation) or that they have been used in a narrower sense than normally attaches to them (narrow interpretation).

The first question which arises therefore is what is the subject and aim of the convention in which occurs the article to be interpreted.

2. — La Convention de Washington sur le travail de nuit des femmes a été conclue conformément à la Partie XIII du Traité de Versailles et pour réaliser une partie du programme que ce traité assigne à l'Organisation internationale du Travail.

A mon avis, il est hors de doute que la Partie XIII du Traité de Versailles a pour objet la réglementation du travail des ouvriers. Je puis admettre que les dispositions de cette Partie ne limitent pas *obligatoirement* la compétence de l'Organisation internationale du Travail aux ouvriers proprement dits et qu'il lui reste la possibilité de s'occuper également de certaines autres catégories de travailleurs ; mais cette dernière tâche est secondaire et en quelque sorte accidentelle, alors que la réglementation des conditions du travail des ouvriers constitue la tâche essentielle et normale de l'Organisation.

Ceci résulte, en premier lieu, du rapport historique qui passe entre cette Partie du Traité de Versailles et ce mouvement scientifique et pratique qui, surtout dès les premières années du siècle, avait préparé et déjà partiellement réalisé ce qu'on appelait tantôt le « droit international ouvrier », tantôt le « droit international du travail » et qui, sous un titre ou sous l'autre, avait pour but de rendre possibles et de garantir, moyennant des accords entre États, certaines mesures de protection ouvrière. La Partie XIII du Traité de Versailles reprend et continue ce mouvement dans les conditions nouvelles issues de la guerre : la base est de beaucoup plus large, puisque l'Organisation embrasse, au moins potentiellement, tous les États ; la procédure plus efficace, puisque l'Organisation est permanente ; mais le but et l'objet sont restés les mêmes, il s'agit toujours de la protection ouvrière moyennant une réglementation des conditions du travail.

Rien dans la Partie XIII du Traité de Versailles — ni, si l'on veut s'y référer, dans les travaux préparatoires — n'autorise à penser qu'il ne s'agirait plus de la protection des ouvriers, mais des travailleurs en général. Par contre, et malgré les défauts ou les incohérences de la terminologie dans l'un ou l'autre texte, la Partie XIII du Traité de

2.—The Convention of Washington concerning the employment of women during the night was concluded in accordance with Part XIII of the Treaty of Versailles and as a part of the programme which this Treaty assigns to the International Labour Organization.

In my view there can be no doubt that Part XIII of the Treaty of Versailles has for its object the regulation of the employment of manual workers (*ouvriers*). I am prepared to admit that the provisions of this Part do not *necessarily* restrict the competence of the International Labour Organization to manual workers (*ouvriers*) properly so-called and that it is open to that Organization also to concern itself with certain other categories of workers (*travailleurs*); but this latter task is a secondary and in a sense an incidental one, whereas the regulation of the conditions of employment of manual workers (*ouvriers*) is the essential and normal task of the Organization.

This follows, in the first place, from the historical connection between this Part of the Treaty of Versailles and the scientific and practical movement which, especially since the early years of the century, had prepared and already in part brought into being what was called "international labour legislation" (in French: *"droit international ouvrier"* or *"le droit international du travail"*) and which, whatever name it was known by, was intended to make possible and to guarantee, by means of international agreements, certain measures for the protection of labour. Part XIII of the Treaty of Versailles takes up and carries on this movement under the new conditions resulting from the war: the basis adopted is much broader, since the Organization includes, at all events potentially, all States; the procedure is more effective since the Organization is permanent; but the subject and aim remain the same, viz. the protection of labour by the regulation of conditions of work.

There is nothing in Part XIII of the Treaty of Versailles—nor, if it is desired to refer to them, in the records of the preparatory work—to justify the idea that what was aimed at was no longer the protection of manual workers (*ouvriers*) but the protection of workers in general (*travailleurs*). On the contrary, notwithstanding the deficiencies

Versailles indique clairement que c'est bien de la protection ouvrière qu'il s'agit, que c'est l'ancien programme de réformes sociales dans l'intérêt de la classe ouvrière que les Hautes Parties contractantes conviennent de réaliser par une action commune.

C'est ainsi que le préambule de cette Partie du Traité de Versailles, dans lequel est exposé le programme de l'Organisation, après avoir constaté « qu'il existe des conditions de travail impliquant pour un grand nombre de personnes l'injustice, la misère et les privations, ce qui engendre un tel mécontentement que la paix et l'harmonie universelles sont mises en danger », et « qu'il est urgent d'améliorer ces conditions », indique sur quoi ces améliorations devraient principalement porter et mentionne « la réglementation des heures de travail, la fixation d'une durée maxima de la journée et de la semaine de travail, le recrutement de la main-d'œuvre, la lutte contre le chômage, la garantie d'un salaire assurant des conditions d'existence convenables, la protection des travailleurs contre les maladies générales ou professionnelles et les accidents résultant du travail, la protection des enfants, des adolescents et des femmes, les pensions de vieillesse et d'invalidité, la défense des travailleurs occupés à l'étranger, l'affirmation du principe de la liberté syndicale, l'organisation de l'enseignement professionnel et technique et autres mesures analogues ». De toute évidence, ce sont les revendications que la classe ouvrière avait formulées depuis longtemps et qui sont étroitement liées aux conditions du travail manuel dans l'organisation industrielle moderne.

De même, le préambule explique pourquoi ces améliorations doivent faire l'objet d'une entente internationale : c'est que « la non-adoption par une nation quelconque d'un régime de travail réellement humain fait obstacle aux efforts des autres nations désireuses d'améliorer le sort des travailleurs dans leurs propres pays ». En effet, les efforts humanitaires et réformateurs sur le terrain de la protection ouvrière avaient, jusqu'à ce moment, rencontré l'objection la plus sérieuse dans l'impossibilité de mettre l'industrie nationale dans une condition d'infériorité, en lui imposant des charges qui ne grèveraient pas l'industrie étrangère. La Partie XIII du Traité de

or inconsistencies of the terms used in one or other of the texts, Part XIII of the Treaty of Versailles clearly indicates that its object is the protection of labour, that what the High Contracting Parties agree jointly to carry out is the old programme of social reforms in the interest of the working class.

Thus, the Preamble of this Part of the Treaty of Versailles, in which is set out the programme of the Organization, after stating that "conditions of labour exist involving such injustice, hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperilled" and that "an improvement of those conditions is urgently required", indicates the principal directions in which such improvements should be made, and mentions "the regulation of the hours of work, including the establishment of a maximum working day and week, the regulation of the labour supply, the prevention of unemployment, the provision of an adequate living wage, the protection of the worker against sickness, disease and injury arising out of his employment, the protection of children, young persons and women, provision for old age and injury, protection of the interests of workers when employed in countries other than their own, recognition of the principle of freedom of association, the organization of vocational and technical education and other measures". Clearly, these are the claims which the working class had long since raised and which are closely bound up with the conditions of manual work in modern industrial organization.

Similarly, the Preamble explains why these improvements must form the subject of an international understanding: "the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries". In point of fact, humanitarian efforts to bring about reforms in the domain of the protection of labour had hitherto encountered a very serious objection consisting in the impossibility of placing a national industry in a position of inferiority by imposing upon it burdens which foreign industry had not to bear. Part XIII of the Treaty of Versailles is designed to

Versailles a pour but d'éliminer cet obstacle : elle vise donc la réglementation du travail des ouvriers dans l'industrie, ce mot « industrie » pouvant d'ailleurs être pris dans son sens large et qui comprend aussi bien l'industrie proprement dite que l'agriculture (Avis n° 2).

Cette idée, qui ressort avec tant de netteté du préambule, sert également de base à l'organisation décrite dans le chapitre premier de cette Partie du Traité de Versailles, et qui présuppose l'existence d'organisations professionnelles des employeurs et des travailleurs. On n'a jamais mis en doute que les organisations professionnelles des travailleurs sont les organisations ouvrières par opposition aux organisations patronales. Si l'on met de côté cette idée, toute la Partie XIII du Traité de Versailles, qu'elle soit bonne ou mauvaise, devient incompréhensible ; je ne vois pas, par exemple, comment on pourrait déterminer quelles sont les organisations les plus représentatives des travailleurs d'un pays donné, si l'on devait tenir compte des organisations de travailleurs autres que les organisations ouvrières.

Il convient de mentionner enfin l'article 427, qui contient l'énoncé des « principes généraux », savoir « des méthodes et des principes pour la réglementation des conditions du travail » que les Hautes Parties contractantes conviennent d'appliquer. Après avoir rappelé que « le bien-être physique, moral et intellectuel des travailleurs salariés est d'une importance essentielle au point de vue international », cet article affirme « qu'il y a des méthodes et des principes pour la réglementation des conditions du travail que toutes les communautés industrielles devraient s'efforcer d'appliquer, autant que les circonstances spéciales dans lesquelles elles pourraient se trouver le permettraient » ; méthodes et principes qui, « s'ils sont adoptés par les communautés industrielles qui sont Membres de la Société des Nations .... répandront des bienfaits permanents sur les salariés du monde ». J'ai quelque peine à comprendre comment tout cela aurait été écrit en ayant en vue autre chose que le travail des ouvriers dans l'industrie.

Quant aux « méthodes et principes » énoncés dans l'article, il suffit de les lire pour voir qu'ils ont pour objet la réalisation de certaines mesures de protection qui visent directement les ouvriers, même si la possibilité n'est pas exclue de

remove this obstacle: accordingly it contemplates the regulation of conditions of work in industry, this word "industry" being construed in its wider sense and as covering agriculture as well as industry properly so-called (Opinion No. 2).

This idea, which emerges so clearly from the Preamble, also serves as the basis of the organization which is described in Chapter I of this Part of the Treaty of Versailles and which presupposes the existence of industrial organizations of employers and workers. It has never been questioned that the workers' industrial organizations are manual workers' organizations (*organisations ouvrières*) as opposed to employer's organizations. If this idea be not accepted, the whole of Part XIII of the Treaty of Versailles—whether sound or not—becomes incomprehensible; I do not see, for instance, how one could decide which organizations were most representative of the workers in a particular country, if account had to be taken of labour organizations other than manual labour organizations (*organisations ouvrières*).

Finally, it should be observed that Article 427 enunciates "general principles", i.e. "methods and principles for regulating labour conditions" which the High Contracting Parties agree to apply. After observing that "the well-being, physical, moral and intellectual, of industrial wage-earners is of supreme international importance", this Article declares that "there are methods and principles for regulating labour conditions which all industrial communities should endeavour to apply, so far as their special circumstances will permit"; which methods and principles, "if adopted by the industrial communities who are Members of the League .... will confer lasting benefits upon the wage-earners of the world". I have some difficulty in understanding how all this could have been written with anything else in mind except the labour conditions of manual workers.

As regards the "methods and principles" enunciated in the Article, perusal of them will suffice to show that their object is the introduction of certain measures of protection directly concerning manual workers (*ouvriers*), even though the possi-

leur donner parfois une application plus étendue. Ce n'est pas sans importance de constater que « le principe dirigeant » mentionné dans le deuxième alinéa de l'article 427, et formulé sous le n° 1, est celui d'après lequel « le travail ne doit pas être considéré simplement comme une marchandise ou un article de commerce ».

3. — Si la tâche que la Partie XIII du Traité de Versailles assigne à l'Organisation créée par elle est la réglementation du travail des ouvriers, il n'est que naturel de conclure que toute convention stipulée en vertu de ladite Partie doit être censée avoir pour objet le travail des ouvriers et non le travail en général. Une volonté différente et plus étendue est possible, mais on ne saurait la présumer : elle doit être constatée.

C'est surtout sur ce point que je me trouve en désaccord avec le présent avis. La thèse de la Cour paraît être la suivante : l'article 3 de la convention, pris isolément et par lui-même, s'applique certainement aux femmes visées dans la question soumise à la Cour ; dès lors, pour interpréter cet article comme ne s'appliquant pas aux femmes qui occupent des postes de surveillance ou de direction, il est nécessaire de trouver un motif valable pour donner à l'article une interprétation autre que celle qui est conforme au sens naturel des termes. D'après moi, par contre, l'article 3 ne doit pas être pris isolément et par lui-même, mais il doit être interprété par rapport à la convention dont il fait partie, et qui, de par sa nature, vise le travail des ouvrières ; dès lors, il y a lieu seulement de se demander si, vu les termes employés, cet article permet d'établir que la volonté des Hautes Parties contractantes a été de défendre, non seulement le travail de nuit des ouvrières, mais en général le travail de nuit des femmes dans l'industrie.

A cette question, je crois devoir répondre négativement. Pour autant que je le vois, le seul argument que l'on peut invoquer à l'appui de l'interprétation selon laquelle la Convention de Washington viserait en général toutes les femmes et non seulement les ouvrières, est que cette convention, dans son article 3, de même, d'ailleurs, que dans d'autres endroits,

bility of sometimes endowing such measures with a wider application is not excluded. It is worthy of note that the "guiding principle" referred to in the second paragraph of Article 427 and formulated under No. 1 is to the effect that "labour should not be regarded merely as a commodity or article of commerce".

3.—If the task allotted by Part XIII of the Treaty of Versailles to the Organization which it establishes is the regulation of conditions of manual labour, it is only natural to infer that any convention concluded under this Part is to be regarded as relating to manual labour and not to labour in general. Another and more general intention is conceivable but cannot be presumed: it must be proved.

It is in regard to this point more particularly that I disagree with the present opinion. The Court's view appears to be as follows: Article 3 of the Convention, taken by itself and considered separately, certainly applies to the women referred to in the question submitted to the Court; accordingly, to be able to construe it as not applying to women who hold positions of supervision or management, some valid ground for construing the Article otherwise than in accordance with the natural meaning of the words must be found. In my view, on the other hand, Article 3 should not be taken by itself and considered separately; it should be construed in relation to the Convention of which it forms part and which, by its nature, concerns the employment of women manual workers (*ouvrières*). Accordingly, it has merely to be considered whether, having regard to the terms used, this Article affords proof that the intention of the High Contracting Parties was to prohibit, not only the employment of women manual workers during the night, but in general the employment at night of women in industry.

This question I feel bound to answer in the negative. As I see it, the only argument that can be adduced in support of the interpretation that the Washington Convention applies to women in general and not only to women manual workers (*ouvrières*) is that that Convention, in Article 3, as also in other places, uses the expression "women" without adding

emploie l'expression « femmes » sans rien ajouter qui indique que c'est des ouvrières et non des femmes en général qu'il s'agit.

Mais cet argument, déjà en soi-même assez faible, — car il ne tient aucun compte de la nature de la convention dans laquelle l'expression est employée, — perd toute sa valeur lorsqu'on constate que cette expression est couramment employée dans les textes relatifs à la réglementation du travail pour désigner les femmes ouvrières, de même que les expressions enfants, adolescents désignent, non les enfants et les adolescents en général, mais les enfants ou adolescents qui effectuent un travail d'ouvrier. Les lois nationales en fourniraient un grand nombre d'exemples ; mais je me borne à mentionner le préambule de la Partie XIII du Traité de Versailles et l'article 427, n° 6, de ce traité, de même que la Convention de Berne de 1906 sur l'interdiction du travail de nuit des femmes employées dans l'industrie, où la même expression générale est employée à maintes reprises pour indiquer les femmes ouvrières. Il m'est difficile de penser que les délégués à la Conférence de Washington, qui devaient avoir une certaine familiarité avec les textes dont il s'agit, se seraient servi d'une expression tout au moins assez douteuse, si vraiment leur volonté avait été d'étendre l'interdiction à toutes les femmes.

4. — Pour ces motifs, je suis d'avis qu'une interprétation correcte de l'article 3 de la Convention de Washington porte à conclure que cette convention s'applique exclusivement aux ouvrières.

Si, toutefois, un doute était possible, il y aurait lieu d'avoir recours aux travaux préparatoires, qui, dans ce cas, ne seraient pas invoqués pour élargir ou restreindre un texte clair en soi-même, mais pour constater l'existence d'une intention qui ne résulterait pas nécessairement du texte, mais que ce texte n'exclurait pas nécessairement non plus.

Or, les travaux préparatoires démontrent de la manière la plus évidente que l'intention de la Conférence de Washington a été de maintenir — tout en adoptant, pour des raisons techniques, un texte de convention nouvelle — les lignes essentielles de la Convention de Berne, sauf un certain nombre de

anything to indicate that women manual workers and not women in general are meant.

But this argument, which in itself is sufficiently weak, for it has no regard to the nature of the Convention in which the expression is used, loses all its force when we observe that this expression is used in documents relating to labour legislation to designate women industrial workers, just as the expressions children and young persons mean, not children and young persons in general, but those engaged in manual work (*travail d'ouvrier*). National legislation would furnish a large number of examples; but I will only mention the Preamble of Part XIII of the Treaty of Versailles and Article 427, No. 6, of that Treaty, as also the Convention of Berne of 1906 concerning the prohibition of night work for women employed in industry, where the same general expression is used repeatedly to indicate women manual workers (*ouvrières*). I find it difficult to believe that the delegates at the Washington Conference, who must have been more or less familiar with the texts in question, should have used an expression which, to say the least, is ambiguous, if they really intended to extend the prohibition to all women.

4.—For these reasons, I am of opinion that a correct interpretation of Article 3 of the Convention of Washington leads to the conclusion that that Convention applies exclusively to women manual workers.

If however any doubt were possible, it would be necessary to refer to the preparatory work, which, in such case, would be adduced not to extend or limit the scope of a text clear in itself, but to verify the existence of an intention not necessarily emerging from the text but likewise not necessarily excluded by that text.

Now the preparatory work shows most convincingly that the intention of the Washington Conference was to maintain—whilst for technical reasons adopting a new convention—the main lines of the Berne Convention, save for a certain number of clearly indicated modifications none of which relate to the

modifications bien précisées et dont aucune n'a trait à notre question. Et puisque la Convention de Berne, d'après ses termes mêmes et d'après l'interprétation universellement adoptée, vise seulement les ouvrières, il en résulte que l'intention de la Conférence était de réglementer le travail de nuit des femmes ouvrières. Les travaux préparatoires confirmeraient ainsi, s'il en était besoin, l'interprétation qui, selon moi, découle naturellement du texte de la convention.

5. — Ceci dit, il me reste simplement à ajouter que la réponse à la question posée à la Cour aurait dû, selon moi, s'appuyer sur une double recherche. D'un côté, sur une détermination aussi exacte que possible de la catégorie de travailleurs (ouvriers) auxquels se réfère la Partie XIII du Traité de Versailles ; catégorie dont la notion est loin d'être claire et précise. De l'autre côté, sur la nature des fonctions de surveillance ou de direction visées dans la requête, afin d'établir si, et, le cas échéant, dans quelles circonstances, les femmes qui exercent ces fonctions peuvent rentrer dans la catégorie de travailleurs dont il s'agit.

(*Signé*) D. ANZILOTTI.

question before us. And since the Berne Convention, according both to its actual terms and to the universally adopted interpretation thereof, refers only to women manual workers, it follows that the intention of the Conference was to regulate the night employment of women manual workers. Thus the preparatory work would, if need be, confirm the interpretation which, in my view, naturally flows from the text of the Convention.

5.—This being so, it only remains for me to add that the answer to the question put to the Court should, in my view, have been based on investigations in two directions. On the one hand, it should have sought to obtain as accurate as possible a definition of the category of workers (manual workers: *ouvriers*) referred to in Part XIII of the Treaty of Versailles; a category which is far from being clear and definite. On the other hand, it should have investigated the nature of the duties of supervision or management referred to in the request, in order to establish whether and, if so, in what circumstances, women who are engaged in these duties can be included in the category of workers in question.

(*Signed*) D. ANZILOTTI.