



LL.B. II Term

LB-205 Public International Law

Cases Selected and Edited By

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Course Name- Public International Law
LB-205

Course Objectives:

- Introduction to the relevance and scope of the Public International Law in the globalized world with special reference to India;
- Examine the jurisprudential doctrines, practices and legal instruments that have been instrumental in its formulation, development and functioning;
- Create awareness about the structures and characteristics of Public International Law with emphasis on specific areas of the discipline;
- Examine the position of India vis-à-vis Public International Law and its implementation in India; and
- Engage the students with the cases decided by ICJ and other relevant dispute settlement bodies.

Intended Learning Outcomes:

- Understand the meaning of Public International Law, its legal basis, development, approaches and its position vis-à-vis the Indian legal system;
- Distinguish between various sources of Public International Law and their respective use in any given dispute involving questions of law;
- Understand the relationship between Public International Law and the national legal system with special emphasis on India; &
- Understand and reflect upon the jurisprudential doctrines and law related to the principle of State Responsibility, Law of the Sea, State Jurisdiction, Diplomatic and Consular Immunities.

Prescribed Books

- Malcolm N. Shaw, International Law (9th ed., 2021), Cambridge University Press
- D. Harris & Sandesh Sivakumaran, Cases and Materials on International Law (9th ed., 2020), Sweet & Maxwell
- James Crawford, Brownlie's Principles of Public International Law (9th ed., 2019), Oxford University Press
- Gurdip Singh, International Law (3rd ed., 2015), Eastern Book Company
- V. K. Ahuja, Public International Law (1st ed. 2015), Lexis Nexis
- S. K. Verma, An introduction to Public International Law (3rd ed. 2019), Satyam Law International
- Kaul, J.L. & Anupam Jha, Shifting Horizons of Public International Law, (1st ed. 2018), Springer

Prescribed Treaties

- Charter of the United Nations, 1945
Statute of the International Court of Justice, 1945
International Covenant on Civil and Political Rights (ICCPR), 1966
- International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966
 - Optional Protocols to ICCPR, ICESCR, CEDAW, CRC, CRPD

- European Convention on Human Rights, 1950, Protocol 9 of 1990 and Protocol 11 of 1994
- United Nations Convention on Law of the Sea, 1982
- Agreement relating to the Implementation of Part XI of the United Nations Convention of 1994 on the Law of the Sea of 10 December 1982 v
- The Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act, 1976

Course Syllabus

Topic 1: Nature and Development of International Law (10 hours)

1.1 Definition of International Law

1.2 Development of International Law – Need for international peace and security, establishment of the United Nations, development of different generations of human rights

1.3 Codification of International Law: Work of International Law Commission

1.4 Sanctions of International Law- Security Council, General Assembly, ICJ, Human Rights Council, ITLOS, ICC, PCA, sanctions under different human rights treaties etc.

1.5 Subjects of International Law: Position of States, International Organizations, Individuals- Establishment of International Organizations, development of human rights and position of individuals

1. *Reparation for Injuries Suffered in the Service of the United Nations Case. ICJ Rep.1949, p. 174...1*

2. *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v Russian Federation), ICJ Rep. (2019)*

1.6 Third World and International Law

Topic 2: Sources of International Law (9 hours)

2.1 Statute of the International Court of Justice, 1945 (Article 38)

2.1.1 International Treaties and Conventions

2.1.2 International Custom

3. *Lotus Case (France v. Turkey), PCIJ, Ser. A, No. 10 (1927)*

4. *North Sea Continental Shelf Cases, ICJ Rep. 1969, p. 3127*

5. *Right of Passage over Indian Territory (Merits) (Portugal v. India), ICJ Rep. 1960 p. 67*

6. *Asylum Case (Columbia v. Peru), ICJ Rep. 1950, p. 26613*

2.1.3 General Principles of Law Recognized by Civilized Nations

7. *Advisory Opinion of ICJ on the Effect of Awards of Compensation made by the United Nations Administrative Tribunal , 1954 International Law Reports 31021*

8. *Island of Palmas Case (Netherlands v. United States) (1928) Permanent Court of Arbitration, 2 R.I.A.A. 829*

9. *Temple of Preah Vihear Case (Merits) (Cambodia v. Thailand), ICJ Reports 1962, p.624*

2.1.4 Judicial Decisions, Juristic Opinion

2.1.5 <i>Ex aequo et bono</i>	
2.2 Other Sources of International Law	
2.2.1 Resolutions of General Assembly	
10. <i>Advisory Opinion of ICJ on the Legality of the Threat or Use of Nuclear Weapons</i> , 35 <i>International Legal Materials</i> 809 (1996)	30
2.2.2 Resolutions of Security Council	
11. <i>Advisory Opinion of ICJ on Namibia</i> , ICJ Rep. 1971, p. 16	
12. <i>Advisory Opinion of ICJ in Western Sahara Case</i> , ICJ Rep. 1975, p. 12	
13. <i>Advisory Opinion of ICJ in Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo Case</i> , ICJ Rep. 2010	33
2.2.3 Advisory Opinions of PCIJ and ICJ	
14. <i>Advisory Opinion of Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965</i> , ICJ Rep. 2019	

Topic 3 : Relationship Between International Law and Municipal Law (9 hours)

3.1. Theories	
3.1.1 Monistic Theory	
3.1.2 Dualistic Theory	
3.2 Practice of States: India, United Kingdom, United States of America	
15. <i>In Re Berubari Union No. (I)</i> , AIR 1960 SC 845 : (1960) 3 SCR 250	37
16. <i>Ram Kishore Sen v. Union of India (1966)</i> 1 SCR 430 : AIR 1966 SC 644	46
17. <i>Jolly George Varghese v. Bank of Cochin</i> , AIR 1980 SC 470 (1980) 2 SCC 360.....	52
18. <i>Gramophone Company of India Ltd. v. Birendra Bahadur Pandey</i> , AIR 1984 SC 667: (1984) 2 SCC 534	
19. <i>Union of India v. Sukumar Sengupta</i> , AIR 1990 SC 1692 : 1990 Supp. SCC 545	
20. <i>Vellore Citizens' Welfare Forum v. Union of India (1996)</i> 5 SCC 647.....	59
21. <i>Vishaka v. State of Rajasthan</i> , AIR 1997 SC 3011 : (1997) 6 SCC 241.....	63
22. <i>Justice K S Puttaswamy (Retd.) v. Union of India (2017)</i> 6 SCC 235.....	71

Topic 4: State Responsibility (8 hours)

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23. <i>Corfu Channel Case</i> , ICJ Rep. 1949, p. 4	
24. <i>Barcelona Traction, Light and Power Co. Ltd. Case</i> , ICJ Rep.1964, p. 6	
25 <i>Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)</i> , ICJ Rep.1980, p.3	
26. <i>Nicaragua Case (Nicaragua v. USA)</i> ICJ Rep.1986, p. 14	74
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4.4.1 Restitution	
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4.4.3 Satisfaction	
4.4.4 Guarantee against Repetition	
28. <i>Certain Activities Carried Out By Nicaragua in the Border Area (Costa Rica v Nicaragua) ICJ Reports 2018</i>	
29. <i>Armed Activities on the Territory of The Congo (Democratic Republic of the Congo v Uganda) ICJ Rep 2022</i>	92
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Topic 5: Law of the Sea (9 hours)

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31. <i>Corfu Channel Case, ICJ Rep. 1949, p. 4</i>	119
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5.1.3 Continental Shelf	
5.1.4 Exclusive Economic Zone	
5.1.5 High Seas	
5.2 Delimitation of Adjacent and Opposite Maritime Boundaries	
32. <i>North Sea Continental Shelf Cases, ICJ Rep. 1969, p. 3</i>	127
33. <i>Libya v. Tunisia Continental Shelf Case, ICJ Rep. 1982, p. 17</i>	139
34. <i>Republic of Italy v. Union of India (2013) 4 SCC 721</i>	147
35. <i>In the Matter of the Bay of Bengal Maritime Boundary Arbitration (between the People's Republic of Bangladesh and the Republic of India), PCA, 2014</i>	
36. <i>Maritime Delimitation in the Indian Ocean (Somalia v Kenya) ICJ Rep 2021</i>	163
5.3 Concept of “Common Heritage of Mankind” Relating to the Resources of International Seabed Area	
5.4 International Seabed Mining – Parallel System of Mining	
5.5 Indian Maritime Interests, Policy and Law	
5.6 International Tribunal for the Law of the Sea	

Topic 6: State Jurisdiction (5 hours)

- 6.1. Territorial Jurisdiction
- 6.2. Jurisdiction based on nationality, protective principle
- 6.3. Universal Jurisdiction
- 6.4. Extra territorial Jurisdiction of State
- 6.5. Extradition, Deportation, Asylum
- 37. *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* ICJ Rep. 2002, p.3
- 38. *Abu Salem v. State of Maharashtra (2011)* SCC 214.....177
- 39. *Arrest and Restoration of Savarkar (France/Great Britain, 1911)*.....186

Topic 7: Sovereign, Diplomatic, and Consular Immunity/Privileges (5 hours)

- 7.1. Diplomatic agents- Types
- 7.2. Consuls
- 7.3. Sovereign and Non-Sovereign Acts
- 7.4. Diplomatic Immunity: personal and property
- 7.5. Consular Privileges and Immunities
- 40. *The Schooner Exchange v. McFaddon (1812)* 7 Cranch 116
- 41. *Case Concerning U.S. Diplomatic and Consular Staff in Tehran, ICJ Rep. 1980, p. 3*.....189
- 42. *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)* ICJ Rep. (2008)
- 43. *Jadhav Case (India v Pakistan), ICJ Rep. (2019)*.....208

Important Note:

- The topics, cases and suggested readings given above are not exhaustive. The Committee of teachers teaching the Course shall be at liberty to revise the topics/cases/suggested readings.
- Students are required to study/refer to the treaties as amended from time to time, and consult the latest editions of books.

NATURE AND DEVELOPMENT OF INTERNATIONAL LAW

***REPARATION FOR INJURIES SUFFERED IN THE SERVICE OF
THE UNITED NATIONS***

I.C. J. Reports 1949, p. 174

On December 3rd, 1948, the General Assembly of the United Nations adopted the following Resolution:

"Whereas the series of tragic events which have lately befallen agents of the United Nations engaged in the performance of their duties raises, with greater urgency than ever, the question of the arrangements to be made by the United Nations with a view to ensuring to its agents the fullest measure of protection in the future and ensuring that reparation be made for the injuries suffered; and

Whereas it is highly desirable that the Secretary General should be able to act without question as efficaciously as possible with a view to obtaining any reparation due; therefore

The General Assembly

Decides to submit the following legal questions to the International Court of Justice for an advisory opinion:

1. In the event of an agent of the United Nations in the performance of his duties suffering injury in circumstances involving the responsibility of a State, has the United Nations, as an Organization, the capacity to bring an international claim against the responsible *de jure* or *de facto* government with a view to obtaining the reparation due in respect of the damage caused (a) to the United Nations, (b) to the victim or to persons entitled through him?
2. In the event of an affirmative reply on point 1 (b), how is action by the United Nations to be reconciled with such rights as may be possessed by the State of which the victim is a national?

A State can bring an international claim against another State. Such a claim takes the form of a claim between two political entities equal in law, similar in form, and both the direct subjects of international law. It is dealt with by means of negotiation, and cannot, in the present state of the law as to international jurisdiction, be submitted to a tribunal, except with the consent of the States concerned.

When the Organization brings a claim against one of its Members, this claim will be presented in the same manner, and regulated by the same procedure. It may, when necessary, be supported by the political means at the disposal of the Organization. In these ways the Organization would find a method for securing the observance of its rights by the Member against which it has a claim. But, in the international sphere, has the Organization such a nature as involves the capacity to bring an international claim ?

In order to answer this question, the Court must first enquire whether the Charter has given the Organization such a position that it possesses, in regard to its Members, rights which it is entitled to ask them to respect. In other words, does the Organization possess international

personality? This is no doubt a doctrinal expression, which has sometimes given rise to controversy. But it will be used here to mean that if the Organization is recognized as having that personality, it is an entity capable of availing itself of obligations incumbent upon its Members. To answer this question, which is not settled by the actual terms of the Charter, we must consider what characteristics it was intended thereby to give to the Organization.

The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community. Throughout its history, the development of international law has been influenced by the requirements of international life, and the progressive increase in the collective activities of States has already given rise to instances of action upon the international plane by certain entities which are not States. This development culminated in the establishment in June 1945 of an international organization whose purposes and principles are specified in the Charter of the United Nations. But to achieve these ends the attribution of international personality is indispensable.

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; by authorizing the General Assembly to make recommendations to the Members by giving the organization legal capacity and privileges and immunities in territory of each of its members; and by providing for the conclusion of agreement between the organization and its members.

Practice- in particular the conclusion of convention to which the organization is a party- has confirmed the character of an organization, which occupies a position in certain respect in detachment from its members, from its members, and which is under a duty to remind them, if need be, of certain obligations. It must be added that the organization is a political body, charged, with the political tasks of an important character, and covering a wide field namely the maintenance of international peace and security, the development of friendly relation among nation, and the achievement of international co-operation in the solution of problem of an economic, social, cultural or humanitarian character (Article 1); and in dealing with its members of it employs political means. The "convention on the privileges and immunities of the U.N" of 1946 creates right and duties between each of the signatories and the organization (see in particular, section 35). It is difficult to see how such a convention could operate except upon the international plane and as between parties possessing international personality.

In the opinion of the court, the organization was intended to exercise and enjoy, and is in fact exercise and enjoying function and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon an international plane it is at present the supreme type of international organizations, and it could not carry out the intentions of its founders if it was devoid of international personality. It must be acknowledged that its members, by entrusting certain functions to it, with the attendant

duties and responsibilities, have clothed it with the competence required to enable those function to be effectively discharged.

Accordingly, the court has come to conclusion that the organization is an international person. That is not same thing as saying that it is a state, which it certainly is not, or that its legal personality and rights and duties are the same as those of a state. Still less is it the same thing as saying that it is a super state, whatever that expression may mean it does not imply that all its rights and duties must be upon the international plane, any more than all the rights and duties of a state must be upon that plane. What it does mean is that it is a subject of international law and capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims.

The next question is whether the sum of the international rights of the organizations comprises the right to bring the kind of international claim described in the request for this opinion that is a claim against a state to obtain reparation in respect of the damage caused by the injury of an agent of the Organization in the course of the performance of his duties. Whereas a State possesses the totality of international rights and duties recognized by international law, the rights and duties of an entity such as the Organization must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice. The functions of the Organization are of such a character that they could not be effectively discharged if they involved the concurrent action, on the international plane, of fifty-eight or more Foreign Offices, and the Court concludes that the Members have endowed the Organization with capacity to bring international claims when necessitated by the discharge of its functions.

It cannot be doubted that the Organization has the capacity to bring an international claim against one of its Members which has caused injury to it by a breach of its international obligations towards it. The damage specified in Question 1 (a) means exclusively damage caused to the interests of the Organization itself, to its administrative machine, to its property and assets, and to the interests of which it is the guardian. It is clear that the Organization has the capacity to bring a claim for this damage. As the claim is based on the breach of an international obligation on the part of the Member held responsible by the Organization, the Member cannot contend that this obligation is governed by municipal law, and the Organization is justified in giving its claim the character of an international claim. When the Organization has sustained damage resulting from a breach by a Member of its international obligations, it is impossible to see how it can obtain reparation unless it possesses capacity to bring an international claim. It cannot be supposed that in such an event all the Members of the Organization, save the defendant State, must combine to bring a claim against the defendant for the damage suffered by the Organization.

Question 1 (b) is as follows :

"has the United Nations, as an Organization, the capacity to bring an international claim..in respect of the damage caused..(b) to the victim or to persons entitled through him ?"

In dealing with the question of law which arises out of Question 1 (b), it is unnecessary to repeat the considerations which led to an affirmative answer being given to Question 1 (a). It can now be assumed that the Organization has the capacity to bring a claim on the

international plane, to negotiate, to conclude a special agreement and to prosecute a claim before an international tribunal. The only legal question which remains to be considered is whether, in the course of bringing an international claim of this kind, the Organization can recover "the reparation due in respect of the damage caused....to the victim....". The traditional rule that diplomatic protection is exercised by the national State does not involve the giving of a negative answer to Question 1 (b).

In the first place, this rule applies to claims brought by a State. But here we have the different and new case of a claim that would be brought by the Organization.

In the second place, even in inter-State relations, there are important exceptions to the rule, for there are cases in which protection may be exercised by a State on behalf of persons not having its nationality.

In the third place, the rule rests on two bases. The first is that the defendant State has broken an obligation towards the national State in respect of its nationals. The second is that only the party to whom an international obligation is due can bring a claim in respect of its breach. This is precisely what happens when the Organization, in bringing a claim for damage suffered by its agent, does so by invoking the breach of an obligation towards itself. Thus, the rule of the nationality of claims affords no reason against recognizing that the Organization has the right to bring a claim for the damage referred to in Question 1 (b). On the contrary, the principle underlying this rule leads to the recognition of this capacity as belonging to the Organization, when the Organization invokes, as the ground of its claim, a breach of an obligation towards itself.

Having regard to its purposes and functions already referred to, the Organization may find it necessary, and has in fact found it necessary, to entrust its agents with important missions to be performed in disturbed parts of the world. Many missions, from their very nature, involve the agents in unusual dangers to which ordinary persons are not exposed. For the same reason, the injuries suffered by its agents in these circumstances will sometimes have occurred in such a manner that their national State would not be justified in bringing a claim for reparation on the ground of diplomatic protection, or, at any rate, would not feel disposed to do so. Both to ensure the efficient and independent performance of these missions and to afford effective support to its agents, the Organization must provide them with adequate protection.

In order that the agent may perform his duties satisfactorily, he must feel that this protection is assured to him by the Organization, and that he may count on it. To ensure the independence of the agent, and, consequently, the independent action of the Organization itself, it is essential that in performing his duties he need not have to rely on any other protection than that of the Organization (save of course for the more direct and immediate protection due from the State in whose territory he may be).

In particular, he should not have to rely on the protection of his own State. If he had to rely on that State, his independence might well be compromised, contrary to the principle applied by Article 100 of the Charter. And lastly, it is essential that whether the agent belongs to a powerful or to a weak State; to one more affected or less affected, by the complications of international life; to one in sympathy or not in sympathy with the mission of the agent-he

should know that in the performance of his duties he is under the protection of the Organization. This assurance is even more necessary when the agent is stateless.

The obligations entered into by States to enable the agents of the Organization to perform their duties are undertaken not in the interest of the agents, but in that of the Organization. When it claims redress for a breach of these obligations, the Organization is invoking its own right, the right that the obligations due to it should be respected. On this ground, it asks for reparation of the injury suffered, for "it is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form"; as was stated by the Permanent Court in its Judgment No. 8 of July 26th, 1927 (Series A., No. 9, p. 21). In claiming reparation based on the injury suffered by its agent, the Organization does not represent the agent, but is asserting its own right, the right to secure respect for undertakings entered into towards the Organization.

Having regard to the foregoing considerations, and to the undeniable right of the Organization to demand that its Members shall fulfill the obligations entered into by them in the interest of the good working of the Organization, the Court is of the opinion that, in the case of a breach of these obligations, the Organization has the capacity to claim adequate reparation, and that in assessing this reparation it is authorized to include the damage suffered by the victim or by persons entitled through him.

The question remains whether the Organization has "the capacity to bring an international claim against the responsible *de jure* or *de facto* government with a view to obtaining the reparation due in respect of the damage caused (a) to the United Nations, (b) to the victim or to persons entitled through him" when the defendant State is not a member of the Organization.

In considering this aspect of Question 1 (a) and (b), it is necessary to keep in mind the reasons which have led the Court to give an affirmative answer to it when the defendant State is a Member of the Organization. It has now been established that the Organization has capacity to bring claims on the international plan and that it possesses a right of functional protection in respect of its agents. Here again the Court is authorized to assume that the damage suffered involves the responsibility of a State, and it is not called upon to express an opinion upon the various ways in which that responsibility might be engaged. Accordingly the question is whether the Organization has capacity to bring a claim against the defendant State to recover reparation in respect of that damage or whether, on the contrary, the defendant State, not being a member, is justified in raising the objection that the Organization lacks the capacity to bring an international claim.

On this point, the Court's opinion is that fifty States, representing the vast majority of the members of the international community, had the power, in conformity with international law, to bring into being an entity possessing objective international personality, and not merely personality recognized by them alone, together with capacity to bring international claims.

Accordingly, the Court arrives at the conclusion that an affirmative answer should be given to Question 1 (a) and (b) whether or not the defendant State is a Member of the United Nations.

Question II is as follows:

"In the event of an affirmative reply on point 1 (b), how is action by the United Nations to be reconciled with such rights as may be possessed by the State of which the victim is a national?"

The affirmative reply given by the Court on point 1 (b) obliges it now to examine Question II. When the victim has a nationality, cases can clearly occur in which the injury suffered by him may engage the interest both of his national State and of the Organization.

In such an event, competition between the State's right of diplomatic protection and the Organization's right of functional protection might arise, and this is the only case with which the Court is invited to deal. In such a case, there is no rule of law which assigns priority to the one or to the other, or which compels either the State or the Organization to refrain from bringing an international claim. The question of reconciling action by the Organization with the rights of a national State may arise in another way; that is to say, when the agent bears the nationality of the defendant State.

The ordinary practice whereby a State does not exercise protection on behalf of one of its nationals against a State which regards him as its own national, does not constitute a precedent which is relevant here. The action of the Organization is in fact based not upon the nationality of the victim but upon his status as agent of the Organization. Therefore it does not matter whether or not the State to which the claim is addressed regards him as its own national, because the question of nationality is not pertinent to the admissibility of the claim. In law, therefore, it does not seem that the fact of the possession of the nationality of the defendant State by the agent constitutes any obstacle to a claim brought by the Organization for a breach of obligations towards it occurring in relation to the performance of his mission by that agent.

SOURCES OF INTERNATIONAL LAW

RIGHT OF PASSAGE OVER INDIAN TERRITORY CASE (Merits)

Portugal v. India

ICJ Reports 1960, p.6

(Local Custom- Whether a local custom could be established between only two States?)

Portugal claims a right of passage between Daman and the enclaves, and between the enclaves, across intervening Indian territory, to the extent necessary for the exercise of its sovereignty over the enclaves, subject to India's right of regulation and control of the passage claimed, and without any immunity in Portugal's favour. It claims further that India is under obligation so to exercise its power of regulation and control as not to prevent the passage necessary for the exercise of Portugal's sovereignty over the enclaves.

India argues that the vague and contradictory character of the right claimed by Portugal is proved by Portugal's admission that on the one hand the exercise of the right is subject to India's regulation and control as the territorial sovereign, and that on the other hand the right is not accompanied by any immunity, even in the case of the passage of armed forces.

There is no doubt that the day-to-day exercise of the right of passage as formulated by Portugal, with correlative obligation upon India, may give rise to delicate questions of application, but that is not, in the view of the Court, sufficient ground for holding that the right is not susceptible of judicial determination with reference to Article 38 (1) of the Statute.

In support of its claim, Portugal relies on the Treaty of Poona of 1779 and on *sanads* (decrees), issued by the Maratha ruler in 1783 and 1785, as having conferred sovereignty on Portugal over the enclaves with the right of passage to them.

India objects on various grounds that what is alleged to be the Treaty of 1779 was not validly entered into and never became in law a treaty binding upon the Marathas. It is sufficient to state that the validity of a treaty concluded as long ago as the last quarter of the eighteenth century, in the conditions then prevailing in the Indian Peninsula, should not be judged upon the basis of practices and procedures which have since developed only gradually. The Marathas themselves regarded the Treaty of 1779 as valid and binding upon them, and gave effect to its provisions. The Treaty is frequently referred to as such in subsequent formal Maratha documents, including the two *sanads* of 1783 and 1785, which purport to have been issued in pursuance of the Treaty. The Marathas did not at any time cast any doubt upon the validity or binding character of the Treaty.

India contends further that the Treaty and the two *sanads* of 1783 and 1785 taken together did not operate to transfer sovereignty over the assigned villages to Portugal, but only conferred upon it, with respect to the villages, a revenue grant of the value of 12,000 rupees per annum called a *jagir* or *saranjam*.

Article 17 of the Treaty is relied upon by Portugal as constituting a transfer of sovereignty. From an examination of the various texts of that article placed before it, the Court is unable to conclude that the language employed therein was intended to transfer

sovereignty over the villages to the Portuguese. There are several instances on the record of treaties concluded by the Marathas which show that, where a transfer of sovereignty was intended, appropriate and adequate expressions like cession "in perpetuity" or "in perpetual sovereignty" were used. The expressions used in the two *sanads* and connected relevant documents establish, on the other hand, that what was granted to the Portuguese was only a revenue tenure called a *jagir* or *saranjam* of the value of 12,000 rupees a year. This was a very common form of grant in India and not a single instance has been brought to the notice of the Court in which such a grant has been construed as amounting to a cession of territory in sovereignty.

It is argued that the Portuguese were granted authority to put down revolt or rebellion in the assigned villages and that this is an indication that they were granted sovereignty over the villages. The Court does not consider that this conclusion is well-founded. If the intention of the Marathas had been to grant sovereignty over the villages to the Portuguese, it would have been unnecessary for the grant to recite that the future sovereign would have authority to quell a revolt or rebellion in his own territory. In the context in which this authorization occurs, it would appear that the intention was that the Portuguese would have authority on behalf of the Maratha ruler and would owe a duty to him to put down any revolt or rebellion in the villages against his authority.

It therefore appears that the Treaty of 1779 and the *sanads* of 1783 and 1785 were intended by the Marathas to effect in favour of the Portuguese only a grant of a *jagir* or *saranjam*, and not to transfer sovereignty over the villages to them.

Having regard to the view that the Court has taken of the character of the Maratha grant in favour of the Portuguese, the situation during the Maratha period need not detain the Court further in its consideration of Portugal's claim of a right of passage to and from the enclaves. During the Maratha period sovereignty over the villages comprised in the grant, as well as over the intervening territory between coastal Daman and the villages, vested in the Marathas. There could, therefore, be no question of any enclave or of any right of passage for the purpose of exercising sovereignty over enclaves. The fact that the Portuguese had access to the villages for the purpose of collecting revenue and in pursuit of that purpose exercised such authority as had been delegated to them by the Marathas cannot, in the view of the Court, be equated to a right of passage for the exercise of sovereignty.

It is clear from a study of the material placed before the Court that the situation underwent a change with the advent of the British as sovereign of that part of the country in place of the Marathas. The British found the Portuguese in occupation of the villages and exercising full and exclusive administrative authority over them. They accepted the situation as they found it and left the Portuguese in occupation of, and in exercise of exclusive authority over the villages. The Portuguese held themselves out as sovereign over the villages. The British did not, as successors of the Marathas, themselves claim sovereignty, nor did they accord express recognition of Portuguese sovereignty, over them. The exclusive authority of the Portuguese over the villages was never brought in question. Thus Portuguese sovereignty over the villages was recognized by the British in fact and by implication and was

subsequently tacitly recognized by India. As a consequence the villages comprised in the Maratha grant acquired the character of Portuguese enclaves within Indian territory.

For the purpose of determining whether Portugal has established the right of passage claimed by it, the Court must have regard to what happened during the British and post-British periods. During these periods, there had developed between the Portuguese and the territorial sovereign with regard to passage to the enclaves a practice upon which Portugal relies for the purpose of establishing the right of passage claimed by it.

With regard to Portugal's claim of a right of passage as formulated by it on the basis of local custom, it is objected on behalf of India that no local custom could be established between only two States. It is difficult to see why the number of States between which a local custom may be established on the basis of long practice must necessarily be larger than two. The Court sees no reason why long continued practice between two States accepted by them as regulating their relations should not form the basis of mutual rights and obligations between the two States.

As already stated, Portugal claims a right of passage to the extent necessary for the exercise of its sovereignty over the enclaves, without any immunity and subject to the regulation and control of India. In the course of the written and oral proceedings, the existence of the right was discussed with reference to the different categories making up the right, namely private persons, civil officials, goods in general, armed forces, armed police, and arms and ammunition. The Court will proceed to examine whether such a right as is claimed by Portugal is established on the basis of the practice that prevailed between the Parties during the British and post-British periods in respect of each of these categories.

It is common ground between the Parties that the passage of private persons and civil officials was not subject to any restrictions, beyond routine control, during these periods. There is nothing on the record to indicate the contrary.

Goods in general, that is to say, all merchandise other than arms and ammunition, also passed freely between Daman and the enclaves during the periods in question, subject only, at certain times, to customs regulations and such regulation and control as were necessitated by considerations of security or revenue. The general prohibition of the transit of goods during the Second World War and prohibitions imposed upon the transit of Salt and, on certain occasions, upon that of liquor and materials for the distillation of liquor, were specific measures necessitated by the considerations just referred to. The scope and purpose of each prohibition were clearly defined. In all other cases the passage of goods was free. No authorization or licence was required.

The Court, therefore, concludes that, with regard to private persons, civil officials and goods in general there existed during the British and post-British periods a constant and uniform practice allowing free passage between Daman and the enclaves. This practice having continued over a period extending beyond a century and a quarter unaffected by the change of regime in respect of the intervening territory which occurred when India became independent, the Court is, in view of all the circumstances of the case, satisfied that that practice was accepted as law by the Parties and has given rise to a right and a correlative obligation.

The Court therefore holds that Portugal had in 1954 a right of passage over intervening Indian territory between coastal Daman and the enclaves and between the enclaves, in respect of private persons, civil officials and goods in general, to the extent necessary, as claimed by Portugal, for the exercise of its sovereignty over the enclaves, and subject to the regulation and control of India.

As regards armed forces, armed police and arms and ammunition, the position is different.

It appears that during the British period up to 1878 passage of armed forces and armed police between British and Portuguese possessions was regulated on a basis of reciprocity. No distinction appears to have been made in this respect with regard to passage between Daman and the enclaves. There is nothing to show that passage of armed forces and armed police between Daman and the enclaves or between the enclaves was permitted or exercised as of right.

Paragraph 3 of Article XVIII of the Treaty of Commerce and Extradition of 26 December 1878 between Great Britain and Portugal laid down that the armed forces of the two Governments should not enter the Indian dominions of the other, except for the purposes specified in former Treaties, or for the rendering of mutual assistance as provided for in the Treaty itself, or in consequence of a formal request made by the Party desiring such entry. Subsequent correspondence between the British and Portuguese authorities in India shows that this provision was applicable to passage between Daman and the enclaves.

It is argued on behalf of Portugal that on twenty-three occasions during the years 1880-1889 Portuguese armed forces crossed British territory between Daman and the enclaves without obtaining permission. In this connection, it should be observed that on 8 December 1890 the Government of Bombay forwarded to the Government of Portuguese India a complaint to the effect that "armed men in the service of the Portuguese Government are in the habit of passing without formal request through a portion of the British Pardi *taluka* of Surat en route from Daman to Nagar Haveli and back again. It would appear that the provisions of Article XVIII of the Treaty are thus violated." In his letter of 22 December 1890 addressed to the Governor of Bombay, the Governor-General of Portuguese India stated: "On so delicate a subject I request leave to observe that Portuguese troops never cross British territory without previous permission", and went on to add: "For centuries has this practice been followed, whereby the treaties have been respected and due deference shown to the British Authorities." The statement that this practice concerning the passage of armed forces from the territory of one State to that of the other had continued over a long period even before the enclaves came into existence finds support, for instance, in a Treaty of 1741 between the Marathas and the Portuguese which contained the following provision: "A soldier of the *Sarkar* [Maratha ruler] entering the territory of Daman will do so only with the permission of the *Firangee* [Portuguese]. If a soldier of the *Firangee* were to enter the territory of the *Sarkar*, he will do so only with the permission of the *Sarkar*. There is no reason to enter without permission."

The requirement of a formal request before passage of armed forces could take place was repeated in an agreement of 1913.

With regard to armed police, the position was similar to that of armed forces. The Treaty of 1878 regulated the passage of armed police on the basis of reciprocity. Paragraph 2 of Article XVIII of the Treaty made provision for the entry of the police authorities of the parties into the territories of the other party for certain specific purposes, e.g., the pursuit of criminals and persons engaged in smuggling and contraband practices, on a reciprocal basis. An agreement of 1913 established an arrangement providing for a reciprocal concession permitting parties of armed police to cross intervening territory provided previous intimation was given. An agreement of 1920 provided that armed police below a certain rank should not enter the territory of the other party without consent previously obtained.

An agreement of 1940 concerning passage of Portuguese armed police over the Daman-Silvassa (Nagar-Aveli) road provided that, if the party did not exceed ten in number, intimation of its passage should be given to the British authorities within twenty-four hours after passage had taken place, but that "If any number exceeding ten at a time are required so to travel at any time the existing practice should be followed and concurrence of the British authorities should be obtained by prior notice as heretofore."

Both with regard to armed forces and armed police, no change took place during the post-British period after India became independent.

It would thus appear that, during the British and post-British periods, Portuguese armed forces and armed police did not pass between Daman and the enclaves as of right and that, after 1878, such passage could only take place with previous authorization by the British and later by India, accorded either under a reciprocal arrangement already agreed to, or in individual cases. Having regard to the special circumstances of the case, this necessity for authorization before passage could take place constitutes, in the view of the Court, a negation of passage as of right. The practice predicates that the territorial sovereign had the discretionary power to withdraw or to refuse permission. It is argued that permission was always granted, but this does not, in the opinion of the Court, affect the legal position. There is nothing in the record to show that grant of permission was incumbent on the British or on India as an obligation.

As regards arms and ammunition, paragraph 4 of Article XVIII of the Treaty of 1878 provided that the exportation of arms, ammunition or military stores from the territories of one party to those of the other "shall not be permitted, except with the consent of, and under rules approved of by, the latter".

Rule 7 A, added in 1880 to the rules framed under the Indian Arms Act of 1878, provided that "nothing in rules 5,6, or 7 shall be deemed to authorize the grant of licences ... to import any arms, ammunition or military stores from Portuguese India, [or] to export to Portuguese India ... [such objects] ... except ... by a special licence". Subsequent practice shows that this provision applied to transit between Daman and the enclaves.

There was thus established a clear distinction between the practice permitting free passage of private persons, civil officials and goods in general, and the practice requiring previous authorization, as in the case of armed forces, armed police, and arms and ammunition.

The Court is, therefore, of the view that no right of passage in favour of Portugal involving a correlative obligation on India has been established in respect of armed forces, armed police, and arms and ammunition. The course of dealings established between the Portuguese and the British authorities with respect to the passage of these categories excludes the existence of any such right. The practice that was established shows that, with regard to these categories, it was well understood that passage could take place only by permission of the British authorities. This situation continued during the post-British period.

The Court is here dealing with a concrete case having special features. Historically the case goes back to a period when, and relates to a region in which, the relations between neighbouring States were not regulated by precisely formulated rules but were governed largely by practice. Where therefore the Court finds a practice clearly established between two States, which was accepted by the Parties as governing the relations between them, the Court must attribute decisive effect to that practice for the purpose of determining their specific rights and obligations. Such a particular practice must prevail over any general rules.

Having found that Portugal had in 1954 a right of passage over intervening Indian territory between Daman and the enclaves in respect of private persons, civil officials and goods in general, the Court will proceed to consider whether India has acted contrary to its obligation resulting from Portugal's right of passage in respect of any of these categories.

Portugal complains of the progressive restriction of its right of passage between October 1953 and July 1954. It does not, however, contend that India had, during that period, acted contrary to its obligation resulting from Portugal's right of passage. But Portugal complains that passage was thereafter denied to Portuguese nationals of European origin, whether civil officials or private persons, to native Indian Portuguese in the employ of the Portuguese Government, and to a delegation that the Governor of Daman proposed to send to Nagar-Aveli and Dadra.

It may be observed that the Governor of Daman was granted the necessary visas for a journey to and back from Dadra as late as 21 July 1954.

The events that took place in Dadra on 21-22 July 1954 resulted in the overthrow of Portuguese authority in that enclave. This created tension in the surrounding Indian territory. Thereafter all passage was suspended by India. India contends that this became necessary in view of the abnormal situation which had arisen in Dadra and the tension created in surrounding Indian territory.

In view of the tension then prevailing in intervening Indian territory, the Court is unable to hold that India's refusal of passage to the proposed delegation and its refusal of visas to Portuguese nationals of European origin and to native Indian Portuguese in the employment of the Portuguese Government was action contrary to its obligation resulting from Portugal's right of passage. Portugal's claim of a right of passage is subject to full recognition and exercise of Indian sovereignty over the intervening territory and without any immunity in favour of Portugal. The Court is of the view that India's refusal of passage in those cases was, in the circumstances, covered by its power of regulation and control of the right of passage of Portugal.

ASYLUM CASE
Columbia v. Peru
ICJ Reports 1950, p. 266

(Regional Custom- Essential Requirements)

On October 3rd, 1948, a military rebellion broke out in Peru. It was suppressed on the same day and investigations were at once opened. On October 4th, the President of the Republic issued a decree in the recitals of which a political party, the American People's Revolutionary Alliance, was charged with having organized and directed the rebellion. The decree consequently enacted that this party had placed itself outside the law, that it would henceforth not be permitted to exercise any kind of activity, and that its leaders would be brought to justice in the national courts as instigators of the rebellion. Simultaneously, the head of the Judicial Department of the Navy issued an order requiring the Examining Magistrate to open at once an enquiry as to the facts constituting the crime of military rebellion.

On October 5th, the Minister of the Interior addressed to the Minister for the Navy a "note of denunciation" against the leader of the American People's Revolutionary Alliance, Victor Raul Haya de la Torre, and other members of the party as responsible for the rebellion. This denunciation was approved on the same day by the Minister for the Navy and on October 10th by the Public Prosecutor, who stated that the subject-matter of the proceedings was the crime of military rebellion.

On October 11th, the Examining Magistrate issued an order for the opening of judicial proceedings against Haya de la Torre they are the page charged in the 'denunciation' ", and on October 25th he ordered the arrest of the persons "denounced" who had not yet been detained.

On October 27th, a Military Junta made a coup *d'état* and seized the supreme power. This Military Junta of the Government issued on November 4th a decree providing for Courts-Martial for summary procedure in cases of rebellion, sedition and rioting, fixing short time-limits and severe punishment without appeal.

This decree was not applied to the judicial proceedings against Haya de la Torre and others. These proceedings continued under the same jurisdiction as theretofore. This is shown by a note of November 8th from the Examining Magistrate requesting the production of certain documents, by a note of November 13th from the Head of the Investigation and Surveillance Service to the Examining Magistrate stating that Haya de la Torre and others were not arrested as they could not be found, and by an Order by the Examining Magistrate of the same date requiring the defaulters to be cited by public summons. On November 16th and the two subsequent days, the summons was published in the official gazette *El Peruano*, requiring "the accused persons who are in default" - Haya de la Torre and others-to report to the office of the Examining Magistrate to answer the accusation brought against them "for the crime of military rebellion". Haya de la Torre did not report, and the facts brought to the knowledge of the Court do not show that any further measures were taken against him.

On October 4th, the day after the military rebellion, a state of siege was declared, suspending certain constitutional rights; it was renewed on November 2nd and December 2nd, 1948, and on January 2nd, 1949.

On January 3rd, 1949, Haya de la Torre sought asylum in the Colombian Embassy in Lima. On the next day, the Colombian Ambassador sent the following note to the Peruvian Minister for Foreign Affairs and Public Worship :

"I have the honour to inform Your Excellency, in accordance with what is provided in Article 2, paragraph 2, of the Convention on Asylum signed by Our two countries in the city of Havana in the year 1928, that Senor Victor Raul Haya de la Torre has been given asylum at the seat of this mission as from 9 p.m. yesterday.

In view of the foregoing, and in view of the desire of this Embassy that Senor Haya de la Torre should leave Peru as early as possible, I request Your Excellency to be good enough to give orders for the requisite safe-conduct to be issued, so that Senor Haya de la Torre may leave the country with the usual facilities attaching to the right of diplomatic asylum."

On January 14th, the Ambassador sent to the Minister a further note as follows :

"Pursuant to instructions received from the Chancellery of my country, I have the honour to inform Your Excellency that the Government of Colombia, in accordance with the right conferred upon it by Article 2 of the Convention on Political Asylum signed by our two countries in the city of Montevideo on December 26th, 1933, has qualified Senor Victor Raul Haya de la Torre as a political refugee."

A diplomatic correspondence followed, leading up to the Act of Lima of August 31st, 1949, whereby the dispute which had arisen between the two Governments was referred to the Court.

The Colombian Government has presented two submissions, of which the first asks the Court to adjudge and declare

"That the Republic of Colombia, as the country granting asylum, is competent to qualify the offence for the purpose of the said asylum, within the limits of the obligations resulting in particular from the Bolivarian Agreement on Extradition of July 18th 1911, and the Convention on asylum of February 20th, 1928, and of American international law in general."

The written and oral arguments submitted on behalf of that Government show that its claim must be understood in the sense that Colombia, as the State granting asylum, is competent to qualify the nature of the offence by a unilateral and definitive decision binding on Peru. Colombia has based this submission partly on rules resulting from agreement, partly on an alleged custom.

The Colombian Government has referred to the Bolivarian Agreement of 1911, Article 18, which is framed in the following terms:

"Aside from the stipulations of the present Agreement, the signatory States recognize the institution of asylum in conformity with the principles of international law."

In recognizing "the institution of asylum", this article merely refers to the principles of international law. But the principles of international law do not recognize any rule of unilateral and definitive qualification by the State granting diplomatic asylum.

The Colombian Government has also relied on Article 4 of this Agreement concerning extradition of a criminal refugee from the territory of the State in which he has sought refuge. The arguments submitted in this respect reveal a confusion between territorial asylum (extradition), on the one hand, and diplomatic asylum, on the other. In the case of extradition, the refugee is within the territory of the State of refuge.

A decision with regard to extradition implies only the normal exercise of the territorial sovereignty. The refugee is outside the territory of the State where the offence was committed, and a decision to grant him asylum in no way derogates from the sovereignty of that State.

In the case of diplomatic asylum, the refugee is within the territory of the State where the offence was committed. A decision to grant diplomatic asylum involves a derogation from the sovereignty of that State. It withdraws the offender from the jurisdiction of the territorial State and constitutes an intervention in matters which are exclusively within the competence of that State. Such a derogation from territorial sovereignty cannot be recognized unless its legal basis is established in each particular case.

For these reasons, it is not possible to deduce from the provisions of agreements concerning extradition any conclusion which would apply to the question now under consideration.

The Colombian Government further relies on the Havana Convention on Asylum of 1928. This Convention lays down certain rules relating to diplomatic asylum, but does not contain any provision conferring on the State granting asylum a unilateral competence to qualify the offence with definitive and binding force for the territorial State. The Colombian Government contends, however, that such a competence is implied in that Convention and is inherent in the institution of asylum.

A competence of this kind is of an exceptional character. It involves a derogation from the equal rights of qualification which, in the absence of any contrary rule, must be attributed to each of the States concerned; it thus aggravates the derogation from territorial sovereignty constituted by the exercise of asylum. Such a competence is not inherent in the institution of diplomatic asylum. This institution would perhaps be more effective if a rule of unilateral and definitive qualification were applied. But such a rule is not essential to the exercise of asylum.

These considerations show that the alleged right of unilateral and definitive qualification cannot be regarded as recognized by implication in the Havana Convention. Moreover, this Convention, in pursuance of the desire expressed in its preamble of "fixing the rules" which the Governments of the States of America must observe for the granting of asylum, was

concluded with the manifest intention of preventing the abuses which had arisen in the previous practice, by limiting the grant of asylum.

The Colombian Government has invoked Article 2, paragraph 1, of the Havana Convention, which is framed in the following terms:

"Asylum granted to political offenders in legations, warships, military camps or military aircraft, shall be respected to the extent in which allowed as a right or through humanitarian toleration, by the usages, the conventions or the laws of the country in which granted and in accordance with the following provisions:"

This provision has been interpreted by that Government in the sense that the usages, conventions and laws of Colombia relating to the qualification of the offence can be invoked against Peru. This interpretation, which would mean that the extent of the obligation of one of the signatory States would depend upon any modifications which might occur in the law of another, cannot be accepted. The provision must be regarded as a limitation of the extent to which asylum shall be respected. What the provision says in effect is that the State of refuge shall not exercise asylum to a larger extent than is warranted by its own usages, conventions or laws and that the asylum granted must be respected by the territorial State only where such asylum would be permitted according to the usages, conventions or laws of the State of refuge. Nothing therefore can be deduced from this provision in so far as qualification is concerned.

The Colombian Government has further referred to the Montevideo Convention on Political Asylum of 1933. It is argued that, by Article 2 of that Convention, the Havana Convention of 1928 is interpreted in the sense that the qualification of a political offence appertains to the State granting asylum. The Montevideo Convention has not been ratified by Peru, and cannot be invoked against that State.

The Colombian Government has finally invoked "American international law in general". In addition to the rules arising from agreements which have already been considered, it has relied on an alleged regional or local custom peculiar to Latin-American States.

The Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party. The Colombian Government must prove that the rule invoked by it is in accordance with a constant and uniform usage practised by the States in question, and that this usage is the expression of a right appertaining to the State granting asylum and a duty incumbent on the territorial State. This follows from Article 38 of the Statute of the Court, which refers to international custom "as evidence of a general practice accepted as law".

In support of its contention concerning the existence of such a custom, the Colombian Government has referred to a large number of extradition treaties which, as already explained, can have no bearing on the question now under consideration. It has cited conventions and agreements which do not contain any provision concerning the alleged rule of unilateral and definitive qualification such as the Montevideo Convention of 1889 on international penal law, the Bolivarian Agreement of 1911 and the Havana Convention of 1928. It has invoked conventions which have not been ratified by Peru, such as the Montevideo Conventions of

1933 and 1939. The Convention of 1933 has, in fact, been ratified by not more than eleven States and the Convention of 1939 by two States only.

It is particularly the Montevideo Convention of 1933 which Counsel for the Colombian Government has also relied on in this connection. It is contended that this Convention has merely codified principles which were already recognized by Latin-American custom, and that it is valid against Peru as a proof of customary law. The limited number of States which have ratified this Convention reveals the weakness of this argument, and furthermore, it is invalidated by the preamble which states that this Convention modifies the Havana Convention.

Finally, the Colombian Government has referred to a large number of particular cases in which diplomatic asylum was in fact granted and respected. But it has not shown that the alleged rule of unilateral and definitive qualification was invoked or-if in some cases it was in fact invoked-that it was, apart from conventional stipulations, exercised by the States granting asylum as a right appertaining to them and respected by the territorial States as a duty incumbent on them and not merely for reasons of political expediency. The facts brought to the knowledge of the Court disclose so much uncertainty and contradiction, so much fluctuation and discrepancy in the exercise of diplomatic asylum and in the official views expressed on various occasions, there has been so much inconsistency in the rapid succession of conventions on asylum, ratified by some States and rejected by others, and the practice has been so much influenced by considerations of political expediency in the various cases, that it is not possible to discern in all this any constant and uniform usage, accepted as law, with regard to the alleged rule of unilateral and definitive qualification of the offence.

The Court cannot therefore find that the Colombian Government has proved the existence of such a custom. But even if it could be supposed that such a custom existed between certain Latin-American States only, it could not be invoked against Peru which, far from having by its attitude adhered to it, has, on the contrary, repudiated it by refraining from ratifying the Montevideo Conventions of 1933 and 1939, which were the first to include a rule concerning the qualification of the offence in matters of diplomatic asylum.

In the written Pleadings and during the oral proceedings, the Government of Colombia relied upon official communiqués published by the Peruvian Ministry of Foreign Affairs on October 13th and 26th, 1948, and the Government of Peru relied upon a Report of the Advisory Committee of the Ministry of Foreign Affairs of Colombia dated September 2nd, 1937; on the question of qualification, these documents state views which are contrary to those now maintained by these Governments. The Court, whose duty it is to apply international law in deciding the present case, cannot attach decisive importance to any of these documents.

For these reasons, the Court has arrived at the conclusion that Colombia, as the State granting asylum, is not competent to qualify the offence by a unilateral and definitive decision, binding on Peru.

In its second submission, the Colombian Government asks the Court to adjudge and declare:

"That the Republic of Peru, as the territorial State, is bound in the case now before the Court, to give the guarantees necessary for the departure of M. Victor Raul Haya de la Torre from the country, with due regard to the inviolability of his person."

There exists undoubtedly a practice whereby the diplomatic representative who grants asylum immediately requests a safe conduct without awaiting a request from the territorial State for the departure of the refugee. This procedure meets certain requirements: the diplomatic agent is naturally desirous that the presence of the refugee on his premises should not be prolonged; and the government of the country, for its part, desires in a great number of cases that its political opponent who has obtained asylum should depart. This concordance of views suffices to explain the practice which has been noted in this connection, but this practice does not and cannot mean that the State, to whom such a request for a safe-conduct has been addressed, is legally bound to accede to it.

In the present case, the Peruvian Government has not requested that Haya de la Torre should leave Peru. It has contested the legality of the asylum granted to him and has refused to deliver a safe-conduct. In such circumstances the Colombian Government is not entitled to claim that the Peruvian Government should give the guarantees necessary for the departure of Haya de la Torre from the country, with due regard to the inviolability of his person.

The grant of asylum is not an instantaneous act which terminates with the admission, at a given moment, of a refugee to an embassy or a legation. Any grant of asylum results in, and in consequence logically implies, a state of protection; the asylum is granted as long as the continued presence of the refugee in the embassy prolongs this protection. This view, which results from the very nature of the institution of asylum, is further confirmed by the attitude of the Parties during this case.

The Government of Peru has based its counter-claim on two different grounds which correspond respectively to Article 1, paragraph 1, and Article 2, paragraph 2, of the Havana Convention.

Under Article 1, paragraph 1, "It is not permissible for States to grant asylum to persons accused or condemned for common crimes....".

...the Court considers that the Government of Peru has not proved that the acts of which the refugee was accused before January 3rd/4th, 1949, constitute common crimes. ...the Government of Peru has not established that military rebellion in itself constitutes a common crime. Article 248 of the Peruvian Code of Military Justice of 1939 even tends to prove the contrary, for it makes a distinction between military rebellion and common crimes...

The Government of Peru relies, as a second basis for its counterclaim, upon the alleged disregard of Article 2, paragraph 2, of the Havana Convention, which provides as follows:

"Asylum may not be granted except in urgent cases and for the period of time strictly indispensable for the person who has sought asylum to ensure in some other way his safety."

It has not been contended by the Government of Colombia that Haya de la Torre was in such a situation at the time when he sought refuge in the Colombian Embassy at Lima. At that time, three months had elapsed since the military rebellion. This long interval gives the

present case a very special character. During those three months, Haya de la Torre had apparently been in hiding in the country, refusing to obey the summons to appear of the legal authorities which was published on November 16th/18th, 1948, and refraining from seeking asylum in the foreign embassies where several of his co-accused had found refuge before these dates. It was only on January 3rd, 1949, that he sought refuge in the Colombian Embassy. The Court considers that, *prima facie*, such circumstances make it difficult to speak of urgency.

It is only in the written Reply that the Government of Colombia described in more precise terms the nature of the danger against which the refugee intended to request the protection of the Ambassador. It was then claimed that this danger resulted in particular from the abnormal political situation existing in Peru...

In principle, it is inconceivable that the Havana Convention could have intended the term "urgent cases" to include the danger of regular prosecution to which the citizens of any country lay themselves open by attacking the institutions of that country; nor can it be admitted that in referring to "the period of time strictly indispensable for the person who has sought asylum to ensure in some other way his safety", the Convention envisaged protection from the operation of regular legal proceedings.

It is not possible to infer from that provision (Article 1,Havana Convention) that, because a person is accused of political offences and not of common crimes, he is, by that fact alone, entitled to asylum. It is clear that such an inference would disregard the requirements laid down by Article 2, paragraph 2, for the grant of asylum to political offenders.

In principle, therefore, asylum cannot be opposed to the operation of justice. An exception to this rule can occur only if, in the guise of justice, arbitrary action is substituted for the rule of law. Such would be the case if the administration of justice were corrupted by measures clearly prompted by political aims. Asylum protects the political offender against any measures of a manifestly extra-legal character which a government might take or attempt to take against its political opponents. On the other hand, the safety which arises out of asylum cannot be construed as a protection against the regular application of the laws and against the jurisdiction of legally constituted tribunals. Protection thus understood would authorize the diplomatic agent to obstruct the application of the laws of the country whereas it is his duty to respect them; it would in fact become the equivalent of immunity, which was evidently not within the intentions of the draftsmen of the Havana Convention.

It is true that successive decrees promulgated by the Government of Peru proclaimed and prolonged a state of siege in that country; but it has not been shown that the existence of a state of siege implied the subordination of justice to the executive authority, or that the suspension of certain constitutional guarantees entailed the abolition of judicial guarantees. As for the decree of November 4th, 1948, providing for Courts-Martial, it contained no indication which might be taken to mean that the new provisions would apply retroactively to offences committed prior to the publication of the said decree. In fact, this decree was not applied to the legal proceedings against Haya de la Torre, as appears from the foregoing recital of the facts.

The Court cannot admit that the States signatory to the Havana Convention intended to substitute for the practice of the Latin- American republics, in which considerations of courtesy, good neighbourliness and political expediency have always held a prominent place, a legal system which would guarantee to their own nationals accused of political offences the privilege of evading national jurisdiction. Such a conception, moreover, would come into conflict with one of the most firmly established traditions of Latin America, namely, non-intervention. It was at the Sixth Pan-American Conference of 1928, during which the Convention on Asylum was signed, that the States of Latin America declared their resolute opposition to any foreign political intervention.

***EFFECT OF AWARDS OF COMPENSATION MADE BY THE
UNITED NATIONS ADMINISTRATIVE TRIBUNAL
ADVISORY OPINION OF I.C.J.*** (July 13, 1954)
1954 International Law Reports 310
(Application of the Principle of *Res judicata*)

The first Question submitted to the Court is as follows:

"Having regard to the Statute of the United Nations Administrative Tribunal and to any other relevant instruments and to the relevant records, has the General Assembly the right on any grounds to refuse to give effect to an award of compensation made by that Tribunal in favour of a staff member of the United Nations whose contract of service has been terminated without his assent?"

This Question is strictly limited in scope. It relates solely to an award made by the Administrative Tribunal of the United Nations in favour of a staff member of the United Nations whose contract of service has been terminated without his assent. According to Article 2, paragraph 1, of the Statute of that Tribunal, it "shall be competent to hear and pass judgment upon applications alleging non-observance of contracts of employment of staff members of the Secretariat of the United Nations or of the terms of appointment of such staff members". A comparison between this provision and the terms of the first Question submitted to the Court shows that an award as defined by that Question must be considered as falling within the competence of the Tribunal as defined by Article 2. A claim arising out of the termination of a contract of service without the assent of the staff member must, in fact, either fall within the term "non-observance of contracts of employment", or relate to "the terms of appointment" of the staff member. The Question concerns, in other words, only awards which are made within the limits of the competence of the Tribunal as determined by Article 2.

This examination of the first Question shows that the Court is requested to consider the general and abstract question whether the General Assembly is legally entitled to refuse to give effect to an award of compensation made by the Administrative Tribunal, properly constituted and acting within the limits of its statutory competence. The answer to this question depends on the provisions of the Statute of the Tribunal as adopted by the General Assembly on November 24th, 1949, and on the Staff Regulations and Rules as in force on December 9th, 1953. But the Court will also take into account the amendments which were made to the Statute on the latter date. The Court will first consider whether the Tribunal is established either as a judicial body, or as an advisory organ or a mere subordinate committee of the General Assembly.

Article I of the Statute provides: "A Tribunal is established by the present Statute to be known as the United Nations Administrative Tribunal." This Tribunal shall, according to Article 2, paragraph 1, "be competent to hear and pass judgment upon applications", whereupon the paragraph determines the limits of the Tribunal's competence as already mentioned above.

Article 2, paragraph 3, prescribes:

"In the event of a dispute as to whether the Tribunal has competence, the matter shall be settled by the decision of the Tribunal."

Article 10 contains the following provisions

"2. The judgments shall be final and without appeal."

"3. The judgments shall state the reasons on which they are based. "

These provisions and the terminology used are evidence of the judicial nature of the Tribunal. Such terms as "tribunal", "judgment", competence to "pass judgment upon applications", are generally used with respect to judicial bodies. The above-mentioned provisions of Articles 2 and 10 are of an essentially judicial character and conform with rules generally laid down in statutes or laws issued for courts of justice, such as, for instance, in the Statute of the International Court of Justice, Article 36, paragraph 6, Article 56, paragraph 1, Article 60, first sentence. They provide a striking contrast to Staff Rule 111.1 of the United Nations, which provides:

"A Joint Appeals Board is established to consider and advise the Secretary-General regarding appeals filed under the terms of Staff Regulation 11.1 by staff members serving at Headquarters."

The Statute of the Administrative Tribunal contains no similar provision attributing an advisory character to its functions, nor does it in any way limit the independence of its activity. The independence of its members is ensured by Article 3, paragraph 5, which provides:

"No member of the Tribunal can be dismissed by the General Assembly unless the other members are of the unanimous opinion that he is unsuited for further service."

(Article 9 paragraph I) prescribe both in the original and in the amended text that the Tribunal shall, if it finds that the application is well founded, order the rescinding of the decision contested or the specific performance of the obligation invoked. As the power to issue such orders to the chief administrative officer of the Organization could hardly have been conferred on an advisory organ or a subordinate committee, these provisions confirm the judicial character of the Tribunal.

This examination of the relevant provisions of the Statute shows that the Tribunal is established, not as an advisory organ or a mere subordinate committee of the General Assembly, but as an independent and truly judicial body pronouncing final judgments without appeal within the limited field of its functions.

According to a well-established and generally recognized principle of law, a judgment rendered by such a judicial body is *res judicata* and has binding force between the parties to the dispute. It must therefore be examined who are to be regarded as parties bound by an award of compensation made in favour of a staff member of the United Nations whose contract of service has been terminated without his assent.

Such a contract of service is concluded between the staff member concerned and the Secretary-General in his capacity as the chief administrative officer of the United Nations Organization, acting on behalf of that Organization as its representative. When the Secretary-General concludes such a contract of service with a staff member, he engages the legal responsibility of the Organization, which is the juridical person on whose behalf he acts. If he

terminates the contract of service without the assent of the staff member and this action results in a dispute which is referred to the Administrative Tribunal, the parties to this dispute before the Tribunal are the staff member concerned and the United Nations Organization, represented by the Secretary-General, and these parties will become bound by the judgment of the Tribunal. This judgment is, according to Article 10 of the Tribunal's Statute, final and without appeal. The Statute has provided for no kind of review. As this final judgment has binding force on the United Nations Organization as the juridical person responsible for the proper observance of the contract of service, that Organization becomes legally bound to carry out the judgment and to pay the compensation-awarded to the staff member. It follows that the General Assembly, as an organ of the United Nations, must likewise be bound by the judgment.

As mentioned above, the Statute of the Administrative Tribunal has not provided for any kind of review of judgments, which according to Article 10, paragraph 2, shall be final and without appeal. This rule is similar to the corresponding rule in the Statute of the Administrative Tribunal of the League of Nations, Article VI, paragraph 1, which equally prescribed that "judgments shall be final and without appeal".

It is likewise the result of a deliberate decision that no provision for review of the judgments of the United Nations Administrative Tribunal was inserted in the Statute of that Tribunal.

The General Assembly could, when it adopted the Statute, have provided for means of redress, but it did not do so. Like the Assembly of the League of Nations it refrained from laying down any exception to the rule conferring on the Tribunal the power to pronounce final judgments without appeal.

This rule contained in Article 10, paragraph 2; cannot however be considered as excluding the Tribunal from itself revising a judgment in special circumstances when new facts of decisive importance have been discovered; and the Tribunal has already exercised this power. Such a strictly limited revision by the Tribunal itself cannot be considered as an "appeal" within the meaning of that Article and would conform with rules generally provided in statutes or laws issued for courts of justice, such as for instance in Article 61 of the Statute of the International Court of Justice.

TEMPLE OF PREAH VIHEAR CASE (Merits)
Cambodia v. Thailand
(ICJ Reports 1962, p. 6)
(Principle of Acquiescence and Estoppel)

The Temple of Preah Vihear is an ancient sanctuary and shrine situated on the borders of Thailand and Cambodia. Although now partially in ruins, this Temple has considerable artistic and archaeological interest, and is still used as a place of pilgrimage.

Until Cambodia attained her independence in 1953 she was part of French Indo-China, and her foreign relations-like those of the rest of French Indo-China-were conducted by France as the protecting Power. It is common ground between the Parties that the present dispute has its *fofzs et origo* in the boundary settlements made in the period 1904-1908, between France and Siam (as Thailand was then called) and, in particular, that the sovereignty over Preah Vihear depends upon a boundary treaty dated 13 February 1904, and upon events subsequent to that date. The Court is therefore not called upon to go into the situation that existed between the Parties prior to the Treaty of 1904.

(After the completion of the work of the Mixed Commission of Delimitation, the Siamese Government requested the French Government to prepare the maps of the region). The French Government duly arranged for the work to be done by a team of four French officers. This team worked under the general direction of Colonel Bernard, and in the late autumn of 1907 it completed a series of eleven maps covering a large part of the frontiers between Siam and French Indo-China, including those portions that are material in the present case.

Amongst these was one of that part of the Dangrek range in which the Temple is situated, and on it was traced a frontier line purporting to be the outcome of the work of delimitation and showing the whole Preah Vihear promontory, with the Temple area, as being on the Cambodian side. If therefore the delimitation carried out in respect of the Eastern Dangrek sector established or was intended to establish a watershed line, this map purported to show such a line. This map was filed by Cambodia as Annex 1 map.

It is on this map that Cambodia principally relies in support of her claim to sovereignty over the Temple. Thailand, on the other hand, contests any claim based on this map, on the following grounds: first, that the map was not the work of the Mixed Commission, and had therefore no binding character; secondly, that at Preah Vihear the map embodied a material error, not explicable on the basis of any exercise of discretionary powers of adaptation which the Commission may have possessed. This error, according to Thailand's contention, was that the frontier line indicated on the map was not the true watershed line in this vicinity, and that a line drawn in accordance with the true watershed line would have placed, and would now place, the Temple area in Thailand. It is further contended by Thailand that she never accepted this map or the frontier line indicated on it, at any rate so far as Preah Vihear is concerned, in such a way as to become bound thereby; or, alternatively that, if she did accept

the map, she did so only under, and because of, a mistaken belief (upon which she relied) that the map line was correctly drawn to correspond with the watershed line.

Being one of the series of maps of the frontier areas produced by French Government topographical experts in response to a request made by the Siamese authorities, printed and published by a Paris firm of repute, all of which was clear from the map itself, it was thus invested with an official standing; it had its own inherent technical authority; and its provenance was open and obvious.

The real question, therefore, which is the essential one in this case, is whether the Parties did adopt the Annex 1 map, and the line indicated on it, as representing the outcome of the work of delimitation of the frontier in the region of Preah Vihear, thereby conferring on it a binding character.

It has been contended on behalf of Thailand that this communication of the maps by the French authorities was, so to speak, *ex parte*, and that no formal acknowledgment of it was either requested of, or given by, Thailand. In fact, as will be seen presently, an acknowledgment by conduct was undoubtedly made in a very definite way; but even if it were otherwise, it is clear that the circumstances were such as called for some reaction, within a reasonable period, on the part of the Siamese authorities, if they wished to disagree with the map or had any serious question to raise in regard to it. They did not do so, either then or for many years, and thereby must be held to have acquiesced.

So far as the Annex 1 map is concerned, it was not merely the circumstances of the communication of this and the other maps that called for some reaction from the Siamese side, if reaction there was to be; there were also indications on the face of the map sheet which required a reaction if the Siamese authorities had any reason to contend that the map did not represent the outcome of the work of delimitation. The map-together with the other maps was, as already stated, communicated to the Siamese members of the Mixed Commission. These must necessarily have known (and through them the Siamese Government must have known) that this map could not have represented anything formally adopted by the Mixed Commission, and therefore they could not possibly have been deceived by the title of the map, namely, "Dangrek- Commission of Delimitation between Indo-China and Siam" into supposing that it was purporting to be a production of the Mixed Commission as such. Alternatively, if the Siamese members of the Commission did suppose otherwise, this could only have been because, though without recording them, the Mixed Commission had in fact taken some decisions on which the map was based; and of any such decisions the Siamese members of the Commission would of course have been aware.

The Siamese members of the Commission must also have seen the notice appearing in the top left-hand corner of the map sheet to the effect that the work on the ground had been carried out by Captains Kerler and Oum. They would have known, since they were present at the meeting of the Commission held on 2 December 1906, that Captain Oum had then been instructed to carry out the survey of the eastern sector of the Dangrek range, covering Preah Vihear, and that he was to leave the next day to take up this assignment. They said nothing-

either then or later-to suggest that the map did not represent the outcome of the work of delimitation or that it was in any way inaccurate.

That the Siamese authorities by their conduct acknowledged the receipt, and recognized the character, of these maps, and what they purported to represent, is shown by the action of the Minister of the Interior, Prince Damrong, in thanking the French Minister in Bangkok for the maps, and in asking him for another fifteen copies of each of them for transmission to the Siamese provincial Governors.

Further evidence is afforded by the proceedings of the subsequent Commission of Transcription which met in Bangkok in March of the following year, 1909, and for some months thereafter. This was a mixed Franco-Siamese Commission set up by the Parties with the object of getting an official Siamese geographical service started, through a consolidation of all the work of the two Mixed Commissions of 1904 and 1907. A primary aim was to convert the existing maps into handy atlas form, and to give the French and Siamese terms used in them their proper equivalents in the other languages. No suggestion that the Annex 1 map or line was unacceptable was made in the course of the work of this Commission.

It was claimed on behalf of Thailand that the maps received from Paris were only seen by minor officials who had no expertise in cartography, and would know nothing about the Temple of Preah Vihear. Indeed it was suggested during the oral proceedings that no one in Siam at that time knew anything about the Temple or would be troubling about it.

The Court cannot accept these contentions either on the facts or the law. If the Siamese authorities did show these maps only to minor officials, they clearly acted at their own risk, and the claim of Thailand could not, on the international plane, derive any assistance from that fact. But the history of the matter, as set out above, shows clearly that the maps were seen by such persons as Prince Devawongse, the Foreign Minister, Prince Damrong, the Minister of the Interior, the Siamese members of the First Mixed Commission, the Siamese members of the Commission of Transcription; and it must also be assumed that the Annex 1 map was seen by the Governor of Khukhan province, the Siamese province adjoining the Preah Vihear region on the northern side, who must have been amongst those for whom extra copies were requested by Prince Damrong. None of these persons was a minor official. All or most had local knowledge. Some must have had knowledge of the Dangrek region. It is clear from the documentation in the case that Prince Damrong took a keen personal interest in the work of delimitation, and had a profound knowledge of archaeological monuments. It is not conceivable that the Governor of Khukhan province, of which Preah Vihear formed part up to the 1904 settlement, was ignorant of its existence.

In any case this particular contention of Thailand's is decisively disproved by a document deposited by Thailand herself, according to which the Temple was in 1899 "re-discovered" by the Siamese Prince Sanphasit, accompanied by some fifteen to twenty officials and local dignitaries, including, it seems, the then Governor and Deputy-Governor of Khukhan. It thus appears that only nine years previous to the receipt of the Annex 1 map by the Siamese authorities, a considerable number of persons having high official standing in Siam knew of Preah Vihear.

The Court moreover considers that there is no legal foundation for the consequence it is attempted to deduce from the fact that no one in Thailand at that time may have known of the importance of the Temple or have been troubling about it. Frontier rectifications cannot in law be claimed on the ground that a frontier area has turned out to have an importance not known or suspected when the frontier was established. It follows from the preceding findings that the Siamese authorities in due course received the Annex 1 map and that they accepted it. Now, however, it is contended on behalf of Thailand, so far as the disputed area of Preah Vihear is concerned, that an error was committed, an error of which the Siamese authorities were unaware at the time when they accepted the map.

It is an established rule of law that the plea of error cannot be allowed as an element vitiating consent if the party advancing it contributed by its own conduct to the error, or could have avoided it, or if the circumstances were such as to put that party on notice of a possible error. The Court considers that the character and qualifications of the persons who saw the Annex 1 map on the Siamese side would alone make it difficult for Thailand to plead error in law. These persons included the members of the very Commission of Delimitation within whose competence this sector of the frontier had lain. But even apart from this, the Court thinks that there were other circumstances relating to the Annex 1 map which make the plea of error difficult to receive.

An inspection indicates that the map itself drew such pointed attention to the Preah Vihear region that no interested person, nor anyone charged with the duty of scrutinizing it, could have failed to see what the map was purporting to do in respect of that region. If, as Thailand has argued, the geographical configuration of the place is such as to make it obvious to anyone who has been there that the watershed must lie along the line of the escarpment (a fact which, if true, must have been no less evident in 1908), then the map made it quite plain that the Annex 1 line did not follow the escarpment in this region since it was plainly drawn appreciably to the north of the whole Preah Vihear promontory. Nobody looking at the map could be under any misapprehension about that.

Next, the map marked Preah Vihear itself quite clearly as lying on the Cambodian side of the line, using for the Temple a symbol which seems to indicate a rough plan of the building and its stairways.

It would thus seem that, to anyone who considered that the line of the watershed at Preah Vihear ought to follow the line of the escarpment, or whose duty it was to scrutinize the map, there was everything in the Annex 1 map to put him upon enquiry. Furthermore, as has already been pointed out, the Siamese Government knew or must be presumed to have known, through the Siamese members of the Mixed Commission, that the Annex 1 map had never been formally adopted by the Commission. The Siamese authorities knew it was the work of French topographical officers to whom they had themselves entrusted the work of producing the maps. They accepted it without any independent investigation, and cannot therefore now plead any error vitiating the reality of their consent. The Court concludes therefore that the plea of error has not been made out.

The Court will now consider the events subsequent to the period 1904-1909. The Siamese authorities did not raise any query about the Annex 1 map as between themselves and France or Cambodia, or expressly repudiate it as such, until the 1958 negotiations in Bangkok, when, *inter alia*, the question of Preah Vihear came under discussion between Thailand and Cambodia. Nor was any question raised even after 1934-1935, when Thailand carried out a survey of her own in this region, and this survey had, in Thailand's view, established a divergence between the map line and the true line of the watershed—a divergence having the effect of placing the Temple in Cambodia. Although, after this date, Thailand

eventually produced some maps of her own showing Preah Vihear as being in Thailand, she continued, even for public and official purposes, to use the Annex 1 map, or other maps showing Preah Vihear as lying in Cambodia, without raising any query about the matter (her explanations as to this will be considered presently). Moreover, the Court finds it difficult to overlook such a fact as, for instance, that in 1937, even after Thailand's own survey in 1934-1935, and in the same year as the conclusion of a treaty with France in which, as will be seen, the established common frontiers were reaffirmed, the Siamese Royal Survey Department produced a map showing Preah Vihear as lying in Cambodia.

Thailand had several opportunities of raising with the French authorities the question of the Annex 1 map. There were first of all the negotiations for the 1925 and 1937 Treaties of Friendship, Commerce and Navigation between France, on behalf of Indo-China, and Siam. These Treaties, although they provided for a general process of revision or replacement of previous Agreements, excluded from this process the existing frontiers as they had been established under the Boundary Settlements of 1893, 1904 and 1907. Thereby, and in certain more positive provisions, the Parties confirmed the existing frontiers, whatever they were. These were occasions (particularly in regard to the negotiations for the 1937 Treaty, which occurred only two years after Thailand's own survey of the frontier regions had disclosed, in her belief, a serious divergence between the map line and the watershed line at Preah Vihear) on which it would have been natural for Thailand to raise the matter, if she considered the map indicating the frontier at Preah Vihear to be incorrect-occasions on which she could and should have done so if that was her belief. She did not do so and she even, as has been seen, produced a map of her own in 1937 showing Preah Vihear as being in Cambodia. That this map may have been intended for internal military use does not seem to the Court to make it any less evidence of Thailand's state of mind. The inference must be-particularly in regard to the 1937 occasion-that she accepted or still accepted the Annex 1 map, and the line it indicated, even if she believed it incorrect, even if, after her own survey of 1934- 1935, she thought she knew it was incorrect.

Thailand having temporarily come into possession of certain parts of Cambodia, including Preah Vihear, in 1941, the Ministry of Information of Thailand published a work entitled "Thailand during national reconstruction" in which it was stated in relation to Preah Vihear that it had now been "retaken" for Thailand. This has been represented by Thailand as being an error on the part of a minor official. Nevertheless, similar language, suggesting that Thailand had been in possession of Preah Vihear only since about 1940, was used by representatives of Thailand in the territorial negotiations that took place between Thailand and Cambodia at Bangkok in 1958.

In this connection, much the most significant episode consisted of the visit paid to the Temple in 1930 by Prince Damrong, formerly Minister of the Interior, and at this time President of the Royal Institute of Siam, charged with duties in connection with the National Library and with archaeological monuments. The visit was part of an archaeological tour made by the Prince with the permission of the King of Siam, and it clearly had a quasi-official character. When the Prince arrived at Preah Vihear, he was officially received there by the French Resident for the adjoining Cambodian province, on behalf of the Resident

Superior, with the French flag flying. The Prince could not possibly have failed to see the implications of a reception of this character. A clearer affirmation of title on the French Indo-Chinese side can scarcely be imagined. It demanded a reaction. Thailand did nothing. Furthermore, when Prince Damrong on his return to Bangkok sent the French Resident some photographs of the occasion, he used language which seems to admit that France, through her Resident, had acted as the host country.

The explanations regarding Prince Damrong's visit given on behalf of Thailand have not been found convincing by the Court. Looking at the incident as a whole, it appears to have amounted to a tacit recognition by Siam of the sovereignty of Cambodia (under French Protectorate) over Preah Vihear, through a failure to react in any way, on an occasion that called for a reaction in order to affirm or preserve title in the face of an obvious rival claim. What seems clear is that either Siam did not in fact believe she had any title-and this would be wholly consistent with her attitude all along, and thereafter, to the Annex 1 map and line-or else she decided not to assert it, which again means that she accepted the French claim, or accepted the frontier at Preah Vihear as it was drawn on the map.

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Advisory Opinion of Legality of the Threat or Use of Nuclear Weapons
(ICJ Reports 1996, p. 226)

(Constituent elements of custom; General Assembly Resolutions as one of the sources of international law)

(The General Assembly requested the International Court of Justice to provide an advisory opinion on the following question: 'Is the threat or use of nuclear weapons in any circumstance permitted under international law?')

64. The Court will now turn to an examination of customary international law to determine whether a prohibition of the threat or use of nuclear weapons as such flows from that source of law. As the Court has stated, the substance of that law must be "looked for primarily in the actual practice and *opinio juris* of States" (*Continental Shelf (Libyan Arab Jarnahiriya/Malta), Judgment, I. C. J. Reports 1985, p. 29, para. 27*).

65. States which hold the view that the use of nuclear weapons is illegal have endeavoured to demonstrate the existence of a customary rule prohibiting this use. They refer to a consistent practice of non-utilization of nuclear weapons by States since 1945 and they would see in that practice the expression of an *opinio juris* on the part of those who possess such weapons.

66. Some other States, which assert the legality of the threat and use of nuclear weapons in certain circumstances, invoked the doctrine and practice of deterrence in support of their argument. They recall that they have always, in concert with certain other States, reserved the right to use those weapons in the exercise of the right to self-defence against an armed attack threatening their vital security interests. In their view, if nuclear weapons have not been used since 1945, it is not on account of an existing or nascent custom but merely because circumstances that might justify their use have fortunately not arisen.

67. The Court does not intend to pronounce here upon the practice known as the "policy of deterrence". It notes that it is a fact that a number of States adhered to that practice during the greater part of the Cold War and continue to adhere to it. Furthermore, the members of the international community are profoundly divided on the matter of whether non-recourse to nuclear weapons over the past 50 years constitutes the expression of an *opinio juris*. Under these circumstances the Court does not consider itself able to find that there is such an *opinio juris*.

68. According to certain States, the important series of General Assembly resolutions, beginning with resolution 1653 (XVI) of 24 November 1961, that deal with nuclear weapons and that affirm, with consistent regularity, the illegality of nuclear weapons, signify the existence of a rule of international customary law which prohibits recourse to those weapons. According to other States, however, the resolutions in question have no binding character on

their own account and are not declaratory of any customary rule of prohibition of nuclear weapons; some of these States have also pointed out that this series of resolutions not only did not meet with the approval of all of the nuclear-weapon States but of many other States as well.

69. States which consider that the use of nuclear weapons is illegal indicated that those resolutions did not claim to create any new rules, but were confined to a confirmation of customary law relating to the prohibition of means or methods of warfare which, by their use, overstepped the bounds of what is permissible in the conduct of hostilities. In their view, the resolutions in question did no more than apply to nuclear weapons the existing rules of international law applicable in armed conflict; they were no more than the "envelope" or *instrumentum* containing certain pre-existing customary rules of international law. For those States it is accordingly of little importance that the *instrumentum* should have occasioned negative votes, which cannot have the effect of obliterating those customary rules which have been confirmed by treaty law.

70. The Court notes that General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character. Or a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule.

71. Examined in their totality, the General Assembly resolutions put before the Court declare that the use of nuclear weapons would be "a direct violation of the Charter of the United Nations; and in certain formulations that such use "should be prohibited". The focus of these resolutions has sometimes shifted to diverse related matters; however, several of the resolutions under consideration in the present case have been adopted with substantial numbers of negative votes and abstentions; thus, although those resolutions are a clear sign of deep concern regarding the problem of nuclear weapons, they still fall short of establishing the existence of an *opinio juris* on the illegality of the use of such weapons.

72. The Court further notes that the first of the resolutions of the General Assembly expressly proclaiming the illegality of the use of nuclear weapons, resolution 1653 (XVI) of 24 November 1961 (mentioned in subsequent resolutions), after referring to certain international declarations and binding agreements, from the Declaration of St. Petersburg of 1868 to the Geneva Protocol of 1925, proceeded to qualify the legal nature of nuclear weapons, determine their effects, and apply general rules of customary international law to nuclear weapons in particular. That application by the General Assembly of general rules of customary law to the particular case of nuclear weapons indicates that, in its view, there was

no specific rule of customary law which prohibited the use of nuclear weapons; if such a rule had existed, the General Assembly could simply have referred to it and would not have needed to undertake such an exercise of legal qualification.

73. Having said this, the Court points out that the adoption each year by the General Assembly, by a large majority, of resolutions recalling the content of resolution 1653 (XVI), and requesting the member States to conclude a convention prohibiting the use of nuclear weapons in any circumstance, reveals the desire of a very large section of the international community to take, by a specific and express prohibition of the use of nuclear weapons, a significant step forward along the road to complete nuclear disarmament. The emergence, as *lex lata*, of a customary rule specifically prohibiting the use of nuclear weapons as such is hampered by the continuing tensions between the nascent *opinio juris* on the one hand, and the still strong adherence to the practice of deterrence on the other.

***Advisory Opinion of ICJ in accordance with International Law of the
Unilateral Declaration of Independence in Respect of KOSOVO,***
(July 22, 2010)

(Resolutions of Security Council as a source of international law)

(The General Assembly requested the International Court of Justice to give an advisory opinion on the following question: ‘Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?’)

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

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

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

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

114. First, the Court observes that Security Council resolution 1244 (1999) was essentially designed to create an interim régime for Kosovo, with a view to channelling the long-term political process to establish its final status. The resolution did not contain any provision dealing with the final status of Kosovo or with the conditions for its achievement. In this regard the Court notes that contemporaneous practice of the Security Council shows that in situations where the Security Council has decided to establish restrictive conditions for the permanent status of a territory, those conditions are specified in the relevant resolution. For example, although the factual circumstances differed from the situation in Kosovo, only 19 days after the adoption of resolution 1244 (1999), the Security Council, in its resolution 1251 of 29 June 1999, reaffirmed its position that a “Cyprus settlement must be based on a State of Cyprus with a single sovereignty and international personality and a single citizenship, with its independence and territorial integrity safeguarded” (para. 11). The Security Council thus set out the specific conditions relating to the permanent status of Cyprus. By contrast, under the terms of resolution 1244 (1999) the Security Council did not reserve for itself the final determination of the situation in Kosovo and remained silent on the conditions for the final status of Kosovo. Resolution 1244 (1999) thus does not preclude the issuance of the declaration of independence of 17 February 2008 because the two instruments operate on a different level: unlike resolution 1244 (1999), the declaration of independence is an attempt to determine finally the status of Kosovo.

115. Secondly, turning to the question of the addressees of Security Council resolution 1244 (1999), it sets out a general framework for the “deployment in Kosovo, under United Nations auspices, of international civil and security presences” (para. 5). It is mostly concerned with creating obligations and authorizations for United Nations Member States as well as for organs of the United Nations such as the Secretary-General and his Special Representative (see notably paras. 3, 5, 6, 7, 9, 10 and 11 of Security Council resolution 1244 (1999)). The only point at which resolution 1244 (1999) expressly mentions other actors relates to the Security Council’s demand, on the one hand, “that the KLA and other armed Kosovo Albanian groups end immediately all offensive actions and comply with the requirements for demilitarization” (para. 15) and, on the other hand, for the “full cooperation by all concerned, including the international security presence, with the International Tribunal for the Former Yugoslavia” (para. 14). There is no indication, in the text of Security Council resolution 1244 (1999), that the Security Council intended to impose, beyond that, a specific obligation to act or a prohibition from acting, addressed to such other actors.

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

117. Such reference to the Kosovo Albanian leadership or other actors, notwithstanding the somewhat general reference to “all concerned” (para. 14), is missing from the text of Security Council resolution 1244 (1999). When interpreting Security Council resolutions, the

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

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

118. Bearing this in mind, the Court cannot accept the argument that Security Council resolution 1244 (1999) contains a prohibition, binding on the authors of the declaration of independence, against declaring independence; nor can such a prohibition be derived from the language of the resolution understood in its context and considering its object and purpose. The language of Security Council resolution 1244 (1999) is at best ambiguous in this regard. The object and purpose of the resolution, is the establishment of an interim administration for Kosovo, without making any definitive determination on final status issues. The text of the resolution explains that the “main responsibilities of the international civil presence will include . . . [o]rganizing and overseeing the development of provisional institutions for democratic and autonomous self-government *pending a political settlement*” (para. 11 (c) of the resolution; emphasis added). The phrase “political settlement”, often cited in the present proceedings, does not modify this conclusion. First, that reference is made within the context of enumerating the responsibilities of the international civil presence, i.e., the Special Representative of the Secretary-General in Kosovo and UNMIK, and not of other actors. Secondly, as the diverging views presented to the Court on this matter illustrate, the term “political settlement” is subject to various interpretations. The Court therefore concludes that this part of Security Council resolution 1244 (1999) cannot be construed to include a prohibition, addressed in particular to the authors of the declaration of 17 February 2008, against declaring independence.

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

RELATIONSHIP BETWEEN INTERNATIONAL LAW
AND MUNICIPAL LAW

In Re Berubari Union (I)
Special Reference No. 1 of 1959
(1960) 3 SCR 250

(Reference by the President of India under Article 143(1) of the Constitution of India on the implementation of the Indo-Pakistan Agreement relating to Berubari Union and Exchange of Enclaves)

P.B. GAJENDRAGADKAR, J - 2. In the present Reference we are concerned with two items of the agreement; Item 3 in para 2 of the agreement reads as follows:

“(3) Berubari Union 12:

This will be so divided as to give half the area to Pakistan, the other half adjacent to India being retained by India. The Division of Berubari Union 12 will be horizontal, starting from the north east corner of Debiganj Thana. The division should be made in such a manner that the Cooch-Bihar Enclaves between Pachagar Thana of East Pakistan and Berubari Union 12 of Jalpaiguri Thana of West Bengal will remain connected as at present with Indian territory and will remain with India. The Cooch-Bihar Enclaves lower down between Boda Thana of East Pakistan and Berubari Union 12 will be exchanged along with the general exchange of enclaves and will go to Pakistan.”

Similarly Item 10 of the Agreement is as follows:

“(10) Exchange of old Cooch-Bihar Enclaves in Pakistan and Pakistan Enclaves in India without claim to compensation for extra area going to Pakistan, is agreed to.”

3. It appears that subsequently a doubt has arisen whether the implementation of the Agreement relating to Berubari Union requires any legislative action either by way of a suitable law of Parliament relating to Article 3 of the Constitution or by way of a suitable amendment of the Constitution in accordance with the provisions of Article 368 of the Constitution or both; and that a similar doubt has arisen about the implementation of the Agreement relating to the exchange of Enclaves; and it further appears that there is a likelihood of the constitutional validity of any action taken for the implementation of the Agreement relating to Berubari Union as well as the Agreement relating to the exchange of Enclaves being questioned in courts of law involving avoidable and protracted litigation; that is why the President thought that questions of law which have arisen are of such nature and of such importance that it is expedient that the opinion of the Supreme Court of India should be obtained thereon; and so, in exercise of the powers conferred upon him by clause (1) of Article 143 of the Constitution, he has referred the following three questions to this Court for consideration and report thereon:

(1) Is any legislative action necessary for the implementation of the Agreement relating to Berubari Union?

(2) If so, is a law of Parliament relating to Article 3 of the Constitution sufficient for the purpose or is an amendment of the Constitution in accordance with Article 368 of the Constitution necessary, in addition or in the alternative?

(3) Is a law of Parliament relating to Article 3 of the Constitution sufficient for implementation of the agreement relating to Exchange of Enclaves or is an amendment of the Constitution in accordance with Article 368 of the Constitution necessary for the purpose, in addition or in the alternative?

4. On 20-2-1947, the British Government announced its intention to transfer power in British India to Indian hands by June 1948. On 3-6-1947, the said Government issued a statement as to the method by which the transfer of power would be effected. On July 18, 1947, the British Parliament passed the Indian Independence Act, 1947. This Act was to come into force from August 15, 1947, which was the appointed day. As from the appointed day two independent Dominions, it was declared, would be set up in India to be known respectively as India and Pakistan. Section 2 of the Act provided that subject to the provisions of sub-sections (3) and (4) of Section 2 the territories of India shall be the territories under the sovereignty of His Majesty which immediately before the appointed day were included in British India except the territories which under sub-section (2) of Section 2 were to be the territories of Pakistan. Section 3, sub-section (1), provided, inter alia, that as from the appointed day the Province of Bengal as constituted under the Government of India Act, 1935, shall cease to exist and there shall be constituted in lieu thereof two new Provinces to be known respectively as East Bengal and West Bengal. Sub-section (3) of Section 3 provided, inter alia, that the boundaries of the new Provinces aforesaid shall be such as may be determined whether before or after the appointed day by the award of a boundary commission appointed or to be appointed by the Governor-General in that behalf, but until boundaries are so determined, (a) the Bengal District specified in the First Schedule of this Act ... shall be treated as the territories which are to be comprised as the new Province of East Bengal; (b) the remainder of the territories comprised at the date of the passing of this Act in the Province of Bengal shall be treated as the territories which are to be comprised in the new Province of West Bengal. Section 3, sub-section (4), provided that the expression "award" means, in relation to a boundary commission, the decision of the Chairman of the commission contained in his report to the Governor-General at the conclusion of the commission's proceedings. The Province of West Bengal is now known as the State of West Bengal and is a part of India, whereas the Province of East Bengal has become a part of Pakistan and is now known as East Pakistan.

5. Berubari Union 12, with which we are concerned, has an area of 8.75 sq miles and a population of ten to twelve thousand residents. It is situated in the Police Station Jalpaiguri in the District of Jalpaiguri, which was at the relevant time a part of Rajshahi Division. It has, however, not been specified in the First Schedule of the Independence Act, and if the matter had to be considered in the light of the said Schedule, it would be a part of West Bengal. But,

as we shall presently point out, the First Schedule to the Independence Act did not really come into operation at all.

6. On 30-6-1947, the Governor-General made an announcement that it had been decided that the Province of Bengal and Punjab shall be partitioned. Accordingly, a boundary commission was appointed, inter alia, for Bengal consisting of four judges of High Courts and a Chairman to be appointed later. Sir Cyril Radcliffe was subsequently appointed as Chairman. So far as Bengal was concerned the material terms of reference provided that the boundary commission should demarcate the boundaries of the two parts of Bengal on the basis of ascertaining the contiguous areas of Muslims and non-Muslims; in doing so it had also to take into account other factors. The Commission then held its enquiry and made an award on 12-8-1947, which is known as the Radcliffe Award ("the award"). It would be noticed that this award was made three days before the appointed day under the Independence Act.

8. Subsequently, certain boundary disputes arose between India and Pakistan and it was agreed between them at the Inter-Dominion Conference held in New Delhi on 14-12-1948, that a tribunal should be set up without delay and in any case not later than 31-1-1949, for the adjudication and final decision of the said disputes. This Tribunal is known as Indo-Pakistan Boundaries Disputes Tribunal, and it was presided over by the Hon'ble Lord Justice Algot Bagge. This Tribunal had to consider two categories of disputes in regard to East-West Bengal but on this occasion no issue was raised about the Berubari Union. In fact no reference was made to the District of Jalpaiguri at all in the proceedings before the Tribunal. The Bagge Award was made on 26-1-1950.

9. It was two years later that the question of Berubari Union was raised by the Government of Pakistan for the first time in 1952. During the whole of this period the Berubari Union continued to be in the possession of the Indian Union and was governed as a part of West Bengal. In 1952 Pakistan alleged that under the award Berubari Union should really have formed part of East Bengal and it had been wrongly treated as a part of West Bengal. Apparently correspondence took place between the Prime Ministers of India and Pakistan on this subject from time to time and the dispute remained alive until 1958. It was under these circumstances that the present Agreement was reached between the two Prime Ministers on 10-9-1958. That is the background of the present dispute in regard to Berubari Union 12.

14. On behalf of the Union of India the learned Attorney-General has contended that no legislative action is necessary for the implementation of the Agreement relating to Berubari Union as well as the exchange of enclaves. In regard to the Berubari Union he argues that what the Agreement has purported to do is to ascertain or to delineate the exact boundary about which a dispute existed between the two countries by reason of different interpretations put by them on the relevant description contained in the award; the said Agreement is merely the recognition or ascertainment of the boundary which had already been fixed and in no sense is it a substitution of a new boundary or the alteration of the boundary implying any alteration of the territorial limits of India. He emphasises that the ascertainment or the settlement of the boundary in the light of the award by which both Governments were bound,

is not an alienation or cession of the territory of India, and according to him, if, as a result of the ascertainment of the true boundary in the light of the award, possession of some land has had to be yielded to Pakistan it does not amount to cession of territory; it is merely a mode of settling the boundary. The award had already settled the boundary; but since a dispute arose between the two Governments in respect of the location of the said boundary the dispute was resolved in the light of the directions given by the award and in the light of the maps attached to it. Where a dispute about a boundary thus arises between two States and it is resolved in the light of an award binding on them the agreement which embodies the settlement of such a dispute must be treated as no more than the ascertainment of the real boundary between them and it cannot be treated as cession or alienation of territory by one in favour of the other. According to this argument there was neither real alteration of the boundary nor real diminution of territory, and there would be no occasion to make any alteration or change in the description of the territories of West Bengal in the First Schedule to the Constitution.

15. It is also faintly suggested by the learned Attorney-General that the exchange of Cooch-Bihar Enclaves is a part of the general and broader agreement about the Berubari Union and in fact it is incidental to it. Therefore, viewed in the said context, even this exchange cannot be said to involve cession of any territory.

18. It is, however, urged that in regard to the making of treaties and implementing them the executive powers of the Central Government are co-extensive and co-incidental with the powers of Parliament itself. This argument is sought to be based on the provisions of certain articles to which reference may be made. Article 53(1) provides that the executive power of the Union shall be vested in the President and shall be exercised by him either directly or through officers subordinate to him in accordance with the Constitution. Article 73 on which strong reliance is placed prescribes the extent of the executive power of the Union. Article 73(1) says "that subject to the provisions of this Constitution the executive power of the Union shall extend (a) to the matters with respect to which Parliament has power to make laws; and (b) to the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement provided that the executive power referred to in sub-clause (a) shall not save as expressly provided in this Constitution or in any law made by Parliament, extend in any State to matters with respect to which the legislature of the State has also the power to make laws"; and Article 74 provides that there shall be a Council of Ministers with the prime Minister at the head to aid and advise the President in the exercise of his functions; and Article 74(2) lays down that the question whether any, and if so what, advice was tendered by the Ministers to the President shall not be inquired into in any court. According to the learned Attorney-General the powers conferred on the Union executive under Article 73(1)(a) have reference to the powers exercisable by reference to Entry 14, List I, in the Seventh Schedule, whereas the powers conferred by Article 73(1)(b) are analogous to the powers conferred on the Parliament by Article 253 of the Constitution. Indeed the learned Attorney-General contended that this position is concluded by a decision of this Court in *Ram Jawaya Kapur v. State of Punjab* (1955) II SCR 225. Dealing with the question about the limits within which the executive Government can function under the Indian Constitution Chief Justice Mukherjea, who delivered the unanimous decision of the Court, has observed that "the said limits can be ascertained without much difficulty by

reference to the form of executive which our Constitution has set up”, and has added, “that the executive function comprised both the determination of the policy as well as carrying it into execution. This evidently includes the initiation of legislation, maintenance of order, the promotion of social and economic welfare, the direction of foreign policy, in fact the carrying on or supervision of the general administration of the State”. It is on this observation that the learned Attorney-General has founded his argument.

23. What is true about the Agreement in respect of Berubari Union 12 is still more emphatically true about the exchange of Cooch-Bihar Enclaves. Indeed the learned Attorney-General’s argument that no legislation is necessary to give effect to the Agreement in respect of this exchange was based on the assumption that this exchange is a part of a larger and broader settlement and so it partakes of its character. Union Since we have held that the agreement in respect of Berubari Union 12 itself involves the cession of Enclaves the territory of India *a fortiori* the Agreement in respect of exchange of Cooch-Bihar Enclaves does involve the cession of Indian territory. That is why the question about this exchange must also be considered on the footing that a part of the territory of India has been ceded to Pakistan; besides it is clear that unlike Questions 1 and 2 the third question which has reference to this exchange postulates the necessity of legislation.

24. In this connection we may also deal with another argument urged by the learned Attorney-General. He contended that the implementation of the Agreement in respect of Berubari Union would not necessitate any change in the First Schedule to the Constitution because, according to him, Berubari Union was never legally included in the territorial description of West Bengal contained in the said Schedule. We are not impressed by this argument either. As we have already indicated, since the award was announced Berubari Union has remained in possession of India and has been always treated as a part of West Bengal and governed as such. In view of this factual position there should be no difficulty in holding that it falls within the territories which immediately before the commencement of the Constitution were comprised in the Province of West Bengal. Therefore, as a result of the implementation of this Agreement the boundaries of West Bengal would be altered and the content of Entry 13 in the First Schedule to the Constitution would be affected.

25. Before we part with this topic we ought to refer to the decision of the Australian High Court in *State of South Australia v. State of Victoria*, 12 CLR 667 on which reliance has been placed by the learned Attorney-General. In that case the boundary between the State of South Australia and the State of New South Wales was by Act 4 and 5 Will. IV, c. 95 and the Letters Patent issued under that Act defined to be the 141st meridian of East Longitude. In 1847, by the authority of the Governors of New South Wales and South Australia and with the knowledge and approval of the Secretary of State a line was located and marked on the ground as being the 141st meridian, but it was discovered in 1869 that the said line was in fact about two miles to the westward of that meridian. The line marked in 1847 had, however, been proclaimed by the respective Governors as the boundary and was the *de facto* boundary thenceforward. In dealing with the dispute which had arisen in respect of the true boundary between the two States Griffith, C.J., referred to the fixation of the boundary in 1847 and observed that “the real transaction is the ascertainment of a fact by persons competent to ascertain it, and a finding of fact so made, and accepted by both, is in the nature of an award

or judgment in *rem* binding upon them and all persons claiming under them". The said dispute was subsequently taken to the Privy Council and it was held by the Privy Council that "on the true construction of the Letters Patent it was contemplated that the boundary line of the 141st meridian of East Longitude should be ascertained and represented on the surface of the earth so as to form a boundary line dividing the two colonies, and that it therefore implicitly gave to the executive of the two colonies power to do such acts as were necessary for permanently fixing such boundaries" (LR) 1914 AC 283 at p. 309. The Privy Council also observed that "the material facts showed that the two Governments made with all care a sincere effort to represent as closely as was possible the theoretical boundary assigned by the Letters Patent by a practical line of demarcation on the earth's surface. There is no trace of any intention to depart from the boundary assigned, but only to reproduce it, and as in its nature it was to have the solemn status of a boundary of jurisdiction Their Lordships have no doubt that it was intended by the two executives to be fixed finally as the statutable boundary and that in point of law it was so fixed". It would thus be clear that the settlement of the boundaries which was held not to amount to an alienation in that case had been made wholly by reference to, and in the light of, the provision of the parliamentary statute to which reference already been made. What was done in 1847 by the parties who had authority to deal with the matter was to locate and mark a line on the ground which was held to be the 141st meridian though it is true that in 1869 it was discovered that the line so fixed was about two miles to the westward of the meridian. This was not a case where contracting parties independently determined the line with a view to settle the dispute between the two respective States. What they purported to do was to determine the line in accordance with the provisions of the parliamentary statute. In the present case, as we have already pointed out, the position of the agreement is essentially different; it does not purport to be based on the award and has been reached apart from, and independently of, it. Therefore, we do not think that the learned Attorney-General can derive any assistance from the decision in the case of *State of South Australia v. State of Victoria* in support of his construction of the Agreement.

26. In view of our conclusion that the agreement amounts to cession or alienation of a part of Indian territory and is not a mere ascertainment or determination of the boundary in the light of, and by reference to, the award, it is not necessary to consider the other contention raised by the learned Attorney-General that it was within the competence of the Union executive to enter into such an Agreement, and that the Agreement can be implemented without any legislation. It has been fairly conceded by him that this argument proceeds on the assumption that the Agreement is in substance and fact no more than the ascertainment or the determination of the disputed boundary already fixed by the award. We need not, therefore, consider the merits of the argument about the character and extent of the executive functions and powers nor need we examine the question whether the observations made by Mukherjee, C.J., in the case of *Ram Jawaya Kapur* in fact lend support to the said argument, and if they do, whether the question should not be reconsidered.

27. At this stage it is necessary to consider the merits of the rival contention raised by Mr Chatterjee before us. He urges that even Parliament has no power to cede any part of the territory of India in favour of a foreign State either by ordinary legislation or even by the amendment of the Constitution; and so, according to him, the only opinion we can give on the

Reference is that the Agreement is void and cannot be made effective even by any legislative process. This extreme contention is based on two grounds. It is suggested that the preamble to the Constitution clearly postulates that like the democratic republican form of government the entire territory of India is beyond the reach of Parliament and cannot be affected either by ordinary legislation or even by constitutional amendment. The makers of the Constitution were painfully conscious of the tragic partition of the country into two parts, and so when they framed the Constitution they were determined to keep the entire territory of India as inviolable and sacred. The very first sentence in the preamble which declares that "We, the people of India, having solemnly resolved to constitute India into a sovereign democratic republic", says Mr Chatterjee, irrevocably postulates that India geographically and territorially must always continue to be democratic and republican. The other ground on which this contention is raised is founded on Article 1(3)(c) of the Constitution which contemplates that "the territory of India shall comprise such other territories as may be acquired", and it is argued that whereas the Constitution has expressly given to the country the power to acquire other territories it has made no provision for ceding any part of its territory; and in such a case the rule of construction viz. *expressio unius est exclusio alterius* must apply. In our opinion, there is no substance in these contentions.

31. What then is the nature of the treaty-making power of a sovereign State? That is the next problem which we must consider before addressing ourselves to the questions referred to us for our opinion. As we have already pointed out it is an essential attribute of sovereignty that a sovereign State can acquire foreign territory and can, in case of necessity, cede a part of its territory in favour of a foreign State, and this can be done in exercise of its treaty-making power. Cession of national territory in law amounts to the transfer of sovereignty over the said territory by the owner State in favour of another State. There can be no doubt that such cession is possible and indeed history presents several examples of such transfer of sovereignty. It is true as Oppenheim has observed that "hardship is involved in the fact that in all cases of cession the inhabitants of the territory who remain lose their old citizenship and are handed over to a new sovereign whether they like it or not"; and he has pointed out that "it may be possible to mitigate this hardship by stipulating an option to emigrate within a certain period in favour of the inhabitants of ceded territory as means of averting the charge that the inhabitants are handed over to a new sovereign against their will". But though from the human point of view great hardship is inevitably involved in cession of territory by one country to the other there can be no doubt that a sovereign State can exercise its right to cede a part of its territory to a foreign State. This power, it may be added, is of course subject to the limitations which the Constitution of the State may either expressly or by necessary implication impose in that behalf; in other words, the question as to how treaties can be made by a sovereign State in regard to a cession of national territory and how treaties when made can be implemented would be governed by the provisions in the Constitution of the country. Stated broadly the treaty-making power would have to be exercised in the manner contemplated by the Constitution and subject to the limitations imposed by it. Whether the treaty made can be implemented by ordinary legislation or by constitutional amendment will naturally depend on the provisions of the Constitution itself. We must, therefore, now turn to that aspect of the problem and consider the position under our Constitution.

43. In this connection the learned Attorney-General has drawn our attention to the provisions of Act 47 of 1951 by which the boundaries of the State of Assam were altered consequent on the cession of a strip of territory comprised in that State to the Government of Bhutan. Section 2 of this Act provides that on and from the commencement of the Act the territories of the State of Assam shall cease to comprise the strip of territory specified in the Schedule which shall be ceded to the Government of Bhutan, and the boundaries of the State of Assam shall be deemed to have been altered accordingly. Section 3 provides for the consequential amendment of the first paragraph in Part A of the First Schedule to the Constitution relating to the territory of Assam. The argument is that when Parliament was dealing with the cession of a strip of territory which was a part of the State of Assam in favour of the Government of Bhutan it has purported to pass this Act under Article 3 of the Constitution. It appears that the strip of territory which was thus ceded consisted of about 32 sq. miles of the territory in the Dewangiri Hill Block being a part of Dewangiri on the extreme northern boundary of Kamrup District. This strip of territory was largely covered by forests and only sparsely inhabited by Bhotias. The learned Attorney-General has not relied on this single statute as showing legislative practice. He has only cited this as an instance where Parliament has given effect to the cession of a part of the territory of Assam in favour of the Government of Bhutan by enacting a law relating to Article 3 of the Constitution. We do not think that this instance can be of any assistance in construing the scope and effect of the provisions of Article 3.

46. We have already held that the Agreement amounts to a cession of a part of the territory of India in favour of Pakistan; and so its implementation would naturally involve the alteration of the content of and the consequent amendment of Article 1 and of the relevant part of the First Schedule to the Constitution, because such implementation would necessarily lead to the diminution of the territory of the Union of India. Such an amendment can be made under Article 368. This position is not in dispute and has not been challenged before us; so it follows that acting under Article 368 Parliament may make a law to give effect to, and implement, the agreement in question covering the cession of a part of Berubari Union 12 as well as some of the Cooch-Bihar Enclaves which by exchange are given to Pakistan. Parliament may, however, if it so chooses, pass a law amending Article 3 of the Constitution so as to cover cases of cession of the territory of India in favour of a foreign State. If such a law is passed then Parliament may be competent to make a law under the amended Article 3 to implement the agreement in question. On the other hand, if the necessary law is passed under Article 368 itself that alone would be sufficient to implement the agreement.

47. It would not be out of place to mention one more point before we formulate our opinion on the questions referred to us. We have already noticed that under the proviso to Article 3 of the Constitution it is prescribed that where the proposal contained in the Bill affects the area, boundaries or name of any of the States, the Bill has to be referred by the President to the legislature of that State for its views thereon within such period as is therein prescribed. It has been urged before us by the learned Attorney-General that if it is held that Parliament must act under Article 368 and not under Article 3 to implement the Agreement, it would in effect deprive the legislature of West Bengal of an opportunity to express its views on the cession of the territory in question. That no doubt is true; but, if on its fair and

reasonable construction Article 3 is inapplicable this incidental consequence cannot be avoided. On the other hand, it is clear that if the law in regard to the implementation of the Agreement is to be passed under Article 368 it has to satisfy the requirements prescribed by the said article; the Bill has to be passed in each House by a majority of the total membership of the House and by a majority of not less than two-thirds of the House present and voting; that is to say, it should obtain the concurrence of a substantial section of the House which may normally mean the consent of the major parties of the House, and that is a safeguard provided by the Article in matters of this kind.

48. In this connection it may incidentally be pointed out that the amendment of Article 1 of the Constitution consequent upon the cession of any part of the territory of India in favour of a foreign State does not attract the safeguard prescribed by the proviso to Article 368 because neither Article 1 nor Article 3 is included in the list of entrenched provisions of the Constitution enumerated in the proviso. It is not for us to enquire or consider whether it would not be appropriate to include the said two articles under the proviso. That is a matter for the Parliament to consider and decide.

* * * * *

Ram Kishore Sen v. Union of India

(1966) 1 SCR 430

GAJENDRAGADKAR, C.J. - The writ petition from which this appeal arises was filed by the six appellants who reside within the limits of Thana Jalpaiguri in the district of Jalpaiguri. The substance of the prayer made by the appellants in their writ petition was that the respondents were attempting or taking steps to transfer a portion of Berubari Union No. 12 and the village of Chilahati to Pakistan and they urged that the said attempted transfer was illegal. That is why the writ petition prayed that appropriate writs or directions should be issued restraining the respondents from taking any action in pursuance of their intention to make the said transfer. Appellants 1 and 2 are the original inhabitants of villages Senpara and Deuniapara respectively which are within the limits of Berubari Union No. 12. They own ancestral homes and cultivated lands in the said villages and they live in the homesteads. Appellants 3 and 4 originally resided in villages in Thana Boda adjoining Thana Jalpaiguri; but when Thana Boda was transferred to Pakistan as a result of the partition in 1947, they came over to the villages of Senpara and Gouranga bazar respectively within the limits of Berubari Union No. 12; since then, they have acquired lands there and built their homesteads in which they live. Appellants 5 and 6 are the inhabitants of Village Chilahati, and according to them, the village is situated in Thana Jalpaiguri. In this village, these two appellants have their ancestral homes and cultivated lands.

2. It is a matter of common knowledge that on September 10, 1956, an agreement was reached between the Prime Ministers of India, and Pakistan with a view to settle some of the disputes and problems pending between the two countries. This agreement was set out in the note jointly recorded by the Commonwealth Secretary, Ministry of External Affairs, Government of India, and the Foreign Secretary, Ministry of Foreign Affairs and Commonwealth Relations, Government of Pakistan. After this agreement was entered into, the President of India referred three questions to this Court for consideration and report thereon, under Article 143(1) of the Constitution, because he took the view that the said questions had arisen and were of such nature and of such importance that it was expedient that the opinion of the Supreme Court of India should be obtained thereon. In *re: The Berubari Union and Exchange of Enclaves*—(1960) 3 SCR 250 at pp. 256, 295-96. These three questions were thus formulated:—

“(1) Is any legislative action necessary for the implementation of the Agreement relating to Berubari Union?”

(2) If so, is a law of Parliament relatable to Article 3 of the Constitution sufficient for the purpose or is an amendment of the Constitution in accordance with Article 368 of the Constitution necessary, in addition or in the alternative?”

(3) Is a law of Parliament relatable to Article 3 of the Constitution sufficient for implementation of the Agreement relating to Exchange of Enclaves or is an amendment of the Constitution in accordance with Article 368 of the Constitution necessary for the purpose, in addition or in the alternative?”

On the above Reference, this Court rendered the following answers:

Q. (1) Yes.

Q. (2)(a) A law of Parliament relating to Article 3 of the Constitution would be incompetent;

(b) A law of Parliament relating to Article 368 of the Constitution is competent and necessary;

(c) A law of Parliament relating to both Article 368 and Article 3 would be necessary only if Parliament chooses first to pass a law amending Article 3 as indicated above; in that case, Parliament may have to pass a law on those lines under Article 368 and then follow it up with a law relating to the amended Article 3 to implement the Agreement.

Q. (3) Same as answers (a), (b) and (c) to Question 2.

3. As a result of the opinion thus rendered, Parliament passed the Constitution (Ninth Amendment) Act, 1960 which came into operation on December 28, 1960. Under this amendment, "appointed day" means such date as the Central Government may, by notification in the Official Gazette, appoint as the date for the transfer of territories to Pakistan in pursuance of the "Indo-Pakistan Agreements" which means the Agreements dated 10th September, 1958, 23rd October, 1959, and 11th January, 1960 entered into between the Governments of India and Pakistan.

5. In regard to the appellants' case about the village of Chilahati, the learned Judge held that Chilahati was a part of Debiganj Thana and had been allotted to the share of Pakistan under the Radcliffe Award. The theory set up by the appellants that the village of Chilahati which was being transferred to Pakistan was different from Chilahati which was a part of the Debiganj Thana, was rejected by the learned Judge; and he found that a small area of 512 acres appertaining to the said village had not been delivered to Pakistan at the time of the partition; and so, when the respondents were attempting to transfer that area to Pakistan, it was merely intended to give to Pakistan what really belonged to her, the said area was not, in law, a part of West Bengal, and no question in relation to the constitutional validity of the said proposed transfer can, therefore, arise. The plea of adverse possession which was made by the appellants alternatively in respect of Chilahati was rejected by the learned Judge. In the result, the appellants' prayer for the issue of a writ or order in the nature of mandamus in respect of the said proposed transfer of Chilahati was also disallowed.

6. It appears to have been urged before the learned Judge that in order to make the transfer of a part of Berubari Union No. 12 to Pakistan, it was necessary to make a law relating to Article 3 of the Constitution. The learned Judge held that this plea had been rejected by this Court in the opinion rendered by it on the earlier Reference; and so, an attempt made by the respondents to implement the material provisions of the Ninth Amendment Act was fully valid and justified. That is how the writ petition filed by the appellants came to be dismissed.

7. The appellants then moved the learned Judge for a certificate to prefer in appeal to this Court; and after the learned Judge was pleased to grant them the said certificate, they have come to this Court by their present appeal.

8. Before proceeding to deal with the points which have been raised before us by Mr Mukherjee on behalf of the appellants, it is necessary to advert to the opinion expressed by this Court in *Re: The Berubari Union and Exchange of Enclaves* with a view to correct an error which has crept into the opinion through inadvertence. On that occasion, it was urged on behalf of the Union of India that if any legislative action is held to be necessary for the implementation of the Indo-Pakistan Agreement, a law of Parliament relating to Article 3 of the Constitution would be sufficient for the purpose and that it would not be necessary to take any action under Article 368. This argument was rejected. In dealing with this contention, it was observed by this Court that the power to acquire new territory and the power to cede a part of the national territory were outside the scope of Article 3(c) of the Constitution. This Court then took the view that both the powers were the essential attributes of sovereignty and vested in India as an independent Sovereign Republic. While discussing the significance of the several clauses of Article 3 in that behalf, it seems to have been assumed that the Union territories were outside the purview of the said provisions. In other words, the opinion proceeded on the basis that the word "State" used in all the said clauses of Article 3 did not include the Union territories specified in the First Schedule.

9. Reverting then to the points urged before us by Mr Mukerjee, the first question which falls to be considered is whether the learned trial Judge was in error in holding that the map Ext. A-1 on which the appellants had rested their case was neither relevant nor reliable. There is no doubt that the sole basis on which the appellants challenged the validity of the intended transfer of a part of Berubari Union No. 12 was that the division had to be made by a strict horizontal line beginning with the north-east corner of the Debiganj Thana and drawn east-west, and that if such a division is made, no part of Berubari Union No. 12 could go to Pakistan. It is common ground that the intention of the relevant provision is that after Berubari Union No. 12 is divided, its northern portion should remain with India and the southern portion should go to Pakistan. The appellants, urged that if a horizontal line is drawn from the north-east corner of Debiganj Thana from east to west, no part of Berubari Union No. 12 falls to the south of the horizontal line, and therefore, it is impossible to divide Berubari Union No. 12 into two halves by the process intended by the Amendment Act.

18. In the course of his arguments, Mr Mukerjee no doubt faintly suggested that the Schedule annexed to the Amendment Act should itself have shown how the division had to be made. In other words, the argument was that more details should have been given and specific directions issued by the Ninth Amendment Act itself as to the manner of making the division. This contention is clearly misconceived and must be rejected. All that the relevant provision has done is to record the decision reached by the Prime Ministers of the two countries and make it effective by including it in the Constitution Amendment Act as suggested by this Court in its opinion on the Reference in respect of this case.

20. Mr Mukerjee very strongly relied on certain private documents produced by the appellants in the form of transfer deeds. In these documents, no doubt Chilahati has been referred to as forming part of District Jalpaiguri. These documents range between 1925 AD to 1945 AD. It may well be that a part of this elongated village of Chilahati admeasuring about 15 to 16 square miles may have been described in certain private documents as falling under the district of Jalpaiguri. But, as pointed out by the learned Judge in view of the maps

produced by the respondents it is difficult to attach any importance to the recitals made by individuals in their respective documents which tend to show that Chilahati is a part of Police Station Jalpaiguri. Indeed, no attempt was made to identify the lands concerning the said deeds with the Taluka maps with the object of showing that there was another Taluka Chilahati away from Berubari Union No. 12. The learned Judge has also referred to the fact that Mr Mukerjee himself relied upon a map of Taluka Chilahati which is in Police Station Debiganj and not Jalpaiguri. Therefore, we see no justification for Mr Mukerjee's contention that the learned Judge was in error in rejecting the appellants' case that a part of Chilahati which is being handed over to Pakistan does not pertain to Village Chilahati which is situated in Debiganj Police Station, but is a part of another Chilahati in the district of Jalpaiguri. There is no doubt that if a small portion of land admeasuring about 512 acres which is being transferred to Pakistan is a part of Chilahati situated within the jurisdiction of Debiganj Thana, there can be no valid objection to the proposed transfer. It is common ground that the village of Chilahati in the Debiganj Thana has been allotted to Pakistan; and it appears that through inadvertence, a part of it was not delivered to Pakistan on the occasion of the partition which followed the Radcliffe Award. It is not surprising that in dividing territories under the Radcliffe Award, such a mistake should have occurred; but it is plain that what the respondents now propose to do is to transfer to Pakistan the area in question which really belongs to her. In our opinion, this conduct on the part of the respondents speaks for their fair and straightforward approach in this matter.

21. That takes us to another contention raised by Mr Mukerjee in respect of the village of Chilahati. He argues that having regard to the provisions contained in Entry 13 in the First Schedule to the Constitution of India, it must be held that even though a portion of Chilahati which is being transferred to Pakistan may have formed part of Chilahati allotted to Pakistan under the Radcliffe Award, it has now become a part of West Bengal and cannot be ceded to Pakistan without following the procedure prescribed by this Court in its opinion on the earlier Reference. Entry 13 in the First Schedule on which this argument is based, provides, inter alia, that West Bengal means the territories which immediately before the commencement of this Constitution were either comprised in the Province of West Bengal or were being administered as if they formed part of that Province. Mr Mukerjee's argument is that it is common ground that this portion of Chilahati was being administered as if it was a part of the Province of West Bengal; and so, it must be deemed to have been included in the territory of West Bengal within the meaning of the First Schedule, and if that is so, it is a part of the territory of India under Article 1 of the Constitution. It is true that since this part of Chilahati was not transferred to Pakistan at the proper time, it has been regarded as part of West Bengal and administered as such. But the question is: does this fact satisfy the requirement of Entry 13 on which the argument is based? In other words, what is the meaning of the clause "the territories which were being administered as if they formed part of that Province"; what do the words "as if" indicate in the context? The interpretation of this clause necessarily takes us to its previous history.

22. When the Constitution was first adopted, Part A of the First Schedule enumerated Part A States. The territory of the State of West Bengal was one of such States. The Schedule then provided that the territory of the State of West Bengal shall comprise the territory which

immediately before the commencement of this Constitution was comprised in the Province of West Bengal. The territory of the State of Assam was differently described; but with the description of the said territory we are not concerned in the present appeal. The territory of each of the other States was, however, described as comprising the territories which immediately before the commencement of this Constitution were comprised in the corresponding Province and the territories which, by virtue of an order made under Section 290-A of the Government of India Act, 1935, were immediately before such commencement being administered as if they formed part of that Province. It is significant that this descriptive clause was not used while describing the territory of the State of West Bengal by the Constitution as it was first enacted.

23. The Constitution (Amendment of the First and Fourth Schedules) Order 1950, however, made a change and brought the territory of the State of West Bengal into line with the territories of the other States covered by the clause which we have just quoted. This Order was passed on January 25, 1950, and it deleted the paragraph relating to the territory of the State of West Bengal, with the result that the last clause of the First Schedule became applicable to it. In other words, as a result of the said Order, the territory of the State of West Bengal must be deemed to have always comprised the territory which immediately before the commencement of the Constitution was comprised in the Province of West Bengal, as well as the territories which, by virtue of an order made under Section 290-A of the Government of India Act, 1935, were immediately before such commencement being administered as if they formed part of West Bengal.

25. In view of this Constitutional background, the words "as if" have a special significance. They refer to territories which originally did not belong to West Bengal but which became a part of West Bengal by reason of merger agreements. Therefore, it would be impossible to hold that a portion of Chilahati is a territory which was administered as if it was a part of West Bengal. Chilahati may have been administered as a part of West Bengal; but the said administration cannot attract the provisions of Entry 13 in the First Schedule, because it was not administered as if it was a part of West Bengal within the meaning of that Entry. The physical fact of administering the said area was not referable to any merger at all; it was referable to the accidental circumstance that the said area had not been transferred to Pakistan as it should have been. In other words, the clause "as if" is not intended to take in cases of territories which are administered with the full knowledge that they do not belong to West Bengal and had to be transferred in due course to Pakistan. The said clause is clearly and specifically intended to refer to territories which merged with the adjoining States at the crucial time, and so, it cannot include a part of Chilahati that was administered by West Bengal under the circumstance to which we have just referred. That is why we think Mr Mukerjee is not right in contending that by reason of the fact that about 512 acres of Chilahati were not transferred to Pakistan and continued to be administered by the West Bengal Government, that area became a part of West Bengal within the meaning of Entry 13 in Schedule I. The West Bengal Government knew all the time that it was an area which belonged to Pakistan and which had to be transferred to it. That is, in fact, what the respondents are seeking to do; and so, it would be idle to contend that by virtue of the accidental fact that this area was administered by West Bengal, it has constitutionally and

validly become a part of West Bengal itself. That being so, there can be no question about the constitutional validity of the proposed transfer of this area to Pakistan. What the respondents are seeking to do is to give to Pakistan what belongs to Pakistan under the Radcliffe Award.

26. Mr Dutt, who followed Mr Mukerjee, attempted to argue that the village of Chilahati has become a part of West Bengal and as such, a part of the Union of India because of adverse possession. He contends that ever since the Radcliffe Award was made and implemented, the possession of West Bengal in respect of this area is adverse; and he argues that by adverse possession, Pakistan's title to this area has been lost. We do not think it is open to the appellants to raise this contention. It has been fairly conceded by Mr Dutt that no such plea had been raised in the writ petition filed by the appellants. Besides, it is plain that neither the Union of India, nor the States of West Bengal which are impleaded to the present proceedings make such a claim. It would indeed be surprising that even though the Union of India and the State of West Bengal expressly say that this area belongs to Pakistan under the Radcliffe Award and has to be delivered over to Pakistan, the petitioners should intervene and contend that Pakistan's title to this property has been lost because West Bengal had been adversely in possession of it. It is, therefore, unnecessary to examine the point whether a plea of this kind can be made under international law and if yes, whether it is sustained by any evidence on the record.

27. The result is, the appeal fails and is dismissed.

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Jolly George Verghese & Anr. v The Bank of Cochin

AIR 1980 SC 470

KRISHNA IYER. J.-This litigation has secured special leave from us because it involves a profound issue of constitutional and international law and offers a challenge to the nascent champions of human rights in India whose politicised pre-occupation has forsaken the civil debtor whose personal liberty is imperilled by the judicial process itself, thanks to s. 51 (Proviso) and O. 21, r. 37, Civil Procedure Code. Here is an appeal by judgment-debtors-the appellants-whose personal freedom is in peril because a court warrant for arrest and detention in the civil prison is chasing them for non-payment of an amount due to a bank the respondent, which has ripened into a decree and has not yet been discharged. Is such deprivation of liberty illegal? From the perspective of international law the question posed is whether it is right to enforce a contractual liability by imprisoning a debtor in the teeth of Art. 11 of the International Covenant on Civil and Political Rights. The Article reads: No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation.

An apercu of Art. 21 of the Constitution suggests the question whether it is fair procedure to deprive a person of his personal liberty merely because he has not discharged his contractual liability in the face of the constitutional protection of life and liberty as expanded by a chain of ruling of this Court beginning with Maneka Gandhi's case.

Article 21 reads: Protection of life and personal liberty.-No person shall be deprived of his life or personal liberty except according to procedure established by law.

A third, though humdrum, question is as to whether, in this case, s. 51 has been complied with in its enlightened signification. This turns on the humane meaning of the provision. Some minimal facts may bear a brief narration sufficient to bring the two problems we have indicated,

although we must candidly state that the Special Leave Petition is innocent of these two issues and the arguments at the bar have avoided virgin adventures. Even so, the points have been raised and counsel have helped with their submissions. We therefore, proceed to decide.

The facts. The judgment-debtors (appellants) suffered a decree against them in O.S. No. 57 of 1972 in a sum of Rs. 2.5 lakhs, the respondent-bank being the decree-holder. There are two other money decrees against the appellants (in O.S. 92 of 1972 and 94 of 1974), the total sum payable by them being over Rs. 7 lakhs. In execution of the decree in question (O.S. 57 of 1972) a warrant for arrest and detention in the civil prison was issued to the appellants under s. 51 and o.21, r. 37 of the Civil Procedure Code on 22-6-1979. Earlier, there had been a similar warrant for arrest in execution of the same decree. Besides this process, the decree-holders had proceeded against the properties of the judgment-debtors and in consequence, all these immovable properties had been attached for the purpose of sale in discharge of the decree debts. It is averred that the execution court has also appointed a Receiver for the management of the properties under attachment. In short, the enjoyment or even the power to

alienate the properties by the judgment-debtors has been forbidden by the court direction keeping them under attachment and appointing a Receiver to manage them. Nevertheless, the court has issued a warrant for arrest because, on an earlier occasion, a similar warrant had been already issued. The High Court, in a short order, has summarily dismissed the revision filed by the judgment-debtors against the order of arrest. We see no investigation having been made by the executing court regarding the current ability of the judgment-debtors to clear off the debts or their *malafide* refusal, if any, to discharge the debts. The question is whether under such circumstances the personal freedom of the judgment-debtors can be held in ransom until repayment of the debt, and if s. 51 read with O. 21, r. 37, C.P.C. does warrant such a step, whether the provision of law is constitutional. Tested on the touchstone of fair procedure under Art. 21 and in conformity with the inherent dignity of the human person in the light of Art. 11 of the International Covenant on Civil and Political Rights. A modern Shylock is shackled by law's humane hand-cuffs. At this stage, we may notice the two provisions.

Section 51 runs thus:

51. Subject to such conditions and limitations as may be prescribed, the Court may, on the application of the decree-holder, order execution of the decree-

- (a) by delivery of any property specifically decreed;
- (b) by attachment and sale or by sale without attachment of any property;
- (c) by arrest and detention in prison;
- (d) by appointing a receiver; or
- (e) in such other manner as the nature of the relief granted may require.

Provided that, where the decree is for the payment of money, execution by detention in prison shall not be ordered unless, after giving the judgment-debtor an opportunity of showing cause why he should not be committed to prison, the Court, for reasons recorded in writing, is satisfied-

- (a) that the judgment-debtor, with the object or effect of obstructing or delaying the execution of the decree-
 - (i) is likely to abscond or leave the local limits of the jurisdiction of the Court, or
 - (ii) has, after the institution of the suit in which the decree was passed, dishonestly transferred, concealed, or removed any part of his property, or committed any other act of bad faith in relation to his property, or
- (b) that the judgment-debtor has, or has had since the date of the decree, the means to pay the amount of the decree or some substantial part thereof and refuses or neglects or has refused or neglected to pay the same, or
- (c) that the decree is for a sum for which the judgment-debtor was bound in a fiduciary capacity to account.

Explanation.-In the calculation of the means of the judgment-debtor for the purposes of clause (b), there shall be left out of account any property which, by or under any law or custom having the force of law for the time being in force, is exempt from attachment in execution of the decree.

We may here read also order 21 Rule 37:

37. (1) Notwithstanding anything in these rules, where an application is for the execution of a decree for the payment of money by the arrest and detention in the civil prison of a judgment-debtor who is liable to be arrested in pursuance of the application, the Court shall, instead of issuing a warrant for his arrest, issue a notice calling upon him to appear before the Court on a day to be specified in the notice and show cause why he should not be committed to the civil prison:

Provided that such notice shall not be necessary if the Court is satisfied, by affidavit, or otherwise, that, with the object or effect of delaying the execution of the decree, the judgment-debtor is likely to abscond or leave the local limits of the jurisdiction of the Court.

(2) Where appearance is not made in obedience to the notice, the Court shall, if the decree-holder so requires, issue a warrant for the arrest of the judgment-debtor.

Right at the beginning, we may take up the bearing of Art. 11 on the law that is to be applied by an Indian Court when there is a specific provision in the Civil Procedure Code, authorising detention for non-payment of a decree debt. The Covenant bans imprisonment merely for not discharging a decree debt. Unless there be some other vice or mens rea apart from failure to foot the decree, international law frowns on holding the debtor's person in civil prison, as hostage by the court. India is now a signatory to this Covenant and Art. 51 (c) of the Constitution obligates the State to "foster respect for international law and treaty obligations in the dealings of organised peoples with one another". Even so, until the municipal law is changed to accommodate the Covenant what binds the court is the former, not the latter.

A.H. Robertson in "Human Rights-in National and International Law" rightly points out that international conventional law must go through the process of transformation into the municipal law before the international treaty can become an internal law. From the national point of view the national rules alone count. With regard to interpretation, however, it is a principle generally recognised in national legal system that, in the event of doubt, the national rule is to be interpreted in accordance with the State's international obligations.

The position has been spelt out correctly in a Kerala ruling on the same point (*Xavier v Canara Bank Ltd.*(1969)). In that case, a judgment-debtor was sought to be detained under O. 21, r. 37 C.P.C. although he was seventy and had spent away on his illness the means he once had to pay off the decree. The observations there made are apposite and may bear exception:

The last argument which consumed most of the time of the long arguments of learned counsel for the appellant is that the International Covenants on Civil and Political Rights are part of the law of the land and have to be respected by the Municipal Courts. Article 11, which I have extracted earlier, grants immunity from imprisonment to indigent but honest judgment-debtors.

The march of civilization has been a story of progressive subordination of property rights to personal freedom; and a by-product of this subordination finds noble expression

in the declaration that "No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation." This revolutionary change in the regard for the human person is spanned by the possible shock that a resuscitated Shylock would suffer if a modern Daniel were to come to judgment when the former asks the pound of flesh from Antonio's bosom according to the tenor of the bond, by flatly refusing the mayhem on the debtor, because the inability of an impecunious obligee shall not imperil his liberty or person under the new dispensation proclaimed by the Universal Declaration of Human Rights. Viewed in this progressive perspective we may examine whether there is any conflict between s. 51 CPC and Article 11 of the International Covenants quoted above. As already indicated by me, this latter provision only interdicts imprisonment if that is sought solely on the ground of inability to fulfil the obligation. Section 51 also declares that if the debtor has no means to pay he cannot be arrested and detained. If he has and still refuses or neglects to honour his obligation or if he commits acts of bad faith, he incurs the liability to imprisonment under s. 51 of the Code, but this does not violate the mandate of Article 11. However, if he once had the means but now has not or if he has money now on which there are other pressing claims, it is violative of the spirit of Article 11 to arrest and confine him in jail so as to coerce him into payment.

The judgment dealt with the effect of international law and the enforceability of such law at the instance of individuals within the State, and observed:

The remedy for breaches of International Law in general is not to be found in the law courts of the State because International Law per se or proprio vigore has not the force or authority of civil law, till under its inspirational impact actual legislation is undertaken. I agree that the Declaration of Human Rights merely sets a common standard of achievement for all peoples and all nations but cannot create a binding set of rules. Member States may seek, through appropriate agencies, to initiate action when these basic rights are violated; but individual citizens cannot complain about their breach in the municipal courts even if the country concerned has adopted the covenants and ratified the operational protocol. The individual cannot come to Court but may complain to the Human Rights Committee, which, in turn, will set in motion other procedures. In short, the basic human rights enshrined in the International Covenants above referred to, may at best inform judicial institutions and inspire legislative action within member-States; but apart from such deep reverence, remedial action at the instance of an aggrieved individual is beyond the area of judicial authority.

While considering the international impact of international covenants on municipal law, the decision concluded:

Indeed the construction I have adopted of s. 51, CPC has the flavour of Article 11 of the Human Rights Covenants. Counsel for the appellant insisted that law and justice must be on speaking terms-by justice he meant, in the present case that a debtor unable to pay must not be detained in civil prison. But my interpretation does put law and justice on speaking terms. Counsel for the respondent did argue that International Law is the

vanishing point of jurisprudence is itself vanishing in a world where humanity is moving steadily, though slowly, towards a world order, led by that intensely active, although yet ineffectual body, the United Nations Organisation. Its resolutions and covenants mirror the conscience of mankind and insominate, within the member States, progressive legislation; but till this last step of actual enactment of law takes place, the citizen in a world of sovereign States, has only inchoate rights in the domestic Courts under these international covenants.

While dealing with the impact of the Dicean rule of law on positive law, Hood Phillips wrote-and this is all that the Covenant means now for Indian courts administering municipal law

The significance of this kind of doctrine for the English lawyer is that it finds expression in three ways. First, it influences legislators. The substantive law at any given time may approximate to the "rule of law", but this only at the will of Parliament. Secondly, its principles provide canons of interpretation which express the individualistic attitude of English courts and of those courts which have followed the English tradition. They give an indication of how the law will be applied and legislation interpreted. English courts lean in favour of the liberty of the citizen, especially of his person: they interpret strictly statutes which purport to diminish that liberty, and presume that Parliament does not intend to restrict private rights in the absence of clear words to the contrary.

The positive commitment of the States Parties ignites legislative action at home but does not automatically make the Covenant an enforceable part of the corpus juris of India. Indeed, the Central Law Commission, in its Fifty Fourth Report, did cognise the Covenant, while dealing with s. 51 C.P.C.:

The question to be considered is, whether this mode of execution should be retained on the statute book, particularly in view of the provision in the International Covenant on Civil and Political Rights prohibiting imprisonment for a mere non-performance of contract.

The Law Commission, in its unanimous report, quoted the key passages from the Kerala ruling referred to above and endorsed its ratio. 'We agree with this view' said the Law Commission and adopting that meaning as the correct one did not recommend further change on this facet of the Section. It is important to notice that, interpretationally speaking, the Law Commission accepted the dynamics of the changed circumstances of the debtor :

However, if he once had the means but now has not, or if he has money now on which there are other pressing claims, it is violative of the spirit of Article 11 to arrest and confine him in jail so as to coerce him into payment.

This is reiterated by the Commission:

Imprisonment is not to be ordered merely because, like Shylock, the creditor says: "I crave the law, the penalty and forfeit of my bond." The law does recognise the principle that "Mercy is reasonable in the time of affliction, as clouds of rain in the time of drought."

We concur with the Law Commission in its construction of s. 51 C.P.C. It follows that quondam affluence and current indigence without intervening dishonesty or bad faith in liquidating his liability can be consistent with Art. 11 of the Covenant, because then no detention is permissible under s. 51, C.P.C. Equally meaningful is the import of Art. 21 of the Constitution in the context of imprisonment for non-payment of debts. The high value of human dignity and the worth of the human person enshrined in Art. 21, read with Arts. 14 and 19, obligates the State not to incarcerate except under law which is fair, just and reasonable in its procedural essence. Maneka Gandhi's case as developed further in Sunil Batra v. Delhi Administration, Sita Ram & Ors. v. State of U.P. and Sunil Batra v. Delhi Administration lays down the proposition. It is too obvious to need elaboration that to cast a person in prison because of his poverty and consequent inability to meet his contractual liability is appalling. To be poor, in this land of daridra Narayana, is no crime and to 'recover' debts by the procedure of putting one in prison is too flagrantly violative of Art. 21 unless there is proof of the minimal fairness of his wilful failure to pay in spite of his sufficient means and absence of more terribly pressing claims on his means such as medical bills to treat cancer or other grave illness. Unreasonableness and unfairness in such a procedure is inferable from Art. 11 of the Covenant. But this is precisely the interpretation we have put on the Proviso to s. 51 C.P.C. and the lethal blow of Art. 21 cannot strike down the provision, as now interpreted. The words which hurt are "or has had since the date of the decree, the means to pay the amount of the decree". This implies, superficially read, that if at any time after the passing of an old decree the judgment-debtor had come by some resources and had not discharged the decree, he could be detained in prison even though at that later point of time he was found to be penniless. This is not a sound position apart from being inhuman going by the standards of Art. 11 (of the Covenant) and Art. 21 (of the Constitution). The simple default to discharge is not enough. There must be some element of bad faith beyond mere indifference to pay, some deliberate or recalcitrant disposition in the past or, alternatively, current means to pay the decree or a substantial part of it. The provision emphasizes the need to establish not mere omission to pay but an attitude of refusal on demand verging on dishonest disowning of the obligation under the decree. Here considerations of the debtor's other pressing needs and straitened circumstances will play prominently. We would have, by this construction, sauced law with justice, harmonised s. 51 with the Covenant and the Constitution. The question may squarely arise some day as to whether the Proviso to s. 51 read with O. 21, r. 37 is in excess of the Constitutional mandate in Art. 21 and bad in part. In the present case since we are remitting the matter for reconsideration, the stage has not yet arisen for us to go into the vires, that is why we are desisting from that essay. In the present case the debtors are in distress because of the blanket distraint of their properties. Whatever might have been their means once, that finding has become obsolete in view of later happenings; Sri Krishnamurthi Iyer for the respondent fairly agreed that the law being what we have stated, it is necessary to direct the executing court to readjudicate on the present means of the debtors vis a vis the present

pressures of their indebtedness, or alternatively whether they have had the ability to pay but have improperly evaded or postponed doing so or otherwise dishonestly committed acts of bad faith respecting their assets. The court will take note of other honest and urgent pressures on their assets, since that is the exercise expected of the court under the proviso to s. 51. An earlier adjudication will bind if relevant circumstances have not materially changed.

We set aside the judgment under appeal and direct the executing court to decide de novo the means of the judgment debtor's to discharge the decree in the light of the interpretation we have given.

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Vellore Citizens' Welfare Forum v. Union of India
(1996) 5 SCC 647

KULDIP SINGH, J. - Petition - public interest - under Article 32 of the Constitution of India has been filed by Vellore Citizens' Welfare Forum and is directed against the pollution which is being caused by enormous discharge of untreated effluent by the tanneries and other industries in the State of Tamil Nadu. It is stated that the tanneries are discharging untreated effluent into agricultural fields, roadsides, waterways and open lands. The untreated effluent is finally discharged in River Palar which is the main source of water supply to the residents of the area. According to the petitioner the entire surface and subsoil water of River Palar has been polluted resulting in non-availability of potable water to the residents of the area. It is stated that the tanneries in the State of Tamil Nadu have caused environmental degradation in the area. According to the preliminary survey made by the Tamil Nadu Agricultural University Research Centre, Vellore nearly 35,000 hectares of agricultural land in the tanneries belt has become either partially or totally unfit for cultivation. It has been further stated in the petition that the tanneries use about 170 types of chemicals in the chrome tanning processes. The said chemicals include sodium chloride, lime, sodium sulphate, chlorium (*sic*) sulphate, fat, liquor, ammonia and sulphuric acid besides dyes which are used in large quantities. Nearly 35 litres of water is used for processing one kilogram of finished leather, resulting in dangerously enormous quantities of toxic effluents being let out in the open by the tanning industry. These effluents have spoiled the physico-chemical properties of the soil and have contaminated groundwater by percolation.

2. Along with the affidavit dated 21-7-1992 filed by Deputy Secretary to Government, Environment and Forests Department of Tamil Nadu, a list of villages affected by the tanneries has been attached. The list mentions 59 villages in the three divisions of Thirupathur, Vellore and Ranipet. There is acute shortage of drinking water in these 59 villages and as such alternative arrangements were being made by the Government for the supply of drinking water.

9. It is no doubt correct that the leather industry in India has become a major foreign exchange earner and at present Tamil Nadu is the leading exporter of finished leather accounting for approximately 80 per cent of the country's export. Though the leather industry is of vital importance to the country as it generates foreign exchange and provides employment avenues it has no right to destroy the ecology, degrade the environment and pose as a health-hazard. It cannot be permitted to expand or even to continue with the present production unless it tackles by itself the problem of pollution created by the said industry.

10. The traditional concept that development and ecology are opposed to each other is no longer acceptable. "Sustainable Development" is the answer. In the international sphere, "Sustainable Development" as a concept came to be known for the first time in the Stockholm Declaration of 1972. Thereafter, in 1987 the concept was given a definite shape by the World Commission on Environment and Development in its report called "Our Common Future". The Commission was chaired by the then Prime Minister of Norway, Ms G.H. Brundtland and as such the report is popularly known as "Brundtland Report". In 1991 the World

Conservation Union, United Nations Environment Programme and Worldwide Fund for Nature, jointly came out with a document called “Caring for the Earth” which is a strategy for sustainable living. Finally, came the Earth Summit held in June 1992 at Rio which saw the largest gathering of world leaders ever in the history — deliberating and chalking out a blueprint for the survival of the planet. Among the tangible achievements of the Rio Conference was the signing of two conventions, one on biological diversity and another on climate change. These conventions were signed by 153 nations. The delegates also approved by consensus three non-binding documents namely, a Statement on Forestry Principles, a declaration of principles on environmental policy and development initiatives and Agenda 21, a programme of action into the next century in areas like poverty, population and pollution. During the two decades from Stockholm to Rio “Sustainable Development” has come to be accepted as a viable concept to eradicate poverty and improve the quality of human life while living within the carrying capacity of the supporting ecosystems. “Sustainable Development” as defined by the Brundtland Report means “Development that meets the needs of the present without compromising the ability of the future generations to meet their own needs”. We have no hesitation in holding that “Sustainable Development” as a balancing concept between ecology and development has been accepted as a part of the customary international law though its salient features have yet to be finalised by the international law jurists.

11. Some of the salient principles of “Sustainable Development”, as culled out from Brundtland Report and other international documents, are Inter-Generational Equity, Use and Conservation of Natural Resources, Environmental Protection, the Precautionary Principle, Polluter Pays Principle, Obligation to Assist and Cooperate, Eradication of Poverty and Financial Assistance to the developing countries. We are, however, of the view that “The Precautionary Principle” and “The Polluter Pays Principle” are essential features of “Sustainable Development”. The “Precautionary Principle” - in the context of the municipal law - means:

(i) Environmental measures - by the State Government and the statutory authorities - must anticipate, prevent and attack the causes of environmental degradation.

(ii) Where there are threats of serious and irreversible damage, lack of scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.

(iii) The “onus of proof” is on the actor or the developer/industrialist to show that his action is environmentally benign.

12. “The Polluter Pays Principle” has been held to be a sound principle by this Court in *Indian Council for Enviro-Legal Action v. Union of India* [(1996) 3 SCC 212]. The Court observed:

“(W)e are of the opinion that any principle evolved in this behalf should be simple, practical and suited to the conditions obtaining in this country”.

The Court ruled that:

“... once the activity carried on is hazardous or inherently dangerous, the person carrying on such activity is liable to make good the loss caused to any other person by his activity *irrespective* of the fact whether he took reasonable care while carrying on his activity. The rule is premised upon the very nature of the activity carried on”.

Consequently the polluting industries are “absolutely liable to compensate for the harm caused by them to villagers in the affected area, to the soil and to the underground water and hence, they are bound to take all necessary measures to remove sludge and other pollutants lying in the affected areas”. The “Polluter Pays Principle” as interpreted by this Court means that the absolute liability for harm to the environment extends not only to compensate the victims of pollution but also the cost of restoring the environmental degradation. Remediation of the damaged environment is part of the process of “Sustainable Development” and as such the polluter is liable to pay the cost to the individual sufferers as well as the cost of reversing the damaged ecology.

13. The Precautionary Principle and the Polluter Pays Principle have been accepted as part of the law of the land. Article 21 of the Constitution of India guarantees protection of life and personal liberty. Articles 47, 48A and 51A(g) of the Constitution are as under:

“47. Duty of the State to raise the level of nutrition and the standard of living and to improve public health.-The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health.

48A. Protection and improvement of environment and safeguarding of forests and wildlife.-The State shall endeavour to protect and improve the environment and to safeguard the forests and wildlife of the country.

51A. (g) to protect and improve the natural environment including forests, lakes, rivers and wildlife, and to have compassion for living creatures.”

Apart from the constitutional mandate to protect and improve the environment there are plenty of post-independence legislations on the subject but more relevant enactments for our purpose are: the Water (Prevention and Control of Pollution) Act, 1974 (the Water Act), the Air (Prevention and Control of Pollution) Act, 1981 (the Air Act) and the Environment (Protection) Act, 1986 (the Environment Act).

14. In view of the above-mentioned constitutional and statutory provisions we have no hesitation in holding that the Precautionary Principle and the Polluter Pays Principle are part of the environmental law of the country.

15. Even otherwise once these principles are accepted as part of the Customary International Law there would be no difficulty in accepting them as part of the domestic law. It is almost an accepted proposition of law that the rules of Customary International Law which are not contrary to the municipal law shall be deemed to have been incorporated in the domestic law and shall be followed by the courts of law. To support we may refer to Justice

H.R. Khanna's opinion in *A.D.M. v. Shivakant Shukla* [AIR 1976 SC 1207]; *Jolly George Varghese* case [AIR 1980 SC 470] and *Gramophone Co.* case [AIR 1984 SC 667].

16. The constitutional and statutory provisions protect a person's right to fresh air, clean water and pollution-free environment, but the source of the right is the inalienable common law right of clean environment.

17. Our legal system having been founded on the British common law the right of a person to a pollution-free environment is a part of the basic jurisprudence of the land.

[The Supreme Court held that sustainable development, precautionary principle and polluter pays principle, being customary norms of international law, are part of Indian environmental law and therefore, have full legal force.]

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Vishaka v. State of Rajasthan
(1997) 6 SCC 241

VERMA, C.J. - This writ petition has been filed for the enforcement of the fundamental rights of working women under Articles 14, 19 and 21 of the Constitution of India in view of the prevailing climate in which the violation of these rights is not uncommon. With the increasing awareness and emphasis on gender justice, there is increase in the effort to guard against such violations; and the resentment towards incidents of sexual harassment is also increasing. The present petition has been brought as a class action by certain social activists and NGOs with the aim of focussing attention towards this societal aberration, and assisting in finding suitable methods for realisation of the true concept of “gender equality”; and to prevent sexual harassment of working women in all workplaces through judicial process, to fill the vacuum in existing legislation.

2. The immediate cause for the filing of this writ petition is an incident of alleged brutal gang rape of a social worker in a village of Rajasthan. That incident is the subject-matter of a separate criminal action and no further mention of it, by us, is necessary. The incident reveals the hazards to which a working woman may be exposed and the depravity to which sexual harassment can degenerate and the urgency for safeguards by an alternative mechanism in the absence of legislative measures. In the absence of legislative measures, the need is to find an effective alternative mechanism to fulfil this felt and urgent social need.

3. Each such incident results in violation of the fundamental rights of “Gender Equality” and the “Right to Life and Liberty”. It is a clear violation of the rights under Articles 14, 15 and 21 of the Constitution. One of the logical consequences of such an incident is also the violation of the victim’s fundamental right under Article 19(1)(g) “*to practise any profession or to carry out any occupation, trade or business*”. Such violations, therefore, attract the remedy under Article 32 for the enforcement of these fundamental rights of women. This class action under Article 32 of the Constitution is for this reason. *A writ of mandamus* in such a situation, if it is to be effective, needs to be accompanied by directions for prevention, as the violation of fundamental rights of this kind is a recurring phenomenon. The fundamental right to carry on any occupation, trade or profession depends on the availability of a “safe” working environment. Right to life means life with dignity. The primary responsibility for ensuring such safety and dignity through suitable legislation, and the creation of a mechanism for its enforcement, is of the legislature and the executive. When, however, instances of sexual harassment resulting in violation of fundamental rights of women workers under Articles 14, 19 and 21 are brought before us for redress under Article 32, an effective redressal requires that some guidelines should be laid down for the protection of these rights to fill the legislative vacuum.

5. Apart from Article 32 of the Constitution of India, we may refer to some other provisions which envisage judicial intervention for eradication of this social evil. Some provisions in the Constitution in addition to Articles 14, 19(1)(g) and 21, which have relevance are:

Article 15 :

“15. Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.”-(1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

(3) Nothing in this article shall prevent the State from making any special provision for women and children.”

Article 42 :

“42. Provision for just and humane conditions of work and maternity relief .- The State shall make provision for securing just and humane conditions of work and for maternity relief.”

Article 51A :

“51-A. Fundamental duties .—It shall be the duty of every citizen of India -

(a) to abide by the Constitution and respect its ideals and institutions, ...;

(e) to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities; to renounce practices derogatory to the dignity of women;”

6. Before we refer to the international conventions and norms having relevance in this field and the manner in which they assume significance in application and judicial interpretation, we may advert to some other provisions in the Constitution which permit such use. These provisions are:

Article 51:

“51. Promotion of international peace and security.-The State shall endeavour to-

(c) foster respect for international law and treaty obligations in the dealings of organised peoples with one another; * * *”

Article 253:

“253. Legislation for giving effect to international agreements.-Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body.”

Seventh Schedule :**“List I - Union List**

14. Entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries.”

7. In the absence of domestic law occupying the field, to formulate effective measures to check the evil of sexual harassment of working women at all workplaces, the contents of international conventions and norms are significant for the purpose of interpretation of the

guarantee of gender equality, right to work with human dignity in Articles 14, 15, 19(1)(g) and 21 of the Constitution and the safeguards against sexual harassment implicit therein. Any international convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into these provisions to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee. This is implicit from Article 51(c) and the enabling power of Parliament to enact laws for implementing the international conventions and norms by virtue of Article 253 read with Entry 14 of the Union List in Seventh Schedule of the Constitution. Article 73 also is relevant. It provides that the executive power of the Union shall extend to the matters with respect to which Parliament has power to make laws. The executive power of the Union is, therefore, available till Parliament enacts legislation to expressly provide measures needed to curb the evil.

8. Thus, the power of this Court under Article 32 for enforcement of the fundamental rights and the executive power of the Union have to meet the challenge to protect the working women from sexual harassment and to make their fundamental rights meaningful. Governance of the society by the rule of law mandates this requirement as a logical concomitant of the constitutional scheme. The exercise performed by the Court in this matter is with this common perception shared with the learned Solicitor General and other members of the Bar who rendered valuable assistance in the performance of this difficult task in public interest.

9. The progress made at each hearing culminated in the formulation of guidelines to which the Union of India gave its consent through the learned Solicitor General, indicating that these should be the guidelines and norms declared by this Court to govern the behaviour of the employers and all others at the workplaces to curb this social evil.

10. Gender equality includes protection from sexual harassment and right to work with dignity, which is a universally recognised basic human right. The common minimum requirement of this right has received global acceptance. The international conventions and norms are, therefore, of great significance in the formulation of the guidelines to achieve this purpose.

11. The obligation of this Court under Article 32 of the Constitution for the enforcement of these fundamental rights in the absence of legislation must be viewed along with the role of judiciary envisaged in the Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA region. These principles were accepted by the Chief Justices of Asia and the Pacific at Beijing in 1995 as those representing the minimum standards necessary to be observed in order to maintain the independence and effective functioning of the judiciary. The objectives of the judiciary mentioned in the Beijing Statement are:

“Objectives of the Judiciary:

10. The objectives and functions of the Judiciary include the following:
- (a) to ensure that all persons are able to live securely under the rule of law;
 - (b) to promote, within the proper limits of the judicial function, the observance and the attainment of human rights; and
 - (c) to administer the law impartially among persons and between persons and the State.”

12. Some provisions in the “Convention on the Elimination of All Forms of Discrimination against Women”, of significance in the present context are:

Article 11:

“1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular:

- (a) The right to work as an inalienable right of all human beings;
- (f) The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.

Article 24:

States Parties undertake to adopt all necessary measures at the national level aimed at achieving the full realization of the rights recognised in the present Convention.”

13. The general recommendations of CEDAW in this context in respect of Article 11 are:

“Violence and equality in employment:

22. Equality in employment can be seriously impaired when women are subjected to gender specific violence, such as sexual harassment in the workplace.

23. Sexual harassment includes such unwelcome sexually determined behaviour as physical contacts and advances, sexually-coloured remarks, showing pornography and sexual demands, whether by words or actions. Such conduct can be humiliating and may constitute a health and safety problem; it is discriminatory when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment, including recruiting or promotion, or when it creates a hostile working environment. Effective complaints, procedures and remedies, including compensation, should be provided.

24. States should include in their reports information about sexual harassment, and on measures to protect women from sexual harassment and other forms of violence of coercion in the workplace.”

The Government of India has ratified the above Resolution on 25-6-1993 with some reservations which are not material in the present context. At the Fourth World Conference on Women in Beijing, the Government of India has also made an official commitment, *inter alia*, to formulate and operationalize a national policy on women which will continuously guide and inform action at every level and in every sector; to set up a Commission for Women’s Rights to act as a public defender of women’s human rights; to institutionalize a national level mechanism to monitor the implementation of the Platform for Action. We have, therefore, no hesitation in placing reliance on the above for the purpose of construing the nature and ambit of constitutional guarantee of gender equality in our Constitution.

14. The meaning and content of the fundamental rights guaranteed in the Constitution of India are of sufficient amplitude to encompass all the facets of gender equality including prevention of sexual harassment or abuse. Independence of judiciary forms a part of our constitutional scheme. The international conventions and norms are to be read into them in

the absence of enacted domestic law occupying the field when there is no inconsistency between them. It is now an accepted rule of judicial construction that regard must be had to international conventions and norms for construing domestic law when there is no inconsistency between them and there is a void in the domestic law. The High Court of Australia in *Minister for Immigration and Ethnic Affairs v. Teoh*, 128 Aus LR 353 has recognised the concept of legitimate expectation of its observance in the absence of a contrary legislative provision, even in the absence of a Bill of Rights in the Constitution of Australia.

15. In *Nilabati Behera v. State of Orissa* [(1993) 2 SCC 746], a provision in the ICCPR was referred to support the view taken that “an enforceable right to compensation is not alien to the concept of enforcement of a guaranteed right”, as a public law remedy under Article 32, distinct from the private law remedy in torts. There is no reason why these international conventions and norms cannot, therefore, be used for construing the fundamental rights expressly guaranteed in the Constitution of India which embody the basic concept of gender equality in all spheres of human activity.

16. In view of the above, and the absence of enacted law to provide for the effective enforcement of the basic human right of gender equality and guarantee against sexual harassment and abuse, more particularly against sexual harassment at workplaces, we lay down the guidelines and norms specified hereinafter for due observance at all workplaces or other institutions, until a legislation is enacted for the purpose. This is done in exercise of the power available under Article 32 of the Constitution for enforcement of the fundamental rights and it is further emphasised that this would be treated as the law declared by this Court under Article 141 of the Constitution.

17. The GUIDELINES and NORMS prescribed herein are as under:

HAVING REGARD to the definition of “human rights” in Section 2(d) of the Protection of Human Rights Act, 1993,

TAKING NOTE of the fact that the present civil and penal laws in India do not *adequately* provide for specific protection of women from sexual harassment in workplaces and that enactment of such legislation will take considerable time,

It is necessary and expedient for employers in workplaces as well as other responsible persons or institutions to observe certain guidelines to ensure the prevention of sexual harassment of women:

1. Duty of the employer or other responsible persons in workplaces and other institutions:

It shall be the duty of the employer or other responsible persons in workplaces or other institutions to prevent or deter the commission of acts of sexual harassment and to provide the procedures for the resolution, settlement or prosecution of acts of sexual harassment by taking all steps required.

2. Definition:

For this purpose, sexual harassment includes such unwelcome sexually determined behaviour (whether directly or by implication) as:

- (a) physical contact and advances;

- (b) a demand or request for sexual favours;
- (c) sexually-coloured remarks;
- (d) showing pornography;
- (e) any other unwelcome physical, verbal or non-verbal conduct of sexual nature.

Where any of these acts is committed in circumstances whereunder the victim of such conduct has a reasonable apprehension that in relation to the victim's employment or work whether she is drawing salary, or honorarium or voluntary, whether in government, public or private enterprise such conduct can be humiliating and may constitute a health and safety problem. It is discriminatory for instance when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment or work including recruiting or promotion or when it creates a hostile work environment. Adverse consequences might be visited if the victim does not consent to the conduct in question or raises any objection thereto.

3. Preventive steps:

All employers or persons in charge of workplace whether in the public or private sector should take appropriate steps to prevent sexual harassment. Without prejudice to the generality of this obligation they should take the following steps:

(a) Express prohibition of sexual harassment as defined above at the workplace should be notified, published and circulated in appropriate ways.

(b) The rules/regulations of government and public sector bodies relating to conduct and discipline should include rules/regulations prohibiting sexual harassment and provide for appropriate penalties in such rules against the offender.

(c) As regards private employers steps should be taken to include the aforesaid prohibitions in the standing orders under the Industrial Employment (Standing Orders) Act, 1946.

(d) Appropriate work conditions should be provided in respect of work, leisure, health and hygiene to further ensure that there is no hostile environment towards women at workplaces and no woman employee should have reasonable grounds to believe that she is disadvantaged in connection with her employment.

4. Criminal proceedings:

Where such conduct amounts to a specific offence under the Indian Penal Code or under any other law, the employer shall initiate appropriate action in accordance with law by making a complaint with the appropriate authority.

In particular, it should ensure that victims or witnesses are not victimized or discriminated against while dealing with complaints of sexual harassment. The victims of sexual harassment should have the option to seek transfer of the perpetrator or their own transfer.

5. Disciplinary action:

Where such conduct amounts to misconduct in employment as defined by the relevant service rules, appropriate disciplinary action should be initiated by the employer in accordance with those rules.

6. *Complaint mechanism:* Whether or not such conduct constitutes an offence under law or a breach of the service rules, an appropriate complaint mechanism should be created in the employer's organization for redress of the complaint made by the victim. Such complaint mechanism should ensure time-bound treatment of complaints.

7. *Complaints Committee:*

The complaint mechanism, referred to in (6) above, should be adequate to provide, where necessary, a Complaints Committee, a special counsellor or other support service, including the maintenance of confidentiality.

The Complaints Committee should be headed by a woman and not less than half of its members should be women. Further, to prevent the possibility of any undue pressure or influence from senior levels, such Complaints Committee should involve a third party, either NGO or other body who is familiar with the issue of sexual harassment.

The Complaints Committee must make an annual report to the Government Department concerned of the complaints and action taken by them.

The employers and person-in-charge will also report on the compliance with the aforesaid guidelines including on the reports of the Complaints Committee to the Government Department.

8. *Workers' initiative:*

Employees should be allowed to raise issues of sexual harassment at workers' meeting and in other appropriate forum and it should be affirmatively discussed in employer-employee meetings.

9. *Awareness:*

Awareness of the rights of female employees in this regard should be created in particular by prominently notifying the guidelines (and appropriate legislation when enacted on the subject) in a suitable manner.

10. *Third-party harassment:*

Where sexual harassment occurs as a result of an act or omission by any third party or outsider, the employer and person-in-charge will take all steps necessary and reasonable to assist the affected person in terms of support and preventive action.

11. The Central/State Governments are requested to consider adopting suitable measures including legislation to ensure that the guidelines laid down by this order are also observed by the employers in private sector.

12. These guidelines will not prejudice any rights available under the Protection of Human Rights Act, 1993.

18. Accordingly, we direct that the above guidelines and norms would be strictly observed in all workplaces for the preservation and enforcement of the right to gender equality of the working women. These directions would be binding and enforceable in law until suitable legislation is enacted to occupy the field. These writ petitions are disposed of, accordingly.

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Justice K S Puttaswamy (retd.) v. Union of India
(2004) 6 SCC 235

Dr. D.Y. CHANDRACHUD, J.- 1. Nine judges of this Court assembled to determine whether privacy is a constitutionally protected value. The issue reaches out to the foundation of a constitutional culture based on the protection of human rights and enables this Court to revisit the basic principles on which our Constitution has been founded and their consequences for a way of life it seeks to protect. This case presents challenges for constitutional interpretation. If privacy is to be construed as a protected constitutional value, it would redefine in significant ways our concepts of liberty and the entitlements that flow out of its protection.

2. Privacy, in its simplest sense, allows each human being to be left alone in a core which is inviolable. Yet the autonomy of the individual is conditioned by her relationships with the rest of society. Those relationships may and do often pose questions to autonomy and free choice. The overarching presence of state and non-state entities regulates aspects of social existence which bear upon the freedom of the individual. The preservation of constitutional liberty is, so to speak, work in progress. Challenges have to be addressed to existing problems. Equally, new challenges have to be dealt with in terms of a constitutional understanding of where liberty places an individual in the context of a social order. The emergence of new challenges is exemplified by this case, where the debate on privacy is being analyzed in the context of a global information-based society. In an age where information technology governs virtually every aspect of our lives, the task before the Court is to impart constitutional meaning to individual liberty in an interconnected world. While we revisit the question whether our constitution protects privacy as an elemental principle, the Court has to be sensitive to the needs of and the opportunities and dangers posed to liberty in a digital world.

India's commitments under International law

129. The recognition of privacy as a fundamental constitutional value is part of India's commitment to a global human rights regime. Article 51 of the Constitution, which forms part of the Directive Principles, requires the State to endeavor to "foster respect for international law and treaty obligations in the dealings of organized peoples with one another"²²¹. Article 12 of the Universal Declaration of Human Rights, recognizes the right to privacy:

"Article 12: No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks."

Similarly, the International Covenant on Civil and Political Rights was adopted on 16 December 1979 and came into effect on 23 March 1976. India ratified it on 11 December 1977. Article 17 of the ICCPR provides thus:

"The obligations imposed by this article require the State to adopt legislative and other measures to give effect to the prohibition against such interferences and attacks as well as to the protection of the right."

The Protection of Human Rights Act, 1993 which has been enacted by Parliament refers to the ICCPR as a human rights instrument. Section 2(1)(d) defines human rights:

“human rights” means the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by courts in India.”

Section 2(1)(f) defines International Covenants:

“International Covenants” means the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural rights adopted by the General Assembly of the United Nations on the 16th December, 1966 [and such other Covenant or Convention adopted by the General Assembly of the United Nations as the Central Government may, by notification, specify”

Under Section 12(f) of the Protection of Human Rights Act, 1993, the National Human Rights Commission:

“is entrusted with the function of studying treaties and other international instruments on human rights and make recommendations for their effective implementation.”

130. The ICCPR casts an obligation on states to respect, protect and fulfil its norms. The duty of a State to respect mandates that it must not violate the right. The duty to protect mandates that the government must protect it against interference by private parties. The duty to fulfil postulates that government must take steps towards realization of a right. While elaborating the rights under Article 17, general comment 16 specifically stipulates that:

“.....there is universal recognition of the fundamental importance, and enduring relevance, of the right to privacy and of the need to ensure that it is safeguarded, in law and practice.”

On 30 June 2014, a report was presented by the Office of the United Nations High Commissioner for Human Rights. The report underscores that:

“...there is universal recognition of the fundamental importance, and enduring relevance, of the right to privacy and of the need to ensure that it is safeguarded, in law and in practice.

131. In *Bachan Singh v State of Punjab*²²⁴ (“Bachan Singh”), this Court considered in relation to the death penalty, the obligations assumed by India in international law, following the ratification of the ICCPR. The Court held that the requirements of Article 6 of the ICCPR are substantially similar to the guarantees contained in Articles 20 and 21 of the Constitution. The penal law of India was held to be in accord with its international commitments. In *Francis Coralie*, this Court, while explaining the ambit of Article 21, held that:

“...there is implicit in Article 21 the right to protection against torture or cruel, inhuman or degrading treatment which is enunciated in Article 5 of the Universal Declaration of Human Rights and guaranteed by Article 7 of the International Covenant on Civil and Political Rights...”

132. In *Vishaka v State of Rajasthan*, this Court observed that in the absence of domestic law, the Convention on the Elimination of Discrimination against Women (CEDAW) is applicable. In *NALSA*, while dealing with the rights of transgenders, this Court found that the international conventions were not inconsistent with the fundamental rights guaranteed by the Constitution and must be recognised and followed.

133. The position in law is well settled. Where there is a contradiction between international law and a domestic statute, the Court would give effect to the latter. In the present case, there is no contradiction between the international obligations which have been assumed by India and the Constitution. The Court will not readily presume any inconsistency. On the contrary, constitutional provisions must be read and interpreted in a manner which would enhance their conformity with the global human rights regime. India is a responsible member of the international community and the Court must adopt an interpretation which abides by the international commitments made by the country particularly where its constitutional and statutory mandates indicate no deviation. In fact, the enactment of the Human Rights Act by Parliament would indicate a legislative desire to implement the human rights regime founded on constitutional values and international conventions acceded to by India.

STATE RESPONSIBILITY

MILITARY AND PARAMILITARY ACTIVITIES IN AND AGAINST NICARAGUA

(Nicaragua v United States of America)

ICJ Reports, 1986, p.14

(Principle of state responsibility and attribution; constituent elements of custom; prohibition of use of force and non-intervention as customary rules of international law)

18. The dispute before the Court between Nicaragua and the United States concerns events in Nicaragua subsequent to the fall of the Government of President Anastasio Somoza Debayle in Nicaragua in July 1979, and activities of the Government of the United States in relation to Nicaragua since that time. Following the departure of President Somoza, a Junta of National Reconstruction and an 18-member government was installed by the body which had led the armed opposition to President Somoza, the Frente Sandinista de Liberacion Nacional (FSLN). That body had initially an extensive share in the new government, described as a "democratic coalition", and as a result of later resignations and reshuffles, became almost its sole component.

19. The attitude of the United States Government to the "democratic coalition government" was at first favourable; and a programme of economic aid to Nicaragua was adopted. However by 1981 this attitude had changed. United States aid to Nicaragua was suspended in January 1981 and terminated in April 1981. According to the United States, the reason for this change of attitude was reports of involvement of the Government of Nicaragua in logistical support, including provision of arms, for guerrillas in El Salvador. There was however no interruption in diplomatic relations, which have continued to be maintained up to the present time. In September 1981, according to testimony called by Nicaragua, it was decided to plan and undertake activities directed against Nicaragua.

20. The armed opposition to the new Government in Nicaragua, which originally comprised various movements, subsequently became organized into two main groups: the Fuerza Democratica Nicaragüense (FDN) and the Alianza Revolucionaria Democratica (ARDE). The first of these grew from 1981 onwards into a trained fighting force, operating along the borders with Honduras; the second, formed in 1982, operated along the borders with Costa Rica. The precise extent to which, and manner in which, the United States Government contributed to bringing about these developments will be studied more closely later in the present Judgment. However, after an initial period in which the "covert" operations of United States personnel and persons in their pay were kept from becoming public knowledge, it was made clear, not only in the United States press, but also in Congress and in official statements by the President and high United States officials, that the United States Government had been giving support to the *contras*, a term employed to describe those fighting against the present Nicaraguan Government. In 1983 budgetary legislation enacted by the United States Congress made specific provision for funds to be used by United States intelligence agencies for supporting "directly or indirectly, military or paramilitary operations in Nicaragua". According to Nicaragua, the *contras* have caused it considerable material damage and widespread loss of

life, and have also committed such acts as killing of prisoners, indiscriminate killing of civilians, torture, rape and kidnapping. It is contended by Nicaragua that the United States Government is effectively in control of the *contras*, that it devised their strategy and directed their tactics, and that the purpose of that Government was, from the beginning, to overthrow the Government of Nicaragua.

57. One of the Court's chief difficulties in the present case has been the determination of the facts relevant to the dispute. First of all, there is marked disagreement between the Parties not only on the interpretation of the facts, but even on the existence or nature of at least some of them. Secondly, the respondent State has not appeared during the present merits phase of the proceedings, thus depriving the Court of the benefit of its complete and fully argued statement regarding the facts. The Court's task was therefore necessarily more difficult, and it has had to pay particular heed, as said above, to the proper application of Article 53 of its Statute. Thirdly, there is the secrecy in which some of the conduct attributed to one or other of the Parties has been carried on. This makes it more difficult for the Court not only to decide on the imputability of the facts, but also to establish what are the facts. Sometimes there is no question, in the sense that it does not appear to be disputed, that an act was done, but there are conflicting reports, or a lack of evidence, as to who did it. The problem is then not the legal process of imputing the act to a particular State for the purpose of establishing responsibility, but the prior process of tracing material proof of the identity of the perpetrator. The occurrence of the act itself may however have been shrouded in secrecy. In the latter case, the Court has had to endeavour first to establish what actually happened, before entering on the next stage of considering whether the act (if proven) was imputable to the State to which it has been attributed.

80. ... the Court finds it established that, on a date in late 1983 or early 1984, the President of the United States authorized a United States government agency to lay mines in Nicaraguan ports; that in early 1984 mines were laid in or close to the ports of El Bluff, Corinto and Puerto Sandino, either in Nicaraguan internal waters or in its territorial sea or both, by persons in the pay and acting on the instructions of that agency, under the supervision and with the logistic support of United States agents ; that neither before the laying of the mines, nor subsequently, did the United States Government issue any public and official warning to international shipping of the existence and location of the mines ; and that personal and material injury was caused by the explosion of the mines, which also created risks causing a rise in marine insurance rates.

91. The Court concludes that, as regards the high-altitude overflights for reconnaissance purposes, the statement admitting them made in the Security Council is limited to the period up to March 1982. However, not only is it entitled to take into account that the interest of the United States in "verifying reports of Nicaraguan intervention" - the justification offered in the Security Council for these flights - has not ceased or diminished since 1982, but the photographs attached to the 1984 Background Paper are evidence of at least sporadic overflights subsequently. It sees no reason therefore to doubt the assertion of Nicaragua that such flights have continued. The Court finds that the incidents of overflights causing "sonic booms" in November 1984 are to some extent a matter of public knowledge. As to overflights

of aircraft for supply purposes, it appears from Nicaragua's evidence that these were carried out generally, if not exclusively, by the *contras* themselves, though using aircraft supplied to them by the United States. Whatever other responsibility the United States may have incurred in this latter respect, the only violations of Nicaraguan airspace which the Court finds imputable to the United States on the basis of the evidence before it are first of all, the high-altitude reconnaissance flights, and secondly the low-altitude flights of 7 to 11 November 1984, complained of as causing "sonic booms".

99. The Court finds at all events that from 1981 until 30 September 1984 the United States Government was providing funds for military and paramilitary activities by the *contras* in Nicaragua, and thereafter for "humanitarian assistance". The most direct evidence of the specific purposes to which it was intended that these funds should be put was given by the oral testimony of a witness called by Nicaragua : Mr. David MacMichael, formerly in the employment of the CIA as a Senior Estimates Officer with the Analytic Group of the National Intelligence Council. He informed the Court that in 1981 he participated in that capacity in discussion of a plan relating to Nicaragua, excerpts from which were subsequently published in the *Washington Post*, and he confirmed that, with the exception of a detail (here omitted), these excerpts gave an accurate account of the plan...

106. In the light of the evidence and material available to it, the Court is not satisfied that all the operations launched by the *contra* force, at every stage of the conflict, reflected strategy and tactics wholly devised by the United States. However, it is in the Court's view established that the support of the United States authorities for the activities of the *contras* took various forms over the years, such as logistic support, the supply of information on the location and movements of the Sandinista troops, the use of sophisticated methods of communication, the deployment of field broadcasting networks, radar coverage, etc. The Court finds it clear that a number of military and paramilitary operations by this force were decided and planned, if not actually by United States advisers, then at least in close collaboration with them, and on the basis of the intelligence and logistic support which the United States was able to offer, particularly the supply aircraft provided to the *contras* by the United States.

107. To sum up, despite the secrecy which surrounded it, at least initially, the financial support given by the Government of the United States to the military and paramilitary activities of the *contras* in Nicaragua is a fully established fact. The legislative and executive bodies of the respondent State have moreover, subsequent to the controversy which has been sparked off in the United States, openly admitted the nature, volume and frequency of this support. Indeed, they clearly take responsibility for it, this government aid having now become the major element of United States foreign policy in the region. As to the ways in which such financial support has been translated into practical assistance, the Court has been able to reach a general finding.

108. Despite the large quantity of documentary evidence and testimony which it has examined, the Court has not been able to satisfy itself that the respondent State "created" the *contra* force in Nicaragua. It seems certain that members of the former Somoza National Guard, together with civilian opponents to the Sandinista régime, withdrew from Nicaragua soon after that régime was installed in Managua, and sought to continue their struggle against

it, even if in a disorganized way and with limited and ineffectual resources, before the Respondent took advantage of the existence of these opponents and incorporated this fact into its policies vis-à-vis the régime of the Applicant. Nor does the evidence warrant a finding that the United States gave "direct and critical combat support", at least if that form of words is taken to mean that this support was tantamount to direct intervention by the United States combat forces, or that all *contra* operations reflected strategy and tactics wholly devised by the United States. On the other hand, the Court holds it established that the United States authorities largely financed, trained, equipped, armed and organized the FDN.

109. What the Court has to determine at this point is whether or not the relationship of the *contras* to the United States Government was so much one of dependence on the one side and control on the other that it would be right to equate the *contras*, for legal purposes, with an organ of the United States Government, or as acting on behalf of that Government. Here it is relevant to note that in May 1983 the assessment of the Intelligence Committee was that the *contras* "constitute[d] an independent force" and that the "only element of control that could be exercised by the United States" was "cessation of aid". Paradoxically this assessment serves to underline, *a contrario*, the potential for control inherent in the degree of the *contras'* dependence on aid. Yet despite the heavy subsidies and other support provided to them by the United States, there is no clear evidence of the United States having actually exercised such a degree of control in all fields as to justify treating the *contras* as acting on its behalf.

111. In the view of the Court it is established that the *contra* force has, at least at one period been so dependent on the United States that it could not conduct its crucial or most significant military and paramilitary activities without the multi-faceted support of the United States. This finding is fundamental in the present case. Nevertheless, adequate direct proof that all or the great majority of *contra* activities during that period received this support has not been, and indeed probably could not be, advanced in every respect. It will suffice the Court to stress that a degree of control by the United States Government, as described above is inherent in the position in which the *contra* force finds itself in relation to that Government.

115. The Court has taken the view that United States participation, even if preponderant or decisive, in the financing, organizing, training, supplying and equipping of the *contras*, the selection of its military or paramilitary targets, and the planning of the whole of its operation, is still insufficient in itself, on the basis of the evidence in the possession of the Court, for the purpose of attributing to the United States the acts committed by the *contras* in the course of their military or paramilitary operations in Nicaragua. All the forms of United States participation mentioned above, and even the general control by the respondent State over a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State. Such acts could well be committed by members of the *contras* without the control of the United States. For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.

116. The Court does not consider that the assistance given by the United States to the *contras* warrants the conclusion that these forces are subject to the United States to such an extent that any acts they have committed are imputable to that State. It takes the view that the *contras* remain responsible for their acts, and that the United States is not responsible for the acts of the *contras*, but for its own conduct vis-à-vis Nicaragua, including conduct related to the acts of the *contras*. What the Court has to investigate is not the complaints relating to alleged violations of humanitarian law by the *contras*, regarded by Nicaragua as imputable to the United States, but rather unlawful acts for which the United States may be responsible directly in connection with the activities of the *contras*. The lawfulness or otherwise of such acts of the United States is a question different from the violations of humanitarian law of which the *contras* may or may not have been guilty. It is for this reason that the Court does not have to determine whether the violations of humanitarian law attributed to the *contras* were in fact committed by them. At the same time, the question whether the United States Government was, or must have been, aware at the relevant time that allegations of breaches of humanitarian law were being made against the *contras* is relevant to an assessment of the lawfulness of the action of the United States. In this respect, the material facts are primarily those connected with the issue in 1983 of a manual of psychological operations.

122. The Court concludes that in 1983 an agency of the United States Government supplied to the FDN a manual on psychological guerrilla warfare which, while expressly discouraging indiscriminate violence against civilians, considered the possible necessity of shooting civilians who were attempting to leave a town; and advised the "neutralization" for propaganda purposes of local judges, officials or notables after the semblance of trial in the presence of the population. The text supplied to the *contras* also advised the use of professional criminals to perform unspecified "jobs", and the use of provocation at mass demonstrations to produce violence on the part of the authorities so as to make "martyrs".

148. ... the Court would note that the action of the United States Government itself on the basis of its own intelligence reports does not suggest that arms supply to El Salvador from the territory of Nicaragua was continuous from July 1979, when the new régime took power in Managua and the early months of 1981. The presidential Determination of 12 September 1980, for the purposes of the Special Central American Assistance Act 1979, officially certified that the Government of Nicaragua was not aiding, abetting or supporting acts of violence or terrorism in other countries, and the press release of the same date emphasized the "careful consideration and evaluation of all the relevant evidence provided by the intelligence community and by our Embassies in the field" for the purposes of the Determination. The 1983 Report of the Intelligence Committee, on the other hand, referring to its regular review of intelligence since "the 1979 Sandinista victory in Nicaragua", found that the intelligence available to it in May 1983 supported "with certainty" the judgment that arms and material supplied to "the Salvadorian insurgents transits Nicaragua with the permission and assistance of the Sandinistas" .

152. The Court finds, in short, that support for the armed opposition in El Salvador from Nicaraguan territory was a fact up to the early months of 1981. While the Court does not possess full proof that there was aid, or as to its exact nature, its scale and its continuance

until the early months of 1981, it cannot overlook a number of concordant indications, many of which were provided moreover by Nicaragua itself, from which it can reasonably infer the provision of a certain amount of aid from Nicaraguan territory.

153. After the early months of 1981, evidence of military aid from or through Nicaragua remains very weak. This is so despite the deployment by the United States in the region of extensive technical resources for tracking, monitoring and intercepting air, sea and land traffic . . . The Court merely takes note that the allegations of arms-trafficking are not solidly established; it has not, in any event, been able to satisfy itself that any continuing flow on a significant scale took place after the early months of 1981.

159. It may be objected that the Nicaraguan authorities are alleged to have declared on various occasions that military assistance to the armed opposition in El Salvador was part of their official policy. The Court has already indicated that it is unable to give weight to alleged statements to that effect of which there is insufficient evidence.

160. On the basis of the foregoing, the Court is satisfied that, between July 1979, the date of the fall of the Somoza régime in Nicaragua, and the early months of 1981, an intermittent flow of arms was routed via the territory of Nicaragua to the armed opposition in El Salvador. On the other hand, the evidence is insufficient to satisfy the Court that, since the early months of 1981, assistance has continued to reach the Salvadorian armed opposition from the territory of Nicaragua on any significant scale, or that the Government of Nicaragua was responsible for any flow of arms at either period.

183. In view of this conclusion, the Court has next to consider what are the rules of customary international law applicable to the present dispute. For this purpose, it has to direct its attention to the practice and *opinio juris* of States.

184. The Court notes that there is in fact evidence, to be examined below, of a considerable degree of agreement between the Parties as to the content of the customary international law relating to the non-use of force and non-intervention. This concurrence of their views does not however dispense the Court from having itself to ascertain what rules of customary international law are applicable. The mere fact that States declare their recognition of certain rules is not sufficient for the Court to consider these as being part of customary international law, and as applicable as such to those States. Bound as it is by Article 38 of its Statute to apply, *inter alia*, international custom "as evidence of a general practice accepted as law", the Court may not disregard the essential role played by general practice. Where two States agree to incorporate a particular rule in a treaty, their agreement suffices to make that rule a legal one, binding upon them; but in the field of customary international law, the shared view of the Parties as to the content of what they regard as the rule is not

enough. The Court must satisfy itself that the existence of the rule in the *opinio juris* of States is confirmed by practice.

186. It is not to be expected that in the practice of States the application of the rules in question should have been perfect, in the sense that States should have refrained, with complete consistency, from the use of force or from intervention in each other's internal affairs. The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way *prima facie* incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule.

187. The Court must therefore determine, first, the substance of the customary rules relating to the use of force in international relations, applicable to the dispute submitted to it.

188. The Court thus finds that both Parties take the view that the principles as to the use of force incorporated in the United Nations Charter correspond, in essentials, to those found in customary international law. The Parties thus both take the view that the fundamental principle in this area is expressed in the terms employed in Article 2, paragraph 4, of the United Nations Charter. They therefore accept a treaty-law obligation to refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations. The Court has however to be satisfied that there exists in customary international law an *opinio juris* as to the binding character of such abstention. This *opinio juris* may, though with all due caution, be deduced from, *inter alia*, the attitude of the Parties and the attitude of States towards certain General Assembly resolutions, and particularly resolution 2625 (XXV) entitled "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations". The effect of consent to the text of such resolutions cannot be understood as merely that of a "reiteration or elucidation" of the treaty commitment undertaken in the Charter. On the contrary, it may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves. The principle of non-use of force, for example, may thus be regarded as a principle of customary international law, not as such conditioned by provisions relating to collective security, or to the facilities or armed contingents to be provided under Article 43 of the Charter. It would therefore seem apparent that the attitude referred to expresses an *opinio juris* respecting such rule (or set of rules), to be thenceforth treated separately from the provisions, especially those of an institutional kind, to which it is subject on the treaty-law plane of the Charter.

199. At all events, the Court finds that in customary international law, whether of a general kind or that particular to the inter-American legal system, there is no rule permitting the exercise of collective self-defence in the absence of a request by the State which regards itself

as the victim of an armed attack. The Court concludes that the requirement of a request by the State which is the victim of the alleged attack is additional to the requirement that such a State should have declared itself to have been attacked.

202. The principle of non-intervention involves the right of every sovereign State to conduct its affairs without outside interference; though examples of trespass against this principle are not infrequent, the Court considers that it is part and parcel of customary international law. As the Court has observed: "Between independent States, respect for territorial sovereignty is an essential foundation of international relations" (*I.C.J. Reports 1949*, p. 35), and international law requires political integrity also to be respected. Expressions of an *opinio juris* regarding the existence of the principle of non-intervention in customary international law are numerous and not difficult to find.

227. The Court will first appraise the facts in the light of the principle of the non-use of force, examined in paragraphs 187 to 200 above. What is unlawful, in accordance with that principle, is recourse to either the threat or the use of force against the territorial integrity or political independence of any State. For the most part, the complaints by Nicaragua are of the actual use of force against it by the United States. Of the acts which the Court has found imputable to the Government of the United States, the following are relevant in this respect :

- the laying of mines in Nicaraguan internal or territorial waters in early 1984 ;
- certain attacks on Nicaraguan ports, oil installations and a naval base.

These activities constitute infringements of the principle of the prohibition of the use of force, defined earlier, unless they are justified by circumstances which exclude their unlawfulness, a question now to be examined. The Court has also found (paragraph 92) the existence of military manoeuvres held by the United States near the Nicaraguan borders; and Nicaragua has made some suggestion that this constituted a "threat of force", which is equally forbidden by the principle of non-use of force. The Court is however not satisfied that the manoeuvres complained of, in the circumstances in which they were held, constituted on the part of the United States a breach, as against Nicaragua, of the principle forbidding recourse to the threat or use of force.

238. Accordingly, the Court concludes that the plea of collective self-defence against an alleged armed attack on El Salvador, Honduras or Costa Rica, advanced by the United States to justify its conduct toward Nicaragua, cannot be upheld ; and accordingly that the United States has violated the principle prohibiting recourse to the threat or use of force by the acts listed in paragraph 227 above, and by its assistance to the *contras* to the extent that this assistance "involve[s] a threat or use of force" (paragraph 228 above).

239. The Court comes now to the application in this case of the principle of non-intervention in the internal affairs of States. It is argued by Nicaragua that the "military and paramilitary activities aimed at the government and people of Nicaragua" have two purposes:

- (a) The actual overthrow of the existing lawful government of Nicaragua and its replacement by a government acceptable to the United States; and
- (b) The substantial damaging of the economy, and the weakening of the political system, in order to coerce the government of Nicaragua into the acceptance of United States policies and political demands."

Nicaragua also contends that the various acts of an economic nature, constitute a form of "indirect" intervention in Nicaragua's internal affairs.

242. The Court therefore finds that the support given by the United States, up to the end of September 1984, to the military and paramilitary activities of the *contras* in Nicaragua, by financial support, training, supply of weapons, intelligence and logistic support, constitutes a clear breach of the principle of non-intervention. The Court has however taken note that, with effect from the beginning of the United States governmental financial year 1985, namely 1 October 1984, the United States Congress has restricted the use of the funds appropriated for assistance to the *contras* to "humanitarian assistance" (paragraph 97 above). There can be no doubt that the provision of strictly humanitarian aid to persons or forces in another country, whatever their political affiliations or objectives, cannot be regarded as unlawful intervention, or as in any other way contrary to international law.

290. In the present Judgment, the Court has found that the Respondent has, by its activities in relation to the Applicant, violated a number of principles of customary international law. The Court has however also to recall a further principle of international law, one which is complementary to the principles of a prohibitive nature examined above, and respect for which is essential in the world of today: the principle that the parties to any dispute, particularly any dispute the continuance of which is likely to endanger the maintenance of international peace and security, should seek a solution by peaceful means. Enshrined in Article 33 of the United Nations Charter, which also indicates a number of peaceful means which are available, this principle has also the status of customary law. In the present case, the Court has already taken note, in its Order indicating provisional measures and in its Judgment on jurisdiction and admissibility (I. C.J. Reports 1984, pp. 183-184, paras. 34 ff., pp. 438-441, paras. 102 ff.) of the diplomatic negotiation known as the Contadora Process, which appears to the Court to correspond closely to the spirit of the principle which the Court has here recalled.

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LA GRAND CASE
Germany v. United States of America

ICJ Reports 2001, p.466

(Breach of international obligation, diplomatic protection and application of the principle of state responsibility)

13. Walter LaGrand and Karl LaGrand were born in Germany in 1962 and 1963 respectively, and were German nationals. In 1967, when they were still young children, they moved with their mother to take up permanent residence in the United States. They returned to Germany only once, for a period of about six months in 1974. Although they lived in the United States for most of their lives, and became the adoptive children of a United States national, they remained at all times German nationals, and never acquired the nationality of the United States.

14. On 7 January 1982, Karl LaGrand and Walter LaGrand were arrested in the United States by law enforcement officers on suspicion of having been involved earlier the same day in an attempted armed bank robbery in Marana, Arizona, in the course of which the bank manager was murdered and another bank employee seriously injured. They were subsequently tried before the Superior Court of Pima County, Arizona, which on 17 February 1984 convicted them both of murder in the first degree, attempted murder in the first degree, attempted armed robbery and two counts of kidnapping. On 14 December 1984, each was sentenced to death for first degree murder and to concurrent sentences of imprisonment for the other charges.

(LaGrand brothers learnt of their rights from other sources and contacted the German consular post in June 1992. Subsequently, Germany offered consular assistance. The brothers were formally notified of their right to consular access by the US authorities only in 1998. The Supreme Court of Arizona decided that Karl LaGrand was to be executed on 24 February 1999 and Walter LaGrand on 3 March 1999. In spite of all efforts by Germany and the intervention by the ICJ through the provisional measures order, the brothers were executed).

15. At all material times, Germany as well as the United States were parties to both the Vienna Convention on Consular Relations and the Optional Protocol to that Convention. Article 36, paragraph 1 (h), of the Vienna Convention provides that :

"if he so requests, the competent authorities of the receiving State shall, without delay inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph."

It is not disputed that at the time the LaGrands were convicted and sentenced, the competent United States authorities had failed to provide the LaGrands with the information required by this provision of the Vienna Convention, and had not informed the relevant

German consular post of the LaGrands' arrest. The United States concedes that the competent authorities failed to do so, even after becoming aware that the LaGrands were German nationals and not United States nationals, and admits that the United States has therefore violated its obligations under this provision of the Vienna Convention.

16. However there is some dispute between the Parties as to the time at which the competent authorities in the United States became aware of the fact that the LaGrands were German nationals. Germany argues that the authorities of Arizona were aware of this from the very beginning, and in particular that probation officers knew by April 1982. The United States argues that at the time of their arrest, neither of the LaGrands identified himself to the arresting authorities as a German national, and that Walter LaGrand affirmatively stated that he was a United States citizen. The United States position is that its "competent authorities" for the purposes of Article 36, paragraph 1 (h), of the Vienna Convention were the arresting and detaining authorities, and that these became aware of the German nationality of the LaGrands by late 1984, and possibly by mid-1983 or earlier, but in any event not at the time of their arrest in 1982. Although other authorities, such as immigration authorities or probation officers may have known this even earlier, the United States argues that these were not "competent authorities" for the purposes of this provision of the Vienna Convention. The United States has also suggested that at the time of their arrest, the LaGrands may themselves have been unaware that they were not nationals of the United States.

65. Germany's first submission requests the Court to adjudge and declare:

"that the United States, by not informing Karl and Walter LaGrand without delay following their arrest of their rights under Article 36 subparagraph 1 (b) of the Vienna Convention on Consular Relations, and by depriving Germany of the possibility of rendering consular assistance, which ultimately resulted in the execution of Karl and Walter LaGrand, violated its international legal obligations to Germany, in its own right and in its right of diplomatic protection of its nationals, under Articles 5 and 36 paragraph 1 of the said Convention".

73. The Court will first examine the submission Germany advances in its own right. The Court observes, in this connection, that the United States does not deny that it violated paragraph 1 (b) in relation to Germany. The Court also notes that as a result of this breach, Germany did not learn until 1992 of the detention, trial and sentencing of the LaGrand brothers. The Court concludes therefrom that on the facts of this case, the breach of the United States had the consequence of depriving Germany of the exercise of the rights accorded it under Article 36, paragraph 1 (a) and paragraph 1 (c), and thus violated these provisions of the Convention.

74. Article 36, paragraph 1, establishes an interrelated régime designed to facilitate the implementation of the system of consular protection. It begins with the basic principle governing consular protection: the right of communication and access (Art. 36, para.1(a)). This clause is followed by the provision which spells out the modalities of consular notification (Art. 36, para.1(b)). Finally Article 36, paragraph 1(c), sets out the measures consular officers may take in rendering consular assistance to their nationals in the custody of the receiving State. It follows that when the sending State is unaware of the detention of its

nationals due to the failure of the receiving State to provide the requisite consular notification without delay, which was true in the present case during the period between 1982 and 1992, the sending State has been prevented for all practical purposes from exercising its rights under Article 36, paragraph 1. It is immaterial for the purposes of the present case whether the LaGrands would have sought consular assistance from Germany, whether Germany would have rendered such assistance, or whether a different verdict would have been rendered. It is sufficient that the Convention conferred these rights, and that Germany and the LaGrands were in effect prevented by the breach of the United States from exercising them, had they so chosen.

77. The Court notes that Article 36, paragraph 1(b), spells out the obligations the receiving State has towards the detained person and the sending State. It provides that, at the request of the detained person, the receiving State must inform the consular post of the sending State of the individual's detention "without delay". It provides further that any communication by the detained person addressed to the consular post of the sending State must be forwarded to it by authorities of the receiving State "without delay". Significantly, this subparagraph ends with the following language: "The said authorities shall inform the person concerned without delay of *his rights* under this subparagraph" (emphasis added). Moreover, under Article 36, paragraph 1 (c), the sending State's right to provide consular assistance to the detained person may not be exercised "if he expressly opposes such action". The clarity of these provisions, viewed in their context, admits of no doubt. It follows, as has been held on a number of occasions, that the Court must apply these as they stand. Based on the text of these provisions, the Court concludes that Article 36, paragraph 1, creates individual rights, which, by virtue of Article 1 of the Optional Protocol, may be invoked in this Court by the national State of the detained person. These rights were violated in the present case.

79. The Court will now consider Germany's second submission, in which it asks the Court to adjudge and declare:

"that the United States, by applying rules of its domestic law, in particular the doctrine of procedural default, which barred Karl and Walter LaGrand from raising their claims under the Vienna Convention on Consular Relations, and by ultimately executing them, violated its international legal obligation to Germany under Article 36 paragraph 2 of the Vienna Convention to give full effect to the purposes for which the rights accorded under Article 36 of the said Convention are intended".

89. The Court cannot accept the argument of the United States which proceeds, in part, on the assumption that paragraph 2 of Article 36 applies only to the rights of the sending State and not also to those of the detained individual. The Court has already determined that Article 36, paragraph 1, creates individual rights for the detained person in addition to the rights accorded the sending State, and that consequently the reference to "rights" in paragraph 2 must be read as applying not only to the rights of the sending State, but also to the rights of the detained individual (see paragraph 77 above).

90. Turning now to the "procedural default" rule, the application of which in the present case Germany alleges violated Article 36, paragraph 2, the Court emphasizes that a distinction must be drawn between that rule as such and its specific application in the present case. In itself, the rule does not violate Article 36 of the Vienna Convention. The problem arises when

the procedural default rule does not allow the detained individual to challenge a conviction and sentence by claiming, in reliance on Article 36, paragraph 1, of the Convention, that the competent national authorities failed to comply with their obligation to provide the requisite consular information "without delay", thus preventing the person from seeking and obtaining consular assistance from the sending State. [According to the United States, this rule (procedural default rule):

"is a federal rule that, before a state criminal defendant can obtain relief in federal court, the claim must be presented to a state court. If a state defendant attempts to raise a new issue in a federal *habeus corpus* proceeding, the defendant can only do so by showing cause and prejudice. Cause is an external impediment that prevents a defendant from raising a claim and prejudice must be obvious on its face. One important purpose of this rule is to ensure that the state courts have an opportunity to address issues going to the validity of state convictions before the federal courts intervene." See para.23, ICJ Reports]

91. In this case, Germany had the right at the request of the LaGrands "to arrange for [their] legal representation" and was eventually able to provide some assistance to that effect. By that time, however, because of the failure of the American authorities to comply with their obligation under Article 36, paragraph 1 (b), the procedural default rule prevented counsel for the LaGrands to effectively challenge their convictions and sentences other than on United States constitutional grounds. As a result, although United States courts could and did examine the professional competence of counsel assigned to the indigent LaGrands by reference to United States constitutional standards, the procedural default rule prevented them from attaching any legal significance to the fact, *inter alia*, that the violation of the rights set forth in Article 36, paragraph 1, prevented Germany, in a timely fashion, from retaining private counsel for them and otherwise assisting in their defence as provided for by the Convention. Under these circumstances, the procedural default rule had the effect of preventing "full effect [from being] given to the purposes for which the rights accorded under this article are intended", and thus violated paragraph 2 of Article 36.

92. The Court will now consider Germany's third submission, in which it asks the Court to adjudge and declare:

"that the United States, by failing to take all measures at its disposal to ensure that Walter LaGrand was not executed pending the final decision of the International Court of Justice on the matter, violated its international legal obligation to comply with the Order on provisional measures issued by the Court on 3 March 1999, and to refrain from any action which might interfere with the subject matter of a dispute while judicial proceedings are pending".

99. The dispute which exists between the Parties with regard to this point essentially concerns the interpretation of Article 41, which is worded in identical terms in the Statute of each Court (apart from the respective references to the Council of the League of Nations and the Security Council). This interpretation has been the subject of extensive controversy in the literature. The Court will therefore now proceed to the interpretation of Article 41 of the Statute. It will do so in accordance with customary international law, reflected in Article 31 of the 1969 Vienna Convention on the Law of Treaties. According to paragraph I of Article 31, a

treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of the treaty's object and purpose.

102. The object and purpose of the Statute is to enable the Court to fulfil the functions provided for therein, and, in particular, the basic function of judicial settlement of international disputes by binding decisions in accordance with Article 59 of the Statute. The context in which Article 41 has to be seen within the Statute is to prevent the Court from being hampered in the exercise of its functions because the respective rights of the parties to a dispute before the Court are not preserved. It follows from the object and purpose of the Statute, as well as from the terms of Article 41 when read in their context, that the power to indicate provisional measures entails that such measures should be binding, inasmuch as the power in question is based on the necessity, when the circumstances call for it, to safeguard, and to avoid prejudice to, the rights of the parties as determined by the final judgment of the Court. The contention that provisional measures indicated under Article 41 might not be binding would be contrary to the object and purpose of that Article.

103. A related reason which points to the binding character of orders made under Article 41 and to which the Court attaches importance is the existence of a principle which has already been recognized by the Permanent Court of International Justice when it spoke of

"the principle universally accepted by international tribunals and likewise laid down in many conventions . . . to the effect that the parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given, and, in general, not allow any step of any kind to be taken which might aggravate or extend the dispute" (*Electricity Company of Sofia and Bulgaria, Order of 5 December 1939, P.C.I.J., Series A/B, No. 79, p. 199*).

108. The Court finally needs to consider whether Article 94 of the United Nations Charter precludes attributing binding effect to orders indicating provisional measures. That Article reads as follows:

"1. Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.

2. If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment."

The question arises as to the meaning to be attributed to the words "the decision of the International Court of Justice" in paragraph 1 of this Article. This wording could be understood as referring not merely to the Court's judgments but to any decision rendered by it, thus including orders indicating provisional measures. It could also be interpreted to mean only judgments rendered by the Court as provided in paragraph 2 of Article 94. Under the first interpretation of paragraph 1 of Article 94, the text of the paragraph would confirm the binding nature of provisional measures; whereas the second interpretation would in no way preclude their being accorded binding force under Article 41 of the Statute. The Court

accordingly concludes that Article 94 of the Charter does not prevent orders made under Article 41 from having a binding character.

109. In short, it is clear that none of the sources of interpretation referred to in the relevant Articles of the Vienna Convention on the Law of Treaties, including the preparatory work, contradict the conclusions drawn from the terms of Article 41 read in their context and in the light of the object and purpose of the Statute. Thus, the Court has reached the conclusion that orders on provisional measures under Article 41 have binding effect.

110. The Court will now consider the Order of 3 March 1999. This Order was not a mere exhortation. It had been adopted pursuant to Article 41 of the Statute. This Order was consequently binding in character and created a legal obligation for the United States.

111. As regards the question whether the United States has complied with the obligation incumbent upon it as a result of the Order of 3 March 1999, the Court observes that the Order indicated two provisional measures, the first of which states that

"[t]he United States of America should take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings, and should inform the Court of all the measures which it has taken in implementation of this Order".

The second measure required the Government of the United States to "transmit this Order to the Governor of the State of Arizona". The information required on the measures taken in implementation of this Order was given to the Court by a letter of 8 March 1999 from the Legal Counsellor of the United States Embassy at The Hague. According to this letter, on 3 March 1999 the State Department had transmitted to the Governor of Arizona a copy of the Court's Order. "In view of the extremely late hour of the receipt of the Court's Order", the letter of 8 March went on to say, "no further steps were feasible". The United States authorities have thus limited themselves to the mere transmission of the text of the Order to the Governor of Arizona. This certainly met the requirement of the second of the two measures indicated. As to the first measure, the Court notes that it did not create an obligation of result, but that the United States was asked to "take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings". The Court agrees that due to the extremely late presentation of the request for provisional measures, there was certainly very little time for the United States authorities to act.

112. The Court observes, nevertheless, that the mere transmission of its Order to the Governor of Arizona without any comment, particularly without even so much as a plea for a temporary stay and an explanation that there is no general agreement on the position of the United States that orders of the International Court of Justice on provisional measures are non-binding, was certainly less than could have been done even in the short time available. The same is true of the United States Solicitor General's categorical statement in his brief letter to the United States Supreme Court that "an order of the International Court of Justice indicating provisional measures is not binding and does not furnish a basis for judicial relief".

113. It is also noteworthy that the Governor of Arizona, to whom the Court's Order had been transmitted, decided not to give effect to it, even though the Arizona Clemency Board had recommended a stay of execution for Walter LaGrand.

114. Finally, the United States Supreme Court rejected a separate application by Germany for a stay of execution, "[given the tardiness of the pleas and the jurisdictional barriers they implicate". Yet it would have been open to the Supreme Court, as one of its members urged, to grant a preliminary stay, which would have given it "time to consider, after briefing from all interested parties, the jurisdictional and international legal issues involved . . ." (*Federal Republic of Germany et al. v. United States et al.*, United States Supreme Court, 3 March 1999).

115. The review of the above steps taken by the authorities of the United States with regard to the Order of the International Court of Justice of 3 March 1999 indicates that the various competent United States authorities failed to take all the steps they could have taken to give effect to the Court's Order. The Order did not require the United States to exercise powers it did not have: but it did impose the obligation to "take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings . . .". The Court finds that the United States did not discharge this obligation. Under these circumstances the Court concludes that the United States has not complied with the Order of 3 March 1999.

116. The Court observes finally that in the third submission Germany requests the Court to adjudge and declare only that the United States violated its international legal obligation to comply with the Order of 3 March 1999: it contains no other request regarding that violation. Moreover, the Court points out that the United States was under great time pressure in this case, due to the circumstances in which Germany had instituted the proceedings. The Court notes moreover that at the time when the United States authorities took their decision the question of the binding character of orders indicating provisional measures had been extensively discussed in the literature, but had not been settled by its jurisprudence. The Court would have taken these factors into consideration had Germany's submission included a claim for indemnification.

117. Finally, the Court will consider Germany's fourth submission, in which it asks the Court to adjudge and declare "that the United States shall provide Germany an assurance that it will not repeat its unlawful acts and that, in any future cases of detention of or criminal proceedings against German nationals, the United States will ensure in law and practice the effective exercise of the rights under Article 36 of the Vienna Convention on Consular Relations. In particular in cases involving the death penalty, this requires the United States to provide effective review of and remedies for criminal convictions impaired by a violation of the rights under Article 36."

121. Turning first to the general demand for an assurance of non-repetition, the Court observes that it has been informed by the United States of the "substantial measures [which it is taking] aimed at preventing any recurrence" of the breach of Article 36, paragraph 1 (b). Throughout these proceedings, oral as well as written, the United States has insisted that it "keenly appreciates the importance of the Vienna Convention's consular notification

obligation for foreign citizens in the United States as well as for United States citizens travelling and living abroad"; that "effective compliance with the consular notification requirements of Article 36 of the Vienna Convention requires constant effort and attention"; and that "the Department of State is working intensively to improve understanding of and compliance with consular notification and access requirements throughout the United States, so as to guard against future violations of these requirements". The United States points out that

"[t]his effort has included the January 1998 publication of a booklet entitled 'Consular Notification and Access: Instructions for Federal, State and Local Law Enforcement and Other Officials Regarding Foreign Nationals in the United States and the Rights of Consular Officials to Assist Them', and development of a small reference card designed to be carried by individual arresting officers".

According to the United States, it is estimated that until now over 60,000 copies of the brochure as well as over 400,000 copies of the pocket card have been distributed to federal, state and local law enforcement and judicial officials throughout the United States. The United States is also conducting training programmes reaching out to all levels of government. In the Department of State a permanent office to focus on United States and foreign compliance with consular notification and access requirements has been created.

123. The Court notes that the United States has acknowledged that, in the case of the LaGrand brothers, it did not comply with its obligations to give consular notification. The United States has presented an apology to Germany for this breach. The Court considers however that an apology is not sufficient in this case, as it would not be in other cases where foreign nationals have not been advised without delay of their rights under Article 36, paragraph 1, of the Vienna Convention and have been subjected to prolonged detention or sentenced to severe penalties. In this respect, the Court has taken note of the fact that the United States repeated in all phases of these proceedings that it is carrying out a vast and detailed programme in order to ensure compliance by its competent authorities at the federal as well as at the state and local levels with its obligation under Article 36 of the Vienna Convention.

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

125. The Court will now examine the other assurances sought by Germany in its fourth submission. The Court observes in this regard that it can determine the existence of a

violation of an international obligation. If necessary, it can also hold that a domestic law has been the cause of this violation. In the present case the Court has made its findings of violations of the obligations under Article 36 of the Vienna Convention when it dealt with the first and the second submission of Germany. But it has not found that a United States law, whether substantive or procedural in character, is inherently inconsistent with the obligations undertaken by the United States in the Vienna Convention. In the present case the violation of Article 36, paragraph 2, was caused by the circumstances in which the procedural default rule was applied, and not by the rule as such. In the present proceedings the United States has apologized to Germany for the breach of Article 36, paragraph 1, and Germany has not requested material reparation for this injury to itself and to the LaGrand brothers. The Court considers in this respect that if the United States, notwithstanding its commitment referred to in paragraph 124 above, should fail in its obligation of consular notification to the detriment of German nationals, an apology would not suffice in cases where the individuals concerned have been subjected to prolonged detention or convicted and sentenced to severe penalties. In the case of such a conviction and sentence, it would be incumbent upon the United States to allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention. This obligation can be carried out in various ways. The choice of means must be left to the United States.

127. In reply to the fourth submission of Germany, the Court will therefore limit itself to taking note of the commitment undertaken by the United States to ensure implementation of the specific measures adopted in performance of its obligations under Article 36, paragraph 1 (b), of the Vienna Convention, as well as the aforementioned duty of the United States to address violations of that Convention should they still occur in spite of its efforts to achieve compliance.

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***ARMED ACTIVITIES ON THE TERRITORY OF THE CONGO
(CONGO v. UGANDA)***

ICJ Rep (2022)

(State Responsibility: Forms of Reparation)

On 23 June 1999, the Democratic Republic of the Congo (hereinafter the “DRC”) filed in the Registry of the Court an Application instituting proceedings against the Republic of Uganda (hereinafter “Uganda”) in respect of a dispute concerning “acts of *armed aggression* perpetrated by Uganda on the territory of the Democratic Republic of the Congo, in flagrant violation of the United Nations Charter and of the Charter of the Organization of African Unity” (emphasis in the original). In order to found the jurisdiction of the Court, the Application relied on the declarations made by the two Parties accepting the Court’s compulsory jurisdiction under Article 36, paragraph 2, of the Statute of the Court.

In its Judgment dated 19 December 2005 (hereinafter the “2005 Judgment”), the Court found, *inter alia*, with respect to the claims brought by the DRC, that:

“the Republic of Uganda, by engaging in military activities against the Democratic Republic of the Congo on the latter’s territory, by occupying Ituri and by actively extending military, logistic, economic and financial support to irregular forces having operated on the territory of the DRC, violated the principle of non-use of force in international relations and the principle of non-intervention” (*Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, I.C.J. Reports 2005*, p. 280, para. 345, subpara. (1) of the operative part);

“the Republic of Uganda, by the conduct of its armed forces, which committed acts of killing, torture and other forms of inhumane treatment of the Congolese civilian population, destroyed villages and civilian buildings, failed to distinguish between civilian and military targets and to protect the civilian population in fighting with other combatants, trained child soldiers, incited ethnic conflict and failed to take

measures to put an end to such conflict; as well as by its failure, as an occupying Power, to take measures to respect and ensure respect for human rights and international humanitarian law in Ituri district, violated its obligations under international human rights law and international humanitarian law” (*ibid.*, p. 280, para. 345, subpara. (3) of the operative part); and

“the Republic of Uganda, by acts of looting, plundering and exploitation of Congolese natural resources committed by members of the Ugandan armed forces in the territory of the Democratic Republic of the Congo and by its failure to comply with its obligations as an occupying Power in Ituri district to prevent acts of looting, plundering and exploitation of Congolese natural resources, violated obligations owed to the Democratic Republic of the Congo under international law” (*ibid.*, pp. 280-281, para. 345, subpara. (4) of the operative part).

With respect to these violations, the Court found that Uganda was under an obligation to make reparation to the DRC for the injury caused (*ibid.*, p. 281, para. 345, subpara. (5) of the operative part).

In relation to the counter-claims presented by Uganda, the Court found that:

“the Democratic Republic of the Congo, by the conduct of its armed forces, which attacked the Ugandan Embassy in Kinshasa, maltreated Ugandan diplomats and other individuals on the Embassy premises, maltreated Ugandan diplomats at Ndjili International Airport, as well as by its failure to provide the Ugandan Embassy and Ugandan diplomats with effective protection and by its failure to prevent archives and Ugandan property from being seized from the premises of the Ugandan Embassy, violated obligations owed to the Republic of Uganda under the Vienna Convention on Diplomatic Relations of 1961” (2005 Judgment, *I.C.J. Reports 2005*, p. 282, para. 345, subpara. (12) of the operative part).

With respect to these violations, the Court found that the DRC was under an obligation to make reparation to Uganda for the injury caused (*ibid.*, p. 282, para. 345, subpara. (13) of the operative part).

1. The Court further decided in its 2005 Judgment that, failing agreement between the Parties, the question of reparations due would be settled by the Court (*ibid.*, pp. 281-282, para. 345, subparas. (6) and (14) of the operative part).

2. In view of the failure by the Parties to settle the question of reparations by agreement, it now falls to the Court to determine the nature and amount of reparations to be awarded to the DRC for injury caused by Uganda’s violations of its international obligations, pursuant to the findings of the Court set out in the 2005 Judgment. The Court begins by recalling certain elements on which it based that

Judgment.

3. The Court will take the context of this case into account when determining the extent of the injury and assessing the reparation owed (see Parts III and IV below). It will first examine the principles and rules applicable to the assessment of reparations in the present case, before addressing questions of proof and the forms of damage subject to reparation.

The principles and rules applicable to the assessment of reparations in the present case

The Court recalls that, in its 2005 Judgment, it found that Uganda was under an obligation to make reparation for the damage caused by internationally wrongful acts (actions and omissions) attributable to it:

“259. The Court observes that it is well established in general international law that a State which bears responsibility for an internationally wrongful act is under an obligation to make full reparation for the injury caused by that act (see *Factory at Chorzów, Jurisdiction, 1927, P.C.I.J., Series A, No. 9*, p. 21; *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 81, para. 152; *Avena and Other Mexican Nationals (Mexico v. United States of America), Judgment, I.C.J. Reports 2004*, p. 59, para. 119). Upon examination of the case file, given the character of the internationally wrongful acts for which Uganda has been found responsible (illegal use of force, violation of sovereignty and territorial integrity, military intervention, occupation of Ituri, violations of international human rights law and of international humanitarian law, looting, plunder and exploitation of the DRC’s natural resources), the Court considers that those acts resulted in injury to the DRC and to persons on its territory. Having satisfied itself that this injury was caused to the DRC by Uganda, the Court finds that Uganda has an obligation to make reparation accordingly.” (2005 Judgment, *I.C.J. Reports 2005*, p. 257, para. 259.)

As regards reparation, Article 31 of the International Law Commission’s Articles on Responsibility of States for Internationally Wrongful Acts (hereinafter the “ILC Articles on State Responsibility”), which reflects customary international law, provides that:

“1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.

2. Injury includes any damage, whether material or moral, caused by the

internationally wrongful act of a State.”

71. In view of the foregoing, the Court will determine the principles and rules applicable to the assessment of reparations in the present case, first, by distinguishing between the different situations that arose during the conflict in Ituri and in other areas of the DRC (Subsection 1); second, by analyzing the required causal nexus between Uganda’s internationally wrongful acts and the injury suffered by the Applicant (Subsection 2); and, finally, by examining the nature, form and amount of reparation (Subsection 3).

The causal nexus between the internationally wrongful acts and the injury suffered

85. The Parties differ on whether reparation should be limited to the injury directly linked to an internationally wrongful act or should also cover the indirect consequences of that act.

The Court may award compensation only when an injury is caused by the internationally wrongful act of a State. As a general rule, it falls to the party seeking compensation to prove the existence of a causal nexus between the internationally wrongful act and the injury suffered. In accordance with the jurisprudence of the Court, compensation can be awarded only if there is “a sufficiently direct and certain causal nexus between the wrongful act . . . and the injury suffered by the Applicant, consisting of all damage of any type, material or moral” (*ibid.*, pp. 233-234, para. 462). The Court applied this same criterion in two other cases in which the question of reparations arose. (*Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, *Compensation, Judgment, I.C.J. Reports 2018 (I)*, p. 26, para. 32; *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, *Compensation, Judgment, I.C.J. Reports 2012 (I)*, p. 332, para. 14). However, it should be noted that the causal nexus required may vary depending on the primary rule violated and the nature and extent of the injury.

86. In particular, in the case of damage resulting from war, the question of the causal nexus can raise certain difficulties. In a situation of a long-standing and large-scale armed conflict, as in this case, the causal nexus between the wrongful conduct and certain injuries for which an applicant seeks reparation may be readily established. For some other injuries, the link between the internationally wrongful act and the alleged injury may be insufficiently direct and certain to call for reparation. It may be that the damage is attributable to several concurrent causes, including the actions or omissions of the respondent. It is also possible that several

internationally wrongful acts of the same nature, but attributable to different actors, may result in a single injury or in several distinct injuries. The Court will consider these questions as they arise, in light of the facts of this case and the evidence available. Ultimately, it is for the Court to decide if there is a sufficiently direct and certain causal nexus between Uganda's internationally wrongful acts and the various forms of damage allegedly suffered by the DRC (see Part II, Section A above).

87. The Court is of the opinion that, in analysing the causal nexus, it must make a distinction between the alleged actions and omissions that took place in Ituri, which was under the occupation and effective control of Uganda, and those that occurred in other areas of the DRC, where Uganda did not necessarily have effective control, notwithstanding the support it provided to several rebel groups whose actions gave rise to damage. The Court recalls that Uganda is under an obligation to make reparation for all damage resulting from the conflict in Ituri, even that resulting from the conduct of third parties, unless it has established, with respect to a particular injury, that it was not caused by Uganda's failure to meet its obligations as an occupying Power (see paragraph 78 above).

88. Lastly, the Court cannot accept the Respondent's argument based on an analogy with the 2007 Judgment in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, *I.C.J. Reports 2007 (I)*, p. 234, para. 462, in which the Court expressly "confine[d] itself to determining the specific scope of the duty to prevent in the Genocide Convention" and did not "purport to establish a general jurisprudence applicable to all cases where a treaty instrument, or other binding legal norm, includes an obligation for States to prevent certain acts" (*ibid.*, pp. 220-221, para. 429). The Court considers that the legal régimes and factual circumstances in question are not comparable, given that, unlike the above-mentioned *Genocide* case, the present case concerns a situation of occupation.

The nature, form and amount of reparation

99. The Court will recall certain international legal principles that inform the determination of the nature, form and amount of reparation under the law on the international responsibility of States in general and in situations of mass violations in the context of armed conflict in particular.

100. It is well established in international law that "the breach of an engagement involves an obligation to make reparation in an adequate form" (*Factory at Chorzów, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9*, p. 21). This is an obligation to make full reparation for the damage caused by an internationally

wrongful act (*Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, *Compensation, Judgment*, *I.C.J. Reports 2018 (I)*, p. 26, para. 30; *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, *Merits, Judgment*, *I.C.J. Reports 2010 (II)*, p. 691, para. 161; *Avena and Other Mexican Nationals (Mexico v. United States of America)*, *Judgment*, *I.C.J. Reports 2004 (I)*, p. 59, para. 119; *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, *Judgment*, *I.C.J. Reports 1997*, p. 80, para. 150).

101. As stated in Article 34 of the ILC Articles on State Responsibility, “[f]ull reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination”. Thus, compensation may be an appropriate form of reparation, particularly in those cases where restitution is materially impossible (*Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, *Compensation, Judgment*, *I.C.J. Reports 2018 (I)*, p. 26, para. 31; *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, *Judgment*, *I.C.J. Reports 2010 (I)*, pp. 103-104, para. 273).

102. In view of the circumstances of the present case, the Court emphasizes that it is well established in international law that reparation due to a State is compensatory in nature and should not have a punitive character (*Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, *Compensation, Judgment*, *I.C.J. Reports 2018 (I)*, p. 26, para. 31). The Court observes, moreover, that any reparation is intended, as far as possible, to benefit all those who suffered injury resulting from internationally wrongful acts (see *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, *Compensation, Judgment*, *I.C.J. Reports 2012 (I)*, p. 344, para. 57).

The Court is convinced that it should proceed in this manner in the present case. It will take due account of the above-mentioned conclusions regarding the nature, form and amount of reparation when considering the different forms of damage claimed by the DRC.

On the basis of all the preceding considerations (see paragraphs 133-225 above, specifically 166, 181, 193, 206 and 225), and given that Uganda has not established that particular injuries alleged by the DRC in Ituri were not caused by its failure to meet its obligations as an occupying Power, the Court finds it appropriate to award a single global sum of US\$225,000,000 for the loss of life and other damage to persons.

257. The Court recalls that it may, under the exceptional circumstances of the present case, award compensation in the form of a global sum, within the range of

possibilities indicated by the evidence and taking into account equitable considerations (see paragraph 106 above). The Court notes that the available evidence in relation to damage to property caused by Uganda is limited, but the Mapping Report at least substantiates many instances of damage to property caused by Uganda. Taking into account all the available evidence (see paragraphs 230-253 above), the proposals regarding the assignment of value to damage to property (see paragraphs 234-235 and 239 above), as well as its jurisprudence and the pronouncements of other international bodies (see paragraphs 69-126 above), the Court will award compensation for damage to property as a global sum of US\$40,000,000 (see paragraph 106 above).

364. Taking into account all the available evidence (see paragraphs 260-363 above, specifically 298, 310, 322, 332, 344, 363), in particular the findings and estimates contained in the report by the Court-appointed expert Mr. Nest, as well as its jurisprudence and the pronouncements of other international bodies (see paragraphs 69-126 above), the Court will award compensation for the looting, plundering and exploitation of natural resources in the form of global sum of US\$60,000,000.

365. The Court concludes that the DRC has not demonstrated that a sufficiently direct and certain causal nexus exists between the internationally wrongful acts of Uganda and any possible macroeconomic damage. The Court therefore cannot award compensation to the DRC for losses allegedly arising from the general disruption to the economy as a result of the conflict (see EECC, *Final Award, Ethiopia's Damages Claims, Decision of 17 August 2009, RIAA*, Vol. XXVI, p. 747, para. 395). The Court thus rejects the claim of the DRC for macroeconomic damage.

SATISFACTION

366. The DRC argues that, regardless of the amount awarded by the Court, compensation as a form of reparation is not sufficient to remedy fully the damage caused to the DRC and its population. It therefore asks that Uganda be required to give satisfaction through: (i) the criminal investigation and prosecution of officers and soldiers of the UPDF; (ii) the payment of US\$25 million for the creation of a fund to promote reconciliation between the Hema and the Lendu in Ituri; and (iii) the payment of US\$100 million for the non-material harm suffered by the DRC as a result of the war.

367. Uganda, for its part, is of the view that the DRC's request for criminal investigations and prosecutions is a new liability claim which was not brought at the merits phase. Furthermore, it asserts that the claim for a payment of US\$125 million concerns the same injury already covered by the DRC's other claims, and

that, in any event, satisfaction should take the form of a purely symbolic payment.

368. Before examining the three forms of satisfaction sought by the DRC, the Court recalls that, in general, a declaration of violation is, in itself, appropriate satisfaction in most cases (*Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, *I.C.J. Reports 2010 (I)*, p. 106, para. 282 (1); *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment, *I.C.J. Reports 2008*, p. 245, para. 204; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, *I.C.J. Reports 2007 (I)*, p. 234, para. 463, and p. 239, para. 471 (9); *Corfu Channel (United Kingdom v. Albania)*, Merits, Judgment, *I.C.J. Reports 1949*, p. 35). However, satisfaction can take an entirely different form depending on the circumstances of the case, and in so far as compensation does not wipe out all the consequences of an internationally wrongful act.

369. As regards the first measure sought by the DRC, namely the conduct of criminal investigations and prosecutions, the Court recalls that under Article 37 of the ILC Articles on State Responsibility:

“1. The State responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation.

2. Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality.”

370. The Court observes that the forms of satisfaction listed in the second paragraph of this provision are not exhaustive. In principle, satisfaction can include measures such as “disciplinary or penal action against the individuals whose conduct caused the internationally wrongful act” (commentary to Article 37 of the ILC Articles on State Responsibility, *Yearbook of the International Law Commission*, 2001, Vol. II, Part Two, p. 106, para. 5).

371. The Court recalls that, in its 2005 Judgment, it found that Ugandan troops had committed grave breaches of the Geneva Conventions. The Court observes that, pursuant to Article 146 of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 and to Article 85 of the Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I), Uganda has a duty to investigate, prosecute and punish those responsible for the commission of such violations. There is no need for the Court to order any additional specific

measure of satisfaction relating to the conduct of criminal investigations or prosecutions. The Respondent is required to investigate and prosecute by virtue of the obligations incumbent on it.

372. As regards the second measure of satisfaction sought by the DRC, namely the payment of US\$25 million for the creation of a fund to promote reconciliation between the Hema and the Lendu in Ituri, the Court recalls that in its 2005 Judgment it considered that the UPDF had “incited ethnic conflicts and t[aken] no action to prevent such conflicts in Ituri district” (*I.C.J. Reports 2005*, p. 240, para. 209). In this case, however, the material damage caused by the ethnic conflicts in Ituri is already covered by the compensation awarded for damage to persons and to property. The Court nevertheless invites the Parties to co-operate in good faith to establish different methods and means of promoting reconciliation between the Hema and Lendu ethnic groups in Ituri and ensure lasting peace between them.

373. Lastly, the Court cannot uphold the third measure of satisfaction sought by the DRC, namely the payment of US\$100 million for non-material harm. There is no basis for granting satisfaction for non-material harm to the DRC in such circumstances, given the subject-matter of reparation in international law and international practice in this regard. The EECC rejected Ethiopia’s claim for moral damage suffered by Ethiopians and by the State itself on account of Eritrea’s illegal use of force (*Final Award, Ethiopia’s Damages Claims, Decision of 17 August 2009, RIAA*, Vol. XXVI, p. 662, paras. 54-55, and p. 664, para. 61). In the circumstances of the case, the Court considers that the non-material harm for which the DRC seeks satisfaction is included in the global sums awarded by the Court for various heads of damage.

TOTAL SUM AWARDED

374. The total amount of compensation awarded to the DRC is US\$325,000,000. This global sum includes US\$225,000,000 for damage to persons, US\$40,000,000 for damage to property, and US\$60,000,000 for damage related to natural resources.

375. The total sum is to be paid in annual instalments of US\$65,000,000, due on 1 September of each year, from 2022 to 2026. The Court decides that, should payment be delayed, post-judgment interest at an annual rate of 6 per cent on each instalment will accrue on any overdue amount from the day which follows the day on which the instalment was due.

376. The Court is satisfied that the total sum awarded, and the terms of payment, remain within the capacity of Uganda to pay. Therefore, the Court does not need to

consider the question whether, in determining the amount of compensation, account should be taken of the financial burden imposed on the responsible State, given its economic condition (see paragraph 110 above).

377. The Court notes that the reparation awarded to the DRC for damage to persons and to property reflects the harm suffered by individuals and communities as a result of Uganda's breach of its international obligations. In this regard, the Court takes full cognizance of, and welcomes, the undertaking given by the Agent of the DRC during the oral proceedings regarding the fund that has been established by the Government of the DRC, according to which the compensation to be paid by Uganda will be fairly and effectively distributed to victims of the harm, under the supervision of organs whose members include representatives of victims and civil society and whose operation is supported by international experts. In distributing the sums awarded, the fund is encouraged to consider also the possibility of adopting measures for the benefit of the affected communities as a whole.

378. For these reasons, the Court fixes the following amounts for the compensation due from the Republic of Uganda to the Democratic Republic of the Congo for the damage caused by the violations of international obligations by the Republic of Uganda, as found by the Court in its Judgment of 19 December 2005: (a) US \$40 million for damage to property (b) US \$ 225 million for damage to persons (c) US \$ 60 million for damage to natural resources (d) the total amount due under point (b) shall be paid in 5 annual installment of US \$ 65 million starting on 1 September 2022 (d) should payment be delayed, post-judgment interest of 6% will accrue on any overdue amount as from the day which follows the day on which the installment was due € rejects the request of the DRC that the costs it incurred in the present case be borne by the Republic of Uganda.

**DRAFT CODE ON RESPONSIBILITY OF STATES FOR
INTERNATIONALLY WRONGFUL ACTS**
[Adopted by the International Law Commission at its Fifty-third Session (2001)]

PART ONE

THE INTERNATIONALLY WRONGFUL ACT OF A STATE

CHAPTER I

General principles

Article 1 - Responsibility of a State for its internationally wrongful acts

Every internationally wrongful act of a State entails the international responsibility of that State.

Article 2 - Elements of an internationally wrongful act of a State

There is an internationally wrongful act of a State when conduct consisting of an action or omission:

- (a) Is attributable to the State under international law; and
- (b) Constitutes a breach of an international obligation of the State.

Article 3 - Characterization of an act of a State as internationally wrongful

The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.

CHAPTER II

Attribution of conduct to a State

Article 4 - Conduct of organs of a State

1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.

2. An organ includes any person or entity which has that status in accordance with the internal law of the State.

Article 5 - Conduct of persons or entities exercising elements of governmental authority

The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.

Article 6 - Conduct of organs placed at the disposal of a State by another State

The conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed.

Article 7 - Excess of authority or contravention of instructions

The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.

Article 8 - Conduct directed or controlled by a State

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.

Article 9 - Conduct carried out in the absence or default of the official authorities

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.

Article 10 - Conduct of an insurrectional or other movement

1. The conduct of an insurrectional movement which becomes the new government of a State shall be considered an act of that State under international law.

2. The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered an act of the new State under international law.

3. This article is without prejudice to the attribution to a State of any conduct, however related to that of the movement concerned, which is to be considered an act of that State by virtue of articles 4 to 9.

Article 11 - Conduct acknowledged and adopted by a State as its own

Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own.

CHAPTER III**Breach of an international obligation****Article 12 - Existence of a breach of an international obligation**

There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character.

Article 13 - International obligation in force for a State

An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs.

Article 14 - Extension in time of the breach of an international obligation

1. The breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the act is performed, even if its effects continue.

2. The breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation.

3. The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation.

Article 15 - Breach consisting of a composite act

1. The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful, occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.

2. In such a case, the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation.

CHAPTER IV

Responsibility of a State in connection with the act of another State

Article 16 - Aid or assistance in the commission of an internationally wrongful act

A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

- (a) That State does so with knowledge of the circumstances of the internationally wrongful act; and
- (b) The act would be internationally wrongful if committed by that State.

Article 17 - Direction and control exercised over the commission of an internationally wrongful act

A State which directs and controls another State in the commission of an internationally wrongful act by the latter is internationally responsible for that act if:

- (a) That State does so with knowledge of the circumstances of the internationally wrongful act; and
- (b) The act would be internationally wrongful if committed by that State.

Article 18 - Coercion of another State

A State which coerces another State to commit an act is internationally responsible for that act if:

- (a) The act would, but for the coercion, be an internationally wrongful act of the coerced State; and
- (b) The coercing State does so with knowledge of the circumstances of the act.

Article 19 - Effect of this chapter

This chapter is without prejudice to the international responsibility, under other provisions of these articles, of the State which commits the act in question, or of any other State.

CHAPTER V**Circumstances precluding wrongfulness****Article 20 - Consent**

Valid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent.

Article 21 - Self-defence

The wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations.

Article 22 - Countermeasures in respect of an internationally wrongful act

The wrongfulness of an act of a State not in conformity with an international obligation towards another State is precluded if and to the extent that the act constitutes a countermeasure taken against the latter State in accordance with chapter II of Part Three.

Article 23 - Force majeure

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act is due to *force majeure*, that is the occurrence of an irresistible force or of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation.

2. Paragraph 1 does not apply if:

- (a) The situation of *force majeure* is due, either alone or in combination with other factors, to the conduct of the State invoking it; or
- (b) The State has assumed the risk of that situation occurring.

Article 24 - Distress

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the author of the act in question has no other reasonable way, in a situation of distress, of saving the author's life or the lives of other persons entrusted to the author's care.

2. Paragraph 1 does not apply if:

- (a) The situation of distress is due, either alone or in combination with other factors, to the conduct of the State invoking it; or
- (b) The act in question is likely to create a comparable or greater peril.

Article 25 - Necessity

1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:

- (a) Is the only way for the State to safeguard an essential interest against a grave and imminent peril; and
- (b) Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.

2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:

- (a) The international obligation in question excludes the possibility of invoking necessity;
or
(b) The State has contributed to the situation of necessity.

Article 26 - Compliance with peremptory norms

Nothing in this chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law.

Article 27 - Consequences of invoking a circumstance precluding wrongfulness

The invocation of a circumstance precluding wrongfulness in accordance with this chapter is without prejudice to:

- (a) Compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists;
(b) The question of compensation for any material loss caused by the act in question.

PART TWO

CONTENT OF THE INTERNATIONAL RESPONSIBILITY OF A STATE

CHAPTER I

General principles

Article 28 - Legal consequences of an internationally wrongful act

The international responsibility of a State which is entailed by an internationally wrongful act in accordance with the provisions of Part One involves legal consequences as set out in this Part.

Article 29 - Continued duty of performance

The legal consequences of an internationally wrongful act under this Part do not affect the continued duty of the responsible State to perform the obligation breached.

Article 30 - Cessation and non-repetition

The State responsible for the internationally wrongful act is under an obligation:

- (a) To cease that act, if it is continuing;
(b) To offer appropriate assurances and guarantees of non-repetition, if circumstances so require.

Article 31 - Reparation

1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.

2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.

Article 32 - Irrelevance of internal law

The responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations under this Part.

Article 33 - Scope of international obligations set out in this Part

1. The obligations of the responsible State set out in this Part may be owed to another State, to several States, or to the international community as a whole, depending in particular on the character and content of the international obligation and on the circumstances of the breach.

2. This Part is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State.

CHAPTER II

Reparation for injury

Article 34 - Forms of reparation

Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter.

Article 35 - Restitution

A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:

- (a) Is not materially impossible;
- (b) Does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.

Article 36 - Compensation

1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.

2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.

Article 37 - Satisfaction

1. The State responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation.

2. Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality.

3. Satisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible State.

Article 38 - Interest

1. Interest on any principal sum due under this chapter shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result.

2. Interest runs from the date when the principal sum should have been paid until the date the obligation to pay is fulfilled.

Article 39 - Contribution to the injury

In the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought.

CHAPTER III

Serious breaches of obligations under peremptory norms of general international law

Article 40 - Application of this chapter

1. This chapter applies to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law.

2. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation.

Article 41 - Particular consequences of a serious breach of an obligation under this chapter

1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40.

2. No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation.

3. This article is without prejudice to the other consequences referred to in this Part and to such further consequences that a breach to which this chapter applies may entail under international law.

PART THREE
**THE IMPLEMENTATION OF THE INTERNATIONAL
RESPONSIBILITY OF A STATE**
CHAPTER I

Invocation of the responsibility of a State

Article 42 - Invocation of responsibility by an injured State

A State is entitled as an injured State to invoke the responsibility of another State if the obligation breached is owed to:

- (a) That State individually; or
- (b) A group of States including that State, or the international community as a whole, and the breach of the obligation:

- (i) Specially affects that State; or
- (ii) Is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation.

Article 43 - Notice of claim by an injured State

1. An injured State which invokes the responsibility of another State shall give notice of its claim to that State.

2. The injured State may specify in particular:

- (a) The conduct that the responsible State should take in order to cease the wrongful act, if it is continuing;
- (b) What form reparation should take in accordance with the provisions of Part Two.

Article 44 - Admissibility of claims

The responsibility of a State may not be invoked if:

- (a) The claim is not brought in accordance with any applicable rule relating to the nationality of claims;
- (b) The claim is one to which the rule of exhaustion of local remedies applies and any available and effective local remedy has not been exhausted.

Article 45 - Loss of the right to invoke responsibility

The responsibility of a State may not be invoked if:

- (a) The injured State has validly waived the claim;
- (b) The injured State is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim.

Article 46 - Plurality of injured States

Where several States are injured by the same internationally wrongful act, each injured State may separately invoke the responsibility of the State which has committed the internationally wrongful act.

Article 47 - Plurality of responsible States

1. Where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act.

2. Paragraph 1:

(a) Does not permit any injured State to recover, by way of compensation, more than the damage it has suffered;

(b) Is without prejudice to any right of recourse against the other responsible States.

Article 48 - Invocation of responsibility by a State other than an injured State

1. Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if:

(a) The obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or

(b) The obligation breached is owed to the international community as a whole.

2. Any State entitled to invoke responsibility under paragraph 1 may claim from the responsible State:

(a) Cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 30; and

(b) Performance of the obligation of reparation in accordance with the preceding articles, in the interest of the injured State or of the beneficiaries of the obligation breached.

3. The requirements for the invocation of responsibility by an injured State under articles 43, 44 and 45 apply to an invocation of responsibility by a State entitled to do so under paragraph 1.

CHAPTER II**Countermeasures****Article 49 - Object and limits of countermeasures**

1. An injured State may only take countermeasures against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations under Part Two.

2. Countermeasures are limited to the non-performance for the time being of international obligations of the State taking the measures towards the responsible State.

3. Countermeasures shall, as far as possible, be taken in such a way as to permit the resumption of performance of the obligations in question.

Article 50 - Obligations not affected by countermeasures

1. Countermeasures shall not affect:

(a) The obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations;

(b) Obligations for the protection of fundamental human rights;

(c) Obligations of a humanitarian character prohibiting reprisals;

(d) Other obligations under peremptory norms of general international law.

2. A State taking countermeasures is not relieved from fulfilling its obligations:

(a) Under any dispute settlement procedure applicable between it and the responsible State;

(b) To respect the inviolability of diplomatic or consular agents, premises, archives and documents.

Article 51 - Proportionality

Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question.

Article 52 - Conditions relating to resort to countermeasures

1. Before taking countermeasures, an injured State shall:

(a) Call on the responsible State, in accordance with article 43, to fulfil its obligations under Part Two;

(b) Notify the responsible State of any decision to take countermeasures and offer to negotiate with that State.

2. Notwithstanding paragraph 1(b), the injured State may take such urgent countermeasures as are necessary to preserve its rights.

3. Countermeasures may not be taken, and if already taken must be suspended without undue delay if:

(a) The internationally wrongful act has ceased; and

(b) The dispute is pending before a court or tribunal which has the authority to make decisions binding on the parties.

4. Paragraph 3 does not apply if the responsible State fails to implement the dispute settlement procedures in good faith.

Article 53 - Termination of countermeasures

Countermeasures shall be terminated as soon as the responsible State has complied with its obligations under Part Two in relation to the internationally wrongful act.

Article 54 - Measures taken by States other than an injured State

This chapter does not prejudice the right of any State, entitled under article 48, paragraph 1 to invoke the responsibility of another State, to take lawful measures against that State to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached.

LAW OF THE SEA

Anglo-Norwegian Fisheries Case

ICJ Reports, 1951, p.116

(Straight baselines in the measurement of territorial sea; the persistent objector)

The historical facts laid before the Court establish that as the result of complaints from the King of Denmark and of Norway, at the beginning of the seventeenth century, British fishermen refrained from fishing in Norwegian coastal waters for a long period, from 1616-1618 until 1906.

In 1906 a few British fishing vessels appeared off the coasts of Eastern Finnmark. From 1908 onwards they returned in greater numbers. These were trawlers equipped with improved and powerful gear. The local population became perturbed, and measures were taken by the Norwegian Government with a view to specifying the limits within which fishing was prohibited to foreigners.

The first incident occurred in 1911 when a British trawler was seized and condemned for having violated these measures. Negotiations ensued between the two Governments. These were interrupted by the war in 1914. From 1922 onwards incidents recurred. Further conversations were initiated in 1924. In 1932, British trawlers, extending the range of their activities, appeared in the sectors off the Norwegian coast west of the North Cape, and the number of warnings and arrests increased. On July 27th, 1933, the United Kingdom Government sent a memorandum to the Norwegian Government complaining that in delimiting the territorial sea the Norwegian authorities had made use of unjustifiable baselines. On July 12th, 1935, a Norwegian Royal Decree was enacted delimiting the Norwegian fisheries zone north of 66° 28.8' North latitude.

The United Kingdom made urgent representations in Oslo in the course of which the question of referring the dispute to the Permanent Court of International Justice was raised. Pending the result of the negotiations, the Norwegian Government made it known that Norwegian fishery patrol vessels would deal leniently with foreign vessels fishing a certain distance within the fishing limits. In 1948, since no agreement had been reached, the Norwegian Government abandoned its lenient enforcement of the 1935 Decree; incidents then became more and more frequent. A considerable number of British trawlers were arrested and condemned. It was then that the United Kingdom Government instituted the present proceedings.

The Norwegian Royal Decree of July 12th, 1935, concerning the delimitation of the Norwegian fisheries zone sets out in the preamble the considerations on which its provisions are based. In this connection it refers to "well-established national titles of right", "the geographical conditions prevailing on the Norwegian coasts", "the safeguard of the vital interests of the inhabitants of the northernmost parts of the country"; it further relies on the

Royal Decrees of February 22nd, 1812, October 16th, 1869, January 5th, 1881, and September 9th, 1889.

The subject of the dispute is clearly indicated under point 8 of the Application instituting proceedings: "The subject of the dispute is the validity or otherwise under international law of the lines of delimitation of the Norwegian fisheries zone laid down by the Royal Decree of 1935 for that part of Norway which is situated northward of 66° 28.8' North latitude." And further on: "... the question at issue between the two Governments is whether the lines prescribed by the Royal Decree of 1935 as the base-lines for the delimitation of the fisheries zone have or have not been drawn in accordance with the applicable rules of international law".

Although the Decree of July 12th, 1935, refers to the Norwegian fisheries zone and does not specifically mention the territorial sea, there can be no doubt that the zone delimited by this Decree is none other than the sea area which Norway considers to be her territorial sea.

The Norwegian Government does not deny that there exist rules of international law to which this delimitation must conform. It contends that the propositions formulated by the United Kingdom Government in its "Conclusions" do not possess the character attributed to them by that Government. It further relies on its own system of delimitation which it asserts to be in every respect in conformity with the requirements of international law.

The coastal zone concerned in the dispute is of considerable length. It lies north of latitude 66° 28.8' N., that is to say, north of the Arctic Circle, and it includes the coast of the mainland of Norway and all the islands, islets, rocks and reefs, known by the name of the "skjaergaard" (literally, rock rampart), together with all Norwegian internal and territorial waters.

Along the coast are situated comparatively shallow banks, veritable under-water terraces which constitute fishing grounds where fish are particularly abundant; these grounds were known to Norwegian fishermen and exploited by them from time immemorial. Since these banks lay within the range of vision, the most desirable fishing grounds were always located and identified by means of the method of alignments at points where two lines drawn between points selected on the coast or on islands intersected.

In these barren regions the inhabitants of the coastal zone derive their livelihood essentially from fishing.

Such are the realities which must be borne in mind in appraising the validity of the United Kingdom contention that the limits of the Norwegian fisheries zone laid down in the 1935 Decree are contrary to international law.

The Parties being in agreement on the figure of 4 miles for the breadth of the territorial sea, the problem which arises is from what base-line this breadth is to be reckoned. The

Conclusions of the United Kingdom are explicit on this point: the base-line must be low-water mark on permanently dry land which is a part of Norwegian territory, or the proper closing line of Norwegian internal waters.

The Court has no difficulty in finding that, for the purpose of measuring the breadth of the territorial sea, it is the low-water mark as opposed to the high-water mark, or the mean between the two tides, which has generally been adopted in the practice of States. This criterion is the most favourable to the coastal State and clearly shows the character of territorial waters as appurtenant to the land territory. The Court notes that the Parties agree as to this criterion, but that they differ as to its application.

The Parties also agree that in the case of a low-tide elevation (drying rock) the outer edge at low water of this low-tide elevation may be taken into account as a base-point for calculating the breadth of the territorial sea.

The Court finds itself obliged to decide whether the relevant low water mark is that of the mainland or of the "skjaergaard". Since the mainland is bordered in its western sector by the "skjaergaard", which constitutes a whole with the mainland, it is the outer line of the "skjaergaard" which must be taken into account in delimiting the belt of Norwegian territorial waters. This solution is dictated by geographic realities.

Three methods have been contemplated to effect the application of the low-water mark rule. The simplest would appear to be the method of the *tracé parallèle*, which consists of drawing the outer limit of the belt of territorial waters by following the coast in all its sinuosities. This method may be applied without difficulty to an ordinary coast, which is not too broken. Where a coast is deeply indented and cut into, as is that of Eastern Finnmark, or where it is bordered by an archipelago such as the "skjaergaard" along the western sector of the coast here in question, the base-line becomes independent of the low-water mark, and can only be determined by means of a geometrical construction. In such circumstances the line of the low-water mark can no longer be put forward as a rule requiring the coastline to be followed in all its sinuosities. Nor can one characterize as exceptions to the rule the very many derogations which would be necessitated by such a rugged coast: the rule would disappear under the exceptions. Such a coast, viewed as a whole, calls for the application of a different method; that is, the method of base-lines which, within reasonable limits, may depart from the physical line of the coast.

The principle that the belt of territorial waters must follow the general direction of the coast makes it possible to fix certain criteria valid for any delimitation of the territorial sea; these criteria will be elucidated later. The Court will confine itself at this stage to noting that, in order to apply this principle, several States have deemed it necessary to follow the straight base-lines method and that they have not encountered objections of principle by other States. This method consists of selecting appropriate points on the low-water mark and drawing straight lines between them. This has been done, not only in the case of well-defined bays, but

also in cases of minor curvatures of the coastline where it was solely a question of giving a simpler form to the belt of territorial waters.

It has been contended, on behalf of the United Kingdom, that Norway may draw straight lines only across bays. The Court is unable to share this view. If the belt of territorial waters must follow the outer line of the "skjaergaard", and if the method of straight baselines must be admitted in certain cases, there is no valid reason to draw them only across bays, as in Eastern Finnmark, and not also to draw them between islands, islets and rocks, across the sea areas separating them, even when such areas do not fall within the conception of a bay. It is sufficient that they should be situated between the island formations of the "skjaergaard", *inter fauces terrarum*.

The Court now comes to the question of the length of the baselines drawn across the waters lying between the various formations of the "skjaergaard". Basing itself on the analogy with the alleged general rule of ten miles relating to bays, the United Kingdom Government still maintains on this point that the length of straight lines must not exceed ten miles.

In this connection, the practice of States does not justify the formulation of any general rule of law. The attempts that have been made to subject groups of islands or coastal archipelagoes to conditions analogous to the limitations concerning bays (distance between the islands not exceeding twice the breadth of the territorial waters, or ten or twelve sea miles), have not got beyond the stage of proposals.

Furthermore, apart from any question of limiting the lines to ten miles, it may be that several lines can be envisaged. In such cases the coastal State would seem to be in the best position to appraise the local conditions dictating the selection.

Consequently, the Court is unable to share the view of the United Kingdom Government, that "Norway, in the matter of base-lines, now claims recognition of an exceptional system". As will be shown later, all that the Court can see therein is the application of general international law to a specific case.

Thus the Court, confining itself for the moment to the Conclusions of the United Kingdom, finds that the Norwegian Government in fixing the base-lines for the delimitation of the Norwegian fisheries zone by the 1935 Decree has not violated international law.

It does not at all follow that, in the absence of rules having the technically precise character alleged by the United Kingdom Government, the delimitation undertaken by the Norwegian Government in 1935 is not subject to certain principles which make it possible to judge as to its validity under international law. The delimitation of sea areas has always an international aspect; it cannot be dependent merely upon the will of the coastal State as expressed in its municipal law. Although it is true that the act of delimitation is necessarily a unilateral act, because only the coastal State is competent to undertake it, the validity of the delimitation with regard to other States depends upon international law.

In this connection, certain basic considerations inherent in the nature of the territorial sea, bring to light certain criteria which, though not entirely precise, can provide courts with an adequate basis for their decisions, which can be adapted to the diverse facts in question.

Among these considerations, some reference must be made to the close dependence of the territorial sea upon the land domain. It is the land which confers upon the coastal State a right to the waters off its coasts. It follows that while such a State must be allowed the latitude necessary in order to be able to adapt its delimitation to practical needs and local requirements, the drawing of base-lines must not depart to any appreciable extent from the general direction of the coast.

Another fundamental consideration, of particular importance in this case, is the more or less close relationship existing between certain sea areas and the land formations which divide or surround them. The real question raised in the choice of base-lines is in effect whether certain sea areas lying within these lines are sufficiently closely linked to the land domain to be subject to the regime of internal waters. This idea, which is at the basis of the determination of the rules relating to bays, should be liberally applied in the case of a coast, the geographical configuration of which is as unusual as that of Norway.

Finally, there is one consideration not to be overlooked, the scope of which extends beyond purely geographical factors: that of certain economic interests peculiar to a region, the reality and importance of which are clearly evidenced by a long usage.

Norway puts forward the 1935 Decree as the application of a traditional system of delimitation, a system which she claims to be in complete conformity with international law. The Norwegian Government has referred in this connection to an historic title, the meaning of which was made clear by Counsel for Norway at the sitting on October 12th 1951 : "The Norwegian Government does not rely upon history to justify exceptional rights, to claim areas of sea which the general law would deny ; it invokes history, together with other factors, to justify the way in which it applies the general law." This conception of an historic title is in consonance with the Norwegian Government's understanding of the general rules of international law. In its view, these rules of international law take into account the diversity of facts and, therefore, concede that the drawing of base-lines must be adapted to the special conditions obtaining in different regions. In its view, the system of delimitation applied in 1935, a system characterized by the use of straight lines, does not therefore infringe the general law; it is an adaptation rendered necessary by local conditions.

The Court must ascertain precisely what this alleged system of delimitation consists of, what is its effect in law as against the United Kingdom, and whether it was applied by the 1935 Decree in a manner which conformed to international law.

The 1869 Statement of Reasons brings out all the elements which go to make up what the Norwegian Government describes as its traditional system of delimitation: base-points

provided by the islands or islets farthest from the mainland, the use of straight lines joining up these points, the lack of any maximum length for such lines. The judgment of the Norwegian Supreme Court in the *St. Just* case upheld this interpretation and added that the 1812 Decree had never been understood or applied "in such a way as to make the boundary follow the sinuosities of the coast or to cause its position to be determined by means of circles drawn round the points of the Skjzrgaard or of the mainland furthest out to sea—a method which it would be very difficult to adopt or to enforce in practice, having regard to the special configuration of this coast". Finally, it is established that, according to the Norwegian system, the base-lines must follow the general direction of the coast, which is in conformity with international law.

In the light of these considerations, and in the absence of convincing evidence to the contrary, the Court is bound to hold that the Norwegian authorities applied their system of delimitation consistently and uninterruptedly from 1869 until the time when the dispute arose.

From the standpoint of international law, it is now necessary to consider whether the application of the Norwegian system encountered any opposition from foreign States.

Norway has been in a position to argue without any contradiction that neither the promulgation of her delimitation Decrees in 1869 and in 1889, nor their application, gave rise to any opposition on the part of foreign States. Since, moreover, these Decrees constitute, as has been shown above, the application of a well-defined and uniform system, it is indeed this system itself which would reap the benefit of general toleration, the basis of an historical consolidation which would make it enforceable as against all States.

The general toleration of foreign States with regard to the Norwegian practice is an unchallenged fact. For a period of more than sixty years the United Kingdom Government itself in no way contested it. It would appear that it was only in its Memorandum of July 27th, 1933, that the United Kingdom made a formal and definite protest on this point.

The United Kingdom Government has argued that the Norwegian system of delimitation was not known to it and that the system therefore lacked the notoriety essential to provide the basis of an historic title enforceable against it. The Court is unable to accept this view. As a coastal State on the North Sea, greatly interested in the fisheries in this area, as a maritime Power traditionally concerned with the law of the sea and concerned particularly to defend the freedom of the seas, the United Kingdom could not have been ignorant of the Decree of 1869 which had at once provoked a request for explanations by the French Government. Nor, knowing of it, could it have been under any misapprehension as to the significance of its terms, which clearly described it as constituting the application of a system.

Norway's attitude with regard to the North Sea Fisheries (Police) Convention of 1882 is a further fact which must at once have attracted the attention of Great Britain. There is scarcely any fisheries convention of greater importance to the coastal States of the North Sea or of greater interest to Great Britain. Norway's refusal to adhere to this Convention clearly

raised the question of the delimitation of her maritime domain, especially with regard to bays, the question of their delimitation by means of straight lines of which Norway challenged the maximum length adopted in the Convention. Having regard to the fact that a few years before, the delimitation of Sunnmore by the 1869 Decree had been presented as an application of the Norwegian system, one cannot avoid the conclusion that, from that time on, all the elements of the problem of Norwegian coastal waters had been clearly stated. The steps subsequently taken by Great Britain to secure Norway's adherence to the Convention clearly show that she was aware of and interested in the question.

The Court notes that in respect of a situation which could only be strengthened with the passage of time, the United Kingdom Government refrained from formulating reservations. The notoriety of the facts, the general toleration of the international community, Great Britain's position in the North Sea, her own interest in the question, and her prolonged abstention would in any case warrant Norway's enforcement of her system against the United Kingdom. The Court is thus led to conclude that the method of straight lines, established in the Norwegian system, was imposed by the peculiar geography of the Norwegian coast; that even before the dispute arose, this method had been consolidated by a constant and sufficiently long practice, in the face of which the attitude of governments bears witness to the fact that they did not consider it to be contrary to international law.

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Corfu Channel Case

ICJ Reports 1949, p.4

(State responsibility- modes of reparation-use of circumstantial evidence-right of innocent passage- passage of warships through territorial waters-self help)

By the first part of the Special Agreement, the following question is submitted to the Court:

"(1) Is Albania responsible under international law for the explosions which occurred on the 22nd October 1946 in Albanian waters and for the damage and loss of human life which resulted from them and is there any duty to pay compensation?"

On October 22nd, 1946, a squadron of British warships, the cruisers *Mauritius* and *Leander* and the destroyers *Saumarez* and *Volage*, left the port of Corfu and proceeded northward through a channel previously swept for mines in the North Corfu Strait. The cruiser *Mauritius* was leading, followed by the destroyer *Saumarez*; at a certain distance thereafter came the cruiser *Leander* followed by the destroyer *Volage*. Outside the Bay of Saranda, *Saumarez* struck a mine and was heavily damaged. *Volage* was ordered to give her assistance and to take her in tow. Whilst towing the damaged ship, *Volage* struck a mine and was much damaged. Nevertheless, she succeeded in towing the other ship back to Corfu.

Three weeks later, on November 13th, the North Corfu Channel was swept by British minesweepers and twenty-two moored mines were cut.

In October, 1944, the North Corfu Channel was swept by the British Navy and no mines were found in the channel thus swept, whereupon -the existence of a safe route through the Channel was announced in November 1944. In January and February, 1945, the Channel was check-swept by the British Navy with negative results. That the British Admiralty must have considered the Channel to be a safe route for navigation is shown by the fact that on May 15th, 1946, it sent two British cruisers and on October 22nd a squadron through the Channel without any special measures of precaution against danger from moored mines. It was in this swept channel that the minefield was discovered on November 13th, 1946.

The Court consequently finds that the following facts are established. The two ships were mined in Albanian territorial waters in a previously swept and check-swept channel just at the place where a newly laid minefield consisting of moored contact German GY mines was discovered three weeks later. The damage sustained by the ships was inconsistent with damage which could have been caused by floating mines, magnetic ground mines, magnetic moored mines, or German GR mines, but its nature and extent were such as would be caused by mines of the type found in the minefield. In such circumstances the Court arrives at the conclusion that the explosions were due to mines belonging to that minefield.

In the light of the information now available to the Court, the authors of the mine laying remain unknown. In any case, the task of the Court, as defined by the Special Agreement, is to decide whether Albania is responsible, under international law, for the explosions which occurred on October 22nd, 1946, and to give judgment as to the compensation, if any.

It is clear that knowledge of the mine laying cannot be imputed to the Albanian Government by reason merely of the fact that a minefield discovered in Albanian territorial waters caused the explosions of which the British warships were the victims. It is true, as international practice shows, that a State on whose territory or in whose waters an act contrary to international law has occurred, may be called upon to give an explanation. It is also true that that State cannot evade such a request by limiting itself to a reply that it is ignorant of the circumstances of the act and of its authors. The State may, up to a certain point, be bound to supply particulars of the use made by it of the means of information and inquiry at its disposal. But it cannot be concluded from the mere fact of the control exercised by a State over its territory and waters that that State necessarily knew, or ought to have known, of any unlawful act perpetrated therein, nor yet that it necessarily knew, or should have known, the authors. This fact, by itself and apart from other circumstances, neither involves *prima facie* responsibility nor shifts the burden of proof.

On the other hand, the fact of this exclusive territorial control exercised by a State within its frontiers has a bearing upon the methods of proof available to establish the knowledge of that State as to such events. By reason of this exclusive control, the other State, the victim of a breach of international law, is often unable to furnish direct proof of facts giving rise to responsibility. Such a State should be allowed a more liberal recourse to inferences of fact and circumstantial evidence. This indirect evidence is admitted in all systems of law, and its use is recognized by international decisions. It must be regarded as of special weight when it is based on a series of facts linked together and leading logically to a single conclusion.

The Court must examine therefore whether it has been established by means of indirect evidence that Albania has knowledge of mine laying in her territorial waters independently of any connivance on her part in this operation. The proof may be drawn from inferences of fact, provided that they leave *no room* for reasonable doubt. The elements of fact on which these inferences can be based may differ from those which are relevant to the question of connivance.

In the present case, two series of facts, which corroborate one another, have to be considered : the first relates to Albania's attitude before and after the disaster of October 22nd, 1946 ; the other concerns the feasibility of observing mine laying from the Albanian coast.

It is clearly established that the Albanian Government constantly kept a close watch over the waters of the North Corfu Channel, at any rate after May 1946. This vigilance is proved by the declaration of the Albanian Delegate in the Security Council on February 19th, 1947 (*Official Records of the Security Council*, Second Year, No. 16, p. 328), and especially by the diplomatic notes of the Albanian Government concerning the passage of foreign ships through its territorial waters.

The Albanian Government's notes are all evidence of its intention to keep a jealous watch on its territorial waters. The *note verbale* addressed to the United Kingdom on May 21st, 1946, reveals the existence of a "General Order", in execution of which the Coastal Commander gave the order to fire in the direction of the British cruisers. This same note formulates a demand that "permission" shall be given, by the Albanian authorities, for passage through

territorial waters. The insistence on "formalities" and "permission" by Albania is repeated in the Albanian note of June 19th.

As the Parties agree that the minefield had been recently laid, it must be concluded that the operation was carried out during the period of close watch by the Albanian authorities in this sector. This conclusion renders the Albanian Government's assertion of ignorance *a priori* somewhat improbable.

The telegrams sent by the Albanian Government on November 13th and November 27th, 1946, to the Secretary-General of the United Nations, at a time when that Government was fully aware of the discovery of the minefield in Albanian territorial waters, are especially significant of the measures taken by the Albanian Government. In the first telegram, that Government raised the strongest protest against the movements and activity of British naval units in its territorial waters on November 12th and 13th, 1946, without even mentioning the existence of a minefield in these waters. In the second, it repeats its accusations against the United Kingdom, without in any way protesting against the laying of this minefield which, if effected without Albania's consent, constituted a very serious violation of her sovereignty.

Another indication of the Albanian Government's knowledge consists in the fact that that Government did not notify the presence of mines in its waters, at the moment when it must have known this, at the latest after the sweep on November 13th, and further, whereas the Greek Government immediately appointed a Commission to inquire into the events of October 22nd, the Albanian Government took no decision of such a nature, nor did it proceed to the judicial investigation incumbent, in such a case, on the territorial sovereign.

This attitude does not seem reconcilable with the alleged ignorance of the Albanian authorities that the minefield had been laid in Albanian territorial waters. It could be explained if the Albanian Government, while knowing of the mine laying, desired the circumstances of the operation to remain secret.

2. As regards the possibility of observing mine laying from the Albanian coast, the Court regards the following facts, relating to the technical conditions of a secret mine laying and to the Albanian surveillance, as particularly important.

The Bay of Saranda and the channel used by shipping through the Strait are, from their geographical configuration, easily watched; the entrance of the bay is dominated by heights offering excellent observation points, both over the bay and over the Strait; whilst the channel throughout is close to the Albanian coast. The laying of a minefield in these waters could hardly fail to have been observed by the Albanian coastal defences.

On this subject, it must first be said that the mine laying operation itself must have required a certain time. The method adopted required, according to the Experts of the Court, the methodical and well thought-out laying of two rows of mines that had clearly a combined offensive and defensive purpose: offensive, to prevent the passage, through the Channel, of vessels drawing ten feet of water or more; defensive, to prevent vessels of the same draught from entering the Bay of Saranda. The report of the Experts reckons the time that the minelayers would have been in the waters, between Cape Kiephali and St. George's Monastery, at between two and two and a half hours. This is sufficient time to attract the

attention of the observation posts, placed, as the Albanian Government stated, at Cape Kiephali and St. George's Monastery. The facilities for observation from the coast are confirmed by the two following circumstances: the distance of the nearest mine from the coast was only 500 metres; the minelayers must have passed at not more than about 500 metres from the coast between Denta Point and St. George's Monastery.

The Court cannot fail to give great weight to the opinion of the Experts who examined the locality in a manner giving every guarantee of correct and impartial information. Apart from the existence of a look-out post at Cape Denta, which has not been proved, the Court, basing itself on the declarations of the Albanian Government that look-out posts were stationed at Cape Kiephali and St. George's Monastery, refers to the following conclusions in the Experts' Report: (1) that in the case of mine laying from the North towards the South, the minelayers would have been seen from Cape Kiephali ; (2) in the case of mine laying from the South, the minelayers would have been seen from Cape Kiephali and St. George's Monastery.

From all the facts and observations mentioned above, the Court draws the conclusion that the laying of the minefield which caused the explosions on October 22nd, 1946, could not have been accomplished without the knowledge of the Albanian Government.

The obligations resulting for Albania from this knowledge are not disputed between the Parties. The obligations incumbent upon the Albanian authorities consisted in notifying, for the benefit of shipping in general, the existence of a minefield in Albanian territorial waters and in warning the approaching British warships of the imminent danger to which the minefield exposed them. Such obligations are based, not on the Hague Convention of 1907, No. VTII, which is applicable in time of war, but on certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war; the principle of the freedom of maritime communication; and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.

In fact, Albania neither notified the existence of the minefield, nor warned the British warships of the danger they were approaching.

But Albania's obligation to notify shipping of the existence of mines in her waters depends on her having obtained knowledge of that fact in sufficient time before October 22nd ; and the duty of the Albanian coastal authorities to warn the British ships depends on the time that elapsed between the moment that these ships were reported and the moment of the first explosion.

On this subject, the Court makes the following observations. As has already been stated, the Parties agree that the mines were recently laid. It must be concluded that the mine laying, whatever may have been its exact date, was done at a time when there was a close Albanian surveillance over the Strait. If it be supposed that it took place at the last possible moment, i.e., in the night of October 21st-22nd, the only conclusion to be drawn would be that a general notification to the shipping of all States before the time of the explosions would have been difficult, perhaps even impossible. But this would certainly not have prevented the Albanian authorities from taking, as they should have done, all necessary steps immediately to warn ships near the danger zone, more especially those that were approaching that zone. When on October 22nd about 13.00 hours the British warships were reported by the look-out

post at St. George's Monastery to the Commander of the Coastal Defences as approaching 'Cape Long, it was perfectly possible for the Albanian authorities to use the interval of almost two hours that elapsed before the explosion affecting *Saumarez* (14.53 hours or 14.55 hours) to warn the vessels of the danger into which they were running.

In fact, nothing was attempted by the Albanian authorities to prevent the disaster. These grave omissions involve the international responsibility of Albania.

The Court therefore reaches the conclusion that Albania is responsible under international law for the explosions which occurred on October 22nd, 1946, in Albanian waters, and for the damage and loss of human life which resulted from them, and that there is a duty upon Albania to pay compensation to the United Kingdom.

In the final submissions contained in its oral reply, the United Kingdom Government asked the Court to give judgment that, as a result of the breach by the Albanian Government of its obligations under international law, it had sustained damages amounting to £87 5,000.

The Albanian Government has not disputed the competence of the Court to decide what kind of satisfaction is due under this part of the Agreement. The case was argued on behalf of both Parties on the basis that this question should be decided by the Court.

As has been said above, the Security Council, in its Resolution of April 9th, 1947, undoubtedly intended that the whole dispute should be decided by the Court. If, however, the Court should limit itself to saying that there is a duty to pay compensation without deciding what amount of compensation is due, the dispute would not be finally decided. An important part of it would remain unsettled. As both Parties have repeatedly declared that they accept the Resolution of the Security Council, such a result would not conform with their declarations. It would not give full effect to the Resolution, but would leave open the possibility of a further dispute.

For the foregoing reasons, the Court has arrived at the conclusion that it has jurisdiction to assess the amount of the compensation. This cannot, however, be done in the present Judgment. The Albanian Government has not yet stated which items, if any, of the various sums claimed it contests, and the United Kingdom Government has not submitted its evidence with regard to them.

The Court therefore considers that further proceedings on this subject are necessary; the order and time-limits of these proceedings will be fixed by the Order of this date.

In the second part of the Special Agreement, the following question is submitted to the Court :

"(2) Has the United Kingdom under international law violated the sovereignty of the Albanian People's Republic by reason of the acts of the Royal Navy in Albanian waters on the 22nd October and on the 12th and 13th November 1946 and is there any duty to give satisfaction?"

The Court will first consider whether the sovereignty of Albania was violated by reason of the acts of the British Navy in Albanian waters on October 22nd, 1946.

On May 15th, 1946, the British cruisers *Orion* and *Superb*, while passing southward through the North Corfu Channel, were fired at by an Albanian battery in the vicinity of Saranda. It appears from the report of the commanding naval officer dated May 29th, 1946, that the firing started when the ships had already passed the battery and were moving away from it ; that from 12 to 20 rounds were fired ; that the firing lasted 12 minutes and ceased only when the ships were out of range ; but that the ships were not hit although there were a number of "shorts" and of "overs". An Albanian note of May 21st states that the Coastal Commander ordered a few shots to be fired in the direction of the ships "in accordance with a General Order founded on international law".

The Court will now consider the Albanian contention that the United Kingdom Government violated Albanian sovereignty by sending the warships through this Strait without the previous authorization of the Albanian Government.

It is, in the opinion of the Court, generally recognized and in accordance with international custom that States in time of peace have a right to send their warships through straits used for international navigation between two parts of the high seas without the previous authorization of a coastal State, provided that the passage is *innocent*. Unless otherwise prescribed in an international convention, there is no right for a coastal State to prohibit such passage through straits in time of peace.

The Albanian Government does not dispute that the North Corfu Channel is a strait in the geographical sense; but it denies that this Channel belongs to the class of international highways through which a right of passage exists, on the grounds that it is only of secondary importance and not even a necessary route between two parts of the high seas, and that it is used almost exclusively for local traffic to and from the ports of Corfu and Saranda.

It may be asked whether the test is to be found in the volume of traffic passing through the Strait or in its greater or lesser importance for international navigation. But in the opinion of the Court the decisive criterion is rather its geographical situation as connecting two parts of the high seas and the fact of its being used for international navigation. Nor can it be decisive that this Strait is not a necessary route between two parts of the high seas, but only an alternative passage between the Aegean and the Adriatic Seas. It has nevertheless been a useful route for international maritime traffic.

One fact of particular importance is that the North Corfu Channel constitutes a frontier between Albania and Greece, that a part of it is wholly within the territorial waters of these States, and that the Strait is of special importance to Greece by reason of the traffic to and from the port of Corfu.

Having regard to these various considerations, the Court has arrived at the conclusion that the North Corfu Channel should be considered as belonging to the class of international highways through which passage cannot be prohibited by a coastal State in time of peace.

On the other hand, it is a fact that the two coastal States did not maintain normal relations, that Greece had made territorial claims precisely with regard to a part of Albanian territory bordering on the Channel, that Greece had declared that she considered herself technically in a state of war with Albania, and that Albania, invoking the danger of Greek incursions, had

considered it necessary to take certain measures of vigilance in this region. The Court is of opinion that Albania, in view of these exceptional circumstances, would have been justified in issuing regulations in respect of the passage of warships through the Strait, but not in prohibiting such passage or in subjecting it to the requirement of special authorization.

For these reasons the Court is unable to accept the Albanian contention that the Government of the United Kingdom has violated Albanian sovereignty by sending the warships through the Strait without having obtained the previous authorization of the Albanian Government.

The Albanian Government has further contended that the sovereignty of Albania was violated because the passage of the British warships on October 22nd, 1946, was not an *innocent passage*.

The legality of this measure taken-by the Government of the United Kingdom cannot be disputed, provided that it was carried out in a manner consistent with the requirements of international law. The "mission" was designed to affirm a right which had been unjustly denied. The Government of the United Kingdom was not bound to abstain from exercising its right of passage, which the Albanian Government had illegally denied.

It remains, therefore, to consider whether the *manner* in which the passage was carried out was consistent with the principle of innocent passage and to examine the various contentions of the Albanian Government in so far as they appear to be relevant.

In the above-mentioned telegram of October 26th, the Commander- in-Chief reported that the passage "was made with ships at action stations in order that they might be able to retaliate quickly if fired upon again". In view of the firing from the Albanian battery on May 15th, this measure of precaution cannot, in itself, be regarded as unreasonable. But four warships-two cruisers and two destroyers-passed in this manner, with crews at action stations, ready to retaliate quickly if fired upon. They passed one after another through this narrow channel, close to the Albanian Coast, at a time of political tension in this region. The intention must have been, not only to test Albania's attitude, but at the same time to demonstrate such force that she would abstain from firing again on passing ships. Having regard, however, to all the circumstances of the case, as described above, the Court is unable to characterize these measures taken by the United Kingdom authorities as a violation of Albania's sovereignty.

Having thus examined the various contentions of the Albanian Government in so far as they appear to be relevant, the Court has arrived at the conclusion that the United Kingdom did not violate the sovereignty of Albania by reason of the acts of the British Navy in Albanian waters on October 22nd, 1946.

After the explosions of October 22nd, the United Kingdom Government sent a note to the Albanian Government, in which it announced its intention to sweep the Corfu Channel shortly. The Albanian reply, which was received in London on October 31st, stated that the Albanian Government would not give its consent to this unless the operation in question took place outside Albanian territorial waters. Meanwhile, at the United Kingdom Government's request, the International Central Mine Clearance Board decided, in a resolution of November 1st, 1946, that there should be a further sweep of the Channel, subject to Albania's consent.

The United Kingdom Government having informed the Albanian Government, in a communication of November 10th, that the proposed sweep would take place on November 12th the Albanian Government replied on 11th, protesting against this "unilateral decision of His Majesty's Government". It said it did not consider it inconvenient that the British fleet should undertake the sweeping of the channel of navigation, but added that, before sweeping was carried out, it considered it indispensable to decide what area of the sea should be deemed to constitute this channel, and proposed the establishment of a Mixed Commission for the purpose. It ended by saying that any sweeping undertaken without the consent of the Albanian Government outside the channel thus constituted, i.e., inside Albanian territorial waters where foreign warships have no reason to sail, could only be considered as a deliberate violation of Albanian territory and sovereignty.

After this exchange of notes, "Operation Retail" took place on November 12th and 13th. Commander Mestre, of the French Navy, was asked to attend as observer, and was present at the sweep on November 13th. The operation was carried out under the protection of an important covering force composed of an aircraft carrier, cruisers and other war vessels. This covering force remained throughout the operation at a certain distance to the west of the Channel, except for the frigate *St. Bride's Bay*, which was stationed in the Channel south-east of Cape Kiephali. The sweep began in the morning of November 13th, at about 9 o'clock, and ended in the afternoon near nightfall. The area swept was in Albanian territorial waters, and within the limits of the channel previously swept.

The United Kingdom Government does not dispute that "Operation Retail" was carried out against the clearly expressed wish of the Albanian Government. It recognizes that the operation had not the consent of the international mine clearance organizations, that it could not be justified as the exercise of a right of innocent passage, and lastly that, in principle, international law does not allow a State to assemble a large number of warships in the territorial waters of another State and to carry out minesweeping in those waters. The United Kingdom Government states that the operation was one of extreme urgency, and that it considered itself entitled to carry it out without anybody's consent.

The Court does not consider this argument convincing.

Between independent States, respect for territorial sovereignty is an essential foundation of international relations. The Court recognizes that the Albanian Government's complete failure to carry out its duties after the explosions, and the dilatory nature of its diplomatic notes, are extenuating circumstances for the action of the United Kingdom Government. But to ensure respect for international law, of which it is the organ, the Court must declare that the action of the British Navy constituted a violation of Albanian sovereignty. This declaration is in accordance with the request made by Albania through her Counsel, and is in itself appropriate satisfaction.

* * * * *

North Sea Continental Shelf Cases

ICJ Reports, 1969, p.3

(Whether Article 6 of the Geneva Convention on Continental Shelf customary rule?
Principles applicable in the delimitation of continental shelf)

1. By the two Special Agreements respectively concluded between the Kingdom of Denmark and the Federal Republic of Germany, and between the Federal Republic and the Kingdom of the Netherlands, the Parties have submitted to the Court certain differences concerning “the delimitation as between the Parties of the areas of the continental shelf in the North Sea which appertain to each of them”.

4. The waters of the North Sea are shallow, and the whole seabed consists of continental shelf at a depth of less than 200 metres, except for the formation known as the Norwegian Trough, a belt of water 200-650 metres deep, fringing the southern and south-western coasts of Norway to a width averaging about 80-100 kilometres. Much the greater part of this continental shelf has already been the subject of delimitation by a series of agreements concluded between the United Kingdom (which, as stated, lies along the whole western side of it) and certain of the States on the eastern side, namely Norway, Denmark and the Netherlands. These three delimitations were carried out by the drawing of what are known as “median lines” which, for immediate present purposes, may be described as boundaries drawn between the continental shelf areas of “opposite” States, dividing the intervening spaces equally between them.

60. The conclusions so far reached leave open, and still to be considered, the question whether on some basis other than that of an *a priori* logical necessity, i.e., through positive law processes, the equidistance principle has come to be regarded as a rule of customary international law, so that it would be obligatory for the Federal Republic in that way, even though Article 6 of the Geneva Convention is not, as such, opposable to it. For this purpose it is necessary to examine the status of the principle as it stood when the Convention was drawn up, as it resulted from the effect of the Convention, and in the light of State practice subsequent to the Convention; but it should be clearly understood that in the pronouncements the Court makes on these matters it has in view solely the delimitation provisions (Article 6) of the Convention, not other parts of it, nor the Convention as such.

(Federal Republic of Germany did not ratify the 1958 Geneva Convention on Continental Shelf and hence Article 6 was held not applicable to it. Denmark and the Netherlands’ therefore, plead on the customary status of Article 6 to make it binding on the Federal Republic).

61. The first of these questions can conveniently be considered in the form suggested on behalf of Denmark and the Netherlands themselves in the course of the oral hearing, when it was stated that they had not in fact contended that the delimitation article (Article 6) of the Convention “embodied already received rules of customary law in the sense that the Convention was merely declaratory of existing rules”. Their contention was, rather, that although prior to the Conference, continental shelf law was only in the formative stage, and State practice lacked uniformity, yet “the process of the definition and consolidation of the

emerging customary law took place through the work of the International Law Commission, the reaction of governments to that work and the proceedings of the Geneva Conference”; and this emerging customary law became “crystallized in the adoption of the Continental Shelf Convention by the Conference”.

62. ...the principle of equidistance, as it now figures in Article 6 of the Convention, was proposed by the Commission with considerable hesitation, somewhat on an experimental basis, at most *de lege ferenda*, and not at all *de lege lata* or as an emerging rule of customary international law. This is clearly not the sort of foundation on which Article 6 of the Convention could be said to have reflected or crystallized such a rule.

63. The foregoing conclusion receives significant confirmation from the fact that Article 6 is one of those in respect of which, under the reservations article of the Convention (Article 12) reservations may be made by any State on signing, ratifying or acceding-for, speaking generally, it is a characteristic of purely conventional rules and obligations that, in regard to them, some faculty of making unilateral reservations may, within certain limits, be admitted; - whereas this cannot be so in the case of general or customary law rules and obligations which, by their very nature, must have equal force for all members of the international community, and cannot therefore be the subject of any right of unilateral exclusion exercisable at will by any one of them in its own favour. Consequently, it is to be expected that when, for whatever reason, rules or obligations of this order are embodied, or are intended to be reflected in certain provisions of a convention, such provisions will figure amongst those in respect of which a right of unilateral reservation is not conferred, or is excluded. This expectation is, in principle, fulfilled by Article 12 of the Geneva Continental Shelf Convention, which permits reservations to be made to all the articles of the Convention “other than to Articles 1 to 3 inclusive”-these three Articles being the ones which, it is clear, were then regarded as reflecting, or as crystallizing, received or at least emergent rules of customary international law relative to the continental shelf, amongst them the question of the seaward extent of the shelf; the juridical character of the coastal State’s entitlement; the nature of the rights exercisable; the kind of natural resources to which these relate; and the preservation intact of the legal status as high seas of the waters over the shelf, and the legal status of the superjacent air-space.

64. The normal inference would therefore be that any articles that do not figure among those excluded from the faculty of reservation under Article 12, were not regarded as declaratory of previously existing or emergent rules of law; and this is the inference the Court in fact draws in respect of Article 6 (delimitation), having regard also to the attitude of the International Law Commission to this provision, as already described in general terms. Naturally this would not of itself prevent this provision from eventually passing into the general corpus of customary international law by one of the processes considered in paragraphs 70-81 below. But that is not here the issue. What is now under consideration is whether it originally figured in the Convention as such a rule.

65. It has however been suggested that the inference drawn at the beginning of the preceding paragraph is not necessarily warranted, seeing that there are certain other provisions of the Convention, also not excluded from the faculty of reservation, but which do

undoubtedly in principle relate to matters that lie within the field of received customary law, such as the obligation not to impede the laying or maintenance of submarine cables or pipelines on the continental shelf seabed (Article 4), and the general obligation not unjustifiably to interfere with freedom of navigation, fishing, and so on (Article 5, paragraphs 1 and 6). These matters however, all relate to or are consequential upon principles or rules of general maritime law, very considerably ante-dating the Convention, and not directly connected with but only incidental to continental shelf rights as such. They were mentioned in the Convention, not in order to declare or confirm their existence, which was not necessary, but simply to ensure that they were not prejudiced by the exercise of continental shelf rights as provided for in the Convention. Another method of drafting might have clarified the point, but this cannot alter the fact that no reservation could release the reserving party from obligations of general maritime law existing outside and independently of the Convention, and especially obligations formalized in Article 2 of the contemporaneous Convention on the High Seas, expressed by its preamble to be declaratory of established principles of international law.

66. Article 6 (delimitation) appears to the Court to be in a different position. It does directly relate to continental shelf rights as such, rather than to matters incidental to these; and since it was not, as were Articles 1 to 3, excluded from the faculty of reservation, it is a legitimate inference that it was considered to have a different and less fundamental status and not, like those Articles, to reflect pre-existing or emergent customary law. It was however contended on behalf of Denmark and the Netherlands that the right of reservation given in respect of Article 6 was not intended to be an unfettered right, and that in particular it does not extend to effecting a total exclusion of the equidistance principle of delimitation,-for, so it was claimed delimitation on the basis of that principle is implicit in Articles 1 and 2 of the Convention, in respect of which no reservations are permitted. Hence the right of reservation under Article 6 could only be exercised in a manner consistent with the preservation of at least the basic principle of equidistance. In this connection it was pointed out that, of the no more than four reservations so far entered in respect of Article 6, one at least of which was somewhat far-reaching, none has purported to effect such a total exclusion or denial.

67. The Court finds this argument unconvincing for a number of reasons. In the first place, Articles 1 and 2 of the Geneva Convention do not appear to have any direct connection with inter-State delimitation as such. Article 1 is concerned only with the outer, seaward, limit of the shelf generally, not with boundaries between the shelf areas of opposite or adjacent States. Article 2 is equally not concerned with such boundaries. The suggestion seems to be that the notion of equidistance is implicit in the reference in paragraph 2 of Article 2 to the rights of the coastal State over its continental shelf being "exclusive". So far as actual language is concerned this interpretation is clearly incorrect. The true sense of the passage is that in whatever areas of the continental shelf a coastal State has rights, those rights are exclusive rights, not exercisable by any other State. But this says nothing as to what in fact are the precise areas in respect of which each coastal State possesses these exclusive rights. This question, which can arise only as regards the fringes of a coastal State's shelf area, is exactly what falls to be settled through the process of delimitation, and this is the sphere of Article 6, not Article 2.

68. Secondly, it must be observed that no valid conclusions can be drawn from the fact that the faculty of entering reservations to Article 6 has been exercised only sparingly and only within certain limits. This is the affair exclusively of those States which have not wished to exercise the faculty, or which have been content to do so only to a limited extent. Their action or inaction cannot affect the rights of other states to enter reservations to whatever is the legitimate extent of the right.

69. In the light of these various considerations, the Court reaches the conclusion that the Geneva Convention did not embody or crystallize any pre-existing or emergent customary rule of international law, according to which the delimitation of continental shelf areas between adjacent States must, unless the Parties otherwise agree, be carried out on an equi-distance-special circumstance basis.

71. In so far as this contention is concerned (Denmark and the Netherlands contention that equi-distance rule on its own impact and subsequent State practice has attained customary status) on the view that Article 6 of the Convention has had the influence, and has produced the effect, described, it clearly involves treating that Article as a norm-creating provision which has constituted the foundation of, or has generated a rule which, while conventional or contractual in its origin, has since passed into the general corpus of international law, and is now accepted as such by the *opinio juris*, so as to have become binding even for countries which have never, and do not, become parties to the Convention. There is no doubt that this process is a perfectly possible one and does from time to time occur; it constitutes indeed one of the recognized methods by which new rules of customary international law may be formed. At the same time this result is not lightly to be regarded as having been attained.

72. It would in the first place be necessary that the provision concerned should, at all events potentially, be of a fundamentally norm creating character such as could be regarded as forming the basis of a general rule of law. Considered in *abstracto* the equidistance principle might be said to fulfil this requirement. Yet in the particular form in which it is embodied in Article 6 of the Geneva Convention, and having regard to the relationship of that Article to other provisions of the Convention, this must be open to some doubt. In the first place, Article 6 is so framed as to put second the obligation to make use of the equidistance method, causing it to come after a primary obligation to effect delimitation by agreement. Such a primary obligation constitutes an unusual preface to what is claimed to be a potential general rule of law. Without attempting to enter into, still less pronounce upon any question of, *jus cogens*, it is well understood that, in practice, rules of international law can, by agreement, be derogated from in particular cases, or as between particular parties,-but this is not normally the subject of any express provision, as it is in Article 6 of the Geneva Convention. Secondly the part played by the notion of special circumstances relative to the principle of equidistance as embodied in Article 6, and the very considerable, still unresolved controversies as to the exact meaning and scope of this notion, must raise further doubts as to the potentially norm-creating character of the rule. Finally, the faculty of making reservations to Article 6, while it might not of itself prevent the equidistance principle being eventually received as general law, does add considerably to the difficulty of regarding this result as having been brought about (or being potentially possible) on the basis of the Convention: for so long as this faculty continues to exist, and is not the subject of any revision brought about in consequence of a

request made under Article 13 of the Convention-of which there is at present no official indication-it is the Convention itself which would, for the reasons already indicated, seem to deny to the provisions of Article 6 the same norm-creating character as, for instance, Articles 1 and 2 possess.

73. With respect to the other elements usually regarded as necessary before a conventional rule can be considered to have become a general rule of international law, it might be that, even without the passage of any considerable period of time, a very widespread and representative participation in the convention might suffice of itself, provided it included that of States whose interests were specially affected. In the present case however, the Court notes that, even if allowance is made for the existence of a number of States to whom participation in the Geneva Convention is not open, or which, by reason for instance of being land-locked States, would have no interest in becoming parties to it, the number of ratifications and accessions so far secured is, though respectable, hardly sufficient. That non-ratification may sometimes be due to factors other than active disapproval of the convention concerned can hardly constitute a basis on which positive acceptance of its principles can be implied: the reasons are speculative, but the facts remain.

74. As regards the time element, the Court notes that it is over ten years since the Convention was signed, but that it is even now less than five since it came into force in June 1964, and that when the present proceedings were brought it was less than three years, while less than one had elapsed at the time when the respective negotiations between the Federal Republic and the other two Parties for a complete delimitation broke down on the question of the application of the equidistance principle. Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; - and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.

75. The Court must now consider whether State practice in the matter of continental shelf delimitation has, subsequent to the Geneva Convention, been of such a kind as to satisfy this requirement. Leaving aside cases which, for various reasons, the Court does not consider to be reliable guides as precedents, such as delimitations effected between the present Parties themselves, or not relating to international boundaries, some fifteen cases have been cited in the course of the present proceedings, occurring mostly since the signature of the 1958 Geneva Convention, in which continental shelf boundaries have been delimited according to the equidistance principle-in the majority of the cases by agreement, in a few others unilaterally-or else the delimitation was foreshadowed but has not yet been carried out. Amongst these fifteen are the four North Sea delimitations United Kingdom/Norway-Denmark-Netherlands, and Norway/Denmark already mentioned in paragraph 4 of this Judgment. But even if these various cases constituted more than a very small proportion of those potentially calling for delimitation in the world as a whole, the Court would not think it

necessary to enumerate or evaluate them separately, since there are, *a priori*, several grounds which deprive them of weight as precedents in the present context.

76. To begin with, over half the States concerned, whether acting unilaterally or conjointly, were or shortly became parties to the Geneva Convention, and were therefore presumably, so far as they were concerned, acting actually or potentially in the application of the Convention. From their action no inference could legitimately be drawn as to the existence of a rule of customary international law in favour of the equidistance principle. As regards those States, on the other hand, which were not, and have not become parties to the Convention, the basis of their action can only be problematical and must remain entirely speculative. Clearly, they were not applying the Convention. But from that no inference could justifiably be drawn that they believed themselves to be applying a mandatory rule of customary international law. There is not a shred of evidence that they did and, as has been seen, there is no lack of other reasons for using the equidistance method, so that acting, or agreeing to act in a certain way, does not of itself demonstrate anything of a juridical nature.

77. The essential point in this connection-and it seems necessary to stress it-is that even if these instances of action by non-parties to the Convention were much more numerous than they in fact are, they would not, even in the aggregate, suffice in themselves to constitute the *mphasi juris*; -for, in order to achieve this result, two conditions must be fulfilled. Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *mphasi juris sive mphasizeds*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough. There are many international acts, e.g., in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty.

78. In this respect the Court follows the view adopted by the Permanent Court of International Justice in the Lotus case, as stated in the following passage, the principle of which is, by analogy, applicable almost word for word, *mutatis mutandis*, to the present case (P.C.I.J., Series A, No. 10, 1927, at p. 28):

“Even if the rarity of the judicial decisions to be found . . . were sufficient to prove . . . the circumstance alleged . . . , it would merely show that States had often, in practice, abstained from instituting criminal proceedings, and not that they recognized themselves as being obliged to do so; for only if such abstention were based on their being conscious of having a duty to abstain would it be possible to speak of an international custom. The alleged fact does not allow one to infer that States have been conscious of having such a duty; on the other hand, . . . there are other circumstances calculated to show that the contrary is true.”

Applying this dictum to the present case, the position is simply that in certain cases-not a great number-the States concerned agreed to draw or did draw the boundaries concerned according to the principle of equidistance. There is no evidence that they so acted because

they felt legally compelled to draw them in this way by reason of a rule of customary law obliging them to do so-especially considering that they might have been motivated by other obvious factors.

79. Finally, it appears that in almost all of the cases cited, the delimitations concerned were median-line delimitations between opposite States, not lateral delimitations between adjacent States. For reasons which have already been given the Court regards the case of median-line delimitations between opposite States as different in various respects, and as being sufficiently distinct not to constitute a precedent for the delimitation of lateral boundaries. In only one situation discussed by the Parties does there appear to have been a geographical configuration which to some extent resembles the present one, in the sense that a number of States on the same coastline are grouped around a sharp curve or bend of it. No complete delimitation in this area has however yet been carried out. But the Court is not concerned to deny to this case, or any other of those cited, all evidential value in favour of the thesis of Denmark and the Netherlands. It simply considers that they are inconclusive, and insufficient to bear the weight sought to be put upon them as evidence of such a settled practice, manifested in such circumstances, as would justify the inference that delimitation according to the principle of equidistance amounts to a mandatory rule of customary international law,-more particularly where lateral delimitations are concerned.

81. The Court accordingly concludes that if the Geneva Convention was not in its origins or inception declaratory of a mandatory rule of customary international law enjoining the use of the equidistance principle for the delimitation of continental shelf areas between adjacent States, neither has its subsequent effect been constitutive of such a rule; and that State practice up-to-date has equally been insufficient for the purpose.

84. The Court has to indicate to the Parties the principles and rules of law in the light of which the methods for eventually effecting the delimitation will have to be chosen. The Court will discharge this task in such a way as to provide the Parties with the requisite directions, without substituting itself for them by means of a detailed indication of the methods to be followed and the factors to be taken into account for the purposes of a delimitation the carrying out of which the Parties have expressly reserved to themselves.

85. It emerges from the history of the development of the legal régime of the continental shelf that the essential reason why the equidistance method is not to be regarded as a rule of law is that, if it were to be compulsorily applied in all situations, this would not be consonant with certain basic legal notions which, have from the beginning reflected the *mphasi juris* in the matter of delimitation; those principles being that delimitation must be the object of agreement between the States concerned, and that such agreement must be arrived at in accordance with equitable principles. On a foundation of very general precepts of justice and good faith, actual rules of law are here involved which govern the delimitation of adjacent continent shelves-that is to say, rules upon States for all delimitations; -in short, it is not a question of applying equity simply as a matter of abstract justice, but of applying a rule of law which itself requires the application of equitable principles, in accordance with the ideas which have always underlain the development of the legal régime of the continental shelf in this field, namely:

(a) the parties are under an obligation to enter into negotiations with a view to arriving at an agreement, and not merely to go through a formal process of negotiation as a sort of prior condition for the automatic application of a certain method of delimitation in the absence of agreement; they are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it;

(6) the parties are under an obligation to act in such a way that, in the particular case, and taking all the circumstances into account, equitable principles are applied,- for this purpose the equidistance method can be used, but other methods exist and may be employed, alone or in combination, according to the areas involved;

© for the reasons given in paragraphs 43 and 44, the continental shelf of any State must be the natural prolongation of its land territory and must not encroach upon what is the natural prolongation of the territory of another State.

86. It is now necessary to examine these rules more closely, as also certain problems relative to their application. So far as the first rule is concerned, the Court would recall not only that the obligation to negotiate which the Parties assumed by Article 1, paragraph 2, of the Special Agreements arises out of the Truman Proclamation, which, for the reasons given in paragraph 47, must be considered as having propounded the rules of law in this field, but also that this obligation merely constitutes a special application of a principle which underlies all international relations, and which is moreover recognized in Article 33 of the Charter of the United Nations as one of the methods for the peaceful settlement of international disputes.

87. In the present case, it needs to be observed that whatever the details of the negotiations carried on in 1965 and 1966, they failed of their purpose because the Kingdoms of Denmark and the Netherlands, convinced that the equidistance principle alone was applicable, in consequence of a rule binding upon the Federal Republic, saw no reason to depart from that rule; and equally, given the geographical considerations stated in the last sentence of paragraph 7 above, the Federal Republic could not accept the situation resulting from the application of that rule. So far therefore the negotiations have not satisfied the conditions indicated in paragraph 85 (a), but fresh negotiations are to take place on the basis of the present Judgment.

88. The Court comes next to the rule of equity. The legal basis of that rule in the particular case of the delimitation of the continental shelf as between adjoining States has already been stated. It must however be noted that the rule rests also on a broader basis. Whatever the legal reasoning of a court of justice, its decisions must by definition be just, and therefore in that sense equitable. Nevertheless, when mention is made of a court dispensing justice or declaring the law, what is meant is that the decision finds its objective justification in considerations lying not outside but within the rules, and in this field it is precisely a rule of law that calls for the application of equitable principles. There is consequently no question in this case of any decision *ex aequo et bono*, such as would only be possible under the conditions prescribed by Article 38, paragraph 2, of the Court's Statute.

89. It must next be observed that, in certain geographical circumstances which are quite frequently met with, the equidistance method, despite its known advantages, leads unquestionably to inequity, in the following sense:

(a) The slightest irregularity in a coastline is automatically magnified by the equidistance line as regards the consequences for the delimitation of the continental shelf. Thus it has been seen in the case of concave or convex coastlines that if the equidistance method is employed, then the greater the irregularity and the further from the coastline the area to be delimited, the more unreasonable are the results produced. So great an exaggeration of the consequences of a natural geographical feature must be remedied or compensated for as far as possible, being of itself creative of inequity.

(b) In the case of the North Sea in particular, where there is no outer boundary to the continental shelf, it happens that the claims of several States converge, meet and intercross in localities where, despite their distance from the coast, the bed of the sea still unquestionably consists of continental shelf. A study of these convergences, as revealed by the maps, shows how inequitable would be the apparent simplification brought about by a delimitation which, ignoring such geographical circumstances, was based solely on the equidistance method.

90. If for the above reasons equity excludes the use of the equidistance method in the present instance, as the sole method of delimitation, the question arises whether there is any necessity to employ only one method for the purposes of a given delimitation. There is no logical basis for this, and no objection need be felt to the idea of effecting a delimitation of adjoining continental shelf areas by the concurrent use of various methods. The Court has already stated why it considers that the international law of continental shelf delimitation does not involve any imperative rule and permits resort to various principles or methods, as may be appropriate, or a combination of them, provided that, by the application of equitable principles, a reasonable result is arrived at.

91. Equity does not necessarily imply equality. There can never be any question of completely refashioning nature, and equity does not require that a State without access to the sea should be allotted an area of continental shelf, any more than there could be a question of rendering the situation of a State with an extensive coastline similar to that of a State with a restricted coastline. Equality is to be reckoned within the same plane, and it is not such natural inequalities as these that equity could remedy. But in the present case there are three States whose North Sea coastlines are in fact comparable in length and which, therefore, have been given broadly equal treatment by nature except that the configuration of one of the coastlines would, if the equidistance method is used, deny to one of these States treatment equal or comparable to that given the other two. Here indeed is a case where, in a theoretical situation of equality within the same order, an inequity is created. What is unacceptable in this instance is that a State should enjoy continental shelf rights considerably different from those of its neighbours merely because in the one case the coastline is roughly convex in form and in the other it is markedly concave, although those coastlines are comparable in length. It is therefore not a question of totally refashioning geography whatever the facts of the situation

but, given a geographical situation of quasi-equality as between a number of States, of abating the effects of an incidental special feature from which an unjustifiable difference of treatment could result.

92. It has however been maintained that no one method of delimitation can prevent such results and that all can lead to relative injustices. This argument has in effect already been dealt with. It can only strengthen the view that it is necessary to seek not one method of delimitation but one goal. It is in this spirit that the Court must examine the question of how the continental shelf can be delimited when it is in fact the case that the equidistance principle does not provide an equitable solution. As the operation of delimiting is a matter of determining areas appertaining to different jurisdictions, it is a truism to say that the determination must be equitable; rather is the problem above all one of defining the means whereby the delimitation can be carried out in such a way as to be recognized as equitable. Although the Parties have made it known that they intend to reserve for themselves the application of the principles and rules laid down by the Court, it would, even so, be insufficient simply to rely on the rule of equity without giving some degree of indication as to the possible ways in which it might be applied in the present case, it being understood that the Parties will be free to agree upon one method rather than another, or different methods if they so prefer.

93. In fact, there is no legal limit to the considerations which States may take account of for the purpose of making sure that they apply equitable procedures, and more often than not it is the balancing-up of all such considerations that will produce this result rather than reliance on one to the exclusion of all others. The problem of the relative weight to be accorded to different considerations naturally varies with the circumstances of the case.

94. In balancing the factors in question it would appear that various aspects must be taken into account. Some are related to the geological, others to the geographical aspect of the situation, others again to the idea of the unity of any deposits. These criteria, though not entirely precise, can provide adequate bases for decision adapted to the factual situation.

95. The institution of the continental shelf has arisen out of the recognition of a physical fact; and the link between this fact and the law, without which that institution would never have existed, remains an important element for the application of its legal régime. The continental shelf is, by definition, an area physically extending the territory of most coastal States into a species of platform which has attracted the attention first of geographers and hydrographers and then of jurists. The importance of the geological aspect is emphasized by the care which, at the beginning of its investigation, the International Law Commission took to acquire exact information as to its characteristics, as can be seen in particular from the definitions to be found on page 131 of Volume 1 of the *Yearbook of the International Law Commission* for 1956. The appurtenance of the shelf to the countries in front of whose coastlines it lies is therefore a fact, and it can be useful to consider the geology of that shelf in order to find out whether the direction taken by certain configurational features should influence delimitation because, in certain localities, they point-up the whole notion of the appurtenance of the continental shelf to the State whose territory it does in fact prolong.

96. The doctrine of the continental shelf is a recent instance of encroachment on maritime expanses which, during the greater part of history, appertained to no-one. The contiguous zone and the continental shelf are in this respect concepts of the same kind. In both instances the principle is applied that the land dominates the sea; it is consequently necessary to examine closely the geographical configuration of the coastlines of the countries whose continental shelves are to be delimited. This is one of the reasons why the Court does not consider that markedly pronounced configurations can be ignored; for, since the land is the legal source of the power which a State may exercise over territorial extensions to seaward, it must first be clearly established what features do in fact constitute such extensions. Above all is this the case when what is involved is no longer areas of sea, such as the contiguous zone, but stretches of submerged land; for the legal régime of the continental shelf is that of a soil and a subsoil, two words evocative of the land and not of the sea.

97. Another factor to be taken into consideration in the delimitation of areas of continental shelf as between adjacent States is the unity of any deposits. The natural resources of the subsoil of the sea in those parts which consist of continental shelf are the very object of the legal régime established subsequent to the Truman Proclamation. Yet it frequently occurs that the same deposit lies on both sides of the line dividing a continental shelf between two States, and since it is possible to exploit such a deposit from either side, a problem immediately arises on account of the risk of prejudicial or wasteful exploitation by one or other of the States concerned. To look no farther than the North Sea, the practice of States shows how this problem has been dealt with, and all that is needed is to refer to the undertakings entered into by the coastal States of that sea with a view to ensuring the most efficient exploitation or the apportionment of the products extracted. The Court does not consider that unity of deposit constitutes anything more than a factual element which it is reasonable to take into consideration in the course of the negotiations for a delimitation. The Parties are fully aware of the existence of the problem as also of the possible ways of solving it.

98. A final factor to be taken account of is the element of a reasonable degree of proportionality which a delimitation effected according to equitable principles ought to bring about between the extent of the continental shelf appertaining to the States concerned and the lengths of their respective coastlines, -these being measured according to their general direction in order to establish the necessary balance between States with straight, and those with markedly concave or convex coasts, or to reduce very irregular coastlines to their truer proportions. The choice and application of the appropriate technical methods would be a matter for the parties. One method discussed in the course of the proceedings, under the name of the principle of the coastal front, consists in drawing a straight baseline between the extreme points at either end of the Coast concerned, or in some cases a series of such lines. Where the parties wish to employ in particular the equidistance method of delimitation, the establishment of one or more baselines of this kind can play a useful part in eliminating or diminishing the distortions that might result from the use of that method.

99. In a sea with the particular configuration of the North Sea, and in view of the particular geographical situation of the Parties' coastlines upon that sea, the methods chosen by them for the purpose of fixing the delimitation of their respective areas may happen in

certain localities to lead to an overlapping of the areas appertaining to them. The Court considers that such a situation must be accepted as a given fact and resolved either by an agreed, or failing that by an equal division of the overlapping areas, or by agreements for joint exploitation, the latter solution appearing particularly appropriate when it is a question of preserving the unity of a deposit.

100. The Court has examined the problems raised by the present case in its own context, which is strictly that of delimitation. Other questions relating to the general legal régime of the continental shelf have been examined for that purpose only. This régime furnishes an example of a legal theory derived from a particular source that has secured a general following. As the Court has recalled in the first part of its Judgment, it was the Truman Proclamation of 28 September 1945 which was at the origin of the theory, whose special features reflect that origin. It would therefore not be in harmony with this history to over-systematize a pragmatic construct the developments of which have occurred within a relatively short space of time.

The principle and rules of international law applicable to the delimitation as between the Parties are as follows:

1. Delimitation is to be effected by agreement in accordance with equidistance principles, and taking into account of all the relevant circumstances, in such a way as to leave as much as possible to each Party all those parts of the continental shelf that constitute a natural prolongation of its land territory into and under the sea, without encroachment on the natural prolongation of the land territory of the other;
2. If, in the application of the preceding sub-paragraph, the delimitation leaves to the parties areas that overlap, these are to be divided between them in agreed proportions or, failing agreement, equally, unless they decided on a régime of joint jurisdiction, user, or exploitation for the zones which overlap or any part of them.

In the course of negotiations, the factors to be taken into account are to include:

1. The general configuration of the coasts of the Parties, as well as the presence of any special or unusual features;
2. So far as known or readily ascertained, the physical and geological structure and natural resources, of the continental shelf areas involved;
3. The element of a reasonable degree of proportionality, which a delimitation carried out in accordance with equitable principles ought to bring about between the extent of the continental shelf areas appertaining to the coastal state and the length of its coast measured in the general direction of the coastline, account being taken for this purpose of the effects, actual or prospective, of any other continental shelf delimitations between adjacent states in the same region.

* * * * *

Continental Shelf (Tunisia/Libyan Arab Jamahriya)

ICJ Reports 1982, p. 17

(Customary international law; principles applicable in the delimitation of continental shelf)

37. For both Parties, the starting point for a discussion of the applicable principles and rules has been the Court's Judgment of 20 February 1969 in the *North Sea Continental Shelf* cases. The Parties both take the view that, as in those cases, the delimitation in the present case has to be effected

"by agreement in accordance with equitable principles, and taking account of all the relevant circumstances, in such a way as to leave as much as possible to each Party all those parts of the continental shelf that constitute a natural prolongation of its land territory into and under the sea, without encroachment on the natural prolongation of the land territory of the other",

and that among the factors to be taken into account in the negotiations contemplated between the Parties was

"the element of a reasonable degree of proportionality . . . between the extent of the continental shelf areas appertaining to the coastal State and the length of its coast measured in the general direction of the coastline" (I.C.J. *Reports* 1969, pp. 53-54, para. 101 (C) (1) and (D) (3)).

38. The present case however illustrates how the application of the principles and rules enunciated, and the factors indicated, by the Court in 1969 may lead to widely differing results according to the way in which those principles and rules are interpreted and applied, and the relative weight given to each of those factors in determining the method of delimitation. Yet here also the Parties are, to a lesser extent, in accord: for both Parties it is the concept of the natural prolongation of the land into and under the sea which is commanding. Where they differ in this respect is first, as to the meaning of the expression "natural prolongation", that is to say by reference to what terrestrial unit (continental landmass or State territory), and by the application of what criteria, it is to be determined whether a given area is the natural prolongation of the one State or of the other. Secondly, while there is also broad agreement between the Parties that a delimitation which leaves as much as possible to each State those parts of the continental shelf that constitute its natural prolongation will necessarily be in accordance with equitable principles, they differ in particular as to the extent to which considerations other than the dictates of geography, geomorphology and geology - and specifically considerations of equity - operate to determine what is the natural prolongation of each State.

41. Both Parties consider that the "continental shelf" is an institution of international law which, while it remains linked to a physical fact, is not to be identified with the phenomenon designated by the same term - "continental shelf" - in other disciplines. It was the continental shelf as "an area physically extending the territory of most coastal States into a species of platform" which "attracted the attention first of geographers and hydrographers and then of

jurists" (I. C. J. Reports 1969, p. 51, para. 95); but the Court notes that at a very early stage in the development of the continental shelf as a concept of law, it acquired a more extensive connotation, so as eventually to embrace any sea-bed area possessing a particular relationship with the coastline of a neighbouring State, whether or not such area presented the specific characteristics which a geographer would recognize as those of what he would classify as "continental shelf". This widening of the concept for legal purposes, evident particularly in the use of the criterion of exploitability for determining the seaward extent of shelf rights, is clearly apparent in the records of the International Law Commission and other *travaux préparatoires* of the 1958 Geneva Convention on the Continental Shelf.

42. It will be recalled that the definition of the continental shelf in Article 1 of the 1958 Convention is as follows:

"For the purpose of these articles, the term 'continental shelf' is used as referring (a) to the seabed and subsoil of the submarine areas adjacent to the Coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas : (b) to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands."

While the 200-metre limit was chosen partly as corresponding approximately to the normal outer limit of the shelf in the physical sense, the definition of the outer limit of the shelf by reference to the possibility of exploitation of the sea-bed is clearly open-ended, and emphasizes the lack of identity between the legal concept of the continental shelf and the physical phenomenon known to geographers by that name. This definition, which was according to its terms expressed to be for the purpose of a convention text, was considered by the Court in its 1969 Judgment to have been one of those regarded in 1958 as "reflecting, or as crystallizing, received or at least emergent rules of customary law relative to the continental shelf" (I. C.J. Reports 1969, p. 39, para. 63). The fact that the legal concept, while it derived from the natural phenomenon, pursued its own development, is implicit in the whole discussion by the Court in that case of the legal rules and principles applicable to it.

43. It was the Court itself in its 1969 Judgment which gave currency to the expression "natural prolongation" as part of the vocabulary of the international law of the sea. It should, however, first be recalled that the geographical and other physical circumstances of that case were different from those of the present case. In particular the whole relevant area of the North Sea consisted of continental shelf at a depth of less than 200 metres. Secondly, it should be borne in mind that, as the Court itself made clear in that Judgment, it was engaged in an analysis of the concepts and principles which in its view underlay the actual practice of States which is expressive, or creative, of customary rules. The concept of natural prolongation thus was and remains a concept to be examined within the context of customary law and State practice. While the term "natural prolongation" may have been novel in 1969, the idea to which it gave expression was already a part of existing customary law as the basis of the title of the coastal State. The Court also attributed to that concept a certain role in the delimitation of shelf areas, in cases in which the geographical situation made it appropriate to do so. But while the idea of the natural prolongation of the land territory defined, in general

terms, the physical object or location of the rights of the coastal State, it would not necessarily be sufficient, or even appropriate, in itself to determine the precise extent of the rights of one State in relation to those of a neighbouring State.

44. Both Parties to the present case have in effect based their argument upon the idea that because a delimitation should, in accordance with the Judgment in the *North Sea Continental Shelf* cases, leave to each Party "all those parts of the continental shelf that constitute a natural prolongation of its land territory into and under the sea" (I. C.J. Reports 1969, p. 53, para. 101 (C) (I)), therefore the determination of what constitutes such natural prolongation will produce a correct delimitation. The Court in 1969 did not regard an equitable delimitation and a determination of the limits of "natural prolongation" as synonymous, since in the operative clause of its Judgment, just quoted, it referred only to the delimitation being effected in such a way as to leave "as much as possible" to each Party the shelf areas constituting its natural prolongation. The Court also clearly distinguished between a principle which affords the justification for the appurtenance of an area to a State and a rule for determining the extent and limits of such area: "the appurtenance of a given area, considered as an entity, in no way governs the precise delimitation of its boundaries" (*I.C.J. Reports* 1969, p. 32, para. 46). The Court is therefore unable to accept the contention of Libya that "once the natural prolongation of a State is determined, delimitation becomes a simple matter of complying with the dictates of nature". It would be a mistake to suppose that it will in all cases, or even in the majority of them, be possible or appropriate to establish that the natural prolongation of one State extends, in relation to the natural prolongation of another State, just so far and no farther, so that the two prolongations meet along an easily defined line. Nor can the Court approve the argument of Tunisia that the satisfying of equitable principles in a particular geographical situation is just as much a part of the process of the identification of the natural prolongation as the identification of the natural prolongation is necessary to satisfy equitable principles. The satisfaction of equitable principles is, in the delimitation process, of cardinal importance, as the Court will show later in this Judgment, and identification of natural prolongation may, where the geographical circumstances are appropriate, have an important role to play in defining an equitable delimitation, in view of its significance as the justification of continental shelf rights in some cases; but the two considerations - the satisfying of equitable principles and the identification of the natural prolongation - are not to be placed on a plane of equality.

45. Since the Court gave judgment in the *North Sea Continental Shelf* cases, a period has elapsed during which there has been much State practice in this field of international law, and it has been under very close review, particularly in the context of the Third United Nations Conference on the Law of the Sea. The term "natural prolongation" has now made its appearance in Article 76 of the draft Convention on the Law of the Sea. At this point, the Court must thus turn to the question whether principles and rules of international law applicable to the delimitation may be derived from, or may be affected by, the "new accepted trends" which have emerged at the Third United Nations Conference on the Law of the Sea.

47. Article 76 and Article 83 of the draft convention are the provisions of the draft convention prepared by the Conference which may be relevant as incorporating new accepted trends to be taken into account in the present case. According to Article 76, paragraph 1, "the

continental shelf of a coastal State comprises the sea-bed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance." That definition consists of two parts, employing different criteria. According to the first part of paragraph 1 the natural prolongation of the land territory is the main criterion. In the second part of the paragraph, the distance of 200 nautical miles is in certain circumstances the basis of the title of a coastal State. The legal concept of the continental shelf as based on the "species of platform" has thus been modified by this criterion. The definition in Article 76, paragraph 1, also discards the exploitability test which is an element in the definition of the Geneva Convention of 1958.

48. The principle that the natural prolongation of the coastal State is a basis of its legal title to continental shelf rights does not in the present case, as explained above, necessarily provide criteria applicable to the delimitation of the areas appertaining to adjacent States. In so far as Article 76, paragraph 1, of the draft convention repeats this principle, it introduces no new element and does not therefore call for further consideration. In so far however as the paragraph provides that in certain circumstances the distance from the baseline, measured on the surface of the sea, is the basis for the title of the coastal State, it departs from the principle that natural prolongation is the sole basis of the title. The question therefore arises whether the concept of the continental shelf as contained in the second part of the definition is relevant to the decision of the present case. It is only the legal basis of the title to continental shelf rights - the mere distance from the Coast - which can be taken into account as possibly having consequences for the claims of the Parties. Both Parties rely on the principle of natural prolongation: they have not advanced any argument based on the "trend" towards the distance principle. The definition in Article 76, paragraph 1, therefore affords no criterion for delimitation in the present case

61. The conclusion which, in the Court's view, has ineluctably to be drawn from this analysis is that, despite the confident assertions of the geologists on both sides that a given area is "an evident prolongation" or "the real prolongation" of the one or the other State, for legal purposes it is not possible to define the areas of continental shelf appertaining to Tunisia and to Libya by reference solely or mainly to geological considerations. The function of the Court is to make use of geology only so far as required for the application of international law. It is of the view that what must be taken into account in the delimitation of shelf areas are the physical circumstances as they are today; that just as it is the geographical configuration of the present-day coasts, so also it is the present-day sea-bed, which must be considered. It is the outcome, not the evolution in the long-distant past, which is of importance.

70. Since the Court considers that it is bound to decide the case on the basis of equitable principles, it must first examine what such principles entail, divorced from the concept of natural prolongation which has been found not to be applied for purposes of delimitation in this case. The result of the application of equitable principles must be equitable. This terminology, which is generally used, is not entirely satisfactory because it employs the term equitable to characterize both the result to be achieved and the means to be applied to reach

this result. It is, however, the result which is predominant; the principles are subordinate to the goal. The equitableness of a principle must be assessed in the light of its usefulness for the purpose of arriving at an equitable result. It is not every such principle which is in itself equitable; it may acquire this quality by reference to the equitableness of the solution. The principles to be indicated by the Court have to be selected according to their appropriateness for reaching an equitable result. From this consideration it follows that the term "equitable principles" cannot be interpreted in the abstract; it refers back to the principles and rules which may be appropriate in order to achieve an equitable result. This was the view of the Court when it said, in its Judgment of 1969:

"it is a truism to say that the determination must be equitable, rather is the problem above all one of defining the means whereby the delimitation can be carried out in such a way as to be recognized as equitable" (I. C.J. *Reports 1969*, p. 50, para. 92).

71. Equity as a legal concept is a direct emanation of the idea of justice. The Court whose task is by definition to administer justice is bound to apply it. In the course of the history of legal systems the term "equity" has been used to define various legal concepts. It was often contrasted with the rigid rules of positive law, the severity of which had to be mitigated in order to do justice. In general, this contrast has no parallel in the development of international law; the legal concept of equity is a general principle directly applicable as law. Moreover, when applying positive international law, a court may choose among several possible interpretations of the law the one which appears, in the light of the circumstances of the case, to be closest to the requirements of justice. Application of equitable principles is to be distinguished from a decision *ex aequo et bono*. The Court can take such a decision only on condition that the Parties agree (Art. 38, para. 2, of the Statute), and the Court is then freed from the strict application of legal rules in order to bring about an appropriate settlement. The task of the Court in the present case is quite different: it is bound to apply equitable principles as part of international law, and to balance up the various considerations which it regards as relevant in order to produce an equitable result. While it is clear that no rigid rules exist as to the exact weight to be attached to each element in the case, this is very far from being an exercise of discretion or conciliation; nor is it an operation of distributive justice.

72. The Court has thus examined the question of equitable principles, which, besides being mentioned in the Special Agreement as the first of the three factors to be taken into account, are, as the Court has emphasized, of primordial importance in the delimitation of the continental shelf; it has also dealt with the third of the factors mentioned in the Special Agreement, the "new accepted trends" in the Third Conference on the Law of the Sea. The second factor must now be considered, that of the "relevant circumstances which characterize the area"; and again, it is not merely because they are mentioned in the Special Agreement that the Court must have regard to them. It is clear that what is reasonable and equitable in any given case must depend on its particular circumstances. There can be no doubt that it is virtually impossible to achieve an equitable solution in any delimitation without taking into account the particular relevant circumstances of the area. Both Parties recognize that equitable principles dictate that "the relevant circumstances which characterize the area" be taken into account, but differ as to what they are. The Special Agreement moreover confers on the Court

the task of ascertaining what are the relevant circumstances and assessing their relative weight for the purpose of achieving an equitable result. It is evident that the first and most essential step in this respect is to determine with greater precision what is the area in dispute between the Parties and what is the area which is relevant to the delimitation.

73. It should first be recalled that exclusive rights over submarine areas belong to the coastal State. The geographic correlation between coast and submerged areas off the coast is the basis of the coastal State's legal title. As the Court explained in the *North Sea Continental Shelf* cases the continental shelf is a legal concept in which "the principle is applied that the land dominates the sea" (*I. C. J. Reports 1969*, p. 51, para. 96). In the *Aegean Sea Continental Shelf* case the Court emphasized that

"it is solely by virtue of the coastal State's sovereignty over the land that rights of exploration and exploitation in the continental shelf can attach to it, *ipso jure*, under international law. In short, continental shelf rights are legally both an emanation from and an automatic adjunct of the territorial sovereignty of the coastal State." (*I.C.J. Reports 1978*, p. 36, para. 86.)

As has been explained in connection with the concept of natural prolongation, the coast of the territory of the State is the decisive factor for title to submarine areas adjacent to it. Adjacency of the sea-bed to the territory of the coastal State has been the paramount criterion for determining the legal status of the submerged areas, as distinct from their delimitation, without regard to the various elements which have become significant for the extension of these areas in the process of the legal evolution of the rules of international law.

74. The coast of each of the Parties, therefore, constitutes the starting line from which one has to set out in order to ascertain how far the submarine areas appertaining to each of them extend in a seaward direction, as well as in relation to neighbouring States situated either in an adjacent or opposite position. The only areas which can be relevant for the determination of the claims of Libya and Tunisia to the continental shelf in front of their respective coasts are those which can be considered as lying either off the Tunisian or off the Libyan coast. These areas form together the area which is relevant to the decision of the dispute. The area in dispute, where one claim encroaches on the other, is that part of this whole area which can be considered as lying both off the Libyan coast and off the Tunisian coast.

75. Nevertheless, for the purpose of shelf delimitation between the Parties, it is not the whole of the coast of each Party which can be taken into account; the submarine extension of any part of the coast of one Party which, because of its geographic situation, cannot overlap with the extension of the coast of the other, is to be excluded from further consideration by the Court. It is clear from the map that there comes a point on the coast of each of the two Parties beyond which the coast in question no longer has a relationship with the coast of the other Party relevant for submarine delimitation. The sea-bed areas off the coast beyond that point cannot therefore constitute an area of overlap of the extensions of the territories of the two Parties, and are therefore not relevant to the delimitation. In the view of the Court, in the present context that point on the Tunisian coast is Ras Kaboudia ; on the Libyan coast it is Ras Tajoura. The Court cannot, therefore, take into consideration such parts of the sea-bed of the Pelagian Block as lie beyond those points. As for the boundaries to seaward of the area

relevant for the delimitation, these are not at present material and will be considered only in relation to the criterion of proportionality, for the purposes of which such boundaries will have to be defined. The conclusion that these areas are not legally relevant to the delimitation between the Parties does not however lead to the conclusion by way of corollary that the whole area bounded by the coasts of both countries and by such seaward boundaries is reserved in its entirety for division between Libya and Tunisia. As mentioned above, the rights of other States bordering on the Pelagian Sea which may be claimed in the northern and north-eastern parts of that area must not be prejudged by the decision in the present case.

81. The "relevant circumstances which characterize the area" are not limited to the facts of geography or geomorphology, either as a matter of interpretation of the Special Agreement or in application of the equitable principle requiring all relevant circumstances to be taken into account. Apart from the circumstance of the existence and interests of other States in the area, and the existing or potential delimitations between each of the Parties and such States, there is also the position of the land frontier, or more precisely the position of its intersection with the coastline, to be taken into account. In that connection, the Court must in the present case consider a number of alleged maritime limits resulting from the conduct of the States concerned. It has further to give due consideration to the historic rights claimed by Tunisia, and to a number of economic considerations which one or the other Party has urged as relevant.

82. The absence of maritime boundaries formally agreed upon between the Parties constitutes one of the difficulties of the present case, since the delimitation of the continental shelf should start from the outer limit of the territorial sea, in accordance with a principle of international law embodied in Article 1 of the 1958 Geneva Convention on the Continental Shelf and Article 76, paragraph 1, of the draft convention on the Law of the Sea. Since there has never been any agreement between Tunisia and Libya on delimitation of the territorial sea, contiguous zones, exclusive economic zones, or the continental shelf, the undisputed land frontier between the Parties established by a convention becomes a circumstance of considerable relevance.

107. The Court is, however, of the view that these economic considerations cannot be taken into account for the delimitation of the continental shelf areas appertaining to each Party. They are virtually extraneous factors since they are variables which unpredictable national fortune or calamity, as the case may be, might at any time cause to tilt the scale one way or the other. A country might be poor today and become rich tomorrow as a result of an event such as the discovery of a valuable economic resource. As to the presence of oil-wells in an area to be delimited, it may, depending on the facts, be an element to be taken into account in the process of weighing all relevant factors to achieve an equitable result.

133. A. The principles and rules of international law applicable for the delimitation, to be effected by agreement in implementation of the present Judgment, of the areas of continental shelf appertaining to the Republic of Tunisia and the Socialist People's Libyan Arab Jamahiriya respectively, in the area of the Pelagian Block in dispute between them as defined in paragraph B, subparagraph (l), below, are as follows:

(1) the delimitation is to be effected in accordance with equitable principles, and taking account of all relevant circumstances ;

(2) the area relevant for the delimitation constitutes a single continental shelf as the natural prolongation of the land territory of both Parties, so that in the present case, no criterion for delimitation of shelf areas can be derived from the principle of natural prolongation as such ;

(3) in the particular geographical circumstances of the present case, the physical structure of the continental shelf areas is not such as to determine an equitable line of delimitation.

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Republic of Italy v. Union of India
(2013) 4 SCC 721

ALTAMAS KABIR, CJI.

1. The past decade has witnessed a sharp increase in acts of piracy on the high seas off the Coast of Somalia and even in the vicinity of the Minicoy islands forming part of the Lakshadweep archipelago. In an effort to counter piracy and to ensure freedom of navigation of merchant shipping and for the protection of vessels flying the Italian flag in transit in International seas, the Republic of Italy enacted Government Decree 107 of 2011, converted into Law of Parliament of Italy No.130 of 2nd August, 2011, to protect Italian ships from piracy in International seas. Article 5 of the said legislation provides for deployment of Italian Military Navy Contingents on Italian vessels flying the Italian flag, to counter the growing menace of piracy on the seas. Pursuant to the said law of Parliament of Italy No.130 of 2nd August, 2011, a Protocol of Agreement was purportedly entered into on 11th October, 2011, between the Ministry of Defence – Naval Staff and Italian Shipowners’ Confederation (Confitarma), pursuant to which the Petitioner Nos.2 and 3 in the writ Petition, who are also the Petitioner Nos.1 and 2 in the Special Leave Petition, were deployed along with four others, as “Team Latorre”, on board the “M.V. Enrica Lexie” on 6th February, 2012, to protect the said vessel and to embark thereon on 11th February, 2011, from Galle in Sri Lanka. The said Military Deployment Order was sent by the Italian Navy General Staff to the concerned Military Attaches in New Delhi, India and Muscat, Oman. A change in the disembarkation plans, whereby the planned port of disembarkation was shifted from Muscat to Djibouti, was also intimated to the concerned Attaches.

2. While the aforesaid vessel, with the Military Protection Detachment on board, was heading for Djibouti on 15th February, 2012, it came across an Indian fishing vessel, St. Antony, which it allegedly mistook to be a pirate vessel, at a distance of about 20.5 nautical miles from the Indian sea coast off the State of Kerala, and on account of firing from the Italian vessel, two persons in the Indian fishing vessel were killed. After the said incident, the Italian vessel continued on its scheduled course to Djibouti. When the vessel had proceeded about 38 nautical miles on the High Seas towards Djibouti, it received a telephone message, as well as an e-mail, from the Maritime Rescue Co-ordination Centre, Mumbai, asking it to return to Cochin Port to assist with the enquiry into the incident. Responding to the message, the M.V. Enrica Lexie altered its course and came to Cochin Port on 16th February, 2012. Upon docking in Cochin, the Master of the vessel was informed that First Information Report (F.I.R.) No.2 of 2012 had been lodged with the Circle Inspector, Neendakara, Kollam, Kerala, under Section 302 read with Section 34 of the Indian Penal Code (I.P.C.) in respect of the firing incident leading to the death of the two Indian fishermen. On 19th February, 2012, Massimiliano Latorre and Salvatore Girone, the Petitioner Nos.2 and 3 in Writ Petition No.135 of 2012, were arrested by the Circle Inspector of Police, Coastal Police Station, Neendakara, Kollam, from Willington Island and have been in judicial custody ever since.

3. On 20th February, 2012, the petitioner Nos.2 and 3 were produced before the Chief Judicial Magistrate (C.J.M.), Kollam, by the Circle Inspector of Police, Coastal Police Station, Neendakara, who prayed for remand of the accused to judicial custody.

4. The petitioners thereupon filed Writ Petition No.4542 of 2012 before the Kerala High Court, under Article 226 of the Constitution, challenging the jurisdiction of the State of Kerala and the Circle Inspector of Police, Kollam District, Kerala, to register the F.I.R. and to conduct investigation on the basis thereof or to arrest the petitioner Nos.2 and 3 and to produce them before the Magistrate. The Writ Petitioners prayed for quashing of F.I.R. No.2 of 2012 on the file of the Circle Inspector of

Police, Neendakara, Kollam District, as the same was purportedly without jurisdiction, contrary to law and null and void. The Writ Petitioners also prayed for a declaration that their arrest and detention and all proceedings taken against them were without jurisdiction, contrary to law and, therefore, void. A further prayer was made for the release of the Petitioner Nos.2 and 3 from the case.

5. Between 22nd and 26th February, 2012, several relatives of the deceased sought impleadment in the Writ Petition and were impleaded as Additional Respondents Nos.4, 5 and 6.

6. During the pendency of the Writ Petition, the Presenting Officer within the Tribunal of Rome, Republic of Italy, intimated the Ministry of Defence of Italy on 24th February, 2012, that Criminal Proceedings No.9463 of 2012 had been initiated against the Petitioner Nos.2 and 3 in Italy. It was indicated that punishment for the crime of murder under Section 575 of the Italian Penal Code is imprisonment of at least 21 years.

7. After entering appearance in the writ petition, the Union of India and its Investigating Agency filed joint statements therein on 28th February, 2012, on behalf of the Union of India and the Coast Guard, with the Kerala High Court, along with the Boarding Officers Report dated 16th- 17th February, 2012, as an annexure. On 5th March, 2012, the Consul General filed a further affidavit on behalf of the Republic of Italy, annexing additional documents in support of its claim that the accused had acted in an official capacity. In the affidavit, the Consul General reasserted that Italy had exclusive jurisdiction over the writ petitioners and invoked sovereign and functional immunity.

8. The Kerala High Court heard the matter and directed the Petitioners to file their additional written submissions, which were duly filed on 2nd April, 2012, whereupon the High Court reserved its judgment. However, in the meantime, since the judgment in the Writ Petition was not forthcoming, the Petitioners filed the present Writ Petition under Article 32 of the Constitution of India on 19th April, 2012, inter alia, for the following reliefs:-

“(i) Declare that any action by all the Respondents in relation to the alleged incident referred to in Para 6 and 7 above, under the Criminal Procedure Code or any other Indian law, would be illegal and ultra vires and violative of Articles 14 and 21 of the Constitution of India; and

(ii) Declare that the continued detention of Petitioners 2 and 3 by the State of Kerala is illegal and ultra vires being violative of the principles of sovereign immunity and also violative of Art. 14 and 21 of the Constitution of India; and

(iii) Issue writ of Mandamus and/or any other suitable writ, order or direction under Article 32 directing that the Union of India take all steps as may be necessary to secure custody of Petitioners 2 and 3 and make over their custody to Petitioner No.1.”

9. During the pendency of the said Writ Petition in this Court, the Kerala State Police filed charge sheet against the Petitioner Nos.2 and 3 herein on 18th May, 2012 under Sections 302, 307, 427 read with Section 34 Indian Penal Code and Section 3 of the Suppression of Unlawful Acts against Safety of Maritime Navigation and Fixed Platforms on Continental Shelf Act, 2002, hereinafter referred to as 'the SUA Act'. On 29th May, 2012, the learned Single Judge of the Kerala High Court dismissed Writ Petition (Civil) No.4542 of 2012 on two grounds. The learned Single Judge held that under the Notification No. SO 67/E dated 27th August, 1981, the entire Indian Penal Code had been extended to the Exclusive Economic Zone and the territorial jurisdiction of the State of Kerala was not limited to 12 nautical miles only. The learned Single Judge also held that under the provisions of the SUA Act, the State of Kerala has jurisdiction upto 200 nautical miles from the Indian coast, falling within the Exclusive Economic Zone of India.

10. Aggrieved by the aforesaid judgment of the Kerala High Court, the Petitioners filed Special Leave Petition (Civil) No.20370 of 2012, challenging the order of dismissal of their Writ Petition by the Kerala High Court.

11. As will be evident from what has been narrated hereinabove, the subject matter and the reliefs prayed for in Writ Petition (Civil)No.4542 of 2012 before the Kerala High Court and S.L.P.(C) No.20370 of 2012 are the same as those sought in Writ Petition (Civil) No.135 of 2012.

12. Accordingly, the Special Leave Petition and the Writ Petition have been heard together.

13. Simply stated, the case of the Petitioners is, that the Petitioner Nos.2 and 3, had been discharging their duties as members of the Italian Armed Forces, in accordance with the principles of Public International Law and an Italian National Law requiring the presence of armed personnel on board commercial vessels to protect them from attacks of piracy. It is also the Petitioners' case that the determination of international disputes and responsibilities as well as proceedings connected therewith, must necessarily be between the Sovereign Governments of the two countries and not constituent elements of a Federal Structure. In other words, in cases of international disputes, the State units/governments within a federal structure, could not be regarded as entities entitled to maintain or participate in proceedings relating to the sovereign acts of one nation against another, nor could such status be conferred upon them by the Federal/Central Government. It is also the case of the writ petitioners that the proceedings, if any, in such cases, could only be initiated by the Union at its discretion. Consequently, the arrest and continued detention of the Petitioner

Nos.2 and 3 by the State of Kerala is unlawful and based on a misconception of the law relating to disputes between two sovereign nations.

14. Appearing for the writ petitioners, Mr. Harish N. Salve, learned Senior Advocate, contended that the acquiescence of the Union of India to the unlawful arrest and detention of the Petitioner Nos.2 and 3 by the State of Kerala was in violation of the long standing Customary International Law, Principles of International Comity and Sovereign Equality Amongst States, as contained in the United Nations General Assembly Resolution titled "Declaration on Principles of International Law

Concerning Friendly Relations and Cooperation between States in accordance with the Charter of the United Nations". Mr. Salve contended that these aforesaid principles require that any proceeding, whether diplomatic or judicial, where the conduct of a foreign nation in the exercise of its sovereign functions is questioned, has to be conducted only at the level of the Federal or Central Government and could not be the subject matter of a proceeding initiated by a Provincial/State Government.

15. Mr. Salve submitted that the incident which occurred on 15th February, 2012, was an incident between two nation States and any dispute arising therefrom would be governed by the principles of International Legal Responsibility under which the rights and obligations of the parties will be those existing between the Republic of India and the Republic of Italy. Mr. Salve submitted that no legal relationship exists between the Republic of Italy and the State of Kerala and by continued detention of the members of the Armed Forces of the Republic of Italy, acting in discharge of their official duties, the State of Kerala had acted in a manner contrary to Public International Law, as well as the provisions of the Constitution of India.

94. The next question which arises is whether the incident of firing could be said to be an incident of navigation. The context in which the expression has been used in Article 97 of the Convention seems to indicate that the same refers to an accident occurring in the course of navigation, of which collision between two vessels is the principal incident. An incident of navigation as intended in the aforesaid Article, cannot, in my view, involve a criminal act in whatever circumstances. In what circumstances the incident occurred may be set up as a defence in a criminal action that may be taken, which legal position is accepted by both the countries which have initiated criminal proceedings against the two marines. Even the provisions of Article 100 of UNCLOS may be used for the same purpose. Whether the accused acted on the misunderstanding that the Indian fishing vessel was a pirate vessel which caused the accused to fire, is a matter of evidence which can only be established during a trial. If the defence advanced on behalf of the Petitioner Nos. 2 and 3 is accepted, then only will the provisions of Article 100 of the Convention become applicable to the facts of the case.

95. The decision in the Lotus Case (supra) relied upon by the learned Additional Solicitor General would accordingly be dependent on whether the provisions of Article 97 of the Convention are attracted in the facts of this case. As already indicated hereinbefore, the expression "incident of navigation" in Article 97 cannot be extended to a criminal act,

involving the killing of two Indian fishermen on board an Indian fishing vessel, although, the same was not flying the Indian flag. If at all, Article 100 of the Convention may stand attracted if and when the defence version of apprehension of a pirate attack is accepted by the Trial Court. In the Lotus case, the question relating to the extent of the criminal

jurisdiction of a State was brought to the Permanent Court of International Justice in 1927. The said case related to a collision between the French Steamship 'Lotus' and the Turkish Steamship 'Boz-Kourt', which resulted in the sinking of the latter ship and the death of eight Turkish subjects. Once the Lotus arrived at Constantinople, the Turkish Government commenced criminal proceedings both against the Captain of the Turkish vessel and the French Officer of the Watch on board the Lotus. On both being sentenced to imprisonment, the French Government questioned the judgment on the ground that Turkey had no jurisdiction over an act committed on the open seas by a foreigner on board a foreign vessel, whose flag gave it exclusive jurisdiction in the matter. On being referred to the Permanent Court of

International Justice, it was decided that Turkey had not acted in a manner which was contrary to International Law since the act committed on board the Lotus had effect on the Boz-Kourt flying the Turkish flag. In the ninth edition of Oppenheim's International Law, which has been referred to in the judgment under consideration, the nationality of ships in the high seas has been referred to in paragraph 287, wherein it has been observed by the learned author that the legal order on the high seas is based primarily on the rule of International Law which requires every vessel sailing the high seas to possess the nationality of, and to fly the flag of, one State, whereby a vessel and persons on board the vessel are subjected to the law of the State of the flag and in general subject to its exclusive jurisdiction. In paragraph 291 of the aforesaid discourse, the learned author has defined the scope of flag jurisdiction to mean that jurisdiction in the high seas is dependent upon the Maritime Flag under which vessels sail, because, no State can extend its territorial jurisdiction to the high seas. Of course, the aforesaid principle is subject to the right of "hot pursuit", which is an exception to the exclusiveness of the flag jurisdiction over ships on the high seas in certain special cases.

96. This takes us to another dimension involving the concept of sovereignty of a nation in the realm of Public International Law. The exercise of sovereignty amounts to the exercise of all rights that a sovereign exercises over its subjects and territories, of which the exercise of penal jurisdiction under the criminal law is an important part. In an area in which a country exercises sovereignty, its laws will prevail over other laws in case of a conflict between the two. On the other hand, a State may have sovereign rights over an area, which stops short of complete sovereignty as in the instant case where in view of the provisions both of the Maritime Zones Act, 1976, and UNCLOS 1982, the Exclusive Economic Zone is extended to 200 nautical miles from the baseline for measurement of Territorial Waters. Although, the provisions of Section 188A I.P.C. have been extended to the Exclusive Economic Zone, the same are extended to areas declared as "designated areas" under the Act which are confined to installations and artificial islands, created for the purpose of exploring and exploiting the natural resources in and under the sea to the extent

of 200 nautical miles, which also includes the area comprising the Continental Shelf of a country. However, the Exclusive Economic Zone continues to be

part of the High Seas over which sovereignty cannot be exercised by any nation.

97. In my view, since India is a signatory, she is obligated to respect the provisions of UNCLOS 1982, and to apply the same if there is no conflict with the domestic law. In this context, both the countries may have to subject themselves to the provisions of Article 94 of the Convention which deals with the duties of the Flag State and, in particular, sub-Article (7) which provides that each State shall cause an inquiry to be held into every marine casualty or incident of navigation on the high seas involving a ship flying its flag and causing loss of life or serious injury to nationals of another State. It is also stipulated that the Flag State and the other State shall cooperate in the conduct of any inquiry held by that other State into any such marine casualty or incident of navigation.

98. The principles enunciated in the Lotus case (*supra*) have, to some extent, been watered down by Article 97 of UNCLOS 1982. Moreover, as observed in *Starke's International Law*, referred to by Mr. Salve, the territorial criminal jurisdiction is founded on various principles which provide that, as a matter of convenience, crimes should be dealt with by the States whose social order is most closely affected. However, it has also been observed that some public ships and armed forces of foreign States may enjoy a degree of immunity from the territorial jurisdiction of a nation.

99. This brings me to the question of applicability of the provisions of the Indian Penal Code to the case in hand, in view of Sections 2 and 4 thereof. Of course, the applicability of Section 4 is no longer in question in this case on account of the concession made on behalf of the State of Kerala in the writ proceedings before the Kerala High Court. However, Section 2 of the Indian Penal Code as extracted hereinbefore provides otherwise. Undoubtedly, the incident took place within the Contiguous Zone over which, both under the provisions of the Maritime Zones Act, 1976, and UNCLOS 1982, India is entitled to exercise rights of sovereignty. However, as decided by this Court in the *Aban Loyd Chiles Offshore Ltd. Case* (*supra*), referred to by Mr. Salve, Sub-section (4) of Section 7 only provides for the Union of India to have sovereign rights limited to exploration, exploitation, conservation and management of the natural resources, both living and non-living, as well as for producing energy from tides, winds and currents, which cannot be equated with rights of sovereignty over the said areas, in the Exclusive Economic Zone. It also provides for the Union of India to exercise other ancillary rights which only clothes the Union of India with sovereign rights and not rights of sovereignty in the Exclusive Economic Zone. The said position is reinforced under Sections 6 and 7 of the Maritime Zones Act, 1976, which also provides that India's sovereignty extends over its Territorial Waters while, the position is different in respect of the Exclusive Economic Zone. I am unable to accept Mr. Banerji's submissions to the contrary to the effect that Article 59 of the Convention permits States to assert rights or jurisdiction beyond those specifically provided in the Convention.

100. What, therefore, transpires from the aforesaid discussion is that while India is entitled both under its Domestic Law and the Public International Law to exercise rights of sovereignty upto 24 nautical miles from the baseline on the basis of which the width of Territorial Waters is measured, it can exercise only sovereign rights within the Exclusive Economic Zone for certain purposes. The incident of firing from the Italian vessel on the Indian shipping vessel having occurred within the Contiguous Zone, the Union of India is entitled to prosecute the two Italian marines under the criminal justice system prevalent in the country. However, the same is subject to the provisions of Article 100 of UNCLOS 1982. I agree with Mr. Salve that the "Declaration on Principles of International Law Concerning Family Relations and Cooperation between States in accordance with the Charter of the United Nations" has to be conducted only at the level of the Federal or Central Government and cannot be the subject matter of a proceeding initiated by a Provincial/State Government.

101. While, therefore, holding that the State of Kerala has no jurisdiction to investigate into the incident, I am also of the view that till such time as it is proved that the provisions of Article 100 of the

UNCLOS 1982 apply to the facts of this case, it is the Union of India which has jurisdiction to proceed with the investigation and trial of the Petitioner Nos.2 and 3 in the Writ Petition. The Union of India is, therefore, directed, in consultation with the Chief Justice of India, to set up a Special Court to try this case and to dispose of the same in accordance with the provisions of the Maritime Zones Act, 1976, the Indian Penal Code, the Code of Criminal Procedure and most importantly, the provisions of UNCLOS 1982, where there is no conflict between the domestic law and UNCLOS 1982. The pending proceedings before the Chief Judicial Magistrate, Kollam, shall stand transferred to the Special Court to be constituted in terms of this judgment and it is expected that the same shall be disposed of expeditiously. This will not prevent the Petitioners herein in the two matters from invoking the provisions of Article 100 of UNCLOS 1982, upon adducing evidence in support thereof, whereupon the question of jurisdiction of the Union of India to investigate into the incident and for the Courts in India to try the accused may be reconsidered. If it is found that both the Republic of Italy and the Republic of India have concurrent jurisdiction over the matter, then these directions will continue to hold good.

102. It is made clear that the observations made in this judgment relate only to the question of jurisdiction prior to the adducing of evidence and once the evidence has been recorded, it will be open to the Petitioners to re-agitate the question of jurisdiction before the Trial Court which will be at liberty to reconsider the matter in the light of the evidence which may be adduced by the parties and in accordance with law. It is also made clear that nothing in this judgment should come in the way of such reconsideration, if such an application is made.

Chelameswar, J.

1. I agree with the conclusions recorded in the Judgment of the Hon'ble Chief Justice. But, I wish to supplement the following.

2. The substance of the submission made by Shri Harish Salve, learned senior counsel for the petitioners is;

(1) The incident in question occurred beyond the territory of India to which location the sovereignty of the country does not extend; and Parliament cannot extend the application of the laws made by it beyond the territory of India. Consequentially, the two marines are not amenable to the jurisdiction of India;

Alternatively it is argued; (2) that the incident, which resulted in the death of two Indians is an "incident of navigation" within the meaning of Article 97[1] of the United Nations Convention on the Law of the Sea (hereinafter referred to as UNCLOS) and therefore, no penal proceedings may be instituted against the two marines except before the Judicial authorities of the 'Flag State' or the State of which the marines are nationals.

3. The authority of the Sovereign to make laws and enforce them against its subjects is undoubted in constitutional theory. Though written Constitutions prescribe limitations, either express or implied on such authority, under our Constitution, such limitations are with respect to territory [Article 245(1)] or subject matter [Article 246] or time span of the operation of the laws [Articles 249 & 250] or the inviolable rights of the subjects [fundamental rights] etc. For the purpose of the present case, we are concerned only with the limitation based on territory.

4. That leads me to the question as to what is the territory of the Sovereign Democratic Republic of India ?

5. The territory of India is defined under Article 1;

"Name and territory of the Union.-

1) India, that is Bharat, shall be a Union of States.

2) The States and the territories thereof shall be as specified in the First

Schedule.

3) The territory of India shall comprise--

(a) The territories of the States;

(b) The Union territories specified in the First Schedule; and

(c) such other territories as may be acquired."

But that deals only with geographical territory. Article 297 deals with 'maritime territory'[2].

6. Article 297(3) authorises the Parliament to specify from time to time the limits of various maritime zones such as, territorial waters, continental shelf, etc. Clauses (1) and (2) of the said article make a declaration that all lands, minerals and other things of value and all other resources shall vest in the Union of India.

"Article 297: Things of value within territorial waters or continental shelf and resources of the exclusive economic zone to vest in the Union.-

1) All lands, minerals and other things of value underlying the ocean within the territorial waters, or the continental shelf, or the exclusive economic zone, of India shall vest in the Union and be held for the purposes of the Union.

2) All other resources of the exclusive economic zone of India shall also vest in the Union and be held for the purposes of the Union.

3) The limits of the territorial waters, the continental shelf, the exclusive economic zone, and other maritime zones, of India shall be such as may be specified, from time to time, by or under any law made by Parliament.

7. Two things follow from the above declaration under Article 297. Firstly, India asserts its authority not only on the land mass of the territory of India specified under Article 1, but also over the areas specified under Article 297. It authorises the Parliament to specify the limits of such areas (maritime zones). The nature of the said authority may not be the same for the various maritime zones indicated in Article 297. However, the preponderance of judicial authority appears to be that the sovereignty of the coastal state extends to the territorial waters[3].

8. The sovereignty of a Nation / State over the landmass comprised within the territorial boundaries of the State, is an established principle of both constitutional theory and International Law. The authority of the Sovereign to make and enforce laws within the territory over which the sovereignty extends is unquestionable in constitutional theory. That the sovereignty of a 'coastal State' extends to its territorial waters, is also a well accepted principle of International Law[4] though there is no uniformly shared legal norm establishing the limit of the territorial waters - "maritime territory". Whether the maritime territory is also a part of the national territory of the State is a question on which difference of opinion exists. Insofar as this Court is concerned, a Constitution Bench in *B.K.Wadeyar v. M/s. Daulatram Rameshwarlal* (AIR 1961 SC 311) held at para 8 as follows:

"..... These territorial limits would include the territorial waters of India....."

9. Insofar the Republic of India is concerned, the limit of the territorial waters was initially understood to be three nautical miles. It had been extended subsequently, up to six nautical miles by a Presidential proclamation dated 22.3.52 and to twelve nautical miles by another proclamation dated 30.9.67. By Act 80 of 1976 of the Parliament, it was statutorily fixed at 12 nautical miles. The Act also authorizes the Parliament to alter such limit of the territorial waters.

10. The Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act, 80 of 1976 (hereinafter referred to as 'the Maritime Zones Act'), was made by the Parliament in exercise of the authority conferred under Article 297. Except Sections 5 and 7, rest of the Sections of the Act, came into force on 26-08-1976. Sections 5 and 7 came into force, subsequently, on 15-01-1977, by virtue of a notification

contemplated under Section 1(2). Section 3(1) declares that the sovereignty of India extends, and has always extended, to the territorial waters of India:

"The sovereignty of India extends and has always extended to the territorial waters of India (hereinafter referred to as the territorial waters) and to the seabed and subsoil underlying, and the air space over, such waters."

Under sub-section (2), the limit of the territorial waters is specified to be twelve nautical miles from the nearest point of the appropriate baseline:

"The limit of the territorial waters is the line every point of which is at a distance of twelve nautical miles from the nearest point of the appropriate baseline."

Sub-section (3) authorises the Government of India to alter the limit of the territorial waters by a notification approved by both the Houses of Parliament, with due regard to the International Law and State practice:

"Notwithstanding anything contained in sub-section (2), the Central Government may, whenever it considers necessary so to do having regard to International Law and State practice, alter, by notification in the Official Gazette, the limit of the territorial waters."

11. Section 5 defines contiguous zone to be an area beyond and adjacent to the territorial waters extending up to twenty-four nautical miles from the nearest point of the appropriate baseline:

"Section 5(1): The contiguous zone of India (hereinafter referred to as the contiguous zone) is an area beyond and adjacent to the territorial waters and the limit of the contiguous zone is the line every point of which is at a distance of twenty-four nautical miles from the nearest point of the baseline referred to in sub-section (2) of section 3."

This limit also can be altered by the Government of India, in the same manner as the limit of the territorial waters. Section 6 describes the continental shelf, whereas Section 7 defines the exclusive economic zone. While the Parliament authorizes the Government of India^[5] under Sections 3(3), 5(2) and 7(2) respectively to alter the limits of territorial waters, contiguous zone and exclusive economic zone with the approval of both the Houses of the Parliament, the law does not authorise the alteration of the limit of the continental shelf.

12. While Section 3 declares that "the sovereignty of India extends, and has always extended, to the territorial waters", no such declaration is to be found in the context of contiguous zone. On the other hand, with reference to continental shelf, it is declared under Section 6(2) that "India has, and always had, full and exclusive sovereign rights in respect of its continental shelf". With reference to exclusive economic zone, Section 7(4)(a) declares that "in the exclusive economic zone, the Union has sovereign rights for the purpose of exploration, exploitation, conservation and management of the natural resources, both living and non-living as well as for producing energy from tides, winds and currents."

13. Whatever may be the implications flowing from the language of the Maritime Zones Act and the meaning of the expression "sovereign rights" employed in Sections 6(2), 6(3)(a)[6] and 7(4)(a), (Whether or not the sovereignty of India extends beyond its territorial waters and to the contiguous zone or not)[7], in view of the scheme of the Act, as apparent from Section 5(5)(a)[8] and Section 7(7)(a)[9], the application of "any enactment for the time being in force in India" (like the Indian Penal Code and the Code of Criminal Procedure), is not automatic either to the contiguous zone or exclusive economic zone. It requires a notification in the official gazette of India to extend the application of such enactments to such maritime zone. The Maritime Zones Act further declares that once such a notification is issued, the enactment whose application is so extended "shall have effect as if" the contiguous zone or exclusive economic zone, as the case may be, "is part of the territory of India".

Creation of such a legal fiction is certainly within the authority of the Sovereign Legislative Body.

14. In exercise of the power conferred by Section 7(7) of the Maritime Zones Act, the Government of India extended the application of both the Indian Penal Code and the Code of Criminal Procedure to the exclusive economic zone by a notification dated 27-08-1981. By the said notification, the Code of Criminal Procedure also stood modified. A new provision - Section 188A - came to be inserted in the Code of Criminal Procedure, which reads as follows:

"188A. Offence committed in exclusive economic zone: When an offence is committed by any person in the exclusive economic zone described in sub-section(1) of Section 7 of the Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act, 1976 (80 of 1976) or as altered by notification, if any, issued under sub-section (2) thereof, such person may be dealt with in respect of such offence as if it had been committed in any place in which he may be found or in such other place as the Central Government may direct under Section 13 of the Said Act."

15. Under the Constitution, the legislative authority is distributed between the Parliament and the State Legislatures. While the State legislature's authority to make laws is limited to the territory of the State, Parliament's authority has no such limitation.

16. Though Article 245[10] speaks of the authority of the Parliament to make laws for the territory of India, Article 245(2) expressly declares -

"No law made by Parliament shall be deemed to be invalid on the ground that it would have extra territorial operation". In my view the declaration is a fetter on the jurisdiction of the Municipal Courts including Constitutional Courts to either declare a law to be unconstitutional or decline to give effect to such a law on the ground of extra territoriality. The first submission of Shri Salve must, therefore, fail.

17. Even otherwise, territorial sovereignty and the ability of the sovereign to make, apply and enforce its laws to persons (even if not citizens), who are not corporeally present within the sovereign's territory, are not necessarily co-extensive.

18. No doubt that with respect to Criminal Law, it is the principle of 19th century English jurisprudence that;

"all crime is local. The jurisdiction over the crime belongs to the country where the crime is committed" [11].

But that principle is not accepted as an absolute principle any more. The increased complexity of modern life emanating from the advanced technology and travel facilities and the large cross border commerce made it possible to commit crimes whose effects are felt in territories beyond the residential borders of the offenders. Therefore, States claim jurisdiction over; (1) offenders who are not physically present within; and (2) offences committed beyond-the-territory of the State whose "legitimate interests" are affected. This is done on the basis of various principles known to international law, such as, "the objective territorial claim, the nationality claim, the passive personality claim, the security claim, the universality claim and the like"[12].

19. The protection of Articles 14 and 21 of the Constitution is available even to an alien when sought to be subjected to the legal process of this country. This court on more than one occasion held so on the ground that the rights emanating from those two Articles are not confined only to or dependent upon the citizenship of this country[13]. As a necessary concomitant, this country ought to have the authority to apply and enforce the laws of this country against the persons and things beyond its territory when its legitimate interests are affected. In assertion of such a principle, various laws of this country are made applicable beyond its territory.

20. Section 2 read with 4 of the Indian Penal Code[14] makes the provisions of the Code applicable to the offences committed "in any place without and beyond" the territory of India; (1) by a citizen of India or (2) on any ship or aircraft registered in India, irrespective of its location, by any person not necessarily a citizen[15]. Such a declaration was made as long back as in 1898. By an amendment in 2009 to the said Section, the Code is extended to any person in any place "without and beyond the territory of India", committing an offence targeting a computer resource located in India.

21. Similarly, Parliament enacted the Suppression of Unlawful Acts Against Safety of Maritime Navigation And Fixed Platforms on Continental Shelf Act, 2002 (Act No.69 of 2002), under Section 1(2), it is declared as follows:

"It extends to the whole of India including the limit of the territorial waters, the continental shelf, the exclusive economic zone or any other maritime zone of India within the meaning of section 2 of the Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act,

1976 (80 of 1976)."

(emphasis supplied)

Thereby expressly extending the application of the said Act beyond the limits of the territorial waters of India.

22. Section 3 of the said Act, insofar it is relevant for our purpose is as follows:

"(1) Whoever unlawfully and intentionally-

(a) commits an act of violence against a person on board a fixed platform or a ship which is likely to endanger the safety of the fixed platform or, as the case may be, safe navigation of the ship shall be punished with imprisonment for a term which may extend to ten years and shall also be liable to fine;"

(emphasis supplied)

23. The expression "ship" for the purpose of the said Act is defined under Section 2(h):

"(h) "ship" means a vessel of any type whatsoever not permanently attached to the seabed and includes dynamically supported craft submersibles, or any other floating craft."

24. Parliament asserted its authority to apply the penal provisions against persons, who "hijack" (described under Section 3[16] of the Anti-Hijacking Act, 1982) an aircraft. The Act does not take into account the nationality of the hijacker. The Act expressly recognises the possibility of the commission of the act of hijacking outside India and provides under Section 6 that the person committing such offence may be dealt with in respect thereof as if such offence had been committed in any place within India at which he may be found. Similarly, Section 3 of the Geneva Conventions Act, 1960, provides that "any person commits or attempts to commit, or abets or procures the commission by any other person of a grave breach of any of the Conventions", either "within or without India", shall be punished.

25. Thus, it is amply clear that Parliament always asserted its authority to make laws, which are applicable to persons, who are not corporeally present within the territory of India (whether or not they are citizens) when such persons commit acts which affect the legitimate interests of this country.

26. In furtherance of such assertion and in order to facilitate the prosecution of the offenders contemplated under Section 4(1) & (2) of the Indian Penal Code, Section 188 of the Code of Criminal Procedure[17] prescribes the jurisdiction to deal with such offences. Each one of the above referred enactments also contains a provision parallel to Section 188.

27. Such assertion is not peculiar to India, but is also made by various other countries. For example, the issue arose in a case reported in *R v. Baster* [1971] 2 All ER 359 (C.A.). The accused posted letters in Northern Ireland to football pool promoters in England falsely claiming that he had correctly forecast the results of football matches and

was entitled to winnings. He was charged with attempting to obtain property by deception contrary to Section 15 of the Theft Act 1968. The accused contended that when the letters were posted in Northern Ireland the attempt was complete and as he had never left Northern Ireland during the relevant period, the attempt had not been committed within the jurisdiction of the English Courts. It was held:

"The attempt was committed within the jurisdiction because an offence could be said to be committing an attempt at every moment of the period between the commission of the proximate act necessary to constitute the attempt and the moment when the attempt failed; accordingly the accused was attempting to commit the offence of obtaining by deception when the letter reached its destination within England and thus the offence was committed within the jurisdiction of the English courts; alternatively it could be said that the accused made arrangements for the transport and delivery of the letter, essential parts of the attempt, within the jurisdiction; the presence of the accused within the jurisdiction was not an essential element of offences committed in England."

(emphasis supplied)

28. The United States of America made such assertions:

"..... the provision extending the special maritime and territorial jurisdiction of the US to include any place outside the jurisdiction of any nation with respect to an offence by or against a national of the United States. In 1986, following the Achille Lauro incident, the US adopted the Omnibus Diplomatic Security and Anti-Terrorism Act, inserting into the criminal code a new section which provided for US jurisdiction over homicide and physical violence outside the US where a national of the US is the victim."

(International Law by Malcolm N. Shaw page 665 [sixth Edition])

29. Therefore, I am of the opinion that the Parliament, undoubtedly, has the power to make and apply the law to persons, who are not citizens of India, committing acts, which constitute offences prescribed by the law of this country, irrespective of the fact whether such acts are committed within the territory of India or irrespective of the fact that the offender is corporeally present or not within the Indian territory at the time of the commission of the offence. At any rate, it is not open for any Municipal Court including this Court to decline to apply the law on the ground that the law is extra-territorial in operation when the language of the enactment clearly extends the application of the law.

30. Before parting with the topic, one submission of Shri Salve is required to be dealt with: Shri Salve relied heavily upon the decision reported in *Aban Loyd Chilies Offshore Ltd. v. Union of India and ors.* [(2008) 11 SCC 439], for the purpose of establishing that the sovereignty of this country does not extend beyond the territorial waters of India and therefore, the extension of the Indian Penal Code beyond the territorial waters of India is impermissible.

31. No doubt, this Court did make certain observations to the effect that under the Maritime Zones Act;

"....., India has been given only certain limited sovereign rights and such limited sovereign rights conferred on India in respect of continental shelf and exclusive economic zone cannot be equated to extending the sovereignty of India over the continental shelf and exclusive economic zone as in the case of territorial waters....."

32. With great respect to the learned Judges, I am of the opinion that sovereignty is not "given", but it is only asserted. No doubt, under the Maritime Zones Act, the Parliament expressly asserted sovereignty of this country over the territorial waters but, simultaneously, asserted its authority to determine / alter the limit of the territorial waters.

33. At any rate, the issue is not whether India can and, in fact, has asserted its sovereignty over areas beyond the territorial waters. The issue in the instant case is the authority of the Parliament to extend the laws beyond its territorial waters and the jurisdiction of this Court to examine the legality of such exercise. Even on the facts of *Aban Loyd* case, it can be noticed that the operation of the Customs Act was extended beyond the territorial waters of India and this Court found it clearly permissible although on the authority conferred by the Maritime Zones Act. The implications of Article 245(2) did not fall for consideration of this Court in that Judgment.

34. Coming to the second issue; whether the incident in issue is an "incident of navigation" in order to exclude the jurisdiction of India on the ground that with respect to an "incident of navigation", penal proceedings could be instituted only before the Judicial Authorities of the "Flag State" or of the State of which the accused is a national.

35. The expression "incident of navigation" occurring under Article 97 of the UNCLOS is not a defined expression. Therefore, necessarily the meaning of the expression must be ascertained from the context and scheme of the relevant provisions of the UNCLOS. Article 97 occurs in Part-VII of the UNCLOS, which deals with "HIGH SEAS". Article 86 stipulates the application of Part-VII. It reads as follows:

"The provisions of this Part apply to all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State. This article does not entail any abridgement of the freedoms enjoyed by all States in the exclusive economic zone in accordance with article 58."

Further, Article 89 makes an express declaration that:

"No State may validly purport to subject any part of the high seas to its sovereignty."

36. From the language of Article 86 it is made very clear that Part-VII applies only to that part of the sea which is not included in the exclusive economic zone, territorial waters, etc. Exclusive economic zone is defined under Article 55 as follows:

"Article 55: Specific legal regime of the exclusive economic zone: The exclusive economic zone is an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in this Part, under which the rights and jurisdiction of the

coastal State and the rights and freedoms of other States are governed by the relevant provisions of this Convention."

That being the case, I am of the opinion that irrespective of the meaning of the expression "incident of navigation", Article 97 has no application to the exclusive economic zone. Even under UNCLOS, Article 57 stipulates that "the exclusive economic zone shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured". It follows from a combined reading of Articles 55 and 57 that within the limit of 200 nautical miles, measured as indicated under Article 57, the authority of each coastal State to prescribe the limits of exclusive economic zone is internationally recognised. The declaration under Section 7(1) of the Maritime Zones Act, which stipulates the limit of the exclusive economic zone, is perfectly in tune with the terms of UNCLOS.

Therefore, Article 97 of UNCLOS has no application to the exclusive economic zone, of which the contiguous zone is a part and that is the area relevant, in the context of the incident in question. For that reason, the second submission of Shri Salve should also fail.

Maritime Delimitation in the Indian Ocean**(SOMALIA v. KENYA)**

I.C.J. Rep., 2021

(Methods of Maritime Delimitation between Adjacent States)

In the claims presented by Somalia ICJ is asked to determine, on the basis of international law, the complete course of the single maritime boundary dividing all the maritime areas appertaining to Somalia and to Kenya in the Indian Ocean, including in the continental shelf beyond 200 [nautical miles].

Procedural backdrop (paras. 1-28)

The Court begins by recalling that, on 28 August 2014, the Federal Republic of Somalia (hereinafter “Somalia”) filed in the Registry of the Court an Application instituting proceedings against the Republic of Kenya (hereinafter “Kenya”) concerning a dispute in relation to “the establishment of the single maritime boundary between Somalia and Kenya in the Indian Ocean delimiting the territorial sea, exclusive economic zone . . . and continental shelf, including the continental shelf beyond 200 nautical miles”. In its Application, Somalia sought to found the jurisdiction of the Court on the declarations made, pursuant to Article 36, paragraph 2, of the Statute of the Court, by Somalia on 11 April 1963 and by Kenya on 19 April 1965. On 7 October 2015, Kenya raised preliminary objections to the jurisdiction of the Court and to the admissibility of the Application. By its Judgment of 2 February 2017 (hereinafter the “2017 Judgment”), the Court rejected the preliminary objections raised by Kenya, and found that it had jurisdiction to entertain the Application filed by Somalia and that the Application was admissible. Following the filing of the Parties’ written pleadings, public hearings on the merits were held from 15 to 18 March 2021. Kenya did not participate in those hearings.

I. GEOGRAPHICAL AND HISTORICAL BACKGROUND (PARAS. 31-34)

The Court first recalls the Parties’ geographical situation, before noting the following facts. On 15 July 1924, Italy and the United Kingdom concluded a treaty regulating certain questions concerning the boundaries of their respective territories in East Africa, including what Somalia describes as “the Italian colony of Jubaland”, located in present-day Somalia, and the British colony of Kenya. By an Exchange of Notes dated 16 and 26 June 1925, the boundary between the Italian and British colonial territories was redefined in its southernmost section. Between 1925 and 1927, a joint British-Italian commission surveyed and demarcated the boundary. Following the completion of this exercise, the commission recorded its decisions in an Agreement signed on 17 December 1927 (hereinafter the “1927 Agreement”), which was subsequently formally confirmed by an Exchange of Notes of 22 November 1933 between the British and Italian Governments (the 1927 Agreement and this Exchange of Notes hereinafter collectively being referred to as the “1927/1933 treaty arrangement”).

Somalia and Kenya gained their independence in 1960 and 1963, respectively. Both Parties signed the United Nations Convention on the Law of the Sea (hereinafter “UNCLOS” or the “Convention”) on 10 December 1982. They ratified it on 2 March 1989 and 24 July 1989, respectively, and the Convention entered into force for them on 16 November 1994.

Both Somalia and Kenya have filed submissions with the Commission on the Limits of the Continental Shelf (hereinafter the “CLCS” or the “Commission”) in order to obtain its recommendations on the establishment of the outer limits of their continental shelves beyond 200 nautical miles, in accordance with Article 76, paragraph 8, of UNCLOS. While they previously objected to the consideration by the Commission of each other’s submissions, these objections were subsequently withdrawn. As of the date of the Judgment, the Commission has yet to issue its recommendations in respect of the Parties’ submissions.

II. OVERVIEW OF THE POSITIONS OF THE PARTIES (PARA. 35)

The Court notes that the Parties have adopted fundamentally different approaches to the delimitation of the maritime areas. Somalia argues that no maritime boundary exists between the two States and asks the Court to plot a boundary line using the equidistance/special circumstances method (for the delimitation of the territorial sea) and the equidistance/relevant circumstances method (for the maritime areas beyond the territorial sea). In its view, an unadjusted equidistance line throughout all maritime areas achieves the equitable result required by international law. Kenya, for its part, contends that there is already an agreed maritime boundary between the Parties, because Somalia has acquiesced to a boundary that follows the parallel of latitude at 1° 39' 43.2" S (hereinafter “the parallel of latitude”). Kenya further contends that the Parties have considered this to be an equitable delimitation, in light of both the geographical context and regional practice. Kenya submits that, even if the Court were to conclude that there is no maritime boundary in place, it should delimit the maritime areas following the parallel of latitude, and that, even if the Court were to employ the delimitation methodology suggested by Somalia, the outcome, following adjustment to reach an equitable result, would be a delimitation that follows the parallel of latitude.

III. WHETHER SOMALIA HAS ACQUIESCED TO A MARITIME BOUNDARY FOLLOWING THE PARALLEL OF LATITUDE (PARAS. 36-89)

The Court first ascertains whether there is an agreed maritime boundary between the Parties on the basis of acquiescence by Somalia.

It recalls that both Kenya and Somalia are parties to UNCLOS. For the delimitation of the territorial sea, Article 15 of the Convention provides for the use of a median line “failing agreement between [the two States] to the contrary”, unless “it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a [different] way”. The delimitation of the exclusive economic zone and the continental shelf is governed by Article 74, paragraph 1, and Article 83, paragraph 1, of the Convention,

respectively. They establish that delimitation “shall be effected by agreement on the basis of international law”.

The Court reiterates that maritime delimitation between States with opposite or adjacent coasts must be effected by means of an agreement between them, and that, where such an agreement has not been achieved, delimitation should be effected by recourse to a third party possessing the necessary competence. Maritime delimitation cannot be effected unilaterally by either of the States concerned.

An agreement establishing a maritime boundary is usually expressed in written form. The Court considers, however, that the “agreement” referred to in Article 15, Article 74, paragraph 1, and Article 83, paragraph 1, of the Convention may take other forms as well. The essential question is whether there is a shared understanding between the States concerned regarding their maritime boundaries.

The jurisprudence relating to acquiescence and tacit agreement may be of assistance when examining whether there exists an agreement that is not in written form regarding the maritime boundary between two States. In this regard, the Court recalls that acquiescence is equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as consent. If the circumstances are such that the conduct of the other State calls for a response, within a reasonable period, the absence of a reaction may amount to acquiescence. This is based on the principle *qui tacet consentire videtur si loqui debuisset ac potuisset*. In determining whether a State’s conduct calls for a response from another State, it is important to consider whether the State has consistently maintained that conduct. In evaluating the absence of a reaction, duration may be a significant factor.

The Court observes that it has set a high threshold for proof that a maritime boundary has been established by acquiescence or tacit agreement. It has thus emphasized that since the establishment of a permanent maritime boundary is a matter of grave importance, evidence of a tacit legal agreement must be compelling. Acquiescence presupposes clear and consistent acceptance of another State’s position. To date, the Court has recognized the existence of a tacit agreement delimiting a maritime boundary in only one case, in which the parties had acknowledged in a binding international agreement that a maritime boundary already existed. In the present case, the Court uses the criteria it has identified in earlier cases and examines whether there is compelling evidence that Kenya’s claim to a maritime boundary at the parallel of latitude was maintained consistently and, consequently, called for a response from Somalia. It then considers whether there is compelling evidence that Somalia clearly and consistently accepted the boundary claimed by Kenya.

In this respect, the Court notes that Somalia and Kenya present arguments regarding the Proclamations by the President of the Republic of Kenya dated 28 February 1979 and 9 June 2005 (hereinafter the “1979 Proclamation” and the “2005 Proclamation”), Kenya’s 2009 Submission to the CLCS and their respective domestic laws. They also refer to other conduct of the Parties in the period between 1979 and 2014. The Court examines these arguments in

turn.

The Court observes that the 1979 and 2005 Proclamations both claim a boundary at the parallel of latitude, but Kenya's legislation refers to a boundary along a median or equidistance line. Moreover, in Notes Verbales of 26 September 2007 and 4 July 2008, Kenya requested Somalia to confirm its agreement to a boundary along the parallel of latitude, but it has not been shown that Somalia provided such confirmation. Furthermore, Kenya's 2009 Submission to the CLCS and a Memorandum of Understanding (hereinafter the "MOU") signed by the two States that same year recognize the existence of a maritime boundary dispute between the Parties. Finally, the negotiations held between the Parties in 2014 and Notes Verbales of Kenya in 2014 and 2015 also indicate a lack of agreement between the Parties on their maritime boundaries. In light of the foregoing, the Court considers that Kenya has not consistently maintained its claim that the parallel of latitude constitutes the single maritime boundary with Somalia. It thus concludes that there is no compelling evidence that Kenya's claim and related conduct were consistently maintained and, consequently, called for a response from Somalia.

The Court also considers that Somalia's conduct between 1979 and 2014 in relation to its maritime boundary with Kenya, in particular its alleged absence of protest against Kenya's claim, does not establish Somalia's clear and consistent acceptance of a maritime boundary at the parallel of latitude. In this regard, the Court is of the view that, contrary to what is claimed by Kenya, it cannot be inferred from the Parties' positions during the Third United Nations Conference on the Law of the Sea that Somalia rejected equidistance as a possible method of achieving an equitable solution. Moreover, there is no indication that Somalia accepted the boundary claimed by Kenya during the bilateral negotiations held in 1980 and 1981. Furthermore, although Somalia's Maritime Law of 1988 refers to a boundary for the territorial sea which follows "a straight line toward the sea from the land as indicated on the enclosed charts", this phrase is unclear and, without the charts mentioned, its meaning cannot be determined. The Court also notes that the 2009 MOU, Somalia's 2009 submission of preliminary information to the CLCS, a letter from Somalia dated 19 August 2009 and addressed to the Secretary-General of the United Nations, and Somalia's 2014 objection to the consideration by the CLCS of Kenya's submission all mention the existence of a maritime boundary dispute between the Parties. Finally, the Court adds that the context of the civil war that afflicted Somalia, depriving it of a fully operational government and administration between 1991 and 2005, must be taken into account in evaluating the extent to which it was in a position to react to Kenya's claim during this period.

In addition, the Court examines other conduct of the Parties between 1979 and 2014 concerning naval patrols, fisheries, marine scientific research and oil concessions, and considers that it does not confirm that Somalia has clearly and consistently accepted a boundary at the parallel of latitude.

In conclusion on this question, the Court finds that there is no compelling evidence that Somalia has acquiesced to the maritime boundary claimed by Kenya and that, consequently, there is no agreed maritime boundary between the Parties at the parallel of latitude. It therefore rejects Kenya's claim in this respect.

IV. MARITIME DELIMITATION (PARAS. 90-197)

In view of this conclusion, the Court turns to the delimitation of the maritime areas appertaining to Somalia and Kenya.

A. Applicable law (para. 92)

The Court first recalls that both Somalia and Kenya are parties to UNCLOS, and the provisions of the Convention must therefore be applied in determining the course of the maritime boundary between the two States.

B. Starting-point of the maritime boundary (paras. 93-98)

The Court notes that although the Parties initially proffered divergent views on the appropriate approach to defining the starting-point of the maritime boundary, those views evolved in the course of the proceedings and are now by and large concordant. Taking into account the views of the Parties, the Court considers that the starting-point of the maritime boundary is to be determined by connecting the final permanent boundary beacon, known as Primary Beacon No. 29, or “PB 29”, to a point on the low-water line by a straight line that runs in a south-easterly direction and that is perpendicular to “the general trend of the coastline at Dar Es Salam” in accordance with the terms of the 1927/1933 treaty arrangement.

C. Delimitation of the territorial sea (paras. 99-118)

The Court then turns to the delimitation of the territorial sea. It notes that Somalia submits that this delimitation is to be effected pursuant to Article 15 of the Convention, whereas Kenya maintains that the maritime boundary in the territorial sea already exists at the parallel of latitude. The Court recalls that it has already concluded that no such boundary was agreed between the Parties. It also observes that Kenya, in its Counter-Memorial, referred to the 1927/1933 treaty arrangement and stated that it “provided for the establishment of [a] boundary of the territorial sea”. The Court notes, however, that neither Party asks it to confirm the existence of any segment of a maritime boundary or to delimit the boundary in the territorial sea on the basis of the 1927/1933 treaty arrangement. It recalls that in their legislation concerning the territorial sea neither Party has referred to the terms of the 1927/1933 treaty arrangement to indicate the extent of the territorial sea in relation to its adjacent neighbour.

The Court further notes that the agenda of the meeting between Somalia and Kenya, held on 26 and 27 March 2014, to discuss the maritime boundary between the two countries, covered all maritime zones, including the territorial sea, and that, in a presentation attached to the report on that meeting, Kenya referred to Articles 15, 74 and 83 of the Convention as relevant to maritime delimitation, emphasizing that Article 15 provides for delimitation through a “[m]edian line for [the] territorial sea unless there is an agreement to the contrary based on [a] claim by historical title and or special circumstances”. In light of the above, the Court considers it unnecessary to decide whether the 1927/1933 treaty arrangement had as an

objective the delimitation of the boundary in the territorial sea.

The Court recalls that the delimitation methodology is based on the geography of the coasts of the two States concerned, and that a median or equidistance line is constructed using base points appropriate to that geography. It explains that, although in the identification of base points the Court will have regard to the proposals of the parties, it need not select a particular base point, even if the parties are in agreement in that respect, if it does not consider that base point to be appropriate. It may select a base point that neither party has proposed. The Court further recalls that it has sometimes been led to eliminate the disproportionate effect of small islands by not selecting a base point on such small maritime features. As the Court has stated in the past, there may be situations in which the equitableness of an equidistance line depends on the precaution taken to eliminate the disproportionate effect of certain islets, rocks and minor coastal projections.

In the circumstances of the present case, the Court considers it appropriate to place base points for the construction of the median line solely on solid land on the mainland coasts of the Parties. It does not consider it appropriate to place base points on the tiny arid Diua Damasciaca islets, which would have a disproportionate impact on the course of the median line in comparison to the size of these features. For similar reasons, nor does the Court consider it appropriate to select a base point on a low-tide elevation off the southern tip of Ras Kaambooni, which is a minor protuberance in Somalia's otherwise relatively straight coastline in the vicinity of the land boundary terminus, which constitutes the starting-point for the maritime delimitation.

The Court then gives the geographic co-ordinates of the base points that it places on the Parties' coasts for the construction of the median line. The resulting line starts from the land boundary terminus and continues out to the point (Point A) at a distance of 12 nautical miles from the coast. That median line is depicted on sketch-map No. 5 (reproduced in Annex 2).

The Court observes that the course of the median line corresponds closely to that of a line "at right angles to the general trend of the coastline", assuming that the 1927/1933 treaty arrangement, in using this phrase, had as an objective to draw a line that continues into the territorial sea, a question that the Court need not decide.

D. Delimitation of the exclusive economic zone and the continental shelf within 200 nautical miles (paras. 119-177)

1. Delimitation methodology (paras. 119-131)

The Court then proceeds to the delimitation of the exclusive economic zone and the continental shelf within 200 nautical miles from the coasts of the Parties, noting that the relevant provisions of the Convention for this exercise are contained in Article 74 of UNCLOS for the delimitation of the exclusive economic zone and Article 83 for the delimitation of the continental shelf. It observes that those provisions are of a very general nature and do not provide much by way of guidance for those involved in the maritime delimitation exercise. The goal of that exercise is to achieve an equitable solution. If two States have freely agreed on a maritime boundary, they are deemed to have achieved such an

equitable solution. However, if they fail to reach an agreement on their maritime boundary and the matter is submitted to the Court, it is the task of the Court to find an equitable solution in the maritime delimitation it has been requested to effect.

The Court recalls that, since the adoption of the Convention, it has gradually developed a maritime delimitation methodology to assist it in carrying out its task. In determining the maritime delimitation line, the Court proceeds in three stages, which it described in the case concerning *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*. In the first stage, the Court will establish the provisional equidistance line from the most appropriate base points on the parties' coasts. In the second, the Court will consider whether there are factors calling for the adjustment or shifting of the provisional equidistance line in order to achieve an equitable result. In the third and final stage, the Court will subject the envisaged delimitation line, either the equidistance line or the adjusted line, to the disproportionality test. The purpose of this test is to assure the Court that there is no marked disproportion between the ratio of the lengths of the parties' relevant coasts and the ratio of the parties' respective shares in the relevant area to be delimited by the envisaged line, and thus to confirm that the delimitation achieves an equitable solution as required by the Convention.

The Court observes that the three-stage methodology is not prescribed by UNCLOS and therefore is not mandatory. It has been developed by the Court in its jurisprudence on maritime delimitation as part of its effort to arrive at an equitable solution, as required by Articles 74 and 83 of the Convention. The methodology is based on objective, geographical criteria, while at the same time taking into account any relevant circumstances bearing on the equitableness of the maritime boundary. It has brought predictability to the process of maritime delimitation and has been applied by the Court in a number of past cases. The three-stage methodology for maritime delimitation has also been used by international tribunals. The Court will nonetheless abstain from using the three-stage methodology if there are factors which make the application of the equidistance method inappropriate, for instance if the construction of an equidistance line from the coasts is not feasible. This is not the case in the present circumstances, however, where such a line can be constructed.

Moreover, the Court does not consider that the use of the parallel of latitude is the appropriate methodology to achieve an equitable solution, as suggested by Kenya. A boundary along the parallel of latitude would produce a severe cut-off effect on the maritime projections of the southernmost coast of Somalia.

The Court therefore sees no reason in the present case to depart from its usual practice of using the three-stage methodology to establish the maritime boundary between Somalia and Kenya in the exclusive economic zone and on the continental shelf.

2. Relevant coasts and relevant area (paras. 132-141)

(a) *Relevant coasts* (paras. 132-137)

The Court begins by identifying the relevant coasts of the Parties, namely those coasts whose projections overlap. It states that, using radial projections which overlap within 200 nautical miles, it has identified that the relevant coast of Somalia extends for approximately 733 km and that of Kenya for approximately 511 km.

(b) Relevant area (paras. 138-141)

The Court notes that the Parties disagree as to the identification of the relevant area. It recalls that it has explained on a number of occasions that the relevant area comprises that part of the maritime space in which the potential entitlements of the parties overlap. The Court also recalls its observation that the relevant area cannot extend beyond the area in which the entitlements of both parties overlap. In the present case, the Court is of the view that, in the north, the relevant area extends as far as the overlap of the maritime projections of the coast of Kenya and the coast of Somalia. The Court considers it appropriate to use the overlap of the 200-nautical-mile radial projections from the land boundary terminus. As far as the southern limit of the relevant area is concerned, the Court notes that the Parties agree that the maritime space south of the boundary between Kenya and Tanzania is not part of the relevant area. The relevant area, as identified by the Court for the purpose of delimiting the exclusive economic zone and the continental shelf up to 200 nautical miles from the coasts, measures approximately 212,844 sq km.

3. Provisional equidistance line (paras. 142-146)

The Court next constructs the provisional equidistance line. It identifies the appropriate base points for the construction of this line within 200 nautical miles of the coasts. The provisional equidistance line constructed on the basis of these base points begins from the endpoint of the maritime boundary in the territorial sea (Point A) and continues until it reaches 200 nautical miles from the starting-point of the maritime boundary, at a point (Point 10') the co-ordinates of which are given in the Judgment. The line thus obtained is depicted on sketch-map No. 9 (reproduced in Annex 2).

4. Whether there is a need to adjust the provisional equidistance line (paras. 147-174)

The Court considers whether there are factors requiring the adjustment or shifting of the provisional equidistance line in order to achieve an equitable solution. It recalls that Kenya perceives the provisional equidistance line as inequitable while Somalia sees no plausible reason for adjusting the line and believes that it would constitute an equitable boundary.

The Court notes that Kenya, by invoking various factors which it considers relevant circumstances in the context of this case, has consistently sought a maritime boundary that would follow the parallel of latitude. The Court has already concluded that no maritime boundary between Somalia and Kenya following the parallel of latitude was established in the past. Nor has the Court accepted the methodology based on the parallel of latitude for establishing the maritime boundary between the Parties as advocated by Kenya. Kenya would now like to achieve the same result by a major shifting of the provisional equidistance line, changing its south-easterly direction to an exclusively easterly direction. The Court considers

that such a shifting of the provisional equidistance line, as argued for by Kenya, would represent a radical adjustment while clearly not achieving an equitable solution. It would severely curtail Somalia's entitlements to the continental shelf and the exclusive economic zone generated by its coast adjacent to that of Kenya. A line thus adjusted would not allow the Parties' coasts to produce their effects in terms of maritime entitlements in a reasonable and mutually balanced way.

The Court begins by considering those factors, relied on by Kenya, which are non-geographical in nature. First, as far as Kenya's security interests are concerned, the Court observes that boundaries between States, including maritime boundaries, are aimed at providing permanency and stability. This being so, the Court believes that the current security situation in Somalia and in the maritime spaces adjacent to its coast is not of a permanent nature. The Court is therefore of the view that the current security situation does not justify the adjustment of the provisional equidistance line. Moreover, the Court recalls its statement in a previous case that legitimate security considerations may be a relevant circumstance if a maritime delimitation was effected particularly near to the coast of a State. This is not the case here, as the provisional equidistance line does not pass near the coast of Kenya.

The Court also recalls that control over the exclusive economic zone and the continental shelf is not normally associated with security considerations and does not affect rights of navigation.

Access for Kenya's fisherfolk to natural resources is another factor which Kenya brought to the attention of the Court when arguing for the adjustment of the line. The Court explains that such a factor can be taken into account as a relevant circumstance in exceptional cases, in particular if the line would likely entail catastrophic repercussions for the livelihood and economic well-being of the population of the countries concerned. On the basis of the evidence before it, the Court is not convinced that the provisional equidistance line would entail such harsh consequences for the population of Kenya in the present case. Moreover, the Court has to consider the well-being of the populations on both sides of the delimitation line. In light of the foregoing, the Court cannot accept Kenya's argument that the provisional equidistance line would deny Kenya equitable access to fisheries resources that are vital to its population.

The Court then turns to another argument put forward by Kenya. It contends that the evidence of the Parties' long-standing and consistent conduct in relation to oil concessions, naval patrols, fishing and other activities reflects the existence of "a *de facto* maritime boundary" along the parallel of latitude which calls for the adjustment of the provisional equidistance line. However, the Court recalls that it has already concluded that no maritime boundary along the parallel of latitude has been agreed by the Parties. There is no *de facto* maritime boundary between Somalia and Kenya. The Court therefore cannot accept Kenya's argument that, on the basis of the conduct of the Parties, the provisional equidistance line has to be adjusted so that it coincides with the alleged *de facto* maritime boundary.

Finally, the Court considers the two remaining arguments which, according to Kenya, call for the adjustment of the provisional equidistance line. Kenya submits that the application of an equidistance line would produce a significant cut-off effect with respect to its maritime areas, and that the regional context and practice require the provisional equidistance line to be adjusted.

The Court recalls that both the ICJ itself and international tribunals have acknowledged that the use of an equidistance line can produce a cut-off effect, particularly where the coastline is characterized by concavity, and that an adjustment of that line might be necessary in order to reach an equitable solution. Nevertheless, it considers that any cut-off effect as a result of the Kenya-Tanzania maritime boundary is not a relevant circumstance. The agreements between Kenya and Tanzania are *res inter alios acta* and cannot per se affect the maritime boundary between Kenya and Somalia. However, the issue to be considered in the present case is whether the use of an equidistance line produces a cut-off effect for Kenya, not as a result of the agreed boundary between Kenya and Tanzania, but as a result of the configuration of the coastline.

The Court observes that if the examination of the coastline is limited only to the coasts of Kenya and Somalia, any concavity is not conspicuous. However, examining only the coastlines of the two States concerned to assess the extent of any cut-off effect resulting from the geographical configuration of the coastline may be an overly narrow approach. Examining the concavity of the coastline in a broader geographical configuration is consistent with the approach taken by this Court and international tribunals. In this regard, the Court refers, in particular, to the two *North Sea Continental Shelf* cases and the *Bangladesh/Myanmar* and *Bangladesh v. India* cases, before stating that, in the present case, the potential cut-off of Kenya's maritime entitlements should be assessed in a broader geographical configuration. In the Court's view, the potential cut-off of Kenya's maritime entitlements cannot be properly observed by examining the coasts of Kenya and Somalia in isolation. When the mainland coasts of Somalia, Kenya and Tanzania are observed together, as a whole, the coastline is undoubtedly concave. Kenya faces a cut-off of its maritime entitlements as the middle State located between Somalia and Tanzania. The presence of Pemba Island, a large and populated island that appertains to Tanzania, accentuates this cut-off effect because of its influence on the course of a hypothetical equidistance line between Kenya and Tanzania. The provisional equidistance line between Somalia and Kenya progressively narrows the coastal projection of Kenya, substantially reducing its maritime entitlements within 200 nautical miles. This cut-off effect occurs as a result of the configuration of the coastline extending from Somalia to Tanzania, independently of the boundary line agreed between Kenya and Tanzania, which in fact mitigates that effect in the south, in the exclusive economic zone and on the continental shelf up to 200 nautical miles.

The Court recalls its jurisprudence and that of international tribunals according to which an adjustment of the provisional equidistance line is warranted if the cut-off effect is "serious" or "significant". In the Court's view, even though the cut-off effect in the present case is less pronounced than in some other cases, it is nonetheless still serious enough to warrant some

adjustment to address the substantial narrowing of Kenya's potential entitlements. In order to attenuate this cut-off effect, the Court considers it reasonable to adjust the provisional equidistance line. In view of these considerations, the Court believes that it is necessary to shift the line to the north so that, from Point A, it follows a geodetic line with an initial azimuth of 114°. This line would attenuate in a reasonable and mutually balanced way the cut-off effect produced by the unadjusted equidistance line due to the geographical configuration of the coasts of Somalia, Kenya and Tanzania. The resulting line would end at its intersection with the 200-nautical-mile limit from the coast of Kenya, at a point (Point B) the co-ordinates of which are given in the Judgment. The line thus adjusted is depicted on sketch-map No. 11 (reproduced in Annex 2).

5. Disproportionality test (paras. 175-177)

In the final stage, the Court checks whether the envisaged delimitation line leads to a significant disproportionality between the ratio of the lengths of the Parties' respective relevant coasts and the ratio of the size of the relevant areas apportioned by that line. The Court recalls that the relevant coast of Somalia is 733 km long, and that of Kenya, 511 km long. The ratio of the relevant coasts is 1:1.43 in favour of Somalia. The maritime boundary determined by the Court divides the relevant area within 200 nautical miles of the coast in such a way that approximately 120,455 sq km would appertain to Kenya and the remaining part, measuring approximately 92,389 sq km, would appertain to Somalia. The ratio between the maritime zones that would appertain respectively to Kenya and Somalia is 1:1.30 in favour of Kenya. A comparison of these two ratios does not reveal any significant or marked disproportionality. The Court is thus satisfied that the adjusted line that it has established as the maritime boundary for the exclusive economic zones and the continental shelves of Somalia and Kenya within 200 nautical miles in the Indian Ocean achieves an equitable solution as required by Article 74, paragraph 1, and Article 83, paragraph 1, of the Convention.

E. Question of the delimitation of the continental shelf beyond 200 nautical miles (paras. 178-197)

The Court turns finally to the question of the delimitation of the continental shelf beyond 200 nautical miles. It first recalls that both Parties have asked the Court to determine the complete course of the maritime boundary between them, including the continental shelf beyond 200 nautical miles. The Court also recalls that any claim of continental shelf rights beyond 200 miles by a State party to UNCLOS must be in accordance with Article 76 of the Convention and reviewed by the Commission on the Limits of the Continental Shelf established thereunder.

The Court observes that both States have made submissions on the limits of the continental shelf beyond 200 nautical miles to the Commission in accordance with Article 76, paragraph 8, of UNCLOS. The Court notes that both Somalia and Kenya have fulfilled their obligations under Article 76 of the Convention. At the same time, the Commission has yet to consider these submissions and make any recommendations to Somalia and to Kenya on matters related to the establishment of the outer limits of their continental shelves. It is only after such

recommendations are made that Somalia and Kenya can establish final and binding outer limits of their continental shelves, in accordance with Article 76, paragraph 8, of UNCLOS.

The Court emphasizes that the lack of delineation of the outer limit of the continental shelf is not, in and of itself, an impediment to its delimitation between two States with adjacent coasts, as is the case here. The exercise by international courts and tribunals of their jurisdiction regarding the delimitation of maritime boundaries, including that of the continental shelf, is without prejudice to the exercise by the Commission of its functions on matters related to the delineation of the outer limits of the continental shelf.

The Court observes that the Parties' entitlements to the continental shelf beyond 200 nautical miles are to be determined by reference to the outer edge of the continental margin, to be ascertained in accordance with Article 76, paragraphs 4 and 5, of UNCLOS. The entitlement of a State to the continental shelf beyond 200 nautical miles thus depends on geological and geomorphological criteria, subject to the constraints set out in Article 76, paragraph 5. An essential step in any delimitation is to determine whether there are entitlements, and whether they overlap. The situation in the present case is not the same as that addressed by the International Tribunal for the Law of the Sea in the *Bangladesh/Myanmar* case. In that case, the unique situation in the Bay of Bengal and the negotiation record at the Third United Nations Conference on the Law of the Sea, which threw a particular light upon the parties' contentions on the subject, were sufficient to enable the Tribunal to proceed with the delimitation of the area beyond 200 nautical miles.

The Court notes that in their submissions to the Commission both Somalia and Kenya claim on the basis of scientific evidence a continental shelf beyond 200 nautical miles, and that their claims overlap. In most of the area of overlapping claims beyond 200 nautical miles, both Parties claim that their continental shelf extends to a maximum distance of 350 nautical miles. The Court further notes that neither Party questions the existence of the other Party's entitlement to a continental shelf beyond 200 nautical miles or the extent of that claim. Their dispute concerns the boundary delimiting that shelf between them. Both Parties in their submissions — Somalia in those presented at the close of the hearings and Kenya in its Rejoinder — request the Court to delimit the maritime boundary between them in the Indian Ocean up to the outer limit of the continental shelf. For the reasons set out above, the Court proceeds to do so.

As regards the relevant circumstances invoked by Kenya for the adjustment of the provisional equidistance line, the Court observes that it has already considered them earlier and adjusted the line accordingly in the exclusive economic zone and on the continental shelf up to 200 nautical miles. It recalls that both Somalia and Kenya have claimed a continental shelf extending up to 350 nautical miles in the greater part of the area of overlapping claims. In view of the foregoing, the Court considers it appropriate to extend the geodetic line used for the delimitation of the exclusive economic zone and the continental shelf within 200 nautical miles to delimit the continental shelf beyond 200 nautical miles.

The Court therefore concludes that the maritime boundary beyond 200 nautical miles continues along the same geodetic line as the adjusted line within 200 nautical miles until it reaches the outer limits of the Parties' continental shelves, which are to be delineated by Somalia and Kenya, respectively, on the basis of the recommendations to be made by the Commission, or until it reaches the area where the rights of third States may be affected. The direction of that line is depicted on sketch-map No. 12 (reproduced in Annex 2).

The Court adds that, depending on the extent of Kenya's entitlement to a continental shelf beyond 200 nautical miles as it may be established in the future on the basis of the Commission's recommendation, the delimitation line might give rise to an area of limited size located beyond 200 nautical miles from the coast of Kenya and within 200 nautical miles from the coast of Somalia, but on the Kenyan side of the delimitation line ("grey area"). This possible grey area is depicted on sketch-map No. 12. Since the existence of this "grey area" is only a possibility, the Court does not consider it necessary, in the circumstances of the present case, to pronounce itself on the legal régime that would be applicable in that area. The complete course of the maritime boundary is depicted on sketch-map No. 13 (reproduced in Annex 2).

V. ALLEGED VIOLATIONS BY KENYA OF ITS INTERNATIONAL OBLIGATIONS (PARAS. 198-213)

The Court first examines the Applicant's argument that, by its unilateral actions in the disputed area, Kenya has violated Somalia's sovereignty over the territorial sea and its sovereign rights and jurisdiction in the exclusive economic zone and on the continental shelf. The Court recalls that Somalia's submission was made in the context of proceedings regarding a maritime boundary which had never before been settled, and that the present Judgment has the effect of fixing the maritime boundary between the Parties. The Court considers that when maritime claims of States overlap, maritime activities undertaken by a State in an area which is subsequently attributed to another State by a judgment cannot be considered to be in violation of the sovereign rights of the latter if those activities were carried out before the judgment was delivered and if the area concerned was the subject of claims made in good faith by both States. Somalia complains of surveying and drilling activities conducted or authorized by Kenya in areas located entirely or partially north of the equidistance line claimed by Somalia as the maritime boundary.

There is no evidence that Kenya's claims over the zone concerned were not made in good faith. Under the circumstances, the Court concludes that it has not been established that Kenya's maritime activities, including those that may have been conducted in parts of the disputed area that have now been attributed to Somalia, were in violation of Somalia's sovereignty or its sovereign rights and jurisdiction.

The Court then turns to the Applicant's argument that Kenya's activities were in violation of Article 74, paragraph 3, and Article 83, paragraph 3, of UNCLOS. Under these provisions, States with opposite or adjacent coasts that have not reached an agreement on the delimitation

of the exclusive economic zone or continental shelf are under an obligation to “make every effort . . . during this transitional period, not to jeopardize or hamper the reaching of the final agreement”. The Court considers that the “transitional period” mentioned in these provisions refers to the period from the moment the maritime delimitation dispute has been established until a final delimitation by agreement or adjudication has been achieved. The Court recalls that it is of the view that a maritime delimitation dispute between the Parties has been established since 2009. Accordingly, the Court only examines whether the activities conducted by Kenya after 2009 jeopardized or hampered the reaching of a final agreement on the delimitation of the maritime boundary.

The Court observes that Somalia complains of certain activities, including the award of oil concession blocks to private operators and the performance of seismic and other surveys in those blocks, which are of a transitory character. In the Court’s view, these activities are not of the kind that could lead to permanent physical change in the marine environment, and it has not been established that they had the effect of jeopardizing or hampering the reaching of a final agreement on the delimitation of the maritime boundary. Somalia also complains of certain drilling activities which are of the kind that could lead to permanent physical change in the marine environment. Such activities may alter the status quo between the parties to a maritime dispute and could jeopardize or hamper the reaching of a final agreement. However, the Court is of the opinion that, on the basis of the evidence before it, it is not in a position to determine with sufficient certainty that drilling operations that could have led to permanent physical change in the disputed area took place after 2009. The Court further notes that, in 2014, the Parties engaged in negotiations on maritime delimitation and that, in 2016, Kenya suspended its activities in the disputed area and offered to enter into provisional arrangements with Somalia. In light of these circumstances, the Court cannot conclude that the activities carried out by Kenya in the disputed area jeopardized or hampered the reaching of a final agreement on the delimitation of the maritime boundary, in violation of Article 74, paragraph 3, or Article 83, paragraph 3, of UNCLOS.

For these reasons, the Court finds that Kenya has not violated its international obligations through its maritime activities in the disputed area. Since Kenya’s international responsibility is not engaged, the Court need not examine Somalia’s request for reparation. Somalia’s submission must therefore be rejected.

STATE JURISDICTION

Abu Salem Abdul Qayoom Ansari v. State of Maharashtra (2010)

CRIMINAL APPEAL NOS. 1142-1143 OF 2007

AND

WRIT PETITION (CRIMINAL) NO. 171 OF 2006

JUDGMENT

P. Sathasivam, J.

1) The appeals and the writ petition raised a common question, as such were heard together and are being disposed of by this common judgment. The grievance of the appellant-Abu Salem Abdul Qayoom Ansari in the appeals and writ petition is that the criminal courts in the country have no jurisdiction to try in respect of offences which do not form part of the extradition judgment, by virtue of which he has been brought to this country and he can be tried only for the offences mentioned in the extradition decree.

2) Criminal Appeal No. 990 of 2006, filed under Section 19 of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (hereinafter referred to as "the TADA Act"), arose out of framing of charge on 18.03.2006 against the appellant by the Designated Court at Arthur Road Jail, Mumbai in RC No.1(S/93)/CBI/STF known as Bombay Bomb Blast Case No. 1 of 1993 and the order dated 13.06.2006 passed by the said Court separating the trial of the accused/appellant from the main trial in the Bombay Bomb Blast Case.

3) The appellant filed Criminal Appeal Nos. 1142-1143 of 2007 against the order dated 16.04.2007 by the same Designated Court, framing charges against him under Sections 120B, 302, 307, 387, 382 IPC and under Sections 3(2)(i), 3(2)(ii), 3(3), 3(5) and 5 of the TADA Act.

4) In addition to filing of the above said appeals, the appellant has also filed Writ Petition (Crl.) No. 171 of 2006 under Article 32 of the Constitution of India seeking a) to issue a writ of Certiorari to quash the charges framed against him in Bombay Bomb Blast Case No. 1 of 1993 arising out of RC No. 1 (S/93)/CBI/STF by framing of charge on

18.03.2006; b) to issue a writ of Certiorari to quash the order passed by the Designated Court under TADA Act dated 13.06.2006 passed in Misc. Application No. 144 of 2006; c) issue a writ of Certiorari to declare that the charges framed on 18.03.2006, in Bombay Bomb Blast Case No. 1 of 1993, as violative of the Rule of Speciality and Section 21 of the Extradition Act, 1962; (d) issue a writ of Mandamus to release and discharge the writ petitioner by quashing all the proceedings against him; (e) issue a writ of Prohibition prohibiting the respondents from prosecuting the writ petitioner any further for the offences for which the petitioner has not been extradited by the Court of Appeals at Lisbon as affirmed by the order of the Supreme Court of Portugal; f) issue a writ of Prohibition prohibiting the Designated Court at Arthur Road Jail at Mumbai from separating the trial of the writ petitioner from the other accused whose trial is stated to have been completed.

5) Facts of the Case:

a) On 12.03.1993, there were a series of bomb explosions in the Mumbai City which resulted in death of 257 persons, injuries of various types to 713 persons and destruction of properties worth more than Rs. 27 crores (approximately). These bomb explosions were caused at vital Government installations, public places and crowded places in the city and its suburbs with an intention to overawe the Government established by law, and to strike terror among the public at large and also to adversely affect the peace and harmony among different sections of the people. Twenty-seven criminal cases were registered at respective Police Stations with regard to the said bomb explosions and subsequent recovery of arms, 4 ammunitions and explosives, which were illegally smuggled into the country with the intention to commit the said terrorist acts. On completion of investigation, it was disclosed that various acts committed by the accused persons were out of a single conspiracy and, therefore, a single charge-sheet was filed in the specially created Designated Court, Mumbai, against 189 accused persons including 44 absconders on 04.11.1993 for offences punishable under Section 120B read with Sections 324, 326, 427, 435, 121, 121-A, 122, 307, 302 and 201 of the Indian Penal Code read with Sections 3, 4 and 5 of the TADA Act read with Sections 3, 7(a), 25(1A), 25(1AA), 26, 29, 35 of the Arms Act, 1959 read with Sections 3, 4, 5 and 6 of the Explosive Substances Act, 1908. The appellant-Abu Salem was one of the absconders mentioned in the charge-sheet.

b) The investigation disclosed that the appellant-Abu Salem and other accused persons hatched a criminal conspiracy during the period December, 1992 to April, 5 1993 with an object to create disturbances of serious nature by committing terrorist acts by bomb explosions, murders and causing destruction of properties throughout India. In pursuance of the said criminal conspiracy, a large quantity of arms like AK-56 rifles, pistols, hand-grenades, ammunitions and RDX explosives were illegally smuggled into the country through sea at Dighi Jetty and Shekhadi ports in Maharashtra State during January and February, 1993. These illegal arms and ammunitions were kept and stored at different places with different persons with the object to commit terrorist acts. c) The appellant-Abu Salem was entrusted with the task of transportation of illegally smuggled arms and ammunitions, their

storage and distribution to other co-accused persons. Investigation has disclosed that a portion of arms and explosives, which were smuggled and brought illegally into India on 09.01.1993, were taken to the State of Gujarat and stored at Village Sansrod, Dist. Bharuch. In the second week of January, 1993, on the 6 instructions of absconding accused, Anees Ibrahim Kaskar, appellant-Abu Salem brought AK-56 rifles, their ammunitions and hand-grenades from Village Sansrod to Mumbai and distributed the same among co-accused persons.

d) On 12.03.1993, RDX filled vehicles and suit-cases were planted at strategic places like Bombay Stock Exchange, Air India Building, Near Shiv Sena Bhawan, Plaza cinema and thickly populated commercial places like Zaveri Bazar, Sheikh Memon Street etc. The suit-case bombs were also planted in the rooms of 3 five-star Hotels, namely, Hotel Sea Rock, Bandra, Hotel Juhu Centaur and Airport Centaur, Mumbai. Explosions were caused from the said vehicle-bombs and suit-case bombs in the afternoon of 12.03.1993 and within a period of about two hours, large-scale deaths and destruction was caused, as described earlier. Hand-grenades were also thrown at two places i.e. Sahar International Airport, Mumbai and 7 Fishermen Colony, Mahim, Mumbai. The explosions caused by hand-grenades also produced similar results. e) During the course of investigation, a large quantity of arms, ammunitions and explosives were recovered from the possession of accused persons. In India, AK-56 rifles, ammunitions and hand-grenades cannot be possessed by private individuals, as these types of sophisticated arms and ammunitions can only be used by the armed forces and other law enforcing agencies.

f) Since the appellant-Abu Salem absconded and could not be arrested during the course of investigation, he was shown as an absconder in the charge-sheet. The Designated Court, Mumbai, issued Proclamation No. 15777 of 1993 against him on 15.09.1993. As the accused did not appear before the Court despite issuance of Proclamation, he was declared as a Proclaimed Offender on 15.10.1993. The Designated Court, Mumbai issued Non-bailable Warrant against appellant-Abu Salem and Interpol Secretariat General, Lyons, France also issued a Red Corner Notice No. A-103/3-1995 for his arrest. g) During the course of trial, the Designated Court, Mumbai, framed common charge of criminal conspiracy punishable under Section 3(3) of the TADA Act and Section 120 B of the Indian Penal Code read with Sections 3(2)(i), (ii), 3(3), 3(4), 5 and 6 of the TADA Act read with Sections 302, 307, 326, 324, 427, 435, 436, 201 and 212 of the Indian Penal Code and offences under Sections 3 and 7 read with Sections 25 (1A), (1B), (a) of the Arms Act, 1959, Sections 9-B(1), (a), (b), (c) of the Explosives Act, 1884, Sections 3, 4(a), (b), 5 and 6 of the Explosive Substances Act, 1908 and Section 4 of the Prevention of Damage to Public Property Act, 1984 against all the accused who were present before the Court, as also the accused who are absconding including the appellant. The Designated Court, Mumbai, on 19.06.1995, ordered that the evidence of the witnesses may be recorded against absconding accused persons in their absence in accordance with the provisions of Section 299 Cr.P.C. h) On 18.09.2002, the appellant-Abu Salem was detained by the Portuguese Police at Lisbon on the basis of the above mentioned Red Corner

Notice. In December 2002, on receipt of the intimation about his detention in Lisbon, the Government of India submitted a request for his extradition in 9 criminal cases (3 cases of CBI, 2 cases of Mumbai Police and 4 cases of Delhi Police). The request was made relying on the International Convention for the Suppression of Terrorist Bombings and on an assurance of reciprocity as applicable in international law. Along with the requisition of extradition, the relevant facts of the cases were enclosed in the form of duly sworn affidavits of the concerned Police officers, together with other supporting documents. The letter of requisition was issued under the signature of the then Minister of State for External Affairs and the affidavit-in-support was affirmed by Sr. Superintendent of Police, CBI/STF.

34. Now, it cannot be disputed that an offence under Section 365 IPC is a lesser offence than the offence punishable under Section 364-A IPC. Since extradition of Suman Sood was allowed for a crime punishable with higher offence (Section 364-A IPC), her prosecution and trial for a lesser offence (Section 365 IPC) cannot be held to be without authority of law. The contention, therefore, has no force and is hereby rejected. (Emphasis supplied) The ratio in the Suman Sood (supra) is directly applicable to the case on hand.

27) The main grievance of the appellant, as stated above, is that he had been extradited under International Convention for the Suppression of Terrorist Bombings and therefore, he can be tried only for the offences which are related to the said Convention. The said assumption cannot be sustained. If the said claim is accepted, it would be contrary to the judgment of the Constitutional Court of Portugal and it also shows the ignorance of the appellant towards the notification dated 13.12.2002, issued by the Government of India making the Extradition Act, 1962 applicable to Government of Portugal except Chapter III. As rightly pointed out by the respondents that the Court has not granted extradition merely on the basis of Extradition Treaty but also on the basis of reciprocity. Pursuant to Section 3 of the Act, the order of the Government of India GSR-822(E) dated 13.12.2002 had been approved and published ensuring due regard for the principle of reciprocity. In view of the same, the claim of the appellant is without any substance.

28) As discussed earlier, it is true that there is no Extradition Treaty between India and Portugal. However, the laws of both the countries permit entertaining request for extradition from Non Treaty States also. The extradition request was made to the Government of Portugal by the Government of India under the provisions of the Extradition Act applicable to Non Treaty States i.e. Section 19 of the Act. Although the Convention was also relied upon for the extradition, as rightly pointed out by the respondent, it was not the sole basis as is apparent from the Letter of Request. The primary consideration for the request of extradition was the assurance of reciprocity. The notification dated 13.12.2002 by the Government of India directing that the provisions contained in the Extradition Act shall be applicable to the Republic of Portugal was issued keeping in view the said principle of reciprocity. For the

purpose of extradition proceedings, appellant-Abu Salem was treated as a fugitive criminal as defined under Section 2(f) of the Extradition Act, 1962. We have already adverted to the Gazette Notification dated 13.12.2002 making it clear that the provisions of Extradition Act shall apply to Portuguese Republic in accordance with the principle of reciprocity. The provisions of the Act are applicable in respect of the extradition of appellant-Abu Salem. The Court of Appeals of Lisbon has recognized this principle of reciprocity and the applicability of the provisions of the Extradition Act, 1962 to the Republic of Portugal. The Supreme Court of Justice and Constitutional Court of Portugal have also approved it. None of these Courts have mentioned in their orders that the accused could not be tried in India for the offences for which his trial could take place as per the domestic laws of India.

29) We have already adverted to Section 21 of the Extradition Act. A bare reading of the above section would indicate that the appellant-Abu Salem can be tried for the offences for which he has been extradited. The Supreme Court of Justice, Portugal has granted extradition of appellant-Abu Salem for all the offences mentioned in para-1 of the order dated 27.01.2005. In addition, Abu Salem can also be tried for lesser offence/offences in view of Section 21 of the Extradition Act disclosed by the facts proved for the purposes of securing his surrender. Lesser offence means an offence which is made out from the proved facts and provides lesser punishment, as compared to the offences for which the fugitive has been extradited. The offence has to be an extradition offence, as defined under Section 2 (c) (ii) of the Act i.e. an offence punishable with imprisonment for a term which shall not be less than one year under the laws of India or of a foreign State. The lesser offence cannot be equated with the term minor offence; as mentioned in Section 222 of the Code of Criminal Procedure. The Legislature has deliberately used the word lesser in Section 21(b) of the Extradition Act instead of the word minor. Thus, the punishment provided for the offence is relevant and not the ingredients for the purposes of interpretation of the term lesser offence. 30) The contention of the appellant that he can be tried only for the offences covered under Article 2(1) of the said Convention is misconceived in view of the fact that he was extradited not only under the said Convention but also in the light of the principle of reciprocity made applicable through the application of the Extradition Act to the Republic of Portugal. A complete reading of Article 2 of the said Convention makes it clear that it deals not only with those accused who commit the substantive offences as defined in Article 2(1) but also includes all the conspirators and those who have constructive liability for commission of the substantive offences as per Sub-section 3 of Article 2 of the Convention, which fact has also been mentioned by the Supreme Court of Justice, Portugal in para 9.4 of its order. Further sub-section (d) of Article 1(3) of the Convention makes it abundantly clear that the explosive or lethal device means a weapon or device i.e. designed, or has the capability to cause death, serious bodily injury or substantial material damage through its release etc. AK-56 rifles are the weapons/devices, which have the capability to cause death and serious bodily injury through the release of cartridges and are covered under the said Article. The appellant has been charged for possession, transportation and distribution of AK-56 rifles, their ammunitions as well as hand-grenades, which were illegally smuggled into the country in pursuance of the criminal conspiracy.

31) We are also satisfied that there has been no violation of Rule of Speciality and the Solemn Sovereign Assurance given by the Government of India in the letter dated 25.05.2003 of the Indian Ambassador to the Government of Portugal regarding the trial of the appellant-Abu Salem. The said assurance of the Indian Ambassador was given to the effect that the appellant will not be prosecuted for the offences other than those for which his extradition has been sought and that he will not be re-extradited to any other third country. As rightly pointed out by the Solicitor General, there has been no violation of Rule of Speciality. As per the Government of India Gazette Notification dated 13.12.2002, all the provisions contained under the Extradition Act are made applicable in respect of the extradition of Abu Salem except those contained in Chapter III of the Act. The Court of Appeals in Lisbon, has recognized this principle of reciprocity and the applicability of the provisions of Extradition Act to Portugal. The Supreme Court of Justice and Constitutional Court of Portugal have also approved it. In view of the fact that the provisions of the Extradition Act, 1962 have been made applicable to Portugal, provisions contained in Section 21 of the Act would come into operation while conducting the trial of appellant-Abu Salem. 32) We are also satisfied that the Designated Judge has correctly concluded that the appellant-Abu Salem can be tried for 'lesser offences', even if, the same are not covered by the Extradition Decree since the same is permitted under Section 21(b) of the Extradition Act. No bar has been placed by the Portuguese Courts for the trial of lesser offences in accordance with the provisions contained under Section 21(b) of the Extradition Act although Portuguese Courts were aware of the said provisions of Extradition Act.

33) We have already highlighted how the Government of India and the Government of Portugal entered into an agreement at the higher level mentioning the relevant offences and the appellant was extradited to India to face the trial. We have also noted the Notification of the Government of India about the applicability of Extradition Act, 1962. In the light of the said Notification, the additional charges that have been framed fit well within the proviso to Section 21(b) of the Extradition Act. The offences with which the appellant has been additionally charged are lesser than the offences for which the appellant has been extradited. To put it clear, the offences with which the appellant is charged are punishable with lesser punishment than the offence for which he has been extradited. The extradition granted in the present case had due regard to the facts placed which would cover the offences with which the appellant has been charged. As rightly pointed out by learned Solicitor General, the offences are disclosed by the same set of facts placed before the Government of Portugal. We agree with the submission of the learned Solicitor General and the ultimate decision of the Designated Court.

34) Coming to the order of the Designated Court directing separation of the trial of the appellant, it is the grievance of the appellant that because of the separation, he would forego the opportunity to cross-examine the witnesses. This grievance has been dealt with in a separate set of proceeding which we have adverted to in the earlier part of our judgment. The

order dated 24.08.2009 has granted the appellant an opportunity to submit a list of witnesses examined in the main trial for cross-examination. Hence, there is no basis in the apprehension raised by the appellant.

35) In the light of the above discussion, we are of the view that the appellant has been charged within the permissible scope of Section 21(b) of the Extradition Act and the Designated Court has not committed any illegality in passing the impugned orders. Consequently, all the appeals as well as the writ petition are liable to be dismissed, accordingly dismissed. Since the trial is pending from the year 1983 and connected matters have already been disposed of, we direct the Designated Court to proceed with the trial expeditiously.J. (P. SATHASIVAM)

JUDGMENT

GANGULY, J.

1. I have gone through the judgment prepared by Hon'ble Brother Justice P. Sathasivam and I agree with the conclusions reached by His Lordship.

2. Having regard to the importance of the issues discussed in the judgment, may I express my views on the same.

3. Conceptually extradition is a rather complex jurisprudential zone as it has encompassed within itself various trajectories of apparently conflicting ideas.

4. Generally, a State's criminal jurisdiction extends over offences committed within its geographical boundaries but it is the common experience of all the countries that often a criminal committing an offence in one country flees to another country and thus seeks to avoid conviction and the consequential punishment. This poses a threat in all civilized countries to a fair adjudication of crime and sustaining the Constitutional norms of Rule of Law.

5. To remedy such anomalous and unjust situation, Extradition has been evolved by way of International treaty obligation which ensures a mode of formal surrender of an accused by the one country to another based on reciprocal arrangements.

6. In India, extradition has not been defined under the Extradition Act 1962 (hereinafter, "the Act"). However, a comprehensive definition of extradition has been given in Gerhard Terlinden vs. John C. Ames in which Chief Justice Fuller defined extradition as:-the surrender by one nation to another of an individual accused or convicted of an offence outside of its own territory, and within the territorial jurisdiction of the other, which, being competent to try and to punish him, demands the surrender." [184 U.S. 270 at p. 289]

7. In the above formulation, the learned Chief Justice virtually echoed the principles of extradition laid down by Professor M. Cherif Bassiouni in his treatise "International Extradition and World Public Order, 1974, Oceana Publications". The learned Professor explained: In contemporary practice extradition means a formal process through which a person is surrendered by one state to another by virtue of a treaty, reciprocity or comity as between the respective states. The participants in such a process are, therefore, the two states

and, depending upon value-perspectives, the individual who is the object-subject of the proceedings. To a large extent, the processes and its participants have not changed much in the course of time but the rationale and purposes of the practice have changed, and as a consequence so have the formal aspects of the proceedings." (Page 2)

8. But extradition is different from deportation by which competent State authorities order a person to leave a country and prevent him from returning to the same territory. Extradition is also different from exclusion, by which an individual is prohibited from staying in one part of a Sovereign State. As a result of such orders, sometimes deserters or absentees from Armed Forces of a particular country are returned to the custody of Armed Forces of the country to which they belong.

9. Both deportation and exclusion basically are non-consensual exercise whereas extradition is based on a consensual treaty obligation between the requesting State and the requested State. Extradition, however, is only to be resorted to in cases of serious offences and Lord Templeman was right in holding that extradition treaties and legislation are designed to combine speed and justice [Re Evans - 1994 (3) All E.R. 449 at 450- 451].

10. In the context of extradition law, which is based on international treaty obligations, we must keep in mind the emerging Human Rights movements in the post World War II scenario and at the same time the need to curb transnational and international crime. The conflict between these two divergent trends is sought to be resolved by expanding the network of bilateral and multilateral treaties to outlaw transnational crime on the basis of mutual treaty obligation. In such a situation there is obviously a demand for inclusion of Human Rights concerns in the extradition process and at the same time garnering more international support and awareness for suppression of crime. A fair balance has to be struck between Human Rights norms and the need to tackle transnational crime. This is best summed up in the leading decision of European Court of Human Rights rendered in Soering vs. United Kingdom reported in 1989 (11) EHRR 439 and the relevant excerpt is quoted: ...inherent in the whole of the Convention (European Convention on Human Rights) is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. As movement about the world becomes easier and crime takes on a larger international dimension, it is increasingly in the interests of all nations that suspected offenders who flee abroad should be brought to justice. Conversely, the establishment of safe havens for fugitives would not only result in danger for the State obliged to harbour the protected person but also tend to undermine the foundations of extradition. These considerations must also be included among the factors to be taken into account in the interpretation and application of the notions of inhuman and degrading treatment or punishment in extradition cases.

11. The extradition law, therefore, has to be an amalgam of international and national law. Normally in extradition law the requested State is to follow the rule of Non-Inquiry which means that the requested State is not to normally make inquiry about the nature of criminal justice system in the requesting State. That is why in this case, on a complaint being made by Abu Salem in the Court of the requested country, the Courts of Portugal await the decision of this Court. The actual conduct of trial of the extradited accused is left to the

criminal jurisprudence followed in the requesting State. This rule of Non-Inquiry is a well developed norm both in Canada and in America [See the decision of Canadian Supreme Court in *Canada vs. Schmidt*, (1987) 1 SCR 500.

12. Justice La Forest delivering the majority judgment in *Schmidt* held: "that I see nothing unjust in surrendering to a foreign country a person accused of having committed a crime there for trial in the ordinary way in accordance with the system for the administration of justice prevailing in that country simply because that system is substantially different from ours with different checks and balances. The judicial process in a foreign country must not be subjected to finicky evaluations against the rules governing the legal process in this country."

13. Whether or not the fugitive who has been extradited would have a standing to complain of the judicial process in the requesting State after extradition has been done, independent of the position taken by the requested State, is a debatable issue. It is a part of the larger debate about the position of an individual as a subject of international law, and the obligation of States towards individuals. This is pertinent here because one of the claims made by Abu Salem is with respect to the erosion of his rights that exist by way of the international commitments India has made through the doctrine of specialty embodied in section 21 of the Extradition Act. His complaint is that by trying him for some offences which are designated as 'lesser offences' and calling them as completely similar to the ones mentioned before the Portuguese authorities, as well as by separating his trial from the other accused, the Government of India has violated its commitments in the extradition request, and therefore has violated the rights with which Abu Salem had been extradited. The answer to this complaint obviously lies in the principle of non-inquiry which prohibits questioning the fairness of the judicial process in the requesting State. That is why the Courts of Portugal await the decision of this Court. However, non-inquiry is not an absolute principle.

14. In a given situation, the requested State may question the procedures in the requesting State if they are prima facie contrary to fundamental principles of justice and there is a high risk of the fugitive being prejudiced by the process of extradition.

* * * * *

Arrest and Return of Savarkar

(France v. Great Britain) PCA, 1911

**AGREEMENT BETWEEN THE UNITED KINGDOM AND FRANCE REFERRING
TO ARBITRATION THE CASE OF VINAYAK DAMODAR SAVARKAR. SIGNED
AT LONDON, 25 OCTOBER, 1910**

Agreement

Article 1.

Should Vinayak Damodar Savarkar, in conformity with the rules of international law, be restored or not be restored by His Britannic Majesty's Government to the Government of the French Republic?

Article 2.

The Arbitral Tribunal shall be composed of five arbitrators chosen from the members of the Permanent Court at The Hague. The two Contracting Parties shall settle the composition of the Tribunal. Each of them may choose as arbitrator one of their nationals.

YOUR EXCELLENCY,

With reference to the agreement which we have concluded this day, for the purpose of submitting to arbitration certain matters in connexion with the arrest and restitution of Vinayak Damodar Savarkar, at Marseilles, in July last, I have the honour to place on record the understanding that any points which may arise in the course of this arbitration which are not covered by the terms of the Agreement above referred to shall be determined by the provisions of the International Convention for the pacific settlement of international disputes signed at the Hague, on the 18th of October, 1907.

Signed: E. GREY

AWARD DELIVERED ON 24 FEBRUARY 1911 BY THE ARBITRAL TRIBUNAL

WHEREAS, by an agreement dated the 25th October 1910, the Government of the French Republic and the Government of His Britannic Majesty agreed to submit to Arbitration the questions of fact and law raised by the arrest and restoration to the mail-steamer " Morea " at Marseilles, on the 8th July 1910, of the British Indian Savarkar, who had escaped from that vessel where he was in custody; and the demand made by the Government of the French Republic for the restitution of Savarkar; the Arbitral Tribunal has been called upon to decide the following question: Should Vinayak Damodar Savarkar, in conformity with the rules of international law, be restored or not be restored by His Britannic Majesty's Government to the Government of the French Republic.

WHEREAS, with regard to the facts which gave rise to the difference of opinion between the two Governments, it is established that, by a letter, dated the 29th June 1910, the Commissioner of the Metropolitan Police in London informed the " Directeur de la Sûreté générale " at Paris, that the British-Indian Vinayak Damodar Savarkar was about to be sent to

India, in order to be prosecuted for abetment of murder etc., and that he would be on board the vessel " Morea " touching at Marseilles on the 7th or 8th July.

WHEREAS, in consequence of the receipt of this letter, the Ministry of the Interior informed the Prefect of the " Bouches-du-Rhône ", by a telegram dated the 4th July 1910, that the British Police were sending Savarkar to India on board the steamship " Morea ". This telegram states that some " révolutionnaires hindus " then on the Continent, might take advantage of this to further the escape of this foreigner, and the Prefect was requested to

take the measures necessary to guard against any attempt of that kind.

WHEREAS the " Directeur de la Sûreté générale " replied by a letter dated the 9th July 1910 to the letter of the Commissioner of the Metropolitan Police, stating that he had given the necessary instructions for the purpose of guarding against the occurrence of any incident during the presence at Marseilles of the said Vinayak Damodar Savarkar, on board the steamship " Morea ".

WHEREAS, on the 7th July, the " Morea " arrived at Marseilles. The following morning, between 6 and 7 o'clock, Savarkar, having succeeded in effecting his escape, swam ashore and began to run; he was arrested by a brigadier of the French maritime gendarmerie and taken back to the vessel. Three persons, who had come ashore from the vessel, assisted the brigadier in taking the fugitive back. On the 9th July, the " Morea " left Marseilles with Savarkar on board.

WHEREAS, from the statements made by the French brigadier to the Police at Marseilles, it appears: that he saw the fugitive, who was almost naked, get out of a porthole of the steamer, throw himself into the sea and swim to the quay; that at the same moment some persons from the ship, who were shouting and gesticulating, rushed over the bridge leading to the shore, in order to pursue him; that a number of people on the quay commenced to shout " Arrêtez-le " that the brigadier at once went in pursuit of the fugitive and, coming up to him after running about five hundred metres, arrested him.

WHEREAS the brigadier declares that he was altogether unaware of the identity of the person with whom he was dealing, that he only thought that the man who was escaping was one of the crew, who had possibly committed an offence on board the vessel.

WHEREAS, with regard to the assistance afforded him by one of the crew and two Indian policemen, it appears from the explanations given on this point, that these men came up after the arrest of Savarkar, and that their intervention was only auxiliary to the action of the brigadier. The brigadier had seized Savarkar by one arm for the purpose of taking him back to the ship, and the prisoner went peaceably with him. The brigadier, assisted by the above mentioned persons, did not relax his hold, till he reached the half deck of the vessel. The brigadier said that he did not know English. From what has been stated, it would appear that the incident did not occupy more than a few minutes.

WHEREAS, it is alleged that the brigadier who effected the arrest was not ignorant of the presence of Savarkar on board the vessel, and that his orders, like those of all the French

Police and Gendarmes, were to prevent any Hindoo from coming on board who had not got a ticket.

WHEREAS these circumstances show that the persons on board in charge of Savarkar might well have believed that they could count on the assistance of the French Police.

WHEREAS it is established that a " Commissaire " of the French Police came on board the vessel shortly after her arrival at the port, and, in accordance with the orders of the Prefect, placed himself at the disposal of the Commander in respect of the watch to be kept; that, in consequence, this " Commissaire " was put into communication with the British Police Officer who, with other Police Officers, was in charge of the prisoner ; that the Prefect of Marseilles, as appears from a telegram dated the 13th July 1910 addressed to the Minister of the Interior, stated that he had acted in this matter in accordance with instructions given by the " Sûreté générale " to make the necessary arrangements to prevent the escape of Savarkar.

WHEREAS, having regard to what has been stated, it is manifest that the case is not one of recourse to fraud or force in order to obtain possession of a person who had taken refuge in foreign territory, and that there was not, in the circumstances of the arrest and delivery of Savarkar to the British Authorities and of his removal to India, anything in the nature of a violation of the sovereignty of France, and that all those who took part in the matter certainly acted in good faith and had no thought of doing anything unlawful.

WHEREAS, in the circumstances cited above, the conduct of the brigadier not having been disclaimed by his chiefs before the morning of the 9th July, that is to say before the " Morea " left Marseilles, the British Police might naturally have believed that the brigadier had acted in accordance with his instructions, or that his conduct had been approved.

WHEREAS, while admitting that an irregularity was committed by the arrest of Savarkar, and by his being handed over to the British Police, there is no rule of International Law imposing, in circumstances such as those which have been set out above, any obligation on the Power which has in its custody a prisoner, to restore him because of a mistake committed by the foreign agent who delivered him up to that Power.

FOR THESE REASONS :

The Arbitral Tribunal decides that the Government of His Britannic Majesty is not required to restore the said Vinayak Damodar Savarkar to the Government of the French Republic. Done at The Hague, at the Permanent Court of Arbitration, February 24th, 1911.

* * * * *

**SOVEREIGN, DIPLOMATIC & CONSULAR
IMMUNITY/PRIVILEGE**

***CASE CONCERNING UNITED STATES DIPLOMATIC AND
CONSULAR STAFF IN TEHRAN***

(United States of America v. Iran)

ICJ Rep.1980

JUDGMENT

1. On 29 November 1979, United States of America instituted proceedings against the Islamic Republic of Iran in respect of a dispute concerning the seizure and holding as hostages of members of the United States diplomatic and consular staff and certain other United States nationals in Tehran.

5. After due notice to the Parties, 18 March 1980 was fixed as the date for the opening of the oral proceedings ; on 18, 19 and 20 March 1980, public hearings were held, in the course of which the Court heard the oral argument of the Agent and Counsel of the United States ; the Government of Iran was not represented at the hearings.

6. Both the countries were parties to one or more of the following Conventions and Protocols

(a) the Vienna Convention on Diplomatic Relations of 1961 ;

(b) the Optional Protocol to that Convention concerning the Compulsory Settlement of Disputes ;

(c) the Vienna Convention on Consular Relations of 1963 ;

(d) the Optional Protocol to that Convention concerning the Compulsory Settlement of Disputes ;

(e) the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, of 1973.

8. In the course of the written proceedings the following Submissions were presented on behalf of the Government of the United States of America :

"The United States requests the Court to adjudge and declare as follows

(a) That the Government of Iran, in tolerating, encouraging, and failing to prevent and punish the conduct described in the preceding Statement of Facts, violated its international legal obligations to the United States as provided by

- Articles 22,24,25,27,29,31,37 and 47 of the Vienna Convention on Diplomatic Relations,

- Articles 28,31,33,34,36 and 40 of the Vienna Convention on Consular Relations,

- Articles 4 and 7 of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, and

- Articles II (4), XIII, XVIII and XIX of the Treaty of Amity, Economic Relations, and Consular Rights between the United States and Iran, and

- Articles 2 (3), 2 (4) and 33 of the Charter of the United Nations ;

(b) That pursuant to the foregoing international legal obligations, the Government of Iran is under a particular obligation immediately to secure the release of all United States nationals currently being detained within the premises of the United States Embassy in Tehran and to assure that all such persons and all other United States nationals in Tehran are allowed to leave Iran safely ;

(c) That the Government of Iran shall pay to the United States, in its own right and in the exercise of its right of diplomatic protection of its nationals, reparation for the foregoing violations of Iran's international legal obligations to the United States, in a sum to be determined by the Court ; and

(d) That the Government of Iran submit to its competent authorities for the purpose of prosecution those persons responsible for the crimes committed against the premises and staff of the United States Embassy and against the premises of its Consulates" ; in the Memorial :

"The Government of the United States respectfully requests that the Court adjudge and declare as follows :

(a) that the Government of the Islamic Republic of Iran, in permitting, tolerating, encouraging, adopting, and endeavoring to exploit, as well as in failing to prevent and punish, the conduct described in the Statement of the Facts, violated its international legal obligations to the United States as provided by :

- Articles 22, 24, 25, 26, 27, 29, 31, 37, 44 and 47 of the Vienna Convention on Diplomatic Relations

- Articles 5, 27, 28, 31, 33, 34, 35, 36, 40 and 72 of the Vienna Convention on Consular Relations :

- Article II (4), XIII, XVIII and XIX of the Treaty of Amity, Economic Relations, and Consular Rights between the United States of America and Iran ; and

- Articles 2,4 and 7 of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents ;

(b) That, pursuant to the foregoing international legal obligations :

(i) The Government of the Islamic Republic of Iran shall immediately ensure that the premises at the United States Embassy, Chancery and Consulates are restored to the possession of the United States authorities under their exclusive control, and shall ensure their inviolability and effective protection as provided for by the treaties in force between the two States, and by general international law ;

(ii) the Government of the Islamic Republic of Iran shall ensure the immediate release, without any exception, of all persons of United States nationality who are or have been held in the Embassy of the United States of America or in the Ministry of Foreign Affairs in Tehran, or who are or have been held as hostages elsewhere, and afford full protection to all such persons, in accordance with the treaties in force between the two States, and with general international law ;

(iii) the Government of the Islamic Republic of Iran shall, as from that moment, afford to all the diplomatic and consular personnel of the United States the protection, privileges and immunities to which they are entitled under the treaties in force between the two States, and under general international law, including immunity from any form of criminal jurisdiction and freedom and facilities to leave the territory of Iran ;

(iv) the Government of the Islamic Republic of Iran shall, in affording the diplomatic and consular personnel of the United States the protection, privileges and immunities to which they are entitled, including immunity from any form of criminal jurisdiction, ensure that no such personnel shall be obliged to appear on trial or as a witness, deponent, source of information, or in any other role, at any proceedings, whether formal or informal, initiated by or with the acquiescence of the Iranian Government, whether such proceedings be denominated a 'trial', 'grand jury', 'international commission' or otherwise ;

v) the Government of the Islamic Republic of Iran shall submit to its competent authorities for the purpose of prosecution, or extradite to the United States, those persons responsible for the crimes committed against the personnel and premises of the United States Embassy and Consulates in Iran ;

(c) that the United States of America is entitled to the payment to it, in its own right and in the exercise of its right of diplomatic protection of its nationals held hostage, of reparation by the Islamic Republic of Iran for the violations of the above international legal obligations which it owes to the United States, in a sum to be determined by the Court at a subsequent stage of the proceedings."

17. At approximately 10.30 a.m. on 4 November 1979, during the course of a demonstration of approximately 3,000 persons, the United States Embassy compound in Tehran was overrun by a strong armed group of several hundred people. The Iranian security personnel are reported to have simply disappeared from the scene ; at all events it is established that they made no apparent effort to deter or prevent the demonstrators from seizing the Embassy's premises. The invading group (who subsequently described themselves as "Muslim Student Followers of the Imam's Policy", and who will hereafter be referred to as "the militants") gained access by force to the compound and to the ground floor of the Chancery building. Over two hours after the beginning of the attack, and after the militants had attempted to set fire to the Chancery building and to cut through the upstairs steel doors with a torch, they gained entry to the upper floor ; one hour later they gained control of the main vault. The militants also seized the other buildings, including the various residences, on the Embassy compound. In the course of the attack, all the diplomatic and consular personnel and other persons present in the premises were seized as hostages, and detained in the Embassy compound ; subsequently other United States personnel and one United States

private citizen seized elsewhere in Tehran were brought to the compound and added to the number of hostages.

18. During the three hours or more of the assault, repeated calls for help were made from the Embassy to the Iranian Foreign Ministry, and repeated efforts to secure help from the Iranian authorities were also made through direct discussions by the United States Chargé d'affaires, who was at the Foreign Ministry at the time, together with two other members of the mission. From there he made contact with the Prime Minister's Office and with Foreign Ministry officials. A request was also made to the Iranian Chargé d'affaires in Washington for assistance in putting an end to the seizure of the Embassy. Despite these repeated requests, no Iranian forces were sent in time to provide relief and protection to the Embassy. In fact when Revolutionary Guards ultimately arrived on the scene, despatched by the Government "to prevent clashes", they considered that their task was merely to "protect the safety of both the hostages and the students", according to statements subsequently made by the Iranian Government's spokesman, and by the operations commander of the Guards. No attempt was made by the Iranian Government to clear the Embassy premises, to rescue the persons held hostage, or to persuade the militants to terminate their action against the Embassy.

19. During the morning of 5 November, only hours after the seizure of the Embassy, the United States Consulates in Tabriz and Shiraz were also seized ; again the Iranian Government took no protective action. The operation of these Consulates had been suspended since the attack in February 1979 (paragraph 14 above), and therefore no United States personnel were seized on these premises..

35. In its letter of 9 December 1979 the Government of Iran maintained that the Court could not and should not take cognizance of the present case for another reason, namely, The problem involved in the conflict between Iran and the United States is thus not one of the interpretation and the application of the treaties upon which the American Application is based, but results from an overall situation containing much more fundamental and more complex elements. Consequently, the Court cannot examine the American Application divorced from its proper context, namely the whole political dossier of the relations between Iran and the United States over the last 25 years. This dossier includes, *inter alia*, all the crimes perpetrated in Iran by the American Government, in particular the coup *d'état* of 1953 stirred up and carried out by the CIA, the overthrow of the lawful national government of Dr. Mossadegh, the restoration of the Shah and of his régime which was under the control of American interests, and all the social, economic, cultural and political consequences of the direct interventions in our internal affairs, as well as grave, flagrant and continuous violations of all international norms, committed by the United States in Iran."

36. The Court, however, in its Order of 15 December 1979, made it clear that the seizure of the United States Embassy and Consulates and the detention of internationally protected persons as hostages cannot be considered as something "secondary" or "marginal", having regard to the importance of the legal principles involved. It also referred to a statement of the Secretary-General of the United Nations, and to Security Council resolution 457 (1979), as evidencing the importance attached by the international community as a whole to the observance of those principles in the present case as well as its concern at the dangerous level

of tension between Iran and the United States. The Court, at the same time, pointed out that no provision of the Statute or Rules contemplates that the Court should decline to take cognizance of one aspect of a dispute merely because that dispute has other aspects, however important. It further underlined that, if the Iranian Government considered the alleged activities of the United States in Iran legally to have a close connection with the subject-matter of the United States' Application, it was open to that Government to present its own arguments regarding those activities to the Court either by way of defense in a Counter-Memorial or by way of a counter-claim.

In the present case the principal claims of the United States relate essentially to alleged violations by Iran of its obligations to the United States under the Vienna Conventions of 1961 on Diplomatic Relations and of 1963 on Consular Relations. With regard to these claims the United States has invoked as the basis for the Court's jurisdiction Article 1 of the Optional Protocols concerning the Compulsory Settlement of Disputes which accompany these Conventions. The United Nations publication *Multilateral Treaties in respect of which the Secretary-General Performs Depositary Functions* lists both Iran and the United States as parties to the Vienna Conventions of 1961 and 1963, as also to their accompanying Protocols concerning the Compulsory Settlement of Disputes, and in each case without any reservation to the instrument in question. The Vienna Conventions, which codify the law of diplomatic and consular relations, state principles and rules essential for the maintenance of peaceful relations between States and accepted throughout the world by nations of all creeds, cultures and political complexions. Moreover, the Iranian Government has not maintained in its communications to the Court that the two Vienna Conventions and Protocols are not in force as between Iran and the United States. Accordingly, as indicated in the Court's Order of 15 December 1979, the Optional Protocols manifestly provide a possible basis for the Court's jurisdiction, with respect to the United States' claims under the Vienna Conventions of 1961 and 1963. It only remains, therefore, to consider whether the present dispute in fact falls within the scope of their provisions.

47. The occupation of the United States Embassy by militants on 4 November 1979 and the detention of its personnel as hostages was an event of a kind to provoke an immediate protest from any government, as it did from the United States Government, which dispatched a special emissary to Iran to deliver a formal protest. Although the special emissary, denied all contact with Iranian officials, never entered Iran, the Iranian Government was left in no doubt as to the reaction of the United States to the taking over of its Embassy and detention of its diplomatic and consular staff as hostages. Indeed, the Court was informed that the United States was meanwhile making its views known to the Iranian Government through its Charge d'affaires, who has been kept since 4 November 1979 in the Iranian Foreign Ministry itself, where he happened to be with two other members of his mission during the attack on the Embassy. In any event, by a letter of 9 November 1979, the United States brought the situation in regard to its Embassy before the Security Council. The Iranian Government did not take any part in the debates on the matter in the Council, and it was still refusing to enter into any discussions on the subject when, on 29 November 1979, the United States filed the present Application submitting its claims to the Court. It is clear that on that date there existed

a dispute arising out of the interpretation or application of the Vienna Conventions and thus one falling within the scope of Article 1 of the Protocols.

50. The United States also presents claims in respect of alleged violations by Iran of Articles II, paragraph 4, XIII, XVIII and XIX of the Treaty of Amity, Economic Relations, and Consular Rights of 1955 between the United States and Iran, which entered into force on 16 June 1957.

54. No suggestion has been made by Iran that the 1955 Treaty was not in force on 4 November 1979 when the United States Embassy was overrun and its nationals taken hostage, or on 29 November when the United States submitted the dispute to the Court. The very purpose of a treaty of amity, and indeed of a treaty of establishment, is to promote friendly relations between the two countries concerned, and between their two peoples, more especially by mutual undertakings to ensure the protection and security of their nationals in each other's territory. It is precisely when difficulties arise that the treaty assumes its greatest importance, and the whole object of Article XXI, paragraph 2, of the 1955 Treaty was to establish the means for arriving at a friendly settlement of such difficulties by the Court or by other peaceful means. It would, therefore, be incompatible with the whole purpose of the 1955 Treaty if recourse to the Court under Article XXI, paragraph 2, were now to be found not to be open to the parties precisely at the moment when such recourse was most needed. Furthermore, although the machinery for the effective operation of the 1955 Treaty has, no doubt, now been impaired by reason of diplomatic relations between the two countries having been broken off by the United States, its provisions remain part of the corpus of law applicable between the United States and Iran.

56. The principal facts material for the Court's decision on the merits of The present case have been set out earlier in this Judgment. Those facts have to be looked at by the Court from two points of view. First, it must determine how far, legally, the acts in question may be regarded as imputable to the Iranian State. Secondly, it must consider their compatibility or incompatibility with the obligations of Iran under treaties in force or under any other rules of international law that may be applicable. The events which are the subject of the United States' claims fall into two phases which it will be convenient to examine separately.

57. The first of these phases covers the armed attack on the United States Embassy by militants on 4 November 1979, the overmining of its premises, the seizure of its inmates as hostages, the appropriation of its property and archives and the conduct of the Iranian authorities in the face of those occurrences. The attack and the subsequent overrunning, bit by bit, of the whole Embassy premises, was an operation which continued over a period of some three hours without any body of police, any military unit or any Iranian official intervening to try to stop or impede it from being carried through to its completion. The result of the attack was considerable damage to the Embassy premises and property, the forcible opening and seizure of its archives, the confiscation of the archives and other documents found in the Embassy and, most grave of all, the seizure by force of its diplomatic and consular personnel as hostages, together with two United States nationals.

58. No suggestion has been made that the militants, when they executed their attack on the Embassy, had any form of official status as recognized "agents" or organs of the Iranian

State. Their conduct in mounting the attack, overrunning the Embassy and seizing its inmates as hostages cannot, therefore, be regarded as imputable to that State on that basis. Their conduct might be considered as itself directly imputable to the Iranian State only if it were established that, in fact, on the occasion in question the militants acted on behalf on the State, having been charged by some competent organ of the Iranian State to carry out a specific operation. The information before the Court does not, however, suffice to establish with the requisite certainty the existence at that time of such a link between the militants and any competent organ of the State.

59. Previously, it is true, the religious leader of the country, the Ayatollah Khomeini, had made several public declarations inveighing against the United States as responsible for all his country's problems. In so doing, it would appear, the Ayatollah Khomeini was giving utterance to the general resentment felt by supporters of the revolution at the admission of the former Shah to the United States. The information before the Court also indicates that a spokesman for the militants, in explaining their action afterwards, did expressly refer to a message issued by the Ayatollah Khomeini, on 1 November 1979. In that message the Ayatollah Khomeini had declared that it was "up to the dear pupils, students and theological students to expand with all their might their attacks against the United States and Israel, so they may force the United States to return the deposed and criminal shah, and to condemn this great plot" (that is, a plot to stir up between the main streams of Islamic thought). In the view of the Court, however, it would be going too far to interpret such general declarations of the Ayatollah Khomeini to the people or students of Iran as amounting to an authorization from the State to undertake the specific operation of invading and seizing the United States Embassy. To do so would, indeed, conflict with the assertions of the militants themselves who are reported to have claimed credit for having devised and carried out the plan to occupy the Embassy. Again, congratulations after the event, such as those reportedly telephoned to the militants by the Ayatollah Khomeini on the actual evening of the attack, and other subsequent statements of official approval, though highly significant in another context shortly to be considered, do not alter the initially independent and unofficial character of the militants' attack on the Embassy.

60. The first phase, here under examination, of the events complained of also includes the attacks on the United States Consulates at Tabriz and Shiraz. Like the attack on the Embassy, they appear to have been executed by militants not having an official character, and successful because of lack of sufficient protection.

61. The conclusion just reached by the Court, that the initiation of the attack on the United States Embassy on 4 November 1979, and of the attacks on the Consulates at Tabriz and Shiraz the following day, cannot be considered as in itself imputable to the Iranian State does not mean that Iran is, in consequence, free of any responsibility in regard to those attacks ; for its own conduct was in conflict with its international obligations. By a number of provisions of the Vienna Conventions of 1961 and 1963, Iran was placed under the most categorical obligations, as a receiving State, to take appropriate steps to ensure the protection of the United States Embassy and Consulates, their staffs, their archives, their means of communication and the freedom of movement of the members of their staffs.

62. Thus, after solemnly proclaiming the inviolability of the premises of a diplomatic mission, Article 22 of the 1961 Convention continues in paragraph 2 :

"The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity." (Emphasis added.) So, too, after proclaiming that the person of a diplomatic agent shall be inviolable, and that he shall not be liable to any form of arrest or detention,

Article 29 provides :

"The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity." (Emphasis added.)

The obligation of a receiving State to protect the inviolability of the archives and documents of a diplomatic mission is laid down in Article 24, which specifically provides that they are to be "inviolable at any time and wherever they may be. Under Article 25 it is required to "accord full facilities for the performance of the functions of the mission", under Article 26 to "ensure to all members of the mission freedom of movement and travel in its territory", and under Article 27 to "permit and protect free communication on the part of the mission for all official purposes".

Analogous provisions are to be found in the 1963 Convention regarding the privileges and immunities of consular missions and their staffs (Art. 3 1, para. 3, Arts. 40,33,28,34 and 35). In the view of the Court, the obligations of the Iranian Government here in question are not merely contractual obligations established by the Vienna Conventions of 1961 and 1963, but also obligations under general international law.

63. The facts set out in paragraphs 14 to 27 above establish to the satisfaction of the Court that on 4 November 1979 the Iranian Government failed altogether to take any "appropriate steps" to protect the premises, staff and archives of the United States' mission against attack by the militants, and to take any steps either to prevent this attack or to stop it before it reached its completion. They also show that on 5 November 1979 the Iranian Government similarly failed to take appropriate steps for the protection of the United States Consulates at Tabriz and Shiraz. In addition they show, in the opinion of the Court, that the failure of the Iranian Government to take such steps was due to more than mere negligence or lack of appropriate means.

64. The total inaction of the Iranian authorities on that date in face of urgent and repeated requests for help contrasts very sharply with its conduct on several other occasions of a similar kind. Some eight months earlier, on 14 February 1979, the United States Embassy in Tehran had itself been subjected to the armed attack mentioned above (paragraph 14), in the course of which the attackers had taken the Ambassador and his staff prisoner. On that occasion, however, a detachment of Revolutionary Guards, sent by the Government, had arrived promptly, together with a Deputy Prime Minister, and had quickly succeeded in freeing the Ambassador and his staff and restoring the Embassy to him. On 1 March 1979, moreover, the Prime Minister of Iran had sent a letter expressing deep regret at the incident, giving an assurance that appropriate arrangements had been made to prevent any repetition of

such incidents, and indicating the willingness of his Government to indemnify the United States for the damage. On 1 November 1979, only three days before the events which gave rise to the present case, the Iranian police intervened quickly and effectively to protect the United States Embassy when a large crowd of demonstrators spent several hours marching up and down outside it.

Furthermore, on other occasions in November 1979 and January 1980, invasions or attempted invasions of other foreign embassies in Tehran were frustrated or speedily terminated.

65. A similar pattern of facts appears in relation to consulates. In February 1979, at about the same time as the first attack on the United States Embassy, attacks were made by demonstrators on its Consulates in Tabriz and Shiraz ; but the Iranian authorities then took the necessary steps to clear them of the demonstrators. On the other hand, the Iranian authorities took no action to prevent the attack of 5 November 1979, or to restore the Consulates to the possession of the United States. In contrast, when on the next day militants invaded the Iraqi Consulate in Kermanshah, prompt steps were taken by the Iranian authorities to secure their withdrawal from the Consulate. Thus in this case, the Iranian authorities and police took the necessary steps to prevent and check the attempted invasion or return the premises to their rightful owners.

66. As to the actual conduct of the Iranian authorities when faced with the events of 4 November 1979. the information before the Court establishes that, despite assurances previously given by them to the United States Government and despite repeated and urgent calls for help, they took no apparent steps either to prevent the militants from invading the Embassy or to persuade or to compel them to withdraw. Furthermore, after the militants had forced an entry into the premises of the Embassy, the Iranian authorities made no effort to compel or even to persuade them to withdraw from the Embassy and to free the diplomatic and consular staff whom they had made prisoner.

67. This inaction of the Iranian Government by itself constituted clear and serious violation of Iran's obligations to the United States under the provisions of Article 22, paragraph 2, and Articles 24,25,26, 27 and 29 of the 1961 Vienna Convention on Diplomatic Relations, and Articles 5 and 36 of the 1963 Vienna Convention on Consular Relations. Similarly, with respect to the attacks on the Consulates at Tabriz and Shiraz, the inaction of the Iranian authorities entailed clear and serious breaches of its obligations under the provisions of several further articles of the 1963 Convention on Consular Relations. So far as concerns the two private United States nationals seized as hostages by the invading militants, that inaction entailed, albeit incidentally, a breach of its obligations under Article II, paragraph 4, of the 1955 Treaty of Amity, Economic Relations, and Consular Rights which, in addition to the obligations of Iran existing under general international law, requires the parties to ensure "the most constant protection and security" to each other's nationals in their respective territories.

68. The Court is therefore led inevitably to conclude, in regard to the first phase of the events which has so far been considered, that on 4 November 1979 the Iranian authorities :

(a) were fully aware of their obligations under the conventions in force to take appropriate steps to protect the premises of the United States Embassy and its diplomatic and consular staff from any attack and from any infringement of their inviolability, and to ensure the security of such other persons as might be present on the said premises ;

(b) were fully aware, as a result of the appeals for help made by the United States Embassy, of the urgent need for action on their part ;

(c) had the means at their disposal to perform their obligations ;

d) completely failed to comply with these obligations. Similarly, the Court is led to conclude that the Iranian authorities were equally aware of their obligations to protect the United States Consulates at Tabriz and Shiraz, and of the need for action on their part, and similarly failed to use the means which were at their disposal to comply with their obligations.

69. The second phase of the events which are the subject of the United States' claims comprises the whole series of facts which occurred following the completion of the occupation of the United States Embassy by the militants, and the seizure of the Consulates at Tabriz and Shiraz. The occupation having taken place and the diplomatic and consular personnel of the United States' mission having been taken hostage, the action required of the Iranian Government by the Vienna Conventions and by general international law was manifest. Its plain duty was at once to make every effort, and to take every appropriate step, to bring these flagrant infringements of the inviolability of the premises, archives and diplomatic and consular staff of the United States Embassy to a speedy end, to restore the Consulates at Tabriz and Shiraz to United States control, and in general to re-establish the status quo and to offer reparation for the damage.

70. No such step was, however, taken by the Iranian authorities. At a press conference on 5 November the Foreign Minister, Mr. Yazdi, conceded that "according to international regulations the Iranian Government is duty bound to safeguard the life and property of foreign nationals". But he made no mention of Iran's obligation to safeguard the inviolability of foreign embassies and diplomats ; and he ended by announcing that the action of the students "enjoys the endorsement and support of the government, because America herself is responsible for this incident". As to the Prime Minister, Mr. Bazargan, he does not appear to have made any statement on the matter before resigning his office on 5 November.

71. In any event expressions of approval of the take-over of the Embassy, and indeed also of the Consulates at Tabriz and Shiraz, by militants came immediately from numerous Iranian authorities, including religious, judicial, executive, police and broadcasting authorities. Above all, the Ayatollah Khomeini himself made crystal clear the endorsement by the State both of the take-over of the Embassy and Consulates and of the detention of the Embassy staff as hostages.

72. At any rate, thus fortified in their action, the militants at the Embassy at once went one step farther. On 6 November they proclaimed that the Embassy, which they too referred to as "the U.S. center of plots and espionage", would remain under their occupation. and that

they were watching "most closely" the members of the diplomatic staff taken hostage whom they called "U.S. mercenaries and spies".

73. The seal of official government approval was finally set on this situation by a decree issued on 17 November 1979 by the Ayatollah Khomeini. His decree began with the assertion that the American Embassy was "a center of espionage and conspiracy" and that "those people who hatched plots against our Islamic movement in that place do not enjoy international diplomatic respect". He went on expressly to declare that the premises of the Embassy and the hostages would remain as they were until the United States had handed over the former Shah for trial and returned his property to Iran. This statement of policy the Ayatollah qualified only to the extent of requesting the militants holding the hostages to "hand over the blacks and the women, if it is proven that they did not spy, to the Ministry of Foreign Affairs so that they may be immediately expelled from Iran". As to the rest of the hostages, he made the Iranian Government's intentions all too clear : "The noble Iranian nation will not give permission for the release of the rest of them. Therefore, the rest of them will be under arrest until the American Government acts according to the wish of the nation."

74. The policy thus announced by the Ayatollah Khomeini, of maintaining the occupation of the Embassy and the detention of its inmates as hostages for the purpose of exerting pressure on the United States Government was complied with by other Iranian authorities and endorsed by them repeatedly in statements made in various contexts. The result of that policy was fundamentally to transform the legal nature of the situation created by the occupation of the Embassy and the detention of its diplomatic and consular staff as hostages. The approval given to these facts by the Ayatollah Khomeini and other organs of the Iranian State, and the

decision to perpetuate them, translated continuing occupation of the Embassy and detention of the hostages into acts of that State. The militants, authors of the invasion and jailers of the hostages, had now become agents of the Iranian State for whose acts the State itself was internationally responsible. On 6 May 1980, the Minister for Foreign Affairs, Mr. Ghotbzadeh, is reported to have said in a television interview that the occupation of the United States Embassy had been "done by Our nation".

Moreover, in the prevailing circumstances the situation of the hostages was aggravated by the fact that their detention by the militants did not even offer the normal guarantees which might have been afforded by police and security forces subject to the discipline and the control of official superiors.

75. During the six months which have elapsed since the situation just described was created by the decree of the Ayatollah Khomeini, it has undergone no material change. The Court's Order of 15 December 1979 indicating provisional measures, which called for the immediate restoration of the Embassy to the United States and the release of the hostages, was publicly rejected by the Minister for Foreign Affairs on the following day and has been ignored by all Iranian authorities. On two occasions, namely on 23 February and on 7 April 1980, the Ayatollah Khomeini laid it down that the hostages should remain at the United States Embassy under the control of the militants until the new Iranian parliament should have assembled and taken a decision as to their fate. His adherence to that policy also made it

impossible to obtain his consent to the transfer of the hostages from the control of the militants to that of the Government or of the Council of the Revolution. In any event, while highly desirable from the humanitarian and safety points of view, such a transfer would not have resulted in any material change in the legal situation, for its sponsors themselves emphasized that it must not be understood as signifying the release of the hostages.

76. The Iranian authorities' decision to continue the subjection of the premises of the United States Embassy to occupation by militants and of the Embassy staff to detention as hostages, clearly gave rise to repeated and multiple breaches of the applicable provisions of the Vienna Conventions even more serious than those which arose from their failure to take any steps to prevent the attacks on the inviolability of these premises and staff.

77. In the first place, these facts constituted breaches additional to those already committed of paragraph 2 of Article 22 of the 1961 Vienna Convention on Diplomatic Relations which requires Iran to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of its peace or impairment of its dignity. Paragraphs 1 and 3 of that Article have also been infringed, and continue to be infringed, since they forbid agents of a receiving State to enter the premises of a mission without consent or to undertake any search, requisition, attachment or like measure on the premises. Secondly, they constitute continuing breaches of Article 29 of the same Convention which forbids any arrest or detention of a diplomatic agent and any attack on his person, freedom or dignity. Thirdly, the Iranian authorities are without doubt in continuing breach of the provisions of Articles 25, 26 and 27 of the 1961 Vienna Convention and of pertinent provisions of the 1963 Vienna Convention concerning facilities for the performance of functions, freedom of movement and communications for diplomatic and consular staff, as well as of Article 24 of the former Convention and Article 33 of the latter, which provide for the absolute inviolability of the archives and documents of diplomatic missions and consulates. This particular violation has been made manifest to the world by repeated statements by the militants occupying the Embassy, who claim to be in possession of documents from the archives, and by various government authorities, purporting to specify the contents thereof. Finally, the continued detention as hostages of the two private individuals of United States nationality entails a renewed breach of the obligations of Iran under Article II, paragraph 4, of the 1955 Treaty of Amity, Economic Relations, and Consular Rights.

78. Inevitably, in considering the compatibility or otherwise of the conduct of the Iranian authorities with the requirements of the Vienna Conventions, the Court has focussed its attention primarily on the occupation of the Embassy and the treatment of the United States diplomatic and consular personnel within the Embassy. It is however evident that the question of the compatibility of their conduct with the Vienna Conventions also arises in connection with the treatment of the United States Chargé d'affaires and two members of his staff in the Ministry of Foreign Affairs on 4 November 1979 and since that date. The facts of this case establish to the satisfaction of the Court that on 4 November 1979 and thereafter the Iranian authorities have withheld from the Chargé d'affaires and the two members of his staff the necessary protection and facilities to permit them to leave the Ministry in safety. Accordingly it appears to the Court that with respect to these three members of the United States' mission

the Iranian authorities have committed a continuing breach of their obligations under Articles 26 and 29 of the 1961 Vienna Convention on Diplomatic Relations. It further appears to the Court that the continuation of that situation over a long period has, in the circumstances, amounted to detention in the Ministry 79. The judicial authorities of the Islamic Republic of Iran and the Minister for Foreign Affairs have frequently voiced or associated themselves with, a threat first announced by the militants, of having some of the hostages submitted to trial before a court or some other body. These threats may at present merely be acts in contemplation. But the Court considers it necessary here and now to stress that, if the intention to submit the hostages to any form of criminal trial or investigation were to be put into effect, that would constitute a grave breach by Iran of its obligations under Article 31, paragraph 1, of the 1961 Vienna Convention. This paragraph states in the most express terms : "A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State." Again, if there were an attempt to compel the hostages to bear witness, a suggestion renewed at the time of the visit to Iran of the Secretary-General's Commission, Iran would without question be violating paragraph 2 of that same Article of the 1961 Vienna Convention which provides that : "A diplomatic agent is not obliged to give evidence as a witness."

80. The facts of the present case, viewed in the light of the applicable rules of law, thus speak loudly and clearly of successive and still continuing breaches by Iran of its obligations to the United States under the Vienna Conventions of 1961 and 1963, as well as under the Treaty of 1955. Before drawing from this finding the conclusions which flow from it, in terms of the international responsibility of the Iranian State vis-à-vis the United States of America, the Court considers that it should examine one further point. The Court cannot overlook the fact that on the Iranian side, in often imprecise terms, the idea has been put forward that the conduct of the Iranian Government, at the time of the events of 4 November 1979 and subsequently, might be justified by the existence of special circumstances.

81. In his letters of 9 December 1979 and 16 March 1980, as previously recalled, Iran's Minister for Foreign Affairs referred to the present case as only "a marginal and secondary aspect of an overall problem". This problem, he maintained, "involves, inter *alia*, more than 25 years of continual interference by the United States in the internal affairs of Iran, the shameless exploitation of our country, and numerous crimes perpetrated against the Iranian people, contrary to and in conflict with all international and humanitarian norms". In the first of the two letters he indeed singled out amongst the "crimes" which he attributed to the United States an alleged complicity on the part of the Central Intelligence Agency in the coup d'état of 1953 and in the restoration of the Shah to the throne of Iran. Invoking these alleged crimes of the United States, the Iranian Foreign Minister took the position that the United States' Application could not be examined by the Court divorced from its proper context, which he insisted was "the whole political dossier of the relations between Iran and the United States over the last 25 years".

82. The Court must however observe, first of all, that the matters alleged the Iranian Foreign Minister's letters of 9 December 1979 and 16 March 1980 are of a kind which, if invoked in legal proceedings, must clearly be established to the satisfaction of the tribunal with all the requisite proof. The Court, in its Order of 15 December 1979, pointed out that if

the Iranian Government considered the alleged activities of the United States in Iran legally to have a close connection with the subject-matter of the Application it was open to Iran to present its own case regarding those activities to the Court by way of defence to the United States' claims. The Iranian Government, however, did not appear before the Court. Moreover, even in his letter of 16 March 1980, transmitted to the Court some three months after the issue of that Order, the Iranian Foreign Minister did not furnish the Court with any further information regarding the alleged criminal activities of the United States in Iran, or explain on what legal basis he considered these allegations to constitute a relevant answer to the United States' claims. The large body of information submitted by the United States itself to the Court includes, it is true, some statements emanating from Iranian authorities or from the militants in which reference is made to alleged espionage and interference in Iran by the United States centered upon its Embassy in Tehran. These statements are, however, of the same general character as the assertions of alleged criminal activities of the United States contained in the Foreign Minister's letters, and are unsupported by evidence furnished by Iran before the Court. Hence they do not provide a basis on which the Court could form a judicial opinion on the truth or otherwise of the matters there alleged.

83. In any case, even if the alleged criminal activities of the United States in Iran could be considered as having been established, the question would remain whether they could be regarded by the Court as constituting a justification of Iran's conduct and thus a defence to the United States' claims in the present case. The Court, however, is unable to accept that they can be so regarded. This is because diplomatic law itself provides the necessary means of defence against, and sanction for, illicit activities by members of diplomatic or consular missions.

84. The Vienna Conventions of 1961 and 1963 contain express provisions to meet the case when members of an embassy staff, under the cover of diplomatic privileges and immunities, engage in such abuses of their functions as espionage or interference in the internal affairs of the receiving State. It is precisely with the possibility of such abuses in contemplation that Article 41, paragraph 1, of the Vienna Convention on Diplomatic Relations, and Article 55, paragraph 1, of the Vienna Convention on Consular Relations, provide "Without prejudice to their privileges and immunities, it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the receiving State. They also have a duty not to interfere in the internal affairs of that State." Paragraph 3 of Article 41 of the 1961 Convention further States : "The premises of the mission must not be used in any manner incompatible with the functions of the missions . . . ": an analogous provision, with respect to consular premises is to be found in Article 55, paragraph 2, of the 1963 Convention.

85. Thus, it is for the very purpose of providing a remedy for such possible abuses of diplomatic functions that Article 9 of the 1961 Convention on Diplomatic Relations stipulates : "1. The receiving State may at any time and without having to explain its decision, notify the sending State that the head of the mission or any member of the diplomatic staff of the mission is *persona non grata* or that any other member of the staff of the mission is not acceptable. In any such case, the sending State shall, as appropriate, either recall the person

concerned or terminate his functions with the mission. A person may be declared *non grata* or not acceptable before arriving in the territory of the receiving State.

2. If the sending State refuses or fails within a reasonable period to carry out its obligations under paragraph 1 of this Article, the receiving State may refuse to recognize the person concerned as a member of the mission." The 1963 Convention contains, in Article 23, paragraphs 1 and 4, analogous provisions in respect of consular officers and consular staff. Paragraph 1 of Article 9 of the 1961 Convention, and paragraph 4 of Article 23 of the 1963 Convention, take account of the difficulty that may be experienced in practice of proving such abuses in every case or, indeed, of determining exactly when exercise of the diplomatic function, expressly recognized in Article 3 (1) (d) of the 1961 Convention, of "ascertaining by all lawful means conditions and developments in the receiving State" maybe considered as involving such acts as "espionage" or "interference in internal affairs". The way in which Article 9, paragraph 1, takes account of any such difficulty is by providing expressly in its opening sentence that the receiving State may "at any time and without having to explain its decision" notify the sending State that any particular member of its diplomatic mission is '*persona non grata*' or "not acceptable" (and similarly Article 23, paragraph 4, of the 1963 Convention provides that "the receiving State is not obliged to give to the sending State reasons for its decision"). Beyond that remedy for dealing with abuses of the diplomatic function by individual members of a mission, a receiving State has in its hands a more radical remedy if abuses of their functions by members of a mission reach serious proportions. This is the power which every receiving State has, at its own discretion, to break off diplomatic relations with a sending State and to call for the immediate closure of the offending mission.

86. The rules of diplomatic law, in short, constitute a self-contained régime which, on the one hand, lays down the receiving State's obligations regarding the facilities, privileges and immunities to be accorded to diplomatic missions and, on the other, foresees their possible abuse by members of the mission and specifies the means at the disposal of the receiving State to counter any such abuse. These means are, by their nature, entirely efficacious, for unless the sending State recalls the member of the mission objected to forthwith, the prospect of the almost immediate loss of his privileges and immunities, because of the withdrawal by the receiving State of his recognition as a member of the mission, will in practice compel that

person, in his own interest, to depart at once. But the principle of the inviolability of the persons of diplomatic agents and the premises of diplomatic missions is one of the very foundations of this long-established régime, to the evolution of which the traditions of Islam made a substantial contribution. The fundamental character of the principle of inviolability is, moreover, strongly underlined by the provisions of Articles 44 and 45 of the Convention of 1961 (cf. also Articles 26 and 27 of the Convention of 1963). Even in the case of armed conflict or in the case of a breach in diplomatic relations those provisions require that both the inviolability of the members of a diplomatic mission and of the premises, property and archives of the mission must be respected by the receiving State. Naturally, the observance of this principle does not mean - and this the Applicant Government expressly acknowledges - that a diplomatic agent caught in the act of committing an assault or other offence may not, on

occasion, be briefly arrested by the police of the receiving State in order to prevent the commission of the particular crime. But such eventualities bear no relation at all to what occurred in the present case.

87. In the present case, the Iranian Government did not break off diplomatic relations with the United States ; and in response to a question put to him by a Member of the Court, the United States Agent informed the Court that at no time before the events of 4 November 1979 had the Iranian Government declared, or indicated any intention to declare, any member of the United States diplomatic or consular staff in Tehran *persona non grata*. The Iranian Government did not, therefore, employ the remedies placed at its disposal by diplomatic law specifically for dealing with activities of the kind of which it now complains. Instead, it allowed a group of militants to attack and occupy the United States Embassy by force, and to seize the diplomatic and consular staff as hostages ; instead, it has endorsed that action of those militants and has deliberately maintained their occupation of the Embassy and detention of its staff as a means of coercing the sending State. It has, at the same time, refused altogether to discuss this situation with representatives of the United States. The Court, therefore, can only conclude that Iran did not have recourse to the normal and efficacious means at its disposal, but resorted to coercive action against the United States Embassy and its staff.

88. Anything could hardly be considered as having provided a justification for the attack on the United States Embassy and its diplomatic mission. Whatever extenuation of the responsibility to be attached to the conduct of the Iranian authorities may be found in the offense felt by them because of the admission of the Shah to the United States, that feeling of offence could not affect the imperative character of the legal obligations incumbent upon the Iranian Government which is not altered by a state of diplomatic tension between the two countries. Still less could a mere refusal or failure on the part of the United States to extradite the Shah to Iran be considered to modify the obligations of the Iranian authorities, quite apart from any legal difficulties, in internal or international law, there might be in acceding to such a request for extradition.

89. Accordingly the Court finds that no circumstances exist in the present case which are capable of negating the fundamentally unlawful character of the conduct pursued by the Iranian State on 4 November 1979 and thereafter. This finding does not however exclude the possibility that some of the circumstances alleged, if duly established, may later be found to have some relevance in determining the consequences of the responsibility incurred by the Iranian State with respect to that conduct, although they could not be considered to alter its unlawful character.

90. On the basis of the foregoing detailed examination of the merits of the case, the Court finds that Iran, by committing successive and continuing breaches of the obligations laid upon it by the Vienna Conventions of 1961 and 1963 on Diplomatic and Consular Relations, the Treaty of Amity, Economic Relations, and Consular Rights of 1955, and the applicable rules of general international law, has incurred responsibility towards the United States. As to the consequences of this finding, it clearly entails an obligation on the part of the Iranian State to make reparation for the injury thereby caused to the United States. Since

however Iran's breaches of its obligations are still continuing, the form and amount of such reparation cannot be determined at the present date.

91. At the same time the Court finds itself obliged to stress the cumulative effect of Iran's breaches of its obligations when taken together. A marked escalation of these breaches can be seen to have occurred in the transition from the failure on the part of the Iranian authorities to oppose the armed attack by the militants on 4 November 1979 and their seizure of the Embassy premises and staff, to the almost immediate endorsement by those authorities of the situation thus created, and then to their maintaining deliberately for many months the occupation of the Embassy and detention of its staff by a group of armed militants acting on behalf of the State for the purpose of forcing the United States to bow to certain demands. Wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights. But what has above all to be emphasized is the extent and seriousness of the conflict between the conduct of the Iranian State and its obligations under the whole corpus of the international rules of which diplomatic and consular law is comprised, rules the fundamental character of which the Court must here again strongly affirm. In its Order of 15 December 1979, the Court made a point of stressing that the obligations laid on States by the two Vienna Conventions are of cardinal importance for the maintenance of good relations between States in the interdependent world of today. **"There is no more fundamental prerequisite for the conduct of relations between States", the Court there said, "than the inviolability of diplomatic envoys and embassies,** so that throughout history nations of all creeds and cultures have observed reciprocal obligations for that purpose." The institution of diplomacy, the Court continued, has proved to be "an instrument essential for effective Co-operation in the international community, and for enabling States, irrespective of their differing constitutional and social systems, to achieve mutual understanding and to resolve their differences by peaceful means" (I. *C.J. Reports* 1979, p. 19).

92. It is a matter of deep regret that the situation which occasioned those observations has not been rectified since they were made. Having regard to their importance the Court considers it essential to reiterate them in the present Judgment. The frequency with which at the present time the principles of international law governing diplomatic and consular relations are set at naught by individuals or groups of individuals is already deplorable. But this case is unique and of very particular gravity because here it is not only private individuals or groups of individuals that have disregarded and set at naught the inviolability of a foreign embassy, but the **government of the receiving State itself.** Therefore in recalling yet again the extreme importance of the principles of law which it is called upon to apply in the present case, the Court considers it to be its duty to draw the attention of the entire international community, of which Iran itself has been a member since time immemorial, to the irreparable harm that may be caused by events of the kind now before the Court. Such events cannot fail to undermine the edifice of law carefully constructed by mankind over period of centuries, the maintenance of which is vital for the security and well-being of the complex international

community of the present day, to which it is more essential than ever that the rules developed to ensure the

ordered progress of relations between its members should be constantly and scrupulously respected.

93. Before drawing the appropriate conclusions from its findings on the merits in this case, the Court considers that it cannot let pass without comment the incursion into the territory of Iran made by United States military units on 24-25 April 1980, an account of which has been given earlier in this Judgment (paragraph 32). No doubt the United States Government may have had understandable preoccupations with respect to the well-being of its nationals held hostage in its Embassy for over five months. No doubt also the United States Government may have had understandable feelings of frustration at Iran's long-continued detention of the hostages, notwithstanding two resolutions of the Security Council as well as the Court's own Order of 15 December 1979 calling expressly for their immediate release. Nevertheless, in the circumstances of the present proceedings, the Court cannot fail to express its concern in regard to the United States' incursion into Iran. When, as previously recalled, this case had become ready for hearing on 19 February 1980, the United States Agent requested the Court, owing to the delicate stage of certain negotiations, to defer setting a date for the hearings. Subsequently, on 11 March, the Agent informed the Court of the United States Government's anxiety to obtain an early judgment on the merits of the case. The hearings were accordingly held on 18, 19 and 20 March, and the Court was in course of preparing the present judgment adjudicating upon the claims of the United States against Iran when the operation of 24 April 1980 took place. The Court therefore feels bound to observe that an operation undertaken in those circumstances, from whatever motive, is of a kind calculated to undermine respect for the judicial process in international relations ; and to recall that in paragraph 47, 1 B, of its Order of 15 December 1979 the Court had indicated that no action was to be taken by either party which might aggravate the tension between the two countries.

94. At the same time, however, the Court must point out that neither the question of the legality of the operation of 24 April 1980, under the Charter of the United Nations and under general international law, nor any possible question of responsibility flowing from it, is before the Court. It must also point out that this question can have no bearing on the evaluation of the conduct of the Iranian Government over six months earlier, on 4 November 1979, which is the subject-matter of the United States' Application. It follows that the findings reached by the Court in this Judgment are not affected by that operation.

95. For these reasons, THE COURT,

1. By thirteen votes to two, *Decides* that the Islamic Republic of Iran, by the conduct which the Court has set out in this Judgment, has violated in several respects, and is still violating, obligations owed by it to the United States of America under international conventions in force between the two countries, as well as under long-established rules of general international law ;

2. By thirteen votes to two, *Decides* that the violations of these obligations engage the responsibility of the Islamic Republic of Iran towards the United States of America under international law ;

3. Unanimously, *Decides* that the Government of the Islamic Republic of Iran must immediately take all steps to redress the situation resulting from the events of 4 November 1979 and what followed from these events, and to that end :

(a) must immediately terminate the unlawful detention of the United States Chargé d'affaires and other diplomatic and consular staff and other United States nationals now held hostage in Iran, and must immediately release each and every one and entrust them to the protecting Power (Article 45 of the 1961 Vienna Convention on Diplomatic Relations) ;

(b) must ensure that all the said persons have the necessary means of leaving Iranian territory, including means of transport ;

(c) must immediately place in the hands of the protecting Power the premises, property, archives and documents of the United States Embassy in Tehran and of its Consulates in Iran

4. Unanimously, *Decides* that no member of the United States diplomatic or consular staff may be kept in Iran to be subjected to any form of judicial proceedings or to participate in them as a witness ;

5. By twelve votes to three, *Decides* that the Government of the Islamic Republic of Iran is under an obligation to make reparation to the Government of the United States of America for the injury caused to the latter by the events of 4 November 1979 and what followed from these events ;

6. By fourteen votes to one, *Decides* that the form and amount of such reparation, failing agreement between the Parties, shall be settled by the Court, and reserves for this purpose the subsequent procedure in the case.

(Signed) Humphrey WALDOCK, President.

JADHAV CASE
(INDIA v. PAKISTAN)
ICJ Rep. 2019
(Consular Immunity)

(1) Factual Background: Since 3 March 2016, an individual named Kulbhushan Sudhir Jadhav (hereinafter “Mr. Jadhav”) has been in the custody of Pakistani authorities. The circumstances of his apprehension remain in dispute between the Parties. According to India, Mr. Jadhav was kidnapped from Iran, where he was residing and carrying out business activities after his retirement from the Indian Navy. He was subsequently transferred to Pakistan and detained for interrogation. Pakistan contends that Mr. Jadhav, whom it accuses of performing acts of espionage and terrorism on behalf of India, was arrested in Balochistan near the border with Iran after illegally entering Pakistani territory. Pakistan explains that, at the moment of his arrest, Mr. Jadhav was in possession of an Indian passport bearing the name “Hussein Mubarak Patel”. India denies these allegations. On 25 March 2016, Pakistan raised the issue with the High Commissioner of India in Islamabad and released a video in which Mr. Jadhav appears to confess to his involvement in acts of espionage and terrorism in Pakistan at the behest of India’s foreign intelligence agency “Research and Analysis Wing” (also referred to by its acronym “RAW”). The circumstances under which the video was recorded are unknown to the Court. On the same day, Pakistan notified the permanent members of the Security Council of the United Nations of the matter. Also on the same day, by means of a Note Verbale from the High Commission of India in Islamabad to the Ministry of Foreign Affairs of Pakistan, India noted the “purported arrest of an Indian” and requested consular access “at the earliest” to “the said individual”. Subsequently, and at least until 9 October 2017, India sent more than ten Notes Verbales in which it identified Mr. Jadhav as its national and sought consular access to him. On 8 April 2016, Pakistani police authorities registered a “First Information Report” (hereinafter “FIR”), which is an official document recording information on the alleged commission of criminal offences. Pakistan explains that, once registered, a FIR enables police authorities to initiate an investigation. In this case, the FIR gave details of Mr. Jadhav’s

alleged involvement in espionage and terrorism activities and stated that he was “under interrogation” by Pakistani military authorities. A supplementary FIR was said to have been registered on 6 September 2016. On 22 July 2016, Mr. Jadhav made a confessional statement, which was allegedly recorded before a magistrate. The trial of Mr. Jadhav started on 21 September 2016 and, according to Pakistan, was conducted before a Field General Court Martial. Various details of the trial were made public by means of a press release and a statement dated 10 and 14 April 2017 respectively. On the basis of this information (from the only source made available to the Court), it appears that Mr. Jadhav was tried under Section 59 of the Pakistan Army Act of 1952 and Section 3 of the Official Secrets Act of 1923. According to Pakistan, after the trial had begun, he was given an additional period of three weeks in order to facilitate the preparation of his defence, for which “a law qualified field officer” was specifically appointed. All witness statements were allegedly recorded under oath in the presence of Mr. Jadhav, who was allowed to put questions to the witnesses. During the trial, a law officer of Pakistan’s Judge Advocate General Branch “remained a part of the Court”. On 2 January 2017, the Adviser to the Prime Minister of Pakistan on Foreign Affairs sent a letter to the Secretary-General of the United Nations informing him of Mr. Jadhav’s arrest and confession, which, in his view, confirmed India’s involvement in activities aimed at “destabilizing Pakistan”. On 23 January 2017, the Ministry of Foreign Affairs of Pakistan sent a “Letter of Assistance for Criminal Investigation against Indian National Kulbhushan Sudhair Jadhev” to the High Commission of India in Islamabad, seeking, in particular, support in “obtaining evidence material and record for the criminal investigation” of Mr. Jadhav’s activities. The letter referred to India’s “earlier assurances of assistance, on a reciprocal basis, in criminal/terrorism matters”, as well as resolution 1373 (2001) adopted by the Security Council concerning measures to prevent and suppress threats to international peace and security caused by terrorist acts. Pakistan claims that, despite reiterated reminders, prior to the hearings before the Court, it has received no “substantive response” from India regarding this request. India, for its part, refers to two Notes Verbales dated 19 June and 11 December 2017, respectively, in which it stated that Pakistan’s request had no legal basis and was not, in any event, supported by credible evidence. On 21 March 2017, the Ministry of Foreign Affairs of Pakistan sent a Note Verbale to the High Commission of India in Islamabad indicating that India’s request for consular access would be considered “in the light of Indian side’s response to Pakistan’s request for assistance in the investigation process and early dispensation of justice”. On 31 March 2017, India replied that “consular access to Mr. Jadhav would be an essential pre-requisite in order to verify the facts and understand the circumstances of his presence in Pakistan”. The Parties raised similar arguments in subsequent diplomatic exchanges. On 10 April 2017, Pakistan announced that Mr. Jadhav had been sentenced to death. This was followed by a press statement issued on 14 April 2017 by the Adviser to the Prime Minister on Foreign Affairs. In addition to the above-mentioned details of Mr. Jadhav’s trial, the statement referred to the availability of the following means of redress: an appeal before a Military Appellate Court within 40 days of the sentence; a mercy petition addressed to the Chief of Army Staff within 60 days of the Military Appellate Court’s decision; and a similar petition addressed to the President of Pakistan within 90 days of the decision of the Chief of Army Staff.

On 26 April 2017, the High Commission of India in Islamabad transmitted to Pakistan, on behalf of Mr. Jadhav’s mother, an “appeal” under Section 133 (B) and a petition to the Federal Government

of Pakistan under Section 131 of the Pakistan Army Act. India asserts that, because Pakistan denied it access to the case file, both documents had to be prepared on the sole basis of information available in the public domain. On 22 June 2017, the Inter Services Public Relations of Pakistan issued a press release announcing that Mr. Jadhav had made a mercy 4 Ord_1173.indb 26 16/07/20 16:02 430 jadhav (judgment) 16 petition to the Chief of Army Staff after the rejection of his appeal by the Military Appellate Court. India claims that it has received no clear information on the circumstances of this appeal or the status of any appeal or petition concerning Mr. Jadhav's sentence. The above-mentioned press release also referred to another confessional statement by Mr. Jadhav recorded on a date and in circumstances that remain unknown to the Court. On 10 November 2017, Pakistan informed India of its decision to allow Mr. Jadhav's wife to visit him on "humanitarian grounds". The offer was extended to Mr. Jadhav's mother on 13 November 2017. At India's request, Pakistan gave assurances that it would ensure the free movement, safety and well-being of the visitors and allow the presence of a diplomatic representative from India. The visit took place on 25 December 2017; however, the Parties disagree over the extent to which Pakistan gave effect to its assurances. On 8 May 2017, the Government of the Republic of India (hereinafter "India") filed in the Registry of the Court an application instituting proceedings against the Islamic Republic of Pakistan (hereinafter "Pakistan") alleging violations of the Vienna Convention on Consular Relations of 24 April 1963 (hereinafter the "Vienna Convention") "in the matter of the detention and trial of an Indian national, Mr. Kulbhushan Sudhir Jadhav", sentenced to death by a military court in Pakistan.

Appoint Pakistan National Judge: Since the Court included upon the Bench no judge of Pakistani nationality, Pakistan proceeded to exercise the right conferred upon it by Article 31, paragraph 2, of the Statute to choose a judge ad hoc to sit in the case; it chose Mr. Tassaduq Hussain Jilani.

India's Claims: In the Application, the following claims were made by India: "(1) A relief by way of immediate suspension of the sentence of death awarded to the accused. (2) A relief by way of restitution in integrum by declaring that the sentence of the military court arrived at, in brazen defiance of the Vienna Convention rights under Article 36, particularly Article 36, paragraph 1 (b), and in defiance of elementary human rights of an accused which are also to be given effect as mandated under Article 14 of the 1966 International Covenant on Civil and Political Rights, is violative of international law and the provisions of the Vienna Convention; and (3) Restraining Pakistan from giving effect to the sentence awarded by the military court, and directing it to take steps to annul the decision of the military court as may be available to it under the law in Pakistan. (4) If Pakistan is unable to annul the decision, then this Court to declare the decision illegal being violative of international law and treaty rights and restrain Pakistan from acting in violation of the Vienna Convention and international law by giving effect to the sentence or the conviction in any manner, and directing it to release the convicted Indian national forthwith."

II. Jurisdiction: India and Pakistan have been parties to the Vienna Convention since 28 December 1977 and 14 May 1969 respectively. They also were, at the time of the filing of the Application, parties to the Optional Protocol without any reservations or declarations. India seeks to found the Court's jurisdiction on Article 36, paragraph 1, of the Statute and on Article I of the Optional Protocol, which provides: "Disputes arising out of the interpretation or application of the

Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol.” The present dispute concerns the question of consular assistance with regard to the arrest, detention, trial and sentencing of Mr. Jadhav. The Court notes that Pakistan has not contested that the dispute relates to the interpretation and application of the Vienna Convention. The Court also notes that, in its Application, written pleadings and final submissions, India asks the Court to declare that Pakistan has violated Mr. Jadhav’s “elementary human rights”, “which are also to be given effect as mandated under Article 14 of the 1966 International Covenant on Civil and Political Rights” (hereinafter the “Covenant”). The Covenant entered into force for India on 10 July 1979 and for Pakistan on 23 September 2010. In this respect, the Court observes that its jurisdiction in the present case arises from Article I of the Optional Protocol and therefore does not extend to the determination of breaches of international law obligations other than those under the Vienna Convention.

III Pakistan’s Objections: In its judgment on the preliminary objections (regarding abuse of Process by India) in the case concerning Immunities and Criminal Proceedings (Equatorial Guinea v. France), the Court ruled that “abuse of rights cannot be invoked as a ground of inadmissibility when the establishment of the right in question is properly a matter for the merits” (Preliminary Objections, Judgment, I.C.J. Reports 2018 (I), p. 337, para. 151). The Court notes, however, that by raising the argument that India has not provided the Court with his “actual passport in his real name”, Pakistan appears to suggest that India has failed to prove Mr. Jadhav’s nationality. This argument is relevant to the claims based on Article 36 of the Vienna Convention in relation to Mr. Jadhav, and therefore, must be addressed at this stage. In this respect, the Court observes that the evidence before it shows that both Parties have considered Mr. Jadhav to be an Indian national. Indeed, Pakistan has so described Mr. Jadhav on various occasions, including in its “Letter of Assistance for Criminal Investigation against Indian National Kulbhushan Sudhair Jadhev”. Consequently, the Court is satisfied that the evidence before it leaves no room for doubt that Mr. Jadhav is of Indian nationality.

As indicated above, the second and third arguments advanced by Pakistan in support of its second objection to the admissibility of the Application are based on various alleged breaches of India’s obligations under Security Council resolution 1373 (2001). In particular, Pakistan refers to India’s failure to respond to Pakistan’s request for mutual legal assistance with its criminal investigations into Mr. Jadhav’s espionage and terrorism activities, as well as the issuance of what Pakistan describes as a “false cover name authentic passport”. The Court observes that, in essence, Pakistan seems to argue that India cannot request consular assistance with respect to Mr. Jadhav, while at the same time it has violated other obligations under international law as a result of the above-mentioned acts. While Pakistan has not clearly explained the link between these allegations and the rights invoked by India on the merits, in the Court’s view, such allegations are properly a matter for the merits and therefore cannot be invoked as a ground of inadmissibility. For these reasons, the Court finds that Pakistan’s second objection to the admissibility of India’s Application must be rejected.

In its third objection to the admissibility of India’s Application, Pakistan asks the Court to dismiss the Application on the basis of India’s alleged unlawful conduct. Relying on the doctrine of “clean

hands” and the principles of “ex turpi causa [non oritur actio]” and “ex injuria jus non oritur”, Pakistan contends that India has failed to respond to its request for assistance with the investigation into Mr. Jadhav’s activities, that it has provided him with a “false cover name authentic passport” and, more generally, that it is responsible for Mr. Jadhav’s espionage and terrorism activities in Pakistan. The Court does not consider that an objection based on the “clean hands” doctrine may by itself render an application based on a valid title of jurisdiction inadmissible. It recalls that in the case concerning Certain Iranian Assets (Islamic Republic of Iran v. United States of America), it ruled that “even if it were shown that the Applicant’s conduct was not beyond reproach, this would not be sufficient per se to uphold the objection to admissibility raised by the Respondent on the basis of the ‘clean hands’ doctrine” (Preliminary Objections, Judgment, I.C.J. Reports 2019, p. 44, para. 122). The Court therefore concludes that Pakistan’s objection based on the said doctrine must be rejected.

Pakistan argues that the Vienna Convention does not apply in cases of individuals “who manifest from their own conduct and the materials in their possession a prima facie case of espionage activity”. The Court notes that India is not a party to the 1969 Vienna Convention on the Law of Treaties and that, while Pakistan signed that Convention on 29 April 1970, it has not ratified it. The Court will interpret the Vienna Convention on Consular Relations according to the customary rules of treaty interpretation which, as it has stated on many occasions, are reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties. Under these rules of customary international law, the provisions of the Vienna Convention on Consular Relations must be interpreted in good faith in accordance with the ordinary meaning to be given to their terms in their context and in the light of the object and purpose of the Convention. To confirm the meaning resulting from that process, or to remove ambiguity or obscurity, or to avoid a manifestly absurd or unreasonable result, recourse may be had to supplementary means of interpretation, which include the preparatory work of the Convention and the circumstances of its conclusion.

(a) Interpretation of Article 36 in accordance with the ordinary meaning of its terms: Article 36 of the Vienna Convention on Consular Relations provides as follows: “*Article 36 Communication and contact with nationals of the sending State 1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State: (a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State; (b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph; (c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action. The rights referred to in paragraph 1 of this*

article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this article are intended.”

The Court observes that neither Article 36 nor any other provision of the Vienna Convention contains a reference to cases of espionage. Nor does Article 36 exclude from its scope, when read in its context and in light of the object and purpose of the Convention, certain categories of persons, such as those suspected of espionage. The object and purpose of the Vienna Convention as stated in its preamble is to “contribute to the development of friendly relations among nations”. The purpose of Article 36, paragraph 1, of the Convention as indicated in its introductory sentence is to “facilitate the exercise of consular functions relating to nationals of the sending State”. Consequently, consular officers may in all cases exercise the rights relating to consular access set out in that provision for the nationals of the sending State. It would run counter to the purpose of that provision if the rights it provides could be disregarded when the receiving State alleges that a foreign national in its custody was involved in acts of espionage. The Court thus concludes that, when interpreted in accordance with the ordinary meaning to be given to the terms of the Vienna Convention in their context and in the light of its object and purpose, Article 36 of the Convention does not exclude from its scope certain categories of persons, such as those suspected of espionage.

(b) The *travaux préparatoires* of Article 36: In view of the conclusion above, the Court need not, in principle, resort to supplementary means of interpretation, such as the *travaux préparatoires* of the Vienna Convention and the circumstances of its conclusion, to determine the meaning of Article 36 of the Convention. However, as in other cases (see, for example, *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Preliminary Objections, Judgment, I.C.J. Reports 2018 (I), p. 322, para. 96; *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, Judgment, I.C.J. Reports 2002, p. 653, para. 53), the Court may have recourse to the *travaux préparatoires* in order to confirm its interpretation of Article 36 of the Vienna Convention.

(i) International Law Commission (1960): During the discussions of the International Law Commission on the topic of “consular intercourse and immunities”, there was no suggestion that Article 36 would not apply to certain categories of persons, such as those suspected of espionage. It provided, in the relevant part, that “[t]he local authorities shall inform the consul of the sending State without delay when any national of that State is detained in custody within his district” (Yearbook of the International Law Commission, 1960, Vol. I, p. 42, para. 1). Among the issues discussed in relation to this provision was the question of whether and to what extent it was conceivable for consular notification to be made “without delay” in countries which had a system of detention incommunicado, whereby the person might be held isolated from the outside world for a certain period at the beginning of a criminal investigation. The Court notes that cases of espionage were also mentioned in the context of the Commission’s discussions on the possible inclusion of a reference to security zones in the proposed provision. However, there was no suggestion of consular access not being granted in cases of espionage because of national security concerns. During its 1961 session, the Commission decided to change the words “without delay” to “without undue delay” (Yearbook of the International Law Commission, 1961, Vol. I, pp. 242-245). The Court observes that this decision had no implication for the scope of draft Article 36. The

Commission's commentary to draft Article 36, paragraph 1 (b), merely states that "[t]he expression 'without undue delay' used in paragraph 1 (b) allows for cases where it is necessary to hold a person incommunicado for a certain period for the purposes of the criminal investigation" (Official Records of the United Nations Conference on Consular Relations, Vienna, 4 March-22 April 1963 (United Nations, doc. A/CONF.25/16/Add.1), Vol. II, p. 24, para. 6).

(ii) The Vienna Conference (1963): During the United Nations Conference on Consular Relations held in Vienna from 4 March to 22 April 1963, the question of espionage was raised in relation to the words "without undue delay" in draft Article 36: "The CHAIRMAN invited Mr. Zourek [the former Special Rapporteur of the International Law Commission on this topic] to explain why the International Law Commission had included the words 'without undue delay' in its draft . . . Mr. ZOUREK (Expert) said that . . . [t]hey were intended to allow for cases in which the receiving State's police might wish to hold [sic] a criminal in custody for a time. For example, if a smuggler was suspected of controlling a network, the police might wish to keep his arrest secret until they had been able to find his contacts. Similar measures might be adopted in case of espionage." (Ibid., Vol. I, p. 338, paras. 8-9.) The explanation given by Mr. Zourek suggests that while the charge of espionage was thought to be relevant in determining the appropriate period of time within which notification to the sending State should be made by the receiving State, cases of espionage were not excluded from the scope of the Vienna Convention. The Court further notes that in the course of the discussion on proposed amendments to draft Article 36, including a proposal by the United Kingdom to delete the word "undue" from the phrase "without undue delay" which was eventually adopted (ibid., Vol. I, p. 348), it was not suggested that certain categories of persons, such as those suspected of espionage, were to be excluded from the protection of the Convention.

2. Alleged espionage exception under customary international law: According to Pakistan, State practice establishes that at the time of the adoption of the Vienna Convention in 1963, there was no rule of customary international law that made consular access obligatory in the case of individuals accused of espionage. Pakistan argues that there was a rule of customary international law in 1963 that prima facie cases of espionage constituted an exception to the right of consular access. It cites the preamble of the Vienna Convention, which affirms that "the rules of customary international law continue to govern matters not expressly regulated by the provisions of the present Convention", in support of its conclusion that the rule of customary international law was unaffected by the Convention and continues to prevail over it.

The Court notes that the preamble of the Vienna Convention states that "the rules of customary international law continue to govern matters not expressly regulated by the provisions of the present Convention" (emphasis added). Article 36 of the Convention expressly regulates the question of consular access to, and communication with, nationals of the sending State and makes no exception with regard to cases of espionage. The Court recalls that India and Pakistan have been parties to the Vienna Convention since 1977 and 1969 respectively and that neither Party attached any reservation or declaration to the provisions of the Convention. The Court, therefore considers that Article 36 of the Convention, and not customary international law, governs the matter at hand in the relations between the Parties. Having reached this conclusion, the Court does not find it necessary to determine whether, when the Vienna Convention was adopted in 1963, there existed the rule of customary international law that Pakistan advances.

3. Relevance of the 2008 Agreement on Consular Access between India and Pakistan: Pakistan maintains that it is the 2008 Agreement rather than the Vienna Convention on Consular Relations that governs the question of consular access between India and Pakistan, including in the present case.¹ In Pakistan’s view, the nature and circumstances of Mr. Jadhav’s alleged espionage and terrorist activities bring his arrest squarely within the national security qualification contained in point (vi) of the Agreement. Pakistan thus argues that it was entitled to consider the question of consular access to Mr. Jadhav “on its merits” in the particular circumstances of this case. In Pakistan’s view, point (vi) of the 2008 Agreement is fully consistent with Article 73 of the Vienna Convention on Consular Relations and with Article 41 of the Vienna Convention on the Law of Treaties, because the 2008 Agreement can properly be seen as “supplementing” or “amplifying” the provisions of the Vienna Convention on Consular Relations.

The Court recalls that point (vi) of the 2008 Agreement provides that “[i]n case of arrest, detention or sentence made on political or security grounds, each side may examine the case on its merits”. It also recalls that, in the preamble of the Agreement, the Parties declared that they were “desirous of furthering the objective of humane treatment of nationals of either country arrested, detained or imprisoned in the other country”. The Court is of the view that point (vi) of the Agreement cannot be read as denying consular access in the case of an arrest, detention or sentence made on political or security grounds. Given the importance of the rights concerned in guaranteeing the “humane treatment of nationals of either country arrested, detained or imprisoned in the other country”, if the Parties had intended to restrict in some way the rights guaranteed by Article 36, one would expect such an intention to be unequivocally reflected in the provisions of the Agreement. That is not the case.

The alleged exception of espionage in the Vienna Convention, any derogation from Article 36 of the Vienna Convention for political or security grounds may render the right related to consular access meaningless as it would give the receiving State the possibility of denying such access. Account should also be taken of Article 73, paragraph 2, of the Vienna Convention for the purpose of interpreting the 2008 Agreement. This paragraph provides that “[n]othing in the present Convention shall preclude States from concluding international agreements confirming or supplementing or extending or amplifying the provisions thereof”. The language of this paragraph indicates that it refers to subsequent agreements to be concluded by parties to the Vienna Convention. The Court notes that the Vienna Convention was drafted with a view to establishing, to the extent possible, uniform standards for consular relations. The ordinary meaning of Article

¹ “Agreement on Consular Access: The Government of India and the Government of Pakistan, desirous of furthering the objective of humane treatment of nationals of either country arrested, detained or imprisoned in the other country, have agreed to reciprocal consular facilities as follows:
 (ii) Immediate notification of any arrest, detention or imprisonment of any person of the other country shall be provided to the respective High Commission.
 (iv) Each Government shall provide consular access within three months to nationals of one country under arrest, detention or imprisonment in the other country. (v) Both Governments agree to release and repatriate persons within one month of confirmation of their national status and completion of sentences. (vi) In case of arrest, detention or sentence made on political or security grounds, each side may examine the case on its merits.”

73, paragraph 2, suggests that it is consistent with the Vienna Convention to conclude only subsequent agreements which confirm, supplement, extend or amplify the provisions of that instrument, such as agreements which regulate matters not covered by the Convention. The Parties have negotiated the 2008 Agreement in full awareness of Article 73, paragraph 2, of the Vienna Convention. Having examined that Agreement and in light of the conditions set out in Article 73, paragraph 2, the Court is of the view that the 2008 Agreement is a subsequent agreement intended to “confirm, supplement, extend or amplify” the Vienna Convention. Consequently, the Court considers that point (vi) of that Agreement does not, as Pakistan contends, displace the obligations under Article 36 of the Vienna Convention. For these reasons, the Court finds that none of the arguments raised by Pakistan concerning the applicability of Article 36 of the Vienna Convention to the case of Mr. Jadhav can be upheld. The Court thus concludes that the Vienna Convention is applicable in the present case, regardless of the allegations that Mr. Jadhav was engaged in espionage activities.

Alleged failure to inform Mr. Jadhav of his rights under Article 36, paragraph 1 (b): Article 36, paragraph 1 (b), of the Vienna Convention provides that the competent authorities of the receiving State must inform a foreign national in detention of his rights under that provision. The Court, therefore needs to determine whether the competent Pakistani authorities informed Mr. Jadhav of his rights in accordance with this provision. In this respect, the Court observes that Pakistan has not contested India’s contention that Mr. Jadhav was not informed of his rights under Article 36, paragraph 1 (b), of the Convention. To the contrary, in the written and oral proceedings, Pakistan consistently maintained that the Convention does not apply to an individual suspected of espionage. The Court infers from this position of Pakistan that it did not inform Mr. Jadhav of his rights under Article 36, paragraph 1 (b), of the Vienna Convention, and thus concludes that Pakistan breached its obligation to inform Mr. Jadhav of his rights under that provision.

Alleged failure to inform India, without delay, of the arrest and detention of Mr. Jadhav: The Court found that there was a delay of some three weeks between Mr. Jadhav’s arrest on 3 March 2016 and the notification made to India on 25 March 2016. The Court recalls that neither the terms of the Vienna Convention as normally understood nor its object and purpose, suggest that “without delay” is to be understood as “immediately upon arrest and before interrogation”. It also recalls that there is no suggestion in the travaux that the phrase “without delay” might have different meanings in each of the three sets of circumstances in which it is used in Article 36, paragraph 1 (b). Taking account of the particular circumstances of the present case, the Court considers that the fact that the notification was made some three weeks after the arrest, in this case, constitutes a breach of the obligation to inform “without delay”, as required by Article 36, paragraph 1 (b), of the Vienna Convention.

Alleged failure to provide consular access: The Court then addresses India’s third submission concerning the alleged failure of Pakistan to provide consular access to Mr. Jadhav. The Court recalls that Article 36, paragraph 1, creates individual rights, which, by virtue of Article I of the Optional Protocol, may be invoked in this Court by the national State of the detained person. Article 36, paragraph 1 (c), provides that consular officers have the right to arrange legal representation for a detained national of the sending State. The provision presupposes that consular officers can arrange legal representation based on conversation and correspondence with the

detained person. In the view of the Court, Pakistan's contention that Mr. Jadhav was allowed to choose a lawyer for himself, but that he opted to be represented by a defending officer qualified for legal representation, even if it is established, does not dispense with the consular officers' right to arrange for his legal representation. The Court, therefore concludes that Pakistan has breached the obligations incumbent on it under Article 36, paragraph 1 (a) and (c), of the Vienna Convention, by denying consular officers of India access to Mr. Jadhav, contrary to their right to visit him, to converse and correspond with him, and to arrange for his legal representation.

REMEDIES: The Court notes that it has already found that Pakistan acted in breach of its obligations under Article 36 of the Vienna Convention: first, by not informing Mr. Jadhav of his rights under Article 36, paragraph 1 (b); secondly, by not informing India, without delay, of the arrest and detention of Mr. Jadhav; and thirdly, by denying access to Mr. Jadhav by consular officers of India, contrary to their right, *inter alia*, to arrange for his legal representation. The Court considers that the first and third breaches by Pakistan, as just set out, constitute internationally wrongful acts of a continuing character. Accordingly, the Court is of the view that Pakistan is under an obligation to cease those acts and to comply fully with its obligations under Article 36 of the Vienna Convention. Consequently, Pakistan must inform Mr. Jadhav without further delay of his rights under Article 36, paragraph 1 (b), and allow Indian consular officers to have access to him and to arrange for his legal representation, as provided by Article 36, paragraph 1 (a) and (c).

With regard to India's submission that the Court declare that the sentence handed down by Pakistan's military court is violative of international law and the provisions of the Vienna Convention, the Court recalls that its jurisdiction has its basis in Article I of the Optional Protocol. This jurisdiction is limited to the interpretation or application of the Vienna Convention and does not extend to India's claims based on any other rules of international law. The Court notes, however, that the remedy to be ordered in this case has the purpose of providing reparation only for the injury caused by the internationally wrongful act of Pakistan that falls within the Court's jurisdiction, namely its breach of obligations under Article 36 of the Vienna Convention on Consular Relations, and not of the Covenant.

With regard to India's contention that it is entitled to restitution in integrum and its request to annul the decision of the military court and to restrain Pakistan from giving effect to the sentence or conviction, and its further request to direct Pakistan to take steps to annul the decision of the military court, to release Mr. Jadhav and to facilitate his safe passage to India, the Court reiterates that it is not the conviction and sentence of Mr. Jadhav which are to be regarded as a violation of Article 36 of the Vienna Convention. The Court also recalls that it is not to be presumed that partial or total annulment of conviction or sentence provides the necessary and sole remedy in cases of violations of Article 36 of the Vienna Convention. Thus, the Court finds that these submissions made by India cannot be upheld.

The Court considers the appropriate remedy in this case to be effective review and reconsideration of the conviction and sentence of Mr. Jadhav. The Court notes that Pakistan acknowledges that this is the appropriate remedy in the present case. Special emphasis must be placed on the need for the review and reconsideration to be effective. The review and reconsideration of the conviction and sentence of Mr. Jadhav, in order to be effective, must ensure that full weight is given to the effect of the violation of the rights set forth in Article 36, paragraph 1, of the Convention and guarantee

that the violation and the possible prejudice caused by the violation are fully examined. It presupposes the existence of a procedure which is suitable for this purpose.

The Court observes that it is normally the judicial process which is suited to the task of review and reconsideration. The Court notes that, according to Pakistan, the High Courts of Pakistan can exercise review jurisdiction. The Court observes, however, that Article 199, paragraph 3, of the Constitution of Pakistan has been interpreted by the Supreme Court of Pakistan as limiting the availability of such review for a person who is subject to any law relating to the Armed Forces of Pakistan, including the Pakistan Army Act of 1952. The Supreme Court has stated that the High Courts and the Supreme Court may exercise judicial review over a decision of the Field General Court Martial on “the grounds of coram non iudice, without jurisdiction or suffering from mala fides, including malice in law only”. Article 8, paragraph 1, of the Constitution provides that any law which is inconsistent with fundamental rights guaranteed under the Constitution is void, but this provision does not apply to the Pakistan Army Act of 1952 by virtue of a constitutional amendment. Thus, it is not clear whether judicial review of a decision of a military court is available on the ground that there has been a violation of the rights set forth in Article 36, paragraph 1, of the Vienna Convention.

The Court considers that the clemency process is not sufficient in itself to serve as an appropriate means of review and reconsideration but that appropriate clemency procedures can supplement judicial review and reconsideration, in particular where the judicial system has failed to take due account of the violation of the rights set forth in the Vienna Convention. Respect for the principles of a fair trial is of cardinal importance in any review and reconsideration, and that, in the circumstances of the present case, it is essential for the review and reconsideration of the conviction and sentence of Mr. Jadhav to be effective. The Court considers that the violation of the rights set forth in Article 36, paragraph 1, of the Vienna Convention, and its implications for the principles of a fair trial, should be fully examined and properly addressed during the review and reconsideration process. In particular, any potential prejudice and the implications for the evidence and the right of defence of the accused should receive close scrutiny during the review and reconsideration.

To conclude, the Court finds that Pakistan is under an obligation to provide, by means of its own choosing, effective review and reconsideration of the conviction and sentence of Mr. Jadhav, so as to ensure that full weight is given to the effect of the violation of the rights set forth in Article 36 of the Vienna Convention. Finally, the Court recalls that it indicated a provisional measure directing Pakistan to take all measures at its disposal to ensure that Mr. Jadhav is not executed pending the final decision in the present proceedings. The Court considers that a continued stay of execution constitutes an indispensable condition for the effective review and reconsideration of the conviction and sentence of Mr. Jadhav.
