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 forma1 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 quel1 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, al1 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 al1 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 1 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 arrned 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 al1 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.

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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 officia1 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 :

> "1 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, 1 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, 1 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 connexion. 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 officia1 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 al1 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 officia1 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 connexion, 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.

ISLAND OF PALMAS
Netherlands v. *USA*
(RIAA, 1928, p.829)

(Principle of Prescription recognized by municipal law in the claims on title to property is applicable in international legal disputes on title to territory.)

The origin of the dispute is to be found in the visit paid to the Island of Palmas (or Miangas) on January 21st, 1906, by General Leonard Wood, who was then Governor of the Province of Moro. It is true that according to information contained in the Counter-Memorandum of the United States the same General Wood had already visited the island "about the year 1903", but as this previous visit appears to have had no results, and it seems even doubtful whether it took place, that of January 2lst, 1906, is to be regarded as the first entry into contact by the American authorities with the island. The report of General Wood to the Military Secretary, United States Army, dated January 26th, 1906, and the certificate delivered on January 21st by First Lieutenant Gordon Johnston to the native interrogated by the controller of the Sangi (Sanghi) and Talauer (Talaut) Islands clearly show that the visit of January 21st relates to the island in dispute.

This visit led to the statement that the Island of Palmas (or Miangas), undoubtedly included in the "archipelago known as the Philippine Islands", as delimited by Article III of the Treaty of Peace between the United States and Spain, dated December 10lh, 1898 (hereinafter also called "Treaty of Paris"), and ceded in virtue of the said article to the United States, was considered by the Netherlands as forming part of the territory of their possessions in the East Indies. There followed a diplomatic correspondence, beginning on March 31st, 1906, and leading up to the conclusion of the Special Agreement of January 23rd, 1925.

The *United States,* as successor to the rights of Spain over the Philippines, bases its title in the first place on discovery. The existence of sovereignty thus acquired is, in the American view, confirmed not merely by the most reliable cartographers and authors, but also by treaty, in particular by the Treaty of Munster, of 1648, to which Spain and the Netherlands are themselves Contracting Parlies. As, according to the same argument, nothing has occurred of a nature, in international law, to cause the acquired title to disappear, this latter title was intact at the moment when, by the Treaty of December l0th, 1898, Spain ceded the Philippines to the United States. In these circumstances, it is, in the American view, unnecessary to establish facts showing the actual display of sovereignty precisely over the Island of Palmas (or Miangas). The United States Government finally maintains that Palmas (or Miangas) forms a geographical part of the Philippine group and in virtue of the principle of contiguity belongs to the Power having the sovereignty over the Philippines.

According to the Netherlands Government, on the other hand, the fact of discovery by Spain is not proved, nor yet any other form of acquisition, and even if Spain had at any moment had a title, such title had been lost. The principle of contiguity is contested.

The Netherlands Government's main argument endeavours to show that the Netherlands, represented for this purpose in the first period of colonization by the East India Company, have possessed and exercised rights of sovereignty from 1677, or probably from a date prior even to 1648, to the present day. This sovereignty arose out of conventions entered into with native princes of the Island of Sangi (the main island of the Talautse (Sangi) Isles), establishing the suzerainty of the Netherlands over the territories of these princes, including Palmas (or Miangas). The state of affairs thus set up is claimed to be validated by international treaties.

The facts alleged in support of the Netherlands arguments are, in the United States Government's view, not proved, and, even if they were proved, they would not create a title of sovereignty, or would not concern the Island of Palmas.

Titles of acquisition of territorial sovereignty in present-day international law are either based on an act of effective apprehension, such as occupation or conquest, or, like cession, presuppose that the ceding and the cessionary Powers or at least one of them, have the faculty of effectively disposing of the ceded territory. In the same way natural accretion can only be conceived of as an accretion to a portion of territory where there exists an actual sovereignty capable of extending to a spot which falls within its sphere of activity. It seems therefore natural that an element which is essential for the constitution of sovereignty should not be lacking in its continuation. So true is this, that practice, as well as doctrine, recognizes—though under different legal formulae and with certain differences as to the conditions required—that the continuous and peaceful display of territorial sovereignty (peaceful in relation to other States) is as good as a title.The growing insistence with which international law, ever since the middle of the 18th century, has demanded that the occupation shall be effective would be inconceivable, if effectiveness were required only for the act of acquisition and not equally for the maintenance of the right. If the effectiveness has above all been insisted on in regard to occupation, this is because the question rarely arises in connection with territories in which there is already an established order of things. Just as before the rise of international law, boundaries of lands were necessarily determined by the fact that the power of a State was exercised within them, so too, under the reign of international law, the fact of peaceful and continuous display is still one of the most important considerations in establishing boundaries between States.

Territorial sovereignty, as has already been said, involves the exclusive right to display the activities of a State. This right has as corollary a duty: the obligation to protect within the territory the rights of other States, in particular their right to integrity and inviolability in peace and in war, together with the rights which each State may claim for its nationals in foreign territory. Without

manifesting its territorial sovereignty in a manner corresponding to circumstances, the State cannot fulfil this duty. Territorial sovereignty cannot limit itself to its negative side, i.e. to excluding the activities of other States; for it serves to divide between nations the space upon which human activities are employed, in order to assure them at all points the minimum of protection of which international law is the guardian.

Although municipal law, thanks to its complete judicial system, is able to recognize abstract rights of property as existing apart from any material display of them, it has none the less limited their effect by the principles of prescription and the protection of possession. International law, the structure of which is not based on any super-State organisation, cannot be presumed to reduce a right such as territorial sovereignty, with which almost all international relations are bound up, to the category of an abstract right, without concrete manifestations.

The principle that continuous and peaceful display of the functions of State within a given region is a constituent element of territorial sovereignty is not only based on the conditions of the formation of independent States and their boundaries (as shown by the experience of political history) as well as on an international jurisprudence and doctrine widely accepted; this principle has further been recognized in more than one federal State, where a jurisdiction is established in order to apply, as need arises, rules of international law to the interstate relations of the States members. This is the more significant, in that it might well be conceived that in a federal State possessing a complete judicial system for interstate matters—far more than in the domain of international relations properly so-called—there should be applied to territorial questions the principle that, failing any specific provision of law to the contrary, *a. jus in re* once lawfully acquired shall prevail over *de facto* possession however well established.

It may suffice to quote among several non dissimilar decisions of the Supreme Court of the United States of America that in the case of the State of Indiana *v.* State of Kentucky (136 U.S. 479) 1890, where the precedent of the case of Rhode Island *v.* Massachusetts (4 How. 591, 639) is supported by quotations from Vattel and Wheaton, who both admit prescription founded on length of time as a valid and incontestable title.

Manifestations of territorial sovereignty assume, it is true, different forms, according to conditions of time and place. Although continuous in principle, sovereignty cannot be exercised in fact at every moment on every point of a territory. The intermittence and discontinuity compatible with the maintenance of the right necessarily differ according as inhabited or uninhabited regions are involved, or regions enclosed within territories in which sovereignty is incontestably displayed or again regions accessible from, for instance, the high seas. It is true that neighbouring States may by convention fix limits to their own sovereignty, even in regions such as the interior of scarcely explored continents where such sovereignty is scarcely manifested, and

in this way each may prevent the other from any penetration of its territory. The delimitation of Hinterland may also be mentioned in this connection.

If, however, no conventional line of sufficient topographical precision exists or if there are gaps in the frontiers otherwise established, or if a conventional line leaves room for doubt, or if, as e.g. in the case of an island situated in the high seas, the question arises whether a title is valid *erga omnes*, the actual continuous and peaceful display of State functions is in case of dispute the sound and natural critérium of territorial sovereignty.

In the opinion of the Arbitrator the Netherlands have succeeded in establishing the following facts:

a. The Island of Palmas (or Miangas) is identical with an island designated by this or a similar name, which has formed, at least since 1700, successively a part of two of the native States of the Island of Sangi (Talautse Isles).

b. These native States were from 1677 onwards connected with the East India Company, and thereby with the Netherlands, by contracts of suzerainty, which conferred upon the suzerain such powers as would justify his considering the vassal State as a part of his territory.

c. Acts characteristic of State authority exercised either by the vassal State or by the suzerain Power in regard precisely to the Island of Palmas (or Miangas) have been established as occurring at different epochs between 1700 and 1898, as well as in the period between 1898 and 1906.

The acts of indirect or direct display of Netherlands sovereignty at Palmas (or Miangas), especially in the 18th and early 19th centuries are not numerous, and there are considerable gaps in the evidence of continuous display. But apart from the consideration that the manifestations of sovereignty over a small and distant island, inhabited only by natives, cannot be expected to be frequent, it is not necessary that the display of sovereignty should go back to a very far distant period. It may suffice that such display existed in 1898, and had already existed as continuous and peaceful before that date long enough to enable any Power who might have considered herself as possessing sovereignty over the island, or having a claim to sovereignty, to have, according to local conditions, a reasonable possibility for ascertaining the existence of a state of things contrary to her real or alleged rights.

It is not necessary that the display of sovereignty should be established as having begun at a precise epoch; it suffices that it had existed at the critical period preceding the year 1898. It is quite natural that the establishment of sovereignty may be the outcome of a slow evolution, of a progressive intensification of State control. This is particularly the case, if sovereignty is acquired by the establishment of the suzerainty of a colonial Power over a native State, and in regard to outlying possessions of such a vassal State.

Now the evidence relating to the period after the middle of the 19th century makes it clear that the Netherlands Indian Government considered the island distinctly as a part of its possessions and that, in the years immediately preceding 1898, an intensification of display of sovereignty took place. Since the moment when the Spaniards, in withdrawing from the Moluccas in 1666, made express reservations as to the maintenance of their sovereign rights, up to the contestation made by the United States in 1906, no contestation or other action whatever or protest against the exercise of territorial rights by the Netherlands over the Talautse (Sangi) Isles and their dependencies (Miangas included) has been recorded. The peaceful character of the display of Netherlands sovereignty for the entire period to which the evidence concerning acts of display relates (1700-1906) must be admitted.

There is moreover no evidence which would establish any act of display of sovereignty over the island by Spain or another Power, such as might counter- balance or annihilate the manifestations of Netherlands sovereignty. As to third Powers, the evidence submitted to the Tribunal does not disclose any trace of such action, at least from the middle of the 17th century onwards. These circumstances, together with the absence of any evidence of a conflict between Spanish and Netherlands authorities during more than two centuries as regards Palmas (or Miangas), are an indirect proof of the exclusive display of Netherlands sovereignty.

This being so, it remains to be considered first whether the display of State authority might not be legally defective and therefore unable to create a valid title of sovereignty, and secondly whether the United States may not put forward a better title to that of the Netherlands.

As to the conditions of acquisition of sovereignty by way of continuous and peaceful display of State authority (so-called prescription), some of which have been discussed in the United States Counter-Memorandum, the following must be said:

The display has been open and public, that is to say that it was in conformity with usages as to exercise of sovereignty over colonial States. A clandestine exercise of State authority over an inhabited territory during a considerable length of time would seem to be impossible. An obligation for the Netherlands to notify to other Powers the establishment of suzerainty over the Sangi States or of the display of sovereignty in these territories did not exist.

There can further be no doubt that the Netherlands exercised the State authority over the Sangi States as sovereign in their own right, not under a derived or precarious title.

Finally it is to be observed that the question whether the establishment of the Dutch on the Talautse Isles (Sangi) in 1677 was a violation of the Treaty of Munster and whether this circumstance might have prevented the acquisition of sovereignty even by means of prolonged exercise of State authority, need not be examined, since the Treaty of Utrecht recognized the state

of things existing in 1714 and therefore the suzerain right of the Netherlands over Tabukan and Miangas.

The conditions of acquisition of sovereignty by the Netherlands are therefore to be considered as fulfilled. It remains now to be seen whether the United States as successors of Spain are in a position to bring forward an equivalent or stronger title. This is to be answered in the negative.

The title of discovery, if it had not been already disposed of by the Treaties of Munster and Utrecht would, under the most favourable and most extensive interpretation, exist only as an inchoate title, as a claim to establish sovereignty by effective occupation. An inchoate title however cannot prevail over a definite title founded on continuous and peaceful display of sovereignty.

The title of contiguity, understood as a basis of territorial sovereignty, has no foundation in international law.

The title of recognition by treaty does not apply, because even if the Sangi States, with the dependency of Miangas, are to be considered as "held and possessed" by Spain in 1648, the rights of Spain to be derived from the Treaty of Munster would have been superseded by those which were acquired by the Treaty of Utrecht. Now if there is evidence of a state of possession in 1714 concerning the island of Palmas (or Miangas), such evidence is exclusively in favour of the Netherlands. But even if the Treaty of Utrecht could not be taken into consideration, the acquiescence of Spain in the situation created after 1677 would deprive her and her successors of the possibility of still invoking conventional rights at the present time.

The Netherlands title of sovereignty, acquired by continuous and peaceful display of State authority during a long period of time going probably back beyond the year 1700, therefore holds good.

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 officia1 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 forma1 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 officia1 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 persona1 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 officia1 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 officia1 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 al1 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 interna1 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.

After the war, by a Settlement Agreement of November 1946 with France, Thailand accepted a reversion to the *status quo ante* 1941. It is Thailand's contention that this reversion to the *status quo* did not affect Preah Vihear because Thailand already had sovereignty over it before the war. The Court need not discuss this contention, for whether Thailand did have such sovereignty is precisely what is in issue in these proceedings. The important point is that, in consequence of the war events, France agreed to set up a Franco-Siamese Conciliation Commission consisting of the two representatives of the Parties and three neutral Commissioners, whose terms of reference were specifically to go into, and make recommendations on an equitable basis in regard to, any complaints or proposals for revision which Thailand might wish to make as to, *inter alia*, the frontier settlements of 1904 and 1907. The Commission met in 1947 in Washington, and here therefore was an outstanding opportunity for Thailand to claim a rectification of the frontier at Preah Vihear on the ground that the delimitation embodied a serious error which would have caused Thailand to reject it had she known of the error in 1908-1909. In fact, although Thailand made complaints about the frontier line in a considerable number of regions, she made none about Preah Vihear. She even (12 May 1947) filed with the Commission a map showing Preah Vihear as lying in Cambodia. Thailand contends that this involved no adverse implications as regards her claim to the Temple, because the Temple area was not in issue before the Commission, that it was other regions that were under discussion, and that it was in relation to these that the map was used. But it is precisely the fact that Thailand had raised these other questions, but not that of Preah Vihear, which requires explanation; for, everything else apart, Thailand was by this time well aware, from certain local happenings in relation to the Temple, to be mentioned presently,

that France regarded Preah Vihear as being in Cambodian territory-even if this had not already and long since been obvious from the frontier line itself, as mapped by the French authorities and communicated to the Siamese Government in 1908. The natural inference from Thailand's failure to mention Preah Vihear on this occasion is, again, that she did not do so because she accepted the frontier at this point as it was drawn on the map, irrespective of its correspondence with the watershed line.

As regards the use of a map showing Preah Vihear as lying in Cambodia, Thailand maintains that this was for purely cartographical reasons, that there were no other maps, or none that were so convenient, or none of the right scale for the occasion. The Court does not find this explanation convincing. Thailand could have used the map but could also have entered some kind of reservation with France as to its correctness. This she did not do.

As regards her failure even to raise the question of the map as such until 1958, Thailand states that this was because she was, at al1 material times, in possession of Preah Vihear; therefore she had no need to raise the matter. She indeed instances her acts on the ground as evidence that she never accepted the Annex 1 line at Preah Vihear at all, and contends that if she never accepted it she clearly had no need to repudiate it, and that no adverse conclusions can be drawn from her failure to do so. The acceptability of this explanation must obviously depend on whether in fact it is the case that Thailand's conduct on the ground affords ex *Post facto* evidence sufficient to show that she never accepted the Annex 1 line in 1908 in respect of Preah Vihear, and considered herself at al1 material times to have the sovereignty over the Temple area.

The Court has considered the evidence furnished by Thailand of acts of an administrative character performed by her officials at or relative to Preah Vihear. France, and subsequently Cambodia, in view of her title founded on the Treaty of 1904, performed only a very few routine acts of administration in this small, deserted area. It was specifically admitted by Thailand in the course of the oral hearing that if Cambodia acquired sovereignty over the Temple area by virtue of the frontier settlement of 1904, she did not subsequently abandon it, nor did Thailand subsequently obtain it by any process of acquisitive prescription. Thailand's acts on the ground were therefore put forward as evidence of conduct as sovereign, sufficient to negative any suggestion that, under the 1904 Treaty settlement, Thailand accepted a delimitation having the effect of attributing the sovereignty over Preah Vihear to Cambodia. It is therefore from this standpoint that the Court must consider and evaluate these acts. The real question is whether they sufficed to efface or cancel out the clear impression of acceptance of the frontier line at Preah Vihear to be derived from the various considerations already discussed.

With one or two important exceptions to be mentioned presently, the acts concerned were exclusively the acts of local, provincial, authorities… the Court finds it difficult to regard such

local acts as overriding and negativing the consistent and undeviating attitude of the central Siamese authorities to the frontier line as mapped.

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-officia1 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 al1 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,* ***1.*** *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 gradua1 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 juvis* 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.

Accordance with International Law of the Unilateral Declaration of Independence in Respect of KOSOVO

Advisory Opinion of I.C.J. (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

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(*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-Behar 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-Behar 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-Behar 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 relatable 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 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?

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 Rajashahi 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-Behar 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(l)(*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(l)(*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-Behar 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-Behar 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 ad 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-Behar

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.

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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 transfererd 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 relatable to Article 3 of the Constitution would be incompetent;

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

(*c*) A law of Parliament relatable 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 relatable 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-l 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 judgement-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:21. 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 shacked 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 sine 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 oblige 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 quondom 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 recusant disposition in the past or, alternatively, current means to pay the decree or a substantial part of it. The provision emphasises 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 judgmentdebtors 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.]

* * * * *

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.

* * * * *

Gaurav Jain v *Union of India & Ors.*

AIR 1997 SC 3021

"Frailty, the name is woman", was the ignominy heaped upon women of Victorian Era by William Shakespeare in his great work `Hamlet'. The history or sociology has, however, established the contrary, i.e., `fortitude', thy name is woman; `caress', thy name is woman; `self-sacrifice', thy name is woman; tenacity and successful pursuit, their apathetically is women. Indira Gandhi, Margaret Thatcher, Srimovo Bhandarnaike and Golda Meir are few illustrious women having proved successful in democratic governance of the respective democratic States. Amidst them, still, a class of women is trapped as victims of circumstances, unfounded social sanctions, handicaps and coercive forms in the flesh trade, optimised as `prostitutes', (for short, `fallen women'). Seeking their redemptions, a few enlightened segments are tapping and doors of this Court under Article 32 of the Constitution, through a public spirited advocate, Gaurav Jain who filed, on their behalf, the main writ petitions claiming that right to be free citizens; right not to be trapped again ; readjusted by economic empowerment, social justice and self-sustenance thereby with equality of status, dignity of person in truth and reality and social integration in the mainstream are their magna carta. An article "A Red light trap: Society gives no chance to prostitutes' offspring" in `India Today' dated July 11, 1988 is founded as source material and has done yeoman's service to ignite the sensitivity of Gaurav to seek improvement of the plight of the unfortunate fallen women and their progeny. Though Gaurav had asked for establishing separate

educational institutions for the children of the fallen women, this Court after hearing all the State

Governments and Union Territories which were then represented through their respective standing counsel, observed on November 15, 1989 in Gaurav Jain vs. Union of India & Ors. [1990 Supp. SCC 709] that "segregating children of prostitutes by locating separate schools and providing separate hostels" would not be in the interest of the children and the society at large. This Court directed that they "should be segregated from their mothers and be allowed to mingle with others and become a part of the society". Accepting the suggestion from the Bar and rejecting the limited prayer of the petitioner, this Court had ordered that Gaurav Jain vs Union Of India & Ors on 9 July, 1997 "Children of prostitutes should, however, not be permitted to leave in inferno and the undesirable surroundings of prostitute homes". This was felt particularly so in the case of young girls whose body and mind are likely to be abused with growing age for being admitted into the profession of their mothers. While this Court did not accept the plea for separate hostels for children of prostitutes, it felt that "accommodation in hostels and other reformatory homes should be adequately available to help segregation of these children from their mothers living in prostitute homes as soon as they are identified". In that view, instead of disposing of the writ petition with a set of directions, this Court constituted a Committee comprising S/Shri V .C. Mahajan, R.K. Jain, Senior Advocates and others including M.N. Shroff, Advocate, as its Convenor, and other individuals named in the Order; the Court directed the Committee to submit its report giving suggestions for appropriate action. Accordingly, the report was submitted.

Arguments wee heard and judgment was reserved but could not be delivered. Resultantly, it was released from judgment. We have re-heard the counsel on both sides. The primary question in this case is: what are the rights of the children of fallen women, the modules to segregate them from their mothers and others so as to give them protection, care and rehabilitation in the mainstream of the national life? And as facet of it, what should be the scheme to be evolved to eradicate prostitution, i.e., the source itself; and what succour and sustenance can be provided to the fallen victims of flesh trade? These are primary questions we angulate for consideration in this public interest litigation.

The Preamble, an integral part of the Constitution, pledges to secure `socio-economic justice' to all its citizens with stated liberties, `equality of status and of opportunity', assuring `fraternity' and `dignity' of the individual in a united and integrated Bharat. The fallen women too are part of citizenry. Prostitution in society has not been an unknown phenomenon; it is of ancient origin and has its manifestation in various forms with varied degrees unfounded on so-called social sanctions etc. The victims of the trap are the poor, illiterate and ignorant sections of the society and are the target group in the flesh trade; rich communities exploit them and harvest at their misery and ignominy in an organised gangsterism, in particular, with police nexus. It is of grave social concern, increasingly realised by enlightened public spirited sections of the society to prevent gender exploitation of girl children. The prostitute has always been an object and was never seen as complete human being with dignity of person; as if she has had no needs and aspirations of her own, individually or collectively. Their problems are compounded by coercion laid around them and torturous treatment meted out to them. When they make attempts either to resist the prostitution or to relieve themselves from the trap, they succumb to the violent treatment and resultantly many a one settle for prostitution. Prostitute is equally a human being. Despite that trap, she is confronted with the problems to bear and rear the children. The limitations of trade confront them in bringing up their children, be it male or female. Their children are equally subjected to inhuman treatment by managers of brothels and are subjected to discrimination, social isolation; they are deprived of their right to live normal life for no fault of their own. In recent times, however, there has been a growing body of opinion, by certain enlightened sections of the society advocating the need to no longer treat the fallen women as a criminals or as an object of shocking sexual abuse; they are victims of circumstances and hence should be treated as human beings like others, so as to bring them into the mainstream of the social order without any attached stigma. Equally, they realise the need to keep their children away from the red light area, particularly girl children and have them inducted into respectable and meaningful avocations and/or self-employment schemes. In no circumstances, they should continue to be in the trap of flesh trade for commercial exploitation. They need to be treated with humanity and compassion so as to integrate them into the social mainstream. If given equal opportunity, they would be able to play their own part for peaceful rehabilitation, live a life with happiness purposefully, with meaningful right to life, culturally, socially and economically with equality of status and dignity of person. These constitutional and human rights to the victims of fallen track of flesh trade, need

care and consideration of the society. This case calls upon to resolve the human problem with caress and purposeful guidelines, lend help to ameliorate their socio-economic conditions, eradicate social stigma and to make available to them equal opportunities for the social order. Equally, the right of the child is the concern of the society so that fallen women surpass trafficking of her person from exploitation; contribute to bring up her children; live a life with dignity; and not to continue in the foul social environment. Equally, the children have the right to equality of opportunity, dignity and care, protection and rehabilitation by the society with both hands open to bring them into the mainstream of social life without pre-stigma affixed on them for no fault of her/his.

The Convention on the Right of the Child, the fundamental Rights in Part III of the Constitution, Universal Declaration of Human Rights, the Directive Principles of the State Policy are equally made available and made meaningful instruments and means to ameliorate their conditions - social, educational, economical and cultural, and to bring them into the social stream by giving the same opportunities as had by other children. Thus, this case calls for a careful and meaningful consideration with diverse perspectives, to decide the problems in the light of constitutional and human rights and directions given to the executive to effectuate them on administrative side effectively so that those rights become real and meaningful to them. Let us, therefore, first consider the rights of the fallen women and their children given by the Constitution and the Directive Principles, the Human Rights and the Convention on the Right of Child, before considering the social ignominy attached to them and before looking for remedy to relieve them from the agony and make them equal participants in normal social order. Article 14 provides for equality in general. Article 21 guarantees right to life and liberty. Article 15 prohibits discrimination on the grounds of religious race, caste, sex or place of birth, or of any of them. article 15(3) provides for special protective discrimination in favour of woman and child relieving them from the moribund of formal equality. It state that "nothing in this article shall prevent the State from making any special provision for women and children". Article 16(1) covers equality of opportunity in matters of public employment. Article 23 prohibits traffic in human beings and forced labour and makes it punishable under Suppression of Immoral Traffic in Women and Girls Act, 1956 which is renamed in 1990 as the Immoral Traffic (Prohibition) Act (for short, the `ITP Act'). article 24 prohibits employment of children in any hazardous employment or in any factory or mine unsuited to their age. Article 38 enjoins the State to secure and protect, as effectively as it may, a social order in which justice - social, economic and political, shall inform all the institutions of national life. It enjoins, by appropriate statutory or administrative actions, that the state should minimise the inequalities in status and provide facilities and opportunities to make equal results. Article 39(f) provides that the children should be given opportunities and facilities to develop in a healthy manner and conditions of freedom and dignity; and that childhood and youth are protected against exploitation and against moral and material abandonment. Article 46 directs the State to promote the educational and economic interests of the women and weaker sections of the people and that it shall protect them from social injustice and all forms of

exploitation. Article 45 makes provision for free of exploitation. Article 45 makes provision for free and compulsory education for children, which is now well settled as a fundamental right to the children upto the age of 14 years; it also mandates that facilities and opportunities for higher educational avenues be provided to them. The social justice and economic empowerment are firmly held as fundamental rights of every citizen.

Article 1 of the Universal Declaration of Human Rights provides that all human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood. Article 2 provides that everyone, which includes fallen women and their children, is entitled to all the rights and freedoms set forth in the Declaration without any distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Article 3 provides that everyone has the right to life, liberty and security of person. Article 4 enjoins that no one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms. The fallen victims in the flesh trade is no less than a slave trade. Article 5 provides that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. The fallen/trapped victims of flesh trade are subjected to cruel, inhuman and degrading treatment which are obnoxious, abominable and an affront to Article 5 of the Universal Declaration and Article 21 of the Indian Constitution. Equally, Article 6 declares that everyone has the right to recognition everywhere as a person before the law. The victims of flesh trade are equally entitled before the law to the recognition as equal citizens with equal status and dignity in the society. Article 7 postulates that all are equal before the law and are entitled, without discrimination, to equal protection of the law. So, denial of equality of the rights and opportunities and of dignity and of the right to equal protection against any discrimination of fallen women is violation of the Universal Declaration under Article 7 and Article 14 of the Indian Constitution. Article 8 of the Universal Declaration provides that everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted by the Constitution or the law.

The Supreme Court of India, which is the sentinel in the qui vive, is enjoined to protect equally the rights of the poor, the deprived, the degraded women and children trapped in the flesh trade, kept in inhumane and degrading conditions, and to grant them the constitutional right to freedoms, protection, rehabilitation and treatment by the social engineering, in law, constitution and appropriate administrate measures so as to enable them to work hand-in- hand to live with dignity and without any stigma due to their past conduct tagged to them by social conditions, unfounded customs and circumstances which have become blot on the victims and their children. They too are entitled to full equality, fair and adequate facilities and opportunities to develop their personality with fully grown potentiality to improve their excellence in every walk of life. Article 51-A of the Constitution enjoins duty on every citizen to develop the scientific temper, humanism and the spirit of inquiry and reform and to strive toward excellence in all spheres of individual

and collective activity so that the nation constantly rises to higher levels of endeavor and achievement.

Preamble to the Declaration of the Right of the Child adopted by the UNO on November 20, 1959, provides that the child by reason of his or her physical or mental immaturity, needs special safeguards and care including her appropriate legal protection before as well as after birth. Recalling the provisions of Declaration of Social and Legal Principles relating to Protection and Welfare of the Children with Special Reference to Foster or Placement and Adoption Nationally and Internationally; the General Assembly Resolution 41/85 of December 3, 1986; the United Nations adopted Standard Minimum Rules for the administration of Juvenile Justice (The Beijing Rules) dated November 29, 1985. India is a signatory to the Declaration and has the same and effectively participated in bringing the Declaration in force. Article 3 (1) postulates that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be the primary consideration. Article 3 (2) enjoins to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally and all the appropriate measures in that behalf shall be taken by the State. Article 3 (3) postulates that the state shall ensure the availability of institutional services and facilities responsible for the care or protection of children, shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their self as well as competent supervision. Article 4 obligates by appropriate legislative, administrative or other measures, implementation of the right recognised in the Convention. The State has undertaken to implement economic, social and cultural rights, such measures to the maximum extent of the available resources and where needed within the framework of international co-operation. Article 6 postulates that State Parties recognise that every child has the inherent right to life which is already granted by Article 21 of the Constitution of India which has been interpreted expansively by this Court to make the right to life meaningful, socially, culturally, economically, even to the deprived segments of the society with dignity of person and in pursuit of happiness. Article 6(2) enjoins to ensure development of the child and Article 7(2) postulates that the state shall ensure implementation of these rights in accordance with law and their obligations. Article 9 (3) envisages that the state shall respect the right of the child who is separated from her parents to maintain personal relations and contact with her parents on regular basis. Article 14(2) provides that the state shall respect the rights and duties of the parents, and when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child. Article 17(2)(e) enjoins the state to encourage the development of appropriate guidelines for the protection of the child from information and material injurious to his or her well-bearing in mind the provisions of Articles 13 and 18. Article 18(1) provides that the state shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents and State have the primary responsibility

for the upbringing and development of the child. The best interests of the child will be their basic concern. Sub-para (2) postulates that for promoting the rights set forth in this Convention, parents, legal guardian or the State in the performance of their child-rearing responsibilities, shall ensure the development of institutions, facilities and services for the care of children. Article 19(1) provides that the State Parties shall take all appropriate legislative, administrative social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, mal-treatment or exploitation including sexual abuse, while in the care of parents, legal guardians or any other person who has the care of the child. Equally, sub-para (2) of Article 19 postulates protective measures, as may be appropriate, should include effective procedure for the establishment of social programme to provide necessary support for the child and for those who have the care of the child as well as for other forms of prevention etc. Article 20 which is material for the purpose postulates as under:

> "1. A child temporarily or permanently deprived of his or her family environment, or in whose own best interest cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.
>
> 2. States Parties shall in accordance with their national laws ensure alternative care for such a child.
>
> 3. Such care could include, inter alia, foster placement, Kafala or Islamic Law, adoption, or if necessary placement in suitable institutions for the case of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethic, religious cultural and linguistic background."

Article 28 recognises the right of the child to education and with a view of achieving this right progressively and on the basis of equal opportunity, the state shall in particular: (a) make primary education compulsory and available free to all; (b) encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child and take appropriate measures such as the introduction of free education and offering financial assistance in case of need; (c) make higher education accessible to all on the basis of capacity by every appropriate means; (d) make educational and vocational information and guidance available and accessible to all children; and (e) take measures to encourage regular attendance at schools and the reduction of drop-out rates. Article 29 envisages that the State Parties agree that the education of the child shall be directed to: (a) the development of the child's personality, talents and mental and physical abilities to their fullest potential; (b) the development of respect for human rights and fundamental freedoms and for the principles enshrined in the Charter of the United Nations; (c) the development of respect for the child's parents, his or her own cultural identity, languages and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own; (d) the preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship

among all peoples, ethnic, national and religious groups and persons of indigenous origin; and (e) the development of respect for the natural environment. Article 32 recognises the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education or to be harmful to the child's health or physical, mental, spiritual, moral or social development. Articles 34, 36 and 37(a) are equally relevant and read as under:

"34. State Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral

and multilateral measures to prevent:

(a) the inducement or coercion of a child to engage in any unlawful sexual activity;

(b) the exploitative use of children in prostitution or other unlawful sexual practices;

(c) the exploitative use of children in pornographic performances and materials.

36. State Parties shall protect the child against all other forms of exploitation prejudicial to any aspects of the child's welfare.

37. State Parties shall ensure that:

(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment for life imprisonment without possibility of release shall be imposed for offences committed by persons below 18 years of age;"

Article 8 of the Declaration on the Right to Development provides that the State shall undertake at the national level, all necessary measures for the realisation of the right to development and shall ensure, inter alia, equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income. Effective measures should be undertaken to ensure that women have an active role in the development process. Appropriate economic and social reforms should be carried out with a view to eradicating all social injuries.

The Convention on the Elimination of All Forms of Discrimination Against Women, 1979 enjoins by Article 1, prohibition of discrimination of women. Article 5 enjoins to modify social and patterns of conduct of men and women with a view to achieving elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of the sexes or on stereotyped roles for men and women. Article 12 prescribes discrimination against women in the field of health care in order to ensure on the basis of equality of men and women, access to health care services, including those related to family planning. Article 13 proscribes discrimination and directs that the State Parties shall eliminate discrimination against women in other areas of economic and social life in order to ensure on the basis of equality of men and women, the same rights, in particular, the right to family benefits, the right to participate in recreational activities, sports and all aspects of cultural life. Article

16(d) enjoins the State to ensure on the basis of equality of men and women, the same rights and responsibility as parties, irrespective of their martial status, in matters relating to their children; in all cases the interests of the children shall be paramount. In Madhu Kishwar & Ors. vs. State of Bihar & Ors. [(1996) 5 SCC 125], this Court considered the provisions of the Conviction on the Elimination of All Forms of Discrimination Against Women, 1979 (CEDAW) and held the same to be integral scheme of the Fundamental Rights and the Directive Principles. Article 2(e) of CEDAW enjoins the State Parties to breathe life into the dry bones of the Constitution, international Conventions and the Protection of Human Rights Act, to prevent gender- based discrimination and to effectuate right to life including empowerment of economic, social and cultural rights. Article 2(f) read with Articles 3, 14, and 15 of the CEDAW embodies concomitant right to development as an integral scheme of the Indian constitution and the Human Rights Act charges the National Commission with duty to ensure proper implementation as well as preventation of violation of human rights and fundamental freedoms. Human Rights are derived from the dignity and worth inherent in the human person. Human rights and fundamental freedom have been reiterated by the Universal Declaration of Human Rights. Democracy, development and respect for human rights and fundamental freedoms are interdependent and have mutual reinforcement. The human rights for women, including girl child are, therefore, inalienable, integral and indivisible part of universal human rights. The full development of personality and fundamental freedoms and equal participation by women in political, social, economic and cultural life are concomitants for national development, social and family stability and growth - cultural, social and economical. All forms of discrimination on ground of gender is violative of fundamental freedoms and human rights. It would, therefore, be imperative to take all steps to prohibit prostitution. Eradication of prostitution in any form is integral to social weal and glory of womenhood. Right of the child to development hinges upon elimination of prostitution. Success lies upon effective measures to eradicate root and branch of prostitution.

The society should make reparation to prevent trafficking in the women, rescue them from red light areas and other areas in which the women are driven or trapped in prostitution. Their rehabilitation by socio-economic empowerment and justice, is the constitutional duty of the State. Their economic empowerment and social justice with dignity of person, are the fundamental rights and the Court and the Government should positively endeavour to ensure them. The State in a democratic policy includes its three constitutional organs - the Legislature, the Executive and the Judiciary. Legislature has already done its duty. The Executive and the Judiciary are required to act in union to ensure enforcement of fundamental and human rights of the fallen women. I am also conscience that the Union of India as well as the State Governments are sensitive to the conscience of their constitutional duty under article 23 and are desirous to have the prostitution eradicated from the root with the aid of ITP Act, IPC and other appropriate legislative or executive actions. Sequential rehabilitation of the fallen women rescued from the red light areas and other areas required enforcement. The observations made in this Order, the constitutional provisions, the human rights and other International Conventions referred to in the Order and the

national Policy would aid the Union of India and the State Governments as foundation and guide them to discuss the problems in Ministerial and Secretarial level Conferences and as suggested in this Order to evolve procedures and principles to ensure that the fallen women also enjoy their fundamental and human rights mentioned in the Order. Before parting with the case, we place on record the valuable assistance and yeoman's service rendered by V.C. Mahajan Committee. The directions are accordingly given.

*** * * * ***

CIT v. *P.V.A.L. Kulandagan Chettiar*

(2004) 6 SCC 235

S. RAJENDRA BABU, CJI - These appeals involve the following two questions for our consideration although several other questions were considered by the High Court:

(*a*) Whether the Malaysian income cannot be subjected to tax in India on the basis of the Agreement of Avoidance of Double Taxation entered into between the Government of India and the Government of Malaysia?

(*b*) Whether the capital gains should be taxable only in the country in which the assets are situated?

2. The facts leading to these appeals are that the respondent is a firm owning immovable properties at Ipoh, Malaysia; that during the course of the assessment year the assessee earned income of Rs. 88,424 from rubber estates; that the respondent sold the property, the short-term capital gains of which came to Rs. 18,113; that the Income Tax Officer assessed that both the incomes are assessable in India and brought the same to tax; that the respondent filed an appeal before the Commissioner of Income Tax (Appeals) who held that under Article VII(1) of the Agreement of Avoidance of Double Taxation of Income and Prevention of Fiscal Evasion of Tax unless the respondent has a permanent establishment of the business in India such business income in Malaysia cannot be included in the total income of the assessee and, therefore, no part of the capital gains arising to the respondent in the foreign country could be taxed in India.

3. This order was carried in appeal to the Tribunal. The Tribunal, after examining various contentions raised before it, confirmed the order of the Commissioner of Income Tax (Appeals) and held that: (*i*) since the respondent has no permanent establishment for business in India, the business income in Malaysia cannot be included in his income in India, and (*ii*) since the property is situated in Malaysia, capital gains cannot be taxed in India. Thereafter, the matter was carried by way of a reference to the High Court.

4. The High Court held that the finding of the Tribunal is in accordance with the provisions of the Agreement of Avoidance of Double Taxation of Income. The High Court took the view that:

> Where there exists a provision to the contrary in the Agreement, there is no scope for applying the law of any one of the respective contracting States to tax the income and the liability to tax has to be worked out in the manner and to the extent permitted or allowed under the terms of the Agreement.

8. Where liability to tax arises under the local enactment provisions of Sections 4 and 5 of the Act provide that taxation of global income of an assessee chargeable to tax thereunder is subject to the provisions of an agreement entered into between the Central Government and the Government of a foreign country for avoidance of double taxation as envisaged under Section 90 to the contrary, if any, and such an agreement will act as an exception to or modification of Sections 4 and 5 of the Income Tax Act. The provisions of such agreement cannot fasten a tax liability where the liability is not imposed by a local Act. Where tax liability is imposed by the

Act, the agreement may be resorted to either for reducing the tax liability or altogether avoiding the tax liability. In case of any conflict between the provisions of the agreement and the Act, the provisions of the agreement would prevail over the provisions of the Act, as is clear from the provisions of Section 90(2) of the Act. Section 90(2) makes it clear that

> "where the Central Government has entered into an agreement with the Government of any country outside India for granting relief of tax, or for avoidance of double taxation, then, in relation to the assessee to whom such agreement applies, the provisions of this Act shall apply to the extent they are more beneficial to that assessee"

meaning thereby that the Act gets modified in regard to the assessee insofar as the agreement is concerned, if it falls within the category stated therein.

13. The Agreement between the Government of India and the Government of Malaysia for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income was entered into on 1-4-1977. This Agreement is applicable to persons who are resident of one or both of the contracting States.

17. The immovable property in question is situate in Malaysia and income is derived from that property. Further, it has also been held as a matter of fact that there is no permanent establishment in India in regard to carrying on the business of rubber plantations in Malaysia out of which income is derived and that finding of fact has been recorded by all the authorities and affirmed by the High Court. We, therefore, do not propose to re-examine the question whether the finding is correct or not. Proceeding on that basis, we hold that business income out of rubber plantations cannot be taxed in India because of closer economic relations between the assessee and Malaysia in which the property is located and where the permanent establishment has been set up will determine the fiscal domicile. On the first issue, the view taken by the High Court is correct.

18. Reading the Treaty in question as a whole when it is intended that even though it is possible for a resident in India to be taxed in terms of Sections 4 and 5, if he is deemed to be a resident of a contracting State where his personal and economic relations are closer, then his residence in India will become irrelevant. The Treaty will have to be interpreted as such and prevails over Sections 4 and 5 of the Act. Therefore, we are of the view that the High Court is justified in reaching its conclusion, though for different reasons from those stated by the High Court.

21. Taxation policy is within the power of the Government and Section 90 of the Income Tax Act enables the Government to formulate its policy through treaties entered into by it and even such treaty treats the fiscal domicile in one State or the other and thus prevails over the other provisions of the Income Tax Act, it would be unnecessary to refer to the terms addressed in OECD or in any of the decisions of foreign jurisdiction or in any other agreements.

22. In this view of the matter, it is unnecessary to refer to the decisions cited before us since we have taken the view with reference to clauses set out under the Agreement. We, therefore, find no merit in these appeals and they stand dismissed.

STATE RESPONSIBILITY

MILITARY AND PARAMILITARY ACTIVITIES IN AND AGAINST NICARAGUA (Nicaragua v United States of America), Merits

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 fa1l 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. Certain opponents of the new Government, primarily supporters of the former Somoza Government and in particular ex-members of the National Guard, formed themselves into irregular military forces, and commenced a policy of armed opposition, though initially on a limited scale.

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.

58. A further aspect of this case is that the conflict to which it relates has continued and is continuing. It has therefore been necessary for the Court to decide, for the purpose of its definition of the factual situation, what period of time, beginning from the genesis of the dispute, should be taken into consideration. The Court holds that general principles as to the judicial process require that the facts on which its Judgment is based should be those occurring up to the close of the oral proceedings on the merits of the case. While the Court is of course very well aware, from reports in the international press, of the developments in Central America since that date, it cannot treat such reports as evidence, nor has it had the benefit of the comments or argument of either of the Parties on such reports.

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 officia1 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".

93. The Court must now examine in more detail the genesis, development and activities of the *contra* force, and the role of the United States in relation to it, in order to determine the legal significance of the conduct of the United States in this respect.

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, described in evidence by Mr. MacMichael and its use of a range of intelligence and information sources in a political context where, moreover, the Government had declared and recognized surveillance of Nicaragua as a "high priority". The Court cannot of course conclude from this that no transborder traffic in arms existed, although it does not seem particularly unreasonable to believe that traffic of this kind, had it been persistent and on a significant scale, must inevitably have been discovered in view of the magnitude of the resources used for that purpose. 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.

158. Confining itself to the regional States concerned, the Court accordingly considers that it is scarcely possible for Nicaragua's responsibility for an arms traffic taking place on its territory to be automatically assumed while the opposite assumption is adopted with regard to its neighbours in respect of similar traffic. Having regard to the circumstances characterizing this part of Central America, the Court considers it more realistic, and consistent with the probabilities, to recognize that an activity of that nature, if on a limited scale, may very well be pursued unbeknown to the territorial government.

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. In the report of the diplomatic talks held on 12 August 1981 at Managua, Commander Ortega did not in any sense promise to cease sending arms, but, on the contrary, said on the one hand that Nicaragua had taken immediate steps to put a stop to it once precise information had been given and, on the other hand, expressed inability to take such steps where Nicaragua was not provided with information enabling that traffic to be located. The Court would further observe that the four draft treaties submitted by Nicaragua within the Contadora process in 1983 do not constitute an admission by Nicaragua of the supply of assistance to the armed opposition in El Salvador, but simply make provision for the future in the context of the inter-American system, in which a State is prohibited from assisting the armed opposition within another State.

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.

163. As the Court has already observed, both the Parties have addressed themselves primarily to the question of aid by the Government of Nicaragua to the armed opposition in El Salvador, and the question of aggression directed against Honduras and Costa Rica has fallen somewhat into the background. Nevertheless the allegation that such aggression affords a basis for the exercise by the United States of the right of collective self-defence remains on the record; and the Court has to note that Nicaragua has not taken the opportunity during the proceedings of expressly refuting the assertion that it has made cross-border military attacks on the territory of those two States. At the opening of the hearings in 1984 on the questions of jurisdiction and admissibility, the Agent of Nicaragua referred to the "supposed armed attacks of Nicaragua against its neighbours", and proceeded to "reiterate our denial of these accusations which in any

case we will amply address in the merits phase of these proceedings". However, the declaration of the Nicaraguan Foreign Minister annexed to the Memorial on the merits filed on 30 April 1985, while repudiating the accusation of support for the armed opposition in El Salvador, did not refer at all to the allegation of border incidents involving Honduras and Costa Rica.

164. The Court, while not as fully informed on the question as it would wish to be, therefore considers as established the fact that certain transborder military incursions into the territory of Honduras and Costa Rica are imputable to the Government of Nicaragua. The Court is also aware of the fact that the FDN operates along the Nicaraguan border with Honduras, and the ARDE operates along the border with Costa Rica.

172. The Court has now to turn its attention to the question of the law applicable to the present dispute. In formulating its view on the significance of the United States multilateral treaty reservation, the Court has reached the conclusion that it must refrain from applying the multilateral treaties invoked by Nicaragua in support of its claims, without prejudice either to other treaties or to the other sources of law enumerated in Article 38 of the Statute.

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 parce1 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 interna1 or territorial waters in early1984 ;

- 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.

* * * * *

LAGRAND 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, *interalia*, 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 disposa1 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

> "[tlhe United States of America should take al1 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.

* * * * *

AVENA AND OTHER MEXICAN NATIONALS
(Mexico v United States of America)

ICJ Reports 2004, p.12

(Principle of state responsibility and reparation)

15. The present proceedings have been brought by Mexico against the United States on the basis of the Vienna Convention, and of the Optional Protocol providing for the jurisdiction of the Court over "disputes arising out of the interpretation or application" of the Convention. Mexico and the United States are, and were at all relevant times, parties to the Vienna Convention and to the Optional Protocol. Mexico claims that the United States has committed breaches of the Vienna Convention in relation to the treatment of a number of Mexican nationals who have been tried, convicted and sentenced to death in criminal proceedings in the United States. The original claim related to 54 such persons, but as a result of subsequent adjustments to its claim made by Mexico, only 52 individual cases are involved, These criminal proceedings have been taking place in nine different States of the United States, namely California (28 cases), Texas (1 5 cases), Illinois (three cases), Arizona (one case), Arkansas (one case), Nevada (one case), Ohio (one case), Oklahoma (one case) and Oregon (one case), between 1979 and the present.

17. The provisions of the Vienna Convention of which Mexico alleges violations are contained in Article 36. Article 36 relates, according to its title, to "Communication and contact with nationals of the sending State". Paragraph I (b) of that Article provides that if a national of that State "is arrested or committed to prison or to custody pending trial or is detained in any other manner", and he so requests, the local consular post of the sending State is to be notified. The Article goes on to provide that the "competent authorities of the receiving State" shall "inform the person concerned without delay of his rights" in this respect.

40. In its final submissions Mexico asks the Court to adjudge and declare that the United States, in failing to comply with Article 36, paragraph 1, of the Vienna Convention, has "violated its international legal obligations to Mexico, in its own right and in the exercise of its right of diplomatic protection of its nationals".

The Court would first observe that the individual rights of Mexican nationals under paragraph I *(b)* of Article 36 or the Vienna Convention are rights which are to be asserted, at any rate in the first place, within the domestic legal system of the United States. Only when that process is completed and local remedies are exhausted would Mexico be entitled to espouse the individual claims of its nationals through the procedure of diplomatic protection.

In the present case Mexico does not, however, claim to be acting solely on that basis. It also asserts its own claims, basing them on the injury which it contends that it *has* itself *suffered, directly and through its nationals* as a result of the violation by the United States of the obligations incumbent upon it under Article 36, paragraph 1 (a), (b) and *(c).*

The Court would recall that, in the *LaGrand* case, it recognized that

> "Article 36, paragraph 1 [of the Vienna Convention], creates individual rights [for the national concerned], which . . . may be invoked in this Court by the national State or the detained person" (I. C. J. *Reports 2001,* p. 494, para. 77).

It would further observe that violations of the rights of the individual under Article 36 may entail a violation of the rights of the sending State, and that violations of the rights of the latter may entail a violation of the rights of the individual. In these special circumstances of interdependence of the rights of the State and of individual rights, Mexico may, in submitting a claim in its own name, request the Court to rule on the violation of rights which it claims to have suffered both directly and through the violation of individual rights conferred on Mexican nationals under Article 36, paragraph 1 (b). The duty to exhaust local remedies does not apply to such a request. Further, for reasons just explained, the Court does not find it necessary to deal with Mexico's claims of violation under a distinct heading of diplomatic protection.

41. The Court now turns to the question of the alleged dual nationality of certain of the Mexican nationals the subject of Mexico's claims. The United States regards it as an accepted principle that, when a person arrested or detained in the receiving State is a national of that State, then even if he is also a national of another State party to the Vienna Convention, Article 36 has no application, and the authorities or the receiving State are not required to proceed as laid down in that Article; and Mexico has indicated that, for the purposes of the present case it does not contest that dual nationals have no right to be advised of their rights under Article 36.

50. The Court has already in its Judgment in the *LaGrand* case described Article 36, paragraph 1, as "an interrelated regime designed to facilitate the implementation of the system of consular protection" (I. *C.* J. *Reports 2001,* p. 492, para. 74).

51. The United States as the receiving State does not deny its duty to perform these obligations. However, it claims that the obligations apply only to individuals shown to be of Mexican nationality alone, and not to those of dual Mexican/United States nationality. The United States further contends *inter alia* that it has not committed any breach of Article 36, paragraph 1 (b), upon the proper interpretation of "without delay" as used in that subparagraph.

52. Thus two major issues under Article 36, paragraph 1 (b), that are in dispute between the Parties are, first, the question of the nationality of the individuals concerned; and second, the question of the meaning to be given to the expression "without delay". The Court will examine each of these in turn.

57. The Court finds that it is for Mexico to show that the 52 persons listed above held Mexican nationality at the time of their arrest. The Court notes that to this end Mexico has produced birth certificates and declarations of nationality, whose contents have not been challenged by the United States.

The Court observes further that the United States has, however, questioned whether some of these individuals were not also United States nationals. Thus, the United States has informed the Court that, "in the case of defendant Ayala (case No. 2) we are close to certain that Ayala is a

United States citizen", and that this could be confirmed with absolute certainty if Mexico produced facts about this matter. Similarly Mr. Avena (case No. 1) was said to be "likely to be a United States citizen, and there was "some possibility" that some 16 other defendants were United States citizens. As to six others, the United States said it "cannot rule out the possibility" of United States nationality. The Court takes the view that it was for the United States to demonstrate that this was so and to furnish the Court with all information on the matter in its possession. In so far as relevant data on that matter are said by the United States to lie within the knowledge of Mexico, it was for the United States to have sought that information from the Mexican authorities. The Court cannot accept that, because such information may have been in part in the hands of Mexico, it was for Mexico to produce such information. It was for the United States to seek such information, with sufficient specificity, and to demonstrate both that this was done and that the Mexican authorities declined or failed to respond to such specific requests. At no stage, however, has the United States shown the Court that it made specific enquiries of *those* authorities about particular cases and that responses were not forthcoming. The Court accordingly concludes that the United States has not met its burden of proof in its attempt to show that persons of Mexican nationality were also United States nationals.

The Court therefore finds that, as regards the 52 persons the United States had obligations under Article 36, paragraph 1 (b).

61. The Court thus now turns to the interpretation of Article 36, paragraph 1 (b), having found in paragraph 57 above that it is applicable to the 52 persons listed. It begins by noting that Article 36, paragraph 1 (b), contains three separate but interrelated elements: the right of the individual concerned to be informed without delay of his rights under Article 36, paragraph 1 (b); the right of the consular post to be notified without delay of the individual's detention, if he so requests; and the obligation of the receiving State to forward without delay any communication addressed to the consular post by the detained person.

62. The third element of Article 36, paragraph 1 (b), has not been raised on the facts before the Court. The Court thus begins with the right of an arrested or detained individual to information.

63. The Court finds that the duty upon the detaining authorities to give the Article 36, paragraph 1 (b), information to the individual arises once it is realized that the person is a foreign national, or once there are grounds to think that the person is probably a foreign national. Precisely when this may occur will vary with circumstances. The United States Department of State booklet, *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,* issued to Federal, state and local authorities in order to promote compliance with Article 36 of the Vienna Convention points out in such cases that: "most, but not all, persons born outside the United States are not [citizens]. Unfamiliarity with English may also indicate foreign nationality." The Court notes that when an arrested person himself claims to be of United States nationality, the realization by the authorities that he is not in

fact a United States national, or grounds for that realization, is likely to come somewhat later in time.

64. The United States has told the Court that millions of aliens reside, either legally or illegally, on its territory, and moreover that its laws concerning citizenship are generous. The United States has also pointed out that it is a mullicultura1 society, with citizenship being held by persons of diverse appearance, speaking many languages. The Court appreciates that in the United States the language that a person speaks, or his appearance, does not necessarily indicate that he is a foreign national. Nevertheless, and particularly in view of the large numbers of foreign nationals living in the United States, these very circumstances suggest that it would be desirable for enquiry routinely to be made of the individual as to his nationality upon his detention, so that the obligations of the Vienna Convention may be complied with. The United States has informed the Court that some of its law enforcement authorities do routinely ask persons taken into detention whether they are United States citizens. Indeed, were each individual to be told at that time that, should he be a foreign national, he is entitled to ask for his consular post to be contacted, compliance with this requirement under Article 36, paragraph 1 (b), would be greatly enhanced. The provision of such in formation could parallel the reading of' those rights of which any person taken into custody in connection with a criminal offence must be informed prior to interrogation by virtue of what in the United States is known as the "Miranda rule"; these rights include, *inter alia,* the right to remain silent, the right to have an attorney present during questioning, and the right to have an attorney appointed at government expense if the person cannot afford one. The Court notes that, according to the United States, such a practice in respect of the Vienna Convention rights is already being followed in some local jurisdictions.

65. Bearing in mind the complexities explained by the United States, the Court now begins by examining the application of Article 36, paragraph I (b), of the Vienna Convention to the 52 cases. In 45 of these cases, the Court has no evidence that the arrested persons claimed United States nationality, or were reasonably thought to be United States nationals, with specific enquiries being made in timely fashion to verify such dual nationality. The Court has explained in paragraph 57 above what enquiries it would have expected to have been made, within a short time period, and what information should have been provided to the Court.

66. Seven persons, however, are asserted by the United States to have stated at the time of arrest that they were United States citizens. Only in the case of Mr. Salcido (case No. 22) has the Court been provided by the United States with evidence of such a statement. This has been acknowledged by Mexico. Further, there has been no evidence before the Court to suggest that there were in this case at the same time also indications of Mexican nationality, which should have caused rapid enquiry by the arresting authorities and the providing of consular information "without delay". Mexico has accordingly not shown that in the case of Mr. Salcido the United States violated its obligations under Article 36,paragraph 1 (b).

74. The Court concludes that Mexico has failed to prove the violation by the United States of its obligations under Article 36, paragraph 1 (b), in the case of Mr. Salcido (case No. 22), and his

case will not be further commented upon. On the other hand, as regards the other individuals who are alleged to have claimed United States nationality on arrest, whose cases have been considered the argument of the United States cannot be upheld.

75. The question nonetheless remains as to whether, in each of the 45 cases referred to in paragraph 65 and of the six cases mentioned in paragraphs 67 to 73, the United States did provide the required information to the arrested persons "without delay". It is to that question that the Court now turns.

76. The Court has been provided with declarations from a number of the Mexican nationals concerned that attest to their never being informed of their rights under Article 36, paragraph 1 (b). The Court at the outset notes that, in 47 such cases, the United States nowhere challenges this fact of information not being given. Nevertheless, in the case of Mr. Hernandez (case No. 34), the United States observes that

> "Although the [arresting] officer did not ask Hernandez Llanas whether he wanted them to inform the Mexican Consulate of his arrest, it was certainly not unreasonable for him to assume that an escaped convict would not want the Consulate of the country from which he escaped notified of his arrest."

The Court notes that the clear duty to provide consular information under Article 36, paragraph 1 (b), does not invite assumptions as to what the arrested person might prefer, as a ground for not informing him. It rather gives the arrested person, once informed, the right to say he nonetheless does not wish his consular post to be notified. It necessarily follows that in each of these 41 cases, the duty to inform "without delay" has been violated.

77. In four cases, namely Ayala (case No. 2), Esquivel (case No. 7), Juarez (case No. 10) and Solache (case No. 47), some doubts remain as to whether the information that was given was provided without delay. For these, some examination of the term is thus necessary.

83. The Court now addresses the question of the proper interpretation of the expression "without delay" in the light of arguments put to it by the Parties. The Court begins by noting that the precise meaning of "without delay", as it is to be understood in Article 35, paragraph 1 (b), is not defined in the Convention. This phrase therefore requires interpretation according to the customary rules of treaty interpretation reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties.

84. Article I of the Vienna Convention on Consular Relations, which defines certain of the terms used in the Convention, offers no definition of the phrase "without delay". Moreover, in the different language versions of the Convention various terms are employed to render the phrases "without delay" in Article 36 and "immediately" in Article 14. The Court observes that dictionary definitions, in the various languages of the Vienna Convention, offer diverse meanings of the term "without delay" (and also of "immediately"). It is therefore necessary lo look elsewhere for an understanding of this term.

85. As for the object and purpose of the Convention, the Court observes that Article 36 provides for consular officers to be free to communicate with nationals of the sending State, to have access to them, to visit and speak with them and to arrange for their legal representation. It is not envisaged, either in Article 36, paragraph 1, or elsewhere in the Convention, that consular functions entail a consular officer himself or herself acting as the legal representative or more directly engaging in the criminal justice process. Indeed, this is confirmed by the wording of Article 36, paragraph 2, of the Convention. Thus, neither the terms of the Convention as normally understood, nor its object and purpose, suggest that "without delay" is to be understood as "immediately upon arrest and before interrogation".

86. The Court further notes that, notwithstanding the uncertainties in the *travaux preparatoires,* they too do not support such an interpretation. During the diplomatic conference, the conference's expert, former Special Rapporteur of the International Law Commission, explained to the delegates that the words "without undue delay" had been introduced by the Commission, after long discussion in both the plenary and drafting committee, to allow for special circumstances which might permit information as to consular notification not to be given at once. Germany, the only one of two States to present an amendment, proposed adding "but at latest within one month". There was an extended discussion by many different delegates as to what such outer time-limit would be acceptable. During that debate no delegate proposed "immediately". The shortest specific period suggested was by the United Kingdom, namely "promptly" and no later than "48 hours" afterwards. Eventually, in the absence of agreement on a precise time period, the United Kingdom's other proposal to delete the word "undue" was accepted as the position around which delegates could converge. It is also of interest 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).

87. The Court thus finds that "without delay" is not necessarily to be interpreted as "immediately" upon arrest. It further observes that during the Conference debates on this term, no delegate made any connection with the issue of interrogation. The Court considers that the provision in Article 36, paragraph I (b), that the receiving State authorities "shall inform the person concerned without delay of his rights" cannot be interpreted to signify that the provision of such information must necessarily precede any interrogation, so that the commencement of interrogation before the information is given would be a breach of Article 36.

88. Although, by application of the usual rules of interpretation, "without delay" as regards the duty to inform an individual under Article 36, paragraph 1 (b), is not to be understood as necessarily meaning "immediately upon arrest", there is nonetheless a duty upon the arresting authorities to give that information to an arrested person as soon as it is realized that the person is a foreign national, or once there are grounds to think that the person is probably a foreign national.

89. With one exception, no information as to entitlement to consular notification was given in any of the cases cited in paragraph 77 within any of the various time periods suggested by the

delegates to the Conference on the Vienna Convention, or by the United States itself. Indeed, the information was given either not at all or at periods very significantly removed from the time of arrest. In the case of Mr. Juarez (case No. l0), the defendant was informed of his consular rights 40 hours after his arrest. The Court notes, however, that Mr. Juirez's arrest report stated that he had been born in Mexico; moreover, there had been indications of his Mexican nationality from the time of his initial interrogation by agents of the Federal Bureau of Investigation (FBI) following his arrest. It follows that Mr. Juarez's Mexican nationality was apparent from the outset of his detention by the United States authorities. In these circumstances, in accordance with its interpretation of the expression "without delay", the Court concludes that the United States violated the obligation incumbent upon it under Article 36, paragraph 1 (b), to inform Mr. Juarez without delay of his consular rights. The Court notes that the same finding was reached by a California Superior Court, albeit on different grounds.

90. The Court accordingly concludes that, with respect to each of the individuals listed in paragraph 16, with the exception of Mr. Salcido (case No. 22), the United States has violated its obligation under Article 36, paragraph 1 (b), of the Vienna Convention to provide information to the arrested person.

91. As noted above, Article 36, paragraph I (b), contains three elements. Thus far, the Court has been dealing with the right of an arrested person to be informed that he may ask for his consular post to be notified. The Court now turns to another aspect of Article 36, paragraph 1 (b). The Court finds the United States is correct in observing that the fact that a Mexican consular post was not notified under Article 36, paragraph 1 (b), does not of necessity show that the arrested person was not informed of his rights under that provision. He may have been informed and declined to have his consular post notified. The giving of the information is relevant, however, for satisfying the element in Article 36, paragraph 1 (b), on which the other two elements therein depend.

92. In only two cases has the United States claimed that the arrested person was informed of his consular rights but asked for the consular post not to be notified. These are Mr. Juarez(case No. 10) and Mr. Solache (case No. 47).

93. The Court is satisfied that when Mr. Juarez (case No. 10) was informed of his consular rights 40 hours after his arrest he chose not to have his consular post notified. As regards Mr. Solache (case No. 47), however, it is not sufficiently clear to the Court, on the evidence before it, that he requested that his consular post should not be notified. Indeed, the Court has not been provided with any reasons as to why, if a request of non-notification was made, the consular post was then notified some three months later.

99. The relationship between the three subparagraphs of Article 36, paragraph 1, has been described by the Court in its Judgment in the *LaGrand* case *(I.C.J. Reports 2001*, p. 492, para. 74) as "an interrelated regime". The legal conclusions to be drawn from that interrelationship necessarily depend upon the facts of each case. In the *LaGrand* case, the Court found that the

failure for 16 years to inform the brothers of their right to have their consul notified effectively prevented the exercise of other rights that Germany might have chosen to exercise under subparagraphs (a) and (c).

100. It is necessary to revisit the interrelationship of the three subparagraphs of Article 36, paragraph 1, in the light of the particular facts and circumstances of the present case.

101. The Court would first recall that, in the case of Mr. Juarez (case No. 10), when the defendant was informed of his rights, he declined to have his consular post notified. Thus in this case there was no violation of either subparagraph (a) or subparagraph (c) of Article 36, paragraph 1.

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

103. The same is true, *pari passu,* of certain rights identified in subparagraph (c): "consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, and to converse and correspond with him . . .".

104. On the other hand, and on the particular facts of this case, no such generalized answer can he given as regards a further entitlement mentioned in subparagraph (c), namely, the right of consular officers "to arrange for [the] legal representation" of the foreign national. The Court observes that the exercise of the rights or the sending State under Article 36, paragraph 1 (c), depends upon notification by the authorities of the receiving State. It may be, however, that information drawn to the attention of the sending State by other means may still enable its consular officers to assist in arranging legal representation for its national.

107. In its third final submission Mexico asks the Court to adjudge and declare that "the United States violated its obligations under Article 36 (2) of the Vienna Convention by failing to provide meaningful and effective review and reconsideration of convictions and sentences impaired by a violation of Article 36 (I)".

111. The "procedural default" rule in United States law has already been brought to the attention of the Court in the *LaGrand* case. The following brief definition of the rule was provided by Mexico in its Memorial in this case and has not been challenged by the United States: "a defendant who could have raised, but fails to raise, a legal issue at trial will generally not be permitted to raise it in future proceedings, on appeal or in a petition for a writ of *habeas corpus".* The rule requires exhaustion of remedies, *inter alia,* at the state level and before a *habeas corpus* motion can be filed with federal courts. In the *LaGrand* case, the rule in question

was applied by United States federal courts; in the present case, Mexico also complains of the application of the rule in certain state courts of criminal appeal.

112. The Court has already considered the application of the "procedural default" rule, alleged by Mexico to be a hindrance to the full implementation of the international obligations of the United States under Article 36, in the *LaGrand* case, when the Court addressed the issue of its implications for the application of Article 36, paragraph 2, of the Vienna Convention. The Court emphasized that "a distinction must be drawn between that rule as such and its specific application in the present case". On this basis, the Court concluded that "the procedural default rule prevented counsel for the LaGrands to effectively challenge their convictions and sentences other than on United States constitutional grounds" (*I. C.J. Reports 2001*, p. 493, para. 91). This statement of the Court seems equally valid in relation to the present case, where a number of Mexican nationals have been placed exactly in such a situation.

113. The Court will return to this aspect below, in the context of Mexico's claims as to remedies. For the moment, the Court simply notes that the procedural default rule has not been revised, nor has any provision been made to prevent its application in cases where it has been the failure of the United States itself to inform that may have precluded counsel from being in a position to have raised the question of a violation of the Vienna Convention in the initial trial. It thus remains the case that the procedural default rule may continue to prevent courts from attaching legal significance to the fact, *inter alia*, that the violation of the rights set forth in Article 36, paragraph 1, prevented Mexico, in a timely fashion, from retaining private counsel for certain nationals and otherwise assisting in their defence. In such cases, application of the procedural default rule would have the effect of preventing "full effect [from being] given to the purposes for which the rights accorded under this article are intended", and thus violate paragraph 2 of Article 36. The Court notes moreover that in several of the cases cited in Mexico's final submissions the procedural default rule has already been applied, and that in others it could be applied at subsequent stages in the proceedings. However, in none of the cases, save for the three mentioned in paragraph 114 below, have the criminal proceedings against the Mexican nationals concerned already reached a stage at which there is no further possibility of judicial reexamination of those cases; that is to say, all possibility is not yet excluded of "review and reconsideration" of conviction and sentence, as called for in the *LaCrand* case. It would therefore be premature for the Court to conclude at this stage that, in those cases, there is already a violation of the obligations under Article 36, paragraph 2, of the Vienna Convention.

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

119. The general principle on the legal consequences of the commission of an internationally wrongful act was stated by the Permanent Court of International Justice in the *Factory at*

Chorzow case as follows: "It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form." *[Factory at Chorzow, Jurisdiction, 19.27, P. C. I.J., Series A, No. 9,* p. 21.) What constitutes "reparation in an adequate form" clearly varies depending upon the concrete circumstances surrounding each case and the precise nature and scope of the injury, since the question has to be examined from the viewpoint of what is the "reparation in an adequate form" that corresponds to the injury. In a subsequent phase of the same case, the Permanent Court went on lo elaborate on this point as follows:

> "The essential principle contained in the actual notion of an illegal act - a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals – is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed." *(Factory at Chorzow, Merits, 1928, P.C. I.J., Series A, No. 17,* p. 47.)

120. In the *LaGrand* case the Court made a general statement on the principle involved as follows:

> "The Court considers in this respect that if the United States, notwithstanding its commitment [to ensure implementation of the specific measures adopted in performance of its obligations under Article 36, paragraph 1 (b)], 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." *(ICJ Reports* 2001, pp. 513-514, para. 125.)

121. Similarly, in the present case the Court's task is to determine what would be adequate reparation for the violations of Article 36. It should be clear from what has been observed above that the internationally wrongful acts committed by the United States were the failure of its competent authorities to inform the Mexican nationals concerned, to notify Mexican consular posts and to enable Mexico to provide consular assistance. It follows that the remedy to make good these violations should consist in an obligation on the United States to permit review and reconsideration of these nationals' cases by the United States courts, with a view to ascertaining whether in each case the violation of Article 36 committed by the competent authorities caused actual prejudice to the defendant in the process of administration of criminal justice.

131. In stating in its Judgment in the *LaGrand* case that "the United States of America, *by means of its own choosing,* shall allow the review and reconsideration of the conviction and sentence" (*I. C.J. Reports' 2001,* p. 516, para. 128 (7); emphasis added), the Court acknowledged

that the concrete modalities for such review and reconsideration should be left primarily to the United States. It should be underlined, however, that this freedom in the choice of means for such review and reconsideration is not without qualification: as the passage of the Judgment quoted above makes abundantly clear, such review and reconsideration has to be carried out "by taking account of the violation of the rights set forth in the Convention" *(I. C. J. Reports 2001,* p. 514, para. 125); including, in particular, the question of the legal consequences of the violation upon the criminal proceedings that have followed the violation.

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

139. Accordingly, in a situation of the violation of rights under Article 36, paragraph I, of the Vienna Convention, the defendant raises his claim in this respect not as a case of "harm to a particular right essential to a fair trial" - a concept relevant to the enjoyment of due process rights under the United States Constitution - but as a case involving the infringement of his rights under Article 36, paragraph 1. The rights guaranteed under the Vienna Convention are treaty rights which the United States has undertaken to comply with in relation to the individual concerned, irrespective of the due process rights under United States constitutional law. In this regard, the Court would point out that what is crucial in the review and reconsideration process is the existence of a procedure which guarantees that full weight is given to the violation of the rights set forth in the Vienna Convention, whatever may be the actual outcome of such review and reconsideration.

140… the Court is of the view that, in cases where the breach of the individual rights of Mexican nationals under Article 36, paragraph 1 (b), of the Convention has resulted, in the sequence of judicial proceedings that has followed, in the individuals concerned being subjected to prolonged detention or convicted and sentenced to severe penalties, the legal consequences of this breach have to be examined and taken into account in the course of review and reconsideration. The Court considers that it is the judicial process that is suited to this task.

141. The Court in the *LaGrand* case left to the United States the choice of means as to how review and reconsideration should be achieved, especially in the light of the procedural default rule. Nevertheless, the premise on which the Court proceeded in that case was that the process of review and reconsideration should occur within the overall judicial proceedings relating to the individual defendant concerned.

142. As regards the clemency procedure, the Court notes that this performs an important function in the administration of criminal justice in the United States and is "the historic remedy for preventing miscarriages of justice where judicial process has been exhausted" *(Herrera* v.

Collins, 506 US 390 (1443) at pp. 411-412). The Court accepts that executive clemency, while not judicial, is an integral part of the overall scheme for ensuring justice and fairness in the legal process within the United States criminal justice system. It must, however, point out that what is at issue in the present case is not whether executive clemency as an institution it; or is not an integral part of the "existing laws and regulations of the United States", but whether the clemency process as practised within the criminal justice systems of different states in the United States can, in and of itself, qualify as an appropriate means for undertaking the effective "review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention", as the Court prescribed in the *LaGrand* Judgment (*I. C. J. Reports 2001,* p. 514, para. 125).

150. The Court would further note in this regard that in the *LaGrand* case Germany sought, *inter alia,* "a straightforward assurance that the United States will not repeat its unlawful acts" (*I. C. J. Reports 2001,* p. 51 1, para. 120). With regard to this general demand for an assurance of non-repetition, the Court stated: The Court believes that as far as the request of Mexico for guarantees and assurances of non-repetition is concerned, what the Court stated in this passage of the *LaGrand* Judgment remains applicable, and therefore meets that request.

151. The Court would now re-emphasize a point of importance. In the present case, it has had occasion to examine the obligations of the United States under Article 36 of the Vienna Convention in relation to Mexican nationals sentenced to death in the United States. Its findings as to the duty of review and reconsideration of convictions and sentences have been directed to the circumstance of severe penalties being imposed on foreign nationals who happen to be of Mexican nationality. To avoid any ambiguity, it should be made clear that, while what the Court has stated concerns the Mexican nationals whose cases have been brought before it by Mexico, the Court has been addressing the issues of principle raised in the course of the present proceedings from the viewpoint of the general application of the Vienna Convention, and there can be no question of making an a *contrario* argument in respect of any of the Court's findings in the present Judgment. In other words, the fact that in this case the Court's ruling has concerned only Mexican nationals cannot be taken to imply, that the conclusions reached by it in the present Judgment do not apply to other foreign nationals finding themselves in similar situations in the United States.

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Barcelona Traction, Light and Power Company, Limited

ICJ Reports 1970, p.3

(Diplomatic protection and application of the principle of state responsibility; application of municipal law with respect to limited liability companies; lifting the corporate veil; nationality of a corporate entity)

8. The Barcelona Traction, Light and Power Company, Limited, is a holding company incorporated in 1911 in Toronto (Canada), where it has its head office. For the purpose of creating and developing an electric power production and distribution system in Catalonia (Spain), it formed a number of operating, financing and concession-holding subsidiary companies. Three of these companies, whose shares it owned wholly or almost wholly, were incorporated under Canadian law and had their registered offices in Canada; the others were incorporated under Spanish law and had their registered offices in Spain.

28. For the sake of clarity, the Court will briefly recapitulate the claim and identify the entities concerned in it. The claim is presented on behalf of natural and juristic persons, alleged to be Belgian nationals and shareholders in the Barcelona Traction, Light and Power Company, Limited. The submissions of the Belgian Government make it clear that the object of its Application is reparation for damage allegedly caused to these persons by the conduct, said to be contrary to international law, of various organs of the Spanish State towards that company and various other companies in the same group.

30. The States which the present case principally concerns are Belgium, the national State of the alleged shareholders, Spain, the State whose organs are alleged to have committed the unlawful acts complained of, and Canada, the State under whose laws Barcelona Traction was incorporated and in whose territory it has its registered office ("head office" in the terms of the by-laws of Barcelona Traction).

31. Thus the Court has to deal with a series of problems arising out of a triangular relationship involving the State whose nationals are shareholders in a company incorporated under the laws of another State, in whose territory it has its registered office; the State whose organs are alleged to have committed against the company unlawful acts prejudicial to both it and its shareholders; and the State under whose laws the company is incorporated, and in whose territory it has its registered office.

32. In these circumstances it is logical that the Court should first address itself to what was originally presented as the subject-matter of the third preliminary objection: namely the question of the right of Belgium to exercise diplomatic protection of Belgian shareholders in a company which is a juristic entity incorporated in Canada, the measures complained of having been taken in relation not to any Belgian national but to the company itself.

33. When a State admits into its territory foreign investments or foreign nationals, whether natural or juristic persons, it is bound to extend to them the protection of the law and assumes obligations concerning the treatment to be afforded them. These obligations, however, are neither absolute nor unqualified. In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations ***erga omnes.***

34. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law ***(Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951,*** p. 23); others are conferred by international instruments of a universal or quasi-universal character.

35. Obligations the performance of which is the subject of diplomatic protection are not of the same category. It cannot be held, when one such obligation in particular is in question, in a specific case, that all States have a legal interest in its observance. In order to bring a claim in respect of the breach of such an obligation, a State must first establish its right to do so, for the rules on the subject rest on two suppositions:

"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." ***(Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C. J. Reports 1949,*** pp. 181-182.)

In the present case it is therefore essential to establish whether the losses allegedly suffered by Belgian shareholders in Barcelona Traction were the consequence of the violation of obligations of which they were the beneficiaries. In other words: has a right of Belgium been violated on account of its nationals' having suffered infringement of their rights as shareholders in a Company not of Belgian nationality?

36. Thus it is the existence or absence of a right, belonging to Belgium and recognized as such by international law, which is decisive for the problem of Belgium's capacity.

> "This right is necessarily limited to intervention [by a State] on behalf of its own nationals because, in the absence of a special agreement, it is the bond of nationality between the State and the individual which alone confers upon the State the right of diplomatic protection, and it is as a part of the function of diplomatic protection that the right to take up a claim and to ensure respect for the rules of international law must be envisaged." (Panevezys-Saldutiskis Railway, Judgment, *1939,* P.C.I. J., Series *A/B,* No. 76, p. 16.)

It follows that the same question is determinant in respect of Spain's responsibility towards Belgium. Responsibility is the necessary corollary of a right. In the absence of any treaty on the subject between the Parties, this essential issue has to be decided in the light of the general rules of diplomatic protection.

37. In seeking to determine the law applicable to this case, the Court has to bear in mind the continuous evolution of international law. Diplomatic protection deals with a very sensitive area of international relations, since the interest of a foreign State in the protection of its nationals confronts the rights of the territorial sovereign, a fact of which the general law on the subject has had to take cognizance in order to prevent abuses and friction. From its origins closely linked with international commerce, diplomatic protection has sustained a particular impact from the growth of international economic relations, and at the same time from the profound transformations which have taken place in the economic life of nations. These latter changes have given birth to municipal institutions, which have transcended frontiers and have begun to exercise considerable influence on international relations. One of these phenomena which has a particular bearing on the present case is the corporate entity.

38. In this field international law is called upon to recognize institutions of municipal law that have an important and extensive role in the international field. This does not necessarily imply drawing any analogy between its own institutions and those of municipal law, nor does it amount to making rules of international law dependent upon categories of municipal law. All it means is that international law has had to recognize the corporate entity as an institution created by States in a domain essentially within their domestic jurisdiction. This in turn requires that, whenever legal issues arise concerning the rights of States with regard to the treatment of companies and shareholders, as to which rights international law has not established its own rules, it has to refer to the relevant rules of municipal law. Consequently, in view of the relevance to the present case of the rights of the corporate entity and its shareholders under municipal law, the Court must devote attention to the nature and interrelation of those rights.

41. Municipal law determines the legal situation not only of such limited liability companies but also of those persons who hold shares in them. Separated from the company by numerous barriers, the shareholder cannot be identified with it. The concept and structure of the company are founded on and determined by a firm distinction between the separate entity of the company and that of the shareholder, each with a distinct set of rights. The separation of property rights as between company and shareholder is an important manifestation of this distinction. So long as the company is in existence the shareholder has no right to the corporate assets.

42. It is a basic characteristic of the corporate structure that the company alone, through its directors or management acting in its name, can take action in respect of matters that are of a corporate character. The underlying justification for this is that, in seeking to serve its own best interests, the company will serve those of the shareholder too. Ordinarily, no individual shareholder can take legal steps, either in the name of the company or in his own name. If the shareholders disagree with the decisions taken on behalf of the company they may, in accordance

with its articles or the relevant provisions of the law, change them or replace its officers, or take such action as is provided by law. Thus to protect the company against abuse by its management or the majority of shareholders, several municipal legal systems have vested in shareholders (sometimes a particular number is specified) the right to bring an action for the defence of the company, and conferred upon the minority of shareholders certain rights to guard against decisions affecting the rights of the company vis-à-vis its management or controlling shareholders. Nonetheless the shareholders' rights in relation to the company and its assets remain limited, this being, moreover, a corollary of the limited nature of their liability.

43. At this point the Court would recall that in forming a company, its promoters are guided by all the various factors involved, the advantages and disadvantages of which they take into account. So equally does a shareholder, whether he is an original subscriber of capital or a subsequent purchaser of the company's shares from another shareholder. He may be seeking safety of investment, high dividends or capital appreciation or a combination of two or more of these. Whichever it is, it does not alter the legal status of the corporate entity or affect the rights of the shareholder. In any event he is bound to take account of the risk of reduced dividends, capital depreciation or even loss, resulting from ordinary commercial hazards or from prejudice caused to the company by illegal treatment of some kind.

44. Notwithstanding the separate corporate personality, a wrong done to the company frequently causes prejudice to its shareholders. But the mere fact that damage is sustained by both company and shareholder does not imply that both are entitled to claim compensation. Thus no legal conclusion can be drawn from the fact that the same event caused damage simultaneously affecting several natural or juristic persons. Creditors do not have any right to claim compensation from a person who, by wronging their debtor, causes them loss. In such cases, no doubt, the interests of the aggrieved are affected, but not their rights. Thus whenever a shareholder's interests are harmed by an act done to the company, it is to the latter that he must look to institute appropriate action; for although two separate entities may have suffered from the same wrong, it is only one entity whose rights have been infringed.

46. Persons suffer damage or harm in most varied circumstances. This in itself does not involve the obligation to make reparation. Not a mere interest affected, but solely a right infringed involves responsibility, so that an act directed against and infringing only the company's rights does not involve responsibility towards the shareholders, even if their interests are affected.

47. The situation is different if the act complained of is aimed at the direct rights of the shareholder as such. It is well known that there are rights which municipal law confers upon the latter distinct from those of the company, including the right to any declared dividend, the right to attend and vote at general meetings, the right to share in the residual assets of the company on liquidation. Whenever one of his direct rights is infringed, the shareholder has an independent right of action. On this there is no disagreement between the Parties. But a distinction must be drawn between a direct infringement of the shareholder's rights, and difficulties or financial losses to which he may be exposed as the result of the situation of the company.

52. International law may not, in some fields, provide specific rules in particular cases. In the concrete situation, the company against which allegedly unlawful acts were directed is expressly vested with a right, whereas no such right is specifically provided for the shareholder in respect of those acts. Thus the position of the company rests on a positive rule of both municipal and international law. As to the shareholder, while he has certain rights expressly provided for him by municipal law as referred to in paragraph 42 above, appeal can, in the circumstances of the present case, only be made to the silence of international law. Such silence scarcely admits of interpretation in favour of the shareholder.

56. Forms of incorporation and their legal personality have sometimes not been employed for the sole purposes they were originally intended to serve; sometimes the corporate entity has been unable to protect the rights of those who entrusted their financial resources to it; thus inevitably there have arisen dangers of abuse, as in the case of many other institutions of law. Here, then, as elsewhere, the law, confronted with economic realities, has had to provide protective measures and remedies in the interests of those within the corporate entity as well as of those outside who have dealings with it: the law has recognized that the independent existence of the legal entity cannot be treated as an absolute. It is in this context that the process of "lifting the corporate veil" or "disregarding the legal entity" has been found justified and equitable in certain circumstances or for certain purposes. The wealth of practice already accumulated on the subject in municipal law indicates that the veil is lifted, for instance, to prevent the misuse of the privileges of legal personality, as in certain cases of fraud or malfeasance, to protect third persons such as a creditor or purchaser, or to prevent the evasion of legal requirements or of obligations.

57. Hence the lifting of the veil is more frequently employed from without, in the interest of those dealing with the corporate entity. However, it has also been operated from within, in the interest of-among others-the shareholders, but only in exceptional circumstances.

58. In accordance with the principle expounded above, the process of lifting the veil, being an exceptional one admitted by municipal law in respect of an institution of its own making, is equally admissible to play a similar role in international law. It follows that on the international plane also there may in principle be special circumstances which justify the lifting of the veil in the interest of shareholders.

66. It cannot however, be contended that the corporate entity of the company has ceased to exist, or that it has lost its capacity to take corporate action. It was free to exercise such capacity in the Spanish courts and did in fact do so. It has not become incapable in law of defending its own rights and the interests of the shareholders. In particular, a precarious financial situation cannot be equated with the demise of the corporate entity, which is the hypothesis under consideration: the company's status in law is alone relevant, and not its economic condition, nor even the possibility of its being "practically defunct”-a description on which argument has been based but which lacks al1 legal precision. Only in the event of the legal demise of the company are the shareholders deprived of the possibility of a remedy available through the company; it is

only if they became deprived of all such possibility that an independent right of action for them and their government could arise.

67. In the present case, Barcelona Traction is in receivership in the country of incorporation. Far from implying the demise of the entity or of its rights, this much rather denotes that those rights are preserved for so long as no liquidation has ensued. Though in receivership, the company continues to exist. Moreover, it is a matter of public record that the company's shares were quoted on the stock-market at a recent date.

69. The Court will now turn to the second possibility, that of the lack of capacity of the company's national State to act on its behalf. The first question which must be asked here is whether Canada-the third apex of the triangular relationship-is, in law, the national State of Barcelona Traction.

70. In allocating corporate entities to States for purposes of diplomatic protection, international law is based, but only to a limited extent, on an analogy with the rules governing the nationality of individuals. The traditional rule attributes the right of diplomatic protection of a corporate entity to the State under the laws of which it is incorporated and in whose territory it has its registered office. These two criteria have been confirmed by long practice and by numerous international instruments. This notwithstanding, further or different links are at times said to be required in order that a right of diplomatic protection should exist. Indeed, it has been the practice of some States to give a company incorporated under their law diplomatic protection solely when it has its seat or management or centre of control in their territory, or when a majority or a substantial proportion of the shares has been owned by nationals of the State concerned. Only then, it has been held, does there exist between the corporation and the State in question a genuine connection of the kind familiar from other branches of international law. However, in the particular field of the diplomatic protection of corporate entities, no absolute test of the "genuine connection" has found general acceptance.

71. In the present case, it is not disputed that the company was incorporated in Canada and has its registered office in that country. The incorporation of the company under the law of Canada was an act of free choice. Not only did the founders of the company seek its incorporation under Canadian law but it has remained under that law for a period of over 50 years. It has maintained in Canada its registered office, its accounts and its share registers. Board meetings were held there for many years; it has been listed in the records of the Canadian tax authorities. Thus a close and permanent connection has been established, fortified by the passage of over half a century. This connection is in no way weakened by the fact that the company engaged from the very outset in commercial activities outside Canada, for that was its declared object. Barcelona Traction's links with Canada are thus manifold.

72. Furthermore, the Canadian nationality of the company has received general recognition. Prior to the institution of proceedings before the Court, three other governments apart from that of Canada (those of the United Kingdom, the United States and Belgium) made representations

concerning the treatment accorded to Barcelona Traction by the Spanish authorities. The United Kingdom Government intervened on behalf of bondholders and of shareholders. Several representations were also made by the United States Government, but not on behalf of the Barcelona Traction company as such.

73. Both Governments acted at certain stages in close cooperation with the Canadian Government. An agreement was reached in 1950 on the setting-up of an independent committee of experts. While the Belgian and Canadian Governments contemplated a committee composed of Belgian, Canadian and Spanish members, the Spanish Government suggested a committee composed of British, Canadian and Spanish members. This was agreed to by the Canadian and United Kingdom Governments, and the task of the committee was, in particular, to establish the monies imported into Spain by Barcelona Traction or any of its subsidiaries, to determine and appraise the materials and services brought into the country, to determine and appraise the amounts withdrawn from Spain by Barcelona Traction or any of its subsidiaries, and to compute the profits earned in Spain by Barcelona Traction or any of its subsidiaries and the amounts susceptible of being withdrawn from the country at 31 December 1949.

74. As to the Belgian Government, its earlier action was also undertaken in close co-operation with the Canadian Government. The Belgian Government admitted the Canadian character of the company in the course of the present proceedings. It explicitly stated that Barcelona Traction was a company of neither Spanish nor Belgian nationality but a Canadian company incorporated in Canada. The Belgian Government has even conceded that it was not concerned with the injury suffered by Barcelona Traction itself, since that was Canada's affair.

75. The Canadian Government itself, which never appears to have doubted its right to intervene on the company's behalf, exercised the protection of Barcelona Traction by diplomatic representation for a number of years, in particular by its note of 27 March 1948, in which it alleged that a denial of justice had been committed in respect of the Barcelona Traction, Ebro and National Trust companies, and requested that the bankruptcy judgment be cancelled. It later invoked the Anglo- Spanish treaty of 1922 and the agreement of 1924, which applied to Canada. Further Canadian notes were addressed to the Spanish Government in 1950, 1951 and 1952. Further approaches were made in 1954, and in 1955 the Canadian Government renewed the expression of its deep interest in the affair of Barcelona Traction and its Canadian subsidiaries.

76. In sum, the record shows that from 1948 onwards the Canadian Government made to the Spanish Government numerous representations which cannot be viewed otherwise than as the exercise of diplomatic protection in respect of the Barcelona Traction Company. Therefore this was not a case where diplomatic protection was refused or remained in the sphere of fiction. It is also clear that over the whole period of its diplomatic activity the Canadian Government proceeded in full knowledge of the Belgian attitude and activity.

78. The Court would here observe that, within the limits prescribed by international law, a State may exercise diplomatic protection by whatever means and to whatever extent it thinks fit,

for it is its own right that the State is asserting. Should the natural or legal persons on whose behalf it is acting consider that their rights are not adequately protected, they have no remedy in international law. Al1 they can do is to resort to municipal law, if means are available, with a view to furthering their cause or obtaining redress. The municipal legislator may lay upon the State an obligation to protect its citizens abroad, and may also confer upon the national a right to demand the performance of that obligation, and clothe the right with corresponding sanctions. However, al1 these questions remain within the province of municipal law and do not affect the position internationally.

81. The cessation by the Canadian Government of the diplomatic protection of Barcelona Traction cannot, then, be interpreted to mean that there is no remedy against the Spanish Government for the damage done by the allegedly unlawful acts of the Spanish authorities. It is not a hypothetical right which was vested in Canada, for there is no legal impediment preventing the Canadian Government from protecting Barcelona Traction. Therefore there is no substance in the argument that for the Belgian Government to bring a claim before the Court represented the only possibility of obtaining redress for the damage suffered by Barcelona Traction and, through it, by its shareholders.

82. Nor can the Court agree with the view that the Canadian Government had of necessity to interrupt the protection it was giving to Barcelona Traction, and to refrain from pursuing it by means of other procedures, solely because there existed no link of compulsory jurisdiction between Spain and Canada. International judicial proceedings are but one of the means available to States in pursuit of their right to exercise diplomatic protection ***(Reparation for Injuries Suffercnd in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949,*** p. ***178).*** The lack of a jurisdictional link cannot be regarded either in this or in other fields of international law as entailing the non-existence of a right.

83. The Canadian Government's right of protection in respect of the Barcelona Traction company remains unaffected by the present proceedings. The Spanish Government has never challenged the Canadian nationality of the company, either in the diplomatic correspondence with the Canadian Government or before the Court. Moreover it has unreservedly recognized Canada as the national State of Barcelona Traction in both written pleadings and oral statements made in the course of the present proceedings. Consequently, the Court considers that the Spanish Government has not questioned Canada's right to protect the company.

85. The Court will now examine the Belgian claim from a different point of view, disregarding municipal law and relying on the rule that in inter-State relations, whether claims are made on behalf of a State's national or on behalf of the State itself, they are always the claims of the State. As the Permanent Court said,

"The question, therefore, whether the . . . dispute originates in an injury to a private interest, which in point of fact is the case in many international disputes, is irrelevant from this

standpoint." (Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series ***A,*** No. 2, p. 12. See also Nottebohm, Second Phase, Judgment, I.C.J. Reports 1955, p. 24.)

86. Hence the Belgian Government would be entitled to bring a claim if it could show that one of its rights had been infringed and that the acts complained of involved the breach of an international obligation arising out of a treaty or a general rule of law. The opinion has been expressed that a claim can accordingly be made when investments by a State's nationals abroad are thus prejudicially affected, and that since such investments are part of a State's national economic resources, any prejudice to them directly involves the economic interest of the State.

87. Governments have been known to intervene in such circumstances not only when their interests were affected, but also when they were threatened. However, it must be stressed that this type of action is quite different from and outside the field of diplomatic protection. When a State admits into its territory foreign investments or foreign nationals it is, as indicated in paragraph 33, bound to extend to them the protection of the law. However, it does not thereby become an insurer of that part of another State's wealth which these investments represent. Every investment of this kind carries certain risks. The real question is whether a right has been violated, which right could only be the right of the State to have its nationals enjoy a certain treatment guaranteed by general international law, in the absence of a treaty applicable to the particular case. On the other hand it has been stressed that it must be proved that the investment effectively belongs to a particular economy. This is, as it is admitted, sometimes very difficult, in particular where complex undertakings are involved. Thus the existing concrete test would be replaced by one which might lead to a situation in which no diplomatic protection could be exercised, with the consequence that an unlawful act by another State would remain without remedy.

88. It follows from what has already been stated above that, where it is a question of an unlawful act committed against a company representing foreign capital, the general rule of international law authorizes the national State of the company alone to make a claim.

89. Considering the important developments of the last half-century, the growth of foreign investments and the expansion of the international activities of corporations, in particular of holding companies, which are often multinational, and considering the way in which the economic interests of States have proliferated, it may at first sight appear surprising that the evolution of law has not gone further and that no generally accepted rules in the matter have crystallized on the international plane. Nevertheless, a more thorough examination of the facts shows that the law on the subject has been formed in a period characterized by an intense conflict of systems and interests. It is essentially bilateral relations which have been concerned, relations in which the rights of both the State exercising diplomatic protection and the State in respect of which protection is sought have had to be safeguarded. Here as elsewhere, a body of rules could only have developed with the consent of those concerned. The difficulties encountered have been reflected in the evolution of the law on the subject.

90. Thus, in the present state of the law, the protection of shareholders requires that recourse be had to treaty stipulations or special agreements directly concluded between the private investor and the State in which the investment is placed. States ever more frequently provide for such protection, in both bilateral and multilateral relations, either by means of special instruments or within the framework of wider economic arrangements. Indeed, whether in the form of multilateral or bilateral treaties between States, or in that of agreements between States and companies, there has since the Second World War been considerable development in the protection of foreign investments. The instruments in question contain provisions as to jurisdiction and procedure in case of disputes concerning the treatment of investing companies by the States in which they invest capital. Sometimes companies are themselves vested with a direct right to defend their interests against States through prescribed procedures. No such instrument is in force between the Parties to the present case.

92. Since the general rule on the subject does not entitle the Belgian Government to put forward a claim in this case, the question remains to be considered whether nonetheless, as the Belgian Government has contended during the proceedings, considerations of equity do not require that it be held to possess a right of protection.

96. The Court considers that the adoption of the theory of diplomatic protection of shareholders as such, by opening the door to competing diplomatic claims, could create an atmosphere of confusion and insecurity in international economic relations. The danger would be all the greater inasmuch as the shares of companies whose activity is international are widely scattered and frequently change hands. It might perhaps be claimed that, if the right of protection belonging to the national States of the shareholders were considered as only secondary to that of the national State of the company, there would be less danger of difficulties of the kind contemplated. However, the Court must state that the essence of a secondary right is that it only comes into existence at the time when the original right ceases to exist. As the right of protection vested in the national State of the company cannot be regarded as extinguished because it is not exercised, it is not possible to accept the proposition that in case of its non-exercise the national States of the shareholders have a right of protection secondary to that of the national State of the company.

100. In the present case, it is clear from what has been said above that Barcelona Traction was never reduced to a position of impotence such that it could not have approached its national State, Canada, to ask for its diplomatic protection, and that, as far as appeared to the Court, there was nothing to prevent Canada from continuing to grant its diplomatic protection to Barcelona Traction if it had considered that it should do so.

101. For the above reasons, the Court is not of the opinion that, in the particular circumstances of the present case, jus *standi* is conferred on the Belgian Government by considerations of equity.

NOTTEBOHM CASE
Liechtenstein v. *Guatemala*

1CJ Reports 1955, p. 4

(Concept of nationality in international law-diplomatic protection on behalf of the national-principle of state responsibility)

Nottebohm was born at Hamburg on September 16th, 1881. He was German by birth, and still possessed German nationality when, in October 1939, he applied for naturalization in Liechtenstein.

In 1905 he went to Guatemala. He took up residence there and made that country the headquarters of his business activities, which increased and prospered; these activities developed in the field of commerce, banking and plantations. Having been an employee in the firm of Nottebohm Hermanos, which had been founded by his brothers Juan and Arturo, he became their partner in 1912 and later, in 1937, he was made head of the firm. After 1905 he sometimes went to Germany on business and to other countries for holidays. He continued to have business connections in Germany. He paid a few visits to a brother who had lived in Liechtenstein since 1931. Some of his other brothers, relatives and friends were in Germany, others in Guatemala. He himself continued to have his fixed abode in Guatemala until 1943, that is to Say, until the occurrence of the events which constitute the basis of the present dispute.

In 1939, after having provided for the safeguarding of his interests in Guatemala by a power of attorney given to the firm of Nottebohm Hermanos on March 22nd, he left that country at a date fixed by Counsel for Liechtenstein as at approximately the end of March or the beginning of April, when he seems to have gone to Hamburg, and later to have paid a few brief visits to Vaduz where he was at the beginning of October 1939. It was then, on October 9th, a little more than a month after the opening of the second World War marked by Germany's attack on Poland, that his attorney, Dr. Marxer, submitted an application for naturalization on behalf of Nottebohm.

Since no proof has been adduced that Guatemala has recognized the title to the exercise of protection relied upon by Liechtenstein as being derived from the naturalization which it granted to Nottebohm, the Court must consider whether such an act of granting nationality by Liechtenstein directly entails an obligation on the part of Guatemala to recognize its effect, namely, Liechtenstein's right to exercise its protection. In other words, it must be determined whether that unilateral act by Liechtenstein is one which can be relied upon against Guatemala in regard to the exercise of protection.

The Court will deal with this question without considering that of the validity of Nottebohm's naturalization according to the law of Liechtenstein. It is for Liechtenstein, as it is for every sovereign State, to settle by its own legislation the rules relating to the acquisition of its nationality, and to confer that nationality by naturalization granted by its own organs in accordance with that legislation. It is not necessary to determine whether international law imposes any limitations on its freedom of decision in this domain. Furthermore, nationality has its most immediate, its most far-reaching and, for most people, its only effects within the legal system of the State conferring it. Nationality serves above all to determine that the person upon whom it is conferred enjoys the rights and is bound by the obligations which the law of the State in question grants to or imposes on its nationals. This is implied in the wider concept that nationality is within the domestic jurisdiction of the State.

But the issue which the Court must decide is not one which pertains to the legal system of Liechtenstein. It does not depend on the law or on the decision of Liechtenstein whether that State is entitled to exercise its protection, in the case under consideration. To exercise protection, to apply to the Court, is to place oneself on the plane of international law. It is international law which determines whether a State is entitled to exercise protection and to seise the Court.

The naturalization of Nottebohm was an act performed by Liechtenstein in the exercise of its domestic jurisdiction. The question to be decided is whether that act has the international effect here under consideration. International practice provides many examples of acts performed by States in the exercise of their domestic jurisdiction which do not necessarily or automatically have international effect, which are not necessarily and automatically binding on other States or which are binding on them only subject to certain conditions: this is the case, for instance, of a judgment given by the competent court of a State which it is sought to invoke in another State.

In the present case it is necessary to determine whether the naturalization conferred on Nottebohm can be successfully invoked against Guatemala, whether, as has already been stated, it can be relied upon as against that State, so that Liechtenstein is thereby entitled to exercise its protection in favour of Nottebohm against Guatemala.

When one State has conferred its nationality upon an individual and another State has conferred its own nationality on the same person, it may occur that each of these States, considering itself to have acted in the exercise of its domestic jurisdiction, adheres to its own view and bases itself thereon in so far as its own actions are concerned. In so doing, each State remains within the limits of its domestic jurisdiction.

This situation may arise on the international plane and fall to be considered by international arbitrators or by the courts of a third State. If the arbitrators or the courts of such a State should confine themselves to the view that nationality is exclusively within the domestic jurisdiction of

the State, it would be necessary for them to find that they were confronted by two contradictory assertions made by two sovereign States, assertions which they would consequently have to regard as of equal weight, which would oblige them to allow the contradiction to subsist and thus fail to resolve the conflict submitted to them.

In most cases arbitrators have not strictly speaking had to decide a conflict of nationality as between States, but rather to determine whether the nationality invoked by the applicant State was one which could be relied upon as against the respondent State, that is to Say, whether it entitled the applicant State to exercise protection. International arbitrators, having before them allegations of nationality by the applicant State which were contested by the respondent State, have sought to ascertain whether nationality had been conferred by the applicant State in circumstances such as to give rise to an obligation on the part of the respondent State to recognize the effect of that nationality. In order to decide this question arbitrators have evolved certain principles for determining whether full international effect was to be attributed to the nationality invoked. The same issue is now before the Court: it must be resolved by applying the same principles.

The courts of third States, when confronted by a similar situation, have dealt with it in the same way. They have done so not in connection with the exercise of protection, which did not arise before them, but where two different nationalities have been invoked before them they have had, not indeed to decide such a dispute as between the two States concerned, but to determine whether a given foreign nationality which had been invoked before them was one which they ought to recognize.

International arbitrators have decided in the same way numerous cases of dual nationality, where the question arose with regard to the exercise of protection. They have given their preference to the real and effective nationality, that which accorded with the facts, that based on stronger factual ties between the person concerned and one of the States whose nationality is involved. Different factors are taken into consideration, and their importance will vary from one case to the next: the habitua1 residence of the individual concerned is an important factor, but there are other factors such as the centre of his interests, his family ties, his participation in public life, attachment shown by him for a given country and inculcated in his children, etc.

Similarly, the courts of third States, when they have before them an individual whom two other States hold to be their national, seek to resolve the conflict by having recourse to international criteria and their prevailing tendency is to prefer the real and effective nationality.

The same tendency prevails in the writings of publicists and in practice. This notion is inherent in the provisions of Article 3, paragraph 2**,** of the Statute of the Court. National laws reflect this tendency when, *inter alia*, they make naturalization dependent on conditions indicating the existence of a link, which may vary in their purpose or in their nature but which are

essentially concerned with this idea. The Liechtenstein Law of January 4th, 1934, is a good example.

The practice of certain States which refrain from exercising protection in favour of a naturalized person when the latter has in fact, by his prolonged absence, severed his links with what is no longer for him anything but his nominal country, manifests the view of these States that, in order to be capable of being invoked against another State, nationality must correspond with the factual situation. A similar view is manifested in the relevant provisions of the bilateral nationality treaties concluded between the United States of America and other States since 1868, such as those sometimes referred to as the Bancroft Treaties, and in the Pan-American Convention, signed at Rio de Janeiro on August 13th, 1906, on the status of naturalized citizens who resume residence in their country of origin.

The character thus recognized on the international level as pertaining to nationality is in no way inconsistent with the fact that international law leaves it to each State to lay down the rules governing the grant of its own nationality. The reason for this is that the diversity of demographic conditions has thus far made it impossible for any general agreement to be reached on the rules relating to nationality, although the latter by its very nature affects international relations. It has been considered that the best way of making such rules accord with the varying demographic conditions in different countries is to leave the fixing of such rules to the competence of each State. On the other hand, a State cannot claim that the rules it has thus laid down are entitled to recognition by another State unless it has acted in conformity with this general aim of making the legal bond of nationality accord with the individual's genuine connection with the State which assumes the defence of its citizens by means of protection as against other States.

The essential facts are as follows :

At the date when he applied for naturalization Nottebohm had been a German national from the time of his birth. He had always retained his connections with members of his family who had remained in Germany and he had always had business connections with that country. His country had been at war for more than a month, and there is nothing to indicate that the application for naturalization then made by Nottebohm was motivated by any desire to dissociate himself from the Government of his country.

He had been settled in Guatemala for 34 years. He had carried on his activities there. It was the main seat of his interests. He returned there shortly after his naturalization, and it remained the centre of his interests and of his business activities. He stayed there until his removal as a result of war measures in 1943. He subsequently attempted to return there, and he now complains of Guatemala's refusa1 to admit him. There, too, were several members of his family who sought to safeguard his interests.

In contrast, his actual connections with Liechtenstein were extremely tenuous. No settled abode, no prolonged residence in that country at the time of his application for naturalization : the application indicates that he was paying a visit there and confirms the transient character of this visit by its request that the naturalization proceedings should be initiated and concluded without delay. No intention of settling there was shown at that time or realized in the ensuing weeks, months or years-on the contrary, he returned to Guatemala very shortly after his naturalization and showed every intention of remaining there. If Nottebohm went to Liechtenstein in 1946, this was because of the refusa1 of Guatemala to admit him. No indication is given of the grounds warranting the waiver of the condition of residence, required by the 1934 Nationality Law, which waiver was implicitly granted to him. There is no allegation of any economic interests or of any activities exercised or to be exercised in Liechtenstein, and no manifestation of any intention whatsoever to transfer all or some of his interests and his business activities to Liechtenstein. It is unnecessary in this connection to attribute much importance to the promise to pay the taxes levied at the time of his naturalization. The only links to be discovered between the Principality and Nottebohm are the short sojourns already referred to and the presence in Vaduz of one of his brothers: but his brother's presence is referred to in his application for naturalization only as a reference to his good conduct. Furthermore, other members of his family have asserted Nottebohm's desire to spend his old age in Guatemala.

These facts clearly establish, on the one hand, the absence of any bond of attachment between Nottebohm and Liechtenstein and, on the other hand, the existence of a long-standing and close connection between him and Guatemala, a link which his naturalization in no way weakened. That naturalization was not based on any real prior connection with Liechtenstein, nor did it in any way alter the manner of life of the person upon whom it was conferred in exceptional circumstances of speed and accommodation. In both respects, it was lacking in the genuineness requisite to an act of such importance, if it is to be entitled to be respected by a State in the position of Guatemala. It was granted without regard to the concept of nationality adopted in international relations.

Naturalization was asked for not so much for the purpose of obtaining a legal recognition of Nottebohm's membership in fact in the population of Liechtenstein, as it was to enable him to substitute for his status as a national of a belligerent State that of a national of a neutral State, with the sole aim of thus coming within the protection of Liechtenstein but not of becoming wedded to its traditions, its interests, its way of life or of assuming the obligations-other than fiscal obligations-and exercising the rights pertaining to the status thus acquired.

Guatemala is under no obligation to recognize a nationality granted in such circumstances. Liechtenstein consequently is not entitled to extend its protection to Nottebohm vis-à-vis Guatemala and its claim must, for this reason, be held to be inadmissible.

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.

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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 base-lines. 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 interna1 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 interna1 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 forma1 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)** 1s 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 V*olage,* 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, he 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.

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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 1aw 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 □*mphasi 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* □*mphasized*□*s*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitua1 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 de1imitations; -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 forma1 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 al1 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 □mphasized 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 al1 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 regime 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 above 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 SheIf* 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. 5 1, 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 areà"; 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. 5 1, 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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Continental Shelf (Libyan Arab Jamahiriya/Malta)

ICJ Reports, 1985,p.13

(Interrelationship between continental shelf and exclusive economic zone; principles applicable in the delimitation of continental shelf)

18. The question which the Court is requested to decide is there defined as follows:

> "What principles and rules of international law are applicable to the delimitation of the area of the continental shelf which appertains to the Republic of Malta and the area of continental shelf which appertains to the Libyan Arab Republic, and how in practice such principles and rules can be applied by the two Parties in this particular case in order that they may without difficulty delimit such areas by an agreement as provided in Article III."

26. The Parties are broadly in agreement as to the sources of the law applicable in this case. Malta is a party to the 1958 Geneva Convention on the Continental Shelf, while Libya is not; the Parties agree that the Convention, and in particular the provisions for delimitation in Article 6, is thus not as such applicable in the relations between them. Both Parties have signed the 1982 United Nations Convention on the Law of the Sea, but that Convention has not yet entered into force, and is therefore not operative as treaty-law; the Special Agreement contains no provisions as to the substantive law applicable. Nor are there any other bilateral or multilateral treaties claimed to be binding on the Parties. The Parties thus agree that the dispute is to be governed by customary international law. This is not at all to say, however, that the 1982 Convention was regarded by the Parties as irrelevant: the Parties are again in accord in considering that some of its provisions constitute, to a certain extent, the expression of customary international law in the matter. The Parties do not however agree in identifying the provisions which have this status, or the extent to which they are so treated.

27. It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States, even though multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them. There has in fact been much debate between the Parties in the present case as to the significance, for the delimitation of – and indeed entitlement to - the continental shelf, of State practice in the matter, and this will be examined further at a later stage in the present judgment. Nevertheless, it cannot be denied that the 1982 Convention is of major importance, having been adopted by an overwhelming majority of States; hence it is clearly the duty of the Court, even independently of the references made to the Convention by the Parties, to consider in what degree any of its relevant provisions are binding upon the Parties as a rule of customary international law. In this context particularly, the Parties have laid some emphasis on a distinction between the law applicable to the basis of entitlement to areas of continental shelf - the

rules governing the existence, *"ipso jure* and *ab initio"*, and the exercise of sovereign rights of the coastal State over areas of continental shelf situate off its coasts – and the law applicable to the delimitation of such areas of shelf between neighbouring States. The first question is dealt with in Article 76 of the 1982 Convention, and the second in Article 83 of the Convention. Paragraph 1 of that Article provides that:

> "The delimitation of the continental shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution."

Paragraph 10 of Article 76 provides that "The provisions of this article are without prejudice to the question of delimitation of the continental shelf between States with opposite or adjacent coasts". That the questions of entitlement and of definition of continental shelf, on the one hand, and of delimitation of continental shelf on the other, are not only distinct but are also complementary is self-evident. The legal basis of that which is to be delimited, and of entitlement to it, cannot be other than pertinent to that delimitation.

28. At this stage of the present Judgment, the Court would also first recall that, as it noted in its Judgment in the case concerning the *Continental Shelf (TunisialLibyan Arab Jamahiriya)*,

> "In the new text, any indication of a specific criterion which could give guidance to the interested States in their effort to achieve an equitable solution has been excluded. Emphasis is placed on the equitable solution which has to be achieved. The principles and rules applicable to the delimitation of continental shelf areas are those which are appropriate to bring about an equitable result . . ." *(I. C.J. Reports 1982,* p. 49, para. 50.)

The Convention sets a goal to be achieved, but is silent as to the method to be followed to achieve it. It restricts itself to setting a standard, and it is left to States themselves, or to the courts, to endow this standard with specific content. Secondly, the Court in 1982 observed the disappearance, in the last draft text of what became Article 83, paragraph 1, of reference to delimitation by agreement "in accordance with equitable principles" *(I.C.J. Reports 1982,* p. 49, para. 49). It found however that it was "bound to decide the case on the basis of equitable principles" as well as that "The result of the application of equitable principles must be equitable" (ibid., p. 59, para. 70).

33. In the view of the Court, even though the present case relates only to the delimitation of the continental shelf and not to that of the exclusive economic zone, the principles and rules underlying the latter concept cannot be left out of consideration. As the 1982 Convention demonstrates, the two institutions - continental shelf and exclusive economic zone – are linked together in modern law. Since the rights enjoyed by a State over its continental shelf would also be possessed by it over the sea-bed and subsoil of any exclusive economic zone which it might proclaim, one of the relevant circumstances to be taken into account for the delimitation of the continental shelf of a State is the legally permissible extent of the exclusive economic zone

appertaining to that same State. This does not mean that the concept of the continental shelf has been absorbed by that of the exclusive economic zone; it does however signify that greater importance must be attributed to elements, such as distance from the Coast, which are common to both concepts.

34. For Malta, the reference to distance in Article 76 of the 1982 Convention represents a consecration of the "distance principle"; for Libya, only the reference to natural prolongation corresponds to customary international law. It is in the Court's view incontestable that, apart from those provisions, the institution of the exclusive economic zone, with its rule on entitlement by reason of distance, is shown by the practice of States to have become a part of customary law; in any case, Libya itself seemed to recognize this fact when, at one stage during the negotiation of the Special Agreement, it proposed that the extent of the exclusive economic zone be included in the reference to the Court. Although the institutions of the continental shelf and the exclusive economic zone are different and distinct, the rights which the exclusive economic zone entails over the sea-bed of the zone are defined by reference to the régime laid down for the continental shelf. Although there can be a continental shelf where there is no exclusive economic zone, there cannot be an exclusive economic zone without a corresponding continental shelf. It follows that, for juridical and practical reasons, the distance criterion must now apply to the continental shelf as well as to the exclusive economic zone; and this quite apart from the provision as to distance in paragraph 1 of Article 76. This is not to suggest that the idea of natural prolongation is now superseded by that of distance. What it does mean is that where the continental margin does not extend as far as 200 miles from the shore, natural prolongation, which in spite of its physical origins has throughout its history become more and more a complex and juridical concept, is in part defined by distance from the shore, irrespective of the physical nature of the intervening sea-bed and subsoil. The concepts of natural prolongation and distance are therefore not opposed but complementary; and both remain essential elements in the juridical concept of the continental shelf. As the Court has observed, the legal basis of that which is to be delimited cannot be other than pertinent to the delimitation; the Court is thus unable to accept the Libyan contention that distance from the Coast is not a relevant element for the decision of the present case.

35. It will now be convenient in view of this conclusion to examine two important and opposed arguments of the Parties: first the Libyan "riftzone" argument, which depends upon giving primacy to the idea of natural prolongation, in the physical sense ; and second, the argument of Malta that, on the contrary, it is distance that is now the prime element ; and that, in consequence of this, equidistance, at least between opposite coasts, is virtually a required method, if only as the first stage in a delimitation.

36. As noted above, it is Libya's case that the natural prolongation, in the physical sense, of the land territory into and under the sea is still a primary basis of title to continental shelf. For Libya, as a first step each Party has to prove that the physical natural prolongation of its land territory extends into the area in which the delimitation is to be effected; if there exists a fundamental discontinuity between the shelf area adjacent to one Party and the shelf area adjacent

to the other, then the boundary, it is contended, should lie along the general line of that fundamental discontinuity. The delimitation of continental shelf between Libya and Malta must therefore respect the alleged existence of a fundamental discontinuity which, according to Libya, divides the areas of physical continental shelf appertaining to each of the Parties. The argument is thus that there is no problem of overlapping shelves, but that, on the contrary, two distinct continental shelves are separated by what Libya calls the "rift zone".

39. The Court however considers that since the development of the law enables a State to claim that the continental shelf appertaining to it extends up to as far as 200 miles from its coast, whatever the geological characteristics of the corresponding sea-bed and subsoil, there is no reason to ascribe any role to geological or geophysical factors within that distance either in verifying the legal title of the States concerned or in proceeding to a delimitation as between their claims. This is especially clear where verification of the validity of title is concerned, since, at least in so far as those areas are situated at a distance of under 200 miles from the coasts in question, title depends solely on the distance from the coasts of the claimant States of any areas of sea-bed claimed by way of continental shelf, and the geological or geomorphological characteristics of those areas are completely immaterial. It follows that, since the distance between the coasts of the Parties is less than 400 miles, so that no geophysical feature can lie more than 200 miles from each coast, the feature referred to as the "rift zone" cannot constitute a fundamental discontinuity terminating the southward extension of the Maltese shelf and the northward extension of the Libyan as if it were some natural boundary.

40. Neither is there any reason why a factor which has no part to play in the establishment of title should be taken into account as a relevant circumstance for the purposes of delimitation. It is true that in the past the Court has recognized the relevance of geophysical characteristics of the area of delimitation if they assist in identifying a line of separation between the continental shelves of the Parties. However to rely on this jurisprudence would be to overlook the fact that where such jurisprudence appears to ascribe a role to geophysical or geological factors in delimitation, it finds warrant for doing so in a régime of the title itself which used to allot those factors a place which now belongs to the past, in so far as sea-bed areas less than 200 miles from the Coast are concerned.

42. Neither, however, is the Court able to accept the argument of Malta that the new importance of the idea of distance from the coast has, at any rate for delimitation between opposite coasts, in turn conferred a primacy on the method of equidistance. Since there is not sufficient space between the coasts of Malta and Libya for each of them to enjoy continental shelf rights up to the full 200 miles recognized by international law, the delimitation process must, according to Malta, necessarily begin by taking into consideration an equidistance line between the two coasts. The delimitation of the continental shelf must start from the geographical facts in each particular case ; Malta regards the situation as one of two coastal States facing each other in an entirely normal setting. Malta does not assert that the equidistance method is fundamental, or inherent, or has a legally obligatory character. It does argue that the legal basis of continental

shelf rights - that is to say, for Malta, the "distance principle" - requires that as a starting point of the delimitation process consideration must be given to a line based on equidistance; though it is only to the extent that this primary delimitation produces an equitable result by a balancing up of the relevant circumstances that the boundary coincides with the equidistance line. As a provisional point of departure, consideration of equidistance "is required" on the basis of the legal title.

43. The Court is unable to accept that, even as a preliminary and provisional step towards the drawing of a delimitation line, the equidistance method is one which ***must*** be used, or that the Court is "required, as a first step, to examine the effects of a delimitation by application of the equidistance method" *(I.C.J.* ***Reports*** *1982,* p. 79, para. 110). Such a rule would come near to an espousal of the idea of "absolute proximity", which was rejected by the Court in 1969 (see *I.C.J.* ***Reports*** *1969,* p. 30, para. 41), and which has since, moreover, failed of acceptance at the Third United Nations Conference on the Law of the Sea. That a coastal State may be entitled to continental shelf rights by reason of distance from the coast, and irrespective of the physical characteristics of the intervening sea-bed and subsoil, does not entai1 that equidistance is the only appropriate method of delimitation, even between opposite or quasi-opposite coasts, nor even the only permissible point of departure. The application of equitable principles in the particular relevant circumstances may still require the adoption of another method, or combination of methods, of delimitation, even from the outset.

44. In this connection, something may be said on the subject of the practice of States in the field of continental shelf delimitation; the Parties have in fact discussed the significance of such practice, as expressed in published delimitation agreements, primarily in the context of the status of equidistance in present international law. Over 70 such agreements have been identified and produced to the Court and have been subjected to various interpretations. Libya questions the relevance of State practice in this domain, and has suggested that this practice shows, if anything, progressive disappearance of the distinction to be found in Article 6 of the 1958 Geneva Convention on the Continental Shelf, between "opposite" and "adjacent" States, and that there has since 1969 been a clear trend away from equidistance manifested in delimitation agreements between States, as well as in jurisprudence and in the deliberations at the United Nations Conference on the Law of the Sea. Malta rejects both these latter contentions, and contends that such practice need not be seen as evidence of a particular rule of customary law, but must provide significant and reliable evidence of normal standards of equity. The Court for its part has no doubt about the importance of State practice in this matter. Yet that practice, however interpreted, falls short of proving the existence of a rule prescribing the use of equidistance, or indeed of any method, as obligatory.

45. Judicial decisions are at one - and the Parties themselves agree in holding that the delimitation of a continental shelf boundary must be effected by the application of equitable principles in all the relevant circumstances in order to achieve an equitable result. The Court did of course remark in its 1982 Judgment that this terminology, though 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" (I.C.J. ***Reports*** 1982, p. 59, para. 70). It is however the goal - the equitable result - and not the means used to achieve it, that must be the primary element in this duality of characterization. Thus the justice of which equity is an emanation, is not abstract justice but justice according to the rule of law; which is to say that its application should display consistency and a degree of predictability; even though it looks with particularity to the peculiar circumstances of an instant case, it also looks beyond it to principles of more general application.

46. The normative character of equitable principles applied as a part of general international law is important because these principles govern not only delimitation by adjudication or arbitration, but also, and indeed primarily, the duty of Parties to seek first a delimitation by agreement, which is also to seek an equitable result. That equitable principles are expressed in terms of general application, is immediately apparent from a glance at some well-known examples: the principle that there is to be no question of refashioning geography, or compensating for the inequalities of nature; the related principle of non-encroachment by one party on the natural prolongation of the other, which is no more than the negative expression of the positive rule that the coastal State enjoys sovereign rights over the continental shelf off its coasts to the full extent authorized by international law in the relevant circumstances ; the principle of respect due to all such relevant circumstances ; the principle that although all States are equal before the law and are entitled to equal treatment, "equity does not necessarily imply equality" *(I. C. J. Reports 1969*, p. 49, para. 9 l), nor does it seek to make equal what nature has made unequal ; and the principle that there can be no question of distributive justice.

48. The application of equitable principles thus still leaves the Court with the task of appreciation of the weight to be accorded to the relevant circumstances in any particular case of delimitation. For a court, although there is assuredly no closed list of considerations, it is evident that only those that are pertinent to the institution of the continental shelf as it has developed within the law, and to the application of equitable principles to its delimitation, will qualify for inclusion. Otherwise, the legal concept of continental shelf could itself be fundamentally changed by the introduction of considerations strange to its nature.

49. It was argued by Libya that the relevant geographical considerations include the landmass behind the coast, in the sense that that landmass provides in Libya's view the factual basis and legal justification for the State's entitlement to continental shelf rights, a State with a greater landmass having a more intense natural prolongation. The Court is unable to accept this as a relevant consideration. Landmass has never been regarded as a basis of entitlement to continental shelf rights, and such a proposition finds no support in the practice of States, in the jurisprudence, in doctrine, or indeed in the work of the Third United Nations Conference on the Law of the Sea. It would radically change the part played by the relationship between coast and continental shelf. The capacity to engender continental shelf rights derives not from the landmass, but from sovereignty over the landmass; and it is by means of the maritime front of this landmass, in other

words by its coastal opening, that this territorial sovereignty brings its continental shelf rights into effect. What distinguishes a coastal State with continental shelf rights from a landlocked State which has none, is certainly not the landmass, which both possess, but the existence of a maritime front in one State and its absence in the other. The juridical link between the State's territorial sovereignty and its rights to certain adjacent maritime expanses is established by means of its coast. The concept of adjacency measured by distance is based entirely on that of the coastline, and not on that of the landmass.

50. It was argued by Malta, on the other hand, that the considerations that may be taken account of include economic factors and security. The Court does not however consider that a delimitation should be influenced by the relative economic position of the two States in question, in such a way that the area of continental shelf regarded as appertaining to the less rich of the two States would be somewhat increased in order to compensate for its inferiority in economic resources. Such considerations are totally unrelated to the underlying intention of the applicable rules of international law. It is clear that neither the rules determining the validity of legal entitlement to the continental shelf, nor those concerning delimitation between neighbouring countries, leave room for any considerations of economic development of the States in question. While the concept of the exclusive economic zone has, from the outset, included certain special provisions for the benefit of developing States, those provisions have not related to the extent of such areas nor to their delimitation between neighbouring States, but merely to the exploitation of their resources.

54. Malta has also invoked the principle of sovereign equality of States as an argument in favour of the equidistance method pure and simple, and as an objection to any adjustment based on length of coasts or proportionality considerations. It has observed that since al1 States are equal and equally sovereign, the maritime extensions generated by the sovereignty of each State must be of equal juridical value, whether or not the coasts of one State are longer than those of the other. The first question is whether the use of the equidistance method or recourse to proportionality considerations derive from legal rules accepted by States. If, for example, States had adopted a principle of apportionment of shelf on a basis of strict proportionality of coastal lengths (which the Court does not consider to be the case), their consent to that rule would be no breach of the principle of sovereign equality between them. Secondly, it is evident that the existence of equal entitlement, *ipso jure* and *ab initio*, of coastal States, does not imply an equality of extent of shelf, whatever the circumstances of the area; thus reference to the length of coasts as a relevant circumstance cannot be excluded *apriori*. The principle of equality of States has therefore no particular role to play in the applicable law.

55. Libya has attached great importance to an argument based on proportionality. Proportionality is certainly intimately related both to the governing principle of equity, and to the importance of coasts in the generation of continental shelf rights.

56. It is clear that what the Court intended was a means of identifying and then correcting the kind of distortion - disproportion - that could arise from the use of a method inapt to take

adequate account of some kinds of coastal configuration: thus, for example, since an equidistance line is based on a principle of proximity and is therefore controlled only by salient coastal points, it may yield a disproportionate result where a coast is markedly irregular or markedly concave or convex. In such cases, the raw equidistance method may leave out of the calculation appreciable lengths of coast, whilst at the same time giving undue influence to others merely because of the shape of coastal relationships. In fact the proportionality "factor" arises from the equitable principle that nature must be respected: coasts which are broadly comparable ought not to be treated differently because of a technical quirk of a particular method of tracing the course of a boundary line.

57. It follows - and this also is evident from the 1969 Judgment – that proportionality is one possibly relevant "factor", among several other factors (see the whole of para. (D) of the operative part on pp. 53-54 of I.C.J. Reports 1969) "to be taken into account". Its purpose was again made very clear in the Decision of 30 June 1977 of the Anglo-French Court of Arbitration, already referred to, which stated that:

> "The concept of 'proportionality' merely expresses the criterion or factor by which it may be determined whether such a distortion results in an inequitable delimitation of the continental shelf as between the coastal States concerned. Proportionality, therefore is to be used as a criterion or factor relevant in evaluating the equities of certain geographical situations, not as a general principle providing an independent source of rights to areas of continental shelf." (Para. 101.)

61. The Court has little doubt which criterion and method it must employ at the outset in order to achieve a provisional position in the present dispute. The criterion is linked with the law relating to a State's legal title to the continental shelf. As the Court has found above, the law applicable to the present dispute, that is, to claims relating to continental shelves located less than 200 miles from the coasts of the States in question, is based not on geological or geomorphological criteria, but on a criterion of distance from the Coast or, to use the traditional term, on the principle of adjacency as measured by distance. It therefore seems logical to the Court that the choice of the criterion and the method which it is to employ in the first place to arrive at a provisional result should be made in a manner consistent with the concepts underlying the attribution of legal title.

62. On the basis of the law now applicable (and hence of the distance criterion), the validity of the titles of Libya and Malta to the sea-bed areas claimed by those States is clear enough. Questions arise only in the assessment of the impact of distance considerations on the actual delimiting. In this assessment, account must be taken of the fact that, according to the "fundamental norm" of the law of delimitation, an equitable result must be achieved on the basis of the application of equitable principles to the relevant circumstances. It is therefore necessary to examine the equities of the distance criterion and of the results to which its application may lead. The Court has itself noted that the equitable nature of the equidistance method is particularly

pronounced in cases where delimitation has to be effected between States with opposite coasts. In the cases concerning the ***North Sea Continental Shelf*** it said that :

> "The continental shelf area off, and dividing, opposite States [consists of] prolongations [which] meet and overlap, and can therefore only be delimited by means of a median line ; and, ignoring the presence of islets, rocks and minor coastal projections, the disproportional distorting effect of which can be eliminated by other means, such a line must effect an equal division of the particular area involved." ***(I.C.J. Reports*** 1969, p. 36, para. *57.)*

In the next paragraph it emphasized the appropriateness of a median line for delimitation between opposite coasts ***(ibid.,*** p. 37, para. *58).* But it is in fact a delimitation exclusively between opposite coasts that the Court is, for the first time, asked to deal with. It is clear that, in these circumstances, the tracing of a median line between those coasts, by way of a provisional step in a process to be continued by other operations, is the most judicious manner of proceeding with a view to the eventual achievement of an equitable result.

64. An immediate qualification of the median line which the Court considers must be made concerns the base points from which it is to be constructed. In this case, the equitableness of an equidistance line depends on whether the precaution is taken of eliminating the disproportionate effect of certain "islets, rocks and minor coastal projections7', to use the language of the Court in its 1969 Judgment, quoted above. The Court thus finds it equitable not to take account of Filfla in the calculation of the provisional median line between Malta and Libya. Having established such a provisional median line, the Court still has to consider whether other considerations, including the factor of proportionality, should lead to an adjustment of that line being made.

78. A. The principles and rules of international law applicable for the delimitation are as follows:

> (1) the delimitation is to be effected in accordance with equitable principles and taking account of al1 relevant circumstances, so as to arrive at an equitable result ;
>
> (2) the area of continental shelf to be found to appertain to either Party not extending more than 200 miles from the coast of the Party concerned, no criterion for delimitation of shelf areas can be derived from the principle of natural prolongation in the physical sense.

B. The circumstances and factors to be taken into account are the following:

> (1) the general configuration of the coasts of the Parties, their oppositeness, and their relationship to each other within the general geographical context ;
>
> (2) the disparity in the lengths of the relevant coasts of the Parties and the distance between them ;
>
> (3) the need to avoid in the delimitation any excessive disproportion between the extent of the continental shelf areas appertaining to the coastal State and the length of the relevant part of its coast, measured in the general direction of the coastlines.

* * * * *

Maritime Delimitation and Territorial Questions Between Qatar and Bahrain

ICJ Reports 2001, p.40

(Delimitation of maritime boundary; straight baseline; interrelationship between continental shelf and exclusive economic zone; equitable delimitation)

166. The Court will now turn to the question of the maritime delimitation.

167. The Parties are in agreement that the Court should render its decision on the maritime delimitation in accordance with international law. Neither Bahrain nor Qatar is party to the Geneva Conventions on the Law of the Sea of 29 April 1958; Bahrain has ratified the United Nations Convention on the Law of the Sea of 10 December 1982 but Qatar is only a signatory to it. Customary international law, therefore, is the applicable law. Both Parties, however, agree that most of the provisions of the 1982 Convention which are relevant for the present case reflect customary 1aw.

169. It should be kept in mind that the concept of "single maritime boundary" may encompass a number of functions. In the present case the single maritime boundary will be the result of the delimitation of various jurisdictions. In the southern part of the delimitation area, which is situated where the coasts of the Parties are opposite to each other, the distance between these coasts is nowhere more than 24 nautical miles. The boundary the Court is expected to draw will, therefore, delimit exclusively their territorial seas and, consequently an area over which they enjoy territorial sovereignty.

170. More to the north, however, where the coasts of the two States are no longer opposite to each other but are rather comparable to adjacent coasts, the delimitation to be carried out will be one between the continental shelf and exclusive economic zone belonging to each of the Parties, areas in which States have only sovereign rights and functional jurisdiction. Thus both Parties have differentiated between a southern and a northern sector.

173. The Court observes that the concept of a single maritime boundary does not stem from multilateral treaty law but from State practice, and that it finds its explanation in the wish of States to establish one uninterrupted boundary line delimiting the various - partially coincident - zones of maritime jurisdiction appertaining to them. In the case of coincident jurisdictional zones, the determination of a single boundary for the different objects of delimitation

> "can only be carried out by the application of a criterion, or combination of criteria, which does not give preferential treatment to one of these . . . objects to the detriment of the other, and at the same time is such as to be equally suitable to the division of either of them",

as was stated by the Chamber of the Court in the *Gulf of Maine* case *(I. C.J. Reports* 1984, p. 327, para. 194). In that case, the Chamber was asked to draw a single line which would delimit both the continental shelf and the superjacent water column.

174. Delimitation of territorial seas does not present comparable problems, since the rights of the coastal State in the area concerned are not functional but territorial, and entail sovereignty over the sea-bed and the superjacent waters, and air column. Therefore, when carrying out that part of its task, the Court has to apply first and foremost the principles and rules of international customary law which refer to the delimitation of the territorial sea, while taking into account that its ultimate task is to draw a single maritime boundary that serves other purposes as well.

175. The Parties agree that the provisions of Article 15 of the 1982 Convention on the Law of the Sea, headed "Delimitation of the territorial sea between States with opposite or adjacent coasts" are part of customary international law.

183. With regard to Bahrain's claim that it is entitled to the status of archipelagic State in the sense of the 1982 Convention on the Law of the Sea, the Court observes that Bahrain has not made this claim one of its formal submissions and that the Court is therefore not requested to take a position on this issue. What the Court, however, is called upon to do is to draw a single maritime boundary in accordance with international law. The Court can carry out this delimitation only by applying those rules and principles of customary law which are pertinent under the prevailing circumstances. The Judgment of the Court will have binding force between the Parties, in accordance with Article 59 of the Statute of the Court, and consequently could not be put in issue by the unilateral action of either of the Parties, and in particular, by any decision of Bahrain to declare itself an archipelagic State.

184. The Court, therefore, will accordingly now turn to the determination of the relevant coasts from which the breadth of the territorial seas of the Parties is measured. In this respect the Court recalls that under the applicable rules of international law the normal baseline for measuring this breadth is the low-water line along the Coast (Art. 5, 1982 Convention on the Law of the Sea).

185. In previous cases the Court has made clear that maritime rights derive from the coastal State's sovereignty over the land, a principle which can be summarized as "the land dominates the sea" *(North Sea Continental Shelf, I.C.J. Reports 1969,* p. 51, para. 96; *Aegean Sea Continental Shelf, I. C. J. Reports 1978,* p. 36, para. 86). It is thus the terrestrial territorial situation that must be taken as starting point for the determination of the maritime rights of a coastal State. In accordance with Article 121, paragraph 2, of the 1982 Convention on the Law of the Sea, which reflects customary international law, islands, regardless of their size, in this respect enjoy the same status, and therefore generate the same maritime rights, as other land territory.

201. According to the relevant provisions of the Conventions on the Law of the Sea, which reflect customary international law, a low-tide elevation is a naturally formed area of land which is surrounded by and above water at low tide but submerged at high tide (1958 Convention on the

Territorial Sea and the Contiguous Zone, paragraph 1 of Article 11; 1982 Convention on the Law of the Sea, paragraph 1 of Article 13). Under these provisions, the low-water line of a low-tide elevation may be used as the baseline for measuring the breadth of the territorial sea if it is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the mainland or an island. If a low-tide elevation is wholly situated at a distance exceeding the breadth of the territorial sea, it has no territorial sea of its own. The above-mentioned Conventions further provide that straight baselines shall not be drawn to and from low-tide elevations, unless lighthouses or similar installations which are permanently above sea level have been built on them (1958 Convention, paragraph .3 of Article 4; 1982 Convention, paragraph 4 of Article 7). According to Bahrain this is the case with regard to all low-tide elevations which are relevant in the present case for the delimitation process.

202. When a low-tide elevation is situated in the overlapping area of the territorial sea of two States, whether with opposite or with adjacent coasts, both States in principle are entitled to use its low-water line for the measuring of the breadth of their territorial sea. The same low-tide elevation then forms part of the coastal configuration of the two States. That is so even if the low-tide elevation is nearer to the coast of one State than that of the other, or nearer to an island belonging to one party than it is to the mainland coast of the other. For delimitation purposes the competing rights derived by both coastal States from the relevant provisions of the law of the sea would by necessity seem to neutralize each other

204. Whether this claim by Bahrain is well founded depends upon the answer to the question whether low-tide elevations are territory and can be appropriated in conformity with the rules and principles of territorial acquisition. In the view of the Court, the question in the present case is not whether low-tide elevations are or are not part of the geographical configuration and as such may determine the legal coastline. The relevant rules of the law of the sea explicitly attribute to them that function when they are within a State's territorial sea. Nor is there any doubt that a coastal State has sovereignty over low-tide elevations which are situated within its territorial sea, since it has sovereignty over the territorial sea itself, including its sea-bed and subsoil. The decisive question for the present case is whether a State can acquire sovereignty by appropriation over a low-tide elevation situated within the breadth of its territorial sea when that same low-tide elevation lies also within the breadth of the territorial sea of another State.

205. International treaty law is silent on the question whether low-tide elevations can be considered to be "territory". Nor is the Court aware of a uniform and widespread State practice which might have given rise to a customary rule which unequivocally permits or excludes appropriation of low-tide elevations. It is only in the context of the law of the sea that a number of permissive rules have been established with regard to low-tide elevations which are situated at a relatively short distance from a Coast.

206. The few existing rules do not justify a general assumption that low-tide elevations are territory in the same sense as islands. It has never been disputed that islands constitute terra firma, and are subject to the rules and principles of territorial acquisition; the difference in effects which the law of the sea attributes to islands and low-tide elevations is considerable. It is thus not established that in the absence of other rules and legal principles, low-tide elevations can, from the viewpoint of the acquisition of sovereignty, be fully assimilated with islands or other land territory.

207. In this respect the Court recalls the rule that a low-tide elevation which is situated beyond the limits of the territorial sea does not have a territorial sea of its own. A low-tide elevation, therefore, as such does not generate the same rights as islands or other territory. Moreover, it is generally recognized and implicit in the words of the relevant provisions of the Conventions on the Law of the Sea that, whereas a low-tide elevation which is situated within the limits of the territorial sea may be used for the determination of its breadth, this does not hold for a low-tide elevation which is situated less than 12 nautical miles from that low-tide elevation but is beyond the limits of the territorial sea. The law of the sea does not in these circumstances allow application of the so-called "leapfrogging" method. In this respect it is irrelevant whether the coastal State has treated such a low-tide elevation as its property and carried out some governmental acts with regard to it; it does not generate a territorial sea.

208. Paragraph 3 of Article 4 of the 1958 Convention on the Territorial Sea and the Contiguous Zone and paragraph 4 of Article 7 of the 1982 Convention on the Law of the Sea provide that straight baselines shall not be drawn to and from low-tide elevations unless lighthouses or similar installations which are permanently above sea level have been built on them. These provisions are another indication that low-tide elevations cannot be equated with islands, which under all circumstances qualify as basepoints for straight baselines.

209. The Court, consequently, is of the view that in the present case there is no ground for recognizing the right of Bahrain to use as a baseline the low-water line of those low-tide elevations which are situated in the zone of overlapping claims, or for recognizing Qatar as having such a right. The Court accordingly concludes that for the purposes of drawing the equidistance line, such low-tide elevations must be disregarded.

212. The Court observes that the method of straight baselines, which is an exception to the normal rules for the determination of baselines, may only be applied if a number of conditions are met. This method must be applied restrictively. Such conditions are primarily that either the coastline is deeply indented and cut into, or that there is a fringe of islands along the coast in its immediate vicinity.

213. The fact that a State considers itself a multiple-island State or a *de facto* archipelagic State does not allow it to deviate from the normal rules for the determination of baselines unless the relevant conditions are met. The coasts of Bahrain's main islands do not form a deeply indented coast, nor does Bahrain claim this. It contends, however, that the maritime features off

the coast of the main islands may be assimilated to a fringe of islands which constitute a whole with the mainland.

214. The Court does not deny that the maritime features east of Bahrain's main islands are part of the overall geographical-configuration; it would be going too far, however, to qualify them as a fringe of islands along the coast. The islands concerned are relatively small in number. Moreover, in the present case it is only possible to speak of a "cluster of islands" or an "island system" if Bahrain's main islands are included in that concept. In such a situation, the method of straight baselines is applicable only if the State has declared itself to be an archipelagic State under Part IV of the 1982 Convention on the Law of the Sea, which is not true of Bahrain in this case.

215. The Court, therefore, concludes that Bahrain is not entitled to apply the method of straight baselines. Thus each maritime feature has its own effect for the determination of the baselines, on the understanding that, on the grounds set out before, the low-tide elevations situated in the overlapping zone of territorial seas will be disregarded. It is on this basis that the equidistance line must be drawn.

217. The Court now turns to the question of whether there are special circumstances which make it necessary to adjust the equidistance line as provisionally drawn in order to obtain an equitable result in relation to this part of the single maritime boundary to be fixed (see the case concerning *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark* v. *Norway), Judgment, I. C.J. Reports 1993,* p. 60, para. 50, p. 62, para. 54).

222. Taking account of all of the foregoing, the Court decides that, from the point of intersection of the respective maritime limits of Saudi Arabia on the one hand and of Bahrain and Qatar on the other, which cannot be fixed, the boundary will follow a north-easterly direction, then immediately turn in an easterly direction, after which it will pass between Jazirat Hawar and Janan; it will subsequently turn to the north and pass between the Hawar Islands and the Qatar peninsula and continue in a northerly direction, 'leaving the low-tide elevation of Fasht Bu Thur, and Fasht al Azm, on the Bahraini side, and the low-tide elevations of Qita'a el Erge and Qit'at ash Shajarah on the Qatari side; finally it will pass between Qit'at Jaradah and Fasht ad Dibal, leaving Qit'at Jaradah on the Bahraini side and Fasht ad Dibal on the Qatari side.

223. The Court notes that, because of the line thus adopted, Qatar's maritime zones situated to the south of the Hawar Islands and those situated to the north of those islands are connected only by the channel separating the Hawar Islands from the peninsula. This channel is narrow and shallow, and little suited to navigation. The Court therefore emphasizes that, as Bahrain is not entitled to apply the method of straight baselines, the waters lying between the Hawar Islands and the other Bahraini islands are not interna1 waters of Bahrain, but the territorial sea of that State. Consequently, Qatari vessels, like those of all other States, shall enjoy in these waters the right of

innocent passage accorded by customary international law. In the same way, Bahraini vessels, like those of all other States, enjoy this right of innocent passage in the territorial sea of Qatar.

224. The Court will now deal with the drawing of the single maritime boundary in that part of the delimitation area which covers both the continental shelf and the exclusive economic zone.

225. In its Judgment of 1984, the Chamber of the Court dealing with the *Gulf of Maine* case noted that an increasing demand for single delimitation was foreseeable in order to avoid the disadvantages inherent in a plurality of separate delimitations; according to the Chamber, "preference will henceforth inevitably be given to criteria that, because of their more neutral character, are best suited for use in a multi-purpose delimitation" *(I.C.J. Reports* 1984, p. 327, para. 194).

226. The Court itself referred to the close relationship between continental shelf and exclusive economic zone for delimitation purposes in its Judgment in the case concerning the *Continental Shelf (Libyan Arab Jamahiriya/Malta).* It observed that

> "even though the present case relates only to the delimitation of the continental shelf and not to that of the exclusive economic zone, the principles and rules underlying the latter concept cannot be left out of consideration. As the 1982 Convention demonstrates the two institutions - continental shelf and exclusive economic zone – are linked together in modern law." *(I.* C. *J. Reports 1985,* p. 33, para. 33.)

And the Court went on to say that, in case of delimitation, "greater importance must be attributed to elements, such as distance from the Coast, which are common to both concepts" *(ibid.).*

227. A similar approach was taken by the Court in the *Jan Mayen* case, where it was also asked to draw a single maritime boundary. With regard to the delimitation of the continental shelf the Court stated that

> "even if it were appropriate to apply . . . customary law concerning the continental shelf as developed in the decided cases [the Court had referred to the *Gulf of Maine* and the *Libyan Arab Jamahiriya/Malta cases*], it is in accord with precedents to begin with the median line as a provisional line and then to ask whether 'special circumstances' [the term used in Article 6 of the 1958 Convention on the Continental Shelf, which was the applicable law in the case] require any adjustment or shifting of that line"(*I.C.J.Reports* 1993, p.61, para.51).

229. The Court went on to say that it was further called upon to examine those factors which might suggest an adjustment or shifting of the median line in order to achieve an "equitable result". The Court concluded:

> "It is thus apparent that special circumstances are those circumstances which might modify the result produced by an unqualified application of the equidistance principle.

> General international law, as it has developed through the case-law of the Court and arbitral jurisprudence, and through the work of the Third United Nations Conference on the Law of the Sea, has employed the concept of 'relevant circumstances'. This concept can be described as a fact necessary to be taken into account in the delimitation process." *(Ibid.,* p. 62, para. *55.)*

230. The Court will follow the same approach in the present case. For the delimitation of the maritime zones beyond the 12-mile zone it will first provisionally draw an equidistance line and then consider whether there are circumstances which must lead to an adjustment of that line.

231. The Court further notes that the equidistance/special circumstances rule, which is applicable in particular to the delimitation of the territorial sea, and the equitable principles/relevant circumstances rule, as it has been developed since 1958 in case-law and State practice with regard to the delimitation of the continental shelf and the exclusive economic zone, are closely interrelated.

232. The Court will now examine whether there are circumstances - which might make it necessary to adjust the equidistance line in order to achieve an equitable result.

233. The Court recalls first that in its Judgment in the case concerning the *Continental Shelf (Libyan Arab Jamahiriya/Malta)* it said:

> "the equidistance method is not the only method applicable to the present dispute., and it does not even have the benefit of a presumption in its favour. Thus, under existing law, it must be demonstrated that the equidistance method leads to an equitable result in the case in question." (*I. C. J. Reports 1985,* p. 47, para. 63.)

234. The Court wishes, furthermore, to repeat what it said in its Judgment in the *North Sea Continental Shelf* case:

> "Delimitation in an equitable manner is one thing, but not the same thing as awarding a just and equitable share of a previously undelimited area, even though in a number of cases the results may be comparable, or even identical." (1. C. *J. Reports 1969,* p. 22, para. 18.)

In the same sense the Court stated in the Judgment in the *Jan Mayen* case :

"The task of a, tribunal is to define the boundary line between the areas under the maritime jurisdiction of two States; the sharing-out of the area is therefore the consequence of the delimitation, not vice versa." *(I.* C. *J. Reports 1993,* p. *67,* para. 64.)

236. The Court first takes note of the fact that the pearling industry effectively ceased to exist a considerable time ago. It further observes that, from the evidence submitted to it, it is clear that pearl diving in the Gulf area traditionally was considered as a right which was common to the coastal population. Mention should be made in this respect of the reply given in March 1903 by the British Political Resident in the Gulf to a French entrepreneur who wished to engage in pearl diving and had raised the possibility of seeking permission from the Ruler of Bahrain; the

Political Resident told this entrepreneur that "the pearl banks were the common property of the Coast Arabs and that the Chief of Bahrain had no right to give any one permission to take part in the diving operations". Moreover, even if it were taken as established that pearling had been carried out by a group of fishermen from one State only, this activity seems in any event never to have led to the recognition of an exclusive, quasi-territorial right to the fishing grounds themselves or to the superjacent waters. The Court, therefore, does not consider the existence of pearling banks, though predominantly exploited in the past by Bahrain fishermen, as forming a circumstance which would justify an eastward shifting of the equidistance line as requested by Bahrain.

244. The Court will now consider whether there are other reasons which might require an adjustment of the course of the equidistance line in order to achieve an equitable solution.

245. In drawing the line which delimits the continental shelves and exclusive economic zones of the Parties the Court cannot ignore the location of Fasht al Jarirn, a sizeable maritime feature partly situated in the territorial sea of Bahrain. The Parties have expressed differing views on the legal nature of this maritime feature but, in any event, given the feature's location, its low-water line may be used as the baseline from which the breadth not only of the territorial sea, but also of the continental shelf and the exclusive economic zone, is measured.

246. The Court recalls that in the *Libyan Arab Jamahiriya/Malta* case, referred to above, it stated:

> "the equitableness of an equidistance line depends on whether the precaution is taken of eliminating the disproportionate effect of certain islets, rocks and minor coastal projections', to use the language of the Court in its 1969 Judgment [(case concerning *North Sea Continental Shelf)]" (1. C.J. Reports 1985,* p. *48,* para. 64).

247. The Court further recalls that in the northern sector the coasts of the Parties are comparable to adjacent coasts abutting on the same maritime areas extending seawards into the Gulf. The northern coasts of the territories belonging to the Parties are not markedly different in character or extent; both are flat and have a very gentle slope. The only noticeable element is Fasht al Jarim as a remote projection of Bahrain's coastline in the Gulf area, which, if given full effect, would "distort the boundary and

have disproportionate effects" *(Continental Shelf* case *(FrancelUnited Kingdom),* United Nations, *Reports of International Arbitral Awards,* Vol. XVIII, p. 114, para. 244).

248. In the view of the Court, such a distortion, due to a maritime feature located well out to sea and of which at most a minute part is above water at high tide, would not lead to an equitable solution which would be in accord with all other relevant factors referred to above. In the circumstances of the case considerations of equity require that Fasht al Jarim should have no effect in determining the boundary line in the northern sector.

249. The Court accordingly decides that the single maritime boundary in this sector shall be formed in the first place by a line which, from a point situated to the north-west of Fasht ad Dibal, shall meet the equidistance line as adjusted to take account of the absence of effect given to Fasht al Jarim. The boundary shall then follow this adjusted equidistance line until it meets the delimitation line between the respective maritime zones of Iran on the one hand and of Bahrain and Qatar on the other.

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THE END