071 SCSL-2003-11-PT

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SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
FREETOWN – SIERRA LEONE

IN THE TRIAL CHAMBER

Before: Judge Bankole Thompson
Judge Pierre Boutet
Judge Benjamin Mutanga Itoe

Registrar: Mr Robin Vincent

Date filed: 21 November 2003

THE PROSECUTOR

Against

MOININA FOFANA

CASE NO. SCSL – 2003 – 11 – PT

PROSECUTION RESPONSE TO THE PRELIMINARY DEFENCE MOTION ON THE LACK OF JURISDICTION: ILLEGAL DELEGATION OF POWERS BY THE UNITED NATIONS

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I. INTRODUCTION

1. The Prosecution files this response to the Defence preliminary motion entitled "Preliminary Defence Motion on the Lack of Jurisdiction: Illegal Delegation of Powers by the United Nations" (the "**Preliminary Motion**"), filed on behalf of Moinina Fofana (the "**Accused**") on 14 November 2003.[1]

2. The Preliminary Motion argues essentially that the Special Court lacks jurisdiction on the grounds that the conclusion by the Secretary-General of the United Nations of the Special Court Agreement was an unlawful exercise of the powers of the United Nations.

3. For the reasons given below, the Preliminary Motion should be dismissed in its entirety.

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[1] Registry Page ("RP") 1055-1073.

II. ARGUMENT

A. Capacity of the Special Court to review the lawfulness of its own creation.

4. The Prosecution does not deny the power of the Special Court to review the lawfulness of its own creation.

B. Capacity of the United Nations to conclude a treaty on the establishment of an international criminal court, here to conclude the Special Court Agreement, establishing the Special Court for Sierra Leone.

5. The Defence argues that the responsibility for the maintenance of international peace and security falls within the primary responsibility of the Security Council of the United Nations, that the Special Court was established to give effect to the responsibility of the Security Council for the maintenance of international peace and security and that the conclusion by the Secretary-General of the Special Court Agreement, in exercise of this responsibility, was an unlawful exercise of the powers of the United Nations. The Defence makes two arguments in this regard. First, that the United Nations through the Secretary-General does not have the power to conclude a treaty on the establishment of an international criminal court, here the Special Court Agreement establishing the Special Court for Sierra Leone. Secondly, that the Security Council acted unlawfully in delegating its primary responsibility for the maintenance of international peace and security to an international criminal court, the Special Court, in relation to which the United Nations does not exercise direct control. The Prosecution submits that both arguments lack merit.

6. The capacity of international organizations to enter into international treaties is well-established.[2] In relation specifically to the United Nations, it has been evident for decades that this organisation has such capacity.[3]

7. It is well established in United Nations practice that, pursuant to this provision of the UN Charter, the Secretary-General "represents the UN in the negotiation and conclusion of agreements with governments and other inter-governmental

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[2] See, e.g., the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or Between International Organizations.

[3] McNair, *The Law of Treaties* (1961), pp. 755-756; *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion 11 April 1949, I.C.J. Reports 1949*, p. 239 (the *Reparations* case), at pp. 178-179.

organisations. He directs the negotiation and conclusion of agreements, either at the request of an organ of the UN, with the approval of the [General Assembly], or within the framework of the implied powers of the [Secretary-General]".[4] The Special Court Agreement was clearly negotiated and concluded by the Secretary-General at the request of the Security Council.[5] For the reasons given below, it fell within the powers of the Security Council to request the negotiation and conclusion of the Special Court Agreement.

8. Article 1 of the UN Charter sets out four enumerated purposes of the United Nations. The International Court of Justice has said that the first two of these purposes "may be summarily described as pointing to the goal of international peace and security and friendly relations".[6] The Court has added that when the [United Nations] Organization takes action which warrants the assertion that it was appropriate for the fulfilment of one of the stated purposes of the United Nations the presumption is that such action is not *ultra vires* the Organization."[7]

9. Article 24(1) of the UN Charter further provides that "In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf". This provision of the United Nations Charter may be invoked as the direct basis for action of the United Nations.[8] The fact that the Security Council has "primary responsibility" for the maintenance of international peace and security means that it must have the widest possible discretion as to the kind of measures to be taken. Article 24(2), which refers to the "specific powers granted to the Security Council", is not a provision setting out exhaustively the powers of the Security Council. On the contrary, the reference to "specific powers" implies that the Security

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4 B. Simma (ed.), *The Charter of the United Nations: A Commentary* (2nd edn., 2002) ("**Simma**"), vol. II, p. 1216, margin no. 56.

5 Security Council resolution 1315 (2000).

6 *Certain Expenses of the United Nations, Advisory Opinion 20 July 1962, I.C.J. Reports 1962*, p. 151 (the *Expenses* case), at p. 168.

7 *Ibid.*

8 Simma, p. 450, margin no. 14.

Council has, in addition, "general powers".[9] Article 24(2) must be read as fulfilling the function "of closing any gaps in the provision of powers for the [Security Council] which might otherwise exist, considering the wide range of tasks to be undertaken" by the Security Council.[10]

10. Article 41 of the UN Charter, which is in Chapter VII, provides for the Security Council to decide "what measures not involving the use of armed force are to be employed to give effect to its decisions". The establishment of an international criminal tribunal is within the powers of the Security Council under Article 41.[11] There is no reason why the establishment of an international criminal tribunal should not also be within the powers of the Security Council under Article 24(1). If the Security Council has the power under Chapter VII of the Charter to create an international criminal tribunal by *coercive* means without the consent of any State, *a fortiori* it must be able to take the same action under Article 24 of the Charter when the State affected has consented. In the case of the Special Court, that consent has been provided through the conclusion by the Government of Sierra Leone of the Special Court Agreement.

11. Under Article 7(2) of the United Nations Charter, the principal organs of the United Nations (including the Security Council) have the power to establish subsidiary organs. Subsidiary organs established by a principal organ under this provision may be empowered to perform functions that the principal organ itself cannot perform.[12] Thus, although the United Nations Security Council is not a judicial organ, it has the power, implied from its principal function of the maintenance of international peace and security, to establish as a subsidiary organ an international criminal tribunal[13]

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9 *Ibid.*

10 *Ibid.*, margin no. 10.

11 *Prosecutor v. Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, Case No. IT-94-1-AR72, Appeals Chamber, 2 October 1995 (the *Tadic Jurisdiction Appeal*), paras. 33-36.

12 *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, Advisory Opinion 13 July 1954, I.C.J. Reports 1954*, p. 47 (the *Administrative Tribunal* case); *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, Advisory Opinion 12 July 1973, I.C.J. Reports 1973*, p. 166; Sarooshi, "The Legal Framework Governing United Nations Subsidiary Organs" (1996) 67 *British Yearbook of International Law* 413 ("**Sarooshi**"), 425-426.

13 *Tadic Judisdiction Appeal.* The validity of the establishment of the ICTY and ICTR were impliedly recognised by the International Court of Justice in *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment* (unreported, 14 February 2002) (the *Yerodia* case), p. 22, para. 61.

which is an independent and judicial body, pronouncing final judgements that are not subject to any form of external review, even by the principal organ which established it.[14] Although the ICTY and ICTR were established by the Security Council acting under Chapter VII of the United Nations Charter (with the consequence that these Tribunals are endowed with certain Chapter VII powers that are binding on all States), the power to establish such a Tribunal is found more specifically in Article 24(1) of the Charter (in Chapter V).[15] It follows that Security Council could have established such a Criminal Tribunal under Article 24, with the consent of the State concerned.

12. The same principles must apply by analogy in relation to the treaty-making powers of the United Nations. As the International Court of Justice has said, "The Charter does not forbid the Security Council to act through instruments of its own choice: under Article 29 it "may establish such subsidiary organs as it deems necessary for the performance of its functions"; under Article 98 it may entrust "other functions" to the Secretary-General."[16] The types of powers that may be conferred on a subsidiary organ of the United Nations may thus instead be conferred on an entity external to the United Nations itself.[17] Another type of instrument through which the Security Council must be able to act is an international organisation established by a treaty to which the United Nations is a party.

13. In its resolution 1315 (2000), the Security Council determined that "the situation in Sierra Leone continue[d] to constitute a threat to international peace and security in the region", that "a credible system of justice and accountability for the very serious crimes committed [in Sierra Leone] would end impunity and would contribute to the process of national reconciliation and to the restoration and maintenance of peace" and that there was a "pressing need for international cooperation to assist in

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14 Sarooshi, p. 454.

15 Sarooshi, p. 430.

16 *Expenses* case, p. 177.

17 For instance, "Under the command system operating during the Korean War, the U.S. Army was given executive responsibility for carrying out U.S. military policy in Korea and for negotiating the truce agreement. ... As Commanders in Chief, United Nations Command, they [the United States commanders] also controlled ground, air, and naval forces contributed by some members of the United Nations for the prosecution of the war in Korea." (Hermes, United States Army in the Korean War (1992) (http://www.army.mil/cmh-pg/books/korea/truce/fm.htm)).

strengthening the judicial system of Sierra Leone". It is for the Security Council to evaluate the appropriateness of the chosen measure and its effectiveness in achieving its objective, the restoration of peace—the Security Council "enjoys wide discretionary powers in this regard; and it could not have been otherwise, as such a choice involves political evaluation of highly complex and dynamic situations".[18] It was within the discretion of the Security Council to determine that the establishment of the Special Court was an appropriate measure for addressing the threat to international peace and security posed by the situation in Sierra Leone.

14. The Prosecution further submits that the delegation or transfer by the Security Council of its responsibility to maintain international peace and security does not denude the Security Council of the right to exercise that power or to control and/or supervise the exercise of that power.

15. First, the fact that the Security Council has "primary responsibility" for the maintenance of international peace and security (Article 24(1) of the Charter) does not mean that it has *exclusive* responsibility in this respect. The establishment of other organs or organisations with responsibilities in this field is not inconsistent with the "primary" competence of the Security Council.

16. Secondly, the Security Council has not abandoned its primary responsibility for the maintenance of international peace and security, including in Sierra Leone. Since its Resolution 1315 (2000), the Security Council has been seized of the matter. The Security Council has not delegated any of its substantive powers to the Special Court, but rather, has created a new body exercising certain powers which the Security Council itself is unable to exercise. (See paragraph 12 above.) The Special Court thus does not detract from the powers of the Security Council, but rather, *complements* them. In the very act of calling for the establishment of the Special Court, the Security Council was exercising its functions under Article 24(1) of the Charter.

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[18] *Cf. Tadic Jurisdiction Appeal*, para. 39 (stated with reference to Article 39 of the UN Charter).

III. CONCLUSION

17. The Court should therefore dismiss the Preliminary Motion in its entirety.

Freetown, 21 November 2003.

For the Prosecution,

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PROSECUTION INDEX OF AUTHORITIES

1. 1986 Vienna Convention on the Law of Treaties between States and International Organizations or Between International Organizations.
2. McNair, *The Law of Treaties* (1961) [extract].
3. B. Simma (ed.), *The Charter of the United Nations: A Commentary* (2nd edn., 2002) [extract].
4. Security Council Resolution 1315 (2000).
5. *Certain Expenses of the United Nations, Advisory Opinion 20 July 1962, I.C.J. Reports 1962.*
6. *Prosecutor v. Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction.*
7. *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, Advisory Opinion 13 July 1954, I.C.J. Reports 1954 p.47.*
8. *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, Advisory Opinion 12 July 1973, I.C.J. Reports 1973*, p. 166.
9. *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment* (unreported, 14 February 2002) (the *Yerodia* case).
10. Hermes, *United States Army in the Korean War* (1992) [extract].

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ANNEX 1:

1986 Vienna Convention on the Law of Treaties between States and International Organizations or Between International Organizations.

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International Law Commission

VIENNA CONVENTION ON THE LAW OF TREATIES BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS OR BETWEEN INTERNATIONAL ORGANIZATIONS

(21 March 1986)

The Parties to the present Convention,

Considering the fundamental role of treaties in the history of international relations,

Recognizing the consensual nature of treaties and their ever-increasing importance as a source of international law,

Noting that the principles of free consent and of good faith and the pacta sunt servanda rule are universally recognized,

Affirming the importance of enhancing the process of codification and progressive development of international law at a universal level,

Believing that the codification and progressive development of the rules relating to treaties between States and international organizations or between international organizations are means of enhancing legal order in international relations and of serving the purposes of the United Nations,

Having in mind the principles of international law embodied in the Charter of the United Nations, such as the principles of the equal rights

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and self-determination of peoples, of the sovereign equality and independence of all States, of non-interference in the domestic affairs of States, of the prohibition of the threat or use of force and of universal respect for, and observance of, human rights and fundamental freedoms for all,

Bearing in mind the provisions of the Vienna Convention on the Law of Treaties of 1969,

Recognizing the relationship between the law of treaties between States and the law of treaties between States and international organizations or between international organizations,

Considering the importance of treaties between States and international organizations or between international organizations as a useful means of developing international relations and ensuring conditions for peaceful cooperation among nations, whatever their constitutional and social systems,

Having in mind the specific features of treaties to which international organizations are parties as subjects of international law distinct from States,

Noting that international organizations possess the capacity to conclude treaties which is necessary for the exercise of their functions and the fulfillment of their purposes,

Recognizing that the practice of international organizations in

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concluding treaties with States or between themselves should be in accordance with their constituent instruments,

Affirming that nothing in the present Convention should be interpreted as affecting those relations between an international organization and its members which are regulated by the rules of the organization,

Affirming also that disputes (concerning treaties, like other international disputes, should be settled, in conformity with the Charter of the United Nations, by peaceful means and in conformity with the principles of justice and international law,

Affirming also that the rules of customary international law will continue to govern questions not regulated by the provisions of the present Convention.

Have agreed as follows:

PART I

INTRODUCTION

Article 1

Scope of the present Convention

The present Convention applies to:

(a) treaties between one or more States and one or more international

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organizations, and

(b) treaties between international organizations.

Article 2

Use of terms

1. For the purposes of the present Convention:

(a) "treaty" means an international agreement governed by international law and concluded in written form:

(i) between one or more States and one or more international organizations; or

(ii) between international organizations,

whether that agreement is embodied in a single instrument or in two or more related instruments and whatever its particular designation;

(b) "ratification" means the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty;

(b bis) "act of formal confirmation" means an international act corresponding to that of ratification by a State, whereby an international organization establishes on the international plane its consent to be bound by a treaty;

(b ter) "acceptance", "approval" and "accession" mean in each case the

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international act so named whereby a State or an international organization establishes on the international plane its consent to be bound by a treaty;

(c) "full powers" means a document emanating from the competent authority of a State or from the competent organ of an international organization designating a person or persons to represent the State or the organization for negotiating, adopting or authenticating the text of a treaty, for expressing the consent of the State or of the organization to be bound by a treaty, or for accomplishing any other act with respect to a treaty;

(d) "reservation" means a unilateral statement, however phrased or named, made by a State or by an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that organization;

(e) "negotiating State" and "negotiating organization" mean respectively:

(i) a State, or

(ii) an international organization,

which took part in the drawing up and adoption of the text of the treaty;

(f) "contracting State" and "contracting organization" mean

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respectively:

(i) a State, or

(ii) an international organization,

which has consented to be bound by the treaty, whether or not the treaty has entered into force;

(g) "party" means a State or an international organization which has consented to be bound by the treaty and for which the treaty is in force;

(h) "third State" and "third organization" mean respectively:

(i) a State, or

(ii) an international organization,

not a party to the treaty;

(i) "international organization" means an intergovernmental organization;

(j) "rules of the organization" means, in particular, the constituent instruments, decisions and resolutions adopted in accordance with them, and established practice of the organization.

2. The provisions of paragraph 1 regarding the use of terms in the present Convention are without prejudice to the use of those terms or to the meanings which may be given to them in the internal law of any State or in the rules of any international organization.

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Article 3

International agreements not within the scope
of the present Convention

The fact that the present Convention does not apply:

(i) to international agreements to which one or more States, one or more international organizations and one or more subjects of international law other than States or organizations are parties;

(ii) to international agreements to which one or more international organizations and one or more subjects of international law other than States or organizations are parties;

(iii) to international agreements not in written form between one or more States and one or more international organizations, or between international organizations; or

(iv) to international agreements between subjects of international law other than States or international organizations;

shall not affect:

(a) the legal force of such agreements;

(b) the application to them of any of the rules set forth in the present Convention to which they would be subject under international law

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independently of the Convention;

(c) the application of the Convention to the relations between States and international organizations or to the relations of organizations as between themselves, when those relations are governed by international agreements to which other subjects of international law are also parties.

Article 4

Non-retroactivity of the present Convention

Without prejudice to the application of any rules set forth in the present Convention to which treaties between one or more States and one or more international organizations or between international organizations would be subject under international law independently of the Convention, the Convention applies only to such treaties concluded after the entry into force of the present Convention with regard to those States and those organizations.

Article 5

Treaties constituting international organizations and treaties adopted within an international organization

The present Convention applies to any treaty between one or more States and one or more international organizations which is the constituent instrument of an international organization and to any treaty adopted within an international organization, without prejudice to any

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relevant rules of the organization.

PART II

CONCLUSION AND ENTRY INTO FORCE OF TREATIES

SECTION 1. CONCLUSION OF TREATIES

Article 6

Capacity of international organizations to conclude treaties

The capacity of an international organization to conclude treaties is governed by the rules of that organization.

Article 7

Full powers

1. A person is considered as representing a State for the purpose of adopting or authenticating the text of a treaty or for the purpose of expressing the consent of the State to be bound by a treaty if:

(a) that person produces appropriate full powers; or

(b) it appears from practice or from other circumstances that it was the intention of the States and international organizations concerned to consider that person as representing the State for such purposes without having to produce full powers.

2. In virtue of their functions and without having to produce full

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powers, the following are considered as representing their State:

(a) Heads of State, Heads of Government and Ministers for Foreign Affairs, for the purpose of performing all acts relating to the conclusion of a treaty between one or more States and one or more international organizations;

(b) representatives accredited by States to an international conference, for the purpose of adopting the text of a treaty between States and international organizations;

(c) representatives accredited by States to an international organization or one of its organs, for the purpose of adopting the text of a treaty in that organization or organ;

(d) heads of permanent missions to an international organization, for the purpose of adopting the text of a treaty between the accrediting States and that organization.

3. A person is considered as representing an international organization for the purpose of adopting or authenticating the text of a treaty, or expressing the consent of that organization to be bound by a treaty if:

(a) that person produces appropriate full powers; or

(b) it appears from the circumstances that it was the intention of the States and international organizations concerned to consider that person as representing the organization for such purposes, in accordance with

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the rules of the organization, without having to produce full powers.

Article 8

Subsequent confirmation of an act performed without authorization

An act relating to the conclusion of a treaty performed by a person who cannot be considered under article 7 as authorized to represent a State or an international organization for that purpose is without legal effect unless afterwards confirmed by that State or that organization.

Article 9

Adoption of the text

1. The adoption of the text of a treaty takes place by the consent of all the states and international organizations or, as the case may be, all the organizations participating in its drawing up except as provided in paragraph 2.

2. The adoption of the text of a treaty at an international conference takes place in accordance with the procedure agreed upon by the participants in that conference. If, however, no agreement is reached on any such procedure, the adoption of the text shall take place by the vote of two-thirds of the participants present and voting unless by the same majority they shall decide to apply a different rule.

Article 10

Authentication of the text

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1. The text of a treaty between one or more States and one or more international organizations is established as authentic and definitive:

(a) by such procedure as may be provided for in the text or agreed upon by the States and organizations participating in its drawing up; or

(b) failing such procedure, by the signature, signature ad referendum or initialling by the representatives of those States and those organizations of the text of the treaty or of the Final Act of a conference incorporating the text.

2. The text of a treaty between international organizations is established as authentic and definitive:

(a) by such procedure as may be provided for in the text or agreed upon by the organizations participating in its drawing up; or

(b) failing such procedure, by the signature, signature ad referendum or initialling by the representatives of those organizations of the text of the treaty or of the Final Act of a conference incorporating the text.

Article 11

Means of expressing consent to be bound by a treaty

1. The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed.

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2. The consent of an international organization to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, act of formal confirmation, acceptance, approval or accession, or by any other means if so agreed.

Article 12

Consent to be bound by a treaty expressed by signature

1. The consent of a State or of an international organization to be bound by a treaty is expressed by the signature of the representative of that State or of that organization when:

(a) the treaty provides that signature shall have that effect;

(b) it is otherwise established that the negotiating States and negotiating organizations or, as the case any be, the negotiating organizations were agreed that signature should have that effect; or

(c) the intention of the State or organization to give that effect to the signature appears from the full powers of its representative or was expressed during the negotiation.

2. For the purposes of paragraph 1:

(a) the initialling of a text constitutes a signature of the treaty when it is established that the negotiating States and negotiating organizations or, as the case may be, the negotiating organizations so agreed;

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(b) the signature ad referendum of a treaty by the representative of a State or an international organization, if confirmed by his State or organization, constitutes a full signature of the treaty.

Article 13

Consent to be bound by a treaty expressed
by an exchange of instruments constituting a treaty

The consent of States or of international organizations to be bound by a treaty constituted by instruments exchanged between them is expressed by that exchange when:

(a) the instruments provide that their exchange shall have that effect; or

(b) it is otherwise established that those States and those organizations or, as the case may be, those organizations were agreed that the exchange of instruments should have that effect.

Article 14

Consent to be bound by a treaty expressed by ratification,
act of formal confirmation, acceptance or approval

1. The consent of a State to be bound by at treaty is expressed by ratification when;

(a) the treaty provides for such consent to be expressed by means of ratification;

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(b) it is otherwise established that the negotiating States and negotiating organizations were agreed that ratification should be required;

(c) the representative of the State has signed the treaty subject to ratification; or

(d) the intention of the State to sign the treaty subject to ratification appears from the full powers of its representative or was expressed during the negotiation.

2. The consent of an international organization to be bound by a treaty is expressed by an act of formal confirmation when:

(a) the treaty provides for such consent to be expressed by means of an act of formal confirmation;

(b) it is otherwise established that the negotiating States and negotiating organizations or, as the case may be, the negotiating organizations were agreed that an act of formal confirmation should be required;

(c) the representative of the organization has signed the treaty subject to an act of formal confirmation; or

(d) the intention of the organization to sign the treaty subject to an act of formal confirmation appears from the full powers of its

representative or was expressed during the negotiation. 2191

3. The consent of a State or of an international organization to be bound by a treaty is expressed by acceptance or approval under conditions similar to those which apply to ratification or, as the case may be, to an act of formal confirmation.

Article 15

Consent to be bound by a treaty expressed by accession

The consent of a State or of an international organization to be bound by a treaty is expressed by accession when:

(a) the treaty provides that such consent may be expressed by that State or that organization by means of accession;

(b) it is otherwise established that the negotiating States and negotiating organizations or, as the case amy be, the negotiating organizations were agreed that such consent may be expressed by that State or that organization by means of accession; or

(c) all the parties have subsequently agreed that such consent may be expressed by that State or that organization by means of accession.

Article 16

Exchange or deposit of instruments of ratification, formal confirmation, acceptance, approval or accession

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1. Unless the treaty otherwise provides, instruments of ratification, instruments relating to an act of formal confirmation or instruments of acceptance, approval or accession establish the consent of a State or of an international organization to be bound by treaty between one or more States and one or more international organizations upon:

(a) their exchange between the contracting States and contracting organizations;

(b) their deposit with the depositary; or

(c) their notification to the contracting States and to the contracting organizations or to the depositary, if so agreed.

2. Unless the treaty otherwise provides, instruments relating to an act of formal confirmation or instruments of acceptance, approval or accession establish the consent of an international organization to be bound by a treaty between international organizations upon:

(a) their exchange between the contracting organizations;

(b) their deposit with the depositary; or

(c) their notification to the contracting organizations or to the depositary, if so agreed.

Article 17

Consent to be bound by part of a treaty
and choice of differing provisions

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1. Without prejudice to articles 19 to 23, the consent of a State or of an international organization to be bound by part of a treaty is effective only if the treaty so permits, or if the contracting States and contracting organizations or, as the case may be, the contracting organizations so agree.

2. The consent of a State or of an international organization to be bound by a treaty which permits a choice between differing provisions is effective only if it is made clear to which of the provisions the consent relates.

Article 18

Obligation not to defeat the object
and purpose of a treaty prior to its entry into force

A State or an international organization is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

(a) that State or that organization has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, act of formal confirmation, acceptance or approval, until that State or that organization shall have made its intention clear not to become a party to the treaty; or

(b) that State or that organization has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and

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provided that such entry into force is not unduly delayed.

SECTION 2.

RESERVATIONS

Article 19

Formulation of reservations

A State or an international organization may, when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, formulate a reservation unless:

(a) the reservation is prohibited by the treaty;

(b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or

(c) in cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

Article 20

Acceptance of and objection to reservations

1. A reservation expressly authorized by a treaty does not require any subsequent acceptance by the contracting States and contracting organizations or, as the case may be, by the contracting organizations unless the treaty so provides.

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2. When it appears from the limited number of the negotiating States and negotiating organizations or, as the case may be, of the negotiating organizations and the object and purpose of a treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties.

3. When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.

4. In cases not falling under the preceding paragraphs and unless the treaty otherwise provides:

(a) acceptance of a reservation by a contracting State or by a contracting organization constitutes the reserving State or international organization a party to the treaty in relation to the accepting State or organization if or when the treaty is in force for the reserving State or organization and for the accepting State or organization;

(b) an objection by a contracting State or by a contracting organization to a reservation does not preclude the entry into force of the treaty as between the objecting State or international organization and the reserving State or organization unless a contrary intention is definitely expressed by the objecting State or organization;

(c) an act expressing the consent of a State or of an international

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organization to be bound by the treaty and containing a reservation is effective as soon as at least one contracting State or one contracting organization has accepted the reservation.

5. For the purposes of paragraphs 2 and 4 and unless the treaty otherwise provides, a reservation is considered to have been accepted by a State or an international organization if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.

Article 21

Legal effects of reservations and of objections to reservations

1. A reservation established with regard to another party in accordance with articles 19, 20 and 23:

(a) modifies for the reserving State or international organization in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation; and

(b) modifies those provisions to the same extent for that other party in its relations with the reserving State or international organization.

2. The reservation does not modify the provisions of the treaty for the other parties to the treaty inter se.

3. When a State or an international organization objecting to a

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reservation has not opposed the entry into force of the treaty between itself and the reserving State or organization, the provisions to which the reservation relates do not apply as between the reserving State or organization and the objecting State or organization to the extent of the reservation.

Article 22

Withdrawal of reservations and of objections to reservations

1. Unless the treaty otherwise provides, a reservation may be withdrawn at any time and the consent of a State or of an international organization which has accepted the reservation is not required for its withdrawal.

2. Unless the treaty otherwise provides, an objection to a reservation may be withdrawn at any time.

3. Unless the treaty otherwise provides, or it is otherwise agreed:
(a) the withdrawal of a reservation becomes operative in relation to a contracting State or a contracting organization only when notice of it has been received by that State or that organization;

(b) the withdrawal of an objection to a reservation becomes operative only when notice of it has been received by the State or international organization which formulated the reservation.

Article 23

Procedure regarding reservations

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1. A reservation, an express acceptance of a reservation and an objection to a reservation must be formulated in writing and communicated to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty.

2. If formulated when signing the treaty subject to ratification, act of formal confirmation, acceptance or approval, a reservation must be formally confirmed by the reserving State or international organization when expressing its consent to be bound by the treaty. In such a case the reservation shall be considered as having been made on the date of its confirmation.

3. An express acceptance of, or an objection to, a reservation made previously to confirmation of the reservation does not itself require confirmation.

4. The withdrawal of a reservation or of an objection to a reservation must be formulated in writing.

SECTION 3.

ENTRY INTO FORCE AND PROVISIONAL APPLICATION OF TREATIES

Article 24

Entry into force

1. A treaty enters into force in such manner and upon such date as it

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may provide or as the negotiating States and negotiating organizations or, as the case may be, the negotiating organizations may agree.

2. Failing any such provision or agreement, a treaty enters into force as soon as consent to be bound by the treaty has been established for all the negotiating States and negotiating organizations or, as the case may be, all the negotiating organizations.

3. When the consent of a State or of an international organization to be bound by a treaty is established on a date after the treaty has come into force, the treaty enters into force for that State or that organization on that date, unless the treaty otherwise provides.

4. The provisions of a treaty regulating the authentication of its text, the establishment of consent to be bound by the treaty, the manner or date of its entry into force, reservations, the functions of the depositary and other matters arising necessarily before the entry into force of the treaty apply from the time of the adoption of its text.

Article 25

Provisional application

1. A treaty or a part of a treaty is applied provisionally pending its entry into force if:

(a) the treaty itself so provides; or

(b) the negotiating States and negotiating organizations or, as the

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case may be, the negotiating organizations have in some other manner so agreed.

2. Unless the treaty otherwise provides or the negotiating States and negotiating organizations or, as the case may be, the negotiating organizations have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State or an international organization shall be terminated if that State or that organization notifies the States and organizations with regard to which the treaty is being applied provisionally of its intention not to become a party to the treaty.

PART III

OBSERVANCE, APPLICATION AND INTERPRETATION OF TREATIES

SECTION 1.

OBSERVANCE OF TREATIES

Article 26

Pacta sunt servanda

Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

Article 27

Internal law of States, rules of international organizations

and observance of treaties 2201

1. A State party to a treaty may not invoke the provisions of its internal law as justification for its failure to perform the treaty.

2. An international organization party to a treaty may not invoke the rules of the organization as justification for its failure to perform the treaty.

3. The rules contained in the preceding paragraphs are without prejudice to article 46.

SECTION 2.

APPLICATION OF TREATIES

Article 28

Non-retroactivity of treaties

Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.

Article 29

Territorial scope of treaties

Unless a different intention appears from the treaty or is otherwise established, a treaty between one or more States and one or more

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international organizations is binding upon each State party in respect of its entire territory.

Article 30

Application of successive treaties
relating to the same subject-matter

1. The rights and obligations of States and international organizations parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs.

2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.

3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.

4. When the parties to the later treaty do not include all the parties to the earlier one:

(a) as between two parties, each of which is a party to both treaties, the same rule applies as in paragraph 3;

(b) as between at party to both treaties and a party to only one of the treaties, the treaty to which both are parties governs their mutual

rights and obligations. 2203

5. Paragraph 4 is without prejudice to article 41, or to any question of the termination or suspension of the operation of a treaty under article 60 or to any question of responsibility which may arise for a State or for an international organization from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards a State or an organization under another treaty.

6. The preceding paragraphs are without prejudice to the fact that, in the event of a conflict between obligations under the Charter of the United Nations and obligations under a treaty, the obligations under the Charter shall prevail.

SECTION 3.

INTERPRETATION OF TREATIES

Article 31

General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all

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the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32

Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

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(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.

Article 33

Interpretation of treaties authenticated in two or more languages

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.

2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.

3. The terms of a treaty are presumed to have the same meaning in each authentic text.

4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

SECTION 4.

TREATIES AND THIRD STATES OR THIRD ORGANIZATIONS

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Article 34

General rule regarding third States and third organizations

A treaty does not create either obligations or rights for a third State or a third organization without the consent of that State or that organization.

Article 35

Treaties providing for obligations for third States or third organizations

An obligation arises for a third State or a third organization from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State or the third organization expressly accepts that obligation in writing. Acceptance by the third organization of such an obligation shall be governed by the rules of that organization.

Article 36

Treaties providing for rights for third States or third organizations

1. A right arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third State, or to a group of States to which it belongs, or to all States, and the third State assents thereto. Its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise

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provides.

2. A right arises for a third organization from a provision of a teaty if the parties to the treaty intend the provision to accord that right either to the third organization, or to a group of international organizations to which it belongs, or to all organizations, and the third organization assents thereto. Its assent shall be governed by the rules of the organization.

3. A State or an international organization exercising a right in accordance with paragraph 1 or 2 shall comply with the conditions for its exercise provided for in the treaty or established in conformity with the treaty.

Article 37

Revocation or modification of obligations or rights
of third States or third organizations

1. When an obligation has arisen for a third State or a third organization in conformity with article 35, the obligation may be revoked or modified only with the consent of the parties to the treaty and of the third State or the third organization, unless it is established that they had otherwise agreed.

2. When a right has arisen for a third State or a third organization in conformity with article 36, the right may not be revoked or modified by the parties if it is established that the right was intended not to be

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revocable or subject to modification without the consent of the third State or the third organization.

3. The consent of an international organization party to the treaty or of a third organization, as provided for in the foregoing paragraphs, shall be governed by the rules of that organization.

Article 38

Rules in a treaty becoming binding on third States or third organizations through international custom

Nothing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State or a third organization as a customary rule of international law, recognized as such.

PART IV

AMENDMENT AND MODIFICATION OF TREATIES

Article 39

General rule regarding the amendment of treaties

1. A treaty may be amended by agreement between the parties. The rules laid down in Part II apply to such an agreement except in so far as the treaty may otherwise provide.

2. The consent of an international organization to an agreement provided for in paragraph 1 shall be governed by the rules of that organization.

Article 40

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Amendment of multilateral treaties

1. Unless the treaty otherwise provides, the amendment of multilateral treaties shall be governed by the following paragraphs.

2. Any proposal to amend a multilateral treaty as between all the parties must be notified to all the contracting States and all the contracting organizations, each one of which shall have the right to take part in:

(a) the decision as to the action to be taken in regard to such proposal;

(b) the negotiation and conclusion of any agreement for the amendment of the treaty.

3. Every State or international organization entitled to become a party to the treaty shall also be entitled to become a party to the treaty as amended.

4. The amending agreement does not bind any State or international organization already a party to the treaty which does not become a party to the amending agreement; article 30, paragraph 4(b), applies in relation to such State or organization.

5. Any State or international organization which becomes a party to the treaty after the entry into force of the amending agreement shall,

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failing an expression of a different intention by that State or that organization:

(a) be considered as a party to the treaty as amended; and

(b) be considered as a party to the unamended treaty in relation to any party to the treaty not bound by the amending agreement.

Article 41

Agreements to modify multilateral treaties between certain of the parties only

1. Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:

(a) the possibility of such a modification is provided for by the treaty; or

(b) the modification in question is not prohibited by the treaty and:

(i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;

(ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.

2. Unless in a case falling under paragraph 1 (a) the treaty otherwise provides, the parties in question shall notify the other parties of their

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intention to conclude the agreement and of the modification to the treaty for which it provides.

PART V

INVALIDITY, TERMINATION AND SUSPENSION OF THE OPERATION OF TREATIES

SECTION 1. GENERAL PROVISIONS

Article 42

Validity and continuance in force of treaties

1. The validity of a treaty or of the consent of a State or an international organization to be bound by a treaty may be impeached only through the application of the present Convention.

2. The termination of a treaty, its denunciation or the withdrawal of a party, may take place only as a result of the application of the provisions of the treaty or of the present Convention. The same rule applies to suspension of the operation of a treaty.

Article 43

Obligations imposed by international law independently of a treaty

The invalidity, termination or denunciation of a treaty, the withdrawal of a party from it, or the suspension of its operation, as a result of the application of the present Convention or of the provisions

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of the treaty, shall not in any way impair the duty of any State or of any international organization to fulfil any obligation embodied in the treaty to which that State or that organization would be subject under international law independently of the treaty.

Article 44

Separability of treaty provisions

1. A right of a party, provided for in a treaty or arising under article 56, to denounce, withdraw from or suspend the operation of the treaty may be exercised only with respect to the whole treaty unless the treaty otherwise provides or the parties otherwise agree.

2. A ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty recognized in the present Convention may be invoked only with respect to the whole treaty except as provided in the following paragraphs or in article 60.

3. If the ground relates solely to particular clauses, it may be invoked only with respect to those clauses where:

(a) the said clauses are separable from the remainder of the treaty with regard to their application;

(b) it appears from the treaty or is otherwise established that acceptance of those clauses was not an essential basis of the consent of the other party or parties to be bound by the treaty as a whole; and

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(c) continued performance of the remainder of the treaty would not be unjust.

4. In cases falling under articles 49 and 50, the State or international organization entitled to invoke the fraud or corruption may do so with respect either to the whole treaty or, subject to paragraph 3, to the particular clauses alone.

5. In cases falling under articles 51, 52 and 53, no separation of the provisions of the treaty is permitted.

Article 45

Loss of a right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty

1. A State may no longer invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty under articles 46 to 50 or articles 60 and 62 if, after becoming aware of the facts:

(a) it shall have expressly agreed that the treaty is valid or remains in force or continues in operation, as the case may be; or

(b) it must by reason of its conduct be considered as having acquiesced in the validity of the treaty or in its maintenance in force or in operation, as the case may be.

2. An international organization may no longer invoke a ground for invalidating, terminating, withdrawing from or suspending the operation

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of a treaty under articles 46 to 50 or articles 60 and 62 if, after becoming aware of the facts:

(a) it shall have expressly agreed that the treaty is valid or remains in force or continues in operation, as the case may be; or

(b) it must by reason of the conduct of the competent organ be considered as having renounced the right to invoke that ground.

SECTION 2. INVALIDITY OF TREATIES

Article 46

Provisions of internal law of a State and rules of an international organization regarding competence to conclude treaties

1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

2. An international organization may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of the rules of the organization regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of fundamental importance.

3. A violation is manifest if it would be objectively evident to any

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State or any international organization conducting itself in the matter in accordance with the normal practice of States and, where appropriate, of international organizations and in good faith.

Article 47

Specific restrictions on authority to express the consent of a State or an international organization

If the authority of a representative to express the consent of a State or of an international organization to be bound by a particular treaty has been made subject to a specific restriction, his omission to observe that restriction may not be invoked as invalidating the consent expressed by him unless the restriction was notified to the negotiating States and negotiating organizations prior to his expressing such consent.

Article 48

Error

1. A State or an international organization may invoke an error in a treaty as invalidating its consent to be bound by the treaty if the error relates to a fact or situation which was assumed by that State or that organization to exist at the time when the treaty was concluded and formed an essential basis of the consent of that State or that organization to be bound by the treaty.

2. Paragraph 1 shall not apply if the State or international

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organization in question contributed by its own conduct to the error or if the circumstances were such as to put that State or that organization on notice of a possible error.

3. An error relating only to the wording of the text of a treaty does not affect its validity; article 80 then applies.

Article 49

Fraud

A State or an international organization induced to conclude a treaty by the fraudulent conduct of a negotiating State or a negotiating organization may invoke the fraud as invalidating its consent to be bound by the treaty.

Article 50

Corruption of a representative of a State
or of an international organization

A State or an international organization the expression of whose consent to be bound by a treaty has been procured through the corruption of its representative directly or indirectly by a negotiating State or a negotiating organization may invoke such corruption as invalidating its consent to be bound by the treaty.

Article 51

Coercion of a representative of a State

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or of an international organization

The expression by a State or an international organization of consent to be bound by a treaty which has been procured by the coercion of the representative of that State or that organization through acts or threats directed against him shall be without any legal effect.

Article 52

Coercion of a State or of an international organization by the threat or use of force

A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations.

Article 53

Treaties conflicting with a peremptory norm of general international law (jus cogens)

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

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SECTION 3.

TERMINATION AND SUSPENSION OF
THE OPERATION OF TREATIES

Article 54

Termination of or withdrawal from a treaty under
its provisions or by consent of the parties

The termination of a treaty or the withdrawal of a party may take
place:

(a) in conformity with the provisions of the treaty; or

(b) at any time by consent of all the parties after consultation with
the contracting States and contracting organizations.

Article 55

Reduction of the parties to a multilateral treaty
below the number necessary for its entry into force

Unless the treaty otherwise provides, a multilateral treaty does not
terminate by reason only of the fact that the number of the parties falls
below the number necessary for its entry into force.

Article 56

Denunciation of or withdrawal from a treaty containing no provision
regarding termination, denunciation or withdrawal

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1. A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless:

(a) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or

(b) a right of denunciation or withdrawal may be implied by the nature of the treaty.

2. A party shall give not less than twelve months' notice of its intention to denounce or withdraw from a treaty under paragraph 1.

Article 57

Suspension of the operation of a treaty
under its provisions or by consent of the parties

The operation of a treaty in regard to all the parties or to a particular party may be suspended:

(a) in conformity with the provisions of the treaty; or

(b) at any time by consent of all the parties after consultation with the contracting States and contracting organizations.

Article 58

Suspension of the operation of a multilateral treaty by

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agreement between certain of the parties only

1. Two or more parties to a multilateral treaty may conclude an agreement to suspend the operation of provisions of the treaty, temporarily and as between themselves alone, if:

(a) the possibility of such a suspension is provided for by the treaty; or

(b) the suspension in question is not prohibited by the treaty and:

(i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;

(ii) is not incompatible with the object and purpose of the treaty.

2. Unless in a case falling under paragraph 1(a) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of those provisions of the treaty the operation of which they intend to suspend.

Article 59

Termination or suspension of the operation of a treaty implied by conclusion of a later treaty

1. A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject-matter and:

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(a) it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or

(b) the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.

2. The earlier treaty shall be considered as only suspended in operation if it appears from the later treaty or is otherwise established that such was the intention of the parties.

Article 60

Termination or suspension of the operation of a treaty as a consequence of its breach

1. A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.

2. A material breach of a multilateral treaty by one of the parties entitles:

(a) the other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it either:

(i) in the relations between themselves and the defaulting State

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or international organization, or

(ii) as between all the parties;

(b) a party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State or international organization;

(c) any party other than the defaulting State or international organization to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.

3. A material breach of a treaty, for the purposes of this article, consists in;

(a) a repudiation of the treaty not sanctioned by the present Convention; or

(b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.

4. The foregoing paragraphs are without prejudice to any provision in the treaty applicable in the event of a breach.

5. Paragraphs 1 to 3 do not apply to provisions relating to the

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protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties.

Article 61

Supervening impossibility of performance

1. A party may invoke the impossibility of performing a treaty as a ground for terminating or withdrawing from it if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty. If the impossibility is temporary, it may be invoked only as a ground for suspending the operation of the treaty.

2. Impossibility of performance may not be invoked by a party as a ground for terminating, withdrawing from or suspending the operation of a treaty if the impossibility is the result of a breach by that party either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

Article 62

Fundamental change of circumstances

1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for

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terminating or withdrawing from the treaty unless:

(a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and

(b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

2. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty between two or more States and one or more international organizations if the treaty establishes a boundary.

3. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

4. If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for suspending the operation of the treaty.

Article 63

Severance of diplomatic or consular relations

The severance of diplomatic or consular relations between States

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parties to a treaty between two or more States and one or more international organizations does not affect the legal relations established between those States by the treaty except in so far as the existence of diplomatic or consular relations is indispensable for the application of the treaty.

Article 64

Emergence of a new peremptory norm of general international law (jus cogens)

If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.

SECTION 4. PROCEDURE

Article 65

Procedure to be followed with respect to invalidity, termination, withdrawal from or suspension of the operation of a treaty

1. A party which, under the provisions of the present Convention, invokes either a defect in its consent to be bound by a treaty or a ground for impeaching the validity of a treaty, terminating it, withdrawing from it or suspending its operation, must notify the other parties of its claim. The notification shall indicate the measure proposed to be taken with respect to the treaty and the reasons therefor.

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2. If, after the expiry of a period which, except in cases of special urgency, shall not be less than three months after the receipt of the notification, no party has raised any objection, the party making the notification may carry out in the manner provided in article 67 the measure which it has proposed.

3. If, however, objection has been raised by any other party, the parties shall seek a solution through the means indicated in Article 33 of the Charter of the United Nations.

4. The notification or objection made by an international organization shall be governed by the rules of that organization.

5. Nothing in the foregoing paragraphs shall affect the rights or obligations of the parties under any provisions in force binding the parties with regard to the settlement of disputes.

6. Without prejudice to article 45, the fact that a State or an international organization has not previously made the notification prescribed in paragraph 1 shall not prevent it from making such notification in answer to another party claiming performance of the treaty or alleging its violation.

Article 66

Procedures for judicial settlement, arbitration and conciliation

1. If, under paragraph 3 of article 65, no solution has been reached

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within a period of twelve months following the date on which the objection was raised, the procedures specified in the following paragraphs shall be followed.

2. With respect to a dispute concerning the application or the interpretation of article 53 or 64:

(a) if a State is a party to the dispute with one or more States, it may, by a written application, submit the dispute to the International Court of Justice for a decision;

(b) if a State is a party to the dispute to which one or more international organizations are parties, the State may, through a Member State of the United Nations if necessary, request the General Assembly or the Security Council or, where appropriate, the competent organ of an international organization which is a party to the dispute and is authorized in accordance with Article 96 of the Charter of the United Nations, to request an advisory opinion of the International Court of Justice in accordance with article 65 of the Statute of the Court;

(c) if the United Nations or an international organization that is authorized in accordance with Article 96 of the Charter of the United Nations is a party to the dispute, it may request an advisory opinion of the International Court of Justice in accordance with article 65 of the Statute of the Court;

(d) if an international organization other than those referred to in

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sub-paragraph (c) is a party to the dispute, it may, through a Member State of the United Nations, follow the procedure specified in sub-paragraph (b);

(e) the advisory opinion given pursuant to sub-paragraph (b), (c) or (d) shall be accepted as decisive by all the parties to the dispute concerned;

(f) if the request under sub-paragraph (b), (c) or (d) for an advisory opinion of the Court is not granted, any one of the parties to the dispute may, by written notification to the other party or parties, submit it to arbitration in accordance with the provisions of the Annex to the present Convention.

3. The provisions of paragraph 2 apply unless all the parties to a dispute referred to in that paragraph by common consent agree to submit the dispute to an arbitration procedure, including the one specified in the Annex to the present Convention.

4. With respect to a dispute concerning the application or the interpretation of any of the articles in Part V, other than articles 53 and 64, of the present Convention, any one of the parties to the dispute may set in motion the conciliation procedure specified in the Annex to the Convention by submitting a request to that effect to the Secretary-General of the United Nations.

Article 67

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Instruments for declaring invalid, terminating, withdrawing from or suspending the operation of a treaty

1. The notification provided for under article 65, paragraph 1 must be made in writing.

2. Any act declaring invalid, terminating, withdrawing from or suspending the operation of a treaty pursuant to the provisions of the treaty or of paragraphs 2 or 3 of article 65 shall be carried out through an instrument communicated to the other parties. If the instrument emanating from a State is not signed by the Head of State, Head of Government or Minister for Foreign Affairs, the representative of the State communicating it may be called upon to produce full powers. If the instrument emanates from an international organization, the representative of the organization communicating it may be called upon to produce full powers.

Article 68

Revocation of notifications and instruments provided for in articles 65 and 67

A notification or instrument provided for in articles 65 or 67 may be revoked at any time before it takes effect.

SECTION 5.

CONSEQUENCES OF THE INVALIDITY

TERMINATION OR SUSPENSION OF THE OPERATION OF A TREATY 2230

Article 69

Consequences of the invalidity of a treaty

1. A treaty the invalidity of which is established under the present Convention is void. The provisions of a void treaty have no legal force.

2. If acts have nevertheless been performed in reliance on such a treaty:

(a) each party may require any other party to establish as far as possible in their mutual relations the position that would have existed if the acts had not been performed;

(b) acts performed in good faith before the invalidity was invoked are not rendered unlawful by reason only of the invalidity of the treaty.

3. In cases falling under articles 49, 50, 51 or 52, paragraph 2 does not apply with respect to the party to which the fraud, the act of corruption or the coercion is imputable.

4. In the case of the invalidity of the consent of a particular State or a particular international organization to be bound by a multilateral treaty, the foregoing rules apply in the relations between that State or that organization and the parties to the treaty.

Article 70

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Consequences of the termination of a treaty

1. Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention:

(a) releases the parties from any obligation further to perform the treaty;

(b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.

2. If it State or an international organization denounces or withdraws from a multilateral treaty, paragraph 1 applies in the relations between that State or that organization and each of the other parties to the treaty from the date when such denunciation or withdrawal takes effect.

Article 71

Consequences of the invalidity of a treaty which conflicts with a peremptory norm of general international law

1. In the case of a treaty which is void under article 53 the parties shall:

(a) eliminate as far as possible the consequences of any act performed in reliance on any provision which conflicts with the peremptory norm of general international law; and

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(b) bring their mutual relations into conformity with the peremptory norm of general international law.

2. In the case of a treaty which becomes void and terminates under article 64, the termination of the treaty:

(a) releases the parties from any obligation further to perform the treaty;

(b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination; provided that those rights, obligations or situations may thereafter be maintained only to the extent that their maintenance is not in itself in conflict with the new peremptory norm of general international law.

Article 72

Consequences of the suspension of the operation of a treaty

1. Unless the treaty otherwise provides or the parties otherwise agree, the suspension of the operation of a treaty under its provisions or in accordance with the present Convention:

(a) releases the parties between which the operation of the treaty is suspended from the obligation to perform the treaty in their mutual relations during the period of the suspension;

(b) does not otherwise affect the legal relations between the parties

established by the treaty. 2233

2. During the period of the suspension the parties shall refrain from acts tending to obstruct the resumption of the operation of the treaty.

PART VI

MISCELLANEOUS PROVISIONS

Article 73

Relationship to the Vienna Convention on the Law of Treaties

As between States parties to the Vienna Convention on the Law of Treaties of 1969, the relations of those States under a treaty between two or more States and one or more international organizations shall be governed by that Convention.

Article 74

Questions not prejudged by the present Convention

1. The provisions of the present Convention shall not prejudge any question that may arise in regard to a treaty between one or more States and one or more international organizations from a succession of States or from the international responsibility of a State or from the outbreak of hostilities between States.

2. The provisions of the present Convention shall not prejudge any question that may arise in regard to a treaty from the international

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responsibility of an international organization, from the termination of the existence of the organization or from the termination of participation by a State in the membership of the organization.

3. The provisions of the present Convention shall not prejudge any question that may arise in regard to the establishment of obligations and rights for States members of an international organization under a treaty to which that organization is a party.

Article 75

Diplomatic and consular relations and the conclusion of treaties

The severance or absence of diplomatic or consular relations between two or more States does not prevent the conclusion of treaties between two or more of those States and one or more international organizations. The conclusion of such a treaty does not in itself affect the situation in regard to diplomatic or consular relations.

Article 76

Case of an aggressor State

The provisions of the present Convention are without prejudice to any obligation in relation to a treaty between one or more States and one or more international organizations which may arise for an aggressor State in consequence of measures taken in conformity with the Charter of the United Nations with reference to that State's aggression.

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PART VII

DEPOSITARIES, NOTIFICATIONS, CORRECTIONS AND REGISTRATION

Article 77

Depositaries of treaties

1. The designation of the depositary of a treaty may be made by the negotiating States and negotiating organizations or, as the case may be, the negotiating organizations, either in the treaty itself or in some other manner. The depositary may be one or more States, an international organization or the chief administrative officer of the organization.

2. The functions of the depositary of a treaty are international in character and the depositary is under an obligation to act impartially in their performance. In particular, the fact that a treaty has not entered into force between certain of the parties or that a difference has appeared between a State or an international organization and a depositary with regard to the performance of the latter's functions shall not affect that obligation.

Article 78

Functions of depositaries

1. The functions of a depositary, unless otherwise provided in the treaty or agreed by the contracting States and contracting organizations or, as the case may be, by the contracting organizations, comprise in

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particular:

(a) keeping custody of the original text of the treaty and of any full powers delivered to the depositary;

(b) preparing certified copies of the original text and preparing any further text of the treaty in such additional languages as may be required by the treaty and transmitting them to the parties and to the States and international orgaizations entitled to become parties to the treaty;

(c) receiving any signatures to the treaty and receiving and keeping custody of any instruments, notifications and communications relating to it;

(d) examining whether the signature or any instrument, notification or communication relating to the treaty is in due and proper form and, if need be, bringing the matter to the attention of the State or international organization in question;

(e) informing the parties and the States and international organizations entitled to become parties to the treaty of acts, notifications and communications relating to the treaty;

(f) informing the States and international organizations entitled to become parties to the treaty when the number of signatures or of instruments of ratification, instruments relating to an act of formal confirmation, or of instruments of acceptance, approval or accession

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required for the entry into force of the treaty has been received or deposited;

(g) registering the treaty with the Secretariat of the United Nations;

(h) performing the functions specified in other provisions of the present Convention.

2. In the event of any difference appearing between a State or an international organization and the depositary as to the performance of the latter's functions, the depositary shall bring the question to the attention of:

(a) the signatory States and organizations and the contracting States and contracting organizations; or

(b) where appropriate, the competent organ of the international organization concerned.

Article 79

Notifications and communications

Except as the treaty or the present Convention otherwise provide, any notification or communication to be made by any State or any international organization under the present Convention shall:

(a) if there is no depositary, be transmitted direct to the States and organizations for which it is intended, or if there is a depositary, to the latter;

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(b) be considered as having been nude by the State or organization in question only upon its receipt by the State or organization to which it was transmitted or, as the case may be, upon its receipt by the depositary;

(c) if transmitted to a depositary, be considered as received by the State or organization for which it was intended only when the latter State or organization has been informed by the depositary in accordance with article 78, paragraph 1(e).

Article 80

Correction of errors in texts or in certified copies of treaties

1. Where, after the authentication of the text of a treaty, the signatory States and international organizations and the contracting States and contracting organizations are agreed that it contains an error, the error shall, unless those States and organizations decide upon some other means of correction, be corrected:

(a) by having the appropriate correction made in the text and causing the correction to be initialled by duly authorized representatives;

(b) by executing or exchanging an instrument or instruments setting out the correction which it has been agreed to make; or

(c) by executing a corrected text of the whole treaty by the same

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procedure as in the case of the original text.

2. Where the treaty is one for which there is a depositary, the latter shall notify the signatory States and international organizations and the contracting States and contracting organizations of the error and of the proposal to correct it and shall specify an appropriate time-limit within which objection to the proposed correction may be raised. If, on the expiry of the time-limit:

(a) no objection has been raised, the depositary shall make and initial the correction in the text and shall execute a procs-verbal of the rectification of the text and communicate a copy of it to the parties and to the States and organizations entitled to become parties to the treaty;

(b) an objection has been raised, the depositary shall communicate the objection to the signatory States and organizations and to the contracting States and contracting organizations.

3. The rules in paragraphs 1 and 2 apply also where the text has been authenticated in two or more languages and it appears that there is a lack of concordance which the signatory States and international organizations and the contracting States and contracting organizations agree should be corrected.

4. The corrected text replaces the defective text ab initio, unless the signatory States and international organizations and the contracting

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States and contracting organizations otherwise decide.

5. The correction of the text of a treaty that has been registered shall be notified to the Secretariat of the United Nations.

6. Where an error is discovered in a certified copy of a treaty, the depositary shall execute a procs-verbal specifying the rectification and communicate a copy of it to the signatory States and international organizations and to the contracting States and contracting organizations.

Article 81

Registration and publication of treaties

1. Treaties shall, after their entry into force, be transmitted to the Secretariat of the United Nations for registration or filing and recording, as the case may be, and for publication.

2. The designation of a depositary shall constitute authorization for it to perform the acts specified in the preceding paragraph.

PART VIII

FINAL PROVISIONS

Article 82

Signature

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The present Convention shall be open for signature until 31 December 1986 at the Federal Ministry for Foreign Affairs of the Republic of Austria, and subsequently, until 30 June 1987, at United Nations Headquarters, New York by:

(a) all States;

(b) Namibia, represented by the United Nations Council for Namibia;

(c) international organizations invited to participate in the United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations.

Article 83

Ratification or act of formal confirmation

The present Convention is subject to ratification by States and by Namibia, represented by the United Nations Council for Namibia, and to acts of formal confirmation by international organizations. The instruments of ratification and those relating to acts of formal confirmation shall be deposited with the Secretary-General of the United Nations.

Article 84

Accession

1. The present Convention shall remain open for accession by any State, by Namibia, represented by the United Nations Council for Namibia, and by

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any international organization which has the capacity to conclude treaties.

2. An instrument of accession of an international organization shall contain a declaration that it has the capacity to conclude treaties.

3. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article 85

Entry into force

1. The present Convention shall enter into force on the thirtieth day following the date of deposit of the thirty-fifth instrument of ratification or accession by States or by Namibia, represented by the United Nations Council for Namibia.

2. For each State or for Namibia, represented by the United Nations Council for Namibia, ratifying or acceding to the Convention after the condition specified in paragraph 1 has been fulfilled, the Convention shall enter into force on the thirtieth day after deposit by such State or by Namibia of its instrument of ratification or accession.

3. For each international organization depositing an instrument relating to an act of formal confirmation or an instrument of accession, the Convention shall enter into force on the thirtieth day after such deposit, or at the date the Convention enters into force pursuant to

paragraph 1, whichever is later.

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Article 86

Authentic texts

The original of the present Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

IN WITNESS WHEREOF the undersigned Plenipotentiaries, being duly authorized by their respective Governments, and duly authorized representatives of the United Nations Council for Namibia and of international organizations have signed the present Convention.

DONE at VIENNA this twenty-first day of March one thousand nine hundred and eighty-six.

ANNEX

ARBITRATION AND CONCILIATION PROCEDURES
ESTABLISHED IN APPLICATION OF ARTICLE 66

I. ESTABLISHMENT OF THE ARBITRAL TRIBUNAL
OR CONCILIATION COMMISSION

1. A list consisting of qualified jurists, from which the parties to a dispute may choose the persons who are to constitute an arbitral tribunal or, as the case may be, a conciliation commission, shall be drawn up and

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maintained by the Secretary-General of the United Nations. To this end, every State which is a Member of the United Nations and every party to the present Convention shall be invited to nominate two persons, and the names of the persons so nominated shall constitute the list, a copy of which shall be transmitted to the President of the International Court of Justice. The term of office of a person on the list, including that of any person nominated to fill a casual vacancy, shall be five years and may be renewed. A person whose term expires shall continue to fulfil any function for which he shall have been chosen under the following paragraphs.

2. When notification has been made under article 66, paragraph 2, sub-paragraph (f), or agreement on the procedure in the present Annex has been reached under paragraph 3, the dispute shall be brought before an arbitral tribunal. When a request has been made to the Secretary-General under article 66, paragraph 4, the Secretary-General shall bring the dispute before a conciliation commission. Both the arbitral tribunal and the conciliation commission shall be constituted as follows:

The States, international organizations or, as the case may be, the States and organizations which constitute one of the parties to the dispute shall appoint by common consent:

(a) one arbitrator or, as the case may be, one conciliator, who may or may not be chosen from the list referred to in paragraph 1; and

(b) one arbitrator or, as the case may be, one conciliator, who shall

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be chosen from among those included in the list and shall not be of the nationality of any of the States or nominated by any of the organizations which constitute that party to the dispute, provided that a dispute between two international organizations is not considered by nationals of one and the same State.

The States, international organizations or, as the case may be, the States and organizations which constitute the other party to the dispute shall appoint two arbitrators or, as the case may be, two conciliators, in the same way. The four persons chosen by the parties shall be appointed within sixty days following the date on which the other party to the dispute receives notification under article 66, paragraph 2, sub-paragraph (f), or on which the agreement on the procedure in the present Annex under paragraph 3 is reached, or on which the Secretary-General receives the request for conciliation.

The four persons so chosen shall, within sixty days following the date of the last of their own appointments, appoint from the list a fifth arbitrator or, as the case may be, conciliator, who shall be chairman.

If the appointment of the chairman, or any of the arbitrators or, as the case may be, conciliators, has not been made within the period prescribed above for such appointment, it shall be made by the Secretary-General of the United Nations within sixty days following the expiry of that period. The appointment of the chairman may be made by the Secretary-General either from the list or from the membership of the

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International Law Commission. Any of the periods within which appointments must be made may be extended by agreement between the parties to the dispute. If the United Nations is a party or is included in one of the parties to the dispute, the Secretary-General shall transmit the above-mentioned request to the President of the International Court of Justice, who shall perform the functions conferred upon the Secretary-General under this sub-paragraph.

Any vacancy shall be filled in the manner prescribed for the initial appointment.

The appointment of arbitrators or conciliators by an international organization provided for in paragraphs 1 and 2 shall be governed by the rules of that organization.

II. FUNCTIONING OF THE ARBITRAL TRIBUNAL

3. Unless the parties to the dispute otherwise agree, the Arbitral Tribunal shall decide its own procedure, assuring to each party to the dispute a full opportunity to be heard and to present its case.

4. The Arbitral Tribunal, with the consent of the parties to the dispute, may invite any interested State or international organization to submit to it its views orally or in writing.

5. Decisions of the Arbitral Tribunal shall be adopted by a majority vote of the members. In the event of an equality of votes, the vote of the Chairman shall be decisive.

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6. When one of the parties to the dispute does not appear before the Tribunal or fails to defend its case, the other party may request the Tribunal to continue the proceedings and to make its award. Before making its award, the Tribunal must satisfy itself not only that it has jurisdiction over the dispute but also that the claim is well founded in fact and law.

7. The award of the Arbitral Tribunal shall be confined to the subject-matter of the dispute and state the reasons on which it is based. Any member of the Tribunal may attach a separate or dissenting opinion to the award.

8. The award shall be final and without appeal. It shall be complied with by all parties to the dispute.

9. The Secretary-General shall provide the Tribunal with such assistance and facilities as it may require. The expenses of the Tribunal shall be borne by the United Nations.

III. FUNCTIONING OF THE CONCILIATION COMMISSION

10. The Conciliation Commission shall decide its own procedure. The Commission, with the consent of the parties to the dispute, may invite any party to the treaty to submit to it its views orally or in writing. Decisions and recommendations of the Commission shall be made by a majority vote of the five members.

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11. The Commission may draw the attention of the parties to the dispute to any measures which might facilitate an amicable settlement.

12. The Commission shall hear the parties, examine the claims and objections, and make proposals to the parties with a view to reaching an amicable settlement of the dispute.

13. The Commission shall report within twelve months of its constitution. Its report shall be deposited with the Secretary-General and transmitted to the parties to the dispute. The report of the Commission, including any conclusions stated therein regarding the facts or questions of law, shall not be binding upon the parties and it shall have no other character than that of recommendations submitted for the consideration of the parties in order to facilitate an amicable settlement of the dispute.

14. The Secretary-General shall provide the Commission with such assistance and facilities as it may require. The expenses of the Commission shall be borne by the United Nations.

ANNEX 2:

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McNair, *The Law of Treaties* (1961) (extracts)

THE LAW OF TREATIES

BY

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CONCLUSION

There is good reason to think that in the near future many more disputes arising upon treaties will be referred to the decision of international tribunals than has been the case in the past. My submission is that the task of deciding these disputes will be made easier if we free ourselves from the traditional notion that the instrument known as the treaty is governed by a single set of rules, however inadequate, and set ourselves to study the greatly differing legal character of the several kinds of treaties and to frame rules appropriate to the character of each kind. The few pieces of evidence which I have brought together seem to me to justify this submission.

TREATIES AND SOVEREIGNTY[1]

(1958)

SOVEREIGNTY is so frequently mentioned in connection with treaties that it has seemed to me that it might be useful to bring together the various aspects of this association of ideas and treat them as a whole. Accordingly I shall consider the matter under the following headings:

1. Treaty-making as an exercise of sovereign power;
2. The effect upon sovereignty of treaty obligations;
3. The extent to which a State by virtue of its sovereignty is entitled to regulate a right exercisable upon its territory by another State in pursuance of a treaty between them;
4. The question of the relevance of sovereignty in the interpretation of treaties, that is, the so-called rule of restrictive interpretation.

I. TREATY-MAKING AS AN EXERCISE OF SOVEREIGN POWER

The *Wimbledon*[2] case will be more appropriately discussed later on in connection with the plea that sovereignty affords a justification for refusing to carry out a treaty obligation which limits the sovereign powers of a State. The Permanent Court of International Justice in rejecting this contention advanced by Germany remarked that

'the right of entering into international engagements is an attribute of State sovereignty.'

At first sight this statement might seem to be a platitude, but it was necessary to point out the logical absurdity of the argument that an act done by a State in the exercise of its sovereignty, namely, the conclusion of a treaty, could be lawfully nullified by that State on the ground that the effect of the act was to limit its sovereignty. That was not only the effect but the object of the conclusion of the treaty.

But when it is said that the capacity to make treaties is an attribute or an exercise of State sovereignty, that does not mean that only fully sovereign States, or indeed only States, can possess that capacity. (Let us avoid

[1] Extract from *Symbolae Verzijl*, présentées au Professeur J. H. W. Verzijl à l'occasion de son LXX-ième anniversaire, 1958, with some additional citations.

[2] P.C.I.J. *Publications*, Series A., No. 1, p. 25.

the use of the expression 'treaty-making power' because it is more convenient to reserve that expression for the purpose of indicating a particular internal organ of a State that has the power to make treaties binding upon the State.) Two cases must be considered:

(a) The making of treaties by (i) permanently neutralized States and (ii) dependent States, and
(b) The making of treaties by international entities which are not States at all.

(a) (i) *Permanently neutralized States*

These States are sovereign States and possess the treaty-making capacity, though the fact of their neutralization restricts the kind of obligation which they can contract. Thus it is significant that when Luxemburg was permanently neutralized by the Treaty of May 11, 1867, Belgium (then a permanently neutralized State) became a party to this Treaty only after having secured her special position by means of Article 2, which runs as follows:

'Les Hautes Parties Contractantes s'engagent à respecter le principe de neutralité stipulé par le présent Article.

Le principe est et demeure placé sous la sanction de la garantie collective des Puissances signataires du présent Traité, à l'exception de la Belgique, *qui est elle-même un État neutre*.'[1]

Similarly when Switzerland, another permanently neutralized State, joined the League of Nations in 1920, she was allowed to exclude any obligation 'to participate in a military action or to permit the passage of foreign troops or the preparation of military enterprises upon her territory'.

(a) (ii) *Dependent States*

These States, whether protected States or vassal States, are not fully sovereign. The degree of dependence varies greatly. In some cases they possess no treaty-making capacity and in others only a limited treaty-making capacity. This question turns upon the circumstances in which, and the instruments by which, the dependence came about.

Upon the question of the invalidity of treaties made by not fully sovereign States which are inconsistent with their status, it is difficult to speak with certainty or to say whether such treaties are void *ab initio* or merely voidable at the will of the dominant State.

(b) *International entities which are not States but possess a certain treaty-making capacity*

Fifty years ago it might have been possible to say that only States could conclude treaties, but today any such statement would be out of date. The treaty-making capacity is no longer exclusively confined to States. It cannot be doubted today that the United Nations possesses the treaty-making

[1] Italics mine.

capacity within the scope of its activities, and a perusal of the *United Nations Treaty Series* will afford instances of the exercise of this capacity; for instance, an Agreement with the Swiss Confederation, 'acting for the Canton and Town of Geneva' signed on 11 June and 1 July 1946, regarding the Ariana Site in Geneva;[1] the Headquarters Agreement with the United States of America, dated 26 June 1947;[2] the Convention on the Privileges and Immunities of the United Nations, dated 13 February, 1946;[3] the Interim Arrangement on Privileges and Immunities of the United Nations concluded between the Secretary-General of the United Nations and the Swiss Federal Council, and signed on 11 June and 1 July 1946.[4]

The nature of the personality of the United Nations was examined by the International Court of Justice in its Advisory Opinion on *Reparation for Injuries suffered in the service of the United Nations*.[5] In that Opinion the Court stated that

'The "Convention on the Privileges and Immunities of the United Nations" of 1946 creates rights and duties between each of the signatories and the Organization (see, in particular, Section 35). It is difficult to see how such a convention could operate except upon the international plane and as between parties possessing international personality.

'In the opinion of the Court, the Organization was intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon an international plane. It is at present the supreme type of international organization, and it could not carry out the intentions of its founders if it was devoid of international personality. It must be acknowledged that its Members, by entrusting certain functions to it, with the attendant duties and responsibilities, have clothed it with the competence required to enable those functions to be effectively discharged.

'Accordingly, the Court has come to the conclusion that the Organization is an international person . . .'

But, at the same time, the Court noted a certain difference between a State and the United Nations in the following passage:[6]

'Whereas a State possesses the totality of international rights and duties recognized

[1] Vol. 1 (1946–1947), p. 154; see also Vol. 43 (1949), p. 327; and see Guggenheim, *Droit international public*, I, p. 60, and Parry in 26 *British Year-Book of International Law* (1949), pp. 108–149.

[2] Vol. 11 (1947), p. 11.

[3] Vol. 1 (1946–1947), p. 16.

[4] Vol. 1 (1946–1947), p. 165.

Note also Article 10 of the 'Regulations to give effect to Article 102 of the Charter of the United Nations, adopted by the General Assembly on 14 December 1946', which is as follows (p. xxvi of *United Nations Treaty Series*, Vol. 1 (1946–1947)):

10. 'The Secretariat shall file and record treaties and international agreements, other than those subject to registration under Article 1 of these regulations, if they fall in the following categories:

(a) Treaties or international agreements entered into by the United Nations or by one or more of the specialized agencies . . .'

[5] I.C.J., *Reports*, 1949, p. 179.

[6] Ibid., p. 180.

It is relevant to refer to *Curran* v. *City of New York, Trygve Lie et al.* (1947) 77 New

capacity within the scope of its activities, and a perusal of the *United Nations Treaty Series* will afford instances of the exercise of this capacity; for instance, an Agreement with the Swiss Confederation, 'acting for the Canton and Town of Geneva' signed on 11 June and 1 July 1946, regarding the Ariana Site in Geneva;[1] the Headquarters Agreement with the United States of America, dated 26 June 1947;[2] the Convention on the Privileges and Immunities of the United Nations, dated 13 February, 1946;[3] the Interim Arrangement on Privileges and Immunities of the United Nations concluded between the Secretary-General of the United Nations and the Swiss Federal Council, and signed on 11 June and 1 July 1946.[4]

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[6] Ibid., p. 180.

It is relevant to refer to *Curran* v. *City of New York, Trygve Lie et al.* (1947) 77 New

capacity within the scope of its activities, and a perusal of the *United Nations Treaty Series* will afford instances of the exercise of this capacity; for instance, an Agreement with the Swiss Confederation, 'acting for the Canton and Town of Geneva' signed on 11 June and 1 July 1946, regarding the Ariana Site in Geneva;[1] the Headquarters Agreement with the United States of America, dated 26 June 1947;[2] the Convention on the Privileges and Immunities of the United Nations, dated 13 February, 1946;[3] the Interim Arrangement on Privileges and Immunities of the United Nations concluded between the Secretary-General of the United Nations and the Swiss Federal Council, and signed on 11 June and 1 July 1946.[4]

The nature of the personality of the United Nations was examined by the International Court of Justice in its Advisory Opinion on *Reparation for Injuries suffered in the service of the United Nations*.[5] In that Opinion the Court stated that

'The "Convention on the Privileges and Immunities of the United Nations" of 1946 creates rights and duties between each of the signatories and the Organization (see, in particular, Section 35). It is difficult to see how such a convention could operate except upon the international plane and as between parties possessing international personality.

'In the opinion of the Court, the Organization was intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon an international plane. It is at present the supreme type of international organization, and it could not carry out the intentions of its founders if it was devoid of international personality. It must be acknowledged that its Members, by entrusting certain functions to it, with the attendant duties and responsibilities, have clothed it with the competence required to enable those functions to be effectively discharged.

'Accordingly, the Court has come to the conclusion that the Organization is an international person . . .'

But, at the same time, the Court noted a certain difference between a State and the United Nations in the following passage:[6]

'Whereas a State possesses the totality of international rights and duties recognized

[1] Vol. 1 (1946–1947), p. 154; see also Vol. 43 (1949), p. 327; and see Guggenheim, *Droit international public*, I, p. 60, and Parry in 26 *British Year-Book of International Law* (1949), pp. 108–149.

[2] Vol. 11 (1947), p. 11.

[3] Vol. 1 (1946–1947), p. 16.

[4] Vol. 1 (1946–1947), p. 165.

Note also Article 10 of the 'Regulations to give effect to Article 102 of the Charter of the United Nations, adopted by the General Assembly on 14 December 1946', which is as follows (p. xxvi of *United Nations Treaty Series*, Vol. 1 (1946–1947)):

10. 'The Secretariat shall file and record treaties and international agreements, other than those subject to registration under Article 1 of these regulations, if they fall in the following categories:

(a) Treaties or international agreements entered into by the United Nations or by one or more of the specialized agencies . . .'

[5] I.C.J., *Reports*, 1949, p. 179.

[6] Ibid., p. 180.

It is relevant to refer to *Curran* v. *City of New York, Trygve Lie et al.* (1947) 77 New

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ANNEX 3:

B. Simma (ed.), The Charter of the United Nations: A Commentary (2nd edn., 2002)

(extracts)

The Charter of the UNITED NATIONS

A COMMENTARY

Second Edition

VOLUME I

Edited by BRUNO SIMMA

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of view that they have to pay due respect to each other, the SC and the ICJ have to take each other's decisio into consideration.[26]

10 The enumeration of the specific powers under Chapters VI, VII, VII, and XII which are granted to the SC Art. 24(2) second sentence for the discharge of its duties[27] is not to be taken as a final listing of the powe conferred upon the SC. First of all, the view that the enumeration of the powers of the SC in Art. 24(2) sec ond sentence is final is not supported by the phrasing of this clause. The granting of 'specific' powers log cally presupposes that the organ holding such 'specific powers' also has 'general' powers as well Furthermore, an examination of the UN Charter shows that the listing of powers in Art. 24(2) second sen tence cannot be meant to be a final one because the competences of the SC which are related to the main tenance of peace are also described in other Chapters than those named in Art. 24. For example, there is Chapter IV (Art. 12(1), requesting the GA to make a recommendation in a dispute with which the SC is involved), Chapter V (Art. 26, a mandate for the elaboration of a system of arms control), and Chapter XIV (Art. 94(2), concerning the enforcement of judgments of the ICJ). Finally, a restrictive interpretation of Art. 24(2) second sentence, in the sense of a final enumeration of the powers of the SC—or reading this provision as a mere concretization of the powers which are granted exclusively to the SC for the discharge of its pri mary responsibility for the maintenance of peace—is not compatible with the fact that the SC is charged with such primary responsibility.[28] For, if the SC, as the primarily responsible political organ, is to live up to its mandate to take prompt and effective measures for the maintenance of peace, it must be accorded the widest possible discretion as to the kind of measures to be taken. A restriction of the powers of the SC based on Art. 24(2) second sentence, which in the eyes of the authors of the Charter would appear 'legalistic', would run counter to the purpose of the UN Charter. Article 24(1) therefore serves as the basis for comprehensive powers for the SC which goes beyond the enumeration in para. 2, and thereby fulfils the function of closing any gaps in the provision of powers for the SC which might otherwise exist, considering the wide range of tasks to be undertaken by the SC.[29] However, given the fact that the range of powers of the SC is open in prin ciple, the discretion of the SC in taking action is not completely unlimited. In discharging its functions, the SC also has to stay within the liberally drawn limits set by the delimitation of the functions and purposes pro vided for in the UN Charter. As the Charter states, the SC 'in discharging these duties shall act in accordance with the Purposes and Principles of the United Nations', i.e. it may not act arbitrarily. In summing up we have to recognize that Art. 24(2) second sentence turns out to be legally rather meaningless—as has been cor rectly observed by Kelsen[30]—since the conclusion that an organ may act only within the limits of the pow ers granted to the Organization for which it functions is self-evident. Additionally, the clause is meaningless because the enumeration of the powers granted to the SC for the discharge of its functions is incomplete as well as legally superfluous because of its merely declaratory nature.

11 The legal purpose and meaning of the provision of Art. 24(1), according to which the SC, in discharging its functions for the maintenance of peace, acts on behalf of the member States, is similarly problematic. This provision has been interpreted as meaning that the competence of the SC in the realm of the maintenance of peace rests on a delegation of powers by the members.[31] In conferring power on the SC, each member

26 More extensively Klein, pp. 481 *et seq.* with further refs.

27 The term 'duties' is an unfortunate choice; the subject of the provisions is the functions and powers granted to the SC by the Charter, since by its very nature, the Charter is an order of competences. This is correctly indicated by Kelsen, p. 154, even if one does not agree with his view that the consequence accepted here ultimately results from the lack of power to sanction the 'duties' set out by Art. 24.

28 Kelsen, p. 284, with the proviso, however, that the powers beyond Art. 24 could only be such as are granted by the Charter. A broader view is taken by Dahm, p. 210; GHS, pp. 204 *et seq.* See on this problem also CP/Segni-Degui (2nd edn.), pp. 458 *et seq.*

29 Jiménez de Aréchaga, E., 'United Nations Security Council', *EPIL* IV, pp. 1168 *et seq.*; Dahm, p. 210; GHS, p. 204; CP/Degni-Segui (2nd edn.), p. 459; Dicke, D./Rengeling, H-W., *Die Sicherung des Weltfriedens durch die Vereinten Nationen—Ein Überblick über die Befugnisse der wichtigsten Organe* (1975), expressly quoting from Dahm, pp. 60 *et seq.*, with further refs.; these authors emphasize at the same time that this broader interpretation is not without limits; dissenting with reference to the broad interpretation, Kelsen, p. 284; critical also CP/Degni-Segui (2nd edn.), pp. 458 *et seq.*

30 Kelsen, pp. 230 *et seq.*; Dahm, p. 210.

31 CP/Degni-Segui (2nd edn.), pp. 450 *et seq.*

State has surrendered a part of its sovereignty to that organ.[32] A more detailed analysis of this provision does not, however, support such an interpretation. It is true that in conferring upon the Organization a binding decision-making power and the right to take enforcement measures for the maintenance of peace, the members of the UN have agreed to a restriction of their sovereignty. This becomes particularly clear if one considers that such binding decisions could affect those member States which are neither members of the SC (and therefore did not participate in the decision) nor agreed to it. In spite of this, an interpretation of Art. 24(1) which is based on the premise of a delegation by the member States of the powers granted to the SC under this provision cannot be upheld. The SC is an organ of the UN and therefore derives its powers from the UN Charter itself. As an organ of the UN, the SC acts on behalf of the Organization and not on behalf of the individual member States. Accordingly, its actions and decisions are attributed to the UN Organization as a whole and not to individual members such as, for instance, the members of the SC.[33] If one were to speak of a delegation of sovereign rights by the member States, then it would only refer to the founding of the Organization, i.e. the conclusion of the founding treaty and its acceptance and ratification by the members.[34] Therefore, following Kelsen, the majority of writers deem Art. 24(1), according to which the member States 'agree that in carrying out its duties under this responsibility, the Security Council acts on their behalf', to be legally erroneous and superfluous.

Article 24(3) obliges the SC to 'submit annual and, when necessary, special reports to the General Assembly'. This duty of the SC to report to the GA has been used to argue that the relationship between the SC and the GA is one of subordination of the former to the latter.[35] Such an interpretation of the duty of the SC to report to the GA is supported by the drafting history of Art. 24(3), which was introduced into the Charter in response to the wishes of the medium and small States, with a view to strengthening the position of the GA *vis-à-vis* the SC.[36] 12

One may consider that, going beyond Art. 24(3), the GA has an all-embracing competence in so far as it may, unlike the SC, concern itself with all matters falling within the general competence of the UN. Furthermore, the GA also has the right to decide on the UN budget. Yet it cannot be maintained that the GA is superior to the SC, or that the duty of the SC to report to the GA is merely a concretization of such superiority.[37] Although the idea of conceiving the GA as superior to the SC ultimately rests on the analogy with the relationship between the parliament and the executive in parliamentary democracies,[38] this analogy does not hold in the case of the UN because the small executive organ, the SC, is not responsible to the Plenary organ; such a relationship is an intrinsic element of the parliamentary system. Likewise, the Plenary organ in the UN system, the GA, does not possess any right to sanction decisions or acts of the executive organ, i.e. the SC. The GA has not been granted the power to hold the SC responsible for failing to present a report according to Art. 24(3) or presenting a deficient report, or even for any actions by the SC listed in a report. The SC is not subordinate to the GA either with regard to the duty to report or in the sense that its ability to function could be impaired by the GA if the latter did not fulfil its task of electing a non-permanent member to the SC in time.[39] Even if one were to attribute some kind of politically guiding function to the GA, as some authors do, this result would not support the view that the SC is in law (*inter alia* under Art. 24(3)) subordinate to the GA. 13

32 CP/Degni-Segui (2nd edn.), p. 450 with reference to Virally, M., *L'Organisation mondiale* (1972).
33 Kelsen, p. 280; Dahm, p. 7 and fn. 5; Dicke/Rengeling, *supra*, fn. 29, p. 57.
34 Kelsen, pp. 281 *et seq.*; Dicke/Rengeling, *supra*, fn. 29, pp. 54, 57.
35 See Dahm, p. 186, who does accept 'a certain hierarchy of the organs', but reaches the same conclusion as is drawn here, i.e. that the SC and GA do not exist in a relation of superiority of one over the other or subordination to one another (p. 187).
36 CP/Cassan (2nd edn.), p. 468 with further refs.
37 Dahm, p. 187.
38 For a discussion of this problem see Seidl-Hohenveldern, I./Loibl, G., *Das Recht der Internationalen Organisationen einschließlich der Supranationalen Gemeinschaften* (7th edn., 2000), MN 0917.
39 Suy, pp. 677, 683, who warns, however, that the ultimate test of this view has not been undertaken, because at the beginning of 1980 the SC proceeded to take a vote after the 15th seat on the SC (after 155 ballots) was finally filled by the GA.

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opinion prevailed that the members of the SC do not act for their governments but via the SC as an organ of the UN acting on behalf of the Organization as a whole. That opinion is endorsed here. The SC, therefore, does not act as the agent of the individual member States.[58]

22 Practice under Art. 24(3) corroborates the position taken here that the duty of the SC to report to the GA has no bearing upon the overall organizational structure of the UN in the sense that subordination of the SC to the authority of the GA could not be inferred from it. Practice shows that the GA has taken only formal cognizance of the reports submitted to it by the SC. So far, no debate on the substance of the reports has ever taken place.[59] All 'special' reports which have been submitted have been concerned with questions of the admission of new members on which the SC had previously decided. Therefore, the treatment of these special reports by the GA is irrelevant to the interpretation of Art. 24(3).

D. The Question of the Legitimacy of Security Council Actions

23 The broad construction by the SC of its powers under Art. 24 and Chapter VII has given new strength to the discussion of the legitimacy of the SC's actions in the sense that its composition is no longer representative of the overall membership of the United Nations Organization. This discussion is reminiscent of the early debates over the composition and the powers of the SC that centred around the question of whether broad powers could be conferred on a small executive organ that could subject sovereign States to binding decisions. The early dispute over this issue has become exacerbated today because the SC's composition has largely remained the same,[60] i.e. great power dominated with an underrepresentation of Third World countries, while the early—and still abstract—fear of smaller countries of SC intervention into their internal affairs has become a stark reality in, for instance, cases of gross violations of human rights deemed to constitute a threat to international peace and security. There can be no doubt that reform measures to allay these concerns, particularly of Third World countries, has become an urgent necessity because the alternative, i.e. the reversion to a very restrictive construction of the SC's competences, is hardly acceptable in view of the increasing number of instances of grave violations of human rights, including genocidal acts, on the one hand, and an increased sensitivity of world public opinion with regard to such atrocities, on the other hand.

58 See the discussion in the SC, 662nd session of Mar. 23, 1954, UN Doc. ST/PSCA/Add. 1 (1952–5), pp. 159 *et seq.*
59 See, e.g., RP 5 II, p. 15.
60 See Fassbender, pp. 197 *et seq.*

Article 25

The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.

UN Materials

See the list for Art. 24.

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E. Representational Functions of the Secretary-General

55 As mentioned above,[97] the SG represents the UN and, at times, the complete family of the UN Organization as a whole *vis-à-vis* the public.

56 He represents the UN in the negotiation and conclusion of agreements with governments and other intergovernmental organizations. He directs the negotiation and conclusion of agreements, either at the request of an organ of the UN, with the approval of the GA, or within the framework of the implied powers of the SG.[98]

57 He represents the Organization in every kind of legal action for the Organization, in court and at arbitration proceedings and pursues the legal claims of the Organization.

58 He is responsible for the implementation of and adherence to the Headquarters Agreement and can draw up regulations for the Headquarters district.[99]

59 Pursuant to the General Convention on the Privileges and Immunities of the United Nations,[100] and subject to the approval of the GA, the SG is responsible for determining the categories of officials to which the Convention applies. He also has the authority to waive the privileges and immunities of officials.

60 He is charged with authorizing the use of the emblem of the Organization and the official seal, as well as the name of the Organization and its abbreviations.[101] Finally, he is responsible for all public relations for the Organization.[102]

F. Reporting Activities

I. The Annual Report to the General Assembly

61 According to Art. 98(2), the SG presents to the GA an annual report on the activities of the Organization. Rule 13(a) of the Rules of Procedure of the GA requires that this report be a compulsory component of the provisional agenda of the regular sessions of the GA. Over the course of time, the form of this report has changed considerably. Whereas the early reports were quite extensive,[103] starting with the 32nd GA, the reports were limited to the scope which had been comprised by the introduction of the earlier reports.[104] Attached to the 32nd report was a supplement which corresponded to the main body of the earlier reports.[105] Beginning with the 33rd regular session, the annual reports have been limited to the discussion of decisive developments and do not include an extensive supplement.[106]

II. Further Reporting Activities

62 As has already been mentioned, the SG prepares numerous other special reports covering broadly diverse areas in connection with the performance of his varied duties and upon the request of the organs of the UN.

97 See *supra*, MN 24.
98 *cf.* RP 5 V, p. 120, para. 733.
99 e.g., GA Res. 99(I), Dec. 14, 1946; GA Res. 169(II), Oct. 31, 1947; GA Res. 481(V), Dec. 12, 1950; GA Res. 604(VI), Feb. 1, 1952; more recently, GA Res. 33/95, Dec. 16, 1978.
100 UNTS 1, p. 15, Art. V, sect. 20.
101 GA Res. 92(I), Dec. 7, 1946.
102 With regard to this and for further references, see RP 5 V, p. 120, paras. 737–47.
103 The last annual report in the original form was from the 31st GA: GAOR (31) Supp. No. 1 (A/31/1); its introduction (GAOR (31) Supp. No. 1 A (A/31/1/Add. 1)) corresponded to the later annual reports.
104 GAOR (32) Supp. No. 1 (A/32/1).
105 GAOR (32) Supp. No. 1 A (A/32/1/Add. 1).
106 For the first time, GAOR (33) Supp. No. 1 (A/33/1); most recently, Report of the SG on the Work of the Organization to the 42nd session of the GA, Sept. 9, 1987 (A/42/1), *VN* 35 (1987), pp. 163–70.

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ANNEX 4:

Security Council Resolution 1315 (2000).

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United Nations S/RES/1315 (2000)

Security Council

Distr.: General
14 August 2000

Resolution 1315 (2000)

Adopted by the Security Council at its 4186th meeting, on 14 August 2000

The Security Council:

Deeply concerned at the very serious crimes committed within the territory of Sierra Leone against the people of Sierra Leone and United Nations and associated personnel and at the prevailing situation of impunity,

Commending the efforts of the Government of Sierra Leone and the Economic Community of West African States (ECOWAS) to bring lasting peace to Sierra Leone,

Noting that the Heads of State and Government of ECOWAS agreed at the 23rd Summit of the Organization in Abuja on 28 and 29 May 2000 to dispatch a regional investigation of the resumption of hostilities,

Noting also the steps taken by the Government of Sierra Leone in creating a national truth and reconciliation process, as required by Article XXVI of the Lomé Peace Agreement (S/1999/777) to contribute to the promotion of the rule of law,

Recalling that the Special Representative of the Secretary-General appended to his signature of the Lomé Agreement a statement that the United Nations holds the understanding that the amnesty provisions of the Agreement shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law,

Reaffirming the importance of compliance with international humanitarian law, and *reaffirming further* that persons who commit or authorize serious violations of international humanitarian law are individually responsible and accountable for those violations and that the international community will exert every effort to bring those responsible to justice in accordance with international standards of justice, fairness and due process of law,

Recognizing that, in the particular circumstances of Sierra Leone, a credible system of justice and accountability for the very serious crimes committed there would end impunity and would contribute to the process of national reconciliation and to the restoration and maintenance of peace,

Taking note in this regard of the letter dated 12 June 2000 from the President of Sierra Leone to the Secretary-General and the Suggested Framework attached to it (S/2000/786, annex),

Recognizing further the desire of the Government of Sierra Leone for assistance from the United Nations in establishing a strong and credible court that will meet the objectives of bringing justice and ensuring lasting peace,

Noting the report of the Secretary-General of 31 July 2000 (S/2000/751) and, in particular, *taking note* with appreciation of the steps already taken by the Secretary-General in response to the request of the Government of Sierra Leone to assist it in establishing a special court,

Noting further the negative impact of the security situation on the administration of justice in Sierra Leone and the pressing need for international cooperation to assist in strengthening the judicial system of Sierra Leone,

Acknowledging the important contribution that can be made to this effort by qualified persons from West African States, the Commonwealth, other Member States of the United Nations and international organizations, to expedite the process of bringing justice and reconciliation to Sierra Leone and the region,

Reiterating that the situation in Sierra Leone continues to constitute a threat to international peace and security in the region,

1. *Requests* the Secretary-General to negotiate an agreement with the Government of Sierra Leone to create an independent special court consistent with this resolution, and *expresses* its readiness to take further steps expeditiously upon receiving and reviewing the report of the Secretary-General referred to in paragraph 6 below;

2. *Recommends* that the subject matter jurisdiction of the special court should include notably crimes against humanity, war crimes and other serious violations of international humanitarian law, as well as crimes under relevant Sierra Leonean law committed within the territory of Sierra Leone;

3. *Recommends further* that the special court should have personal jurisdiction over persons who bear the greatest responsibility for the commission of the crimes referred to in paragraph 2, including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone;

4. *Emphasizes* the importance of ensuring the impartiality, independence and credibility of the process, in particular with regard to the status of the judges and the prosecutors;

5. *Requests*, in this connection, that the Secretary-General, if necessary, send a team of experts to Sierra Leone as may be required to prepare the report referred to in paragraph 6 below;

6. *Requests* the Secretary-General to submit a report to the Security Council on the implementation of this resolution, in particular on his consultations and negotiations with the Government of Sierra Leone concerning the establishment of the special court, including recommendations, no later than 30 days from the date of this resolution;

7. *Requests* the Secretary-General to address in his report the questions of the temporal jurisdiction of the special court, an appeals process including the advisability, feasibility, and appropriateness of an appeals chamber in the special court or of sharing the Appeals Chamber of the International Criminal Tribunals for the Former Yugoslavia and Rwanda or other effective options, and a possible alternative host State, should it be necessary to convene the special court outside the seat of the court in Sierra Leone, if circumstances so require;

8. *Requests* the Secretary-General to include recommendations on the following:

(a) any additional agreements that may be required for the provision of the international assistance which will be necessary for the establishment and functioning of the special court;

(b) the level of participation, support and technical assistance of qualified persons from Member States of the United Nations, including in particular, member States of ECOWAS and the Commonwealth, and from the United Nations Mission in Sierra Leone that will be necessary for the efficient, independent and impartial functioning of the special court;

(c) the amount of voluntary contributions, as appropriate, of funds, equipment and services to the special court, including through the offer of expert personnel that may be needed from States, intergovernmental organizations and non-governmental organizations;

(d) whether the special court could receive, as necessary and feasible, expertise and advice from the International Criminal Tribunals for the Former Yugoslavia and Rwanda;

9. *Decides* to remain actively seized of the matter.

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ANNEX 5:

Certain Expenses of the United Nations, Advisory Opinion 20 July 1962, I.C.J. Reports 1962.

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1962 WL 4 (I.C.J.)

CERTAIN EXPENSES OF THE UNITED NATIONS

(Article 17, Paragraph 2, of the Charter)

International Court of Justice
July 20, 1962

***151** Resolution 1731 (XVI) of General Assembly requesting advisory opinion.-Objections to giving opinion based on proceedings in General Assembly.-Interpretation of meaning of 'expenses of the Organization'.-Article 17, paragraphs 1 and 2, of Charter.-Lack of justification for limiting terms 'budget' and 'expenses'.-Article 17 in context of Charter.-Respective functions of Security Council and General Assembly.-Article 11, paragraph 2, in relation to budgetary powers of General Assembly.-Role of General Assembly in maintenance of international peace and security.-Agreements under Article 43.- Expenses incurred for purposes of United Nations.-Obligations incurred by Secretary-General acting under authority of Security Council or General Assembly.-Nature of operations of UNEF and ONUC.-Financing of UNEF and ONUC based on Article 17, paragraph 2.-Implementation by Secretary-General of Security Council resolutions.-Expenditures for UNEF and ONUC and Article 17, paragraph 2, of Charter.

***152** Concerning the question whether certain expenditures authorized by the General Assembly 'constitute 'expenses of the Organization' within the meaning of Article 17, paragraph 2, of the Charter of the United Nations',

THE COURT,

composed as above,

gives the following Advisory Opinion:

The request which laid the matter before the Court was formulated in a letter dated 21 December 1961 from the Acting Secretary-General of the United Nations to the President of the Court, received in the Registry on 27 December. In that letter the Acting Secretary-General informed the President of the Court that the General Assembly, by a resolution adopted on 20 December 1961, had decided to request the International Court of Justice to give an advisory opinion on the following question:

'Do the expenditures authorized in General Assembly resolutions 1583 (XV) and 1590 (XV) of 20 December 1960, 1595 (XV) of 3 April 1961, 1619 (XV) of 21 April 1961 and 1633 (XVI) of 30 October 1961 relating to the United Nations operations in the Congo undertaken in pursuance of the Security Council resolutions of 14 July, 22 July and 9 August 1960, and 21 February and 24 November 1961, and General Assembly resolutions 1474 (ES-IV) of 20 September 1960 and 1599 (XV), 1600 (XV) and 1601 (XV) of 15 April 1961, and the expenditures authorized in General Assembly resolutions 1122 (XI) of 26 November 1956, 1089 (XI) of 21 December 1956, 1090 (XI) of 27 February 1957, 1151 (XII) of 22 November 1957, 1204 (XII) of 13 December 1957, 1337 (XIII) of 13 December 1958, 1441 (XIV) of 5 December 1959 and 1575 (XV) of 20 December 1960 relating to the operations of the United Nations Emergency Force undertaken in pursuance of General Assembly resolutions 997 (ES-I) of 2 November 1956, 998 (ES-I) and 999 (ES-I) of 4 November 1956, 1000 (ES-I) of 5 November 1956, 1001 (ES-I) of 7 November 1956, 1121 (XI) of 24 November 1956 and 1263 (XIII) of 14 November 1958, constitue 'expenses of the Organization' within the meaning of Article 17, paragraph 2, of the Charter of the United Nations?'

In the Acting Secretary-General's letter was enclosed a certified copy of the aforementioned resolution of the General Assembly. At the same time the Acting Secretary-General announced that he would transmit to the Court, in accordance with Article 65 of the Statute, all documents likely to throw light upon the question.

Resolution 1731 (XVI) by which the General Assembly decided to request an advisory opinion from the Court reads as follows:

'The General Assembly,
Recognizing its need for authoritative legal guidance as to obligations of Member States under the Charter of the United Nations ***153*** in the matter of financing the United Nations operations in the Congo and in the Middle East,
1. Decides to submit the following question to the International Court of Justice for an advisory opinion:
'Do the expenditures authorized in General Assembly resolutions 1583 (XV) and 1590 (XV) of 20 December 1960, 1595 (XV) of 3 April 1961, 1619 (XV) of 21 April 1961 and 1633 (XVI) of 30 October 1961 relating to the United Nations operations in the Congo undertaken in pursuance of the Security Council resolutions of 14 July, 22 July and 9 August 1960, and 21 February and 24 November 1961, and General Assembly resolutions 1474 (ES-IV) of 20 September 1960 and 1599 (XV), 1600 (XV) and 1601 (XV) of 15 April 1961, and the expenditures authorized in General Assembly resolutions 1122 (XI) of 26 November 1956, 1089 (XI) of 21 December 1956, 1090 (XI) of 27 February 1957, 1151 (XII) of 22 November 1957, 1204 (XII) of 13 December 1957, 1337 (XIII) of 13 December 1958, 1441 (XIV) of 5 December 1959 and 1575 (XV) of 20 December 1960 relating to the operations of the United Nations Emergency Force undertaken in pursuance of General Assembly resolutions 997 (ES-I) of 2 November 1956, 998 (ES-I) and 999 (ES-I) of 4 November 1956, 1000 (ES-I) of 5 November 1956, 1001 (ES-I) of 7 November 1956, 1121 (XI) of 24 November 1956 and 1263 (XIII) of 14 November 1958, constitute 'expenses of the Organization' within the meaning of Article 17, paragraph 2, of the Charter of the United Nations?'
2. Requests the Secretary-General, in accordance with Article 65 of the Statute of the International Court of Justice, to transmit the present resolution to the Court, accompanied by all documents likely to throw light upon the question.'

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On 27 December 1961, the day the letter from the Acting Secretary-General of the United Nations reached the Registry, the President, in pursuance of Article 66, paragraph 2, of the Statute, considered that the States Members of the United Nations were likely to be able to furnish information on the question and made an Order fixing 20 February 1962 as the time-limit within which the Court would be prepared to receive written statements from them and the Registrar sent to them the special and direct communication provided for in that Article, recalling that resolution 1731 (XVI) and those referred to in the question submitted for opinion were already in their possession.
The notice to all States entitled to appear before the Court of the letter from the Acting Secretary-General and of the resolution therein enclosed, prescribed by Article 66, paragraph 1, of the Statute, was given by letter of 4 January 1962.
The following Members of the United Nations submitted statements, notes or letters setting forth their views: Australia, Bulgaria, ***154*** Byelorussian Soviet Socialist Republic, Canada, Czechoslovakia, Denmark, France, Ireland, Italy, Japan, Netherlands, Portugal, Romania, South Africa, Spain, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, United States of America and Upper Volta. Copies of these communications were transmitted to all Members of the United Nations and to the Acting Secretary-General of the United Nations.
Mexico, the Philippines and Poland referred in letters to the views expressed on their behalf during the session of the General Assembly.
The Acting Secretary-General of the United Nations, in pursuance of Article 65, paragraph 2, of the Statute, transmitted to the Court a dossier of documents likely to throw light upon the question, together with an Introductory Note and a note by the Controller on the budgetary and financial practices of the United Nations; these documents reached the Registry on 21 February and 1 March 1962.
The Members of the United Nations were informed on 23 March 1962 that the oral proceedings in this case would open towards the beginning of May. On 16 April 1962 they

were notified that 14 May had been fixed as the opening date. Hearings were held from 14 to 19 May and on 21 May, the Court being addressed by the following:

for Canada: M. Marcel Cadieux, Deputy Under-Secretary and Legal Adviser for the Department of External Affairs;

for the Netherlands: Professor W. Riphagen, Legal Adviser to the Ministry of Foreign Affairs;

for Italy: M. Riccardo Monaco, Professor at the University of Rome, Head of Department for Contentious Diplomatic Questions, Ministry of Foreign Affairs;

for the United Kingdom of Great Britain and Northern Ireland: The Rt. Hon. Sir Reginald Manningham-Buller, Q.C., Attorney-General;

for Norway: Mr. Jens Evensen, Director-General, Ministry of Foreign Affairs;

for Australia: Sir Kenneth Bailey, Solicitor-General;

for Ireland: Mr. Aindrias O'Caoimh, S.C., Attorney-General;

for the Union of Soviet Socialist Republics: Professor G. I. Tunkin, Director of the Juridical Department of the Ministry of Foreign Affairs;

for the United States of America: The Honorable Abram Chayes, Legal Adviser, Department of State.

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Before proceeding to give its opinion on the question put to it, the Court considers it necessary to make the following preliminary remarks:
The power of the Court to give an advisory opinion is derived from Article 65 of the Statute. The power granted is of a discretionary character. In exercising its discretion, the International Court of Justice, like the Permanent Court of International Justice, has always been guided by the principle which the Permanent Court stated in the case concerning the Status of Eastern Carelia on 23 July 1923: 'The Court, being a Court of Justice, cannot, even in giving advisory opinions, depart from the essential rules guiding their activity as a Court' (P.C.I.J., Series B, No. 5, p. 29). Therefore, and in accordance

with Article 65 of its Statute, the Court can give an advisory opinion only on a legal question. If a question is not a legal one, the Court has no discretion in the matter; it must decline to give the opinion requested. But even if the question is a legal one, which the Court is undoubtedly competent to answer, it may nonetheless decline to do so. As this Court said in its Opinion of 30 March 1950, the permissive character of Article 65 'gives the Court the power to examine whether the circumstances of the case are of such a character as should lead it to decline to answer the Request' (Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (First Phase), I.C.J. Reports 1950, p. 72). But, as the Court also said in the same Opinion, 'the reply of the Court, itself an 'organ of the United Nations', represents its participation in the activities of the Organization, and, in principle, should not be refused' (ibid., p. 71). Still more emphatically, in its Opinion of 23 October 1956, the Court said that only 'compelling reasons' should lead it to refuse to give a requested advisory opinion (Judgments of the Administrative Tribunal of the I.L.O. upon complaints made against the Unesco, I.C.J. Reports 1956, p. 86).

The Court finds no 'compelling reason' why it should not give the advisory opinion which the General Assembly requested by its resolution 1731 (XVI). It has been argued that the question put to the Court is intertwined with political questions, and that for this reason the Court should refuse to give an opinion. It is true that most interpretations of the Charter of the United Nations will have political significance, great or small. In the nature of things it could not be otherwise. The Court, however, cannot attribute a political character to a request which invites it to undertake an essentially judicial task, namely, the interpretation of a treaty provision.

In the preamble to the resolution requesting this opinion, the General Assembly expressed its recognition of 'its need for authoritative ***156*** legal guidance'. In its search for such guidance it has put to the Court a legal question-a question of the interpretation of Article 17, paragraph 2, of the Charter of the United Nations. In its Opinion of 28 May 1948, the Court made it clear that as 'the principal judicial organ of the United Nations', it was entitled to exercise in regard to an article of the Charter, 'a multilateral treaty, an interpretative function which falls within the normal exercise of its judicial powers' (Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), I.C.J. Reports 1947-1948, p. 61).

The Court, therefore, having been asked to give an advisory opinion upon a concrete legal question, will proceed to give its opinion.

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The question on which the Court is asked to give its opinion is whether certain expenditures which were authorized by the General Assembly to cover the costs of the United Nations operations in the Congo (hereinafter referred to as ONUC) and of the operations of the United Nations Emergency Force in the Middle East (hereinafter referred to as UNEF), 'constitute 'expenses of the Organization' within the meaning of Article 17, paragraph 2, of the Charter of the United Nations'.

Before entering upon the detailed aspects of this question, the Court will examine the view that it should take into consideration the circumstance that at the 1086th Plenary Meeting of the General Assembly on 20 December 1961, an amendment was proposed, by the representative of France, to the draft resolution requesting the advisory opinion, and that this amendment was rejected. The amendment would have asked the Court to give an opinion on the question whether the expenditures relating to the indicated operations were 'decided on in conformity with the provisions of the Charter'; if that question were answered in the affirmative, the Court would have been asked to proceed to answer the question which the resolution as adopted actually poses.

If the amendment had been adopted, the Court would have been asked to consider whether the resolutions authorizing the expenditures were decided on in conformity with the Charter; the French amendment did not propose to ask the Court whether the resolutions in pursuance of which the operations in the Middle East and in the Congo were undertaken, were adopted in conformity with the Charter.

The Court does not find it necessary to expound the extent to which the proceedings of the General Assembly, antecedent to the adoption of a resolution, should be taken into account in interpreting that resolution, but it makes the following comments on the argument based upon the rejection of the French amendment.

***157** The rejection of the French amendment does not constitute a directive to the Court to exclude from its consideration the question whether certain expenditures were 'decided on in conformity with the Charter', if the Court finds such consideration appropriate. It is not to be assumed that the General Assembly would thus seek to fetter or hamper the Court in the discharge of its judicial functions; the Court must have full liberty to consider all relevant data available to it in forming an opinion on a question posed to it for an advisory opinion. Nor can the Court agree that the rejection of the French amendment has any bearing upon the question whether the General Assembly sought to preclude the Court from interpreting Article 17 in the light of other articles of the Charter, that is, in the whole context of the treaty. If any deduction is to be made from the debates on this point, the opposite conclusion would be drawn from the clear statements of sponsoring delegations that they took it for granted the Court would consider the Charter as a whole.

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Turning to the question which has been posed, the Court observes that it involves an interpretation of Article 17, paragraph 2, of the Charter. On the previous occasions when the Court has had to interpret the Charter of the United Nations, it has followed the principles and rules applicable in general to the interpretation of treaties, since it has recognized that the Charter is a multilateral treaty, albeit a treaty having certain special characteristics. In interpreting Article 4 of the Charter, the Court was led to consider 'the structure of the Charter' and 'the relations established by it between the General Assembly and the Security Council'; a comparable problem confronts the Court in the instant matter. The Court sustained its interpretation of Article 4 by considering the manner in which the organs concerned 'have consistently interpreted the text' in their practice (Competence of the General Assembly for the Admission of a State to the United Nations, I.C.J. Reports 1950, pp. 8-9).

The text of Article 17 is in part as follows:

'1. The General Assembly shall consider and approve the budget of the Organization.

2. The expenses of the Organization shall be borne by the Members as apportioned by the General Assembly.'

Although the Court will examine Article 17 in itself and in its relation to the rest of the Charter, it should be noted that at least three separate questions might arise in the interpretation of paragraph 2 of this Article. One question is that of identifying what are 'the expenses of the Organization'; a second question might ***158** concern apportionment by the General Assembly; while a third question might involve the interpretation of the phrase 'shall be borne by the Members'. It is the second and third questions which directly involve 'the financial obligations of the Members', but it is only the first question which is posed by the request for the advisory opinion. The question put to the Court has to do with a moment logically anterior to apportionment, just as a question of apportionment would be anterior to a question of Members' obligation to pay. It is true that, as already noted, the preamble of the resolution containing the request refers to the General Assembly's 'need for authoritative legal guidance as to obligations of Member States', but it is to be assumed that in the understanding of the General Assembly, it would find such guidance in the advisory opinion which the Court would give on the question whether certain identified expenditures 'constitute 'expenses of the Organization' within the meaning of Article 17, paragraph 2, of the Charter'. If the Court finds that the indicated expenditures are such 'expenses', it is not called upon to consider the manner in which, or the scale by which, they may be apportioned. The amount of what are unquestionably 'expenses of the Organization within the meaning of Article 17, paragraph 2' is not in its entirety apportioned by the General Assembly and paid for by the contributions of Member States, since the Organization has other sources of income.

A Member State, accordingly, is under no obligation to pay more than the amount apportioned to it; the expenses of the Organization and the total amount in money of the obligations of the Member States may not, in practice, necessarily be identical.

The text of Article 17, paragraph 2, refers to 'the expenses of the Organization' without any further explicit definition of such expenses. It would be possible to begin with a general proposition to the effect that the 'expenses' of any organization are the amounts paid out to defray the costs of carrying out its purposes, in this case, the political, economic, social, humanitarian and other purposes of the United Nations. The next step would be to examine, as the Court will, whether the resolutions authorizing the operations here in question were intended to carry out the purposes of the United Nations and whether the expenditures were incurred in furthering these operations. Or, it might simply be said that the 'expenses' of an organization are those which are provided for in its budget. But the Court has not been asked to give an abstract definition of the words 'expenses of the Organization'. It has been asked to answer a specific question related to certain identified expenditures which have actually been made, but the Court would not adequately discharge the obligation incumbent on it unless it examined in some detail various problems raised by the question which the General Assembly has asked.

***159** It is perhaps the simple identification of 'expenses' with the items included in a budget, which has led certain arguments to link the interpretation of the word 'expenses' in paragraph 2 of Article 17, with the word 'budget' in paragraph 1 of that Article; in both cases, it is contended, the qualifying adjective 'regular' or 'administrative' should be understood to be implied. Since no such qualification is expressed in the text of the Charter, it could be read in, only if such qualification must necessarily be implied from the provisions of the Charter considered as a whole, or from some particular provision thereof which makes it unavoidable to do so in order to give effect to the Charter.

In the first place, concerning the word 'budget' in paragraph 1 of Article 17, it is clear that the existence of the distinction between 'administrative budgets' and 'operational budgets' was not absent from the minds of the drafters of the Charter, nor from the consciousness of the Organization even in the early days of its history. In drafting Article 17, the drafters found it suitable to provide in paragraph 1 that 'The General Assembly shall consider and approve the budget of the Organization'. But in dealing with the function of the General Assembly in relation to the specialized agencies, they provided in paragraph 3 that the General Assembly 'shall examine the administrative budgets of such specialized agencies'. If it had been intended that paragraph 1 should be limited to the administrative budget of the United Nations organization itself, the word 'administrative' would have been inserted in paragraph 1 as it was in paragraph 3. Moreover, had it been contemplated that the Organization would also have had another budget, different from the one which was to be approved by the General Assembly, the Charter would have included some reference to such other budget and to the organ which was to approve it. Similarly, at its first session, the General Assembly in drawing up and approving the Constitution of the International Refugee Organization, provided that the budget of that Organization was to be divided under the headings 'administrative', 'operational' and 'large-scale resettlement'; but no such distinctions were introduced into the Financial Regulations of the United Nations which were adopted by unanimous vote in 1950, and which, in this respect, remain unchanged. These regulations speak only of 'the budget' and do not provide any distinction between 'administrative' and 'operational'.

In subsequent sessions of the General Assembly, including the sixteenth, there have been numerous references to the idea of distinguishing an 'operational' budget; some speakers have advocated such a distinction as a useful book- keeping device; some considered it in connection with the possibility of differing scales of assessment or apportionment; others believed it should mark a differentiation of activities to be financed by voluntary contributions. ***160** But these discussions have not resulted in the adoption of two separate budgets based upon such a distinction.

Actually, the practice of the Organization is entirely consistent with the plain meaning of the text. The budget of the Organization has from the outset included items which would not fall within any of the definitions of 'administrative budget' which have been advanced

in this connection. Thus, for example, prior to the establishment of, and now in addition to, the 'Expanded Programme of Technical Assistance' and the 'Special Fund', both of which are nourished by voluntary contributions, the annual budget of the Organization contains provision for funds for technical assistance; in the budget for the financial year 1962, the sum of $6,400,000 is included for the technical programmes of economic development, social activities, human rights activities, public administration and narcotic drugs control. Although during the Fifth Committee discussions there was a suggestion that all technical assistance costs should be excluded from the regular budget, the items under these heads were all adopted on second reading in the Fifth Committee without a dissenting vote. The 'operational' nature of such activities so budgeted is indicated by the explanations in the budget estimates, e.g. the requests 'for the continuation of the operational programme in the field of economic development contemplated in General Assembly resolutions 200 (III) of 4 December 1948 and 304 (IV) of 16 November 1949'; and 'for the continuation of the operational programme in the field of advisory social welfare services as contemplated in General Assembly resolution 418 (V) of 1 December 1950'.

It is a consistent practice of the General Assembly to include in the annual budget resolutions, provision for expenses relating to the maintenance of international peace and security. Annually, since 1947, the General Assembly has made anticipatory provision for 'unforeseen and extraordinary expenses' arising in relation to the 'maintenance of peace and security'. In a Note submitted to the Court by the Controller on the budgetary and financial practices of the United Nations, 'extraordinary expenses' are defined as 'obligations and expenditures arising as a result of the approval by a council, commission or other competent United Nations body of new programmes and activities not contemplated when the budget appropriations were approved'.

The annual resolution designed to provide for extraordinary expenses authorizes the Secretary-General to enter into commitments to meet such expenses with the prior concurrence of the Advisory Committee on Administrative and Budgetary Questions, except that such concurrence is not necessary if the SecretaryGeneral ***161*** certifies that such commitments relate to the subjects mentioned and the amount does not exceed $2 million. At its fifteenth and sixteenth sessions, the General Assembly resolved 'that if, as a result of a decision of the Security Council, commitments relating to the maintenance of peace and security should arise in an estimated total exceeding $10 million' before the General Assembly was due to meet again, a special session should be convened by the Secretary-General to consider the matter. The Secretary- General is regularly authorized to draw on the Working Capital Fund for such expenses but is required to submit supplementary budget estimates to cover amounts so advanced. These annual resolutions on unforeseen and extraordinary expenses were adopted without a dissenting vote in every year from 1947 through 1959, except for 1952, 1953 and 1954, when the adverse votes are attributable to the fact that the resolution included the specification of a controversial item-United Nations Korean war decorations.

It is notable that the 1961 Report of the Working Group of Fifteen on the Examination of the Administrative and Budgetary Procedures of the United Nations, while revealing wide differences of opinion on a variety of propositions, records that the following statement was adopted without opposition:

'22. Investigations and observation operations undertaken by the Organization to prevent possible aggression should be financed as part of the regular budget of the United Nations.'

In the light of what has been stated, the Court concludes that there is no justification for reading into the text of Article 17, paragraph 1, any limiting or qualifying word before the word 'budget'

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Turning to paragraph 2 of Article 17, the Court observes that, on its face, the term 'expenses of the Organization' means all the expenses and not just certain types of

expenses which might be referred to as 'regular expenses'. An examination of other parts of the Charter shows the variety of expenses which must inevitably be included within the 'expenses of the Organization' just as much as the salaries of staff or the maintenance of buildings.
For example, the text of Chapters IX and X of the Charter with reference to international economic and social cooperation, especially the wording of those articles which specify the functions and powers of the Economic and Social Council, anticipated the numerous and varied circumstances under which expenses of the Organization ***162** could be incurred and which have indeed eventuated in practice.
Furthermore, by Article 98 of the Charter, the Secretary-General is obligated to perform such functions as are entrusted to him by the General Assembly, the Security Council, the Economic and Social Council, and the Trusteeship Council. Whether or not expenses incurred in his discharge of this obligation become 'expenses of the Organization' cannot depend on whether they be administrative or some other kind of expenses.
The Court does not perceive any basis for challenging the legality of the settled practice of including such expenses as these in the budgetary amounts which the General Assembly apportions among the Members in accordance with the authority which is given to it by Article 17, paragraph 2.

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Passing from the text of Article 17 to its place in the general structure and scheme of the Charter, the Court will consider whether in that broad context one finds any basis for implying a limitation upon the budgetary authority of the General Assembly which in turn might limit the meaning of 'expenses' in paragraph 2 of that Article.
The general purposes of Article 17 are the vesting of control over the finances of the Organization, and the levying of apportioned amounts of the expenses of the Organization in order to enable it to carry out the functions of the Organization as a whole acting through its principal organs and such subsidiary organs as may be established under the authority of Article 22 or Article 29.
Article 17 is the only article in the Charter which refers to budgetary authority or to the power to apportion expenses, or otherwise to raise revenue, except for Articles 33 and 35, paragraph 3, of the Statute of the Court which have no bearing on the point here under discussion. Nevertheless, it has been argued before the Court that one type of expenses, namely those resulting from operations for the maintenance of international peace and security, are not 'expenses of the Organization' within the meaning of Article 17, paragraph 2, of the Charter, inasmuch as they fall to be dealt with exclusively by the Security Council, and more especially through agreements negotiated in accordance with Article 43 of the Charter.
The argument rests in part upon the view that when the maintenance of international peace and security is involved, it is only the Security Council which is authorized to decide on any action relative thereto. It is argued further that since the General Assembly's power is limited to discussing, considering, studying and recommending, it cannot impose an obligation to pay the expenses which result from the implementation of its recommendations. This ***163** argument leads to an examination of the respective functions of the General Assembly and of the Security Council under the Charter, particularly with respect to the maintenance of international peace and security.
Article 24 of the Charter provides:
'In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security ...'
The responsibility conferred is 'primary', not exclusive. This primary responsibility is conferred upon the Security Council, as stated in Article 24, 'in order to ensure prompt and effective action'. To this end, it is the Security Council which is given a power to impose an explicit obligation of compliance if for example it issues an order or command to an aggressor under Chapter VII. It is only the Security Council which can require

enforcement by coercive action against an aggressor.

The Charter makes it abundantly clear, however, that the General Assembly is also to be concerned with international peace and security. Article 14 authorizes the General Assembly to 'recommend measures for the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations, including situations resulting from a violation of the provisions of the present Charter setting forth the purposes and principles of the United Nations'. The word 'measures' implies some kind of action, and the only limitation which Article 14 imposes on the General Assembly is the restriction found in Article 12, namely, that the Assembly should not recommend measures while the Security Council is dealing with the same matter unless the Council requests it to do so. Thus while it is the Security Council which, exclusively, may order coercive action, the functions and powers conferred by the Charter on the General Assembly are not confined to discussion, consideration, the initiation of studies and the making of recommendations; they are not merely hortatory.

Article 18 deals with 'decisions' of the General Assembly 'on important questions'. These 'decisions' do indeed include certain recommendations, but others have dispositive force and effect. Among these latter decisions, Article 18 includes suspension of rights and privileges of membership, expulsion of Members, 'and budgetary questions'. In connection with the suspension of rights and privileges of membership and expulsion from membership under Articles 5 and 6, it is the Security Council which has only the power to recommend and it is the General Assembly which decides and whose decision determines status; but there is a close collaboration between the two organs. Moreover, these powers of decision of the General Assembly under Articles ***164** 5 and 6 are specifically related to preventive or enforcement measures.

By Article 17, paragraph 1, the General Assembly is given the power not only to 'consider' the budget of the Organization, but also to 'approve' it. The decision to 'approve' the budget has a close connection with paragraph 2 of Article 17, since thereunder the General Assembly is also given the power to apportion the expenses among the Members and the exercise of the power of apportionment creates the obligation, specifically stated in Article 17, paragraph 2, of each Member to bear that part of the expenses which is apportioned to it by the General Assembly. When those expenses include expenditures for the maintenance of peace and security, which are not otherwise provided for, it is the General Assembly which has the authority to apportion the latter amounts among the Members. The provisions of the Charter which distribute functions and powers to the Security Council and to the General Assembly give no support to the view that such distribution excludes from the powers of the General Assembly the power to provide for the financing of measures designed to maintain peace and security.

The argument supporting a limitation on the budgetary authority of the General Assembly with respect to the maintenance of international peace and security relies especially on the reference to 'action' in the last sentence of Article 11, paragraph 2. This paragraph reads as follows:

'The General Assembly may discuss any questions relating to the maintenance of international peace and security brought before it by any Member of the United Nations, or by the Security Council, or by a State which is not a Member of the United Nations in accordance with Article 35, paragraph 2, and, except as provided in Article 12, may make recommendations with regard to any such question to the State or States concerned or to the Security Council, or to both. Any such question on which action is necessary shall be referred to the Security Council by the General Assembly either before or after discussion.'

The Court considers that the kind of action referred to in Article 11, paragraph 2, is coercive or enforcement action. This paragraph, which applies not merely to general questions relating to peace and security, but also to specific cases brought before the General Assembly by a State under Article 35, in its first sentence empowers the General Assembly, by means of recommendations to States or to the Security Council, or to both, to organize peacekeeping operations, at the request, or with the consent, of the States

concerned. This power of the General Assembly is a special power which in no way derogates from its general powers under Article 10 ***165*** or Article 14, except as limited by the last sentence of Article 11, paragraph 2. This last sentence says that when 'action' is necessary the General Assembly shall refer the question to the Security Council. The word 'action' must mean such action as is solely within the province of the Security Council. It cannot refer to recommendations which the Security Council might make, as for instance under Article 38, because the General Assembly under Article 11 has a comparable power. The 'action' which is solely within the province of the Security Council is that which is indicated by the title of Chapter VII of the Charter, namely 'Action with respect to threats to the peace, breaches of the peace, and acts of aggression'. If the word 'action' in Article 11, paragraph 2, were interpreted to mean that the General Assembly could make recommendations only of a general character affecting peace and security in the abstract, and not in relation to specific cases, the paragraph would not have provided that the General Assembly may make recommendations on questions brought before it by States or by the Security Council. Accordingly, the last sentence of Article 11, paragraph 2, has no application where the necessary action is not enforcement action.

The practice of the Organization throughout its history bears out the foregoing elucidation of the term 'action' in the last sentence of Article 11, paragraph 2. Whether the General Assembly proceeds under Article 11 or under Article 14, the implementation of its recommendations for setting up commissions or other bodies involves organizational activity-action-in connection with the maintenance of international peace and security. Such implementation is a normal feature of the functioning of the United Nations. Such committees, commissions or other bodies or individuals, constitute, in some cases, subsidiary organs established under the authority of Article 22 of the Charter. The functions of the General Assembly for which it may establish such subsidiary organs include, for example, investigation, observation and supervision, but the way in which such subsidiary organs are utilized depends on the consent of the State or States concerned.

The Court accordingly finds that the argument which seeks, by reference to Article 11, paragraph 2, to limit the budgetary authority of the General Assembly in respect of the maintenance of international peace and security, is unfounded.

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It has further been argued before the Court that Article 43 of the Charter constitutes a particular rule, a lex specialis, which derogates ***166*** from the general rule in Article 17, whenever an expenditure for the maintenance of international peace and security is involved. Article 43 provides that Members shall negotiate agreements with the Security Council on its initiative, stipulating what 'armed forces, assistance and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security', the Member state will make available to the Security Council on its call. According to paragraph 2 of the Article:

'Such agreement or agreements shall govern the numbers and types of forces, their degree of readiness and general location, and the nature of the facilities and assistance to be provided.'

The argument is that such agreements were intended to include specifications concerning the allocation of costs of such enforcement actions as might be taken by direction of the Security Council, and that it is only the Security Council which has the authority to arrange for meeting such costs.

With reference to this argument, the Court will state at the outset that, for reasons fully expounded later in this Opinion, the operations known as UNEF and ONUC were not enforcement actions within the compass of Chapter VII of the Charter and that therefore Article 43 could not have any applicability to the cases with which the Court is here concerned. However, even if Article 43 were applicable, the Court could not accept this interpretation of its text for the following reasons.

There is nothing in the text of Article 43 which would limit the discretion of the Security Council in negotiating such agreements. It cannot be assumed that in every such agreement the Security council would insist, or that any Member State would be bound to agree, that such State would bear the entire cost of the 'assistance' which it would make available including, for example, transport of forces to the point of operation, complete logistical maintenance in the field, supplies, arms and ammunition, etc. If, during negotiations under the terms of Article 43, a Member State would be entitled (as it would be) to insist, and the Security Council would be entitled (as it would be) to agree, that some part of the expense should be borne by the Organization, then such expense would form part of the expenses of the Organization and would fall to be apportioned by the General Assembly under Article 17. It is difficult to see how it could have been contemplated that all potential expenses could be envisaged in such agreements concluded perhaps long in advance. Indeed, the difficulty or impossibility of anticipating the entire financial impact of enforcement measures on Member States is brought out by the terms of Article 50 which provides that a State, whether a Member of the United Nations or not, 'which finds itself confronted with special economic problems arising from the carrying out of those [preventive or enforcement] measures, shall have ***167** the right to consult the Security Council with regard to a solution of those problems'. Presumably in such a case the Security Council might determine that the overburdened State was entitled to some financial assistance; such financial assistance, if afforded by the Organization, as it might be, would clearly constitute part of the 'expenses of the Organization'. The economic problems could not have been covered in advance by a negotiated agreement since they would be unknown until after the event and in the case of non-Member States, which are also included in Article 50, no agreement at all would have been negotiated under Article 43.

Moreover, an argument which insists that all measures taken for the maintenance of international peace and security must be financed through agreements concluded under Article 43, would seem to exclude the possibility that the Security Council might act under some other Article of the Charter. The Court cannot accept so limited a view of the powers of the Security council under the Charter. It cannot be said that the Charter has left the Security Council impotent in the face of an emergency situation when agreements under Article 43 have not been concluded.

Articles of Chapter VII of the Charter speak of 'situations' as well as disputes, and it must lie within the power of the Security Council to police a situation even though it does not resort to enforcement action against a State. The costs of actions which the Security Council is authorized to take constitute 'expenses of the Organization within the meaning of Article 17, paragraph 2'.

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The Court has considered the general problem of the interpretation of Article 17, paragraph 2, in the light of the general structure of the Charter and of the respective functions assigned by the Charter to the General Assembly and to the Security Council, with a view to determining the meaning of the phrase 'the expenses of the Organization'. The Court does not find it necessary to go further in giving a more detailed definition of such expenses. The Court will, therefore, proceed to examine the expenditures enumerated in the request for the advisory opinion. In determining whether the actual expenditures authorized constitute 'expenses of the Organization within the meaning of Article 17, paragraph 2, of the Charter', the Court agrees that such expenditures must be tested by their relationship to the purposes of the United Nations in the sense that if an expenditure were made for a purpose which is not one of the purposes of the United Nations, it could not be considered an 'expense of the Organization'.

The puroses of the United Nations are set forth in Article 1 of the Charter. The first two purposes as stated in paragraphs 1 ***168** and 2, may be summarily described as pointing to the goal of international peace and security and friendly relations. The third purpose is the achievement of economic, social, cultural and humanitarian goals and respect for

human rights. The fourth and last purpose is: 'To be a center for harmonizing the actions of nations in the attainment of these common ends.'

The primary place ascribed to international peace and security is natural, since the fulfilment of the other purposes will be dependent upon the attainment of that basic condition. These purposes are broad indeed, but neither they nor the powers conferred to effectuate them are unlimited. Save as they have entrusted the Organization with the attainment of these common ends, the Member States retain their freedom of action. But when the Organization takes action which warrants the assertion that it was appropriate for the fulfilment of one of the stated purposes of the United Nations, the presumption is that such action is not ultra vires the Organization.

If it is agreed that the action in question is within the scope of the functions of the Organization but it is alleged that it has been initiated or carried out in a manner not in conformity with the division of functions among the several organs which the Charter prescribes, one moves to the internal plane, to the internal structure of the Organization. If the action was taken by the wrong organ, it was irregular as a matter of that internal structure, but this would not necessarily mean that the expense incurred was not an expense of the Organization. Both national and international law contemplate cases in which the body corporate or politic may be bound, as to third parties, by an ultra vires act of an agent.

In the legal systems of States, there is often some procedure for determining the validity of even a legislative or governmental act, but no analogous procedure is to be found in the structure of the United Nations. Proposals made during the drafting of the Charter to place the ultimate authority to interpret the Charter in the International Court of Justice were not accepted; the opinion which the Court is in course of rendering is an advisory opinion. As anticipated in 1945, therefore, each organ must, in the first place at least, determine its own jurisdiction. If the Security Council, for example, adopts a resolution purportedly for the maintenance of international peace and security and if, in accordance with a mandate or authorization in such resolution, the Secretary-General incurs financial obligations, these amounts must be presumed to constitute 'expenses of the Organization'.

The Financial Regulations and Rules of the United Nations, adopted by the General Assembly, provide:

'Regulation 4.1: The appropriations voted by the General Assembly shall constitute an authorization to the Secretary-***169*** General to incur obligations and make payments for the purposes for which the appropriations were voted and up to the amounts so voted.'

Thus, for example, when the General Assembly in resolution 1619 (XV) included a paragraph reading:

'3. Decides to appropriate an amount of $100 million for the operations of the United Nations in the Congo from 1 January to 31 October 1961',

this constituted an authorization to the Secretary-General to incur certain obligations of the United Nations just as clearly as when in resolution 1590 (XV) the General Assembly used this language:

'3. Authorizes the Secretary-General ... to incur commitments in 1961 for the United Nations operations in the Congo up to the total of $24 million...'

On the previous occasion when the Court was called upon to consider Article 17 of the Charter, the Court found that an award of the Administrative Tribunal of the United Nations created an obligation of the Organization and with relation thereto the Court said that:

'the function of approving the budget does not mean that the General Assembly has an absolute power to approve or disapprove the expenditure proposed to it; for some part of that expenditure arises out of obligations already incurred by the Organization, and to this extent the General Assembly has no alternative but to honour these engagements'. (Effects of awards of compensation made by the United Nations Administrative Tribunal, I.C.J. Reports 1954, p. 59.)

Similarly, obligations of the Organization may be incurred by the Secretary- General, acting on the authority of the Security Council or of the General Assembly, and the

General Assembly 'has no alternative but to honour these engagements'.
The obligation is one thing: the way in which the obligation is met-that is from what source the funds are secured-is another. The General Assembly may follow any one of several alternatives: it may apportion the cost of the item according to the ordinary scale of assessment; it may apportion the cost according to some special scale of assessment; it may utilize funds which are voluntarily contributed to the Organization; or it may find some other method or combination of methods for providing the necessary funds. In this context, it is of no legal significance whether, as a matter of book-keeping or accounting, the General Assembly chooses to have the item in question included under one of the standard' established sections of the 'regular' budget or whether it is separately listed in some special account or fund. The significant fact is that the item is an expense of the Organization and under ***170** Article 17, paragraph 2, the General Assembly therefore has authority to apportion it.
The reasoning which has just been developed, applied to the resolutions mentioned in the request for the advisory opinion, might suffice as a basis for the opinion of the Court. The Court finds it appropriate, however, to take into consideration other arguments which have been advanced.

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The expenditures enumerated in the request for an advisory opinion may conveniently be examined first with reference to UNEF and then to ONUC. In each case, attention will be paid first to the operations and then to the financing of the operations.
In considering the operations in the Middle East, the Court must analyze the functions of UNEF as set forth in resolutions of the General Assembly. Resolution 998 (ES-I) of 4 November 1956 requested the Secretary-General to submit a plan 'for the setting up, with the consent of the nations concerned, of an emergency international United Nations Force to secure and supervise the cessation of hostilities in accordance with all the terms of' the General Assembly's previous resolution 997 (ES-I) of 2 November 1956. The verb 'secure' as applied to such matters as halting the movement of military forces and arms into the area and the conclusion of a cease-fire, might suggest measures of enforcement, were it not that the Force was to be set up 'with the consent of the nations concerned'.
In his first report on the plan for an emergency international Force the Secretary-General used the language of resolution 998 (ES-I) in submitting his proposals. The same terms are used in General Assembly resolution 1000 (ES-I) of 5 November in which operative paragraph 1 reads:
'Establishes a United Nations Command for an emergency international Force to secure and supervise the cessation of hostilities in accordance with all the terms of General Assembly resolution 997 (ES-I) of 2 November 1956.'
This resolution was adopted without a dissenting vote. In his second and final report on the plan for an emergency international Force of 6 November, te Secretary-General, in paragraphs 9 and 10, stated:
'While the General Assembly is enabled to establish the Force with the consent of those parties which contribute units to the Force, it could not request the Force to be stationed or operate on the territory of a given country without the consent of the Government ***171** of that country. This does not exclude the possibility that the Security Council could use such a Force within the wider margins provided under Chapter VII of the United Nations Charter. I would not for the present consider it necessary to elaborate this point further, since no use of the Force under Chapter VII, with the rights in relation to Member States that this would entail, has been envisaged.
10. The point just made permits the conclusion that the setting up of the Force should not be guided by the needs which would have existed had the measure been considered as part of an enforcement action directed against a Member country. There is an obvious difference between establishing the Force in order to secure the cessation of hostilities, with a withdrawal of forces, and establishing such a Force with a view to enforcing a withdrawal of forces.'

Paragraph 12 of the Report is particularly important because in resolution 1001 (ES-I) the General Assembly, again without a dissenting vote, 'Concurs in the definition of the functions of the Force as stated in paragraph 12 of the Secretary-General's report'. Paragraph 12 reads in part as follows:

'the functions of the United Nations Force would be, when a cease-fire is being established, to enter Egyptian territory with the consent of the Egyptian Government, in order to help maintain quiet during and after the withdrawal of non-Egyptian troops, and to secure compliance with the other terms established in the resolution of 2 November 1956. The Force obviously should have no rights other than those necessary for the execution of its functions, in co-operation with local authorities. It would be more than an observers' corps, but in no way a military force temporarily controlling the territory in which it is stationed; nor, moreover, should the Force have military functions exceeding those necessary to secure peaceful conditions on the assumption that the parties to the conflict take all necessary steps for compliance with the recommendations of the General Assembly.'

It is not possible to find in this description of the functions of UNEF, as outlined by the Secretary-General and concurred in by the General Assembly without a dissenting vote, any evidence that the Force was to be used for purposes of enforcement. Nor can such evidence be found in the subsequent operations of the Force, operations which did not exceed the scope of the functions ascribed to it.

It could not therefore have been patent on the face of the resolution that the establishment of UNEF was in effect 'enforcement action' under Chapter VII which, in accordance with the Charter, could be authorized only by the Security Council.

On the other hand, it is apparent that the operations were undertaken to fulfil a prime purpose of the United Nations, that is, to ***172** promote and to maintain a peaceful settlement of the situation. This being true, the Secretary-General properly exercised the authority given him to incur financial obligations of the Organization and expenses resulting form such obligations must be considered 'expenses of the Organization within the meaning of Article 17, paragraph 2'.

Apropos what has already been said about the meaning of the word 'action' in Article 11 of the Charter, attention may be called to the fact that resolution 997 (ES-I), which is chronologically the first of the resolutions concerning the operations in the Middle East mentioned in the request for the advisory opinion, provides in paragraph 5:

'Requests the Secretary-General to observe and report promptly on the compliance with the present resolution to the Security council and to the General Assembly, for such further action as they may deem appropriate in accordance with the Charter.'

The italicized words reveal an understanding that either of the two organs might take 'action' in the premises. Actually, as one knows, the 'action' was taken by the General Assembly in adopting two days later without a dissenting vote, resolution 998 (ES-I) and, also without a dissenting vote, within another three days, resolutions 1000 (ES-I) and 1001 (ES-I), all providing for UNEF.

The Court notes that these 'actions' may be considered 'measures' recommended under Article 14, rather than 'action' recommended under Article 11. The powers of the General Assembly stated in Article 14 are not made subject to the provisions of Article 11, but only of Article 12. Furthermore, as the Court has already noted, the word 'measures' implies some kind of action. So far as concerns the nature of the situations in the Middle East in 1956, they could be described as 'likely to impair ... friendly relations among nations', just as well as they could be considered to involve 'the maintenance of international peace and security'. Since the resolutions of the General Assembly in question do not mention upon which article they are based, and since the language used in most of them might imply reference to either Article 14 or Article 11, it cannot be excluded that they were based upon the former rather than the latter article.

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The financing of UNEF presented perplexing problems and the debates on these problems

have even led to the view that the General Assembly never, either directly or indirectly, regarded the ***173** expenses of UNMEF as 'expenses of the Organization within the meaning of Article 17, paragraph 2, of the Charter'. With this interpretation the Court cannot agree. In paragraph 15 of his second and final report on the plan for an emergency international Force of 6 November 1956, the Secretary-General said that this problem required further study. Provisionally, certain costs might be absorbed by a nation providing a unit, 'while all other costs should be financed outside the normal budget of the United Nations'. Since it was 'obviously impossible to make any estimate of the costs without a knowledge of the size of the corps and the length of its assignment', the 'only practical course ... would be for the General Assembly to vote a general authorization for the cost of the Force on the basis of general principles such as those here suggested'. Paragraph 5 of resolution 1001 (ES-I) of 7 November 1956 states that the General Assembly 'Approves provisionally the basic rule concerning the financing of the Force laid down in paragraph 15 of the Secretary-General's report'.

In an oral statement to the plenary meeting of the General Assembly on 26 November 1956, the Secretary-General said:

'... I wish to make it equally clear that while funds received and payments made with respect to the Force are to be considered as coming outside the regular budget of the Organization, the operation is essentially a United Nations responsibility, and the Special Account to be established must, therefore, be construed as coming within the meaning of Article 17 of the Charter'.

At this same meeting, after hearing this statement, the General Assembly in resolution 1122 (XI) noted that it had 'provisionally approved the recommendations made by the Secretary-General concerning the financing of the Force'. It then authorized the Secretary-General 'to establish a United Nations Emergency Force Special Account to which funds received by the United Nations, outside the regular budget, for the purpose of meeting the expenses of the Force shall be credited and from which payments for this purpose shall be made'. The resolution then provided that the initial amount in the Special Account should be $10 million and authorized the Secretary-General 'pending the receipt of funds for the Special Account, to advance from the Working Capital Fund such sums as the Special Account may require to meet any expenses chargeable to it'. The establishment of a Special Account does not necessarily mean that the funds in it are not to be derived from contributions of Members as apportioned by the General Assembly.

***174** The next of the resolutions of the General Assembly to be considered is 1089 (XI) of 21 December 1956, which reflects the uncertainties and the conflicting views about financing UNEF. The divergencies are duly noted and there is ample reservation concerning possible future action, but operative paragraph 1 follows the recommendation of the Secretary-General 'that the expenses relating to the Force should be apportioned in the same manner as the expenses of the Organization'. The language of this paragraph is clearly drawn from Article 17:

'1. Decides that the expenses of the United Nations Emergency Force, other than for such pay, equipment, supplies and services as may be furnished without charge by Governments of Member States, shall be borne by the United Nations and shall be apportioned among the Member States, to the extent of $10 million, in accordance with the scale of assessments adopted by the General Assembly for contributions to the annual budget of the Organization for the financial year 1957;'

This resolution, which was adopted by the requisite two-thirds majority, must have rested upon the conclusion that the expenses of UNEF were 'expenses of the Organization' since otherwise the General Assembly would have had no authority to decide that they 'shall be borne by the United Nations' or to apportion them among the Members. It is further significant that paragraph 3 of this resolution, which established a study committee, charges this committee with the task of examining 'the question of the apportionment of the expenses of the Force in excess of $10 million ... and the principle or the formulation of scales of contributions different from the scale of contributions by Member States to the ordinary budget for 1957'. The italicized words show that it was not contemplated that the Committee would consider any method of meeting these expenses except

through some form of apportionment although it was understood that a different scale might be suggested.
The report of this study committee again records differences of opinion but the draft resolution which it recommended authorized further expenditures and authorized the Secretary-General to advance funds from the Working Capital Fund and to borrow from other funds if necessary; it was adopted as resolution 1090 (XI) by the requisite two-thirds majority on 27 February 1957. In paragraph 4 of that resolution, the General Assembly decided that it would at its twelfth session 'consider the basis for financing any costs of the Force in excess of $10 million not covered by voluntary contributions'.
Resolution 1151 (XII) of 22 November 1957, while contemplating the receipt of more voluntary contributions, decided in paragraph 4 that the expenses authorized 'shall be borne by the Members of the United Nations in accordance with the scales of assessments ***175*** adopted by the General Assembly for the financial years 1957 and 1958 respectively'.
Almost a year later, on 14 November 1958, in resolution 1263 (XIII) the General Assembly, while 'Noting with satisfaction the effective way in which the Force continues to carry out its function', requested the Fifth Committee 'to recommend such action as may be necessary to finance this continuing operation of the United Nations Emergency Force'.
After further study, the provision contained in paragraph 4 of the resolution of 22 November 1957 was adopted in paragraph 4 of resolution 1337 (XIII) of 13 December 1958. Paragraph 5 of that resolution requested 'the Secretary-General to consult with the Governments of Member States with respect to their views concerning the manner of financing the Force in the future, and to submit a report together with the replies to the General Assembly at its fourteenth session'. Thereafter a new plan was worked out for the utilization of any voluntary contributions, but resolution 1441 (XIV) of 5 December 1959, in paragraph 2: 'Decides to assess the amount of $20 million against all Members of the United Nations on the basis of the regular scale of assessments' subject to the use of credits drawn from voluntary contributions. Resolution 1575 (XV) of 20 December 1960 is practically identical.
The court concludes that, from year to year, the expenses of UNEF have been treated by the General Assembly as expenses of the Organization within the meaning of Article 17, paragraph 2, of the Charter.

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The operations in the Congo were initially authorized by the Security Council in the resolution of 14 July 1960 which was adopted without a dissenting vote. The resolution, in the light of the appeal from the Government of the Congo, the report of the Secretary-General and the debate in the Security Council, was clearly adopted with a view to maintaining international peace and security. However, it is argued that that resolution has been implemented, in violation of provisions of the Charter inasmuch as under the Charter it is the Security Council that determines which States are to participate in carrying out decisions involving the maintenance of international peace and security, whereas in the case of the Congo the Secretary-General himself determined which States were to participate with their armed forces or otherwise.
By paragraph 2 of the resolution of 14 July 1960 the Security Council 'Decides to authorize the Secretary-General to take the necessary steps, in consultation with the Government of the Republic of the Congo, to provide the Government with such military assistance as may be necessary'. Paragraph 3 requested the ***176*** Secretary-General 'to report to the Security Council as appropriate'. The Secretary-General made his first report on 18 July and in it informed the Security Council which States he had asked to contribute forces or materiel, which ones had complied, the size of the units which had already arrived in the Congo (a total of some 3,500 troops), and some detail about further units expected.
On 22 July the Security Council by unanimous vote adopted a further resolution in which

the preamble states that it had considered this report of the Secretary-General and appreciated 'the work of the Secretary-General and the support so readily and so speedily given to him by all Member States invited by him to give assistance'. In operative paragraph 3, the Security Council 'Commends the Secretary-General for the prompt action he has taken to carry out resolution S/4387 of the Security Council, and for his first report'.

On 9 August the Security Council adopted a further resolution without a dissenting vote in which it took note of the second report and of an oral statement of the Secretary-General and in operative paragraph 1: 'Confirms the authority given to the Secretary-General by the Security Council resolutions of 14 July and 22 July 1960 and requests him to continue to carry out the responsibility placed on him thereby'. This emphatic ratification is further supported by operative paragraphs 5 and 6 by which all Member States were called upon 'to afford mutual assistance' and the Secretary-General was requested 'to implement this resolution and to report further to the Council as appropriate'.

The Security Council resolutions of 14 July, 22 July and 9 August 1960 were noted by the General Assembly in its resolution 1474 (ES-IV) of 20 September, adopted without a dissenting vote, in which it 'fully supports' these resolutions. Again without a dissenting vote, on 21 February 1961 the Security Council reaffirmed its three previous resolutions 'and the General Assembly resolution 1474 (ES-IV) of 20 September 1960' and reminded 'all States of their obligations under these resolutions'.

Again without a dissenting vote on 24 November 1961 the Security Council, once more recalling the previous resolutions, reaffirmed 'the policies and purposes of the United Nations with respect to the Congo (Leopoldville) as set out' in those resolutions. Operative paragraphs 4 and 5 of this resolution renew the authority to the Secretary-General to continue the activities in the Congo.

In the light of such a record of reiterated consideration, confirmation, approval and ratification by the Security Council and by the General Assembly of the actions of the Secretary-General in ***177*** implementing the resolution of 14 July 1960, it is impossible to reach the conclusion that the operations in question usurped or impinged upon the prerogatives conferred by the Charter on the Security Council. The Charter does not forbid the Security Council to act through instruments of its own choice: under Article 29 it 'may establish such subsidiary organs as it deems necessary for the performance of its functions'; under Article 98 it may entrust 'other functions' to the Secretary-General.

It is not necessary for the Court to express an opinion as to which article or articles of the Charter were the basis for the resolutions of the Security Council, but it can be said that the operations of ONUC did not include a use of armed force against a State which the Security Council, under Article 39, determined to have committed an act of aggression or to have breached the peace. The armed forces which were utilized in the Congo were not authorized to take military action against any State. The operation did not involve 'preventive or enforcement measures' against any State under Chapter VII and therefore did not constitute 'action' as that term is used in Article 11.

For the reasons stated, financial obligations which, in accordance with the clear and reiterated authority of both the Security Council and the General Assembly, the Secretary-General incurred on behalf of the United Nations, constitute obligations of the Organization for which the General Assembly was entitled to make provision under the authority of Article 17.

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In relation to ONUC, the first action concerning the financing of the operation was taken by the General Assembly on 20 December 1960, after the Security Council had adopted its resolutions of 14 July, 22 July and 9 August, and the General Assembly had adopted its supporting resolution of 20 September. This resolution 1583 (XV) of 20 December referred to the report of the Secretary-General on the estimated cost of the Congo operations from 14 July to 31 December 1960, and to the recommendations of the

Advisory Committee on Administrative and Budgetary Questions. It decided to establish an ad hoc account for the expenses of the United Nations in the Congo. It also took note of certain waivers of cost claims and then decided to apportion the sum of $48.5 million among the Member States 'on the basis of the regular scale of assessment' subject to certain exceptions. It made this decision because in the preamble it had already recognized:

'that the expenses involved in the United Nations operations in the Congo for 1960 constitute 'expenses of the Organization' within ***178*** the meaning of Article 17, paragraph 2, of the Charter of the United Nations and that the assessment thereof against Member States creates binding legal obligations on such States to pay their assessed shares'.

By its further resolution 1590 (XV) of the same day, the General Assembly authorized the Secretary-General 'to incur commitments in 1961 for the United Nations operations in the Congo up to the total of $24 million for the period from 1 January to 31 March 1961'. On 3 April 1961, the General Assembly authorized the Secretary-General to continue until 21 April 'to incur commitments for the United Nations operations in the Congo at a level not to exceed $8 million per month'.

Importance has been attached to the statement included in the preamble of General Assembly resolution 1619 (XV) of 21 April 1961 which reads:

'Bearing in mind that the extraordinary expenses for the United Nations operations in the Congo are essentially different in nature from the expenses of the Organization under the regular budget and that therefore a procedure different from that applied in the case of the regular budget is required for meeting these extraordinary expenses.'

However, the same resolution in operative paragraph 4:

'Decides further to apportion as expenses of the Organization the amount of $100 million among the Member States in accordance with the scale of assessment for the regular budget subject to the provisions of paragraph 8 below [paragraph 8 makes certain adjustments for Member States assessed at the lowest rates or who receive certain designated technical assistance], pending the establishment of a different scale of assessment to defray the extraordinary expenses of the Organization resulting from these operations.'

Although it is not mentioned in the resolution requesting the advisory opinion, because it was adopted at the same meeting of the General Assembly, it may be noted that the further resolution 1732 (XVI) of 20 December 1961 contains an identical paragraph in the preamble and a comparable operative paragraph 4 on apportioning $80 million.

The conclusion to be drawn from these paragraphs is that the General Assembly has twice decided that even though certain expenses are 'extraordinary' and 'essetially different' from those under the 'regular budget', they are none the less 'expenses of the Organization' to be apportioned in accordance with the power granted to the General Assembly by Article 17, paragraph 2. This conclusion is strengthened by the concluding clause of paragraph 4 of the two resolutions just cited which states that the decision therein to use the scale of assessment already adopted for the ***179*** regular budget is made 'pending the establishment of a different scale of assessment to defray the extraordinary expenses'. The only alternative-and that means the 'different procedure'-contemplated was another scale of assessment and not some method other than assessment. 'Apportionment' and 'assessment' are terms which relate only to the General Assembly's authority under Article 17.

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At the outset of this opinion, the Court pointed out that the text of Article 17, paragraph 2, of the Charter could lead to the simple conclusion that 'the expenses of the Organization' are the amounts paid out to defray the costs of carrying out the purposes of the Organization. It was further indicated that the Court would examine the resolutions authorizing the expenditures referred to in the request for the advisory opinion in order to ascertain whether they were incurred with that end in view. The Court has made such

an examination and finds that they were so incurred. The Court has also analyzed the principal arguments which have been advanced against the conclusion that the expenditures in question should be considered as 'expenses of the Organization within the meaning of Article 17, paragraph 2, of the Charter of the United Nations', and has found that these arguments are unfounded. Consequently, the Court arrives at the conclusion that the question submitted to it in General Assembly resolution 1731 (XVI) must be answered in the affirmative.

For these reasons,

THE COURT IS OF OPINION,

by nine votes to five,

that the expenditures authorized in General Assembly resolutions 1583 (XV) and 1590 (XV) of 20 December 1960, 1595 (XV) of 3 April 1961, 1619 (XV) of 21 april 1961 and 1633 (XVI) of 30 October 1961 relating to the United Nations operations in the congo undertaken in pursuance of the Security Council resolutions of 14 July, 22 July and 9 August 1960 and 21 February and 24 November 1961, and General Assembly resolutions 1474 (ES-IV) of 20 September 1960 and 1599 (XV), 1600 (XV) and 1601 (XV) of 15 April 1961, and the expenditures authorized in General Assembly resolutions 1122 (XI) of 26 November 1956, 1089 (XI) of 21 December 1956, 1090 (XI) of 27 February 1957, 1151 (XII) of 22 November 1957, 1204 (XII) of 13 December 1957, 1337 (XIII) of 13 December 1958, 1441 (XIV) of 5 December 1959 and 1575 (XV) of 20 December 1960 relating to the operations of the United Nations Emergency ***180** Force undertaken in pursuance of General Assembly resolutions 997 (ES-I) of 2 November 1956, 998 (ES-I) and 999 (ES-I) of 4 November 1956, 1000 (ES-I) of 5 November 1956, 1001 (ES-I) of 7 November 1956, 1121 (XI) of 24 November 1956 and 1263 (XIII) of 14 November 1958, constitute 'expenses of the Organization' within the meaning of Article 17, paragraph 2, of the Charter of the United Nations.

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

(Signed) B. WINIARSKI, President.

(Signed) GARNIER-COIGNET, Registrar.

Judge SPIROPOULOS makes the following declaration:

While accepting the Court's conclusion, I cannot agree with all the views put forward in the Advisory Opinion. In particular, I consider that the affirmative reply to the request for an opinion is justified by the argument that the resolutions of the General Assembly authorizing the financing of the United Nations operations in the Congo and the Middele East, being resolutions designed to meet expenditure concerned with the fulfilment of the purposes of the United Nations, which were adopted by two-thirds of the Members of the General Assembly present and voting, create obligations for the Members of the United Nations.

I express no opinion as to the conformity with the Charter of the resolutions relating to the United Nations operations in the Congo and the Middle East, for the following reasons:

The French delegation had proposed to the General Assembly the acceptance of an amendment to the text, finally adopted by it, according to which amendment the question put to the Court would have become: 'Were the expenditures authorized, etc. ... decided on in conformity with the provisions of the Charter and, if so, do they constitute 'expenses of the Organization' within the meaning of Article 17, paragraph 2, of the Charter of the United Nations?'

On 20 December 1961, in the course of the meeting of the General Assembly, this amendment was accompanied by a statement by the ***181** French delegation justifying

the submission of the French amendment and which, among other things, said:
'In the opinion of the French delegation, the question put to the Court does not enable the latter to give a clear-cut opinion on the juridical basis for the financial obligations of Member States. The Court cannot, in fact, appraise the scope of those resolutions without determining what obligations they may create for Member States under the Charter.
It is for this reason that the French delegation is submitting to the Assembly an amendment [A/L. 378] the adoption of which would enable the Court to determine whether or not the Assembly resolutions concerning the financial implications of the United Nations operations in the Congo and the Middle East are in conformity with the Charter. Only thus, if the matter is referred to the Court, will it be done in such a way as to take into account the scope and nature of the problems raised in the proposal to request an opinion.'
The French amendment was rejected.
The rejection of the French amendment by the General Assembly seems to me to show the desire of the Assembly that the conformity or non-conformity of the decisions of the Assembly and of the Security Council concerning the United Nations operations in the Congo and the Middle East should not be examined by the Court. It seems natural, indeed, that the General Assembly should not have wished that the Court should pronounce on the validity of resolutions which have been applied for several years. In these circumstances, I have felt bound to refrain from pronouncing on the conformity with the Charter of the resolutions relating to the United Nations operations in the Congo and the Middle East.
Judges Sir Percy SPENDER, Sir Gerald FITZMAURICE and MORELLI append to the Opinion of the Court statements of their Separate Opinions.
President WINIARSKI and Judges BASDEVANT, MORENO QUINTANA, KORETSKY and BUSTAMANTE Y RIVERO append to the Opinion of the Court statements of their Dissenting Opinions.
(Initialled) B. W.
(Initialled) G.-C.

*182 SEPARATE OPINION OF JUDGE SIR PERCY SPENDER

I agree that the question should be answered in the affirmative.
The Court is called upon to answer a question which, exceedingly important though it is, lies within a comparatively limited compass.
That question is whether certain particularized expenditure-money spent or to be spent-authorized by certain specified resolutions of the General Assembly, constitute 'expenses of the Organization' within the meaning of Article 17 (2) of the Charter.
Whilst the form in which the question has been framed may not in any manner inhibit the Court from considering any aspect of the Charter, or any part of the record presented to it, to the extent it considers relevant, the opinion the Court gives ought not, in my view, go beyond the limits of what is reasonably necessary to permit it to answer the question. To go beyond these limits is I think an excess of function.
For my part I have not found it necessary to express any opinion upon the validity or regularity of the resolutions pursuant to which the operations in the Congo and the Middle East were undertaken. A conclusion thereon would not, in my view, affect the answer which should be given to the question.
Article 17 has a provenance and field of its own. It is the only Article in the Charter which deals with the budgetary affairs and the expenses of the Organization. Neither the word 'budget' in Article 17 (1) nor the word 'expenses' in Article 17 (2) is qualified in any manner in the text, nor elsewhere by anything appearing in the Charter.
The word 'budget' in Article 17 (1) covers all finance requirements of the Organization and the word 'expenses' in Article 17 (2) covers all expenditures which may be incurred on behalf of the Organization, which give effect to the purposes of the United Nations.
There is, upon the proper interpretation of Article 17, no legal basis for confining these words to what has been described as 'normal', 'ordinary', 'administrative' or 'essential'

costs and expenditure, whatever precisely these terms may denote. The expenditures referred to in the question put to the Court were of a character which could qualify them as incurred in order to give effect to the purposes of the Organization. It was in these circumstances for the General Assembly, and for it alone, to determine, as it did, whether these expenditures did qualify as those of the Organization and to deal with them pursuant to its powers under Article 17 (2).

***183** Once the General Assembly has passed upon what are the expenses of the Organization, and it is apparent that the expenditure incurred and to be incurred on behalf of the Organization is in furtherance of its purposes, their character as such and any apportionment thereof made by the General Assembly under Article 17 (2) of the Charter cannot legally be challenged by any Member State. Its decision may not be impugned and becomes binding upon each Member State. It would be anarchic of any interpretation of the Charter were each Member State its own interpreter of whether this or that particular expense was an expense of the Organization, within the meaning of Article 17 (2), and could, by its own interpretation, be free to refuse to comply with the decision of the General Assembly.

It is, moreover, evident that once the Secretary-General, who, under Article 98 of the Charter, is bound to perform such functions as the General Assembly or the Security Council may entrust him with, is called upon by either organ to discharge certain functions, as he was in respect to the operations in both the Congo and the Middle East, and in discharging them he engages the credit of the Organization and on its behalf incurs financial obligations, then, unless the resolution under which he acts, or what he does, is unconnected with the furtherance of the purposes of the Organization, the moneys involved may properly be dealt with by the General Assembly as 'expenses of the Organization'. Once they have been, the action of the General Assembly would not be open to challenge by a Member State even if the resolutions under which he was called upon to act were not in conformity with the Charter and even if he should exceed the authority conferred upon him. He is the Chief Administrative Officer of the Organization and director of the Secretariat which itself is an organ of the United Nations. If, acting within the apparent scope of his authority, he engages the credit of the Organization, the General Assembly has, in my view, full power to acknowledge the financial obligations involved as 'expenses of the Organization' within the meaning of Article 17 (2) and act accordingly.

Subject to the above and to certain general observations that I wish to make on the discharge by the Court of its function of interpreting the Charter, I associate myself with the opinion of the Court.

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The interpretation given to Article 17 and in particular to subparagraph (2) thereof accords a wide power to the General Assembly.

***184** It is however nothing to the point to contend that so to interpret Article 17 (2) confers an authority so extensive that it could lead the General Assembly, by virtue of its control over the finances of the Organization, to extend, in practice, its own competence in other fields in disregard of the provisions of the Charter. Whatever the ambit of power conferred upon any organ of the United Nations, that may be ascertained only from the terms of the Charter itself. Once the Court has determined the interpretation it must accord to a provision of the Charter on which it is called upon to express its opinion, its function is discharged. Any political consequences which may flow from its decision is not a matter for its concern.

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General Observations on the Interpretation of the Charter

Words communicate their meaning from the circumstances in which they are used. In a written instrument their meaning primarily is to be ascertained from the context, the

setting, in which they are found.
The cardinal rule of interpretation that this Court and its predecessor has stated should be applied is that words are to be read, if they may so be read, in their ordinary and natural sense. If so read they make sense, that is the end of the matter. If, however, so read they are ambiguous or lead to an unreasonable result, then and then only must the Court, by resort to other methods of interpretation, seek to ascertain what the parties really meant when they used the words under consideration (Competence of the General Assembly regarding Admission to the United Nations, I.C.J. Reports 1950, p. 8, and Polish Postal Service in Danzig, P.C.I.J., Series B, No. 11, p. 39).
This injunction is sometimes a counsel of perfection. The ordinary and natural sense of words may at times be a matter of considerable difficulty to determine. What is their ordinary and natural sense to one may not be so to another. The interpreter not uncommonly has, what has been described as, a personal feeling towards certain words and phrases. What makes sense to one may not make sense to another. Ambiguity may lie hidden in the plainest and most simple of words even in their natural and ordinary meaning. Nor is it always evident by what legal yardstick words read in their natural and ordinary sense may be judged to produce an unreasonable result.
Moreover the intention of the parties at the time when they entered into an engagement will not always-depending upon the nature and subject-matter of the engagement-have the same importance. In particular in the case of a multilateral treaty such as ***185** the Charter the intention of its original Members, except such as may be gathered from its terms alone, is beset with evident difficulties. Moreover, since from its inception it was contemplated that other States would be admitted to membership so that the Organization would, in the end, comprise 'all other peace-loving States which accept the obligations contained in the Charter' (Article 4), the intention of the framers of the Charter appears less important than intention in many other treaties where the parties are fixed and constant and where the nature and subject- matter of the treaty is different. It is hardly the intention of those States which originally framed the Charter which is important except as that intention reveals itself in the text. What is important is what the Charter itself provides; what-to use the words of Article 4-is 'contained in ... the Charter'.
It is, I venture to suggest, perhaps safer to say that the meaning of words, however described, depends upon subject-matter and the context in which they are used.

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In the interpretation of a multilateral treaty such as the Charter which establishes a permanent international mechanism or organization to accomplish certain stated purposes there are particular considerations to which regard should, I think, be had.
Its provisions were of necessity expressed in broad and general terms. It attempts to provide against the unknown, the unforeseen and, indeed, the unforeseeable. Its text reveals that it was intended-subject to such amendments as might from time to time be made to it-to endure, at least it was hoped it would endure, for all time. It was intended to apply to varying conditions in a changing and evolving world community and to a multiplicity of unpredictable situations and events. Its provisions were intended to adjust themselves to the ever changing pattern of international existence. It established international machinery to accomplish its stated purposes.
It may with confidence be asserted that its particular provisions should receive a broad and liberal interpretation unless the context of any particular provision requires, or there is to be found elsewhere in the Charter, something to compel a narrower and restricted interpretation.
The stated purposes of the Charter should be the prime consideration in interpreting its text.
Despite current tendencies to the contrary the first task of the Court is to look, not at the travaux preparatoires or the practice which hitherto has been followed within the Organization, but at the terms of the Charter itself. What does it provide to carry out its

purposes?
If the meaning of any particular provision read in its context is sufficiently clear to satisfy the Court as to the interpretation to be ***186*** given to it there is neither legal justification nor logical reason to have recourse to either the travaux preparatoires or the practice followed within the United Nations.
The Charter must, of course, be read as a whole so as to give effect to all its terms in order to avoid inconsistency. No word, or provision, may be disregarded or treated as superfluous, unless this is absolutely necessary to give effect to the Charter's terms read as a whole.

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The purpose pervading the whole of the Charter and dominating it is that of maintaining international peace and security and to that end the taking of effective collective measures for the prevention and removal of threats to the peace.
Interpretation of the Charter should be directed to giving effect to that purpose, not to frustrate it. If two interpretations are possible in relation to any particular provision of it, that which is favourable to the accomplishment of purpose and not restrictive of it must be preferred.
A general rule is that words used in a treaty should be read as having the meaning they bore therein when it came into existence. But this meaning must be consistent with the purposes sought to be achieved. Where, as in the case of the Charter, the purposes are directed to saving succeeding generations in an indefinite future from the scourge of war, to advancing the welfare and dignity of man, and establishing and maintaining peace under international justice for all time, the general rule above stated does not mean that the words in the Charter can only comprehend such situations and contingencies and manifestations of subject-matter as were within the minds of the framers of the Charter (cf. Employment of Women during the Night, P.C.I.J., Series A/B, No. 50, p. 377).
The wisest of them could never have anticipated the tremendous changes which politically, militarily, and otherwise have occurred in the comparatively few years which have elapsed since 1945. Few if any could have contemplated a world in thraldom to atomic weapons on the scale of today, and the dangers inherent in even minor and remote events to spark wide hostilities imperilling both world peace and vast numbers of mankind. No comparable human instrument in 1945 or today could provide against all the contingencies that the future should hold. All that the framers of the Charter reasonably could do was to set forth the purposes the organization set up should seek to achieve, establish the organs to accomplish these purposes and confer upon these organs powers in general terms. Yet these general terms, unfettered by man's incapacity to foretell the future, may be sufficient to meet the thrusts of a changing world.
187 The nature of the authority granted by the Charter to each of its organs does not change with time. The ambit or scope of the authority conferred may nonetheless comprehend ever changing circumstances and conditions and embrace, as history unfolds itself, new problems and situations which were not and could not have been envisaged when the Charter came into being. The Charter must accordingly be interpreted, whilst in no way deforming or dislocating its language, so that the authority conferred upon the Organization and its various organs may attach itself to new and unanticipated situations and events.
All canons of interpretation, however valuable they may be, are but aids to the interpreter. There are, as this Court's predecessor acknowledged, many methods of interpretation (Territorial Jurisdiction of the International Commission on the River Oder, P.C.I.J., Series A, No. 23, p. 26). The question whether an unforeseen, or extraordinary, or abnormal development or situation, or matter relating thereto, falls within the authority accorded to any of the organs of the Organization finds its answer in discharging the essential task of all interpretation-ascertaining the meaning of the relevant Charter provision in its context. The meaning of the text will be illuminated by the stated purposes to achieve which the terms of the Charter were drafted.

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Practice within the United Nations-Its effect on or value as a criterion of interpretation.
In the proceedings on this Advisory Opinion practice and usage within the United Nations has been greatly relied upon by certain States, which have availed themselves of the opportunity to present their views to the Court, as establishing a criterion of interpretation of relevant Charter provisions.
It was for example contended by one State that usages developed in the practice of the United Nations have dealt with certain items of expenditure as expenses of the Organization within the meaning of Article 17 (2) and that such usages whether or not they could be said to have attained the character of customary legal principle are relevant for the purposes of interpreting the meaning and scope of resolutions adopted by the General Assembly concerning specific question. So usage within the United Nations, it was urged, has sanctioned the inclusion in the budget expenses of the Organization of items which related to other than the ordinary administrative and routine duties of the Organization as, for example, those connected with special peace-keeping operations and operations of a similar ***188*** character initiated by either the General Assembly or the Security Council.
Thus, so it was asserted, in practice it had been considered a normal and usual procedure to include such operations in the regular budget which was financed in accordance with Article 17 (2) of the Charter. Though objections had from time to time been made to the inclusion of different items, the General Assembly had not hesitated to overrule such objections and the objecting States, it was claimed, had in the end acquiesced in the decisions by paying their contributions under Article 17 (2). It was also contended that the General Assembly and the Security Council had consistently pursued a practice of considering the General Assembly competent to deal with a matter transferred to it from the Security Council in the circumstances defined by the Uniting for Peace Resolution 377 (V).
These practices were called in aid as relevant considerations in interpreting both Article 17 (2) and Article 24 of the Charter. The proposition advanced was that it is a general principle that a treaty provision should be interpreted in the light of the subsequent conduct of the contracting parties- words which echo those to be found in the Advisory Opinion of the Permanent Court in Interpretation of the Treaty of Lausanne (P.C.I.J., Series B, No. 12, 1925, p. 24)-and that the uniform practice pursued by the organs of the United Nations should be equated with the 'subsequent conduct' of contracting parties as in the case of a bilateral treaty.
Similar contentions were made by other States. The practice of the parties in interpreting a constitutive instrument, it was submitted, was a guide to that instrument's true meaning. The practice of the Security Council, as well as that of the General Assembly, demonstrated, it was said, that the power to approve and apportion the budget of the United Nations was recognized to be the province of the General Assembly alone. Furthermore, by adopting certain resolutions the Security Council and the General Assembly construed the Charter as granting the powers thus exercised, that these organs had the competence to interpret such parts of the Charter as were applicable to their respective and particular functions, and accordingly, that the interpretations such organs have in practice given to their respective powers are entitled to the greatest weight in any subsequent judicial review to determine the meaning and extent of those functions.
The contention of one State went further. The claim was made that any interpretation of the Charter by a United Nations organ ***189*** should be upheld so long as it is an interpretation which is not expressly inconsistent with the Charter and that since any such interpretation would reflect the support of the majority of the Member States, and considering the interpretation of the Charter which has been applied by the Assembly in regard to financing the operation of the UNOC and UNEF, the Court should give its advisory opinion in this case in the affirmative.
These contentions raise questions of importance which should not, I think, be passed over in silence, particularly having regard to the extent to which the Court itself has had

recourse to practice within the United Nations from which to draw sustenance for its interpretation of Charter provisions.

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It is of course a general principle of international law that the subsequent conduct of the parties to a bilateral-or a multilateral-instrument may throw light on the intention of the parties at the time the instrument was entered into and thus may provide a legitimate criterion of interpretation.
So the conduct of one party to such an instrument-or to a unilateral instrument-may throw light upon its intentions when entering into it whilst that of both-or all-parties may have considerable probative value in aid of interpretation.
There is, however, as the late Judge Sir Hersch Lauterpacht has pointed out, an element of artificiality in the principle, and care must be taken to circumscribe its operation. This element of artificiality is greatly magnified when the principle is sought to be extended from the field of bilateral instruments to that of multilateral instruments of an organic character and where the practice (or subsequent conduct) relied upon is that, not of the parties to the instrument, but of an organ created thereunder.
In any case subsequent conduct may only provide a criterion of interpretation when the text is obscure, and even then it is necessary to consider whether that conduct itself permits of only one inference (Brazilian Loans Case, P.C.I.J., Series A/B, Nos. 20/21 , p. 119). Except in the case where a party is by its conduct precluded from relying upon a particular interpretation, with which type of case we are not presently concerned, it can hardly control the language or provide a criterion of interpretation of a text which is not obscure.
I find difficulty in accepting the proposition that a practice pursued by an organ of the United Nations may be equated with the ***190*** subsequent conduct of parties to a bilateral agreement and thus afford evidence of intention of the parties to the Charter (who have constantly been added to since it came into force) and in that way or otherwise provide a criterion of interpretation. Nor can I agree with a view sometimes advanced that a common practice pursued by an organ of the United Nations, though ultra vires and in point of fact having the result of amending the Charter, may nonetheless be effective as a criterion of interpretation.

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The legal rationale behind what is called the principle of 'subsequent conduct' is I think evident enough. In essence it is a question of evidence, its admissibility and value. Its roots are deeply embedded in the experience of mankind.
A man enters into a compact usually between himself and another. The meaning of that compact when entered into whether oral, or in writing, may well be affected, even determined, by the manner in which both parties in practice have carried it out.
That is evident enough. Their joint conduct expresses their common understanding of what the terms of their compact, at the time they entered into it, were intended to mean, and thus provides direct evidence of what they did mean.
That conduct on the part of both parties to a treaty should be considered on the same footing is incontestable. It provides a criterion of interpretation.
It is however evident enough-despite a flimsy and questionable argument based upon what appears in Iranian Oil Company (I.C.J. Reports 1952, pp. 106-107)- that the subsequent conduct of one party alone cannot be evidence in its favour of a common understanding of the meaning intended to be given to the text of a treaty. Its conduct could, under certain conditions to which I have in the Case concerning the Temple of Preah Vihear (I.C.J. Reports 1962, p. 128) made brief reference, preclude it as against the other party to the treaty from alleging an interpretation contrary to that which by its conduct it has represented to be the correct interpretation to be placed upon the treaty.
Short of conduct on its part amounting to preclusion, it may also, if the other party to the

treaty acknowledges that the interpretation so placed upon it by the first party is correct, provide evidence in favour of the first party, depending on the weight the acknowledgement merits, and thus also provide a criterion of interpretation.
As in the field of municipal law, multilateral compacts were a later development; as also were multilateral treaties in the field of international law, particularly those of the organizational character of the Charter.
***191** In the case of multilateral treaties the admissibility and value as evidence of subsequent conduct of one or more parties thereto encounter particular difficulties. If all the parties to a multilateral treaty where the parties are fixed and constant, pursue a course of subsequent conduct in their attitude to the text of the treaty, and that course of conduct leads to an inference, and one inference only, as to their common intention and understanding at the time they entered into the treaty as to the meaning of its text, the probative value of their conduct again is manifest. If however only one or some but not all of them by subsequent conduct interpret the text in a certain manner, that conduct stands upon the same footing as the unilateral conduct of one party to a bilateral treaty. The conduct of such one or more could not of itself have any probative value or provide a criterion for judicial interpretation.
Even where the course of subsequent conduct pursued by both parties to a bilateral treaty or by all parties to a multilateral treaty are in accord and that conduct permits of only one inference it provides a criterion of interpretation only when, as has already been indicated, the text of the treaty is obscure or ambiguous. It may, however, depending upon other considerations not necessary to be here dealt with, provide evidence from which to infer a new agreement with new rights and obligations between the parties, in effect superimposed or based upon the text of the treaty and amending the same. This latter aspect of subsequent conduct is irrelevant for present consideration since no amendment of the Charter may occur except pursuant to Article 108 of the Charter.
When we pass from multilateral treaties in which the parties thereto are fixed and constant to multilateral treaties where the original parties thereto may be added to in accordance with the terms of the treaty itself we move into territory where the role and value of subsequent conduct as an interpretive element is by no means evident.
The Charter provides the specific case with which we are concerned. The original Members of the Charter number less than half the total number of Member States. If the intention of the original Members of the United Nations, at the time they entered into the Charter, is that which provides a criterion of interpretation, then it is the subsequent conduct of those Members which may be equated with the subsequent conduct of the parties to a bilateral or multilateral treaty where the parties are fixed and constant. This, it seems to me, could add a new and indeterminate dimension to the rights and obligations of States that were not original Members and so were not privy to the intentions of the original Members.
However this may be, it is not evident on what ground a practice consistently followed by a majority of Member States not in fact ***192** accepted by other Member States could provide any criterion of interpretation which the Court could properly take into consideration in the discharge of its judicial function. The conduct of the majority in following the practice may be evidence against them and against those who in fact accept the practice as correctly interpreting a Charter provision, but could not, it seems to me, afford any in their favour to support an interpretation which by majority they have been able to assert.

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It is not I think permissible to move the principle of subsequent conduct of parties to a bilateral or multilateral treaty into another field and seek to apply it, not to the parties to the treaty, but to an organ established under the treaty.
My present view is that it is not possible to equate 'subsequent conduct' with the practice of an organ of the United Nations. Not only is such an organ not a party to the Charter but the inescapable reality is that both the General Assembly and the Security Council are

but the mechanisms through which the Members of the United Nations express their views and act. The fact that they act through such an organ, where a majority rule prevails and so determines the practice, cannot, it seems to me, give any greater probative value to the practice established within that organ than it would have as conduct of the Members that comprise the majority if pursued outside of that organ. The contention of the various States, that the practice followed by the General Assembly and the Security Council in interpreting their functions under the Charter has a particular probative value of its own, finds authority, it is claimed, in the jurisprudence of this Court and its predecessor.

It falls for consideration to what extent, if at all, this is so.

The cases which may be relied upon are few and, upon examination, they throw little light upon the matter. The extent to which a practice pursued by an organ of the United Nations may be had resort to by the Court, if at all, as an aid to interpretation, has, I think, yet to receive deliberate consideration by, and to be spelt out by, the Court.

In the Advisory Opinion of the Permanent Court in Competence of the International Labour Organisation (P.C.I.J., Series B, No. 2 (1922), pp. 40-41) when dealing with a question of interpretation arising out of Part XIII of the Treaty of Peace between the Allied ***193*** and Associated Powers and Germany, the fact that the competence of the International Labour Organisation to deal with the subject of agriculture had never been disputed by the Contracting Parties might, the Court observed, if there had been any ambiguity in the text (which the Court found did not exist), 'suffice to turn the scale'. The Court in point of fact had already arrived at its conclusion on the interpretation which should be given to the text; its observation was accordingly obiter dicta. Moreover it was dealing with the conduct of parties to the treaty. In any case from the nature of the Court's observation in that case it must be evident that it has little if any jurisprudential value on the matter presently being considered.

In the Advisory Opinion of the Permanent Court in Treaty of Lausanne (Frontier between Turkey and Iraq) (P.C.I.J., 1925, Series B, No. 12, p. 24) advice was sought by the Council of the League of Nations on Article 3, paragraph 2, of that Treaty. Although this was so, an examination of the case will reveal that what the Court was directing its attention to was in essence a dispute between Great Britain and Turkey in relation to the frontier between the lastmentioned State and Iraq. In that case the Court did concern itself with the subsequent conduct of the Parties but only with the conduct of the Parties to that dispute. It examined the conduct of Great Britain and Turkey. Again the Court in any case had already reached its conclusion on the interpretation it should place upon the Article upon which advice was sought. The meaning was 'sufficiently clear' and thus what it had to say in relation to the subsequent conduct of Great Britain and Turkey was also obiter dicta.

The Court observed

'The facts subsequent to the conclusion of the Treaty of Lausanne can only concern the Court in so far as they throw light upon the intention of the Parties [FN1]-at the time of the conclusion of the Treaty.'

It considered that the 'attitude adopted by the British and Turkish Governments' after the signature of the Treaty 'is only valuable ... as an indication of their views regarding the clause in question'. The fact that the British and Turkish representatives concurred in a certain unanimous vote of the Council of the League on a particular matter showed that there was no disagreement between 'the Parties' as regards their obligation to accept as definitive and binding the decision or recommendation to be made by the Council. The fact that 'the Parties' accepted beforehand the Council's decision might, the Court observed, be regarded as confirming the interpretation which in the Court's opinion flowed from the actual wording of the Article.

194 It hardly needs exposition to establish that this case provides no foundation upon which to rest the contentions of the various States to which reference has previously been made.

Nor does the Advisory Opinion of the Court in Status of South West Africa (I.C.J. Report 1950, p. 128) where the Court said that

'Interpretations placed upon legal instruments by the parties to them though not conclusive as to their meaning have considerable probative value when they contain recognition by a party of its own obligations under an instrument',
or the Brazilian Loans Case (P.C.I.J. (1929)), Series A, Nos. 20/21 , p. 119)- both of which cases were relied upon in support of the proposition that the interpretation given by the General Assembly and the Security Council to provisions of the Charter were entitled to the greatest weight in any subsequent judicial review-carry the matter any further. In the former case a common intention was found to exist-the interpretation that South Africa was said to have placed upon the Charter (or its mandate) by its conduct provided evidence against it. The latter case has little if any relevance. Having stated the principle of 'subsequent conduct' in terms already indicated the Court went on to say that there was indeed no ambiguity in the text. The principle accordingly did not apply. The Court however, because of arguments advanced in the course of the proceeding before it, was induced to consider whether the bondholders' conduct provided any basis for an inference that they- the bondholders-were of the opinion that they were not entitled to payment on the basis of gold; in short whether their conduct could provide evidence against them.
Finally there is the Advisory Opinion of this Court in Competence of the General Assembly regarding Admission to the United Nations (Article 4 of the Charter) (I.C.J. Reports 1950, p. 9) which the Court in the present case accepts as authority for its reliance upon practice within the United Nations to sustain its reasoning and which is usually relied upon in support of the proposition that 'subsequent conduct' is to be equated with a practice pursued by the organs of the United Nations.
In that Advisory Opinion the Court would appear to have found support for its conclusion already otherwise arrived at on the meaning of Article 4 of the Charter. It had found 'no difficulty in ascertaining the natural and ordinary meaning of the words in question and no difficulty in giving effect to them'. But it appears to have found sustenance or satisfaction for its conclusion in the fact that 'the organs to which Article 4 entrusts the judgment of the Organization have consistently interpreted the text' in the manner ***195** which it had concluded was its proper interpretation. Again, whatever is the significance to be attached to this purely factual observation on a coincidence, it was unnecessary and irrelevant to the Court's opinion. The Court had already made it abundantly clear that it was only when the words in their natural and ordinary meaning were ambiguous or led to an unreasonable result, that it was permissible to resort to other methods of interpretation. It thus confirmed the rule laid down in Case of Brazilian Loans (ante), Serbian Loans (P.C.I.J., Series A, Nos. 20/21 , p. 38) and International Labour Organisation (ante) that it is only where a treaty is ambiguous that resort may be had 'to the manner of performance in order to ascertain the intention of the parties'.
That being so it is not apparent what legal significance is to be attached to the Court's observation. The fact stated added nothing to the Court's reasoning. Whether the General Assembly and the Security Council had consistently interpreted Article 4 in the sense in which the Court did or had consistently interpreted it in a different sense was quite irrelevant to the Court's conclusion. On any rational examination of this case, it provides, I believe, no authority, at least none of any weight, for the proposition that the practice followed by an organ of the United Nations may be equated with the subsequent conduct of the parties to a treaty.
The jurisprudence of this Court and of the Permanent Court accordingly reveals, I believe, no support for the various contentions advanced by the States to which reference has been made and in particular lends none to the proposition that a pratice pursued by a majority of Member States in an organ of the United Nations has probative value in the present case.

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Apart from a practice which is of a peaceful, uniform and undisputed character accepted in fact by all current Members, a consideration of which is not germane to the present

examination, I accordingly entertain considerable doubt whether practice of an organ of the United Nations has any probative value either as providing evidence of the intentions of the original Member States or otherwise a criterion of interpretation. As presently advised I think it has none.

If however it has probative value, what is the measure of its value before this Court? An organ of the United Nations, whether it be the General Assembly, the Security Council, the Economic and Social Council, the Secretariat or its subsidiary organs, has in practice to interpret its authority in order that it may effectively function. So, throughout the world, have countless governmental and administrative ***196*** organs and officials to interpret theirs. The General Assembly may thus in practice, by majority vote, interpret Charter provisions as giving it authority to pursue a certain course of action. It may continue to give the same interpretation to these Charter provisions in similar or different situations as they arise. In so doing action taken by it may be extended to cover circumstances and situations which had never been contemplated by those who framed the Charter. But this would not, for reasons which have already been given, necessarily involve any departure from the terms of the Charter.

On the other hand, the General Assembly may in practice construe its authority beyond that conferred upon it, either expressly or impliedly, by the Charter. It may, for example, interpret its powers to permit it to enter a field prohibited to it under the Charter or in disregard of the procedure prescribed in the Charter. Action taken by the General Assembly (or other organs) may accordingly on occasions be beyond power.

The Charter establishes an Organization. The Organization must function through its constituted organs. The functions and authorities of those organs are set out in the Charter. However the Charter is otherwise described the essential fact is that it is a multilateral treaty. It cannot be altered at the will of the majority of the Member States, no matter how often that will is expressed or asserted against a protesting minority and no matter how large be the majority of Member States which assert its will in this manner or how small the minority.

It is no answer to say that the protesting minority has the choice of remaining in or withdrawing from the Organization and that if it chooses to remain or because it pays its contributions according to apportionment under Article 17 (2) the Members in the minority 'acquiesce' in the practice or must be deemed to have done so. They are bound to pay these contributions and the minority has a right to remain in the Organization and at the same time to assert what it claims to be any infringement of its rights under the Charter or any illegal use of power by any organ of the United Nations.

In practice, if the General Assembly (or any organ) exceeds its authority there is little that the protesting minority may do except to protest and reserve its rights whatever they may be. If, however, the authority purported to be exercised against the objection of any Member State is beyond power it remains so.

So, if the General Assembly were to 'intervene in matters which are essentially within the domestic jurisdiction of any State' within the meaning of Article 2 (7) of the Charter, whatever be the meaning to be given to these words, that intervention would be the ***197*** entering into a field prohibited to it under the Charter and be beyond the authority of the General Assembly. This would continue to be so, no matter how frequently and consistently the General Assembly had construed its authority to permit it to make intervention in matters essentially within the domestic jurisdiction of any States. The majority has no power to extend, alter or disregard the Charter.

Each organ of the United Nations, of course, has an inherent right to interpret the Charter in relation to its authority and functions. But the rule that they may do so is not in any case applicable without qualification. Their interpretation of their respective authorities under the Charter may conceivably conflict one with the other. They may agree. They may, after following a certain interpretation for many years, change it. In any case, their right to interpret the Charter gives them no power to alter it.

The question of constitutionality of action taken by the General Assembly or the Security Council will rarely call for consideration except within the United Nations itself, where a majority rule prevails. In practice this may enable action to be taken which is beyond

power. When, however, the Court is called upon to pronounce upon a question whether certain authority exercised by an organ of the Organization is within the power of that organ, only legal considerations may be invoked and de facto extension of the Charter must by disregarded.

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Once a request for an Advisory Opinion is made to this Court and it decides to respond to that request, the question on which the Opinion has been sought passes, as is claimed by the Republic of France in its written statement in this case, on to the legal plane and takes on a new character, in the determination of which legal considerations and legal considerations only may be invoked.
In the present case, it is sufficient to say that I am unable to regard any usage or practice followed by any organ of the United Nations which has been determined by a majority therein against the will of a minority as having any legal relevance or probative value.

(Signed) Percy C. SPENDER.

***198** SEPARATE OPINION OF JUDGE SIR GERALD FITZMAURICE

I

I have not written this separate opinion because I disagree with the operative conclusion of the Opinion of the Court. I consider that the expenditures referred to in the Assembly's Request are without doubt expenses of the Organization within the meaning of Article 17, paragraph 2, of the Charter. I also agree with much of the reasoning on which the Court's Opinion is based, although it goes more into matters of pure detail and procedure than I would have thought necessary. But as I shall indicate, I have reservations on certain points of principle having wider implications, though they do not affect the final conclusion reached in the present case.
Moreover (and this constitutes my main reason for writing a separate opinion), it would seem that the Opinion of the Court, while dealing elaborately with certain matters, refrains designedly from discussing other, more general, aspects of the subject, involving difficulties which have troubled a number of those who have had to do with it. The Opinion, in short, ignores various points which appear to me to be very relevant; for although the 'legal guidance' mentioned in the preambular part of the Request is asked for in connection with the question of 'financing the United Nations operations in the Congo and in the Middle East', I consider that even in these contexts alone, this guidance must fall short of full utility if it fails to deal with certain more general matters, and also with one or two others that the Court has not gone into.
For instance, the Court has taken the view that it is only required to state whether certain specified expenditures are expenses of the Organization, and is not called upon to declare what are the financial obligations of Member States (hence the change in the title of the case). To my mind the two questions are indissolubly linked, for except in so far as there is an obligation to contribute to expenditures which duly rank as 'expenses', there is no point in determining whether these expenditures are expenses or not; and as I shall show, it is necessary to deal with certain types of case in which it could be contended that, although given expenditures are expenses of the Organization, there may not necessarily or always be an obligation for every Member State to contribute to them.

***199** II

A short answer to the question put in the Request could be given on the following lines: first, that the notion of expenses of the Organization cannot be confined merely to its regular administrative expenses, since the latter are not incurred as an end in themselves

but as a means to an end, namely, to enable the Organization to carry out the essential substantive functions for which it exists; therefore, to regard the obligation of Member States as extending only to routine administrative expenses would be as stultifying as it would be disingenuous [FN1]:
secondly, that the notion of expenses of the Organization must extend at least to those incurred in the discharge of the essential functions of the Organization for which it was brought into existence; that peace-keeping activities constitute such a function; and that the expenditures specified in the Request for an advisory opinion relate to peace-keeping activities;
thirdly, that the Charter does not exclude, and indeed (subject to specified conditions and limitations) makes express provision for the carrying out of certain peace-keeping activities by the Assembly (Articles 11, 14, 35, etc.); and that the activities of the Assembly in respect of which the expenditures at issue were incurred were of this kind, and did not exceed the conditions and limitations in question.
Broadly speaking, though in greater detail and with more elaboration, these are some of the main considerations on which the Opinion of the Court is in fact founded and, framed as indicated above, I concur in them. The Court however, in addition to these considerations, and more particularly in connection with those coming under the third of them, has alluded to the possibility that, even if, in carrying out the activities concerned, the Assembly was not acting in conformity with the division of functions established by the Charter, this would not cause the resulting expenditures to cease being expenses of the Organization, provided that the related activities came within the functions of the Organization as a whole-the irregularity ranking merely as a matter appertaining to the internal economy of the Organization. This is an idea which I think must not be pressed too far (nor does the Court rely on it except incidentally). It is certainly correct in one sense, namely, that internal irregularities would not affect liabilities definitely incurred by or on behalf of the Organization, in relation to third parties outside ***200*** the Organization or its membership [FN2]. But what is really in question here is the relationship of the Member States inter se, and vis-a-vis the Organization as such, and there can be no doubt that, in principle at least, expenditures incurred in excess of the powers of the expending body are invalid expenditures. The question is, are they invalid if they merely exceed the powers of the particular organ authorizing them, but not those of the Organization as a whole? It is true that there are cases, both in the domestic and in the international legal spheres, where all that matters (except on the purely internal plane) is that a certain act has in fact been performed, or not performed, as the case may be, and where the reasons for, or channels through which the performance or non-performance has taken place are immaterial. But in the present case, the question of the financial obligations of Member States in relation to the Organization is a question moving on the internal plane; and if an instrument such as the Charter of the United Nations attributes given functions in an exclusive manner to one of its organs, constituted in a certain way-other and different functions being attributed to other and differently constituted organs-this can only be because, in respect of the performance of the functions concerned, importance was attached to the precise constitution of the organ concerned [FN3].
It is not however necessary to express any final view on this matter, for the simple reason that, as the Opinion of the Court brings out, the Charter does not, in fact, in the matter of peacekeeping activities, establish any rigid general division of function between the role of the Security Council and that of the Assembly. Enforcement or coercitive action stricto sensu is of course exclusively for the Security Council, but I agree with the Court that the action of the Assembly in the Middle East and in the Congo has not been of this character. Furthermore, and as indicated by the Court, I consider that this action of the Assembly has fallen within the scope of its functions under the Charter, and has not exceeded the limitations thereby imposed on the scope and exercise of those functions. Beyond a somewhat general statement of this character, I would not wish to go for present purposes. While I agree with the general trend of the Court's reasoning on what I will call the 'military' provisions of the Charter, I would have to reserve my position on a

number of points of formulation if I thought it necessary to go into these provisions in detail.

***201** III

Much of the Opinion of the Court is concerned with and based on a consideration of what has been the actual practice of the United Nations in financial matters, both generally and in relation to the particular expenditures here involved. I would have preferred to see less reliance on practice and more on ordinary reasoning. The argument drawn from practice, if taken too far, can be question-begging.

However, no one would deny that practice must be a very relevant factor. According to what has become known as the 'principle of subsequent practice', the interpretation in fact given to an international instrument by the parties to it, as a matter of settled practice, is good presumptive (and may in certain cases be virtually conclusive) evidence of what the correct legal interpretation is-a principle applied by the Court on several occasions [FN4]. But where this is the case, it is so because it is possible and reasonable in the circumstances to infer from the behaviour of the parties that they have regarded the interpretation they have given to the instrument in question as the legally correct one, and have tacitly recognized that, in consequence, certain behaviour was legally incumbent upon them. In the present context, it is necessary to take into account the fact that any Member State can at all times, and in any event, contribute voluntarily to the expenses of the Organization, whether or not it recognizes a legal obligation to do so; and furthermore, that a number of the expenditures of the Organization are in fact financed partly and, in certain important cases, even wholly or mainly by voluntary contributions [FN5]. In these circumstances, it is hardly possible to infer from the mere fact that Member States pay, that they necessarily admit in all cases a positive legal obligation to do so; and where, as has not infrequently occurred, they have only paid under or after protest, the easier inference is that this was because, for whatever reason (by no means necessarily consciousness of legal obligation) they were unwilling in the last resort to withhold a contribution.

Nevertheless, while the existence of these considerations renders it impossible to regard the practice of the United Nations as conclusive in the matter-(it is indeed the validity of some part of that practice which is put in issue by the present Request)-it cannot be less than very material; and even if a majority vote cannot in the formal sense bind the minority, it can, if consistently exercised in a ***202** particular way, suffice to establish a settled practice which a tribunal can usefully and properly take account of.

IV

Subject to the foregoing reservations (which however go to reasoning only) I agree that the particular expenditures mentioned in the Request rank as expenses of the Organization; but in arriving at that conclusion the Court has failed to indicate in terms (though it may to some extent have implied) what are the general limitations of principle within which any given expenditure can rank as an expense of the Organization; and this is something which I think an advisory opinion on the financial obligations of Member States ought to do, even though it is only their obligations respecting certain particular expenditures that are actually in question.

In my opinion, two-partly overlapping but technically distinct-conditions must be fulfilled before any given expenditure can rank as an expense of the Organization. First, the expenditure must belong to the genus 'expense'-that is to say it must come within the class or category of expenditure normally (and which can in the particular circumstances reasonably be) regarded as having the basic nature of an 'expense' properly so called. A sum of money does not become an expense merely by being expended, or by its expenditure being authorized. Secondly, even if the expenditure in question belongs in principle to the genus 'expense', it must have been validly incurred, for a purpose which was itself valid and legitimate, in order to rank as an expense within the meaning of

Article 17, paragraph 2, involving for Member States an obligation to contribute to it. There will remain a third question, namely, does it follow that because a given expenditure is an 'expense', every Member State is invariably, and irrespective of circumstances, bound to contribute to it according to that Member's apportioned share? I shall indicate in due course why, in my opinion, the answer to this last question is not self- evident.

It will be convenient to deal first with the second of the above-mentioned questions-that of the validity of any given expenditures. This involves issues such as the powers of the authorizing organ, whether the object of the expenditure falls within the scope of the purposes of the Organization, and so forth, which must depend on the particular circumstances of each case, and to which no general solution is possible. In the present case, an affirmative answer on the question of the validity of the expenditures concerned can and must be given, as indicated by the Court. But the important practical point involved is how the validity or invalidity of any given expenditures can be determined if controversy arises, seeing that, as the Court points out, the Assembly is under no obligation to ***203** consult the Court, and, even if consulted, the Court can only render an opinion having a purely advisory character; and moreover, that there exists no other jurisdiction to which compulsory reference can be made and which can also render a binding decision.

The solution propounded by the Court is a twofold one. One aspect is indicated in the statement made in the Opinion (italics added) that 'As anticipated in 1945 ... each organ [sc. of the United Nations] must, in the first place at least, determine its own jurisdiction'-i.e. the scope of its own powers and the validity of their exercise. The phrase which has been italicized in the above citation makes the view which the citation puts forward acceptable up to a certain point. It is no doubt true that any objection to a given exercise of powers, or to action based on the presumed existence of certain powers, must be advanced in the first instance in the organ concerned, and will be subject to a ruling by it, in the form of a motion or resolution adopted by a majority vote.

The real question however, in my view (and the Court does not deal with it), is whether such a ruling would have to be regarded as final. In the course of the oral proceedings, the Court was in effect invited to take the view that this would be the case. It was suggested, for example, that the mere fact that certain expenditures had been actually apportioned by the Assembly, was conclusive as to their validity. Apportionment would certainly be conclusive as to the majority view of the Assembly, but this merely begs the question. It amounts to saying that even if, on an objective and impartial assessment, given expenditures had in fact been invalidly and improperly incurred or authorized, they would nevertheless stand automatically validated by the act of the Assembly in either apportioning them among Member States or, in the event of a challenge, subsequently resolving that the apportionment was good.

This is a view which I am unable to accept. It is too extreme. Moreover, I do not read the Opinion of the Court as going so far. The issues involved clearly transcend the merely financial problem, and even on the financial side they go deeper; for if the Assembly had the power automatically to validate any expenditure, as some Governments appear to have claimed in their written or oral statements, this would mean that, merely by deciding to spend money, the Assembly could, in practice, do almost anything, even something wholly outside its functions, or maybe those of the Organization as a whole. Member States would be bound to contribute, and accordingly a degree of power, if not unlimited, certainly much greater than was ever contemplated in the framing of the Charter, would be placed in the hands of the Assembly. In this way, there could well come about an actual realization of the fears expressed in one of the written statements presented to the Court, possibilities which, otherwise, are perhaps not very serious, so ***204** long as Member States retain at least a last resort right not to pay [FN6].

The problem is to determine what that right consists of and, more particularly, in what conditions it can be exercised. As indicated above, it can only be a right of last resort; for an unlimited right on the part of Member States to withhold contributions at will, on the basis of a mere claim that in their view the expenditures concerned had been improperly

incurred, not only could speedily cause serious disruption, but would also give those Member States which, on the basis of the normal scales of apportionment, are major contributors, a degree of control and veto over the affairs of the United Nations which, equally, can never have been intended in the framing of the Charter to be exercised by these means, or Article 17, paragraph 2, would not be there.

This brings me to the second element in the solution propounded by the Court, and on this aspect of the matter I can concur. The solution is not technically a final one, for as things are at present, means continue to be lacking whereby, in the case of controversy, a decision binding both on the Organization and on Member States can be obtained. In practice the proposition involved will help towards producing a de facto solution. To state it in my own way-when, on the basis of an item which has been regularly placed on the agenda, and has gone through the normal procedural stages, the Assembly, after due discussion, adopts by the necessary two-thirds majority, a resolution authorizing or apportioning certain expenditures incurred, or to be incurred,

ANNEX 6:

Prosecutor v. Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction.

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Before:
Judge Cassese, Presiding
Judge Li
Judge Deschênes
Judge Abi-Saab Judge Sidhwa

Registrar:
Mrs. Dorothee de Sampayo Garrido-Nijgh

Decision of:
2 October 1995

PROSECUTOR

v.

DUSKO TADIC a/k/a "DULE"

DECISION ON THE DEFENCE MOTION FOR INTERLOCUTORY APPEAL ON JURISDICTION

The Office of the Prosecutor:

Mr. Richard Goldstone, Prosecutor
Mr. Grant Niemann
Mr. Alan Tieger
Mr. Michael Keegan
Ms. Brenda Hollis

Counsel for the Accused:

Mr. Michail Wladimiroff
Mr. Alphons Orie
Mr. Milan Vujin
Mr. Krstan Simic

I. INTRODUCTION

A. The Judgement Under Appeal

1. The Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991 (hereinafter "International Tribunal") is seized of an appeal lodged by Appellant the Defence against a judgement rendered by the Trial Chamber II on 10 August 1995. By that judgement, Appellant's motion challenging the jurisdiction of the International Tribunal was denied.

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2. Before the Trial Chamber, Appellant had launched a three-pronged attack:

a) illegal foundation of the International Tribunal;
b) wrongful primacy of the International Tribunal over national courts;
c) lack of jurisdiction *ratione materiae.*

The judgement under appeal denied the relief sought by Appellant; in its essential provisions, it reads as follows:

> "THE TRIAL CHAMBER [. . .]HEREBY DISMISSES the motion insofar as it relates to primacy jurisdiction and subject-matter jurisdiction under Articles 2, 3 and 5 and otherwise decides it to be incompetent insofar as it challenges the establishment of the International Tribunal HEREBY DENIES the relief sought by the Defence in its Motion on the Jurisdiction of the Tribunal." (Decision on the Defence Motion on Jurisdiction in the Trial Chamber of the International Tribunal, 10 August 1995 (Case No. IT-94-1-T), at 33 (hereinafter *Decision at Trial*).)

Appellant now alleges error of law on the part of the Trial Chamber.

3. As can readily be seen from the operative part of the judgement, the Trial Chamber took a different approach to the first ground of contestation, on which it refused to rule, from the route it followed with respect to the last two grounds, which it dismissed. This distinction ought to be observed and will be referred to below.
From the development of the proceedings, however, it now appears that the question of jurisdiction has acquired, before this Chamber, a two-tier dimension:

a) the jurisdiction of the Appeals Chamber to hear this appeal;
b) the jurisdiction of the International Tribunal to hear this case on the merits.

Before anything more is said on the merits, consideration must be given to the preliminary question: whether the Appeals Chamber is endowed with the jurisdiction to hear this appeal at all.

B. Jurisdiction Of The Appeals Chamber

4. Article 25 of the Statute of the International Tribunal (Statute of the International Tribunal (originally published as annex to *the Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993)* (U.N. Doc. S/25704) and adopted pursuant to Security Council resolution 827 (25 May 1993) (hereinafter *Statute of the International Tribunal*)) adopted by the United Nations Security Council opens up the possibility of appellate proceedings within the International Tribunal. This provision stands in conformity with the International Covenant on Civil and Political Rights which insists upon a right of appeal (International Covenant on Civil and Political Rights, 19 December 1966, art. 14, para. 5, G.A. Res. 2200 (XXI), 21 U.N. GAOR, Supp. (No. 16) 52, U.N. Doc. A/6316 (1966) (hereinafter *ICCPR*)).

As the Prosecutor of the International Tribunal has acknowledged at the hearing of 7 and 8 September 1995, the Statute is general in nature and the Security Council surely expected that it would be supplemented, where advisable, by the rules which the Judges were mandated to adopt, especially for "*Trials and Appeals*" (Art.15). The Judges did indeed adopt such rules: Part Seven of the Rules of Procedure and Evidence (Rules of Procedure and Evidence, 107-08 (adopted on 11 February 1994 pursuant to Article 15 of the Statute of the International Tribunal, as amended (IT/32/Rev. 5))

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(hereinafter *Rules of Procedure*)).

5. However, Rule 73 had already provided for "*Preliminary Motions by Accused*", including five headings. The first one is: "objections based on lack of jurisdiction." Rule 72 (B) then provides:

> "The Trial Chamber shall dispose of preliminary motions *in limine litis* and without interlocutory appeal, save in the case of dismissal of an objection based on lack of jurisdiction." (Rules of Procedure, Rule 72 (B).)

This is easily understandable and the Prosecutor put it clearly in his argument:

> "I would submit, firstly, that clearly within the four corners of the Statute the Judges must be free to comment, to supplement, to make rules not inconsistent and, to the extent I mentioned yesterday, it would also entitle the Judges to question the Statute and to assure themselves that they can do justice in the international context operating under the Statute. There is no question about that.
>
> Rule 72 goes no further, in my submission, than providing a useful vehicle for achieving - really it is a provision which achieves justice because but for it, one could go through, as Mr. Orie mentioned in a different context, admittedly, yesterday, one could have the unfortunate position of having months of trial, of the Tribunal hearing witnesses only to find out at the appeal stage that, in fact, there should not have been a trial at all because of some lack of jurisdiction for whatever reason.
>
> So it is really a rule of fairness for both sides in a way, but particularly in favour of the accused in order that somebody should not be put to the terrible inconvenience of having to sit through a trial which should not take place. So, it is really like many of the rules that Your Honours and your colleagues made with regard to rules of evidence and procedure. It is to an extent supplementing the Statute, but that is what was intended when the Security Council gave to the Judges the power to make rules. They did it knowing that there were spaces in the Statute that would need to be filled by having rules of procedure and evidence.
>
> [. . .]
>
> So, it is really a rule of convenience and, if I may say so, a sensible rule in the interests of justice, in the interests of both sides and in the interests of the Tribunal as a whole." (Transcript of the Hearing of the Interlocutory Appeal on Jurisdiction, 8 September 1995, at 4 (hereinafter *Appeal Transcript*).)

The question has, however, been put whether the three grounds relied upon by Appellant really go to the jurisdiction of the International Tribunal, in which case only, could they form the basis of an interlocutory appeal. More specifically, can the legality of the foundation of the International Tribunal and its primacy be used as the building bricks of such an appeal?

In his Brief in appeal, at page 2, the Prosecutor has argued in support of a negative answer, based on the distinction between the validity of the creation of the International Tribunal and its jurisdiction. The second aspect alone would be appealable whilst the legality and primacy of the International Tribunal could not be challenged in appeal. (Response to the Motion of the Defence on the Jurisdiction of the Tribunal before the Trial Chamber of the International Tribunal, 7 July 1995 (Case No. IT-94-1-T), at 4 (hereinafter *Prosecutor Trial Brief*).)

6. This narrow interpretation of the concept of jurisdiction, which has been advocated by the Prosecutor and one *amicus curiae*, falls foul of a modern vision of the administration of justice. Such a fundamental matter as the jurisdiction of the International Tribunal should not be kept for decision at the end of a potentially lengthy, emotional and expensive trial. All the grounds of contestation relied upon by Appellant result, in final analysis, in an assessment of the legal capability of the International Tribunal to try his case. What is this, if not in the end a question of jurisdiction? And what body is legally authorized to pass on that issue, if not the Appeals Chamber of the International Tribunal? Indeed - this is by no means conclusive, but interesting nevertheless: were not those questions to be dealt with *in limine litis*, they could obviously be raised on an appeal on the merits. Would the higher interest of justice be served by a decision in favour of the accused, after the latter had undergone what would then have to be branded as an unwarranted trial. After all, in a court of law, common sense ought to be honoured not only when facts are weighed, but equally when laws are surveyed and the proper rule is selected. In the present case, the jurisdiction of this Chamber to hear and dispose of Appellant's interlocutory appeal is indisputable.

C. Grounds Of Appeal

7. The Appeals Chamber has accordingly heard the parties on all points raised in the written pleadings. It has also read the *amicus curiae* briefs submitted by *Juristes sans Frontières* and the Government of the United States of America, to whom it expresses its gratitude.

8. Appellant has submitted two successive Briefs in appeal. The second Brief was late but, in the absence of any objection by the Prosecutor, the Appeals Chamber granted the extension of time requested by Appellant under Rule 116.
The second Brief tends essentially to bolster the arguments developed by Appellant in his original Brief. They are offered under the following headings:

a) unlawful establishment of the International Tribunal;
b) unjustified primacy of the International Tribunal over competent domestic courts;
c) lack of subject-matter jurisdiction.

The Appeals Chamber proposes to examine each of the grounds of appeal in the order in which they are raised by Appellant.

II. UNLAWFUL ESTABLISHMENT OF THE INTERNATIONAL TRIBUNAL

9. The first ground of appeal attacks the validity of the establishment of the International Tribunal.

A. Meaning Of Jurisdiction

10. In discussing the Defence plea to the jurisdiction of the International Tribunal on grounds of invalidity of its establishment by the Security Council, the Trial Chamber declared:

> "There are clearly enough matters of jurisdiction which are open to determination by the International Tribunal, questions of time, place and nature of an offence charged. These are properly described as jurisdictional, whereas the validity of the creation of the International Tribunal is not truly a matter of jurisdiction but rather the lawfulness of its creation [. . .]" (Decision at Trial, at para. 4.)

There is a *petitio principii* underlying this affirmation and it fails to explain the criteria by which it the

Trial Chamber disqualifies the plea of invalidity of the establishment of the International Tribunal as a plea to jurisdiction. What is more important, that proposition implies a narrow concept of jurisdiction reduced to pleas based on the limits of its scope in time and space and as to persons and subject-matter (*ratione temporis, loci, personae and materiae*). But jurisdiction is not merely an ambit or sphere (better described in this case as "competence"); it is basically - as is visible from the Latin origin of the word itself, *jurisdictio* - a legal power, hence necessarily a legitimate power, "to state the law" (*dire le droit*) within this ambit, in an authoritative and final manner.

This is the meaning which it carries in all legal systems. Thus, historically, in common law, the **Termes de la ley** provide the following definition:

> "jurisdiction' is a dignity which a man hath by a power to do justice in causes of complaint made before him." (Stroud's Judicial Dictionary, 1379 (5th ed. 1986).)

The same concept is found even in current dictionary definitions:

> "[Jurisdiction] is the power of a court to decide a matter in controversy and presupposes the existence of a duly constituted court with control over the subject matter and the parties." Black's Law Dictionary, 712 (6th ed. 1990) (citing Pinner v. Pinner, 33 N.C. App. 204, 234 S.E.2d 633).)

11. A narrow concept of jurisdiction may, perhaps, be warranted in a national context but not in international law. International law, because it lacks a centralized structure, does not provide for an integrated judicial system operating an orderly division of labour among a number of tribunals, where certain aspects or components of jurisdiction as a power could be centralized or vested in one of them but not the others. In international law, every tribunal is a self-contained system (unless otherwise provided). This is incompatible with a narrow concept of jurisdiction, which presupposes a certain division of labour. Of course, the constitutive instrument of an international tribunal can limit some of its jurisdictional powers, but only to the extent to which such limitation does not jeopardize its "judicial character", as shall be discussed later on. Such limitations cannot, however, be presumed and, in any case, they cannot be deduced from the concept of jurisdiction itself.

12. In sum, if the International Tribunal were not validly constituted, it would lack the legitimate power to decide in time or space or over any person or subject-matter. The plea based on the invalidity of constitution of the International Tribunal goes to the very essence of jurisdiction as a power to exercise the judicial function within any ambit. It is more radical than, in the sense that it goes beyond and subsumes, all the other pleas concerning the scope of jurisdiction. This issue is a preliminary to and conditions all other aspects of jurisdiction.

B. Admissibility Of Plea Based On The Invalidity Of The Establishment Of The International Tribunal

13. Before the Trial Chamber, the Prosecutor maintained that:

> (1) the International Tribunal lacks authority to review its establishment by the Security Council (Prosecutor Trial Brief, at 10-12); and that in any case
> (2) the question whether the Security Council in establishing the International Tribunal complied with the United Nations Charter raises "political questions" which are "non-justiciable" (id. at 12-14).

The Trial Chamber approved this line of argument.

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This position comprises two arguments: one relating to the power of the International Tribunal to consider such a plea; and another relating to the classification of the subject-matter of the plea as a "political question" and, as such, "non-justiciable", i.e.", regardless of whether or not it falls within its jurisdiction.

1. Does The International Tribunal Have Jurisdiction?

14. In its decision, the Trial Chamber declares:

> "[I]t is one thing for the Security Council to have taken every care to ensure that a structure appropriate to the conduct of fair trials has been created; it is an entirely different thing in any way to infer from that careful structuring that it was intended that the International Tribunal be empowered to question the legality of the law which established it. The competence of the International Tribunal is precise and narrowly defined; as described in Article 1 of its Statute, it is to prosecute persons responsible for serious violations of international humanitarian law, subject to spatial and temporal limits, and to do so in accordance with the Statute. That is the full extent of the competence of the International Tribunal." (Decision at Trial, at para. 8.)

Both the first and the last sentences of this quotation need qualification. The first sentence assumes a subjective stance, considering that jurisdiction can be determined exclusively by reference to or inference from the intention of the Security Council, thus totally ignoring any residual powers which may derive from the requirements of the "judicial function" itself. That is also the qualification that needs to be added to the last sentence.

Indeed, the jurisdiction of the International Tribunal, which is defined in the middle sentence and described in the last sentence as "the full extent of the competence of the International Tribunal", is not, in fact, so. It is what is termed in international law "original" or "primary" and sometimes "substantive" jurisdiction. But it does not include the "incidental" or "inherent" jurisdiction which derives automatically from the exercise of the judicial function.

15. To assume that the jurisdiction of the International Tribunal is absolutely limited to what the Security Council "intended" to entrust it with, is to envisage the International Tribunal exclusively as a "subsidiary organ" of the Security Council (see United Nations Charter, Arts. 7(2) & 29), a "creation" totally fashioned to the smallest detail by its "creator" and remaining totally in its power and at its mercy. But the Security Council not only decided to establish a subsidiary organ (the only legal means available to it for setting up such a body), it also clearly intended to establish a special kind of "subsidiary organ": a tribunal.

16. In treating a similar case in its advisory opinion on the *Effect of Awards of the United Nations Administrative Tribunal,* the International Court of Justice declared:

> "[T]he view has been put forward that the Administrative Tribunal is a subsidiary, subordinate, or secondary organ; and that, accordingly, the Tribunal's judgements cannot bind the General Assembly which established it.
>
> [. . .]
>
> The question cannot be determined on the basis of the description of the relationship between the General Assembly and the Tribunal, that is, by considering whether the Tribunal is to be regarded as a subsidiary, a subordinate, or a secondary organ, or on the basis of the fact that it was

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established by the General Assembly. It depends on the intention of the General Assembly in establishing the Tribunal and on the nature of the functions conferred upon it by its Statute. An examination of the language of the Statute of the Administrative Tribunal has shown that the General Assembly intended to establish a judicial body." (Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, 1954 I.C.J. Reports 47, at 60-1 (Advisory Opinion of 13 July) (hereinafter *Effect of Awards*).)

17. Earlier, the Court had derived the judicial nature of the United Nations Administrative Tribunal ("UNAT") from the use of certain terms and language in the Statute and its possession of certain attributes. Prominent among these attributes of the judicial function figures the power provided for in Article 2, paragraph 3, of the Statute of UNAT:

> "In the event of a dispute as to whether the Tribunal has competence, the matter shall be settled by the decision of the Tribunal." (Id. at 51-2, *quoting* Statute of the United Nations Administrative Tribunal, art. 2, para. 3.)

18. This power, known as the principle of "*Kompetenz-Kompetenz*" in German or "*la compétence de la compétence*" in French, is part, and indeed a major part, of the incidental or inherent jurisdiction of any judicial or arbitral tribunal, consisting of its "jurisdiction to determine its own jurisdiction." It is a necessary component in the exercise of the judicial function and does not need to be expressly provided for in the constitutive documents of those tribunals, although this is often done (see, e.g., Statute of the International Court of Justice, Art. 36, para. 6). But in the words of the International Court of Justice:

> "[T]his principle, which is accepted by the general international law in the matter of arbitration, assumes particular force when the international tribunal is no longer an arbitral tribunal [. . .] but is an institution which has been pre-established by an international instrument defining its jurisdiction and regulating its operation." (Nottebohm Case (Liech. v. Guat.), 1953 I.C.J. Reports 7, 119 (21 March).)

This is not merely a power in the hands of the tribunal. In international law, where there is no integrated judicial system and where every judicial or arbitral organ needs a specific constitutive instrument defining its jurisdiction, "the first obligation of the Court - as of any other judicial body - is to ascertain its own competence." (Judge Cordova, dissenting opinion, advisory opinion on Judgements of the Administrative Tribunal of the I.L.O. upon complaints made against the U.N.E.S.C.O., 1956 I.C.J. Reports, 77, 163 (Advisory Opinion of 23 October)(Cordova, J., dissenting).)

19. It is true that this power can be limited by an express provision in the arbitration agreement or in the constitutive instruments of standing tribunals, though the latter possibility is controversial, particularly where the limitation risks undermining the judicial character or the independence of the Tribunal. But it is absolutely clear that such a limitation, to the extent to which it is admissible, cannot be inferred without an express provision allowing the waiver or the shrinking of such a well-entrenched principle of general international law.
As no such limitative text appears in the Statute of the International Tribunal, the International Tribunal can and indeed has to exercise its "*compétence de la compétence*" and examine the jurisdictional plea of the Defence, in order to ascertain its jurisdiction to hear the case on the merits.

20. It has been argued by the Prosecutor, and held by the Trial Chamber that:

> "[T]his International Tribunal is not a constitutional court set up to scrutinise the actions of organs of the United Nations. It is, on the contrary, a criminal tribunal with clearly defined powers,

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> involving a quite specific and limited criminal jurisdiction. If it is to confine its adjudications to those specific limits, it will have no authority to investigate the legality of its creation by the Security Council." (Decision at Trial, at para. 5; *see also* paras. 7, 8, 9, 17, 24, *passim.*)

There is no question, of course, of the International Tribunal acting as a constitutional tribunal, reviewing the acts of the other organs of the United Nations, particularly those of the Security Council, its own "creator." It was not established for that purpose, as is clear from the definition of the ambit of its "primary" or "substantive" jurisdiction in Articles 1 to 5 of its Statute.

But this is beside the point. The question before the Appeals Chamber is whether the International Tribunal, in exercising this "incidental" jurisdiction, can examine the legality of its establishment by the Security Council, solely for the purpose of ascertaining its own "primary" jurisdiction over the case before it.

21. The Trial Chamber has sought support for its position in some dicta of the International Court of Justice or its individual Judges, (see Decision at Trial, at paras. 10 - 13), to the effect that:

> "Undoubtedly, the Court does not possess powers of judicial review or appeal in respect of decisions taken by the United Nations organs concerned." (Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. Reports 16, at para. 89 (Advisory Opinion of 21 June) (hereafter the *Namibia Advisory Opinion*).)

All these dicta, however, address the hypothesis of the Court exercising such judicial review as a matter of "primary" jurisdiction. They do not address at all the hypothesis of examination of the legality of the decisions of other organs as a matter of "incidental" jurisdiction, in order to ascertain and be able to exercise its "primary" jurisdiction over the matter before it. Indeed, in the *Namibia Advisory Opinion*, immediately after the dictum reproduced above and quoted by the Trial Chamber (concerning its "primary" jurisdiction), the International Court of Justice proceeded to exercise the very same "incidental" jurisdiction discussed here:

> "[T]he question of the validity or conformity with the Charter of General Assembly resolution 2145 (XXI) or of related Security Council resolutions does not form the subject of the request for advisory opinion. However, in the exercise of its judicial function and since objections have been advanced the Court, in the course of its reasoning, will consider these objections before determining any legal consequences arising from those resolutions." (Id. at para. 89.)

The same sort of examination was undertaken by the International Court of Justice, *inter alia,* in its advisory opinion on the *Effect of Awards Case*:

> "[T]he legal power of the General Assembly to establish a tribunal competent to render judgements binding on the United Nations has been challenged. Accordingly, it is necessary to consider whether the General Assembly has been given this power by the Charter." (Effect of Awards, at 56.)

Obviously, the wider the discretion of the Security Council under the Charter of the United Nations, the narrower the scope for the International Tribunal to review its actions, even as a matter of incidental jurisdiction. Nevertheless, this does not mean that the power disappears altogether, particularly in cases where there might be a manifest contradiction with the Principles and Purposes of the Charter.

22. In conclusion, the Appeals Chamber finds that the International Tribunal has jurisdiction to examine the plea against its jurisdiction based on the invalidity of its establishment by the Security Council.

2. Is The Question At Issue Political And As Such Non-Justiciable?

23. The Trial Chamber accepted this argument and classification. (See Decision at Trial, at para. 24.)

24. The doctrines of "political questions" and "non-justiciable disputes" are remnants of the reservations of "sovereignty", "national honour", etc. in very old arbitration treaties. They have receded from the horizon of contemporary international law, except for the occasional invocation of the "political question" argument before the International Court of Justice in advisory proceedings and, very rarely, in contentious proceedings as well.

The Court has consistently rejected this argument as a bar to examining a case. It considered it unfounded in law. As long as the case before it or the request for an advisory opinion turns on a legal question capable of a legal answer, the Court considers that it is duty-bound to take jurisdiction over it, regardless of the political background or the other political facets of the issue. On this question, the International Court of Justice declared in its advisory opinion on *Certain Expenses of the United Nations:*

> "[I]t has been argued that the question put to the Court is intertwined with political questions, and that for this reason the Court should refuse to give an opinion. It is true that most interpretations of the Charter of the United Nations will have political significance, great or small. In the nature of things it could not be otherwise. The Court, however, cannot attribute a political character to a request which invites it to undertake an essentially judicial task, namely, the interpretation of a treaty provision." (Certain Expenses of the United Nations, 1962 I.C.J. Reports 151, at 155 (Advisory Opinion of 20 July).)

This dictum applies almost literally to the present case.

25. The Appeals Chamber does not consider that the International Tribunal is barred from examination of the Defence jurisdictional plea by the so-called "political" or "non-justiciable" nature of the issue it raises.

C. The Issue Of Constitutionality

26. Many arguments have been put forward by Appellant in support of the contention that the establishment of the International Tribunal is invalid under the Charter of the United Nations or that it was not duly established by law. Many of these arguments were presented orally and in written submissions before the Trial Chamber. Appellant has asked this Chamber to incorporate into the argument before the Appeals Chamber all the points made at trial. (See Appeal Transcript, 7 September 1995, at 7.) Apart from the issues specifically dealt with below, the Appeals Chamber is content to allow the treatment of these issues by the Trial Chamber to stand.

27. The Trial Chamber summarized the claims of the Appellant as follows:

> "It is said that, to be duly established by law, the International Tribunal should have been created either by treaty, the consensual act of nations, or by amendment of the Charter of the United Nations, not by resolution of the Security Council. Called in aid of this general proposition are a number of considerations: that before the creation of the International Tribunal in 1993 it was

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never envisaged that such an ad hoc criminal tribunal might be set up; that the General Assembly, whose participation would at least have guaranteed full representation of the international community, was not involved in its creation; that it was never intended by the Charter that the Security Council should, under Chapter VII, establish a judicial body, let alone a criminal tribunal; that the Security Council had been inconsistent in creating this Tribunal while not taking a similar step in the case of other areas of conflict in which violations of international humanitarian law may have occurred; that the establishment of the International Tribunal had neither promoted, nor was capable of promoting, international peace, as the current situation in the former Yugoslavia demonstrates; that the Security Council could not, in any event, create criminal liability on the part of individuals and that this is what its creation of the International Tribunal did; that there existed and exists no such international emergency as would justify the action of the Security Council; that no political organ such as the Security Council is capable of establishing an independent and impartial tribunal; that there is an inherent defect in the creation, after the event, of ad hoc tribunals to try particular types of offences and, finally, that to give the International Tribunal primacy over national courts is, in any event and in itself, inherently wrong." (Decision at Trial, at para. 2.)

These arguments raise a series of constitutional issues which all turn on the limits of the power of the Security Council under Chapter VII of the Charter of the United Nations and determining what action or measures can be taken under this Chapter, particularly the establishment of an international criminal tribunal. Put in the interrogative, they can be formulated as follows:

1. was there really a threat to the peace justifying the invocation of Chapter VII as a legal basis for the establishment of the International Tribunal?
2. assuming such a threat existed, was the Security Council authorized, with a view to restoring or maintaining peace, to take any measures at its own discretion, or was it bound to choose among those expressly provided for in Articles 41 and 42 (and possibly Article 40 as well)?
3. in the latter case, how can the establishment of an international criminal tribunal be justified, as it does not figure among the ones mentioned in those Articles, and is of a different nature?

1. The Power Of The Security Council To Invoke Chapter VII

28. Article 39 opens Chapter VII of the Charter of the United Nations and determines the conditions of application of this Chapter. It provides:

"The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security." (United Nations Charter, 26 June 1945, Art. 39.)

It is clear from this text that the Security Council plays a pivotal role and exercises a very wide discretion under this Article. But this does not mean that its powers are unlimited. The Security Council is an organ of an international organization, established by a treaty which serves as a constitutional framework for that organization. The Security Council is thus subjected to certain constitutional limitations, however broad its powers under the constitution may be. Those powers cannot, in any case, go beyond the limits of the jurisdiction of the Organization at large, not to mention other specific limitations or those which may derive from the internal division of power within the Organization. In any case, neither the text nor the spirit of the Charter conceives of the Security Council as *legibus solutus* (unbound by law).

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In particular, Article 24, after declaring, in paragraph 1, that the Members of the United Nations "confer on the Security Council primary responsibility for the maintenance of international peace and security", imposes on it, in paragraph 3, the obligation to report annually (or more frequently) to the General Assembly, and provides, more importantly, in paragraph 2, that:

> "In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII." (Id., Art. 24(2).)

The Charter thus speaks the language of specific powers, not of absolute fiat.

29. What is the extent of the powers of the Security Council under Article 39 and the limits thereon, if any?

The Security Council plays the central role in the application of both parts of the Article. It is the Security Council that makes the **determination** that there exists one of the situations justifying the use of the "exceptional powers" of Chapter VII. And it is also the Security Council that chooses the reaction to such a situation: it either makes **recommendations (i.e.,** opts not to use the exceptional powers but to continue to operate under Chapter VI) or decides to use the exceptional powers by ordering measures to be taken in accordance with Articles 41 and 42 with a view to maintaining or restoring international peace and security.
The situations justifying resort to the powers provided for in Chapter VII are a "threat to the peace", a "breach of the peace" or an "act of aggression." While the "act of aggression" is more amenable to a legal determination, the "threat to the peace" is more of a political concept. But the determination that there exists such a threat is not a totally unfettered discretion, as it has to remain, at the very least, within the limits of the Purposes and Principles of the Charter.

30. It is not necessary for the purposes of the present decision to examine any further the question of the limits of the discretion of the Security Council in determining the existence of a "threat to the peace", for two reasons.

The first is that an armed conflict (or a series of armed conflicts) has been taking place in the territory of the former Yugoslavia since long before the decision of the Security Council to establish this International Tribunal. If it is considered an international armed conflict, there is no doubt that it falls within the literal sense of the words "breach of the peace" (between the parties or, at the very least, would be a as a "threat to the peace" of others).

But even if it were considered merely as an "internal armed conflict", it would still constitute a "threat to the peace" according to the settled practice of the Security Council and the common understanding of the United Nations membership in general. Indeed, the practice of the Security Council is rich with cases of civil war or internal strife which it classified as a "threat to the peace" and dealt with under Chapter VII, with the encouragement or even at the behest of the General Assembly, such as the Congo crisis at the beginning of the 1960s and, more recently, Liberia and Somalia. It can thus be said that there is a common understanding, manifested by the "subsequent practice" of the membership of the United Nations at large, that the "threat to the peace" of Article 39 may include, as one of its species, internal armed conflicts.

The second reason, which is more particular to the case at hand, is that Appellant has amended his position from that contained in the Brief submitted to the Trial Chamber. Appellant no longer contests the Security Council's power to determine whether the situation in the former Yugoslavia constituted a

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threat to the peace, nor the determination itself. He further acknowledges that the Security Council "has the power to address to such threats [. . .] by appropriate measures." [Defence] Brief to Support the Notice of (Interlocutory) Appeal, 25 August 1995 (Case No. IT-94-1-AR72), at para. 5.4 (hereinafter *Defence Appeal Brief*).) But he continues to contest the legality and appropriateness of the measures chosen by the Security Council to that end.

2. The Range of Measures Envisaged Under Chapter VII

31. Once the Security Council determines that a particular situation poses a threat to the peace or that there exists a breach of the peace or an act of aggression, it enjoys a wide margin of discretion in choosing the course of action: as noted above (see para. 29) it can either continue, in spite of its determination, to act via recommendations, i.e., as if it were still within Chapter VI ("*Pacific Settlement of Disputes*") or it can exercise its exceptional powers under Chapter VII. In the words of Article 39, it would then "decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security." (United Nations Charter, art. 39.)

A question arises in this respect as to whether the choice of the Security Council is limited to the measures provided for in Articles 41 and 42 of the Charter (as the language of Article 39 suggests), or whether it has even larger discretion in the form of general powers to maintain and restore international peace and security under Chapter VII at large. In the latter case, one of course does not have to locate every measure decided by the Security Council under Chapter VII within the confines of Articles 41 and 42, or possibly Article 40. In any case, under both interpretations, the Security Council has a broad discretion in deciding on the course of action and evaluating the appropriateness of the measures to be taken. The language of Article 39 is quite clear as to the channelling of the very broad and exceptional powers of the Security Council under Chapter VII through Articles 41 and 42. These two Articles leave to the Security Council such a wide choice as not to warrant searching, on functional or other grounds, for even wider and more general powers than those already expressly provided for in the Charter.

These powers are **coercive** *vis-à-vis* the culprit State or entity. But they are also **mandatory** *vis-à-vis* the other Member States, who are under an obligation to cooperate with the Organization (Article 2, paragraph 5, Articles 25, 48) and with one another (Articles 49), in the implementation of the action or measures decided by the Security Council.

3. The Establishment Of The International Tribunal As A Measure Under Chapter VII

32. As with the determination of the existence of a threat to the peace, a breach of the peace or an act of aggression, the Security Council has a very wide margin of discretion under Article 39 to choose the appropriate course of action and to evaluate the suitability of the measures chosen, as well as their potential contribution to the restoration or maintenance of peace. But here again, this discretion is not unfettered; moreover, it is limited to the measures provided for in Articles 41 and 42. Indeed, in the case at hand, this last point serves as a basis for the Appellant's contention of invalidity of the establishment of the International Tribunal.

In its resolution 827, the Security Council considers that "in the particular circumstances of the former Yugoslavia", the establishment of the International Tribunal "would contribute to the restoration and maintenance of peace" and indicates that, in establishing it, the Security Council was acting under Chapter VII (S.C. Res. 827, U.N. Doc. S/RES/827 (1993)). However, it did not specify a particular Article as a basis for this action.

Appellant has attacked the legality of this decision at different stages before the Trial Chamber as well

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as before this Chamber on at least three grounds:

> a) that the establishment of such a tribunal was never contemplated by the framers of the Charter as one of the measures to be taken under Chapter VII; as witnessed by the fact that it figures nowhere in the provisions of that Chapter, and more particularly in Articles 41 and 42 which detail these measures;
>
> b) that the Security Council is constitutionally or inherently incapable of creating a judicial organ, as it is conceived in the Charter as an executive organ, hence not possessed of judicial powers which can be exercised through a subsidiary organ;
>
> c) that the establishment of the International Tribunal has neither promoted, nor was capable of promoting, international peace, as demonstrated by the current situation in the former Yugoslavia.

(a) What Article of Chapter VII Serves As A Basis For The Establishment Of A Tribunal?

33. The establishment of an international criminal tribunal is not expressly mentioned among the enforcement measures provided for in Chapter VII, and more particularly in Articles 41 and 42.

Obviously, the establishment of the International Tribunal is not a measure under Article 42, as these are measures of a military nature, implying the use of armed force. Nor can it be considered a "provisional measure" under Article 40. These measures, as their denomination indicates, are intended to act as a "holding operation", producing a "stand-still" or a "cooling-off" effect, "without prejudice to the rights, claims or position of the parties concerned." (United Nations Charter, art. 40.) They are akin to emergency police action rather than to the activity of a judicial organ dispensing justice according to law. Moreover, not being enforcement action, according to the language of Article 40 itself ("before making the recommendations or deciding upon the measures provided for in Article 39"), such provisional measures are subject to the Charter limitation of Article 2, paragraph 7, and the question of their mandatory or recommendatory character is subject to great controversy; all of which renders inappropriate the classification of the International Tribunal under these measures.

34. *Prima facie*, the International Tribunal matches perfectly the description in Article 41 of "measures not involving the use of force." Appellant, however, has argued before both the Trial Chamber and this Appeals Chamber, that:"

> ...[I]t is clear that the establishment of a war crimes tribunal was not intended. The examples mentioned in this article focus upon economic and political measures and do not in any way suggest judicial measures." (Brief to Support the Motion [of the Defence] on the Jurisdiction of the Tribunal before the Trial Chamber of the International Tribunal, 23 June 1995 (Case No. IT-94-1-T), at para. 3.2.1 (hereinafter *Defence Trial Brief*).)

It has also been argued that the measures contemplated under Article 41 are all measures to be undertaken by Member States, which is not the case with the establishment of the International Tribunal.

35. The first argument does not stand by its own language. Article 41 reads as follows:"

> The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the

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severance of diplomatic relations." (United Nations Charter, art. 41.)

It is evident that the measures set out in Article 41 are merely illustrative **examples** which obviously do not exclude other measures. All the Article requires is that they do not involve "the use of force." It is a negative definition.

That the examples do not suggest judicial measures goes some way towards the other argument that the Article does not contemplate institutional measures implemented directly by the United Nations through one of its organs but, as the given examples suggest, only action by Member States, such as economic sanctions (though possibly coordinated through an organ of the Organization). However, as mentioned above, nothing in the Article suggests the limitation of the measures to those implemented by States. The Article only prescribes what these measures cannot be. Beyond that it does not say or suggest what they have to be.

Moreover, even a simple literal analysis of the Article shows that the first phrase of the first sentence carries a very general prescription which can accommodate both institutional and Member State action. The second phrase can be read as referring particularly to one species of this very large category of measures referred to in the first phrase, but not necessarily the only one, namely, measures undertaken directly by States. It is also clear that the second sentence, starting with "These [measures]" not "Those [measures]", refers to the species mentioned in the second phrase rather than to the "genus" referred to in the first phrase of this sentence.

36. Logically, if the Organization can undertake measures which have to be implemented through the intermediary of its Members, it can a fortiori undertake measures which it can implement directly via its organs, if it happens to have the resources to do so. It is only for want of such resources that the United Nations has to act through its Members. But it is of the essence of "collective measures" that they are collectively undertaken. Action by Member States on behalf of the Organization is but a poor substitute *faute de mieux,* or a "second best" for want of the first. This is also the pattern of Article 42 on measures involving the use of armed force.

In sum, the establishment of the International Tribunal falls squarely within the powers of the Security Council under Article 41.

(b) Can The Security Council Establish A Subsidiary Organ With Judicial Powers?

37. The argument that the Security Council, not being endowed with judicial powers, cannot establish a subsidiary organ possessed of such powers is untenable: it results from a fundamental misunderstanding of the constitutional set-up of the Charter.

Plainly, the Security Council is not a judicial organ and is not provided with judicial powers (though it may incidentally perform certain quasi-judicial activities such as effecting determinations or findings). The principal function of the Security Council is the maintenance of international peace and security, in the discharge of which the Security Council exercises both decision-making and executive powers.

38. The establishment of the International Tribunal by the Security Council does not signify, however, that the Security Council has delegated to it some of its own functions or the exercise of some of its own powers. Nor does it mean, in reverse, that the Security Council was usurping for itself part of a judicial function which does not belong to it but to other organs of the United Nations according to the Charter. The Security Council has resorted to the establishment of a judicial organ in the form of an international criminal tribunal as an instrument for the exercise of its own principal function of maintenance of peace

and security, i.e., as a measure contributing to the restoration and maintenance of peace in the former Yugoslavia.

The General Assembly did not need to have military and police functions and powers in order to be able to establish the United Nations Emergency Force in the Middle East ("UNEF") in 1956. Nor did the General Assembly have to be a judicial organ possessed of judicial functions and powers in order to be able to establish UNAT. In its advisory opinion in the *Effect of Awards,* the International Court of Justice, in addressing practically the same objection, declared:

> "[T]he Charter does not confer judicial functions on the General Assembly [. . .] By establishing the Administrative Tribunal, the General Assembly was not delegating the performance of its own functions: it was exercising a power which it had under the Charter to regulate staff relations." (Effect of Awards, at 61.)

(c) Was The Establishment Of The International Tribunal An Appropriate Measure?

39. The third argument is directed against the discretionary power of the Security Council in evaluating the appropriateness of the chosen measure and its effectiveness in achieving its objective, the restoration of peace.

Article 39 leaves the choice of means and their evaluation to the Security Council, which enjoys wide discretionary powers in this regard; and it could not have been otherwise, as such a choice involves political evaluation of highly complex and dynamic situations.

It would be a total misconception of what are the criteria of legality and validity in law to test the legality of such measures *ex post facto* by their success or failure to achieve their ends (in the present case, the restoration of peace in the former Yugoslavia, in quest of which the establishment of the International Tribunal is but one of many measures adopted by the Security Council).

40. For the aforementioned reasons, the Appeals Chamber considers that the International Tribunal has been lawfully established as a measure under Chapter VII of the Charter.

4. Was The Establishment Of The International Tribunal Contrary To The General Principle Whereby Courts Must Be "Established By Law"?

41. Appellant challenges the establishment of the International Tribunal by contending that it has not been established by law. The entitlement of an individual to have a criminal charge against him determined by a tribunal which has been established by law is provided in Article 14, paragraph 1, of the International Covenant on Civil and Political Rights. It provides: "

> In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law." (ICCPR, art. 14, para. 1.)

Similar provisions can be found in Article 6(1) of the European Convention on Human Rights, which states: "

> In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law [. . .]"(European Convention for the Protection of Human

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> Rights and Fundamental Freedoms, 4 November 1950, art. 6, para. 1, 213 U.N.T.S. 222 (hereinafter ECHR))

and in Article 8(1) of the American Convention on Human Rights, which provides: "

> Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent and impartial tribunal, previously established by law." (American Convention on Human Rights, 22 November 1969, art. 8, para. 1, O.A.S. Treaty Series No. 36, at 1, O.A.S. Off. Rec. OEA/Ser. L/V/II.23 doc. rev. 2 (hereinafter ACHR).)"

Appellant argues that the right to have a criminal charge determined by a tribunal established by law is one which forms part of international law as a "general principle of law recognized by civilized nations", one of the sources of international law in Article 38 of the Statute of the International Court of Justice. In support of this assertion, Appellant emphasises the fundamental nature of the "fair trial" or "due process" guarantees afforded in the International Covenant on Civil and Political Rights, the European Convention on Human Rights and the American Convention on Human Rights. Appellant asserts that they are minimum requirements in international law for the administration of criminal justice.

42. For the reasons outlined below, Appellant has not satisfied this Chamber that the requirements laid down in these three conventions must apply not only in the context of national legal systems but also with respect to proceedings conducted before an international court. This Chamber is, however, satisfied that the principle that a tribunal must be established by law, as explained below, is a general principle of law imposing an international obligation which only applies to the administration of criminal justice in a municipal setting. It follows from this principle that it is incumbent on all States to organize their system of criminal justice in such a way as to ensure that all individuals are guaranteed the right to have a criminal charge determined by a tribunal established by law. This does not mean, however, that, by contrast, an international criminal court could be set up at the mere whim of a group of governments. Such a court ought to be rooted in the rule of law and offer all guarantees embodied in the relevant international instruments. Then the court may be said to be "established by law."

43. Indeed, there are three possible interpretations of the term "established by law." First, as Appellant argues, "established by law" could mean established by a legislature. Appellant claims that the International Tribunal is the product of a "mere executive order" and not of a "decision making process under democratic control, necessary to create a judicial organisation in a democratic society." Therefore Appellant maintains that the International Tribunal not been "established by law." (Defence Appeal Brief, at para. 5.4.)

The case law applying the words "established by law" in the European Convention on Human Rights has favoured this interpretation of the expression. This case law bears out the view that the relevant provision is intended to ensure that tribunals in a democratic society must not depend on the discretion of the executive; rather they should be regulated by law emanating from Parliament. (See Zand v. Austria, App. No. 7360/76, 15 Eur. Comm'n H.R. Dec. & Rep. 70, at 80 (1979); Piersack v. Belgium, App. No. 8692/79, 47 Eur. Ct. H.R. (ser. B) at 12 (1981); Crociani, Palmiotti, Tanassi and D'Ovidio v. Italy, App. Nos. 8603/79, 8722/79, 8723/79 & 8729/79 (joined) 22 Eur. Comm'n H.R. Dec. & Rep. 147, at 219 (1981).)

Or, put another way, the guarantee is intended to ensure that the administration of justice is not a matter of executive discretion, but is regulated by laws made by the legislature.

It is clear that the legislative, executive and judicial division of powers which is largely followed in most

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municipal systems does not apply to the international setting nor, more specifically, to the setting of an international organization such as the United Nations. Among the principal organs of the United Nations the divisions between judicial, executive and legislative functions are not clear cut. Regarding the judicial function, the International Court of Justice is clearly the "principal judicial organ" (*see* United Nations Charter, art. 92). There is, however, no legislature, in the technical sense of the term, in the United Nations system and, more generally, no Parliament in the world community. That is to say, there exists no corporate organ formally empowered to enact laws directly binding on international legal subjects.

It is clearly impossible to classify the organs of the United Nations into the above-discussed divisions which exist in the national law of States. Indeed, Appellant has agreed that the constitutional structure of the United Nations does not follow the division of powers often found in national constitutions. Consequently the separation of powers element of the requirement that a tribunal be "established by law" finds no application in an international law setting. The aforementioned principle can only impose an obligation on States concerning the functioning of their own national systems.

44. A second possible interpretation is that the words "established by law" refer to establishment of international courts by a body which, though not a Parliament, has a limited power to take binding decisions. In our view, one such body is the Security Council when, acting under Chapter VII of the United Nations Charter, it makes decisions binding by virtue of Article 25 of the Charter.

According to Appellant, however, there must be something more for a tribunal to be "established by law." Appellant takes the position that, given the differences between the United Nations system and national division of powers, discussed above, the conclusion must be that the United Nations system is not capable of creating the International Tribunal unless there is an amendment to the United Nations Charter. We disagree. It does not follow from the fact that the United Nations has no legislature that the Security Council is not empowered to set up this International Tribunal if it is acting pursuant to an authority found within its constitution, the United Nations Charter. As set out above (paras. 28-40) we are of the view that the Security Council was endowed with the power to create this International Tribunal as a measure under Chapter VII in the light of its determination that there exists a threat to the peace.

In addition, the establishment of the International Tribunal has been repeatedly approved and endorsed by the "representative" organ of the United Nations, the General Assembly: this body not only participated in its setting up, by electing the Judges and approving the budget, but also expressed its satisfaction with, and encouragement of the activities of the International Tribunal in various resolutions. (See G.A. Res. 48/88 (20 December 1993) and G.A. Res. 48/143 (20 December 1993), G.A. Res. 49/10 (8 November 1994) and G.A. Res. 49/205 (23 December 1994).)

45. The third possible interpretation of the requirement that the International Tribunal be "established by law" is that its establishment must be in accordance with the rule of law. This appears to be the most sensible and most likely meaning of the term in the context of international law. For a tribunal such as this one to be established according to the rule of law, it must be established in accordance with the proper international standards; it must provide all the guarantees of fairness, justice and even-handedness, in full conformity with internationally recognized human rights instruments.

This interpretation of the guarantee that a tribunal be "established by law" is borne out by an analysis of the International Covenant on Civil and Political Rights. As noted by the Trial Chamber, at the time Article 14 of the International Covenant on Civil and Political Rights was being drafted, it was sought, unsuccessfully, to amend it to require that tribunals should be "pre-established" by law and not merely "established by law" (Decision at Trial, at para. 34). Two similar proposals to this effect were made (one

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by the representative of Lebanon and one by the representative of Chile); if adopted, their effect would have been to prevent all *ad hoc* tribunals. In response, the delegate from the Philippines noted the disadvantages of using the language of "pre-established by law":

> "If [the Chilean or Lebanese proposal was approved], a country would never be able to reorganize its tribunals. Similarly it could be claimed that the Nürnberg tribunal was not in existence at the time the war criminals had committed their crimes." (*See* E/CN.4/SR 109. United Nations Economic and Social Council, Commission on Human Rights, 5th Sess., Sum. Rec. 8 June 1949, U.N. Doc. 6.)

As noted by the Trial Chamber in its Decision, there is wide agreement that, in most respects, the International Military Tribunals at Nuremberg and Tokyo gave the accused a fair trial in a procedural sense (Decision at Trial, at para. 34). The important consideration in determining whether a tribunal has been "established by law" is not whether it was pre-established or established for a specific purpose or situation; what is important is that it be set up by a competent organ in keeping with the relevant legal procedures, and should that it observes the requirements of procedural fairness.

This concern about *ad hoc* tribunals that function in such a way as not to afford the individual before them basic fair trial guarantees also underlies United Nations Human Rights Committee's interpretation of the phrase "established by law" contained in Article 14, paragraph 1, of the International Covenant on Civil and Political Rights. While the Human Rights Committee has not determined that "extraordinary" tribunals or "special" courts are incompatible with the requirement that tribunals be established by law, it has taken the position that the provision is intended to ensure that any court, be it "extraordinary" or not, should genuinely afford the accused the full guarantees of fair trial set out in Article 14 of the International Covenant on Civil and Political Rights. (See General Comment on Article 14, H.R. Comm. 43rd Sess., Supp. No. 40, at para. 4, U.N. Doc. A/43/40 (1988), Cariboni v. Uruguay H.R.Comm. 159/83. 39th Sess. Supp. No. 40 U.N. Doc. A/39/40.) A similar approach has been taken by the Inter-American Commission. (*See*, e.g., Inter-Am C.H.R., Annual Report 1972, OEA/Ser. P, AG/doc. 305/73 rev. 1, 14 March 1973, at 1; Inter-Am C.H.R., Annual Report 1973, OEA/Ser. P, AG/doc. 409/174, 5 March 1974, at 2-4.) The practice of the Human Rights Committee with respect to State reporting obligations indicates its tendency to scrutinise closely "special" or "extraordinary" criminal courts in order to ascertain whether they ensure compliance with the fair trial requirements of Article 14.

46. An examination of the Statute of the International Tribunal, and of the Rules of Procedure and Evidence adopted pursuant to that Statute leads to the conclusion that it has been established in accordance with the rule of law. The fair trial guarantees in Article 14 of the International Covenant on Civil and Political Rights have been adopted almost verbatim in Article 21 of the Statute. Other fair trial guarantees appear in the Statute and the Rules of Procedure and Evidence. For example, Article 13, paragraph 1, of the Statute ensures the high moral character, impartiality, integrity and competence of the Judges of the International Tribunal, while various other provisions in the Rules ensure equality of arms and fair trial.

47. In conclusion, the Appeals Chamber finds that the International Tribunal has been established in accordance with the appropriate procedures under the United Nations Charter and provides all the necessary safeguards of a fair trial. It is thus "established by law."

48. The first ground of Appeal: unlawful establishment of the International Tribunal, is accordingly dismissed.

III. UNJUSTIFIED PRIMACY OF THE INTERNATIONAL TRIBUNAL OVER COMPETENT

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DOMESTIC COURTS

49. The second ground of appeal attacks the primacy of the International Tribunal over national courts.

50. This primacy is established by Article 9 of the Statute of the International Tribunal, which provides:

"Concurrent jurisdiction

> 1. The International Tribunal and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991.
>
> 2. *The International Tribunal shall have primacy over national courts.* At any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal." (Emphasis added.)

Appellant's submission is material to the issue, inasmuch as Appellant is expected to stand trial before this International Tribunal as a consequence of a request for deferral which the International Tribunal submitted to the Government of the Federal Republic of Germany on 8 November 1994 and which this Government, as it was bound to do, agreed to honour by surrendering Appellant to the International Tribunal. (United Nations Charter, art. 25, 48 & 49; Statute of the Tribunal, art. 29.2(e); Rules of Procedure, Rule 10.)

In relevant part, Appellant's motion alleges: " [The International Tribunal's] primacy over domestic courts constitutes an infringement upon the sovereignty of the States directly affected." ([Defence] Motion on the Jurisdiction of the Tribunal, 23 June 1995 (Case No. IT-94-1-T), at para. 2.)

Appellant's Brief in support of the motion before the Trial Chamber went into further details which he set down under three headings:

(a) domestic jurisdiction;

(b) sovereignty of States;

(c) *jus de non evocando.*

The Prosecutor has contested each of the propositions put forward by Appellant. So have two of the *amicus curiae*, one before the Trial Chamber, the other in appeal.

The Trial Chamber has analysed Appellant's submissions and has concluded that they cannot be entertained.

51. Before this Chamber, Appellant has somewhat shifted the focus of his approach to the question of primacy. It seems fair to quote here Appellant's Brief in appeal:

> "The defence submits that the Trial Chamber should have denied it's [sic] competence to exercise primary jurisdiction while the accused was at trial in the Federal Republic of Germany and the German judicial authorities were adequately meeting their obligations under international law." (Defence Appeal Brief, at para. 7.5.)

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However, the three points raised in first instance were discussed at length by the Trial Chamber and, even though not specifically called in aid by Appellant here, are nevertheless intimately intermingled when the issue of primacy is considered. The Appeals Chamber therefore proposes to address those three points but not before having dealt with an apparent confusion which has found its way into Appellant's brief.

52. In paragraph 7.4 of his Brief, Appellant states that "the accused was diligently prosecuted by the German judicial authorities"(*id.*, at para 7.4 (Emphasis added)). In paragraph 7.5 Appellant returns to the period "while the accused was at trial." (*id.*, at para 7.5 (Emphasis added.)
These statements are not in agreement with the findings of the Trial Chamber I in its decision on deferral of 8 November 1994:

> "The Prosecutor asserts, and it is not disputed by the Government of the Federal Republic of Germany, nor by the Counsel for Du{ko Tadic, that the said Du{ko Tadic is the subject of an *investigation* instituted by the national courts of the Federal Republic of Germany in respect of the matters listed in paragraph 2 hereof." (Decision of the Trial Chamber on the Application by the Prosecutor for a Formal Request for Deferral to the Competence of the International Tribunal in the Matter of Du{ko Tadic, 8 November 1994 (Case No. IT-94-1-D), at 8 (Emphasis added).)

There is a distinct difference between an investigation and a trial. The argument of Appellant, based erroneously on the existence of an actual trial in Germany, cannot be heard in support of his challenge to jurisdiction when the matter has not yet passed the stage of investigation.

But there is more to it. Appellant insists repeatedly (*see* Defence Appeal Brief, at paras. 7.2 & 7.4) on impartial and independent proceedings diligently pursued and not designed to shield the accused from international criminal responsibility. One recognises at once that this vocabulary is borrowed from Article 10, paragraph 2, of the Statute. This provision has nothing to do with the present case. This is not an instance of an accused being tried anew by this International Tribunal, under the exceptional circumstances described in Article 10 of the Statute. Actually, the proceedings against Appellant were deferred to the International Tribunal on the strength of Article 9 of the Statute which provides that a request for deferral may be made "at any stage of the procedure" (Statute of the International Tribunal, art. 9, para. 2). The Prosecutor has never sought to bring Appellant before the International Tribunal for a new trial for the reason that one or the other of the conditions enumerated in Article 10 would have vitiated his trial in Germany. Deferral of the proceedings against Appellant was requested in accordance with the procedure set down in Rule 9 (iii):

> "What is in issue is closely related to, or otherwise involves, significant factual or legal questions which may have implications for investigations or prosecutions before the Tribunal [. . .]" (Rules of Procedure, Rule 9 (iii).)

After the Trial Chamber had found that that condition was satisfied, the request for deferral followed automatically. The conditions alleged by Appellant in his Brief were irrelevant.

Once this approach is rectified, Appellant's contentions lose all merit.

53. As pointed out above, however, three specific arguments were advanced before the Trial Chamber, which are clearly referred to in Appellant's Brief in appeal. It would not be advisable to leave this ground of appeal based on primacy without giving those questions the consideration they deserve.

The Chamber now proposes to examine those three points in the order in which they have been raised by

Appellant. 2324

A. Domestic Jurisdiction

54. Appellant argued in first instance that:

> "From the moment Bosnia-Herzegovina was recognised as an independent state, it had the competence to establish jurisdiction to try crimes that have been committed on its territory." (Defence Trial Brief, at para. 5.)

Appellant added that:

> "As a matter of fact the state of Bosnia-Herzegovina does exercise its jurisdiction, not only in matters of ordinary criminal law, but also in matters of alleged violations of crimes against humanity, as for example is the case with the prosecution of Mr Karadzic et al."(Id. at para. 5.2.)

This first point is not contested and the Prosecutor has conceded as much. But it does not, by itself, settle the question of the primacy of the International Tribunal. Appellant also seems so to realise. Appellant therefore explores the matter further and raises the question of State sovereignty.

B. Sovereignty Of States

55. Article 2 of the United Nations Charter provides in paragraph 1: "The Organization is based on the principle of the sovereign equality of all its Members."

In Appellant's view, no State can assume jurisdiction to prosecute crimes committed on the territory of another State, barring a universal interest "justified by a treaty or customary international law or an *opinio juris* on the issue." (Defence Trial Brief, at para. 6.2.)

Based on this proposition, Appellant argues that the same requirements should underpin the establishment of an international tribunal destined to invade an area essentially within the domestic jurisdiction of States. In the present instance, the principle of State sovereignty would have been violated. The Trial Chamber has rejected this plea, holding among other reasons:

> "In any event, the accused not being a State lacks the *locus standi* to raise the issue of primacy, which involves a plea that the sovereignty of a State has been violated, a plea only a sovereign State may raise or waive and a right clearly the accused cannot take over from the State." (Decision at Trial, para. 41.)

The Trial Chamber relied on the judgement of the District Court of Jerusalem in *Israel v. Eichmann:*

> "The right to plead violation of the sovereignty of a State is the exclusive right of that State. Only a sovereign State may raise the plea or waive it, and the accused has no right to take over the rights of that State." (36 **International Law Reports** 5, 62 (1961), affirmed by Supreme Court of Israel, 36 **International Law Reports** 277 (1962).)

Consistently with a long line of cases, a similar principle was upheld more recently in the United States of America in the matter of *United States v. Noriega:*

> "As a general principle of international law, individuals have no standing to challenge violations

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> of international treaties in the absence of a protest by the sovereign involved." (746 F. Supp. 1506, 1533 (S.D. Fla. 1990).)

Authoritative as they may be, those pronouncements do not carry, in the field of international law, the weight which they may bring to bear upon national judiciaries. Dating back to a period when sovereignty stood as a sacrosanct and unassailable attribute of statehood, this concept recently has suffered progressive erosion at the hands of the more liberal forces at work in the democratic societies, particularly in the field of human rights.

Whatever the situation in domestic litigation, the traditional doctrine upheld and acted upon by the Trial Chamber is not reconcilable, in this International Tribunal, with the view that an accused, being entitled to a full defence, cannot be deprived of a plea so intimately connected with, and grounded in, international law as a defence based on violation of State sovereignty. To bar an accused from raising such a plea is tantamount to deciding that, in this day and age, an international court could not, in a criminal matter where the liberty of an accused is at stake, examine a plea raising the issue of violation of State sovereignty. Such a startling conclusion would imply a contradiction in terms which this Chamber feels it is its duty to refute and lay to rest.

56. That Appellant be recognised the right to plead State sovereignty does not mean, of course, that his plea must be favourably received. He has to discharge successfully the test of the burden of demonstration. Appellant's plea faces several obstacles, each of which may be fatal, as the Trial Chamber has actually determined.

Appellant can call in aid Article 2, paragraph 7, of the United Nations Charter: "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State [. . .]." However, one should not forget the commanding restriction at the end of the same paragraph: "but this principle shall not prejudice the application of enforcement measures under Chapter VII." (United Nations Charter, art. 2, para. 7.)

Those are precisely the provisions under which the International Tribunal has been established. Even without these provisions, matters can be taken out of the jurisdiction of a State. In the present case, the Republic of Bosnia and Herzegovina not only has not contested the jurisdiction of the International Tribunal but has actually approved, and collaborated with, the International Tribunal, as witnessed by:

> a) Letter dated 10 August 1992 from the President of the Republic of Bosnia and Herzegovina addressed to the Secretary-General of the United Nations (U.N. Doc. E/CN.4/1992/S-1/5 (1992));
>
> b) Decree with Force of Law on Deferral upon Request by the International Tribunal 12 Official Gazette of the Republic of Bosnia and Herzegovina 317 (10 April 1995) (translation);
>
> c) Letter from Vasvija Vidovic, Liaison Officer of the Republic of Bosnia and Herzegovina, to the International Tribunal (4 July 1995).

As to the Federal Republic of Germany, its cooperation with the International Tribunal is public and has been previously noted.

The Trial Chamber was therefore fully justified to write, on this particular issue:

> "[I]t is pertinent to note that the challenge to the primacy of the International Tribunal has been made against the express intent of the two States most closely affected by the indictment against

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> the accused - Bosnia and Herzegovina and the Federal Republic of Germany. The former, on the territory of which the crimes were allegedly committed, and the latter where the accused resided at the time of his arrest, have unconditionally accepted the jurisdiction of the International Tribunal and the accused cannot claim the rights that have been specifically waived by the States concerned. To allow the accused to do so would be to allow him to select the forum of his choice, contrary to the principles relating to coercive criminal jurisdiction." (Decision at Trial, at para. 41.)

57. This is all the more so in view of the nature of the offences alleged against Appellant, offences which, if proven, do not affect the interests of one State alone but shock the conscience of mankind.

As early as 1950, in the case of General Wagener, the Supreme Military Tribunal of Italy held:

> "These norms [concerning crimes against laws and customs of war], due to their highly ethical and moral content, have a universal character, not a territorial one.
>
> [. . .]
>
> The solidarity among nations, aimed at alleviating in the best possible way the horrors of war, gave rise to the need to dictate rules which do not recognise borders, punishing criminals wherever they may be.
>
> [. . .]
>
> Crimes against the laws and customs of war cannot be considered political offences, as they do not harm a political interest of a particular State, nor a political right of a particular citizen. They are, instead, crimes of *lèse-humanité (reati di lesa umanità)* and, as previously demonstrated, the norms prohibiting them have a universal character, not simply a territorial one. Such crimes, therefore, due to their very subject matter and particular nature are precisely of a different and opposite kind from political offences. The latter generally, concern only the States against whom they are committed; the former concern all civilised States, and are to be opposed and punished, in the same way as the crimes of piracy, trade of women and minors, and enslavement are to be opposed and punished, wherever they may have been committed (articles 537 and 604 of the penal code)." (13 March 1950, in **Rivista Penale** 753, 757 (Sup. Mil. Trib., Italy 1950; unofficial translation).1

Twelve years later the Supreme Court of Israel in the *Eichmann* case could draw a similar picture:

> "[T]hese crimes constitute acts which damage vital international interests; they impair the foundations and security of the international community; they violate the universal moral values and humanitarian principles that lie hidden in the criminal law systems adopted by civilised nations. The underlying principle in international law regarding such crimes is that the individual who has committed any of them and who, when doing so, may be presumed to have fully comprehended the heinous nature of his act, must account for his conduct. [. . .]
>
> Those crimes entail individual criminal responsibility because they challenge the foundations of international society and affront the conscience of civilised nations.
>
> [. . .]

> [T]hey involve the perpetration of an international crime which all the nations of the world are interested in preventing."(Israel v. Eichmann, 36 **International Law Reports** 277, 291-93 (Isr. S. Ct. 1962).)

58. The public revulsion against similar offences in the 1990s brought about a reaction on the part of the community of nations: hence, among other remedies, the establishment of an international judicial body by an organ of an organization representing the community of nations: the Security Council. This organ is empowered and mandated, by definition, to deal with trans-boundary matters or matters which, though domestic in nature, may affect "international peace and security" (United Nations Charter, art 2. (1), 2.(7), 24, & 37). It would be a travesty of law and a betrayal of the universal need for justice, should the concept of State sovereignty be allowed to be raised successfully against human rights. Borders should not be considered as a shield against the reach of the law and as a protection for those who trample underfoot the most elementary rights of humanity. In the Barbie case, the Court of Cassation of France has quoted with approval the following statement of the Court of Appeal:

> "[. . .]by reason of their nature, the crimes against humanity [. . .] do not simply fall within the scope of French municipal law but are subject to an international criminal order to which the notions of frontiers and extradition rules arising therefrom are completely foreign. *(Fédération Nationale de Déportés et Internés Résistants et Patriotes And Others v. Barbie,* 78 *International Law Reports* 125, 130 (Cass. crim.1983).)2

Indeed, when an international tribunal such as the present one is created, it must be endowed with primacy over national courts. Otherwise, human nature being what it is, there would be a perennial danger of international crimes being characterised as "ordinary crimes" (Statute of the International Tribunal, art. 10, para. 2(a)), or proceedings being "designed to shield the accused", or cases not being diligently prosecuted (Statute of the International Tribunal, art. 10, para. 2(b)).

If not effectively countered by the principle of primacy, any one of those stratagems might be used to defeat the very purpose of the creation of an international criminal jurisdiction, to the benefit of the very people whom it has been designed to prosecute.

59. The principle of primacy of this International Tribunal over national courts must be affirmed; the more so since it is confined within the strict limits of Articles 9 and 10 of the Statute and Rules 9 and 10 of the Rules of Procedure of the International Tribunal.

The Trial Chamber was fully justified in writing:

> "Before leaving this question relating to the violation of the sovereignty of States, it should be noted that the crimes which the International Tribunal has been called upon to try are not crimes of a purely domestic nature. They are really crimes which are universal in nature, well recognised in international law as serious breaches of international humanitarian law, and transcending the interest of any one State. The Trial Chamber agrees that in such circumstances, the sovereign rights of States cannot and should not take precedence over the right of the international community to act appropriately as they affect the whole of mankind and shock the conscience of all nations of the world. There can therefore be no objection to an international tribunal properly constituted trying these crimes on behalf of the international community."(Decision at Trial, at para. 42.)

60. The plea of State sovereignty must therefore be dismissed.

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C. *Jus De Non Evocando*

61. Appellant argues that he has a right to be tried by his national courts under his national laws.

No one has questioned that right of Appellant. The problem is elsewhere: is that right exclusive? Does it prevent Appellant from being tried - and having an equally fair trial (see Statute of the International Tribunal, art. 21) - before an international tribunal?

Appellant contends that such an exclusive right has received universal acceptance: yet one cannot find it expressed either in the Universal Declaration of Human Rights or in the International Covenant on Civil and Political Rights, unless one is prepared to stretch to breaking point the interpretation of their provisions.

In support of this stand, Appellant has quoted seven national Constitutions (Article 17 of the Constitution of the Netherlands, Article 101 of the Constitution of Germany (unified), Article 13 of the Constitution of Belgium, Article 25 of the Constitution of Italy, Article 24 of the Constitution of Spain, Article 10 of the Constitution of Surinam and Article 30 of the Constitution of Venezuela). However, on examination, these provisions do not support Appellant's argument. For instance, the Constitution of Belgium (being the first in time) provides:

> "**Art. 13**: No person may be withdrawn from the judge assigned to him by the law, save with his consent." (Blaustein & Flanz, Constitutions of the Countries of the World, (1991).)

The other constitutional provisions cited are either similar in substance, requiring only that no person be removed from his or her "natural judge" established by law, or are irrelevant to Appellant's argument.

62. As a matter of fact - and of law - the principle advocated by Appellant aims at one very specific goal: to avoid the creation of special or extraordinary courts designed to try political offences in times of social unrest without guarantees of a fair trial.

This principle is not breached by the transfer of jurisdiction to an international tribunal created by the Security Council acting on behalf of the community of nations. No rights of accused are thereby infringed or threatened; quite to the contrary, they are all specifically spelt out and protected under the Statute of the International Tribunal. No accused can complain. True, he will be removed from his "natural" national forum; but he will be brought before a tribunal at least equally fair, more distanced from the facts of the case and taking a broader view of the matter.

Furthermore, one cannot but rejoice at the thought that, universal jurisdiction being nowadays acknowledged in the case of international crimes, a person suspected of such offences may finally be brought before an international judicial body for a dispassionate consideration of his indictment by impartial, independent and disinterested judges coming, as it happens here, from all continents of the world.

63. The objection founded on the theory of jus de non evocando was considered by the Trial Chamber which disposed of it in the following terms:

> "Reference was also made to the *jus de non evocando*, a feature of a number of national constitutions. But that principle, if it requires that an accused be tried by the regularly established courts and not by some special tribunal set up for that particular purpose, has no application when what is in issue is the exercise by the Security Council, acting under Chapter VII, of the powers

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> conferred upon it by the Charter of the United Nations. Of course, this involves some surrender of sovereignty by the member nations of the United Nations but that is precisely what was achieved by the adoption of the Charter." (Decision at Trial, at para. 37.)

No new objections were raised before the Appeals Chamber, which is satisfied with concurring, on this particular point, with the views expressed by the Trial Chamber.

64. For these reasons the Appeals Chamber concludes that Appellant's second ground of appeal, contesting the primacy of the International Tribunal, is ill-founded and must be dismissed.

IV. LACK OF SUBJECT-MATTER JURISDICTION

65. Appellant's third ground of appeal is the claim that the International Tribunal lacks subject-matter jurisdiction over the crimes alleged. The basis for this allegation is Appellant's claim that the subject-matter jurisdiction under Articles 2, 3 and 5 of the Statute of the International Tribunal is limited to crimes committed in the context of an international armed conflict. Before the Trial Chamber, Appellant claimed that the alleged crimes, even if proven, were committed in the context of an internal armed conflict. On appeal an additional alternative claim is asserted to the effect that there was no armed conflict at all in the region where the crimes were allegedly committed.

Before the Trial Chamber, the Prosecutor responded with alternative arguments that: (a) the conflicts in the former Yugoslavia should be characterized as an international armed conflict; and (b) even if the conflicts were characterized as internal, the International Tribunal has jurisdiction under Articles 3 and 5 to adjudicate the crimes alleged. On appeal, the Prosecutor maintains that, upon adoption of the Statute, the Security Council determined that the conflicts in the former Yugoslavia were international and that, by dint of that determination, the International Tribunal has jurisdiction over this case.

The Trial Chamber denied Appellant's motion, concluding that the notion of international armed conflict was not a jurisdictional criterion of Article 2 and that Articles 3 and 5 each apply to both internal and international armed conflicts. The Trial Chamber concluded therefore that it had jurisdiction, regardless of the nature of the conflict, and that it need not determine whether the conflict is internal or international.

A. Preliminary Issue: The Existence Of An Armed Conflict

66. Appellant now asserts the new position that there did not exist a legally cognizable armed conflict - either internal or international - at the time and place that the alleged offences were committed. Appellant's argument is based on a concept of armed conflict covering only the precise time and place of actual hostilities. Appellant claims that the conflict in the Prijedor region (where the alleged crimes are said to have taken place) was limited to a political assumption of power by the Bosnian Serbs and did not involve armed combat (though movements of tanks are admitted). This argument presents a preliminary issue to which we turn first.

67. International humanitarian law governs the conduct of both internal and international armed conflicts. Appellant correctly points out that for there to be a violation of this body of law, there must be an armed conflict. The definition of "armed conflict" varies depending on whether the hostilities are international or internal but, contrary to Appellant's contention, the temporal and geographical scope of both internal and international armed conflicts extends beyond the exact time and place of hostilities. With respect to the temporal frame of reference of international armed conflicts, each of the four Geneva Conventions contains language intimating that their application may extend beyond the cessation of

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fighting. For example, both Conventions I and III apply until protected persons who have fallen into the power of the enemy have been released and repatriated. (Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, art. 5, 75 U.N.T.S. 970 (hereinafter *Geneva Convention I*); Convention relative to the Treatment of Prisoners of War, 12 August 1949, art. 5, 75 U.N.T.S. 972 (hereinafter *Geneva Convention III*); *see also* Convention relative to the Protection of Civilian Persons in Time of War, 12 August 1949, art. 6, 75 U.N.T.S. 973 (hereinafter *Geneva Convention IV*).)

68. Although the Geneva Conventions are silent as to the geographical scope of international "armed conflicts," the provisions suggest that at least some of the provisions of the Conventions apply to the entire territory of the Parties to the conflict, not just to the vicinity of actual hostilities. Certainly, some of the provisions are clearly bound up with the hostilities and the geographical scope of those provisions should be so limited. Others, particularly those relating to the protection of prisoners of war and civilians, are not so limited. With respect to prisoners of war, the Convention applies to combatants in the power of the enemy; it makes no difference whether they are kept in the vicinity of hostilities. In the same vein, Geneva Convention IV protects civilians anywhere in the territory of the Parties. This construction is implicit in Article 6, paragraph 2, of the Convention, which stipulates that:

> "[i]n the territory of Parties to the conflict, the application of the present Convention shall cease on the general close of military operations." (Geneva Convention IV, art. 6, para. 2 (Emphasis added).)

Article 3(b) of Protocol I to the Geneva Conventions contains similar language. (Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 12 December 1977, art. 3(b), 1125 U.N.T.S. 3 (hereinafter *Protocol I*).) In addition to these textual references, the very nature of the Conventions - particularly Conventions III and IV - dictates their application throughout the territories of the parties to the conflict; any other construction would substantially defeat their purpose.

69. The geographical and temporal frame of reference for internal armed conflicts is similarly broad. This conception is reflected in the fact that beneficiaries of common Article 3 of the Geneva Conventions are those taking no active part (or no longer taking active part) in the hostilities. This indicates that the rules contained in Article 3 also apply outside the narrow geographical context of the actual theatre of combat operations. Similarly, certain language in Protocol II to the Geneva Conventions (a treaty which, as we shall see in paragraphs 88 and 114 below, may be regarded as applicable to some aspects of the conflicts in the former Yugoslavia) also suggests a broad scope. First, like common Article 3, it explicitly protects "[a]ll persons who do not take a direct part or who have ceased to take part in hostilities." (Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 12 December 1977, art. 4, para.1, 1125 U.N.T.S. 609 (hereinafter Protocol II). Article 2, paragraph 1, provides:

> "[t]his Protocol shall be applied [. . .] to all persons *affected* by an armed conflict as defined in Article 1."(Id. at art. 2, para. 1 (Emphasis added).)

The same provision specifies in paragraph 2 that:

"[A]t the end of the conflict, all the persons who have been deprived of their liberty or whose liberty has been restricted for reasons related to such conflict, as well as those deprived of their liberty or whose liberty is restricted after the conflict for the same reasons, shall enjoy the protection of Articles 5 and 6 until the end of such deprivation or restriction of liberty."(*Id.* at art. 2, para. 2.)

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Under this last provision, the temporal scope of the applicable rules clearly reaches beyond the actual hostilities. Moreover, the relatively loose nature of the language "for reasons related to such conflict", suggests a broad geographical scope as well. The nexus required is only a relationship between the conflict and the deprivation of liberty, not that the deprivation occurred in the midst of battle.

70. On the basis of the foregoing, we find that an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.

Applying the foregoing concept of armed conflicts to this case, we hold that the alleged crimes were committed in the context of an armed conflict. Fighting among the various entities within the former Yugoslavia began in 1991, continued through the summer of 1992 when the alleged crimes are said to have been committed, and persists to this day. Notwithstanding various temporary cease-fire agreements, no general conclusion of peace has brought military operations in the region to a close. These hostilities exceed the intensity requirements applicable to both international and internal armed conflicts. There has been protracted, large-scale violence between the armed forces of different States and between governmental forces and organized insurgent groups. Even if substantial clashes were not occurring in the Prijedor region at the time and place the crimes allegedly were committed - a factual issue on which the Appeals Chamber does not pronounce - international humanitarian law applies. It is sufficient that the alleged crimes were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict. There is no doubt that the allegations at issue here bear the required relationship. The indictment states that in 1992 Bosnian Serbs took control of the Opstina of Prijedor and established a prison camp in Omarska. It further alleges that crimes were committed against civilians inside and outside the Omarska prison camp as part of the Bosnian Serb take-over and consolidation of power in the Prijedor region, which was, in turn, part of the larger Bosnian Serb military campaign to obtain control over Bosnian territory. Appellant offers no contrary evidence but has admitted in oral argument that in the Prijedor region there were detention camps run not by the central authorities of Bosnia-Herzegovina but by Bosnian Serbs (Appeal Transcript; 8 September 1995, at 36-7). In light of the foregoing, we conclude that, for the purposes of applying international humanitarian law, the crimes alleged were committed in the context of an armed conflict.

B. Does The Statute Refer Only To International Armed Conflicts?

1. Literal Interpretation Of The Statute

71. On the face of it, some provisions of the Statute are unclear as to whether they apply to offences occurring in international armed conflicts only, or to those perpetrated in internal armed conflicts as well. Article 2 refers to "grave breaches" of the Geneva Conventions of 1949, which are widely understood to be committed only in international armed conflicts, so the reference in Article 2 would seem to suggest that the Article is limited to international armed conflicts. Article 3 also lacks any express reference to the nature of the underlying conflict required. A literal reading of this provision standing alone may lead one to believe that it applies to both kinds of conflict. By contrast, Article 5 explicitly confers jurisdiction over crimes committed in either internal or international armed conflicts. An argument *a contrario* based on the absence of a similar provision in Article 3 might suggest that Article 3 applies only to one class of conflict rather than to both of them. In order better to ascertain the meaning and scope of these provisions, the Appeals Chamber will therefore consider the object and

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purpose behind the enactment of the Statute.

2. Teleological Interpretation Of The Statute

72. In adopting resolution 827, the Security Council established the International Tribunal with the stated purpose of bringing to justice persons responsible for serious violations of international humanitarian law in the former Yugoslavia, thereby deterring future violations and contributing to the re-establishment of peace and security in the region. The context in which the Security Council acted indicates that it intended to achieve this purpose without reference to whether the conflicts in the former Yugoslavia were internal or international.

As the members of the Security Council well knew, in 1993, when the Statute was drafted, the conflicts in the former Yugoslavia could have been characterized as both internal and international, or alternatively, as an internal conflict alongside an international one, or as an internal conflict that had become internationalized because of external support, or as an international conflict that had subsequently been replaced by one or more internal conflicts, or some combination thereof. The conflict in the former Yugoslavia had been rendered international by the involvement of the Croatian Army in Bosnia-Herzegovina and by the involvement of the Yugoslav National Army ("JNA") in hostilities in Croatia, as well as in Bosnia-Herzegovina at least until its formal withdrawal on 19 May 1992. To the extent that the conflicts had been limited to clashes between Bosnian Government forces and Bosnian Serb rebel forces in Bosnia-Herzegovina, as well as between the Croatian Government and Croatian Serb rebel forces in Krajina (Croatia), they had been internal (unless direct involvement of the Federal Republic of Yugoslavia (Serbia-Montenegro) could be proven). It is notable that the parties to this case also agree that the conflicts in the former Yugoslavia since 1991 have had both internal and international aspects. (*See* Transcript of the Hearing on the Motion on Jurisdiction, 26 July 1995, at 47, 111.)

73. The varying nature of the conflicts is evidenced by the agreements reached by various parties to abide by certain rules of humanitarian law. Reflecting the international aspects of the conflicts, on 27 November 1991 representatives of the Federal Republic of Yugoslavia, the Yugoslavia Peoples' Army, the Republic of Croatia, and the Republic of Serbia entered into an agreement on the implementation of the Geneva Conventions of 1949 and the 1977 Additional Protocol I to those Conventions. (See Memorandum of Understanding, 27 November 1991.) Significantly, the parties refrained from making any mention of common Article 3 of the Geneva Conventions, concerning non-international armed conflicts.

By contrast, an agreement reached on 22 May 1992 between the various factions of the conflict within the Republic of Bosnia and Herzegovina reflects the internal aspects of the conflicts. The agreement was based on common Article 3 of the Geneva Conventions which, in addition to setting forth rules governing internal conflicts, provides in paragraph 3 that the parties to such conflicts may agree to bring into force provisions of the Geneva Conventions that are generally applicable only in international armed conflicts. In the Agreement, the representatives of Mr. Alija Izetbegovic (President of the Republic of Bosnia and Herzegovina and the Party of Democratic Action), Mr. Radovan Karadzic (President of the Serbian Democratic Party), and Mr. Miljenko Brkic (President of the Croatian Democratic Community) committed the parties to abide by the substantive rules of internal armed conflict contained in common Article 3 and in addition agreed, on the strength of common Article 3, paragraph 3, to apply certain provisions of the Geneva Conventions concerning international conflicts. (Agreement No. 1, 22 May 1992, art. 2, paras. 1-6 (hereinafter **Agreement No. 1**).) Clearly, this Agreement shows that the parties concerned regarded the armed conflicts in which they were involved as internal but, in view of their magnitude, they agreed to extend to them the application of some provisions of the Geneva Conventions that are normally applicable in international armed conflicts only. The same position was implicitly taken by the International Committee of the Red Cross ("ICRC"), at

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whose invitation and under whose auspices the agreement was reached. In this connection it should be noted that, had the ICRC not believed that the conflicts governed by the agreement at issue were **internal**, it would have acted blatantly contrary to a common provision of the four Geneva Conventions (Article 6/6/6/7). This is a provision formally banning any agreement designed to restrict the application of the Geneva Conventions in case of international armed conflicts. ("No special agreement shall adversely affect the situation of [the protected persons] as defined by the present Convention, nor restrict the rights which it confers upon them." (Geneva Convention I, art. 6; Geneva Convention II, art. 6; Geneva Convention III, art. 6; Geneva Convention IV, art. 7.) If the conflicts were, in fact, viewed as international, for the ICRC to accept that they would be governed only by common Article 3, plus the provisions contained in Article 2, paragraphs 1 to 6, of Agreement No. 1, would have constituted clear disregard of the aforementioned Geneva provisions. On account of the unanimously recognized authority, competence and impartiality of the ICRC, as well as its statutory mission to promote and supervise respect for international humanitarian law, it is inconceivable that, even if there were some doubt as to the nature of the conflict, the ICRC would promote and endorse an agreement contrary to a basic provision of the Geneva Conventions. The conclusion is therefore warranted that the ICRC regarded the conflicts governed by the agreement in question as internal.

Taken together, the agreements reached between the various parties to the conflict(s) in the former Yugoslavia bear out the proposition that, when the Security Council adopted the Statute of the International Tribunal in 1993, it did so with reference to situations that the parties themselves considered at different times and places as either internal or international armed conflicts, or as a mixed internal-international conflict.

74. The Security Council's many statements leading up to the establishment of the International Tribunal reflect an awareness of the mixed character of the conflicts. On the one hand, prior to creating the International Tribunal, the Security Council adopted several resolutions condemning the presence of JNA forces in Bosnia-Herzegovina and Croatia as a violation of the sovereignty of these latter States. See, e.g., S.C. Res. 752 (15 May 1992); S.C.Res. 757 (30 May 1992); S.C. Res. 779 (6 Oct. 1992); S.C. Res. 787 (16 Nov. 1992). On the other hand, in none of these many resolutions did the Security Council explicitly state that the conflicts were international.

In each of its successive resolutions, the Security Council focused on the practices with which it was concerned, without reference to the nature of the conflict. For example, in resolution 771 of 13 August 1992, the Security Council expressed "grave alarm" at the

> "[c]ontinuing reports of widespread violations of international humanitarian law occurring within the territory of the former Yugoslavia and especially in Bosnia and Herzegovina including reports of mass forcible expulsion and deportation of civilians, imprisonment and abuse of civilians in detention centres, deliberate attacks on non-combatants, hospitals and ambulances, impeding the delivery of food and medical supplies to the civilian population, and wanton devastation and destruction of property." (S.C. Res. 771 (13 August 1992).)

As with every other Security Council statement on the subject, this resolution makes no mention of the nature of the armed conflict at issue. The Security Council was clearly preoccupied with bringing to justice those responsible for these specifically condemned acts, regardless of context. The Prosecutor makes much of the Security Council's repeated reference to the grave breaches provisions of the Geneva Conventions, which are generally deemed applicable only to international armed conflicts. This argument ignores, however, that, as often as the Security Council has invoked the grave breaches provisions, it has also referred generally to "other violations of international humanitarian law," an expression which covers the law applicable in internal armed conflicts as well.

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75. The intent of the Security Council to promote a peaceful solution of the conflict without pronouncing upon the question of its international or internal nature is reflected by the Report of the Secretary-General of 3 May 1993 and by statements of Security Council members regarding their interpretation of the Statute. The Report of the Secretary-General explicitly states that the clause of the Statute concerning the temporal jurisdiction of the International Tribunal was

> "clearly intended to convey the notion that no judgement as to the international or internal character of the conflict was being exercised." (Report of the Secretary-General, at para. 62, U.N. Doc. S/25704 (3 May 1993) (hereinafter *Report of the Secretary-General*).)

In a similar vein, at the meeting at which the Security Council adopted the Statute, three members indicated their understanding that the jurisdiction of the International Tribunal under Article 3, with respect to laws or customs of war, included any humanitarian law agreement in force in the former Yugoslavia. (See statements by representatives of France, the United States, and the United Kingdom, Provisional Verbatim Record of the 3217th Meeting, at 11, 15, & 19, U.N. Doc. S/PV.3217 (25 May 1993).) As an example of such supplementary agreements, the United States cited the rules on internal armed conflict contained in Article 3 of the Geneva Conventions as well as "the 1977 Additional Protocols to these [Geneva] Conventions [of 1949]." (*Id.* at 15). This reference clearly embraces Additional Protocol II of 1977, relating to internal armed conflict. No other State contradicted this interpretation, which clearly reflects an understanding of the conflict as both internal and international (it should be emphasized that the United States representative, before setting out the American views on the interpretation of the Statute of the International Tribunal, pointed out: "[W]e understand that other members of the [Security] Council share our view regarding the following clarifications related to the Statute."(*id.*)).

76. That the Security Council purposely refrained from classifying the armed conflicts in the former Yugoslavia as either international or internal and, in particular, did not intend to bind the International Tribunal by a classification of the conflicts as international, is borne out by a *reductio ad absurdum* argument. If the Security Council had categorized the conflict as exclusively international and, in addition, had decided to bind the International Tribunal thereby, it would follow that the International Tribunal would have to consider the conflict between Bosnian Serbs and the central authorities of Bosnia-Herzegovina as international. Since it cannot be contended that the Bosnian Serbs constitute a State, arguably the classification just referred to would be based on the implicit assumption that the Bosnian Serbs are acting not as a rebellious entity but as organs or agents of another State, the Federal Republic of Yugoslavia (Serbia-Montenegro). As a consequence, serious infringements of international humanitarian law committed by the government army of Bosnia-Herzegovina against Bosnian Serbian civilians in their power would not be regarded as "grave breaches", because such civilians, having the nationality of Bosnia-Herzegovina, would not be regarded as "protected persons" under Article 4, paragraph 1 of Geneva Convention IV. By contrast, atrocities committed by Bosnian Serbs against Bosnian civilians in their hands would be regarded as "grave breaches", because such civilians would be "protected persons" under the Convention, in that the Bosnian Serbs would be acting as organs or agents of another State, the Federal Republic of Yugoslavia (Serbia-Montenegro) of which the Bosnians would not possess the nationality. This would be, of course, an absurd outcome, in that it would place the Bosnian Serbs at a substantial legal disadvantage *vis-à-vis* the central authorities of Bosnia-Herzegovina. This absurdity bears out the fallacy of the argument advanced by the Prosecutor before the Appeals Chamber.

77. On the basis of the foregoing, we conclude that the conflicts in the former Yugoslavia have both internal and international aspects, that the members of the Security Council clearly had both aspects of the conflicts in mind when they adopted the Statute of the International Tribunal, and that they intended to empower the International Tribunal to adjudicate violations of humanitarian law that occurred in

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either context. To the extent possible under existing international law, the Statute should therefore be construed to give effect to that purpose.

78. With the exception of Article 5 dealing with crimes against humanity, none of the statutory provisions makes explicit reference to the type of conflict as an element of the crime; and, as will be shown below, the reference in Article 5 is made to distinguish the nexus required by the Statute from the nexus required by Article 6 of the London Agreement of 8 August 1945 establishing the International Military Tribunal at Nuremberg. Since customary international law no longer requires any nexus between crimes against humanity and armed conflict (*see below*, paras. 140 and 141), Article 5 was intended to reintroduce this nexus for the purposes of this Tribunal. As previously noted, although Article 2 does not explicitly refer to the nature of the conflicts, its reference to the grave breaches provisions suggest that it is limited to international armed conflicts. It would however defeat the Security Council's purpose to read a similar international armed conflict requirement into the remaining jurisdictional provisions of the Statute. Contrary to the drafters' apparent indifference to the nature of the underlying conflicts, such an interpretation would authorize the International Tribunal to prosecute and punish certain conduct in an international armed conflict, while turning a blind eye to the very same conduct in an internal armed conflict. To illustrate, the Security Council has repeatedly condemned the wanton devastation and destruction of property, which is explicitly punishable only under Articles 2 and 3 of the Statute. Appellant maintains that these Articles apply only to international armed conflicts. However, it would have been illogical for the drafters of the Statute to confer on the International Tribunal the competence to adjudicate the very conduct about which they were concerned, only in the event that the context was an international conflict, when they knew that the conflicts at issue in the former Yugoslavia could have been classified, at varying times and places, as internal, international, or both.

Thus, the Security Council's object in enacting the Statute - to prosecute and punish persons responsible for certain condemned acts being committed in a conflict understood to contain both internal and international aspects - suggests that the Security Council intended that, to the extent possible, the subject-matter jurisdiction of the International Tribunal should extend to both internal and international armed conflicts.

In light of this understanding of the Security Council's purpose in creating the International Tribunal, we turn below to discussion of Appellant's specific arguments regarding the scope of the jurisdiction of the International Tribunal under Articles 2, 3 and 5 of the Statute.

3. Logical And Systematic Interpretation Of The Statute

(a) Article 2

79. Article 2 of the Statute of the International Tribunal provides:

> "The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention:
>
> (a) wilful killing;
>
> (b) torture or inhuman treatment, including biological experiments;

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(c) wilfully causing great suffering or serious injury to body or health;

(d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;

(e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power;

(f) wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial;

(g) unlawful deportation or transfer or unlawful confinement of a civilian;

(h) taking civilians as hostages."

By its explicit terms, and as confirmed in the Report of the Secretary-General, this Article of the Statute is based on the Geneva Conventions of 1949 and, more specifically, the provisions of those Conventions relating to "grave breaches" of the Conventions. Each of the four Geneva Conventions of 1949 contains a "grave breaches" provision, specifying particular breaches of the Convention for which the High Contracting Parties have a duty to prosecute those responsible. In other words, for these specific acts, the Conventions create universal mandatory criminal jurisdiction among contracting States. Although the language of the Conventions might appear to be ambiguous and the question is open to some debate (see, e.g.,[*Amicus Curiae*] Submission of the Government of the United States of America Concerning Certain Arguments Made by Counsel for the Accused in the Case of *The Prosecutor of the Tribunal v. Dusan Tadic*, 17 July 1995, (Case No. IT-94-1-T), at 35-6 (hereinafter, *U.S. Amicus Curiae Brief*), it is widely contended that the grave breaches provisions establish universal mandatory jurisdiction only with respect to those breaches of the Conventions committed in international armed conflicts. Appellant argues that, as the grave breaches enforcement system only applies to international armed conflicts, reference in Article 2 of the Statute to the grave breaches provisions of the Geneva Conventions limits the International Tribunal's jurisdiction under that Article to acts committed in the context of an international armed conflict. The Trial Chamber has held that Article 2:

"[H]as been so drafted as to be self-contained rather than referential, save for the identification of the victims of enumerated acts; that identification and that alone involves going to the Conventions themselves for the definition of 'persons or property protected'."

[. . .]

[T]he requirement of international conflict does not appear on the face of Article 2. Certainly, nothing in the words of the Article expressly require its existence; once one of the specified acts is allegedly committed upon a protected person the power of the International Tribunal to prosecute arises if the spatial and temporal requirements of Article 1 are met.

[. . .]

[T]here is no ground for treating Article 2 as in effect importing into the Statute the whole of the terms of the Conventions, including the reference in common Article 2 of the Geneva Convention [sic] to international conflicts. As stated, Article 2 of the Statute is on its face, self-contained, save in relation to the definition of protected persons and things." (Decision at Trial, at paras. 49-51.)

80. With all due respect, the Trial Chamber's reasoning is based on a misconception of the grave breaches provisions and the extent of their incorporation into the Statute of the International Tribunal.

The grave breaches system of the Geneva Conventions establishes a twofold system: there is on the one hand an enumeration of offences that are regarded so serious as to constitute "grave breaches"; closely bound up with this enumeration a mandatory enforcement mechanism is set up, based on the concept of a duty and a right of all Contracting States to search for and try or extradite persons allegedly responsible for "grave breaches." The international armed conflict element generally attributed to the grave breaches provisions of the Geneva Conventions is merely a function of the system of universal mandatory jurisdiction that those provisions create. The international armed conflict requirement was a necessary limitation on the grave breaches system in light of the intrusion on State sovereignty that such mandatory universal jurisdiction represents. State parties to the 1949 Geneva Conventions did not want to give other States jurisdiction over serious violations of international humanitarian law committed in their internal armed conflicts - at least not the mandatory universal jurisdiction involved in the grave breaches system.

81. The Trial Chamber is right in implying that the enforcement mechanism has of course not been imported into the Statute of the International Tribunal, for the obvious reason that the International Tribunal itself constitutes a mechanism for the prosecution and punishment of the perpetrators of "grave breaches." However, the Trial Chamber has misinterpreted the reference to the Geneva Conventions contained in the sentence of Article 2: "persons or property protected under the provisions of the relevant Geneva Conventions." (Statute of the Tribunal, art. 2.) For the reasons set out above, this reference is clearly intended to indicate that the offences listed under Article 2 can only be prosecuted when perpetrated against persons or property regarded as "protected" by the Geneva Conventions under the strict conditions set out by the Conventions themselves. This reference in Article 2 to the notion of "protected persons or property" must perforce cover the persons mentioned in Articles 13, 24, 25 and 26 (protected persons) and 19 and 33 to 35 (protected objects) of Geneva Convention I; in Articles 13, 36, 37 (protected persons) and 22, 24, 25 and 27 (protected objects) of Convention II; in Article 4 of Convention III on prisoners of war; and in Articles 4 and 20 (protected persons) and Articles 18, 19, 21, 22, 33, 53, 57 etc. (protected property) of Convention IV on civilians. Clearly, these provisions of the Geneva Conventions apply to persons or objects protected only to the extent that they are caught up in an international armed conflict. By contrast, those provisions do not include persons or property coming within the purview of common Article 3 of the four Geneva Conventions.

82. The above interpretation is borne out by what could be considered as part of the preparatory works of the Statute of the International Tribunal, namely the Report of the Secretary-General. There, in introducing and explaining the meaning and purport of Article 2 and having regard to the "grave breaches" system of the Geneva Conventions, reference is made to "international armed conflicts" (Report of the Secretary-General at para. 37).

83. We find that our interpretation of Article 2 is the only one warranted by the text of the Statute and the relevant provisions of the Geneva Conventions, as well as by a logical construction of their interplay as dictated by Article 2. However, we are aware that this conclusion may appear not to be consonant with recent trends of both State practice and the whole doctrine of human rights - which, as pointed out below (see paras. 97-127), tend to blur in many respects the traditional dichotomy between international wars and civil strife. In this connection the Chamber notes with satisfaction the statement in the *amicus curiae* brief submitted by the Government of the United States, where it is contended that:

> "the 'grave breaches' provisions of Article 2 of the International Tribunal Statute apply to armed conflicts of a non-international character as well as those of an international character." (U.S. *Amicus Curiae* Brief, at 35.)

This statement, unsupported by any authority, does not seem to be warranted as to the interpretation of Article 2 of the Statute. Nevertheless, seen from another viewpoint, there is no gainsaying its

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significance: that statement articulates the legal views of one of the permanent members of the Security Council on a delicate legal issue; on this score it provides the first indication of a possible change in *opinio juris* of States. Were other States and international bodies to come to share this view, a change in customary law concerning the scope of the "grave breaches" system might gradually materialize. Other elements pointing in the same direction can be found in the provision of the German Military Manual mentioned below (para. 131), whereby grave breaches of international humanitarian law include some violations of common Article 3. In addition, attention can be drawn to the Agreement of 1 October 1992 entered into by the conflicting parties in Bosnia-Herzegovina. Articles 3 and 4 of this Agreement implicitly provide for the prosecution and punishment of those responsible for grave breaches of the Geneva Conventions and Additional Protocol I. As the Agreement was clearly concluded within a framework of an internal armed conflict (*see above,* para. 73), it may be taken as an important indication of the present trend to extend the grave breaches provisions to such category of conflicts. One can also mention a recent judgement by a Danish court. On 25 November 1994 the Third Chamber of the Eastern Division of the Danish High Court delivered a judgement on a person accused of crimes committed together with a number of Croatian military police on 5 August 1993 in the Croatian prison camp of Dretelj in Bosnia (The Prosecution v. Refik Saric, unpublished (Den.H. Ct. 1994)). The Court explicitly acted on the basis of the "grave breaches" provisions of the Geneva Conventions, more specifically Articles 129 and 130 of Convention III and Articles 146 and 147 of Convention IV (The Prosecution v. Refik Saric, Transcript, at 1 (25 Nov. 1994)), without however raising the preliminary question of whether the alleged offences had occurred within the framework of an international rather than an internal armed conflict (in the event the Court convicted the accused on the basis of those provisions and the relevant penal provisions of the Danish Penal Code, (see id. at 7-8)). This judgement indicates that some national courts are also taking the view that the "grave breaches" system may operate regardless of whether the armed conflict is international or internal.

84. Notwithstanding the foregoing, the Appeals Chamber must conclude that, in the present state of development of the law, Article 2 of the Statute only applies to offences committed within the context of international armed conflicts.

85. Before the Trial Chamber, the Prosecutor asserted an alternative argument whereby the provisions on grave breaches of the Geneva Conventions could be applied to internal conflicts on the strength of some agreements entered into by the conflicting parties. For the reasons stated below, in Section IV C (para. 144), we find it unnecessary to resolve this issue at this time.

(b) Article 3

86. Article 3 of the Statute declares the International Tribunal competent to adjudicate violations of the laws or customs of war. The provision states:

> "The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:
>
> (a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;
>
> (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
>
> (c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;

(d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;

(e) plunder of public or private property."

As explained by the Secretary-General in his Report on the Statute, this provision is based on the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land, the Regulations annexed to that Convention, and the Nuremberg Tribunal's interpretation of those Regulations. Appellant argues that the Hague Regulations were adopted to regulate interstate armed conflict, while the conflict in the former Yugoslavia is *in casu* an internal armed conflict; therefore, to the extent that the jurisdiction of the International Tribunal under Article 3 is based on the Hague Regulations, it lacks jurisdiction under Article 3 to adjudicate alleged violations in the former Yugoslavia. Appellant's argument does not bear close scrutiny, for it is based on an unnecessarily narrow reading of the Statute.

(i) The Interpretation of Article 3

87. A literal interpretation of Article 3 shows that: (i) it refers to a broad category of offences, namely all "violations of the laws or customs of war"; and (ii) the enumeration of some of these violations provided in Article 3 is merely illustrative, not exhaustive.

To identify the content of the class of offences falling under Article 3, attention should be drawn to an important fact. The expression "violations of the laws or customs of war" is a traditional term of art used in the past, when the concepts of "war" and "laws of warfare" still prevailed, before they were largely replaced by two broader notions: (i) that of "armed conflict", essentially introduced by the 1949 Geneva Conventions; and (ii) the correlative notion of "international law of armed conflict", or the more recent and comprehensive notion of "international humanitarian law", which has emerged as a result of the influence of human rights doctrines on the law of armed conflict. As stated above, it is clear from the Report of the Secretary-General that the old-fashioned expression referred to above was used in Article 3 of the Statute primarily to make reference to the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto (Report of the Secretary-General, at para. 41). However, as the Report indicates, the Hague Convention, considered *qua* customary law, constitutes an important area of humanitarian international law. (*Id.*) In other words, the Secretary-General himself concedes that the traditional laws of warfare are now more correctly termed "international humanitarian law" and that the so-called "Hague Regulations" constitute an important segment of such law. Furthermore, the Secretary-General has also correctly admitted that the Hague Regulations have a broader scope than the Geneva Conventions, in that they cover not only the protection of victims of armed violence (civilians) or of those who no longer take part in hostilities (prisoners of war), the wounded and the sick) but also the conduct of hostilities; in the words of the Report: "The Hague Regulations cover aspects of international humanitarian law which are also covered by the 1949 Geneva Conventions." (Id., at para. 43.) These comments suggest that Article 3 is intended to cover both Geneva and Hague rules law. On the other hand, the Secretary-General's subsequent comments indicate that the violations explicitly listed in Article 3 relate to Hague law not contained in the Geneva Conventions (*id.*, at paras. 43-4). As pointed out above, this list is, however, merely illustrative: indeed, Article 3, before enumerating the violations provides that they "shall include but not be limited to" the list of offences. Considering this list in the general context of the Secretary-General's discussion of the Hague Regulations and international humanitarian law, we conclude that this list may be construed to include other infringements of international humanitarian law. The only limitation is that such infringements must not be already covered by Article 2 (lest this latter provision should become superfluous). Article 3 may be taken to cover **all violations** of international humanitarian law other than the "grave breaches" of the four Geneva Conventions falling under Article 2 (or, for that matter, the violations covered by Articles 4 and 5, to the extent that Articles 3, 4 and 5 overlap).

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88. That Article 3 does not confine itself to covering violations of Hague law, but is intended also to refer to all violations of international humanitarian law (subject to the limitations just stated), is borne out by the debates in the Security Council that followed the adoption of the resolution establishing the International Tribunal. As mentioned above, three Member States of the Council, namely France, the United States and the United Kingdom, expressly stated that Article 3 of the Statute also covers obligations stemming from agreements in force between the conflicting parties, that is Article 3 common to the Geneva Conventions and the two Additional Protocols, as well as other agreements entered into by the conflicting parties. The French delegate stated that:

> "[T]he expression 'laws or customs of war' used in Article 3 of the Statute covers specifically, in the opinion of France, all the obligations that flow from the humanitarian law agreements in force on the territory of the former Yugoslavia at the time when the offences were committed." (Provisional Verbatim Record of the 3217th Meeting, at 11, U.N. Doc. S/PV.3217 (25 May 1993).)

The American delegate stated the following:

> "[W]e understand that other members of the Council share our view regarding the following clarifications related to the Statute:
>
> Firstly, it is understood that the 'laws or customs of war' referred to in Article 3 include all obligations under humanitarian law agreements in force in the territory of the former Yugoslavia at the time the acts were committed, including common article 3 of the 1949 Geneva Conventions, and the 1977 Additional Protocols to these Conventions." (Id., at p. 15.)

The British delegate stated:

> "[I]t would be our view that the reference to the laws or customs of war in Article 3 is broad enough to include applicable international conventions." (*Id.*, at p. 19.)

It should be added that the representative of Hungary stressed:

> "the importance of the fact that the jurisdiction of the International Tribunal covers the whole range of international humanitarian law and the entire duration of the conflict throughout the territory of the former Yugoslavia." (*Id.*, at p. 20.)

Since no delegate contested these declarations, they can be regarded as providing an authoritative interpretation of Article 3 to the effect that its scope is much broader than the enumerated violations of Hague law.

89. In light of the above remarks, it can be held that Article 3 is a general clause covering all violations of humanitarian law not falling under Article 2 or covered by Articles 4 or 5, more specifically: (i) violations of the Hague law on international conflicts; (ii) infringements of provisions of the Geneva Conventions other than those classified as "grave breaches" by those Conventions; (iii) violations of common Article 3 and other customary rules on internal conflicts; (iv) violations of agreements binding upon the parties to the conflict, considered qua treaty law, i.e., agreements which have not turned into customary international law (on this point *see below,* para. 143).

90. The Appeals Chamber would like to add that, in interpreting the meaning and purport of the expressions "violations of the laws or customs of war" or "violations of international humanitarian law",

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one must take account of the context of the Statute as a whole. A systematic construction of the Statute emphasises the fact that various provisions, in spelling out the purpose and tasks of the International Tribunal or in defining its functions, refer to "**serious violations**" of international humanitarian law" (*See* Statute of the International Tribunal, Preamble, arts. 1, 9(1), 10(1)-(2), 23(1), 29(1) (Emphasis added.)). It is therefore appropriate to take the expression "violations of the laws or customs of war" to cover serious violations of international humanitarian law.

91. Article 3 thus confers on the International Tribunal jurisdiction over **any** serious offence against international humanitarian law not covered by Article 2, 4 or 5. Article 3 is a fundamental provision laying down that any "serious violation of international humanitarian law" must be prosecuted by the International Tribunal. In other words, Article 3 functions as a residual clause designed to ensure that no serious violation of international humanitarian law is taken away from the jurisdiction of the International Tribunal. Article 3 aims to make such jurisdiction watertight and inescapable.

92. This construction of Article 3 is also corroborated by the object and purpose of the provision. When it decided to establish the International Tribunal, the Security Council did so to put a stop to all serious violations of international humanitarian law occurring in the former Yugoslavia and not only special classes of them, namely "grave breaches" of the Geneva Conventions or violations of the "Hague law." Thus, if correctly interpreted, Article 3 fully realizes the primary purpose of the establishment of the International Tribunal, that is, not to leave unpunished any person guilty of any such serious violation, whatever the context within which it may have been committed.

93. The above interpretation is further confirmed if Article 3 is viewed in its more general perspective, that is to say, is appraised in its historical context. As the International Court of Justice stated in the *Nicaragua* case, Article 1 of the four Geneva Conventions, whereby the contracting parties "undertake to respect and ensure respect" for the Conventions "in all circumstances", has become a "general principle [. . .] of humanitarian law to which the Conventions merely give specific expression." (Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.) (Merits), 1986 I.C.J. Reports 14, at para. 220 (27 June) (hereinafter *Nicaragua Case*). This general principle lays down an obligation that is incumbent, not only on States, but also on other international entities including the United Nations. It was with this obligation in mind that, in 1977, the States drafting the two Additional Protocols to the Geneva Conventions agreed upon Article 89 of Protocol I, whereby:

> "In situations of **serious violations** of the Conventions or of this Protocol, the High Contracting Parties **undertake to act, jointly or individually, in co-operation with the United Nations** and in conformity with the United Nations Charter." (Protocol I, at art. 89 (Emphasis added).)

Article 3 is intended to realise that undertaking by endowing the International Tribunal with the power to prosecute all "serious violations" of international humanitarian law.

(ii) The Conditions That Must Be Fulfilled For A Violation Of International Humanitarian Law To Be Subject To Article 3

94. The Appeals Chamber deems it fitting to specify the conditions to be fulfilled for Article 3 to become applicable. The following requirements must be met for an offence to be subject to prosecution before the International Tribunal under Article 3:

(i) the violation must constitute an infringement of a rule of international humanitarian law;

(ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions

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must be met (see below, para. 143);

(iii) the violation must be "serious", that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim. Thus, for instance, the fact of a combatant simply appropriating a loaf of bread in an occupied village would not amount to a "serious violation of international humanitarian law" although it may be regarded as falling foul of the basic principle laid down in Article 46, paragraph 1, of the Hague Regulations (and the corresponding rule of customary international law) whereby "private property must be respected" by any army occupying an enemy territory;

(iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.

It follows that it does not matter whether the "serious violation" has occurred within the context of an international or an internal armed conflict, as long as the requirements set out above are met.

95. The Appeals Chamber deems it necessary to consider now two of the requirements set out above, namely: (i) the existence of customary international rules governing internal strife: and (ii) the question of whether the violation of such rules may entail individual criminal responsibility. The Appeals Chamber focuses on these two requirements because before the Trial Chamber the Defence argued that they had not been met in the case at issue. This examination is also appropriate because of the paucity of authoritative judicial pronouncements and legal literature on this matter.

(iii) **Customary Rules of International Humanitarian Law Governing Internal Armed Conflicts**

a. **General**

96. Whenever armed violence erupted in the international community, in traditional international law the legal response was based on a stark dichotomy: belligerency or insurgency. The former category applied to armed conflicts between sovereign States (unless there was recognition of belligerency in a civil war), while the latter applied to armed violence breaking out in the territory of a sovereign State. Correspondingly, international law treated the two classes of conflict in a markedly different way: interstate wars were regulated by a whole body of international legal rules, governing both the conduct of hostilities and the protection of persons not participating (or no longer participating) in armed violence (civilians, the wounded, the sick, shipwrecked, prisoners of war). By contrast, there were very few international rules governing civil commotion, for States preferred to regard internal strife as rebellion, mutiny and treason coming within the purview of national criminal law and, by the same token, to exclude any possible intrusion by other States into their own domestic jurisdiction. This dichotomy was clearly sovereignty-oriented and reflected the traditional configuration of the international community, based on the coexistence of sovereign States more inclined to look after their own interests than community concerns or humanitarian demands.

97. Since the 1930s, however, the aforementioned distinction has gradually become more and more blurred, and international legal rules have increasingly emerged or have been agreed upon to regulate internal armed conflict. There exist various reasons for this development. First, civil wars have become more frequent, not only because technological progress has made it easier for groups of individuals to have access to weaponry but also on account of increasing tension, whether ideological, inter-ethnic or economic; as a consequence the international community can no longer turn a blind eye to the legal regime of such wars. Secondly, internal armed conflicts have become more and more cruel and protracted, involving the whole population of the State where they occur: the all-out resort to armed

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violence has taken on such a magnitude that the difference with international wars has increasingly dwindled (suffice to think of the Spanish civil war, in 1936-39, of the civil war in the Congo, in 1960-1968, the Biafran conflict in Nigeria, 1967-70, the civil strife in Nicaragua, in 1981-1990 or El Salvador, 1980-1993). Thirdly, the large-scale nature of civil strife, coupled with the increasing interdependence of States in the world community, has made it more and more difficult for third States to remain aloof: the economic, political and ideological interests of third States have brought about direct or indirect involvement of third States in this category of conflict, thereby requiring that international law take greater account of their legal regime in order to prevent, as much as possible, adverse spill-over effects. Fourthly, the impetuous development and propagation in the international community of human rights doctrines, particularly after the adoption of the Universal Declaration of Human Rights in 1948, has brought about significant changes in international law, notably in the approach to problems besetting the world community. A State-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach. Gradually the maxim of Roman law *hominum causa omne jus constitutum est* (all law is created for the benefit of human beings) has gained a firm foothold in the international community as well. It follows that in the area of armed conflict the distinction between interstate wars and civil wars is losing its value as far as human beings are concerned. Why protect civilians from belligerent violence, or ban rape, torture or the wanton destruction of hospitals, churches, museums or private property, as well as proscribe weapons causing unnecessary suffering when two sovereign States are engaged in war, and yet refrain from enacting the same bans or providing the same protection when armed violence has erupted "only" within the territory of a sovereign State? If international law, while of course duly safeguarding the legitimate interests of States, must gradually turn to the protection of human beings, it is only natural that the aforementioned dichotomy should gradually lose its weight.

98. The emergence of international rules governing internal strife has occurred at two different levels: at the level of customary law and at that of treaty law. Two bodies of rules have thus crystallised, which are by no means conflicting or inconsistent, but instead mutually support and supplement each other. Indeed, the interplay between these two sets of rules is such that some treaty rules have gradually become part of customary law. This holds true for common Article 3 of the 1949 Geneva Conventions, as was authoritatively held by the International Court of Justice (Nicaragua Case, at para. 218), but also applies to Article 19 of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, and, as we shall show below (para. 117), to the core of Additional Protocol II of 1977.

99. Before pointing to some principles and rules of customary law that have emerged in the international community for the purpose of regulating civil strife, a word of caution on the law-making process in the law of armed conflict is necessary. When attempting To ascertain State practice with a view to establishing the existence of a customary rule or a general principle, it is difficult, if not impossible, to pinpoint the actual behaviour of the troops in the field for the purpose of establishing whether they in fact comply with, or disregard, certain standards of behaviour. This examination is rendered extremely difficult by the fact that not only is access to the theatre of military operations normally refused to independent observers (often even to the ICRC) but information on the actual conduct of hostilities is withheld by the parties to the conflict; what is worse, often recourse is had to misinformation with a view to misleading the enemy as well as public opinion and foreign Governments. In appraising the formation of customary rules or general principles one should therefore be aware that, on account of the inherent nature of this subject-matter, reliance must primarily be placed on such elements as official pronouncements of States, military manuals and judicial decisions.

b. **Principal Rules**

100. The first rules that evolved in this area were aimed at protecting the civilian population from the hostilities. As early as the Spanish Civil War (1936-39), State practice revealed a tendency to disregard

the distinction between international and internal wars and to apply certain general principles of humanitarian law, at least to those internal conflicts that constituted large-scale civil wars. The Spanish Civil War had elements of both an internal and an international armed conflict. Significantly, both the republican Government and third States refused to recognize the insurgents as belligerents. They nonetheless insisted that certain rules concerning international armed conflict applied. Among rules deemed applicable were the prohibition of the intentional bombing of civilians, the rule forbidding attacks on non-military objectives, and the rule regarding required precautions when attacking military objectives. Thus, for example, on 23 March 1938, Prime Minister Chamberlain explained the British protest against the bombing of Barcelona as follows:

> "The rules of international law as to what constitutes a military objective are undefined and pending the conclusion of the examination of this question [. . .] I am not in a position to make any statement on the subject. The one definite rule of international law, however, is that the direct and deliberate bombing of non-combatants is in all circumstances illegal, and His Majesty's Government's protest was based on information which led them to the conclusion that the bombardment of Barcelona, carried on apparently at random and without special aim at military objectives, was in fact of this nature." (333 House of Commons Debates, col. 1177 (23 March 1938).)

More generally, replying to questions by Member of Parliament Noel-Baker concerning the civil war in Spain, on 21 June 1938 the Prime Minister stated the following:

> "I think we may say that there are, at any rate, three rules of international law or three principles of international law which are as applicable to warfare from the air as they are to war at sea or on land. In the first place, it is against international law to bomb civilians as such and to make deliberate attacks upon civilian populations. That is undoubtedly a violation of international law. In the second place, targets which are aimed at from the air must be legitimate military objectives and must be capable of identification. In the third place, reasonable care must be taken in attacking those military objectives so that by carelessness a civilian population in the neighbourhood is not bombed." (337 House of Commons Debates, cols. 937-38 (21 June 1938).)

101. Such views were reaffirmed in a number of contemporaneous resolutions by the Assembly of the League of Nations, and in the declarations and agreements of the warring parties. For example, on 30 September 1938, the Assembly of the League of Nations unanimously adopted a resolution concerning both the Spanish conflict and the Chinese-Japanese war. After stating that "on numerous occasions public opinion has expressed through the most authoritative channels its horror of the bombing of civilian populations" and that "this practice, for which there is no military necessity and which, as experience shows, only causes needless suffering, is condemned under recognised principles of international law", the Assembly expressed the hope that an agreement could be adopted on the matter and went on to state that it

> "[r]ecognize[d] the following principles as a necessary basis for any subsequent regulations:
>
> (1) The intentional bombing of civilian populations is illegal;
> (2) Objectives aimed at from the air must be legitimate military objectives and must be identifiable;
> (3) Any attack on legitimate military objectives must be carried out in such a way that civilian populations in the neighbourhood are not bombed through negligence." (**League of Nations, O.J. Spec. Supp. 183**, at 135-36 (1938).)

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102. Subsequent State practice indicates that the Spanish Civil War was not exceptional in bringing about the extension of some general principles of the laws of warfare to internal armed conflict. While the rules that evolved as a result of the Spanish Civil War were intended to protect civilians finding themselves in the theatre of hostilities, rules designed to protect those who do not (or no longer) take part in hostilities emerged after World War II. In 1947, instructions were issued to the Chinese "peoples' liberation army" by Mao Tse-Tung who instructed them not to "kill or humiliate any of Chiang Kai-Shek's army officers and men who lay down their arms." (*Manifesto of the Chinese People's Liberation Army,* in Mao Tse-Tung, 4 Selected Works (1961) 147, at 151.) He also instructed the insurgents, among other things, not to "ill-treat captives", "damage crops" or "take liberties with women." (*On the Reissue of the Three Main Rules of Discipline and the Eight Points for Attention - Instruction of the General Headquarters of the Chinese People's Liberation Army,* in *id.*, 155.)

In an important subsequent development, States specified certain minimum mandatory rules applicable to internal armed conflicts in common Article 3 of the Geneva Conventions of 1949. The International Court of Justice has confirmed that these rules reflect "elementary considerations of humanity" applicable under customary international law to any armed conflict, whether it is of an internal or international character. (Nicaragua Case, at para. 218). Therefore, at least with respect to the minimum rules in common Article 3, the character of the conflict is irrelevant.

103. Common Article 3 contains not only the substantive rules governing internal armed conflict but also a procedural mechanism inviting parties to internal conflicts to agree to abide by the rest of the Geneva Conventions. As in the current conflicts in the former Yugoslavia, parties to a number of internal armed conflicts have availed themselves of this procedure to bring the law of international armed conflicts into force with respect to their internal hostilities. For example, in the 1967 conflict in Yemen, both the Royalists and the President of the Republic agreed to abide by the essential rules of the Geneva Conventions. Such undertakings reflect an understanding that certain fundamental rules should apply regardless of the nature of the conflict.

104. Agreements made pursuant to common Article 3 are not the only vehicle through which international humanitarian law has been brought to bear on internal armed conflicts. In several cases reflecting customary adherence to basic principles in internal conflicts, the warring parties have unilaterally committed to abide by international humanitarian law.

105. As a notable example, we cite the conduct of the Democratic Republic of the Congo in its civil war. In a public statement issued on 21 October 1964, the Prime Minister made the following commitment regarding the conduct of hostilities:

> "For humanitarian reasons, and with a view to reassuring, in so far as necessary, the civilian population which might fear that it is in danger, the Congolese Government wishes to state that the Congolese Air Force will limit its action to military objectives.
>
> In this matter, the Congolese Government desires not only to protect human lives but also to respect the Geneva Convention [sic]. It also expects the rebels - and makes an urgent appeal to them to that effect - to act in the same manner.
>
> As a practical measure, the Congolese Government suggests that International Red Cross observers come to check on the extent to which the Geneva Convention [sic] is being respected, particularly in the matter of the treatment of prisoners and the ban against taking hostages." (Public Statement of Prime Minister of the Democratic Republic of the Congo (21 Oct. 1964), *reprinted* in **American Journal of International Law** (1965) 614, at 616.)

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This statement indicates acceptance of rules regarding the conduct of internal hostilities, and, in particular, the principle that civilians must not be attacked. Like State practice in the Spanish Civil War, the Congolese Prime Minister's statement confirms the status of this rule as part of the customary law of internal armed conflicts. Indeed, this statement must not be read as an offer or a promise to undertake obligations previously not binding; rather, it aimed at reaffirming the existence of such obligations and spelled out the notion that the Congolese Government would fully comply with them.

106. A further confirmation can be found in the "Operational Code of Conduct for Nigerian Armed Forces", issued in July 1967 by the Head of the Federal Military Government, Major General Y. Gowon, to regulate the conduct of military operations of the Federal Army against the rebels. In this "Operational Code of Conduct", it was stated that, to repress the rebellion in Biafra, the Federal troops were duty-bound to respect the rules of the Geneva Conventions and in addition were to abide by a set of rules protecting civilians and civilian objects in the theatre of military operations. (See A.H.M. Kirk-Greene, **1 Crisis and Conflict in Nigeria, A Documentary Sourcebook 1966-1969**, 455-57 (1971).) This "Operational Code of Conduct" shows that in a large-scale and protracted civil war the central authorities, while refusing to grant recognition of belligerency, deemed it necessary to apply not only the provisions of the Geneva Conventions designed to protect civilians in the hands of the enemy and captured combatants, but also general rules on the conduct of hostilities that are normally applicable in international conflicts. It should be noted that the code was actually applied by the Nigerian authorities. Thus, for instance, it is reported that on 27 June 1968, two officers of the Nigerian Army were publicly executed by a firing squad in Benin City in Mid-Western Nigeria for the murder of four civilians near Asaba, (see New Nigerian, 28 June 1968, at 1). In addition, reportedly on 3 September 1968, a Nigerian Lieutenant was court-martialled, sentenced to death and executed by a firing squad at Port-Harcourt for killing a rebel Biafran soldier who had surrendered to Federal troops near Aba. (See Daily Times - Nigeria, 3 September 1968, at 1; Daily Times, - Nigeria, 4 September 1968, at 1.)

This attitude of the Nigerian authorities confirms the trend initiated with the Spanish Civil War and referred to above (see paras. 101-102), whereby the central authorities of a State where civil strife has broken out prefer to withhold recognition of belligerency but, at the same time, extend to the conflict the bulk of the body of legal rules concerning conflicts between States.

107. A more recent instance of this tendency can be found in the stand taken in 1988 by the rebels (the FMLN) in El Salvador, when it became clear that the Government was not ready to apply the Additional Protocol II it had previously ratified. The FMLN undertook to respect both common Article 3 and Protocol II:

> "The FMLN shall ensure that its combat methods comply with the provisions of common Article 3 of the Geneva Conventions and Additional Protocol II, take into consideration the needs of the majority of the population, and defend their fundamental freedoms." (FMLN, *La legitimidad de nuestros metodos de lucha,* Secretaria de promocion y proteccion de lo Derechos Humanos del FMLN, El Salvador, 10 Octobre 1988, at 89; unofficial translation.)3

108. In addition to the behaviour of belligerent States, Governments and insurgents, other factors have been instrumental in bringing about the formation of the customary rules at issue. The Appeals Chamber will mention in particular the action of the ICRC, two resolutions adopted by the United Nations General Assembly, some declarations made by member States of the European Community (now European Union), as well as Additional Protocol II of 1977 and some military manuals.

109. As is well known, the ICRC has been very active in promoting the development, implementation and dissemination of international humanitarian law. From the angle that is of relevance to us, namely the emergence of customary rules on internal armed conflict, the ICRC has made a remarkable

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contribution by appealing to the parties to armed conflicts to respect international humanitarian law. It is notable that, when confronted with non-international armed conflicts, the ICRC has promoted the application by the contending parties of the basic principles of humanitarian law. In addition, whenever possible, it has endeavoured to persuade the conflicting parties to abide by the Geneva Conventions of 1949 or at least by their principal provisions. When the parties, or one of them, have refused to comply with the bulk of international humanitarian law, the ICRC has stated that they should respect, as a minimum, common Article 3. This shows that the ICRC has promoted and facilitated the extension of general principles of humanitarian law to internal armed conflict. The practical results the ICRC has thus achieved in inducing compliance with international humanitarian law ought therefore to be regarded as an element of actual international practice; this is an element that has been conspicuously instrumental in the emergence or crystallization of customary rules.

110. The application of certain rules of war in both internal and international armed conflicts is corroborated by two General Assembly resolutions on "Respect of human rights in armed conflict." The first one, resolution 2444, was unanimously4 adopted in 1968 by the General Assembly: "[r]ecognizing the necessity of applying basic humanitarian principles in all armed conflicts," the General Assembly "affirm[ed]"

> "the following principles for observance by all governmental and other authorities responsible for action in armed conflict: (a) That the right of the parties to a conflict to adopt means of injuring the enemy is not unlimited; (b) That it is prohibited to launch attacks against the civilian populations as such; (c) That distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible." (G.A. Res. 2444, U.N. GAOR., 23rd Session, Supp. No. 18 U.N. Doc. A/7218 (1968).)

It should be noted that, before the adoption of the resolution, the United States representative stated in the Third Committee that the principles proclaimed in the resolution "constituted a reaffirmation of existing international law" (U.N. GAOR, 3rd Comm., 23rd Sess., 1634th Mtg., at 2, U.N. Doc. A/C.3/SR.1634 (1968)). This view was reiterated in 1972, when the United States Department of Defence pointed out that the resolution was "declaratory of existing customary international law" or, in other words, "a correct restatement" of "principles of customary international law." (See 67 **American Journal of International Law** (1973), at 122, 124.)

111. Elaborating on the principles laid down in resolution 2444, in 1970 the General Assembly unanimously5 adopted resolution 2675 on "Basic principles for the protection of civilian populations in armed conflicts." In introducing this resolution, which it co-sponsored, to the Third Committee, Norway explained that as used in the resolution, "the term 'armed conflicts' was meant to cover armed conflicts of all kinds, an important point, since the provisions of the Geneva Conventions and the Hague Regulations did not extend to all conflicts." (U.N. GAOR, 3rd Comm., 25th Sess., 1785th Mtg., at 281, U.N. Doc. A/C.3/SR.1785 (1970); *see also* U.N. GAOR, 25th Sess., 1922nd Mtg., at 3, U.N. Doc. A/PV.1922 (1970) (statement of the representative of Cuba during the Plenary discussion of resolution 2675).)The resolution stated the following:

> "Bearing in mind the need for measures to ensure the better protection of human rights in armed conflicts of all types, [. . . the General Assembly] Affirms the following basic principles for the protection of civilian populations in armed conflicts, without prejudice to their future elaboration within the framework of progressive development of the international law of armed conflict:
>
> 1. Fundamental human rights, as accepted in international law and laid down in international instruments, continue to apply fully in situations of armed conflict.

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2. In the conduct of military operations during armed conflicts, a distinction must be made at all times between persons actively taking part in the hostilities and civilian populations.

3. In the conduct of military operations, every effort should be made to spare civilian populations from the ravages of war, and all necessary precautions should be taken to avoid injury, loss or damage to civilian populations.

4. Civilian populations as such should not be the object of military operations.

5. Dwellings and other installations that are used only by civilian populations should not be the object of military operations.

6. Places or areas designated for the sole protection of civilians, such as hospital zones or similar refuges, should not be the object of military operations.

7. Civilian populations, or individual members thereof, should not be the object of reprisals, forcible transfers or other assaults on their integrity.

8. The provision of international relief to civilian populations is in conformity with the humanitarian principles of the Charter of the United Nations, the Universal Declaration of Human Rights and other international instruments in the field of human rights. The Declaration of Principles for International Humanitarian Relief to the Civilian Population in Disaster Situations, as laid down in resolution XXVI adopted by the twenty-first International Conference of the Red Cross, shall apply in situations of armed conflict, and all parties to a conflict should make every effort to facilitate this application." (G.A. Res. 2675, U.N. GAOR., 25th Sess., Supp. No. 28 U.N. Doc. A/8028 (1970).)

112. Together, these resolutions played a twofold role: they were declaratory of the principles of customary international law regarding the protection of civilian populations and property in armed conflicts of any kind and, at the same time, were intended to promote the adoption of treaties on the matter, designed to specify and elaborate upon such principles.

113. That international humanitarian law includes principles or general rules protecting civilians from hostilities in the course of internal armed conflicts has also been stated on a number of occasions by groups of States. For instance, with regard to Liberia, the (then) twelve Member States of the European Community, in a declaration of 2 August 1990, stated:

"In particular, the Community and its Member States call upon the parties in the conflict, in conformity with international law and the most basic humanitarian principles, to safeguard from violence the embassies and places of refuge such as churches, hospitals, etc., where defenceless civilians have sought shelter." (6 European Political Cooperation Documentation Bulletin, at 295 (1990).)

114. A similar, albeit more general, appeal was made by the Security Council in its resolution 788 (in operative paragraph 5 it called upon "all parties to the conflict and all others concerned to respect strictly the provisions of international humanitarian law") (S.C. Res. 788 (19 November 1992)), an appeal reiterated in resolution 972 (S.C. Res. 972 (13 January 1995)) and in resolution 1001 (S.C. Res. 1001 (30 June 1995)).

Appeals to the parties to a civil war to respect the principles of international humanitarian law were also

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made by the Security Council in the case of Somalia and Georgia. As for Somalia, mention can be made of resolution 794 in which the Security Council in particular condemned, as a breach of international humanitarian law, "the deliberate impeding of the delivery of food and medical supplies essential for the survival of the civilian population") (S.C. Res. 794 (3 December 1992)) and resolution 814 (S.C. Res. 814 (26 March 1993)). As for Georgia, see Resolution 993, (in which the Security Council reaffirmed "the need for the parties to comply with international humanitarian law") (S.C. Res. 993 (12 May 1993)).

115. Similarly, the now fifteen Member States of the European Union recently insisted on respect for international humanitarian law in the civil war in Chechnya. On 17 January 1995 the Presidency of the European Union issued a declaration stating:

> "The European Union is following the continuing fighting in Chechnya with the greatest concern. The promised cease-fires are not having any effect on the ground. Serious violations of human rights and international humanitarian law are continuing. The European Union strongly deplores the large number of victims and the suffering being inflicted on the civilian population." (Council of the European Union - General Secretariat, Press Release 4215/95 (Presse II-G), at 1 (17 January 1995).)

The appeal was reiterated on 23 January 1995, when the European Union made the following declaration:

> "It deplores the serious violations of human rights and international humanitarian law which are still occurring [in Chechnya]. It calls for an immediate cessation of the fighting and for the opening of negotiations to allow a political solution to the conflict to be found. It demands that freedom of access to Chechnya and the proper convoying of humanitarian aid to the population be guaranteed." (Council of the European Union-General Secretariat, Press Release 4385/95 (Presse 24), at 1 (23 January 1995).)

116. It must be stressed that, in the statements and resolutions referred to above, the European Union and the United Nations Security Council did not mention common Article 3 of the Geneva Conventions, but adverted to "international humanitarian law", thus clearly articulating the view that there exists a **corpus** of general principles and norms on internal armed conflict embracing common Article 3 but having a much greater scope.

117. Attention must also be drawn to Additional Protocol II to the Geneva Conventions. Many provisions of this Protocol can now be regarded as declaratory of existing rules or as having crystallised emerging rules of customary law or else as having been strongly instrumental in their evolution as general principles.

This proposition is confirmed by the views expressed by a number of States. Thus, for example, mention can be made of the stand taken in 1987 by El Salvador (a State party to Protocol II). After having been repeatedly invited by the General Assembly to comply with humanitarian law in the civil war raging on its territory (*see*, e.g., G.A. Res. 41/157 (1986)), the Salvadorian Government declared that, strictly speaking, Protocol II did not apply to that civil war (although an objective evaluation prompted some Governments to conclude that all the conditions for such applications were met, (see, e.g., 43 **Annuaire Suisse de Droit International**, (1987) at 185-87). Nevertheless, the Salvadorian Government undertook to comply with the provisions of the Protocol, for it considered that such provisions "developed and supplemented" common Article 3, "which in turn constitute[d] the minimum protection due to every human being at any time and place"(6) (*See Informe de la Fuerza Armata de El Salvador sobre el*

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respeto y la vigencia de las normas del Derecho Internacional Humanitario durante el periodo de Septiembre de 1986 a Agosto de 1987, at 3 (31 August 1987) (forwarded by Ministry of Defence and Security of El Salvador to Special Representative of the United Nations Human Rights Commission (2 October 1987),; (unofficial translation). Similarly, in 1987, Mr. M.J. Matheson, speaking in his capacity as Deputy Legal Adviser of the United States State Department, stated that:

> "[T]he basic core of Protocol II is, of course, reflected in common article 3 of the 1949 Geneva Conventions and therefore is, and should be, a part of generally accepted customary law. This specifically includes its prohibitions on violence towards persons taking no active part in hostilities, hostage taking, degrading treatment, and punishment without due process" (Humanitarian Law Conference, Remarks of Michael J. Matheson, (2) **American University Journal of International Law and Policy** (1987) 419, at 430-31).

118. That at present there exist general principles governing the conduct of hostilities (the so-called "Hague Law") applicable to international and internal armed conflicts is also borne out by national military manuals. Thus, for instance, the German Military Manual of 1992 provides that:

> Members of the German army, like their Allies, shall comply with the rules of international humanitarian law in the conduct of military operations in all armed conflicts, whatever the nature of such conflicts." (Humanitäres Völkerrecht in bewaffneten Konflikten - Handbuch, August 1992, DSK AV207320065, at para. 211 in fine; unofficial translation.)(7)

119. So far we have pointed to the formation of general rules or principles designed to protect **civilians or civilian objects** from the hostilities or, more generally, to protect **those who do not (or no longer) take active part in hostilities**. We shall now briefly show how the gradual extension to internal armed conflict of rules and principles concerning international wars has also occurred as regards **means and methods of warfare**. As the Appeals Chamber has pointed out above (see para. 110), a general principle has evolved limiting the right of the parties to conflicts "to adopt means of injuring the enemy." The same holds true for a more general principle, laid down in the so-called Turku Declaration of Minimum Humanitarian Standards of 1990, and revised in 1994, namely Article 5, paragraph 3, whereby "[w] eapons or other material or methods prohibited in international armed conflicts must not be employed in any circumstances." (*Declaration of Minimum Humanitarian Standards, reprinted in, Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its Forty-sixth Session,* Commission on Human Rights, 51st Sess., Provisional Agenda Item 19, at 4, U.N. Doc. E/CN.4/1995/116 (1995).) It should be noted that this Declaration, emanating from a group of distinguished experts in human rights and humanitarian law, has been indirectly endorsed by the Conference on Security and Cooperation in Europe in its Budapest Document of 1994 (Conference on Security and Cooperation in Europe, Budapest Document 1994: Towards Genuine Partnership in a New Era, para. 34 (1994)) and in 1995 by the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities (*Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its Forty-sixth Session,* Commission on Human Rights, 51st Sess., Agenda Item 19, at 1, U.N. Doc. E/CN.4/1995/L.33 (1995)).

Indeed, elementary considerations of humanity and common sense make it preposterous that the use by States of weapons prohibited in armed conflicts between themselves be allowed when States try to put down rebellion by their own nationals on their own territory. What is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife.

120. This fundamental concept has brought about the gradual formation of general rules concerning specific weapons, rules which extend to civil strife the sweeping prohibitions relating to international armed conflicts. By way of illustration, we will mention chemical weapons. Recently a number of States

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have stated that the use of chemical weapons by the central authorities of a State against its own population is contrary to international law. On 7 September 1988 the [then] twelve Member States of the European Community made a declaration whereby:

> "The Twelve are greatly concerned at reports of the alleged use of chemical weapons against the Kurds [by the Iraqi authorities]. They confirm their previous positions, condemning any use of these weapons. They call for respect of international humanitarian law, including the Geneva Protocol of 1925, and Resolutions 612 and 620 of the United Nations Security Council [concerning the use of chemical weapons in the Iraq-Iran war]." (4 European Political Cooperation Documentation Bulletin, (1988) at 92.)

This statement was reiterated by the Greek representative, on behalf of the Twelve, on many occasions. (See U.N. GAOR, 1st Comm., 43rd Sess., 4th Mtg., at 47, U.N. Doc. A/C.1/43/PV.4 (1988)(statement of 18 October 1988 in the First Committee of the General Assembly); U.N. GAOR, 1st Comm., 43rd Sess., 31st Mtg., at 23, U.N. Doc. A/C.1/43/PV.31 (statement of 9 November 1988 in meeting of First Committee of the General Assembly to the effect inter alia that "The Twelve [. . .] call for respect for the Geneva Protocol of 1925 and other relevant rules of customary international law"); U.N. GAOR, 1st Comm., 43rd Sess., 49th Mtg., at 16, U.N. Doc. A/C.3/43/SR.49 (summary of statement of 22 November 1988 in Third Committee of the General Assembly); *see also Report on European Union [EPC Aspects]*, 4 European Political Cooperation Documentation Bulletin (1988), 325, at 330; *Question No 362/88 by Mr. Arbeloa Muru (S-E) Concerning the Poisoning of Opposition Members in Iraq*, 4 European Political Cooperation Documentation Bulletin (1988), 187 (statement of the Presidency in response to a question of a member of the European Parliament).)

121. A firm position to the same effect was taken by the British authorities: in 1988 the Foreign Office stated that the Iraqi use of chemical weapons against the civilian population of the town of Halabja represented "a serious and grave violation of the 1925 Geneva Protocol and international humanitarian law. The U.K. condemns unreservedly this and all other uses of chemical weapons." (59 **British Yearbook of International Law** (1988) at 579; *see also* id. at 579-80.) A similar stand was taken by the German authorities. On 27 October 1988 the German Parliament passed a resolution whereby it "resolutely rejected the view that the use of poison gas was allowed on one's own territory and in clashes akin to civil wars, assertedly because it was not expressly prohibited by the Geneva Protocol of 1925"(8) . (50 **Zeitschrift Für Ausländisches Öffentliches Recht Und Völkerrecht** (1990), at 382-83; unofficial translation.) Subsequently the German representative in the General Assembly expressed Germany's alarm "about reports of the use of chemical weapons against the Kurdish population" and referred to "breaches of the Geneva Protocol of 1925 and other norms of international law." (U.N. GAOR, 1st Comm., 43rd Sess., 31st Mtng., at 16, U.N. Doc. A/C.1/43/PV.31 (1988).)

122. A clear position on the matter was also taken by the United States Government. In a "press guidance" statement issued by the State Department on 9 September 1988 it was stated that:

> Questions have been raised as to whether the prohibition in the 1925 Geneva Protocol against [chemical weapon] use 'in war' applies to [chemical weapon] use in internal conflicts. However, it is clear that such use against the civilian population would be contrary to the customary international law that is applicable to internal armed conflicts, as well as other international agreements." (United States, Department of State, Press Guidance (9 September 1988).)

On 13 September 1988, Secretary of State George Schultz, in a hearing before the United States Senate Judiciary Committee strongly condemned as "completely unacceptable" the use of chemical weapons by Iraq. (*Hearing on Refugee Consultation with Witness Secretary of State George Shultz,* 100th Cong., 2d Sess., (13 September 1988) (Statement of Secretary of State Shultz).) On 13 October of the same year,

Ambassador R.W. Murphy, Assistant Secretary for Near Eastern and South Asian Affairs, before the Sub-Committee on Europe and the Middle East of the House of Representatives Foreign Affairs Committee did the same, branding that use as "illegal." (See **Department of State Bulletin** (December 1988) 41, at 43-4.)

123. It is interesting to note that, reportedly, the Iraqi Government "flatly denied the poison gas charges." (New York Times, 16 September 1988, at A 11.) Furthermore, it agreed to respect and abide by the relevant international norms on chemical weapons. In the aforementioned statement, Ambassador Murphy said:

> "On September 17, Iraq reaffirmed its adherence to international law, including the 1925 Geneva Protocol on chemical weapons as well as other international humanitarian law. We welcomed this statement as a positive step and asked for confirmation that Iraq means by this to renounce the use of chemical weapons inside Iraq as well as against foreign enemies. On October 3, the Iraqi Foreign Minister confirmed this directly to Secretary Schultz." (*Id.* at 44.)

This information had already been provided on 20 September 1988 in a press conference by the State Department spokesman Mr Redman. (See State Department Daily Briefing, 20 September 1988, Transcript ID: 390807, p. 8.) It should also be stressed that a number of countries (Turkey, Saudi Arabia, Egypt, Jordan, Bahrain, Kuwait) as well as the Arab League in a meeting of Foreign Ministers at Tunis on 12 September 1988, strongly disagreed with United States' assertions that Iraq had used chemical weapons against its Kurdish nationals. However, this disagreement did not turn on the legality of the use of chemical weapons; rather, those countries accused the United States of "conducting a smear media campaign against Iraq." (See New York Times, 15 September 1988, at A 13; Washington Post, 20 September 1988, at A 21.)

124. It is therefore clear that, whether or not Iraq really used chemical weapons against its own Kurdish nationals - a matter on which this Chamber obviously cannot and does not express any opinion - there undisputedly emerged a general consensus in the international community on the principle that the use of those weapons is also prohibited in internal armed conflicts.

125. State practice shows that general principles of customary international law have evolved with regard to internal armed conflict also in areas relating to methods of warfare. In addition to what has been stated above, with regard to the ban on attacks on civilians in the theatre of hostilities, mention can be made of the prohibition of perfidy. Thus, for instance, in a case brought before Nigerian courts, the Supreme Court of Nigeria held that rebels must not feign civilian status while engaging in military operations. (*See* Pius Nwaoga v. The State, 52 **International Law Reports**, 494, at 496-97 (Nig. S. Ct. 1972).)

126. The emergence of the aforementioned general rules on internal armed conflicts does not imply that internal strife is regulated by general international law in all its aspects. Two particular limitations may be noted: (i) only a number of rules and principles governing international armed conflicts have gradually been extended to apply to internal conflicts; and (ii) this extension has not taken place in the form of a full and mechanical transplant of those rules to internal conflicts; rather, the general essence of those rules, and not the detailed regulation they may contain, has become applicable to internal conflicts. (On these and other limitations of international humanitarian law governing civil strife, see the important message of the Swiss Federal Council to the Swiss Chambers on the ratification of the two 1977 Additional Protocols (38 **Annuaire Suisse de Droit International** (1982) 137 at 145-49.))

127. Notwithstanding these limitations, it cannot be denied that customary rules have developed to

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govern internal strife. These rules, as specifically identified in the preceding discussion, cover such areas as protection of civilians from hostilities, in particular from indiscriminate attacks, protection of civilian objects, in particular cultural property, protection of all those who do not (or no longer) take active part in hostilities, as well as prohibition of means of warfare proscribed in international armed conflicts and ban of certain methods of conducting hostilities.

(iv) **Individual Criminal Responsibility In Internal Armed Conflict**

128. Even if customary international law includes certain basic principles applicable to both internal and international armed conflicts, Appellant argues that such prohibitions do not entail individual criminal responsibility when breaches are committed in internal armed conflicts; these provisions cannot, therefore, fall within the scope of the International Tribunal's jurisdiction. It is true that, for example, common Article 3 of the Geneva Conventions contains no explicit reference to criminal liability for violation of its provisions. Faced with similar claims with respect to the various agreements and conventions that formed the basis of its jurisdiction, the International Military Tribunal at Nuremberg concluded that a finding of individual criminal responsibility is not barred by the absence of treaty provisions on punishment of breaches. (See The Trial of Major War Criminals: Proceedings of the International Military Tribunal Sitting at Nuremberg Germany, Part 22, at 445, 467 (1950).) The Nuremberg Tribunal considered a number of factors relevant to its conclusion that the authors of particular prohibitions incur individual responsibility: the clear and unequivocal recognition of the rules of warfare in international law and State practice indicating an intention to criminalize the prohibition, including statements by government officials and international organizations, as well as punishment of violations by national courts and military tribunals (id., at 445-47, 467). Where these conditions are met, individuals must be held criminally responsible, because, as the Nuremberg Tribunal concluded:

> [c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced." (*id.*, at 447.)

129. Applying the foregoing criteria to the violations at issue here, we have no doubt that they entail individual criminal responsibility, regardless of whether they are committed in internal or international armed conflicts. Principles and rules of humanitarian law reflect "elementary considerations of humanity" widely recognized as the mandatory minimum for conduct in armed conflicts of any kind. No one can doubt the gravity of the acts at issue, nor the interest of the international community in their prohibition.

130. Furthermore, many elements of international practice show that States intend to criminalize serious breaches of customary rules and principles on internal conflicts. As mentioned above, during the Nigerian Civil War, both members of the Federal Army and rebels were brought before Nigerian courts and tried for violations of principles of international humanitarian law (see paras. 106 and 125).

131. Breaches of common Article 3 are clearly, and beyond any doubt, regarded as punishable by the Military Manual of Germany (**Humanitäres Völkerrecht in bewaffneten Konflikten** - Handbuch, August 1992, DSK AV2073200065, at para. 1209)(unofficial translation), which includes among the "grave breaches of international humanitarian law", "criminal offences" against persons protected by common Article 3, such as "wilful killing, mutilation, torture or inhumane treatment including biological experiments, wilfully causing great suffering, serious injury to body or health, taking of hostages", as well as "the fact of impeding a fair and regular trial"(9) . (Interestingly, a previous edition of the German Military Manual did not contain any such provision. See Kriegsvölkerrecht - Allgemeine Bestimmungen des Kriegführungsrechts und Landkriegsrecht, ZDv 15-10, March 1961, para. 12; Kriegsvölkerrecht - Allgemeine Bestimmungen des Humanitätsrechts, ZDv 15/5, August 1959, paras. 15-16, 30-2).

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Furthermore, the "Interim Law of Armed Conflict Manual" of New Zealand, of 1992, provides that "while non-application [i.e. breaches of common Article 3] would appear to render those responsible liable to trial for 'war crimes', trials would be held under national criminal law, since no 'war' would be in existence" (New Zealand Defence Force Directorate of Legal Services, DM (1992) at 112, Interim Law of Armed Conflict Manual, para. 1807, 8). The relevant provisions of the manual of the United States (Department of the Army, The Law of Land Warfare, Department of the Army Field Manual, FM 27-10, (1956), at paras. 11 & 499) may also lend themselves to the interpretation that "war crimes", **i.e.,** "every violation of the law of war", include infringement of common Article 3. A similar interpretation might be placed on the British Manual of 1958 (War Office, The Law of War on Land, Being Part III of the Manual of Military Law (1958), at para. 626).

132. Attention should also be drawn to national legislation designed to implement the Geneva Conventions, some of which go so far as to make it possible for national courts to try persons responsible for violations of rules concerning internal armed conflicts. This holds true for the Criminal Code of the Socialist Federal Republic of Yugoslavia, of 1990, as amended for the purpose of making the 1949 Geneva Conventions applicable at the national criminal level. Article 142 (on war crimes against the civilian population) and Article 143 (on war crimes against the wounded and the sick) expressly apply "at the time of war, armed conflict or occupation"; this would seem to imply that they also apply to internal armed conflicts. (Socialist Federal Republic of Yugoslavia, Federal Criminal Code, arts. 142-43 (1990).) (It should be noted that by a decree having force of law, of 11 April 1992, the Republic of Bosnia and Herzegovina has adopted that Criminal Code, subject to some amendments.) (2 Official Gazette of the Republic of Bosnia and Herzegovina 98 (11 April 1992)(translation).) Furthermore, on 26 December 1978 a law was passed by the Yugoslav Parliament to implement the two Additional Protocols of 1977 (Socialist Federal Republic of Yugoslavia, Law of Ratification of the Geneva Protocols, Medunarodni Ugovori, at 1083 (26 December 1978).) as a result, by virtue of Article 210 of the Yugoslav Constitution, those two Protocols are "directly applicable" by the courts of Yugoslavia. (Constitution of the Socialist Federal Republic of Yugoslavia, art. 210.) Without any ambiguity, a Belgian law enacted on 16 June 1993 for the implementation of the 1949 Geneva Conventions and the two Additional Protocols provides that Belgian courts have jurisdiction to adjudicate breaches of Additional Protocol II to the Geneva Conventions relating to victims of non-international armed conflicts. Article 1 of this law provides that a series of "grave breaches" (***infractions graves***) of the four Geneva Conventions and the two Additional Protocols, listed in the same Article 1, "constitute international law crimes" (***[c]onstituent des crimes de droit international***) within the jurisdiction of Belgian criminal courts (Article 7). (*Loi du 16 juin 1993 relative à la répression des infractions graves aux Conventions internationales de Genève du 12 août 1949 et aux Protocoles I et II du 8 juin 1977, additionnels à ces Conventions,* Moniteur Belge, (5 August 1993).)

133. Of great relevance to the formation of *opinio juris* to the effect that violations of general international humanitarian law governing internal armed conflicts entail the criminal responsibility of those committing or ordering those violations are certain resolutions unanimously adopted by the Security Council. Thus, for instance, in two resolutions on Somalia, where a civil strife was under way, the Security Council unanimously condemned breaches of humanitarian law and stated that the authors of such breaches or those who had ordered their commission would be held "individually responsible" for them. (See S.C. Res. 794 (3 December 1992); S.C. Res. 814 (26 March 1993).)

134. All of these factors confirm that customary international law imposes criminal liability for serious violations of common Article 3, as supplemented by other general principles and rules on the protection of victims of internal armed conflict, and for breaching certain fundamental principles and rules regarding means and methods of combat in civil strife.

135. It should be added that, in so far as it applies to offences committed in the former Yugoslavia, the

notion that serious violations of international humanitarian law governing internal armed conflicts entail individual criminal responsibility is also fully warranted from the point of view of substantive justice and equity. As pointed out above (*see* para. 132) such violations were punishable under the Criminal Code of the Socialist Federal Republic of Yugoslavia and the law implementing the two Additional Protocols of 1977. The same violations have been made punishable in the Republic of Bosnia and Herzegovina by virtue of the decree-law of 11 April 1992. Nationals of the former Yugoslavia as well as, at present, those of Bosnia-Herzegovina were therefore aware, or should have been aware, that they were amenable to the jurisdiction of their national criminal courts in cases of violation of international humanitarian law.

136. It is also fitting to point out that the parties to certain of the agreements concerning the conflict in Bosnia-Herzegovina, made under the auspices of the ICRC, clearly undertook to punish those responsible for violations of international humanitarian law. Thus, Article 5, paragraph 2, of the aforementioned Agreement of 22 May 1992 provides that:

> "Each party undertakes, when it is informed, in particular by the ICRC, of any allegation of violations of international humanitarian law, to open an enquiry promptly and pursue it conscientiously, and to take the necessary steps to put an end to the alleged violations or prevent their recurrence **and to punish those responsible in accordance with the law in force.**" (Agreement No. 1, art. 5, para. 2 (Emphasis added).)

Furthermore, the Agreement of 1st October 1992 provides in Article 3, paragraph 1, that

> "All prisoners not accused of, or sentenced for, grave breaches of International Humanitarian Law as defined in Article 50 of the First, Article 51 of the Second, Article 130 of the Third and Article 147 of the Fourth Geneva Convention, as well as in Article 85 of Additional Protocol I, will be unilaterally and unconditionally released." (Agreement No. 2, 1 October 1992, art. 3, para. 1.)

This provision, which is supplemented by Article 4, paragraphs 1 and 2 of the Agreement, implies that all those responsible for offences contrary to the Geneva provisions referred to in that Article must be brought to trial. As both Agreements referred to in the above paragraphs were clearly intended to apply in the context of an internal armed conflict, the conclusion is warranted that the conflicting parties in Bosnia-Herzegovina had clearly agreed at the level of treaty law to make punishable breaches of international humanitarian law occurring within the framework of that conflict.

(v) **Conclusion**

137. In the light of the intent of the Security Council and the logical and systematic interpretation of Article 3 as well as customary international law, the Appeals Chamber concludes that, under Article 3, the International Tribunal has jurisdiction over the acts alleged in the indictment, regardless of whether they occurred within an internal or an international armed conflict. Thus, to the extent that Appellant's challenge to jurisdiction under Article 3 is based on the nature of the underlying conflict, the motion must be denied.

(c) Article 5

138. Article 5 of the Statute confers jurisdiction over crimes against humanity. More specifically, the Article provides:

> "The International Tribunal shall have the power to prosecute persons responsible for the

following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:

(a) murder;

(b) extermination;

(c) enslavement;

(d) deportation;

(e) imprisonment;

(f) torture;

(g) rape;

(h) persecutions on political, racial and religious grounds;

(i) other inhumane acts."

As noted by the Secretary-General in his Report on the Statute, crimes against humanity were first recognized in the trials of war criminals following World War II. (Report of the Secretary-General, at para. 47.) The offence was defined in Article 6, paragraph 2(c) of the Nuremberg Charter and subsequently affirmed in the 1948 General Assembly Resolution affirming the Nuremberg principles.

139. Before the Trial Chamber, Counsel for Defence emphasized that both of these formulations of the crime limited it to those acts committed "in the execution of or in connection with any crime against peace or any war crime." He argued that this limitation persists in contemporary international law and constitutes a requirement that crimes against humanity be committed in the context of an international armed conflict (which assertedly was missing in the instant case). According to Counsel for Defence, jurisdiction under Article 5 over crimes against humanity "committed in armed conflict, whether international or internal in character" constitutes an ex post facto law violating the principle of *nullum crimen sine lege.* Although before the Appeals Chamber the Appellant has forgone this argument (*see* Appeal Transcript, 8 September 1995, at 45), in view of the importance of the matter this Chamber deems it fitting to comment briefly on the scope of Article 5.

140. As the Prosecutor observed before the Trial Chamber, the nexus between crimes against humanity and either crimes against peace or war crimes, required by the Nuremberg Charter, was peculiar to the jurisdiction of the Nuremberg Tribunal. Although the nexus requirement in the Nuremberg Charter was carried over to the 1948 General Assembly resolution affirming the Nuremberg principles, there is no logical or legal basis for this requirement and it has been abandoned in subsequent State practice with respect to crimes against humanity. Most notably, the nexus requirement was eliminated from the definition of crimes against humanity contained in Article II(1)(c) of Control Council Law No. 10 of 20 December 1945. (Control Council Law No. 10, Control Council for Germany, Official Gazette, 31 January 1946, at p. 50.). The obsolescence of the nexus requirement is evidenced by international conventions regarding genocide and apartheid, both of which prohibit particular types of crimes against humanity regardless of any connection to armed conflict. (Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, art. 1, 78 U.N.T.S. 277, Article 1 (providing that genocide, "whether committed in time of peace or in time of war, is a crime under international

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law"); International Convention on the Suppression and Punishment of the Crime of Apartheid, 30 November 1973, 1015 U.N.T.S. 243, arts. 1-2Article . I(1)).

141. It is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict. Indeed, as the Prosecutor points out, customary international law may not require a connection between crimes against humanity and any conflict at all. Thus, by requiring that crimes against humanity be committed in either internal or international armed conflict, the Security Council may have defined the crime in Article 5 more narrowly than necessary under customary international law. There is no question, however, that the definition of crimes against humanity adopted by the Security Council in Article 5 comports with the principle of *nullum crimen sine lege.*

142. We conclude, therefore, that Article 5 may be invoked as a basis of jurisdiction over crimes committed in either internal or international armed conflicts. In addition, for the reasons stated above, in Section IV A, (paras. 66-70), we conclude that in this case there was an armed conflict. Therefore, the Appellant's challenge to the jurisdiction of the International Tribunal under Article 5 must be dismissed.

C. May The International Tribunal Also Apply International Agreements Binding Upon The Conflicting Parties?

143. Before both the Trial Chamber and the Appeals Chamber, Defence and Prosecution have argued the application of certain agreements entered into by the conflicting parties. It is therefore fitting for this Chamber to pronounce on this. It should be emphasised again that the only reason behind the stated purpose of the drafters that the International Tribunal should apply customary international law was to avoid violating the principle of *nullum crimen sine lege* in the event that a party to the conflict did not adhere to a specific treaty. (Report of the Secretary-General, at para. 34.) It follows that the International Tribunal is authorised to apply, in addition to customary international law, any treaty which: (i) was unquestionably binding on the parties at the time of the alleged offence; and (ii) was not in conflict with or derogating from peremptory norms of international law, as are most customary rules of international humanitarian law. This analysis of the jurisdiction of the International Tribunal is borne out by the statements made in the Security Council at the time the Statute was adopted. As already mentioned above (paras. 75 and 88), representatives of the United States, the United Kingdom and France all agreed that Article 3 of the Statute did not exclude application of international agreements binding on the parties. (Provisional Verbatim Record, of the U.N.SCOR, 3217th Meeting., at 11, 15, 19, U.N. Doc. S/PV.3217 (25 May 1993).).

144. We conclude that, in general, such agreements fall within our jurisdiction under Article 3 of the Statute. As the defendant in this case has not been charged with any violations of any specific agreement, we find it unnecessary to determine whether any specific agreement gives the International Tribunal jurisdiction over the alleged crimes.

145. For the reasons stated above, the third ground of appeal, based on lack of subject-matter jurisdiction, must be dismissed.

V. DISPOSITION

146. For the reasons hereinabove expressed
and
Acting under Article 25 of the Statute and Rules 72, 116 bis and 117 of the Rules of Procedure and Evidence,

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The Appeals Chamber

(1) By 4 votes to 1,

Decides that the International Tribunal is empowered to pronounce upon the plea challenging the legality of the establishment of the International Tribunal.

IN FAVOUR: *President* Cassese, *Judges* Deschênes, Abi-Saab and Sidhwa

AGAINST: *Judge* Li

(2) Unanimously

Decides that the aforementioned plea is dismissed.

(3) Unanimously

Decides that the challenge to the primacy of the International Tribunal over national courts is dismissed.

(4) By 4 votes to 1

Decides that the International Tribunal has subject-matter jurisdiction over the current case.

IN FAVOUR: *President* Cassese, *Judges* Li, Deschênes, Abi-Saab

AGAINST: *Judge* Sidhwa

ACCORDINGLY, THE DECISION OF THE TRIAL CHAMBER OF 10 AUGUST 1995 STANDS REVISED, THE JURISDICTION OF THE INTERNATIONAL TRIBUNAL IS AFFIRMED AND THE APPEAL IS DISMISSED.

Done in English, this text being authoritative.*

(Signed) Antonio Cassese,
President

Judges Li, Abi-Saab and Sidhwa append separate opinions to the Decision of the Appeals Chamber

Judge Deschênes appends a Declaration.

(Initialled) A. C.

Dated this second day of October 1995
The Hague

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The Netherlands

[Seal of the Tribunal]

* French translation to follow

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1 "Trattasi di norme [concernenti i reati contro le leggi e gli usi della guerra] che, per il loro contenuto altamente etico e umanitario, hanno carattere non territoriale, ma universale... Dalla solidarietà delle varie nazioni, intesa a lenire nel miglior modo possibile gli orrori della guerra, scaturisce la necessità di dettare disposizioni che non conoscano barriere, colpendo chi delinque, dovunque esso si trovi....
..[I] reati contro le leggi e gli usi della guerra non possono essere considerati delitti politici, poichè non offendono un interesse politico di uno Stato determinato ovvero un diritto politico di un suo cittadino. Essi invece sono reati di lesa umanità, e, come si è precedentemente dimostrato, le norme relative hanno carattere universale, e non semplicemente territoriale. Tali reati sono, di conseguenza, per il loro oggetto giuridico e per la loro particolare natura, proprio di specie opposta e diversa da quella dei delitti politici. Questi, di norma, interessano solo lo Stato a danno del quale sono stati commessi, quelli invece interessano tutti gli Stati civili, e vanno combattuti e repressi, come sono combattuti e repressi il reato di pirateria, la tratta delle donne e dei minori, la riduzione in schiavitù, dovunque siano stati commessi." (art. 537 e 604 c. p.).
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2 "..[E]n raison de leur nature, les crimes contre l'humanité (...) ne relèvent pas seulement du droit interne français, mais encore d'un ordre répressif international auquel la notion de frontière et les règles extraditionnelles qui en découlent sont fondamentalement étrangères." (6 octobre 1983, 88 Revue Générale de Droit international public, 1984, p. 509.)

3 "El FMLN procura que sus métodos de lucha cumplan con lo estipulado per el art'culo 3 comun a los Convenios de Ginebra y su Protocolo II Adicional, tomen en consideración las necesidades de la mayor'a de la población y estén orientados a defender sus libertades fundamentales."

4 The recorded vote on the resolution was 111 in favour and 0 against. After the vote was taken, however, Gabon represented that it had intended to vote against the resolution. (U.N. GAOR, 23rd Sess., 1748th Mtg., at 7, 12, U.N.Doc. A/PV.1748 (1968)).

5 The recorded vote on the resolution was 109 in favour and 0 against, with 8 members abstaining. (U.N. GAOR, 1922nd Mtg., at 12, U.N.Doc. A/PV.1922 (1970).)

6 "Dentro de esta l'nea de conducta, su mayor preocupación [de la Fuerza Armada] ha sido el mantenerse apegada estrictamente al cumplimiento de las disposiciones contenidas en los Convenios de Ginebra y en El Protocolo II de dichos Convenios, ya que a&uacuten no siendo el mismo aplicable a la situación que confronta actualmente el país, el Gobierno de El Salvador acata y cumple las disposiciones contenidas endicho instrumento, por considerar que ellas constituyen el desarrollo y la complementación del Art. 3, comœn a los Convenios de Ginebra del 12 de agosto de 1949, que a su vez representa la protección mínima que se debe al ser humano encualquier tiempo y lugar."
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7 "Ebenso wie ihre Verbündeten beachten Soldaten der Bundeswehr die Regeln des humanitären Völkerrechts bei militärischen Operationen in allen bewaffneten Konflikten, gleichgültig welcher Art."
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8 "Der Deutsche Bundestag befürchtet, dass Berichte zutreffend sein könnten, dass die irakischen Streitkräfte auf dem Territorium des Iraks nunmehr im Kampf mit kurdischen Aufständischen Giftgas eingesetzt haben. Er weist mit Entschiedenheit die Auffassung zurück, dass der Einsatz von Giftgas im Innern und bei bürgerkriegsähnlichen Auseinandersetzungen zulässig sei, weil er durch das Genfer Protokoll von 1925 nicht ausdrücklich verboten werde..."
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9 "1209. Schwere Verletzungen des humanitären Völkerrechts sind insbesondere; -Straftaten gegen geschützte Personen (Verwundete, Kranke, Sanitätspersonal, Militärgeistliche, Kriegsgefangene, Bewohner besetzter Gebiete, andere

Zivilpersonen), wie vorsätzliche Tötung, Verstümmelung, Folterung oder unmenschliche Behandlung einschliesslich biologischer Versuche, vorsätzliche Verursachung grosser Leiden, schwere Beeinträchtingung der körperlichen Integrität oder Gesundheit, Geiselnahme (1 3, 49-51; 2 3, 50, 51; 3 3, 129, 130; 4 3, 146, 147; 5 11 Abs. 2, 85 Abs. 3 Buchst. a)
[. . .]
-Verhinderung eines unparteiischen ordentlichen Gerichtsverfahrens (1 3 Abs. 3 Buchst. d; 3 3 Abs. 1d; 5 85 Abs. 4 Buschst. e)."
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ANNEX 7:

Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, Advisory Opinion 13 July 1954, I.C.J. Reports 1954 p.47.

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1954 WL 7 (I.C.J.)

EFFECT OF **AWARDS** OF **COMPENSATION** MADE BY THE **UNITED NATIONS** ADMINISTRATIVE TRIBUNAL

International Court of Justice
July 13, 1954

***47** Definition of first question put to the Court: its limited scope.
Examination of the texts upon which the answer depends: Statute of the Administrative Tribunal, Staff Regulations and Staff Rules.-Nature of the Tribunal.-Character and effect of its awards.-Parties to the contract of service-Parties bound by the awards.-Question of power of review.
Examination of principal arguments in favour of the view that the General Assembly is entitled to refuse to give effect to awards: provisions of Charter; power of the Organization, and in particular of the General Assembly, to establish a tribunal to deal with disputes between the Organization and staff members; effect of awards of this Tribunal as regards the General Assembly itself; nature and consequences of the budgetary powers of the General Assembly; delimitation by the General Assembly of the respective powers of the Secretary-General and of the Tribunal; relevance of decision of the League of Nations in 1946.
***48** In the matter of the Effect of Awards of Compensation made by the United Nations Administrative Tribunal, submitted to the Court for advisory opinion at the request of the General Assembly of the United Nations,
THE COURT,
composed as above,
gives the following Advisory Opinion:
With a letter of December 16th, 1953, which was filed in the Registry on December 21st, the Secretary-General of the United Nations transmitted to the Court a certified true copy of a Resolution of the General Assembly of the United Nations of December 9th, 1953, which was in the following terms:
'The General Assembly,
Considering the request for a supplementary appropriation of $179,420, made by the Secretary-General in his report (A/2534) for the purpose of covering the awards made by the United Nations Administrative Tribunal in eleven cases numbered 26, and 37 to 46 inclusive,
Considering the concurrence in that appropriation by the Advisory Committee on Administrative and Budgetary Questions contained in its twenty-fourth report to the eighth session of the General Assembly (A/2580),
Considering, nevertheless, that important legal questions have been raised in the course of debate in the Fifth Committee with respect to that appropriation,
Decides
To submit the following legal questions to the International Court of Justice for an advisory opinion:
(1) 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?
(2) If the answer given by the Court to question (1) is in the affirmative, what are the principal grounds upon which the General Assembly could lawfully exercise such a right?'
The letter of the Secretary-General of the United Nations with the annexed Resolution was communicated on December 24th, 1953, to all States entitled to appear before the Court, in accordance with Article 66, paragraph 1, of the Statute. The Court was not sitting and the President considered that the States Members of ***49** the United Nations and the International Labour Organisation were likely to be able to furnish information on

the questions referred to the Court. Accordingly, the Registrar, in conformity with Article 66, paragraph 2, of the Statute, notified these States and the International Labour Organization on January 14th, 1954, that the Court was prepared to receive written statements from them within a time-limit fixed by an Order of the same date at March 15th, 1954.

The following availed themselves of this opportunity to present written statements: The International Labour Organisation and the Governments of France, Sweden, the Netherlands, Greece, the United Kingdom of Great Britain and Northern Ireland, the United States of America, the Philippines, Mexico, Chile, Iraq, the Republic of China, Guatemala, Turkey and Ecuador. The Governments of Canada, the Union of Soviet Socialist Republics, Yugoslavia, Czechoslovakia and Egypt, while not submitting written statements, drew attention to the views expressed by their representatives in the General Assembly when the question which has given rise to the request for an Advisory Opinion was debated there.

In accordance with Article 65, paragraph 2, of the Statute, the Secretary- General of the United Nations transmitted to the Court the documents likely to throw light upon the question. He also submitted a written statement.

Public hearings were held on June 10th, 11th, 12th and 14th, 1954, for the purpose of hearing oral statements. The following addressed the Court in the order which was decided by the President of the Court in consultation with them:

Mr. C. A. Stavropoulos, Principal Director in charge of the Legal Department of the Secretariat, representing the Secretary-General of the United Nations;

The Honorable Herman Phleger, Legal Adviser of the Department of State, representing the Government of the United States of America;

M. Paul Reuter, Professor of the Faculty of Law of Paris, Assistant Legal Adviser of the Ministry for Foreign Affairs, representing the Government of the French Republic;

Professor Jean Spiropoulos, Legal Adviser of the Ministry for Foreign Affairs, representing the Hellenic Government;

The Right Honourable Sir Reginald Manningham-Buller, Q.C., M.P., Solicitor- General, representing the Government of the United Kingdom of Great Britain and Northern Ireland;

M. A. J. P. Tammes, Professor of International Law at the University of Amsterdam, representing the Government of the Netherlands.

* * *

***50** 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. The Court does not therefore

seem to be requested to express its view with regard to awards which may exceed the scope of that statutory competence.
In the Resolution by which the present Advisory Opinion is requested, the General Assembly refers to the request for a supplementary appropriation made in a report of the Secretary-General for the purpose of covering the awards made by the Administrative Tribunal in eleven cases. It also refers to the concurrence in that appropriation by the Advisory Committee on Administrative and Budgetary Questions in its report to the General Assembly, and the first Question refers to the Statute of that Tribunal and 'to any other relevant instruments and to the relevant records'. In none of these reports or relevant records is to be found any suggestion indicating that the Tribunal, when rendering its awards in those eleven cases, was not legally constituted according to the provisions of Article 3 of its Statute. In such circumstances the Court understands that the first Question submitted to it contemplates awards made by a properly constituted Tribunal.
***51** It is true that by this Question the Court is requested to say whether the General Assembly has the right to refuse to give effect to an award 'on any grounds'. But it is difficult to hold that the General Assembly, by inserting these words, intended to modify the meaning which naturally follows from the other terms of the Question and from the above-mentioned considerations contained in its Resolution. The Court will, however, come back to this matter later in another connection.
The first Question is further limited to awards which grant compensation to a staff member, and it relates solely to awards in favour of a staff member whose contract of service has been terminated without his assent. It does not include awards in other disputes arising out of a contract of service. The Court is requested to say whether the General Assembly has the right to refuse to give effect to an award as defined by the Question. The term 'right' must signify legal right. The Court is asked to say whether the General Assembly is legally entitled to refuse to give effect to such awards. The Court is not called upon to express any view with regard to the particular awards which have given rise to the present Advisory Opinion.
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 1 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.'
***52** 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.'
The original Statute, as adopted on November 24th, 1949, contained in Article 9 the following provisions:
'If the Tribunal finds that the application is well founded, it shall order the rescinding of the decision contested or the specific performance of the obligation invoked; but if, in exceptional circumstances, such rescinding or specific performance is, in the opinion of the Secretary-General, impossible or inadvisable, the Tribunal shall within a period of not more than sixty days order the payment to the applicant of compensation for the injury sustained. The applicant shall be entitled to claim compensation in lieu of rescinding of the contested decision or specific performance....'
These provisions were amended on December 9th, 1953. Article 9 now provides in paragraph 1:
'If the Tribunal finds that the application is well founded, it shall order the rescinding of the decision contested or the specific performance of the obligation invoked. At the same time the Tribunal shall fix the amount of compensation to be paid to the applicant for the injury sustained should the Secretary-General, within thirty days of the notification of the judgment, decide, in the interest of the United Nations, that the applicant shall be compensated without further action being taken in his case; provided that such compensation shall not exceed the equivalent of two years' net base salary of the applicant. The Tribunal may, however, in exceptional cases, when it considers it justified, order ***53*** the payment of a higher indemnity. A statement of the reasons for the Tribunal's decision shall accompany each such order.'
These provisions 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. The amended text contains certain modifications of the Tribunal's powers and procedure, but these modifications have no bearing upon the judicial nature of its functions.
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.

***54** This view is confirmed by express provisions in the Statute of the Administrative Tribunal. Article 9 in the original Statute of 1949 provided:

'In any case involving compensation, the amount awarded shall be fixed by the Tribunal and paid by the United Nations or, as appropriate, by the specialized agency participating under Article 12.'

A similar provision is contained in Article 9, paragraph 3, of the amended Statute. Both provisions show that the payment of an amount of compensation awarded by the Tribunal is an obligation of the United Nations as a whole or, as the case may be, of the specialized agency concerned.

Article 12 is based on the same legal considerations. It provides that the competence of the Tribunal may be extended to any specialized agency brought into relationship with the United Nations upon the terms established by a special agreement to be made with each such agency by the Secretary-General of the United Nations, and it continues:

'Each such special agreement shall provide that the agency concerned shall be bound by the judgments of the Tribunal and be responsible for the payment of any compensation awarded by the Tribunal in respect of a staff member of that agency....'

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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'. The report of the Supervisory Commission, proposing the Statute of this Tribunal of the League of Nations, shows that the omission of any provision for a review of judgments was deliberate. The report stated:

'No provision for the revision of judgments of the Tribunal is inserted in the statute. It is considered that, in the interests of finality and of the avoidance of vexatious proceedings, the Tribunal's judgments should be final and without appeal as is provided in Article VI, paragraph 1.'

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. According to the official records of the General Assembly, Fifth Committee meeting on November 15th, 1946, the representative of Belgium asked the rapporteur of that Committee

***55** 'whether the decisions of the administrative tribunal would be final or whether they would be subject to a revision by the General Assembly'.

The rapporteur replied

'that according to the draft Statute as prepared by the Advisory Committee, there could be no appeal from the administrative tribunal. The Advisory Committee feared an adverse effect on the morale of the staff if appeal beyond the administrative tribunal delayed the final decision in a case which had already been heard before organs within the Secretariat created for that purpose.'

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.
It may be asked whether the General Assembly would in certain exceptional circumstances be legally entitled to refuse to give effect to awards of compensation made by the Administrative Tribunal. The first Question submitted to the Court asks, in fact, whether the General Assembly has the right to refuse to do so 'on any grounds'. When the Court defined the scope of that Question above, it arrived at the conclusion that the Question refers only to awards of compensation made by the Administrative Tribunal, properly constituted and acting within the limits of its statutory competence, and the previous observations of the Court are based upon that ground. If, however, the General Assembly, by inserting the words 'on any grounds', intended also to refer to awards made in excess of the Tribunal's competence or to any other defect which might vitiate an award, there would arise a problem which calls for some general observations.
This problem would not, as has been suggested, raise the question of the nullity of arbitral awards made in the ordinary course of arbitration between States. The present Advisory Opinion deals with a different legal situation. It concerns judgments pronounced by a permanent judicial tribunal established by the General Assembly, ***56*** functioning under a special statute and within the organized legal system of the United Nations, and dealing exclusively with internal disputes between the members of the staff and the United Nations represented by the Secretary-General. In order that the judgments pronounced by such a judicial tribunal could be subjected to review by any body other than the tribunal itself, it would be necessary, in the opinion of the Court, that the statute of that tribunal or some other legal instrument governing it should contain an express provision to that effect. The General Assembly has the power to amend the Statute of the Administrative Tribunal by virtue of Article 11 of that Statute and to provide for means of redress by another organ. But as no such provisions are inserted in the present Statute, there is no legal ground upon which the General Assembly could proceed to review judgments already pronounced by that Tribunal. Should the General Assembly contemplate, for dealing with future disputes, the making of some provision for the review of the awards of the Tribunal, the Court is of opinion that the General Assembly itself, in view of its composition and functions, could hardly act as a judicial organ-considering the arguments of the parties, appraising the evidence produced by them, establishing the facts and declaring the law applicable to them-all the more so as one party to the disputes is the United Nations Organization itself.

* * *

The Court must now examine the principal contentions which have been put forward, in the written and in the oral statements, by the Governments that take the position that there are grounds which would justify the General Assembly in refusing to give effect to awards of the Administrative Tribunal.
The legal power of the General Assembly to establish a tribunal competent to render judgments binding on the United Nations has been challenged. Accordingly, it is necessary to consider whether the General Assembly has been given this power by the Charter.
There is no express provision for the establishment of judicial bodies or organs and no indication to the contrary. However, in its Opinion-Reparation for Injuries suffered in the Service of the United Nations, Advisory Opinion: I.C.J. Reports 1949, p. 182-the Court said:
'Under international law, the Organization must be deemed to have those powers which,

though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties.'

The Court must therefore begin by enquiring whether the provisions of the Charter concerning the relations between the staff members and the Organization imply for the Organization the power to establish a judicial tribunal to adjudicate upon disputes arising out of the contracts of service.

***57** Under the provisions of Chapter XV of the Charter, the Secretariat, which is one of the principal organs of the United Nations, comprises the Secretary-General and the staff. The Secretary-General is appointed by the General Assembly, upon the recommendation of the Security Council, and he is 'the chief administrative officer of the Organization'. The staff members are 'appointed by the Secretary-General under regulations established by the General Assembly'. In the words of Article 101 (3) of the Charter, 'The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence and integrity'.

The contracts of service between the Organization and the staff members are contained in letters of appointment. Each appointment is made subject to terms and conditions provided in the Staff Regulations and Staff Rules, together with such amendments as may be made from time to time.

When the Secretariat was organized, a situation arose in which the relations between the staff members and the Organization were governed by a complex code of law. This code consisted of the Staff Regulations established by the General Assembly, defining the fundamental rights and obligations of the staff, and the Staff Rules, made by the Secretary-General in order to implement the Staff Regulations. It was inevitable that there would be disputes between the Organization and staff members as to their rights and duties. The Charter contains no provision which authorizes any of the principal organs of the United Nations to adjudicate upon these disputes, and Article 105 secures for the United Nations jurisdictional immunities in national courts. It would, in the opinion of the Court, hardly be consistent with the expressed aim of the Charter to promote freedom and justice for individuals and with the constant preoccupation of the United Nations Organization to promote this aim that it should afford no judicial or arbitral remedy to its own staff for the settlement of any disputes which may arise between it and them.

In these circumstances, the Court finds that the power to establish a tribunal, to do justice as between the Organization and the staff members, was essential to ensure the efficient working of the Secretariat, and to give effect to the paramount consideration of securing the highest standards of efficiency, competence and integrity. Capacity to do this arises by necessary intendment out of the Charter.

The existence of this capacity leads to the further enquiry as to the agency by which it may be exercised. Here, there can be no room for doubt.

***58** In Article 7 of the Charter, after naming the six principal organs, it is provided in paragraph (2):

'Such subsidiary organs as may be found necessary may be established in accordance with the present Charter.'

Article 22 provides:

'The General Assembly may establish such subsidiary organs as it deems necessary for the performance of its functions.'

Further, in Article 101, paragraph 1, the General Assembly is given power to regulate staff relations:

'The Staff shall be appointed by the Secretary-General under regulations established by the General Assembly.'

Accordingly, the Court finds that the power to establish a tribunal to do justice between the Organization and the staff members may be exercised by the General Assembly.

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But that does not dispose of the problem before the Court. Some of the Governments that take the position that there are grounds which would justify the General Assembly in refusing to give effect to awards, agree that the powers of the General Assembly, and particularly its power to establish regulations under Article 101, imply the power to set up an administrative tribunal. They agree that the General Assembly would be able to establish a tribunal competent to hear and decide staff grievances, to prescribe its jurisdiction, and to authorize it to give a final decision, in the sense that no appeal could be taken as of right. They nevertheless contend that the implied power does not enable the General Assembly to establish a tribunal with authority to make decisions binding on the General Assembly itself.

In the first place, it is contended that there was no need to go so far, and that an implied power can only be exercised to the extent that the particular measure under consideration can be regarded as absolutely essential. There can be no doubt that the General Assembly in the exercise of its power could have set up a tribunal without giving finality to its judgments. In fact, however, it decided, after long deliberation, to invest the Tribunal with power to render judgments which would be 'final and without appeal', and which would be binding on the United Nations. The precise nature and scope of the measures by which the power of creating a tribunal was to be exercised, was a matter for determination by the General Assembly alone.

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***59** In the second place, it has been argued that, while an implied power of the General Assembly to establish an administrative tribunal may be both necessary and essential, nevertheless, an implied power to impose legal limitations upon the General Assembly's express Charter powers is not legally admissible.

It has been contended that the General Assembly cannot, by establishing the Administrative Tribunal, divest itself of the power conferred by paragraph (1) of Article 17 of the Charter, which reads:

'The General Assembly shall consider and approve the budget of the Organization.'

This provision confers a power on the General Assembly, for the exercise of which Article 18 requires the vote of a two-thirds majority. Accordingly, the establishment of a tribunal competent to make an award of compensation to which the General Assembly was bound to give effect would, it has been argued, contravene the provisions relating to the budgetary power. The Court is unable to accept this contention.

The Court notes that Article 17 of the Charter appears in a section of Chapter IV relating to the General Assembly, which is entitled 'Functions and Powers'. This Article deals with a function of the General Assembly and provides for the consideration and approval by it of the budget of the Organization. Consideration of the budget is thus an act which must be performed and the same is true of its approval, for without such approval there can be no budget.

But the function of approving the budget does not mean that the General Assembly has an absolute power to approve or disapprove the expenditure proposed to it; for some part of that expenditure arises out of obligations already incurred by the Organization, and to this extent the General Assembly has no alternative but to honour these engagements. The question, therefore, to be decided by the Court is whether these obligations comprise the awards of compensation made by the Administrative Tribunal in favour of staff members. The reply to this question must be in the affirmative. The obligatory character of these awards has been established by the considerations set out above relating to the authority of res judicata and the binding effect of the judgments of this Tribunal upon the United Nations Organization.

The Court therefore considers that the assignment of the budgetary function to the General Assembly cannot be regarded as conferring upon it the right to refuse to give effect to the obligation arising out of an award of the Administrative Tribunal.

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***60** It has also been contended that the implied power of the General Assembly to establish a tribunal cannot be carried so far as to enable the tribunal to intervene in matters falling within the province of the Secretary- General. The Court cannot accept this contention.
The General Assembly could at all times limit or control the powers of the Secretary-General in staff matters, by virtue of the provisions of Article 101. Acting under powers conferred by the Charter, the General Assembly authorized the intervention of the Tribunal to the extent that such intervention might result from the exercise of jurisdiction conferred upon the Tribunal by its Statute. Accordingly, when the Tribunal decides that particular action by theSecretary-General involves a breach of the contract of service, it is in no sense intervening in a Charter power of the Secretary- General, because the Secretary-General's legal powers in staff matters have already been limited in this respect by the General Assembly.

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A similar problem is involved in the contention that the General Assembly cannot authorize and the Secretary-General cannot enter into contracts of service which are not in conformity with the Charter. The Staff Regulations are made a part of the contracts of service and No. 11.2 reads as follows:
'The United Nations Administrative Tribunal shall, under conditions prescribed in its Statute, hear and pass judgment upon applications from staff members alleging non-observance of their terms of appointment, including all pertinent regulations and rules.'
It is contended that the incorporation, in the contracts of service, of the right to rely on the Statute of the Administrative Tribunal would conflict with the powers conferred on the General Assembly and on the Secretary-General by the Charter. In view of the foregoing considerations, the Court cannot accept this contention. There can be no doubt that, by virtue of the terms thus incorporated in the contracts of service, and so long as the Statute of the Administrative Tribunal in its present form is in force, the staff members are entitled to resort to the Tribunal and rely on its judgments.

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In the third place, the view has been put forward that the Administrative Tribunal is a subsidiary, subordinate, or secondary organ; and that, accordingly, the Tribunal's judgments cannot bind the General Assembly which established it.
***61** This view assumes that, in adopting the Statute of the Administrative Tribunal, the General Assembly was establishing an organ which it deemed necessary for the performance of its own functions. But the Court cannot accept this basic assumption. The Charter does not confer judicial functions on the General Assembly and the relations between staff and Organization come within the scope of Chapter XV of the Charter. In the absence of the establishment of an Administrative Tribunal, the function of resolving disputes between staff and Organization could be discharged by the Secretary-General by virtue of the provisions of Articles 97 and 101. Accordingly, in the three years or more preceding the establishment of the Administrative Tribunal, the Secretary-General coped with this problem by means of joint administrative machinery, leading to ultimate decision by himself. By establishing the Administrative Tribunal, the General Assembly was not delegating the performance of its own functions: it was exercising a power which it had under the Charter to regulate staff relations. In regard to the Secretariat, the General Assembly is given by the Charter a power to make regulations, but not a power to adjudicate upon, or otherwise deal with, particular instances.
It has been argued that an authority exercising a power to make regulations is inherently incapable of creating a subordinate body competent to make decisions binding its creator. There can be no doubt that the Administrative Tribunal is subordinate in the sense that

the General Assembly can abolish the Tribunal by repealing the Statute, that it can amend the Statute and provide for review of the future decisions of the Tribunal and that it can amend the Staff Regulations and make new ones. There is no lack of power to deal effectively with any problem that may arise. But the contention that the General Assembly is inherently incapable of creating a tribunal competent to make decisions binding on itself cannot be accepted. It cannot be justified by analogy to national laws, for it is common practice in national legislatures to create courts with the capacity to render decisions legally binding on the legislatures which brought them into being. The question cannot be determined on the basis of the description of the relationship between the General Assembly and the Tribunal, that is, by considering whether the Tribunal is to be regarded as a subsidiary, a subordinate, or a secondary organ, or on the basis of the fact that it was established by the General Assembly. It depends on the intention of the General Assembly in establishing the Tribunal, and on the nature of the functions conferred upon it by its Statute. An examination of the language of the Statute of the Administrative Tribunal has shown that the General Assembly intended to establish a judicial body; moreover, it had the legal capacity under the Charter to do so.

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***62** The view has been advanced that the Court should follow what has been called the precedent established by the League of Nations in 1946. On that occasion, the Assembly of the League rejected certain awards of its Administrative Tribunal. It is unnecessary to consider the question whether the Assembly, which in very special circumstances was winding up the League, was justified in rejecting those awards. The cases adjudicated upon by the Tribunal of the League, and the circumstances in which they arose, are different from those which led to the request for this Opinion. Moreover, the cases arose under the Statute of the Administrative Tribunal of the League, and not under the Statute of the Administrative Tribunal of the United Nations, and the Assembly was acting under the Covenant and not under the Charter.
In view of the complete lack of identity between the two situations, and of the conclusions already drawn by the Court from the Charter and the Statute of the Administrative Tribunal of the United Nations and other relevant instruments and records, the Court cannot regard the action of the Assembly of the League in 1946 as an applicable precedent or as an indication of the intention of the General Assembly when the Statute of the Administrative Tribunal was adopted in 1949.

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The Court has accordingly arrived at the conclusion that the first Question submitted to it must be answered in the negative. The second Question does not therefore call for consideration.

* * *

For these reasons,
haveing regard to the Statute of the United Nations Administrative Tribunal and to any other relevant instruments and to the relevant records,
THE COURT IS OF OPINION,
by nine votes to three,
that the General Assembly has not the right on any grounds to refuse to give effect to an award of compensation 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.
***63** Done in English and French, the English text being authoritative, at the Peace Palace, The Hague, this thirteenth day of July, one thousand nine hundred and fifty-four, in two copies, one of which will be placed in the archives of the Court and the other

transmitted to the Secretary-General of the United Nations.

(Signed) Arnold D. MCNAIR, President.

(Signed) GARNIER-COIGNET, Deputy-Registrar.
Judge WINIARSKI, while voting in favour of the Opinion of the Court, avails himself of the right conferred on him by Articles 57 and 68 of the Statute to append a statement of his separate opinion.
Judges ALVAREZ, HACKWORTH and LEVI CARNEIRO declare that they do not share the Court's Opinion and, availing themselves of the right conferred on them by Articles 57 and 68 of the Statute, append thereto statements of their dissenting opinions.
(Initialled) A. D. MCN.
(Initialled) G.-C.

***64** INDIVIDUAL OPINION BY JUDGE B. WINIARSKI

[Translation]
The Advisory Opinion indicates that the question submitted to the Court concerns only awards made by the Administrative Tribunal within the limits of its competence and that it contemplates awards made by the Tribunal when properly constituted. 'It is true', it is said in the Opinion, 'that by this Question the Court is requested to say whether the General Assembly has the right to refuse to give effect to an award 'on any grounds'. But it is difficult to hold that the General Assembly, by inserting these words, intended to modify the meaning which naturally follows from the other terms of the Question and from the .... considerations contained in its Resolution.' The Court accordingly formulates as follows the way in which it understands the Question which the Advisory Opinion must answer: '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'; farther on in the Opinion it is added that 'the previous observations of the Court are based upon that ground'.
To this formula it would, in my opinion, be necessary to add a third element to complete it correctly: the Tribunal, properly constituted, acting within the limits of its statutory competence and in accordance with the rules of its procedure. The Opinion states that 'in none of these reports or relevant records is to be found any suggestion indicating that the Tribunal, when rendering its awards in those eleven cases, was not legally constituted', but it might with equal reason be added: or that it disregarded any essential rule of its procedure. In any event, I understand the Opinion as contemplating awards which are not nullities, and I was accordingly able to vote with the majority, for, like the majority, I consider that the General Assembly has not the right to refuse to give effect to an award where the ground on which it relies is merely an incorrect application of the law or a mistaken finding or appraisal of the facts.
Having thus construed the question to which the answer is given in its operative part, the Advisory Opinion then refers to the following hypothesis which, in my view, goes beyond the ground upon which the observations of the Court are based: 'If, however, the General Assembly, by inserting the words ' on any grounds', intended also to refer to awards made in excess of the Tribunal's competence or to any other defect which might vitiate an award, ***65** there would arise a problem which calls for some general observations.'
I regret to be unable to associate myself with these observations; and as they make it necessary for me to clarify my vote, I am compelled to append to the Advisory Opinion certain considerations which briefly summarize my point of view.
It is said in the Opinion that the problem envisaged by this hypothesis would not raise the question of the nullity of arbitral awards made in the ordinary course of arbitration between States, for the present case concerns judgments pronounced by a permanent judicial tribunal established by the General Assembly, functioning under a special statute adopted by the General Assembly and within the organized legal system of the United

Nations. If this passage refers to a judgment vitiated by such defects as to be a nullity, I can see no difference between the nullity of an arbitral award and that of an award made by the Administrative Tribunal. An arbitral award, which is always final and without appeal, may be vitiated by defects which make it void; in this event, a party to the arbitration will be justified in refusing to give effect to it. This is not by virtue of any rule peculiar to ordinary arbitration between States; it is a natural and inevitable application of a general principle existing in all law: not only a judgment, but any act is incapable of producing legal effects if it is legally null and void. The Administrative Tribunal, organized as it is, for important practical reasons, is a permanent tribunal made available by the United Nations and accepted by staff members under a contract freely entered into. It does not and cannot constitute an exception to the general rule. Its judgments are final and without appeal; but this provision of the Statute says what it says, and the Opinion quotes the Statement of the rapporteur of the Fifth Committee of the General Assembly when the draft Statute of the Administrative Tribunal was under discussion. Indicating that there would be no appeal from the decisions of the Tribunal, the rapporteur, at the meeting on November 15th, 1946, referred to delay in 'the final decision in a case....' if there should be 'appeal beyond the Administrative Tribunal'. There can be no appellate procedure in the absence of an express provision which must in the first place establish an appellate tribunal. But appeal is one thing, and refusal to give effect to a judgment which is a nullity is another. The view that it is only possible for a party to rely on the rule relating to nullities where some procedure for this purpose is established, finds no support in international law. Such a procedure may be established ad hoc between States, as it was in the Orinoco Steamship Company case; it was established in the case of the Administrative Tribunal of the International Labour Organisation; but the absence of an organized procedure does not do away with nullities, and there is no warrant for the idea that there can be no nullity if there is no appropriate court to take cognizance of it. Nor is it necessary that ***66** the principle, in accordance with which a party is entitled to refuse to give effect to a judgment which legally is a nullity, should be enunciated in any express provision.

It is, however, possible that when it considered the hypothesis which has given rise to this Individual Opinion, the Advisory Opinion was contemplating simply an established system of review, review in the sense of a further consideration of the case, and this seems to be so in view of the last lines of the paragraph referred to: 'the Court is of opinion that the General Assembly itself .... could hardly act as a judicial organ-considering the arguments of the parties, appraising the evidence produced by them, establishing the facts and declaring the law applicable to them'. Here, the Opinion seems to be contemplating a consideration on appeal and perhaps in proceedings to have a decision quashed, but this is outside the scope of the question referred to the Court by the General Assembly, which is not concerned with a review of this sort but merely with a refusal to give effect to an award.

Having indicated my agreement with the opinion of the Court on the ground defined by it, I can confine myself to these brief observations designed to indicate my disagreement with what I believe to be the purport of the 'general observations'. As they appear to me to be outside the scope of the factors which determined the attitude of the Court, I shall refrain from going into any detailed argument on this point.

(Signed) B. WINIARSKI.

***67** DISSENTING OPINION BY JUDGE ALVAREZ

[Translation]

I

The question referred to the International Court of Justice by the General Assembly of the United Nations for an Advisory Opinion in the matter of the Effect of Awards of

Compensation made by the United Nationas Administrative Tribunal in favour of certain staff members is drafted in very precise terms which considerably limit its scope.
In Question (1) of the Request for an Advisory Opinion, the General Assembly asks whether, having regard to the Statute of the Administrative Tribunal and any other relevant legal instrument or to the relevant records, it has the right on any grounds to refuse to give effect to an award of compensation made by the Tribunal in favour of a staff member of the United Nations; and in Question (2) it asks, if the answer given by the Court to Question (1) is in the affirmative, what are the principal grounds upon which the General Assembly could lawfully exercise its right.
The question however is more general in character by reason of the third recital in the Request for an Opinion, which reads as follows: 'Considering, nevertheless, that important legal questions have been raised in the course of debate in the Fifth Committee with respect to that appropriation (for the purpose of covering the awards made by the Administrative Tribunal)....'
What the General Assembly is really asking is whether, apart from the specific texts indicated in Question (1), there are other considerations or grounds upon which the General Assembly could exercise a right to refuse to give effect to an award of compensation made by the Administrative Tribunal.
It becomes necessary, therefore, to indicate these considerations or grounds; they may be not only legal but also political, for the question presents this two-fold character.
Some of the Governments to which the Registrar of the Court, in accordance with Article 66 of the Statute of the Court, had communicated the present Request for an Opinion, relied in their Written Statements, or in oral statements made before the Court, not only on the documents referred to in Question (1) but also on legal considerations or considerations of a more general character.
The opinions thus expressed show that there are two conflicting views:
A.-The Administrative Tribunal, established by the Assembly of the United Nations, is a subsidiary organ of the Assembly and accordingly the Assembly is not bound by the decisions of the Tribunal.
***68** B.-The Administrative Tribunal is a real tribunal whose awards are binding and therefore the Assembly must always respect them.
I am unable to concur in the opinion of the majority of the Court because they have relied almost exclusively on the documents indicated in Question (1) of the Request for an Opinion. I, for my part, consider that apart from these elements there are other very important elements of a general character which must also be taken into account.
It is for this reason that I have appended my dissenting opinion to the opinion of the Court.

II

My basic assumption is that the question referred to the Court relates to the international organization established by the Charter of the United Nations; it is therefore a problem of politics and of the new international law, which must be resolved in accordance with those elements and having regard to a new criterion.
Before we show in what respect the problem belongs to the domain of the new international law and before we deal with the solution which should be given to it in accordance with that law, let us consider how it would be resolved by classical international law.
Before 1914 there were no arbitral tribunals operating on a permanent basis; there were merely occasional arbitrators who adjudicated upon disputes regarding specific matters. A distinction had to be made between appeals against such awards and their performance.
As regards appeal, this was provided for in the arbitration agreement, which usually stipulated that revision might be undertaken by the arbitrator in certain cases.
And as regards the performance of the award, the practice was that it was carried out in good faith; but if it contained grave defects and in particular if the arbitrator had acted ultra vires, the party concerned could refuse to give effect to the award. Such a refusal,

moreover, might give rise to a new dispute between the parties.
These precedents of arbitral tribunals finally gave rise to a principle of classical international law to the effect that a party might refuse to give effect to an arbitral award if the award contained grave defects.
If classical international law is applied to the case now before the Court, there can be no doubt as to the solution: the General Assembly of the United Nations must not give effect to awards of the Administrative Tribunal if it considers that they are vitiated by some important defect.
***69** But now that, in addition to arbitral tribunals, the International Court of Justice, which is permanent in character, has come into existence, the question of the review and performance of arbitral awards must be resolved, having regard to the new conditions of arbitration as well as to the new conditions of international life in general.
In this connection, it is necessary to proceed on the basic assumption that, following the last two social cataclysms in particular, rapid and profound transformations have occurred in the life of peoples and in the traditional or classical international law, which have not been sufficiently appreciated. By reason of the extent of these changes, a new epoch, a new era has opened in the life of peoples and in the traditional or classical international law.
A rapid review of these transformations will serve to show how important they are.
Until the two last world wars, all the States formed a mere community and there existed between them no links other than those which had been freely accepted. Since then, and as a result of a number of circumstances, particularly the ever-increasing relations between States, the complexity and variety of those relations, the great number of international services created by the States, as well as the increasing dynamism of the life of peoples, this community has been transformed into a real international society which includes all the States of the world. This transformation has taken place without any convention or solemn act being required for that purpose.
There are great differences between the old community and the new international society.
Without expatiating on this point, I shall merely indicate that in the new international society the psychology of peoples has been deeply modified from a two-fold point of view. Certain peoples who for centuries had followed a traditional course, adopted new ways of life and embraced, almost abruptly, a political, social and economic regime which was entirely different from the one that had hitherto prevailed. This is particularly true of Russia, where the Soviet regime was born. Since that time there has also been an awakening among many peoples of Asia, Oceania and North Africa who are desirous of casting off what they call the European yoke. In this way more than half of the world to-day has, particularly from the international point of view, a psychology which is very different from what it formerly was.
Furthermore, all the peoples now understand that they are no longer isolated or bound only by the instruments which they have freely accepted, but that they are a part of a real society which is broader than the civil community to which they belong and which limits their absolute sovereignty.
As a result, the classical international law which governed the old community has been modified from several points of view. ***70** First, it has established, in many respects, a new legal order by creating certain rights and duties which States did not formerly have; secondly, international law must henceforth have primacy over national law, a fact which was formerly challenged; and finally, international law has undergone considerable change in so far as the concept of that law and its essential facts are concerned; it is no longer exclusively juridical and individualistic, as was classical international law; it now assumes a political and social character as well.
The profound modifications in international life and in international law which I have just outlined are not the mere expression of doctrine or legal speculation, as might be thought at first sight; what are involved are facts, declarations, and bases recognized by the Charter of the United Nations, particularly in its Preamble and in Chapter I.
The political character of international law has been recognized, at least by implication,

by the Third Assembly of the United Nations, when it debated the Advisory Opinion of the Court in the matter of the Admission of New Members to the United Nations.

The social character of the international law of to-day is a result of the new regime of inter-dependence which has emerged and which tends to replace the traditional individualistic regime. Having regard to this social character, what may be called the new international law is particularly concerned with the maintenance of peace and the development of confidence and co-operation between States; it assigns an important place to the general interest and condemns abus du droit; it also has a new aim: the well-being of the individual and of society.

The Charter applies this social law in a number of its provisions, particularly in Chapters IX to XIV. It was also applied in some of the decisions of the International Court of Justice and in the work of the Codification Commission in the preparation of regulations governing certain matters.

Finally, a further characteristic of the international society is that it has been organized by the Charter of the United Nations. The Charter has established six principal organs, including, with particular reference to the matter we are considering, the General Assembly and the Secretariat (Art. 7). And Article 22 provides that 'The General Assembly may establish such subsidiary organs as it deems necessary for the performance of its functions'.

The principal organs play the most important part in the new international society; almost all the activity of that society is concentrated in those organs. The only purpose of the subsidiary organs is to assist the principal organs to discharge their duties.

One fact must be particularly stressed and that is that the organs and agencies established by the Charter-as, indeed, all social institutions-evolve more or less rapidly in accordance ***71*** with the new conditions of the life of peoples; this evolution to-day constitutes a real sociological or social law.

As regards the subject we are here considering, I shall confine myself to the evolution of the General Assembly of the United Nations. This evolution is characterized by a number of factors which transform the Assembly into an all- powerful legislative organ.

First, the Assembly tends to be in almost permanent session.

Secondly, the Assembly is becoming a real international legislative power for, apart from recommendations made to States, it adopts resolutions whose provisions are binding on them all. This fact is of great importance for the future of international law.

A number of publicists and statesmen have expressed the desire for the establishment of an international legislative power: in fact such a power already exists.

A third tendency of the Assembly of the United Nations is to intervene more and more in the solution of the great international problems which arise. To- day, whenever a difficult situation presents itself in international life, its reference to the General Assembly for consideration is always envisaged.

A fourth tendency relates to the formation, within that Assembly, of a special psychology in international matters. Indeed, when the States meet in the Assembly-except in cases involving their vital interests-the juridical conscience of peoples is developed there, along with the new conception of law and of justice.

This conscience gives rise either to legal principles-in other words, principles whose observation can be required, and they are then principles of social law or more properly, of the international law of social inter- dependence-or merely to moral principles, and these constitute international social justice. The latter may become principles of law by means of resolutions of the General Assembly of the United Nations, or by decisions of certain international organs, such as the International Court of Justice, which, in respect of a given matter, may declare that a certain principle of international social justice should be established in positive terms and applied as the law in force.

And, finally, the General Assembly of the United Nations tends to be guided by the notion of social law and international social justice in its work and resolutions, as has already been pointed out above.

This character, this omnipotence which has been acquired by the General Assembly of the United Nations is to be explained by the fact that it is made up almost permanently or

representatives of most of the countries of the world, whereas this was not formerly the case.

***72** The Assembly constitutes the supreme power; it is bound only by the Charter which established it, or by its own resolutions. There is nothing above the Assembly except moral forces, particularly public opinion, which may censure the acts of the Assembly if it considers them open to criticism.

A logical and practical consequence of the foregoing is that any attempt to limit the power of the General Assembly of the United Nations would run counter to the realities of international life.

A further very important consequence is that in the solution of international problems that may arise in the future, regard may no longer be had-as was hitherto the case and as was done by a number of governments in their opinions, to which reference has already been made-for diplomatic precedence, international awards, preparatory work or the views expressed by delegates during the debates relating thereto. In international life there can no longer be any looking backwards, although this was admissible when international life scarcely moved forward; the dynamism of that life makes it necessary to look ahead.

III

The great transformations in international life and in international law which I have just indicated in summary form are so important that they deserve special consideration with regard to the solution of the question put to the Court.

First, the Administrative Tribunal was established by reason of the fact that the Secretariat of the United Nations consists of some thousands of staff members who were engaged under contracts which may give rise to disputes between the Secretariat and the staff members. These disputes are not decided by the General Assembly of the United Nations-this would burden it unduly; nor by the International Court of Justice-this would increase its task considerably; nor by any other tribunal. Accordingly, the General Assembly considered it necessary to establish a subsidiary organ in accordance with Article 22 of the Charter.

Certain governments, in their opinions, and the Court itself, have sought at considerable length to prove that the General Assembly had the capacity to establish that organ; in my opinion, the Assembly clearly had that capacity by virtue of Article 22 quoted above and by virtue of the omnipotence of the Assembly.

The name of this organ is especially significant: 'The United Nations Administrative Tribunal'.

What is involved is, indeed, a tribunal and not-as alleged by certain governments-a mere advisory body of the Assembly because, under the terms of its Statute, the Tribunal delivers binding judgments; it is not, however, a judicial tribunal: it is an administrative tribunal because it deals only with specific questions ***73** in that field, which, in the first instance, fall within the purview of the General Assembly which established the Tribunal to assist it in the discharge of its duties.

The members of the Tribunal are appointed by the General Assembly and the Statute of the Tribunal was drawn up by the Assembly.

It is self-evident that the Tribunal has no competence other than that conferred upon it expressly by the Assembly; the Tribunal's competence is indicated in Article 2 of its Statute: its particular task is to settle disputes arising out of contracts of employment entered into between the Secretariat and the staff members of the United Nations.

Article 10, paragraph 2, of the Statute provides that 'the judgments shall be final and without appeal'; and Article 9 provides that 'in any case involving compensation, the amount awarded shall be fixed by the Tribunal and paid by the United Nations....'.

It is to be noted that the Statute of the Administrative Tribunal does not provide for any means of appeal against the awards; nor does it indicate how effect is to be given to the awards.

There is therefore a difference between the Tribunal and the International Court of Justice

in this respect.
The judgments of the International Court of Justice, which is the principal judicial organ of the United Nations (Art. 92 of the Charter), are 'final and without appeal' (Art. 60 of the Statute of the Court), but provision is made for revision or interpretation by the Court in certain cases (Arts. 60-61 of the Statute).
As regards compliance with the decisions of the Court, the interested party may, in accordance with Article 94 of the Charter, 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 carrying out of the judgments of the Court is thus dependent upon the Security Council, which may make a decision in this respect, as has just been pointed out.
Since the Statute of the Administrative Tribunal contains no provision for the review of its awards and no provision relating to their performance, do those awards automatically bind the Assembly so that the Assembly must always give effect to them even when they are vitiated by a patent defect, such as excess of powers or manifest injustice? Obviously not.
It is inadmissible that a principal organ of the United Nations, such as the General Assembly, which has very broad powers, should be bound passively to give effect to all the awards of a tribunal which it has established. The Assembly is bound to do so only in cases in which the Tribunal has acted within the limits of its competence. But if the Assembly considers that the Tribunal has acted ultra vires-for example, if it grants an amount of compensation which is higher than the amount claimed, or if ***74*** the compensation has been awarded without valid grounds, or if the Tribunal has committed an abus du droit-then there can be no doubt that the Assembly can refuse to give effect to the award by not providing for the amount of compensation in the budget of the Organization; but in such a case the Assembly is bound to indicate expressly the grounds for its refusal, failing which its attitude would be open to criticism.
As I have already pointed out above, it is a principle of classical international law-and also of modern international law-that the awards of tribunals are not binding when they are vitiated by some defect, as, for example, when the tribunal has acted ultra vires, and that accordingly the parties may refuse to give effect to them. In order to make the awards binding in such cases, an express provision would be required in the instrument providing for the constitution of the tribunal. But no such provision exists in the case of the Administrative Tribunal.
What the Court said in its Advisory Opinion in the matter of Reparation for Injuries suffered in the Service of the United Nations is perfectly applicable here; the relevant passage which is quoted in the present Advisory Opinion by the Court in support of other assertions is as follows: 'Under international law, the Organization (the Assembly in the present case) must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties' (I.C.J. Reports 1949, p. 182).
The General Assembly of the United Nations which, as has been pointed out above, must constantly be guided by the notion of international social justice, cannot passively agree to give effect to the awards of a subsidiary organ which it has established if those awards are vitiated by a patent defect.
Furthermore, the nature of the Tribunal is such that its decisions do not have the same scope in respect of the applicant as they do in respect of the respondent, or the General Assembly of the United Nations. They are binding on the applicant since he resorted to this Tribunal, which was especially created to deal with his complaints and which, moreover, is the only tribunal in existence for this purpose; but the decisions of the Tribunal are not binding upon the General Assembly, which may refuse to give effect to them if it considers that there are valid reasons for such a refusal. By acting in this way, the Assembly is not setting itself up as a court of appeal; nor does it proceed to review the awards: it is merely exercising a right which it has to supervise the performance of the judgments of the Administrative Tribunal which it has established. To deny this right to the Assembly would be tantamount to placing the Tribunal above the Assembly, which

is inadmissible.

***75** A concrete case may arise which would fully justify the foregoing assertion: it is the opposite case to the one usually considered. Let us suppose that the Assembly should consider that an application is well-founded which the Administrative Tribunal has found to be inadmissible. Could it then be argued that the General Assembly is not entitled to sustain this application? This is a question which answers itself.

Furthermore, a considerable change may occur in the economic or social conditions between the date of the giving of the award and that of its performance, which might entirely alter the scope of the award, for example, if there should be an abrupt fluctuation in the value of the dollar, the currency in which the amount of compensation is fixed, resulting in a considerable modification in the real value of the compensation. Should the Assembly remain passive? Should it not have the power to refer the matter back to the Tribunal for necessary adjustment, or should the Assembly itself not have the power to make such an adjustment?

Finally, it may happen that an award of compensation has been validly made, but that the Assembly has no funds available for that purpose; the Assembly must then decide how the payment shall subsequently be made.

The Assembly must make provision in the budget of the United Nations for the following expenditure: first, all expenditure relating to bodies established by the Charter, for the Assembly is bound to respect the provisions of the Charter; secondly, all other expenditure deemed necessary by the Assembly, as well as that arising from the performance of the obligations contracted by the Organization; and finally, the compensation to be paid in pursuance of those awards of the Administrative Tribunal which the Assembly regards as justified.

In short, the Assembly is sovereign in the matter of the drawing up and adoption of the budget of the Organization; there is no appeal against the decisions of the Assembly and the only sanction in respect of its actions is the criticism of public opinion.

For the foregoing reasons, I give the following answer to the questions referred to the Court:

In reply to Question (1), I am of opinion that the General Assembly has the right to refuse to give effect to an award of compensation made by the United Nations Administrative Tribunal if it considers that there are serious grounds justifying such a refusal.

In reply to Question (2), I am of the opinion that the grounds on which the General Assembly is entitled to refuse to give effect to such an award are, in particular, if the Tribunal has acted ultra vires or if there has been manifest injustice especially if in conflict with the concept of international social justice, or a violation of the great principles of international law.

(Signed) A. ALVAREZ.

***76** DISSENTING OPINION BY JUDGE HACKWORTH

I regret that I am obliged to dissent from the Opinion of the Court in the present case. Two questions are presented to the Court. The first is whether the General Assembly has the right 'on any grounds' to refuse to give effect to an award of compensation made by the United Nations Administrative Tribunal in favor of a staff member of the United Nations whose contract of service has been terminated without his assent.

The second question, which requires an answer only in the event of an affirmative answer to the first one, asks for a statement of the principal grounds upon which the General Assembly could lawfully exercise such a right.

The United Nations Administrative Tribunal was established by Resolution 351 (IV) adopted by the General Assembly on November 24th, 1949, approving a Statute by which the Tribunal was to be governed. It was given authority to pass upon applications alleging non-observance of contracts of employment of staff members of the Secretariat of the United Nations or of the terms of their appointment. The words 'contracts' and

'terms of appointment' were declared by Article 2 of the Statute to include 'all pertinent regulations and rules in force at the time of alleged nonobservance including the staff pension regulations'.
The present questions arise primarily by reason of provisions contained in Articles 9 and 10 of the Statute.
Article 9 states, inter alia, that:
'.... In any case involving compensation, the amount awarded shall be fixed by the Tribunal and paid by the United Nations, or, as appropriate, by the specialized agency participating under Article 12 [FN1].'
Article 10 states in paragraph 2 that the 'judgments shall be final and without appeal'.
It is these provisions concerning payment of monetary awards and the finality of judgments, that have given rise to the questions on which advice of the Court is requested.
The question, 'has the General Assembly the right .... to refuse to give effect to an award of compensation....' must be understood as meaning a legal right. This follows from the fact that the Court ***77*** is authorized to give Advisory Opinions only on legal questions (Article 65 of the Statute), and also from the request in the second question for a statement of the principal grounds upon which the General Assembly could 'lawfully' exercise such a right.
We might content ourselves by looking to the language of the Statute of the Tribunal and applying common canons of statutory construction. By this process it might be said that the language of the Statute is clear and unambiguous and consequently lends itself to but one construction, namely, that the Tribunal's decisions are final and without appeal and that the Assembly is obligated to pay any monetary award given by the Tribunal. Such a process would constitute an over-simplification of the problem. Indeed the Assembly's request asks the Court to have regard not only to the Statute of the Administrative Tribunal but also to 'other relevant instruments and to the relevant records'.
When we are considering the legal implications of any action taken by an organ of the United Nations, the Charter of the Organization is naturally a relevant instrument. It is the instrument by which the powers and duties of the organs of the United Nations have been delineated. It is the instrument by which the respective Organs are governed. It is, in short, the organic law-the Constitution of the Organization.
By this instrument the Organization has allocated to its principal organs their respective fields of operation. Action taken by an Organ must find its justification within the compass of the powers and duties there stated. It must of necessity be weighed in the light of, and reconciled with, the powers and duties conferred upon that organ by the Charter.

* * *

The matter with which we are here concerned relates to functions of two of the principal organs of the United Nations-the General Assembly and the Secretariat.
The Secretary-General is the principal administrative officer of the United Nations, and he and the staff under him go to make up the Secretariat (Article 97).
The Secretary-General makes the appointments but he must do so under regulations prescribed by the General Assembly. They have separate functions, but they also have a joint responsibility. That joint responsibility is to assure that 'in the employment of the staff and in the determination of the conditions of service .... the highest standards of efficiency, competence and integrity' shall be secured (Article 101).
Although it is not so stated, it may be assumed that it was for the purpose of meeting this requirement of a high standard ***78*** of efficiency, of which harmony within the Secretariat is an essential element, that the Administrative Tribunal was created. It is in relation to disputes between the Secretary- General and members of the staff that the Tribunal was given competence by Article 2 of the Statute.

* * *

We now come to the question concerning the nature of the Administrative Tribunal to which much attention has been devoted in both the written statements and the oral presentations by the various governments.
Article 7 of the Charter, after listing the principal organs of the United Nations, states in the second paragraph that:
'Such subsidiary organs as may be found necessary may be established in accordance with the present Charter.'
The statement 'in accordance with the present Charter' is given definite expression in Articles 22 and 29 by which the General Assembly and the Security Council, respectively, are authorized to establish subsidiary organs.
Article 22 provides:
'The General Assembly may establish such subsidiary organs as it deems necessary for the performance of its functions.'
It must be concluded, therefore, that when the General Assembly approved the Statute creating the Administrative Tribunal it did so in the exercise of its authority under Article 22. Nowhere else in the Charter is any such authorization to be found. And nowhere else in the Charter can there be found any authorization, express or implied, for the establishment by the General Assembly of any other kind of organ be it judicial, quasi judicial or non- judicial.
At this point it is pertinent to refer to the travaux preparatoires of the San Francisco Conference.
The draft of Article 22 as it emanated from the appropriate Committee at San Francisco stated that the Assembly might create '.... such bodies and agencies as it deems necessary for the performance of its functions'. This followed the wording of the Dumbarton Oaks Proposals.
This draft was later changed to its present wording in order that it might conform to Article 7 supra, of the Charter. It was approved by the Conference as changed and as it now reads. There is, therefore, no point to saying that the Statute of the Tribunal is based on Article 101 of the Charter, as has been argued, and as so based is relieved of the consequences of Article 22. That argument must be dismissed as without legal justification.
***79** The reasonable deduction, then, is that the Administrative Tribunal is a subsidiary organ of the General Assembly, created by an act of the Assembly, pursuant to the authorization in Article 22.
Two questions are here presented. One relates to the meaning of 'subsidiary organ', and the other concerns the expression 'necessary for the performance of its functions'- meaning functions of the General Assembly.
The term 'subsidiary organ' has a special and well recognized meaning. It means an auxiliary or inferior organ; an organ to furnish aid and assistance in a subordinate or secondary capacity. This is the common acceptation of the meaning of the term.
The expression 'necessary for the performance of its functions' means performance by the General Assembly of its functions under the Charter.
It was recognized by the framers of the Charter that with the multiplicity of duties assigned to the General Assembly the assistance of different types of subsidiary organs would be needed, hence the provision in Article 22 giving the Assembly the authority to provide this assistance. But nowhere in the Charter is there to be found any suggestion or intimation that the General Assembly might abdicate any of its functions or that it might reassign them to some other organ or agency in such manner as to relinquish its control over the subject-matter.
It is equally unrealistic to assume that a subsidiary organ with certain delegated authority could bind the principal organ possessing plenary powers under the Charter. This would present an anomalous and unique situation in international organization-a situation that can find no sanction, express or implied, in the Charter. The aims and purposes of the Charter must not be obscured or frustrated by such a phenomenon. The whole idea of the Charter was that the role of subsidiary organs should be, as the name implies, to assist

and not to control the principal organ. Any other view, if accepted, would render extremely hazardous the creation of subsidiary organs, unless their powers were severely circumscribed. The principal organ must continue to be the principal organ with authority to accept, modify, or reject, the acts or recommendations of the subordinate organs if the former is not to become functus officio in any given field.

To conclude that the General Assembly, by conferring upon the Administrative Tribunal certain authority in administrative matters is now estopped to question any action of the Tribunal which it created, would be to penalize the Assembly for having been less guarded than it might have been in trying to give to members of the staff, by establishing the Tribunal, assurance of its desire that they should have fair treatment. But any such assurance must be understood and accepted with knowledge that in the final analysis ***80** the General Assembly is the supreme authority. Any act by the Assembly which might seem to be open to a different construction must be considered in the light of this background to the end that the Charter shall be preserved in its present form unless and until it shall have been amended in the manner contemplated by Chapter XVIII.

One cannot lightly assume that the Assembly, in approving the Statute of the Administrative Tribunal, had any intention of inhibiting itself from acting where action might be needed. A reasonable approach to the problem in which the Charter as well as the Statute of the Tribunal are given their proper places will avoid any such assumption. We cannot reach a sustainable conclusion by examining the Statute in isolation. This undoubtedly was recognized by the Assembly when in its Resolution it asked the Court to have regard 'to the Statute of the United Nations Administrative Tribunal and to any other relevant instruments'. Certainly the Charter is a relevant instrument. All other instruments, including the Statute, must be viewed in the light of and with due regard for the Charter.

In support of the contention that the General Assembly is without power to review decisions of the Administrative Tribunal it has been said that the Statute contains no reservation of such right. This argument is by no means convincing. I can readily no means convincing. I can readily admit that such a reservation might have simplified matters as they have since developed, but I cannot admit that such a reservation was at all necessary. The nature of the Tribunal, the method by which it was created and the purpose for which it was created belie any such notion. Any and all power not specifically delegated, including the power of review, was, as a matter of law, reserved to the Assembly.

It has also been emphasized that in establishing the Administrative Tribunal the General Assembly relied, or had the right to rely, upon certain implied powers under the Charter, and in particular the power to implement Article 101, paragraph 3, concerning the maintenance of a high standard of efficiency, etc. This, it is said, necessitated the establishment of a judicial Tribunal. The argument is not persuasive.

The doctrine of implied powers is designed to implement, within reasonable limitations, and not to supplant or vary, expressed powers. The General Assembly was given express authority by Article 22 of the Charter to establish such subsidiary organs as might be necessary for the performance of its functions, whether those functions should relate to Article 101 or to any other article in the Charter. Under this authorization the Assembly may establish any tribunal needed for the implementation of its functions. It is not, therefore, permissible, in the face of this express power, to invoke the doctrine of implied powers to establish a tribunal of a supposedly different kind, nor is there warrant for concluding ***81** that such a thing has resulted. It is of little consequence in the end result whether the Tribunal be described as a judicial, an arbitral or an administrative tribunal-which it is in fact called. No controlling significance is to be attached to the name or to the functions of the Tribunal.

On this first phase of the problem, then, I conclude that the Administrative Tribunal is a subsidiary organ of the General Assembly, and that decisions of the Tribunal are not immune from review by the Assembly, should occasion for such review arise.

* * *

In order the more clearly to understand the legal position of the Assembly vis-a-vis decisions of the Tribunal, it will be convenient to consider Articles 9 and 10 of the Statute in the inverse order, since if the provisions of Article 10 concerning the finality of judgments do not apply to the Assembly, arguments relating to supposed obligations under Article 9 lose much of their force.

The purpose to be served by the Administrative Tribunal is well known. It was to afford a remedy to members of the staff who might have a grievance against the Secretary-General, based on an alleged non-observance by him of their contracts of employment. Within this limited field the Tribunal undoubtedly has competence to give decisions, which by Article 10 are declared to be 'final and without appeal'.

But this competence and this finality of decisions are not determinative of the broader question before the Court, that is to say, whether decisions of the Tribunal are binding on the United Nations in general and on the Assembly in particular.

It is common knowledge that decisions of a tribunal, be it a judicial or other tribunal, are binding only on the parties to the cases before it. This is but a statement of a general rule of law which finds expression in concrete form in Article 59 of the Statute of this Court, providing that:

'The decision of the Court has no binding force except between the parties and in respect of that particular case.'

Now who are the parties to a case coming before the Administrative Tribunal?

The parties are the applicant (the staff member) on the one hand, and the Secretary-General or the specialized agency, as the case may be, on the other hand. This is made abundantly clear by the history incident to the creation of the Tribunal. It is made equally clear by Articles 9 and 12 of the Statute, by the Rules of procedure adopted by the Tribunal, and by the cases that have come before it.

***82** The applicant is the party plaintiff and the Secretary-General, or the specialized agency, is the party defendant. The captions of the cases are: '[Name of staff member], Applicant, vs the Secretary-General of the United Nations, respondent'. These parties are consistently referred to by the Tribunal as the 'applicant and respondent' or as the 'two parties'. The subject-matter is a contested decision or action of the Secretary-General or of the specialized agency, as the case may be.

But is the General Assembly or the United Nations, as such, also a party to these cases? It is difficult to see how this could be. The staff member has no complaint against the Assembly or against the United Nations Organization. His complaint is against the Secretary-General. It is he who is alleged to have failed in some manner properly to honor the contractual rights of the staff member.

But it has been said that the Secretary-General represents the Organization and that therefore the Organization is responsible for his acts.

It is possible to carry this argument much too far. It is true that the Secretary-General is the chief administrative officer of the United Nations and that in that capacity he acts for the Organization. His official acts, in so far as concerns transactions between the Organization and outside entities, personal or juristic, such as contracts for the purchase of supplies and equipment, contracts for services, the lease of premises, etc., when performed within the scope of his authority, engage the responsibility of the Organization. These activities are governed by private law concepts. Disputes concerning them are the kind of disputes which, by Article VIII, Section 29, of the Convention of 1946 on the Privileges and Immunities of the United Nations, the United Nations was authorized to 'make provisions for appropriate modes of settlement'. (1, U.N. Treaty Series (1946-1947), 16, 30.)

But there is another category of activities in which the Secretary-General functions in quite a different capacity. This category pertains to the internal affairs of the Organization. This is a purely intra-organizational field. Operations within this field are not governed by private law concepts. They are governed by provisions of the Charter, and by regulations made pursuant to the Charter. It is within this field that disputes between staff members and the Secretary-General fall. They, to apply an analogy in

international law, are disputes of a domestic character.
The Secretary-General and the staff, as we have seen, constitute the Secretariat, one of the principal organs of the United Nations. Disputes between members of the staff and the Secretary-General are disputes between component parts of that organ. They are not disputes between two organs of the United Nations, or between ***83*** a principal organ, on the one hand, and the United Nations, on the other hand. They are not disputes between staff members and the United Nations as such or between staff members and the General Assembly.
If, then, they are not disputes between the staff member and the United Nations or between the staff member and the General Assembly, and if neither the United Nations nor the General Assembly is a party to a case coming before the Administrative Tribunal, where lies the justification for concluding that either is bound by a decision of the Tribunal?
It must follow, as a matter of law, that the statement in Article 10 of the Statute that decisions of the Tribunal shall be final and without appeal can only mean that they shall be final and without appeal as between the parties to the case, and neither the United Nations nor the General Assembly may be regarded as a party.

* * *

This brings us to a consideration of Article 9 of the Statute, stating that any award of compensation by the Tribunal shall be paid by the United Nations.
Here again, it does not suffice to look at the Statute alone and to apply to the language there used the ordinary rules of statutory construction. We cannot, as stated above, examine the Statute in isolation. We must examine it in the light of other relevant instruments. The Charter is such an instrument. The duty of a court when faced with apparent incompatibility between a legislative enactment and the constitution (the Charter) is to try to reconcile the two. If this cannot be done the constitution must prevail.
The functions of the General Assembly as they were stated in the Dumbarton Oaks proposals were revised and elaborated at the San Francisco Conference. But throughout the discussions from Dumbarton Oaks to the signing of the Charter at San Francisco, the General Assembly was recognized as the organ of the United Nations to which should be entrusted the over-all control of the fiscal affairs of the Organization. It was given authority to 'consider and approve' the budget, and to apportion among the Member States the 'expenses of the Organization' (Article 17). It is both the taxing authority and the spending authority. In its relationship to the Organization it occupies a status of a quasi fiduciary character.
In the performance of these dual functions of raising and disbursing revenue, the General Assembly acts for and on behalf of the Organization. The importance which the Organization attaches to the exercise of these functions is shown by Article 18 of the Charter with respect to voting in the General Assembly. It is there ***84*** stated that each Member shall have one vote, and that decisions on 'important questions' shall be made by a 'two-thirds majority of the members present and voting'.
As a guide to the General assembly in determining what questions should be regarded as important, and hence as requiring this twothirds majority vote, there is set forth in Article 18 a list, not all inclusive, but a representative list, of subjects deemed by the Organization to occupy a pre- eminent position. Included in this list are 'budgetary questions'. This, then, clearly shows the importance attached by the parties to the Charter, to the fiscal affairs of the Organization. Indeed, budgetary or fiscal affairs of any organization, be it a national government, a municipality, a private corporation, a social or an eleemosynary institution, are elements of preoccupation in the life of the Organization.
Various methods of supervising fiscal affairs of national and lesser organizations with their checks and counter-checks hav been devised. In the case of the United Nations, control over both the raising of revenue and of its expenditure is vested in the General

Assembly. All Members of the United Nations have a direct interest in what the Assembly does in these matters. Their own national budgetary problems may be affected by wise or unwise expenditures made on their behalf by the General Assembly.

This brings us more directly to the focal question presented in the request for an opinion: Has the General Assembly the 'right on any grounds to refuse to give effect to an award of compensation made by' the Administrative Tribunal in favor of a staff member of the United Nations whose contract of service has been terminated without his assent?-or, stated in another way: Has the General Assembly, by approving the Statute of the Administrative Tribunal, deprived itself of the right to exercise its normal functions under the Charter, and in particular those pertaining to budgetary questions?

Those who have contended that awards by the Administrative Tribunal must be effectuated by payments, have advanced various reasons in support of their contentions, among them being the theory that a contractual relationship is established between the staff member and the United Nations, by reason of the fact that the Administrative Tribunal is referred to in the Staff Regulations (Regulation 11.2; as adopted by General Assembly Resolution 590 (V) of 2 February 1952 and amended by Resolutions 781A (VIII) and 782 (VIII)); also that the Tribunal is a judicial organ whose decisions must be respected.

These arguments do not go to the root of the question. Regulation 11.2 merely states that:

***85** 'The United Nations Administrative Tribunal shall, under conditions prescribed in its statute, hear and pass judgment upon applications from staff members alleging non-observance of their terms of appointment, including all pertinent regulations and rules.'

It is difficult to see how this may be said to establish a contractual relationship between the staff member and the United Nations, placing upon the latter a duty to pay all judgments given by the Tribunal, regardless of their nature. Moreover, those who make this contention admit that the Assembly may at any time change the staff regulations. In fact, it is specifically stated in the Staff Rules (Chapter IV, Annex II (a) (i)) that the appointment is subject to changes 'made in such regulations and rules from time to time'.

The fact, if it be a fact, that the Administrative Tribunal is a judicial organ, does not place upon the Assembly an obligation to appropriate funds under Article 9 of the Statute in a pro forma manner. In the exercise of its budgetary authority the Assembly acts as a deliberative body with complete discretionary power to approve or refuse to approve any budgetary item, as in its judgment the interests of the United Nations and of good administration shall require. It is not permissible to conclude that by Article 9 of the Statute the Assembly has given, or ever intended to give, prior blanket approval to unpredictable amounts called for by awards of the Tribunal. There is no justification for ascribing to the Assembly such a broad curtailment of its constitutional functions.

In the final analysis the Administrative Tribunal, regardless of what we may call it, is not an organ created by the Charter. It does not have a constitutional status co-ordinate with the General Assembly. Precisely it is, as previously stated, a 'subsidiary organ' of the Assembly.

But it has been urged that an award by the Administrative Tribunal establishes for the United Nations a debt or legal obligation, and for the staff member an acquired or vested right.

These conclusions must presuppose the existence of a valid award. No debt or legal obligation, having a fixed jurisdical status, may be said to result from an unjust judgment, nor can any acquired or vested right be said to result from such a judgment. We may admit the existence of a right to have recourse to the Administrative Tribunal for the adjudication of a complaint, but an award by the Tribunal does not ipso facto create an obligation for the United Nations or a vested right in the staff member.

As a further argument in support of the thesis that the awards are binding on the Assembly it has been urged that by Article 9 of the Statute the Assembly has committed itself to the payment of ***86** monetary awards. But are we to conclude from this that Article 9 means that the Assembly has agreed to pay any and all awards regardless of whether they may, for some legitimate reason, seem to the Assembly not to merit that

treatment? Does it mean that the Assembly has estopped itself from looking into an award which on its face may be open to question? Finally, does it mean that the Assembly has surrendered part of its functions in budgetary matters to a subordinate agency whose decisions it must honor by appropriations even though it may not agree with them? These questions seem to supply their own answers.

It is common knowledge that courts of law and other tribunals, however praiseworthy their intentions may be, are not infallible. In recognition of this fact appellate tribunals are usually provided. In this instance the Administrative Tribunal is the sole tribunal. There is, therefore, all the greater reason for rejecting the contention that the General Assembly has lost all control and is completely at the mercy of the Tribunal in the absence of incontrovertible evidence that such is the case.

If it be concluded that by Article 9 of the Statute the Assembly has surrendered its discretionary authority in budgetary matters to the extent of awards made by the Tribunal, and that it must appropriate the necessary funds to satisfy such awards, then, there is nothing in the Charter which would prevent the Assembly from making similar commitments to other subsidiary organs and thus gradually to whittle away all control in a field where it has been given complete control.

The Assembly is charged by the Charter with a duty to 'consider and approve' the budget of the Organization. It manifestly is not permissible to abdicate, or to transfer to others, this essentially legislative function with which it has been so carefully invested.

What then do we understand to be the real meaning and effect of Article 9 of the Statute? Must the Assembly honor judgments without question or does it have a right to question them?

A reasonable construction of Article 9, and one which is consonant with the Charter, is that in saying that in any case involving compensation the amount shall be fixed by the Tribunal 'and paid by the United Nations', the Assembly was announcing a general policy to be followed by it in the ordinary course, but that it was not entering into an unqualified undertaking that in no event and under no circumstances would it withhold an appropriation. It was not saying that under no circumstances would it enquire into a judgment, or have it enquired into, even if there were apparent reasons for doing so. To summarize, we may draw these conclusions:

First, that in the exercise of its budgetary authority to which we have already referred, the Assembly can scarcely fail to consider ***87*** an award when it forms an item in a budget to be voted;

Second, that the Assembly cannot close its eyes to an award if on its face it is open to serious question;

Third, that as part of the process of considering and adopting budgets, each Member of the Assembly has an express constitutional right to vote for or against any item in the budget; and

Fourth, that no Member of the Assembly may be deprived of this right.

It has been generally admitted that the Assembly has the 'power' to withhold appropriations, and an effort has been made to draw a distinction between the exercise of a 'power' and the exercise of a 'right'. And it has been said that in the situation here presented there is no legal right to decline to appropriate. This conclusion is wholly lacking in legal justification. It amounts to saying that the exercise of a constitutional right is not the exercise of a legal right. In declining to appropriate funds to effectuate an award the Assembly would not be exercising sheer power. It would be exercising not only 'power' but an incontestable 'legal right' conferred by the Charter, a right which, in my judgment, it has in no sense surrendered.

It follows that the provision in the Statute that awards of the Tribunal shall be paid by the United Nations does not deprive the Assembly of its right, when a question has been raised, to examine the award or to cause it to be examined. The decision is not res judicata in the sense that the Assembly is precluded from exercising its powers under the Charter. Even if we assume that the Assembly could surrender its prerogatives in this respect, we cannot assume that it has done so by innuendo.

In support of the proposition that decisions of the Tribunal create a legal liability for the

Organization which it is not free to ignore, reference has been made to Section 21 of the Headquarters Agreement between the United Nations and the United States of America of June 26, 1947, wherein provision is made for submitting to an arbitral tribunal for 'final decision', any dispute concerning the interpretation or application of the Agreement. It is reasoned that a decision by the arbitral tribunal would be binding on the United Nations Organization and not merely on the Secretary-General, and that the General Assembly would have no legal right to repudiate the award (11, U. N. Treaty Series (1947), 12, 30).

This conclusion is not open to question. But it can hardly be said that a decision of the Administrative Tribunal is, from the point of view of its binding force, analogous to a decision of an ***88** arbitral tribunal under the Headquarters Agreement. The two situations are entirely different.

Section 21 of the Headquarters Agreement relates to disputes between the United Nations on the one hand and the United States of America on the other hand, and not to disputes between the United States and the Secretary-General. It provides that three arbitrators shall be chosen, one by the Secretary- General, one by the Secretary of State of the United States, and the third by agreement of the two, or, in the event of their failure to agree, by the President of this Court. Then follows a provision for a request by the General Assembly for an Advisory Opinion, after which the arbitral tribunal shall render a final decision.

It is to be observed:

First, that the Headquarters Agreement is an agreement between the United Nations and a Member State;

Second, that the disputes there envisioned are disputes between the United Nations and the Member State;

Third, that in such a situation the Secretary-General acts merely in a nominal capacity as agent for the United Nations;

Fourth, that the Headquarters Agreement was concluded pursuant to the Convention on Privileges and Immunities, approved by the General Assembly on February 13, 1946. This Convention specifically conferred upon the United Nations, capacity (a) to contract, (b) to acquire and dispose of property, (c) to institute legal proceedings, and (d) to make provision for appropriate modes of settlement of 'disputes arising out of contracts', etc. (1, U.N. Treaty Series (1946-1947), Art. VIII, Sect. 29, pp. 17, 30); and

Fifth, that the Privileges and Immunities Convention provided as a condition precedent to its coming into force as regards any Member of the United Nations, the deposit by that Member with theSecretary-General of an instrument of accession. Such instruments were deposited.

It will thus be apparent that decisions of an arbitral tribunal under the Headquarters Agreement occupy a status quite different from decisions of an Administrative Tribunal created by the General Assembly.

In the first place, decisions by the arbitral tribunal under the Headquarters Agreement have back of them an international convention.

In the second place, the disputes are disputes between the United Nations and a Member State, under an Agreement made pursuant to a Convention.

Whereas in the case of the Administrative Tribunal,

(a) it was not created pursuant to an international convention, but pursuant to authority of the General Assembly under the Charter to create subsidiary organs, and

***89** (b) the disputes coming before the Tribunal are not disputes between the United Nations and a staff member, but between the Secretary-General and a staff member.

It must therefore be obvious that from the point of view of the finality of decisions and the establishment of a legal liability of the United Nations, there is no analogy between the two situations.

What has just been said regarding the Headquarters Agreement applies with equal force to arbitration under the Agreement of July 1, 1946, between the United Nations and the Swiss Confederation concerning certain properties in the 'Town of Geneva' (1, U.N. Treaty Series (1946-1947), 155).

Finally, it has been said that a decision of the Administrative Tribunal is a decision of a judicial organ and that the General Assembly is not empowered by the Charter to exercise judicial functions, and hence cannot review such a decision.
This would seem to be confusing two quite distinct procedural processes, i.e. that of review in the political or administrative sense, and that of review in the judicial sense. It is hardly to be expected that the Assembly would convert itself into a court of law exercising appellate jurisdiction in such cases. The notion of an appellant and a respondent is wholly excluded. The Assembly would be acting as a political body having responsibility for the proper functioning of one of its subordinate organs. It is not for the Court to say in what manner the power of review should be exercised. It is sufficient to say that the authority to review exists, and that it is for the Assembly to decide how best it may be exercised.
The only question before the Court is the abstract question of the right of the Assembly to decline 'on any grounds' to give effect to an award of compensation. To this question I find no difficulty in giving an affirmative answer.

* * *

This brings me to the second question presented, namely, what are the 'principal grounds upon which the General Assembly could lawfully exercise such right'.
It is not to be supposed that the Assembly would desire to act on frivolous grounds, nor is it to be supposed that it would desire to act arbitrarily. This would not be in keeping with its purposes in creating the Administrative Tribunal. There must in the nature of things, be an intermediate position between arbitrary action by the Assembly and compulsory action by it-a position which will safeguard the staff members vis-a-vis the Secretary-General and at the same time safeguard the Assembly and the United Nations.
We may take as our premise that in creating the Tribunal the Assembly had in mind (a) the protection of the contractual rights ***90*** of members of the staff against faulty or arbitrary acts of the Secretary-General; (b) that it also had in mind protection of the Secretary-General against unreasonable and vexatious demands by members of the staff; and (c) that, in short, and in a broad sense, it had in mind the maintenance within the Secretariat of a proper esprit de corps.
An obvious departure by the Tribunal from these broad purposes, such as by denying relief where relief is warranted, or by granting a greater measure of relief than is warranted by the facts and the applicable Rules and Regulations would constitute a deficiency in the administrative process. The extent of the deficiency would be a major consideration in any given case, since no one can expect of any tribunal an unfaltering degree of perfection.
As part of this general picture it is appropriate to observe that there is a presumption that decisions of courts of law, especially courts of last resort, are just and proper. But this is a rebuttable presumption. It is common knowledge that justice is not always administered, and hence there may be a resulting denial of justice.
Denial of justice is a term well recognized in international law. It constitutes a sound basis for establishing State responsibility in the field of international reclamations. It serves as the justification for questioning and enquiring into decisions of national courts of last resort. The term has been variously defined and given varying shades of meaning by international tribunals, depending upon the nature of the cases before them. Examples of expressions used are: manifest injustice, an obvious error in the administration of justice, a clear and notorious injustice, fraud, corruption or wilful injustice, bad faith, a manifestly unjust judgment, a judgment that is arbitrary or capricious, a decision that amounts to an outrage, etc., etc.
I am not suggesting that judgments of the Administrative Tribunal might fall within any one of these categories. I am not here discussing any particular case or any group of cases. Such a discussion is not envisaged by the questions submitted to the Court.
The Court is asked to consider only the abstract question of right to decline to make an appropriation to satisfy an award. To this I have answered that there is no justification

for concluding that the General Assembly is bound to effectuate a decision which is not juridically sound, and which, because of the absence of jurisdical plausibility, does not command the respect of the Assembly. A proper administration of justice within the Secretariat must be the guiding criterion. A denial of justice in the sense of the prevailing jurisprudence on the subject should find no place in the United Nations Organization.
If I am correct in my conclusion stated above, that the Assembly has a right to review a decision of the Tribunal, as a corollary to ***91*** its duty to 'consider and approve the budget of the Organization' and to maintain a high standard of efficiency and integrity, it must follow that it may 'lawfully' exercise that right with respect to any decision which does not commend itself to respectful and favorable consideration.
The principal grounds upon which the Assembly may lawfully exercise a right to decline to give effect to an award may be simply stated as follows:
(1) That the award is ultra vires;
(2) That the award reveals manifest defects or deficiency in the administration of justice;
(3) That the award does not reflect a faithful application of the Charter, the Statute of the Tribunal, or the Staff Rules and Regulations, to the facts of the case; and
(4) That the amount of the award is obviously either excessive or inadequate.

(Signed) Green H. HACKWORTH.

92 DISSENTING OPINION BY JUDGE LEVI CARNEIRO

[Translation]
Having, to my regret, given an answer different from that of the Court to the questions submitted to it, I must set out very briefly the grounds for my opinion.
In order to resolve these questions, it seems to me that the system of the United Nations regarded as a whole is of more importance than the literal meaning of a few words taken from the Statute and the Regulations. Indeed, even with regard to literal interpretation, this Court has already affirmed a principle laid down by the Permanent Court of International Justice:
'.... words must be interpreted in the sense which they would normally have in their context, unless such interpretation would lead to something unreasonable or absurd' (Competence of the General Assembly for the Admission of a State to the United Nations, I.C.J. Reports 1950, p. 8).
I. The United Nations Organization is based on 'the principle of the sovereign equality of all its Members' (Charter, Article 2(1)), and the General Assembly is its only organ established by the Charter which is made up of representatives of all Member States.
(a) The General Assembly is the first of the six 'principal organs' mentioned in Article 7 of the Charter.
(b) The General Assembly dominates the whole Organization, decisively intervening in the formation of the other principal organs, with a considerable control, varying in degree, over their activities and exercising an ever- widening influence in relation to the aims of the United Nations.
(c) The Assembly cannot surrender its prerogatives, nor can it irrevocably delegate them. This principle was recognized when the 'Little Assembly' or 'Interim Committee' was set up. The Assembly, moreover, possesses certain implied powers (Charter, Article 11 (4)).
(d) In order to lighten its burden, the Assembly can merely 'establish such subsidiary organs as it deems necessary for the performance of its functions' (Charter, Article 22). The meaning of the word 'subsidiary' is 'anything which is of assistance to something which is of a principal order' ('subsidiaire: qui vient en aide a quelque chose de principal'- Littre, Dictionnaire). The functions assigned to the subsidiary organ always remain functions of the Assembly.
(e) In respect of the staff of the Secretariat, the Assembly 'establishes' the Regulations under which this staff is appointed by the Secretary-General (Charter, Article 101). Consequently, it ***93*** also regulates the conditions in which these officials must leave. It supervises the application of these Regulations.

II. The 'Administrative Tribunal' was given its name in the days of the League of Nations, possibly as a result of the influence of Albert Thomas, who was himself inspired by the terminology of French public law.
(a) 'Administrative Tribunals'-whatever may be the binding force of their decisions-are not, and never have been, regarded in France as judicial organs: they are administrative organs (Laferriere, Contentieux administratif, Vol. 1, p. 619; Louis Renault, Precis de droit administratif, pp. 38-40).
(b) The United Nations Administrative Tribunal was established by the General Assembly in accordance with the principles referred to above (I, c, d and e), and belongs to the system of the Organization.
(c) The terminology of the Statute does not justify the view that the United Nations Administrative Tribunal is a true and entirely independent judicial organ. The appellation 'tribunal' has been applied to other organs of the United Nations which are not judicial bodies-'the Tribunal for Libya', 'the Tribunal for Eritrea'. When it is said that the 'judgments' of the Tribunal shall be 'final and without appeal' (Statute, Article 10 (2)), the reference is merely to the procedure to be followed: it did not prevent the Tribunal, in special circumstances, from reviewing its own previous decision, and it is not sufficient to prevent the General Assembly from refusing to give an effect to an award of compensation made by the Administrative Tribunal, an organ which is subsidiary in relation to it. The Statute provides that the Administrative Tribunal may 'order the rescinding of the decision or the specific performance of the obligation', but at the same time it permits the Secretary-General to refuse to give effect to the decision, compensation being in that event awarded to the official. The decisions of Conseils de prefecture, which are likewise administrative tribunals, are referred to as 'judgments' in recent French legislation. The provisions (Statute, Articles 9 (3) and 12), in accordance with which the compensation fixed by the Tribunal is to be paid by the United Nations or by a specialized agency, merely indicate by whom the compensation is to be paid, but they do not imply an unconditional obligation to make immediate and complete payment. Any other interpretation of these words would lead to 'something unreasonable or absurd'.
(d) Moreover, there is no requirement that members of the Administrative Tribunal should have any specialized training or, in particular, any legal qualification; they are not called 'judges', they do not enjoy salaries which cannot be reduced, for the General Assembly can in fact fix and alter these salaries at its pleasure; ***94*** they are elected by the General Assembly for the short term of three years. A member of the Tribunal can be dismissed by the Assembly if 'the other members are of the unanimous opinion that he is unsuited for further service' (Statute, Article 3 (5)). Decisions are taken by three members of the Tribunal-less than half of its total membership-and the majority may consist of only two votes.
(e) When it established the Administrative Tribunal in 1949, the General Assembly of the United Nations could not have forgotten what had happened in 1946 with regard to certain decisions of the Administrative Tribunal of the League of Nations. Nothing was, however, done to prevent a further refusal by the General Assembly to give effect to a decision of the Tribunal: the provisions of the former Statute were retained; indeed, the word 'member' was adopted to designate those who in the earlier Statute had been referred to as 'judges'.
(f) The General Assembly could only establish a subsidiary organ which was not a true judicial tribunal, for the General Assembly itself has no judicial functions for the reasons mentioned below (II h).
(g) Even for the purpose of governing the external relations of the Organization-that is, with regard to questions arising with a State or with third parties-in the Conventions of February 13th, 1946, June 11th, 1946, July 1st, 1946, and June 26th, 1947, the United Nations merely provided for arbitral bodies which were not to be organs of the United Nations and whose decisions were to be subject to an Advisory Opinion of the International Court of Justice, or whose third arbitrator was to be appointed by the President of the International Court of Justice.

(h) For the purpose of governing the internal relations of the Organization- such as disputes between officials of the Secretariat and the Secretary- General-if the Assembly had established a judicial organ, that organ would inevitably be directly subordinated to the International Court of Justice, which is the 'principal judicial organ of the United Nations' (Charter, Article 92). The decisions of the Administrative Tribunal of the International Labour Organisation are, by virtue of an express provision of its Statute, subject in certain cases to an Advisory Opinion of the International Court of Justice which is binding.
(i) The General Assembly is not a party to disputes decided by the Administrative Tribunal; it is only the Secretary-General who is the defendant. He is not referred to in terms-at least in the cases which I have seen-as the representative of the United Nations (see III, e).
(j) The decisions of an 'administrative tribunal' thus constituted and functioning in this way (II, d) cannot have the weight ***95*** of res judicata (see Georges Scelle, Manuel de droit international public, 1948, p. 665).
(k) The 'United Nations Administrative Tribunal' is not independent; nor is it a judicial organ; it merely exercises 'quasi judicial' functions. The General Assembly likewise exercises functions of this sort (Kelsen, The Law of the United Nations, p. 194).
III. The relationship between the Administrative Tribunal and the General Assembly, of which it is a 'subsidiary organ', is clearly indicated by the powers of the General Assembly, and the conditions in which that body functions, which have been referred to above. The General Assembly may, as it has already done, modify the jurisdiction of the Tribunal, or it may abolish it. A number of rules which have already been adopted have limited the action of the Tribunal and the scope of its decisions.
(a) Changes of rules governing judicial organization and judicial procedure- even when truly and completely judicial-are applicable to earlier cases.
(b) The officials of the United Nations are bound by a 'public law contract'. In such a case, 'a convention, whatever its provisions may be, cannot have the legal effect of limiting the competence of the Administration [FN1]' (Jeze, Principes generaux de droit administratif, 1926 ed., Vol. III, p. 430).
(c) The Assembly is technically able-and under a duty-to control the action of the Administrative Tribunal, an organ which it has established to assist it in the performance of its functions. Although without judicial competence stricto sensu, it can, in respect of legal questions raised by decisions of the Administrative Tribunal, call upon the collaboration of its Sixth Committee (Legal Committee), of the International Law Commission and-as it has done in the present case-of the International Court of Justice.
(d) The decisions of the Administrative Tribunal are decisions of first instance: as a rule, the dispute must first be submitted to the Joint Appeals Body; this is, however, merely an advisory body and its opinion may be dispensed with, it then being possible to submit the application directly to the Administrative Tribunal (Statute of the Administrative Tribunal, Art. 7).
(e) Decisions of the Administrative Tribunal, if not subject to control by the General Assembly, would have greater binding force than the judgments of the International Court of Justice itself: the General Assembly would have to give effect to them without question. The Tribunal could at its pleasure define the limits of the disciplinary powers of the Secretary-General, could ***96*** interpret, apply or refuse to apply rules adopted by the General Assembly. The decisions of this 'subsidiary organ' would be binding upon two 'principal organs'-the General Assembly and the Secretary-General-even on matters within their own competence.
IV. In the present case, in accordance with the terms of the request for advisory opinion, what is in fact involved is the General Assembly's refusal to give effect to an award of compensation made by the Administrative Tribunal in favour of a dismissed official. The exercise of the Assembly's budgetary power is thus involved.
(a) It is for the General Assembly alone to approve the budget of the Organization (Charter, Art. 17 (1)). 'Budgetary questions' are 'important' and must be decided 'by a two-thirds majority of the members present and voting' (Charter, Art. 18 (2)).

(b) Every increase in the expenditure of the Organization necessarily involves an increase of the contributions by Member States and must consequently affect the national budget of each of these States.
(c) I cannot conceive that the General Assembly can be obliged automatically to give effect to decisions-and to lay upon Member States the ensuing financial burden-which may have been taken by only two members of one of its subsidiary organs, the Administrative Tribunal.
(d) The General Assembly 'must' respect a legal obligation of the United Nations which has duly arisen or been validly recognized; but a decision of the Administrative Tribunal does not give rise to or amount to final recognition of an obligation of the United Nations.
(e) Payment of compensation awarded by the Administrative Tribunal may be made-as has been done in almost all cases-by theSecretary-General when there are funds provided by the budget which he may use for this purpose; this he can do without any examination of the matter by the General Assembly, where the General Assembly itself has expressly or impliedly authorized such a course. In other cases, the General Assembly may refuse payment entirely or may allow only a part of the award, if it considers the decision of the Administrative Tribunal to have been ill-founded.
V. The rights, and indeed the interests, of officials must be guaranteed and respected. But in truth these rights and interests will not be any less guaranteed and respected by the deliberations of the direct representatives of the sixty Member States than by the Administrative Tribunal as at present organized. This is particularly true since: (1) the very existence of the Tribunal ***97*** and the scope of its decisions are dependent upon decisions of the General Assembly, and (2) the General Assembly must always respect the presumption in favour of the legality and the validity of decisions of the Administrative Tribunal, thus exercising in good faith, discretion, and imbued with the spirit of justice, its prerogative of refusing to give effect, either in whole or in part, to any given decision.

(Signed) LEVI CARNEIRO.

FN1 Translation by the Registry.

I.C.J., 1954
EFFECT OF AWARDS OF COMPENSATION MADE BY THE UNITED NATIONS ADMINISTRATIVE TRIBUNAL
1954 I.C.J. 47
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ANNEX 8:

11. *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, Advisory Opinion 12 July 1973, I.C.J. Reports 1973*, p. 166.

2394

1973 WL 7 (I.C.J.)

APPLICATION FOR **REVIEW** OF **JUDGMENT** No. **158** OF THE **UNITED NATIONS** ADMINISTRATIVE TRIBUNAL

International Court of Justice
July 12, 1973

Request for advisory opinion by the Committee on Application for Review of Administrative Tribunal Judgements-General Assembly resolution 957 (X)-Article 11 of the Statute of the United Nations Administrative Tribunal-Competence of the Court-Question whether the body requesting the opinion is a body duly authorized to request opinions-Article 96 of the Charter-Legal questions arising within the scope of the activities of the requesting body-Propriety of the Court's giving the opinion-Compatibility of system of review established by resolution 957 (X) with general principles governing the judicial process.

Scope of questions submitted to Court-Nature of task of Court in proceedings instituted by virtue of Article 11 of Statute of the United Nations Administrative Tribunal.

Objection to Judgement on ground of failure by Administrative Tribunal to exercise jurisdiction vested in it-Test of whether the Tribunal has failed to exercise jurisdiction-Allegations that Tribunal failed to exercise jurisdiction in that it refused to consider fully laims for costs, failed to direct recalculation of rate of remuneration and to order correction and completion of employment record-Extent of power of Tribunal to award compensation-Question of misuse of power by administration.

Objection to Judgement on ground of fundamental error in procedure which occasioned a failure of justice-Meaning of 'fundamental error in procedure'- Absence or insufficiency of statement of reasons for a judgment as fundamental error in procedure-Rejection by the Tribunal of staff member's claim for costs- Question of costs of review proceedings.

In the matter of the Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal,

THE COURT,

composed as above,

gives the following Advisory Opinion:

1. The questions upon which the advisory opinion of the Court has been asked were laid before the Court by a letter dated 28 June 1972, filed in the Registry on 3 July 1972, from the Secretary-General of the United Nations. By that letter the Secretary-General informed the Court that the Committee on Applications for Review of Administrative Tribunal Judgements, set up by General Assembly resolution 957 (X), had, pursuant to Article 11 of the Statute of the United Nations Administrative Tribunal, decided on 20 June 1972 that there was a substantial basis for the application made to that Committee for review of Administrative Tribunal Judgement No. 158, and had accordingly decided to request an advisory opinion of the Court. The decision of the Committee, which was set out in extenso in the Secretary-General's letter, and certified copies of which in English and French were enclosed with that letter, read as follows:

'The Committee on Applications for Review of Administrative Tribunal Judgements has decided that there is a substantial basis within the meaning of Article 11 of the Statute of the Administrative Tribunal for the application for the review of Administrative Tribunal Judgement No. 158, delivered at Geneva on 28 April 1972.

Accordingly, the Committee requests an advisory opinion of the International Court of Justice on the following questions:

1. Has the Tribunal failed to exercise jurisdiction vested in it as contended in the applicant's application to the Committee on Applications for Review of Administrative Tribunal Judgements (A/AC 86/R.59)?

2. Has the Tribunal committed a fundamental error in procedure which has occasioned a

failure of justice as contended in the applicant's application to the Committee on Applications for Review of Administrative Tribunal Judgements (A/AC.86/R.59)?'

2. In accordance with Article 66, paragraph 1, of the Statute of the Court, notice of the request for an advisory opinion was given on 10 July 1972 to all States entitled to appear before the Court; a copy of the Secretary-General's letter with the decision of the Committee appended thereto was transmitted to those States.

3. The Court decided on 14 July 1972 that it considered that the United Nations and its member States were likely to be able to furnish information on the question. Accordingly, on 17 July 1972 the Registrar notified the Organization and its member States, pursuant to Article 66, paragraph 2, of the Statute of the Court, that the Court would be prepared to receive written statements from them within a time-limit fixed by an Order of 14 July 1972 at 20 September 1972.

***168** 4. Pursuant to Article 65, paragraph 2, of the Statute of the Court, the Secretary-General of the United Nations transmitted to the Court a dosssier of documents likely to throw light upon the question; these documents reached the Registry on 29 August 1972.

5. One written statement was received within the time-limit so fixed, namely a statement filed on behalf of the United Nations and comprising a statement on behalf of the Secretary-General of the United Nations and a statement of the views of Mr. Mohamed Fasla, the former staff member to whom the Judgement of the Administrative Tribunal related; the latter statement was transmitted to the Court by the Secretary-General pursuant to Article 11, paragraph 2, of the Statute of the United Nations Administrative Tribunal.

6. Copies of the written statement were communicated to the States to which the communication provided for in Article 66, paragraph 2, of the Statute had been addressed. At the same time, by letter of 6 October 1972, these States, and the United Nations, were informed that it was not contemplated that public hearings for the submission of oral statements would be held in the case, and that the President of the Court had fixed 27 November 1972 as the time-limit for the submission of written comments as provided for in Article 66, paragraph 4, of the Statute.

7. It subsequently appeared to the President of the Court from certain communications from Mr. Fasla, forwarded to the Court by the Secretary-General, that there was doubt whether the statement furnished to the Secretary-General and transmitted to the Court, accurately represented Mr. Fasla's views; the President therefore decided on 25 October 1972 that the written statement referred to in paragraph 5 above might be amended by the filing of a corrected version of the statement of Mr. Fasla's views, and fixed 5 December 1972 as the time-limit for this purpose. A corrected statement of the views of Mr. Fasla was filed through the Secretary-General within the time-limit so fixed, and copies thereof were communicated to the States to which the original written statement had been communicated.

8. In view of the time-limit for the amendment of the written statement, the President extended the time-limit for the submission of written comments under Article 66, paragraph 4, of the Statute to 31 January 1973. Within the time- limit as so extended, written comments were filed on behalf of the United Nations, comprising the comments of the Secretary-General on the corrected version of the statement of the views of Mr. Fasla, and the comments of Mr. Fasla on the statement on behalf of the Secretary-General.

9. Copies of the written comments were communicated to the States to whom the communication provided for in Article 66, paragraph 2, of the Statute had been addressed. At the same time, by letter of 22 February 1973, these States were informed that the Court had decided not to hold public hearings for the submission of oral statements in the case. This decision, taken on 25 January 1973, had been communicated to the United Nations by telegram the same day.

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10. The circumstances which have given rise to the present request for an advisory

opinion are briefly as follows. Mr. Mohamed Fasla, the former staff member referred to above, entered United Nations service ***169*** on 30 June 1964 with a two-year fixed-term contract as Assistant Resident Representative of the Technical Assistance Board in Damascus (Syrian Arab Republic). After further assignments in Beirut (Lebanon), New York and Freetown (Sierra Leone), Mr. Fasla was on 15 September 1968 reassigned to the office of the United Nations Development Programme (UNDP) in Taiz (Yemen) as Assistant Resident Representative. His contract had by then been renewed by successive periods of six months, one year, three months and twenty-one months, and was due to expire on 31 December 1969. On 22 May 1969 Mr. Fasla was informed that while every effort would be made to secure another assignment for him, it might well be that no extension of his existing contract would be made. This advice was reiterated in a letter of 12 September 1969 informing Mr. Fasla that it had not so far been possible to find him an assignment and that he would be maintained on leave with full pay until the expiry of his contract. Mr. Fasla requested the Secretary-General to review that decision, but was informed that no review by the Secretary-General was required. By letter of 20 November 1969, the Director of the UNDP Bureau of Administrative Management and Budget notified Mr. Fasla that it had not been possible to find a new assignment for him and that no extension of his contract could therefore be envisaged. Mr. Fasla, having again requested a review of that decision, was informed by letter of 12 December 1969 that there was no basis for the Secretary-General to alter the position taken by UNDP. On 28 December 1969, he lodged an appeal with the Joint Appeals Board. On 3 June 1970 the Board, having found that UNDP's efforts to assign Mr. Fasla elsewhere were inadequate since the fact-sheet circulated concerning his performance record was incomplete, recommended the correction and completion of the records concerning Mr. Fasla's service, the renewal by UNDP of endeavours to find him a post and, should these fail, an ex gratia payment of six months' salary. By a letter of 10 July 1970, however, Mr. Fasla was informed that the Secretary-General had decided that there was no basis for the granting of an ex gratia payment and that no action should be taken in respect of that recommendation by the Board. By a letter of 31 August 1970 Mr. Fasla was informed that UNDP did not intend to offer him another appointment, as all possible efforts, it was maintained, had been made to find a suitable post for him within UNDP or with other agencies when he was under contractual status with UNDP. On 31 December 1970, after seeking to re-open the proceedings before the Joint Appeals Board, which however considered that this was not possible under the relevant Staff Rules and Regulations, he filed an application with the United Nations Administrative Tribunal. On 11 June 1971, following proceedings before the Joint Appeals Board in respect of a decision dated 15 June 1970 relating to calculation of remuneration, Mr. Fasla filed a supplement to the application with the Administrative Tribunal. Written pleadings were submitted in accordance with the Rules of the Tribunal, and there were also requests for production of documents; judgment (in respect of both the application and the supplement) was given by the Tribunal on 28 April ***170*** 1972. By an application of 26 May 1972, Mr. Fasla raised objections to the decision and asked the Committee on Applications for Review of Administrative Tribunal Judgements to request an advisory opinion of the Court.

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11. In formulating the request for an advisory opinion, the Committee on Applications for Review of Administrative Tribunal Judgements exercised a power conferred upon it by the General Assembly by its resolution 957 (X) of 8 November 1955. This resolution, inter alia, introduced into the Statute of the Administrative Tribunal of the United Nations a new Article 11 by which provision was made for the possibility of challenging judgements of the Tribunal before the Court through the machinery of a request for an advisory opinion. After the Court had given its Opinion concerning the Effect of Awards of Compensation Made by the United Nations Administrative Tribunal (I.C.J. Reports 1954, p. 47), the General Assembly set up a Special Committee to study the question of establishing a procedure for review of the Tribunal's judgements. The new Article 11

embodies the proposals of that Special Committee, as amended at the Tenth Session of the General Assembly, and it is pursuant to the procedure provided in Article 11 that the present request for an opinion has been submitted to the Court.

12. The applicable provisions of Article 11 are contained in its first four paragraphs, which read as follows:

'1. If a Member State, the Secretary-General or the person in respect of whom a judgement has been rendered by the Tribunal (including any one who has succeeded to that person's rights on his death) objects to the judgement on the ground that the Tribunal has exceeded its jurisdiction or competence or that the Tribunal has failed to exercise jurisdiction vested in it, or has erred on a question of law relating to the provisions of the Charter of the United Nations, or has committed a fundamental error in procedure which has occasioned a failure of justice, such Member State, the Secretary-General or the person concerned may, within thirty days from the date of the judgement, make a written application to the Committee established by paragraph 4 of this article asking the Committee to request an advisory opinion of the International Court of Justice on the matter.

2. Within thirty days from the receipt of an application under paragraph 1 of this article, the Committee shall decide whether or not there is a substantial basis for the application. If the Committee decides that such a basis exists, it shall request an advisory opinion of the Court, and the Secretary-General shall arrange to transmit to the Court the views of the person referred to in paragraph 1.

3. If no application is made under paragraph 1 of this article, ***171** or if a decision to request an advisory opin on has not been taken by the Committee, within the periods prescribed in this article, the judgement of the Tribunal shall become final. In any case in which a request has been made for an advisory opinion, the Secretary-General shall either give effect to the opinion of the Court or request the Tribunal to convene specially in order that it shall confirm its original judgement, or give a new judgement, in conformity with the opinion of the Court. If not requested to convene specially the Tribunal shall at its next session confirm its judgement or bring it into conformity with the opinion of the Court.

4. For the purpose of this article, a Committee is established and authorized under paragraph 2 of Article 96 of the Charter to request advisory opinions of the Court. The Committee shall be composed of the Member States the respresentatives of which have served on the General Committee of the most recent regular session of the General Assembly. The Committee shall meet at United Nations Headquarters and shall establish its own rules.'

13. During the debates in the Special Committee and in the Fifth Committee of the General Assembly which led up to the adoption of resolution 957 (X), a number of delegations questioned the legality or the propriety of various aspects of the procedure set out in these paragraphs. In fact, before the adoption of the resolution at the 541st plenary meeting of the General Assembly, one delegation made a formal proposal that the Court should be requested to give an advisory opinion on the question whether the resolution was juridically well founded. Furthermore, although resolution 957 (X) was adopted nearly 18 years ago, this is the first occasion on which the Court has been called upon to consider a request for an opinion made under the procedure laid down in Article 11. Accordingly, although no question has been raised in the statements and comments submitted to the Court in the present proceedings either as to the competence of the Court to give the opinion or as to the propriety of its doing so, the Court will examine these two questions in turn.

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14. As to the Court's competence to give the opinion, doubts have been voiced regarding the legality of the use of the advisory jurisdiction for the review of judgements of the Administrative Tribunal. The contentious jurisdiction of the Court, it has been urged, is limited by Article 34 of its Statute to disputes between States; and it has been

questioned whether the advisory jurisdiction may be used for the judicial review of contentious proceedings which have taken place before other tribunals and to which individuals were parties. However, the existence, in the background, of a dispute the parties to which may be affected s a consequence of the Court's opnion, does not change the advisory nature of the Court's task, which is to answer the questions put to it with regard to a judgment. Thus, in its Opinion concerning Judgments of the Administrative ***172*** Tribunal of the ILO upon Complaints Made against Unesco (I.C.J. Reports 1956, p. 77), the Court upheld its competence to entertain a request for an advisory opinion for the purpose of reviewing judicial proceedings involving individuals. Moreover, in the earlier advisory proceedings concerning the Effect of Awards of Compensation Made by the United Nations Administrative Tribunal (I.C.J. Reports 1954, p. 47) the Court replied to the General Assembly's request for an opinon notwithstanding the fact that the questions submitted to it closely concerned the rights of individuals. The Court sees no reason to depart from the position which it adopted in these cases. If a request for advisory opinion emanates from a body duly authorized in accordance with the Charter to make it, the Court is competent under Article 65 of its Statute to give such opinion on any legal question arising within the scope of the activities of that body. The mere fact that it is not the rights of States which are in issue in the proceedings cannot suffice to deprive the Court of a competence expressly conferred on it by its Statute.

15. In the present case, however, of a request for an opinion made under Article 11 of the Statute of the United Nations Administrative Tribunal, it has been questioned whether the requesting body itself is a body duly authorized under the Charter to initiate advisory proceedings before the Court. Under Article 11 the requesting body is the Committee on Applications for Review of Administrative Tribunal Judgements (hereafter for convenience called the Committee), which was created by General Assembly resolution 957 (X) specifically to provide machinery for initiating advisory proceedings for the review of judgements of the Tribunal. This Committee, it has been maintained is not such a body as can be considered one of the 'organs of the United Nations' entitled to request advisory opinions under Article 96 of the Charter. It has further been argued that the Committee does not have any activities of its own which might enable it to qualify as an organ authorized to request advisory opinions on legal questions arising within the scope of its activities.

16. Article 7 of the Charter, under the heading 'Organs', after naming the six principal organs of the United Nations in paragraph 1, provides in the most general terms in paragraph 2: 'Such subsidiary organs as may be found necessary may be established in accordance with the present Charter.' Article 22 then expressly empowers the General Assembly to 'establish such subsidiary organs as it deems necessary for the performance of its functions'. The object of both those Articles is to enable the United Nations to accomplish its purposes and to function effectively. Accordingly, to place a restrictive interpretation on the power of the General Assembly to establish subsidiary organs would run contrary to the clear intention of the Charter. Article 22, indeed, specifically leaves it to the General Assembly to appreciate the need for any particular organ, and the sole restriction placed by that Article on the General Assembly's ***173*** power to establish subsidiary organs is that they should be 'necessary for the performance of its functions'.

17. In its Opinion on the Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, it is true, the Court expressly held that the Charter 'does not confer judicial functions on the General Assembly' and that, when it established the Administrative Tribunal, it 'was not delegating the performance of its own functions' (I.C.J. Reports 1954, at p. 61). At the same time, however, the Court pointed out that under Article 101, paragraph 1, of the Charter the General Assembly is given power to regulate staff relations, and it held that this power included 'the power to establish a tribunal to do justice between the Organization and the staff members' (ibid., at p. 58). From the above reasoning it necessarily follows that the General Assembly's power to regulate staff relations also comprises the power to create an organ designed to provide machinery for initating the review by the Court of judgments of such a tribunal.

18. Nor does it appear to the Court that there is substance in the suggestion that the

particular constitution of the Committee would preclude it from being considered an 'organ' of the United Nations. As provided in paragraph 4 of Article 11, the Committee is composed of 'the Member States the representatives of which have served on the General Committee of the most recent regular session of the General Assembly'. But this provision is no more than a convenient method of establishing the membership of the Committee, which was set up as a separate committee invested with its own functions distinct from those of the General Committee. Paragraph 4, indeed, underlined the independent character of the Committee by providing that it should establish its own rules. These it drew up at its first meeting, amending them at later meetings. Accordingly, the Court sees no reason to deny to the Committee the character of an organ of the United Nations which the General Assembly clearly intended it to possess.

19. Article 96, paragraph 2, of the Charter, empowers the General Assembly to authorize organs of the United Nations to 'request advisory opinions of the Court on legal questions arising within the scope of their activities'. In the present instance paragraph 4 of Article 11 of the Statute of the Administrative Tribunal expressly states that the Committee 'For the purpose of this article ... is ... authorized under paragraph 2 of Article 96 of the Charter to request advisory opinions of the Court'. These two provisions, prima facie, suffice to establish the competence of the Committee to request advisory opinions of the Court. The point has been raised, however, as to whether under Article 11 of the Statute of the Administrative Tribunal the Committee has any activities of its own which enable it to be considered as requesting advisory opinions 'on legal questions arising within the scope of [its] activities'. Thus, the view has been expressed that the Committee has no other activity than to ***174*** request advisory opinions, and that the 'legal questions' in regard to which Article 11 authorizes it to request an opinion arise not within the scope of 'its activities' but of those of another organ, the Administrative Tribunal.

20. The functions entrusted to the Committee by paragraphs 1 and 2 of Article 11 are: to receive applications which formulate objections to judgements of the Administrative Tribunal on one or more of the grounds set out in paragraph 1 and which ask the Committee to request an advisory opinion; to decide within 30 days whether or not there is a substantial basis for the application; and, if it so decides, to request an advisory opinion of the Court. The scope of the activities of the Committee which result from these functions is, admittedly, a narrow one. But the Committee's activities under Article 11 have to be viewed in the larger context of the General Assembly's function in the regulation of staff relations of which they form a part. This is not a delegation by the General Assembly of its own power to request an advisory opinion; it is the creation of a subsidiary organ having a particular task and invested it with the power to request advisory opinions in the performance of that task. The mere fact that the Committee's activities serve a particular, limited, purpose in the General Assembly's performance of its function in the regulation of staff relations does not prevent the advisory jurisdiction of the Court from being exercised in regard to those activities; nor is there any indication in Article 96 of the Charter of any such restriction upon the General Assembly's power to authorize organs of the United Nations to request advisory opinions.

21. In fact, the primary function of the Committee is not the requesting of advisory opinions, but the examination of objections to judgements in order to decide in each case whether there is a substantial basis for the application so as to call for a request for an advisory opinion. If it finds that there is not such a substantial basis for the application the Committee rejects the application without requesting an opinion of the Court. When it does find that there is a substantial basis for the application, the legal questions which the Committee then submits to the Court clearly arise out of the performance of this primary function of screening the applications presented to it. They are therefore questions which, in the view of the Court, arise within the scope of the Committee's own activities; for they arise not out of the judgements of the Administrative Tribunal but out of objections to those judgements raised before the Committee itself.

22. True, Article 11 does not make it part of the Committee's function to implement any opinion given by the Court in response to the Committee's request; for under paragraph 3 of that Article the implementation of the Court's opinions is a matter for the Secretary-

General and the Administrative Tribunal. But this does not change the fact that the questions which are the subject of the Committee's requests for advisory opinions are legal questions 'arising' within the scope of its activities. All that is necessary for a question to qualify under Article 96, paragraph 2, of the Charter is that it must be a legal one and must arise out of the ***175** activities of the organ concerned. In the present case, the Committee's request is for an advisory opinion regarding alleged failure by the Administrative Tribunal to exercise jurisdiction vested in it and fundamental errors in procedure which it is alleged to have committee. These are questions which by their very nature are legal questions similar in kind to those which the Court in its 1956 Opinion in the Unesco case considered as constituting legal questions within the meaning of Article 96 of the Charter. Moreover, there is nothing in Article 96 of the Charter or Article 65 of the Statute of the Court which requires that the replies to the questions should be designed to assist the requesting body in its own future operations or which makes it obligatory that the effect to be given to an advisory opinion should be the responsibility of the body requesting the opinion.

23. In the light of the foregoing considerations, the Court concludes that the Committee on Applications for Review of Administrative Tribunal Judgements is an organ of the United Nations, duly constituted under Articles 7 and 22 of the Charter, and duly authorized under Article 96, paragraph 2, of the Charter to request advisory opinions of the Court for the purpose of Article 11 of the Statute of the United Nations Administrative Tribunal. It follows that the Court is competent under Article 65 of its Statute to entertain a request for an advisory opinion from the Committee made within the scope of Article 11 of the Statute of the Administrative Tribunal.

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24. Article 65 of the Statute is, however, permissive and, under it, the Court's power to give an advisory opinion is of a discretionary character. In exercising this discretion, the Court has always been guided by the principle that, as a judicial body, it is bound to remain faithful to the requirements of its judicial character even in giving advisory opinions (see, e.g., Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco, Advisory Opinion, I.C.J. Reports 1956, p. 84; Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organisation, Advisory Opinion, I.C.J. Reports 1960, p. 153). During the debates which preceded the adoption of General Assembly resolution 957 (X) and the introduction of Article 11 into the Statute of the Administrative Tribunal, doubts were expressed by some delegations concerning certain features of the procedure established by Article 11 precisely from the point of view of the Court's judicial character. The Court will, therefore, now consider whether, although it is competent to give the opinion requested, these features of the procedure established by Article 11 are of such a character as should lead it to decline to answer the request.

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***176** 25. One objection that has been taken to Article 11 is that it inserts a political organ into the judicial process for settling disputes between staff members and the Organization. The Administrative Tribunal being a judicial organ, it is incompatible with the nature of the judicial process, so it has been suggested, that a political organ should be involved in the judicial review of its judgements. Certainly, being composed of member States, the Committee is a political organ. Its functions, on the other hand, are merely to make a summary examination of any objections to judgements of the Tribunal and to decide whether there is a substantial basis for the application to have the matter reviewed by the Court in an advisory opinion. These are functions which, in the Court's view, are normally discharged by a legal body. But there is no necessary incompatibility between the exercise of these functions by a political body and the requirements of the judicial process, inasmuch as these functions merely furnish a potential link between two

procedures which are clearly judicial in nature. In the Court's view, the compatibility or otherwise of any given system of review with the requirements of the judicial process depends on the circumstances and conditions of each particular system.

26. In the present instance, where recourse is to be made to the International Court of Justice, it is understandable that the General Assembly should have considered it necessary to establish machinery for the purpose of ensuring that only applications for review having a substantial basis should be made the subject of review proceedings by the Court. At the same time, the Court notes that the Rules which the Committee has adopted take account of the quasi- judicial character of its functions. Thus, these Rules provide that the other party to the proceedings before the Administrative Tribunal may submit its comments with respect to the application, and that, if the Committee invities additional information or views, the same opportunity to present them is afforded to all parties to the proceedings. This means that the decisions of the Committee are reached after an examination of the opposing views of the interested parties.

27. The reports of the Committee's meetings reveal that it has dealt with 16 applications for the review of judgements of the Administrative Tribunal, all of which have been made by staff members and none by the Secretary-General or by a member State. The application which is the subject of the present request for an advisory opinion was the fourteenth received by the Committee, and up to date it is the only one in regard to which the Committee has decided that there was 'a substantial basis for the application' calling for recourse to the advisory jurisdiction of the Court. It is for the Committee to interpret the function entrusted to it by paragraph 2 of Article 11, under which it has to 'decide whether or not there is a substantial basis for the application'. In dealing with applications the practice of the Committee has been to limit itself to a bare report of its decision as to whether or not there was a substantial basis for the application and whether or not, in consequence, it should ***177** request an advisory opinion. The decisions taken by the Committee are communicated to all member States, to the parties to the proceedings, and to the Administrative Tribunal. However, the reports do not state the grounds of the applicant's objections to the Tribunal's judgement or the reasons which led the Committee to reject or, as in the present instance, to endorse the application. The Committee meets in closed session, and does not draw up summary records of its proceedings concerning applications, and in the present instance the Court has been informed that these proceedings are regarded as confidential.

28. While it might be desirable for the applicant to receive some indication of the grounds for the Committee's decision in those cases in which the application is rejected, the fact that the Committee's reports are confined to a bare statement of the decision reached does not deprive the review proceedings as a whole of their judicial character, nor constitute a valid reason for the Court's declining to answer the present request. A refusal by the Court to play its role in the system of judicial review set up by the General Assembly would only have the consequence that this system would not operate precisely in those cases in which the Committee has found that there is a substantial basis for the objections which have been raised against a judgement. When the Committee reaches such an affirmative decision there is no occasion for a reasoned statement of its views or a public record of its proceedings; for the Committee's affirmative decision, based only on a prima facie appreciation of the objections, is merely a necessary condition for the opening of the Court's advisory jurisdiction. It is then for the Court itself to reach its own, unhampered, opinion as to whether the objections which have been raised against a judgement are well founded or not and to state the reasons for its opinion.

29. Other than what may be derived from the present proceedings, there is no information before the Court regarding the criteria followed by the Committee in appreciating whether there is 'a substantial basis' for an application. The statistics of the Committee's decisions may appear to suggest the conclusion that, in applications made by staff members, it has adopted a strict interpretation of that requirement. But such a conclusion, even if established, would not suffice by itself to render the procedure under Article 11 of the Tribunal's Statute incompatible with the principles governing the judicial process. It would, on the other hand, be incompatible with these principles if the

Committee were not to adopt a uniform interpretation of Article 11 also in cases in which the applicant was not a staff member. Furthermore, the legislative history of Article 11 shows that recourse to the International Court of Justice was to be had only in exceptional cases.

30. In the light of what has been said above, it does not appear that there is anything in the character or operation of the Committee which requires the Court to conclude that the system of judicial review established by General Assembly resolution 957 (X) is incompatible with the general principles governing the judicial process.

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***178** 31. The Court does not overlook that Article 11 provides for the right of individual member States to object to a judgement of the Administrative Tribunal and to apply to the Committee to initiate advisory proceedings on the matter; and that during the debates in 1955 the propriety of this provision was questioned by a number of delegations. The member State, it was said, would not have been a party to the proceedings before the Administrative Tribunal, and to allow it to initiate proceedings for the review of the judgement would, therefore, be contrary to the general principles governing judicial review. To confer such a right on a member State, it was further said, would impinge upon the rights of the Secretary-General as chief administrative officer and conflict with Article 100 of the Charter. It was also suggested that, in the case of an application by a member State, the staff member would be in a position of inequality before the Committee. These arguments introduce additional considerations which would call for close examination by the Court if it should receive a request for an opinion resulting from an application to the Committee by a member State. The Court is not therefore to be understood as here expressing any opinion in regard to any future proceedings instituted under Article 11 by a member State. But these additional considerations are without relevance in the present proceedings in which the request for an opinion results from an application to the Committee by a staff member. The mere fact that Article 11 provides for the possibility of a member State applying for the review of a judgement does not alter the position in regard to the initiation of review proceedings as between a staff member and the Secretary-General. Article 11, the Court emphasizes, gives the same rights to staff members as it does to the Secretary-General to apply to the Committee for the initiation of review proceedings.

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32. Even so, the Court has still to consider objections which have been raised against the use of advisory jurisdiction for the review of Administrative Tribunal judgements because of what was said to be an inherent inequality under the Statute of the Court between the staff member, on the one hand, and the Secretary-General and member States, on the other. Personal appearance, it was argued, was an essential feature of due process of law, but under Article 66 of the Statute, only States and international organizations were entitled to submit statements to the Court. It was also maintained that a mere expression of a hope by the General Assembly in the proposed resolution (see para. 36 below) that member States and the Secretary-General would forgo their right to an oral hearing was not a sufficient guarantee of equality; nor was it thought appropriate that an individual should be dependent on another party to the dispute for the presentation of his views to the Court.

33. In the year following the adoption of Article 11, as it happened, the Court was called upon to examine the compatibility with its judicial ***179** character of the use of the advisory jurisdiction for review of Administrative Tribunal judgements, though in the different context of Article XII of the Statute of the ILO Administrative Tribunal. Despite the different context, the views then expressed by the Court in its Opinion concerning Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco (I.C.J. Reports 1956, p. 77) are, in certain respects, apposite for the purposes of

the present Opinion.

34. The difficulty regarding the requirement of equality between staff members and their organization in review proceedings involving the Court's advisory jurisdiction arises from the terms of Article 66 of the Statute of the Court. This Article makes provision for the submission of written or oral statements only by States and international organizations. In the 1956 proceedings the difficulty was recognized by Unesco, whose Legal Counsel notified counsel for the staff members that the Organization would transmit directly to the Court, without checking the contents, any observations or information that they might desire to present. The Court indicated that it saw no objection to this procedure, and counsel for the staff members notified Unesco of his agreement to it. Subsequently, the Court informed the States and organizations which had been considered likely to be able to furnish information on the question before the Court that it did not contemplate holding public hearings in the case. At the same time, it fixed a date within which further comments might be submitted in writing, and Unesco informed counsel for the staff members of its readiness to transmit to the Court such further observations as they might wish to present. In the light of the procedure adopted, the Court concluded that the requirements of equality had been sufficiently met to enable it to comply with the request for an Opinion. It observed:

'The difficulty was met, on the one hand, by the procedure under which the observations of the officials were made available to the Court through the intermediary of Unesco and, on the other hand, by dispensing with oral proceedings. The Court is not bound for the future by any consent which it gave or decisions which it made with regard to the procedure thus adopted. In the present case, the procedure which has been adopted has not given rise to any objection on the part of those concerned. It has been consented to by counsel for the officials in whose favour the Judgments were given. The principle of equality of the parties follows from the requirements of good administration of justice. These requirements have not been impaired in the present case by the circumstance that the written statement on behalf of the officials was submitted through Unesco. Finally, although no oral proceedings were held, the Court is satisfied that adequate information has been made available to it. In view of this there would appear to be no compelling reason why the Court should not lend its assistance in the solution of a problem confronting a specialized agency of the United Nations authorized ***180** to ask for an Advisory Opinion of the Court. Notwithstanding the permissive character of Article 65 of the Statute in the matter of advisory opinions, only compelling reasons could cause the Court to adopt in this matter a negative attitude which would imperil the working of the regime established by the Statute of the Administrative Tribunal for the judicial protection of officials. Any seeming or nominal absence of equality ought not to be allowed to obscure or to defeat that primary object.' (I.C.J. Reports 1956, p. 86.)

35. In that Opinion, therefore, the Court took the view that any absence of equality between staff members and the Secretary-General inherent in the terms of Article 66 of the Statute of the Court is capable of being cured by the adoption of appropriate procedures which ensure actual equality in the particular proceedings. In those advisory proceedings, instituted under the Statute of the ILO Administrative Tribunal, the adoption of the appropriate procedures was entirely dependent upon the will of the Organization concerned, Unesco; and yet the Court considered that 'any seeming or nominal absence of equality' inherent in Article 66 of the Court's Statute ought not to prevent it from complying with the request for an opinion. True, certain judges considered that the absence of oral proceedings constituted either an insuperable or a serious obstacle to the Court's complying with the request for an advisory opinion. But that view was not shared by the Court. Moreover, in the present proceedings, instituted under the Statute of the United Nations Administrative Tribunal, the procedural position of the staff member is more secure. Paragraph 2 of Article 11 expressly provides that, when the Committee requests an advisory opinion, the Secretary-General shall arrange to transmit to the Court the views of the staff member concerned. The implication is that the staff member is entitled to have his views transmitted to the Court without any control being exercised over the contents by the Secretary-General; for otherwise the views would not in a true

sense be the views of the staff member concerned. Thus, under Article 11, the equality of a staff member in the written procedure before the Court is not dependent on the will or favour of the Organization, but is made a matter of right guaranteed by the Statute of the Administrative Tribunal.

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36. In resolution 957 (X) the General Assembly sought also to remedy the inequality in regard to the oral procedure between staff members, on the one hand, and member States and the Secretary-General, on the other, which exists in Article 66 of the Court's Statute. In that resolution, after adopting the text of the new Article 11 of the Statute of the Administrative Tribunal, it added the recommendation:
'... that Member States and the Secretary-General should not make oral statements before the International Court of Justice in any ***181*** proceedings under the new article 11 of the Statute of the Administrative Tribunal adopted under the present resolution'.
As to this recommendation, the Court observes that, when under Article 66, paragraph 2, of its Statute written statements have been presented to the Court in advisory proceedings, the further procedure in the case, and in particular the holding of public hearings for the purpose of receiving oral statements, is a matter within the discretion of the Court. In exercising that discretion, the Court will have regard both to the provisions of its Statute and to the requirements of its judicial character. But it does not appear to the Court that there is any general principle of law which requires that in review proceedings the interested parties should necessarily have an opportunity to submit oral statements of their case to the review tribunal. General principles of law and the judicial character of the Court do require that, even in advisory proceedings, the interested parties should each have an opportunity, and on a basis of equality, to submit all the elements relevant to the questions which have been referred to the review tribunal. But that condition is fulfilled by the submission of written statements. Accordingly, the Court sees no reason to resile from the position which it took in its Opinion in the Unesco case that, if the Court is satisfied that adequate information has been made available to it, the fact that no public hearings have been held is not a bar to the Court's complying with the request for an opinion.
37. In the present proceedings, in accordance with Article 65, paragraph 2, of the Statute of the Court, the Secretary-General supplied the Court with a large dossier of relevant documents, including copies of documents which were before the Administrative Tribunal and of those submitted by Mr. Fasla to the Committee; he also submitted a written statement to the Court, and subsequently submitted written comments on the statement of the views of Mr. Fasla, together with some additional documents. Mr. Fasla, on his side, was accorded every opportunity to present his views to the Court in writing on a basis of equality with the Secretary-General, and this opportunity he used to the full. First, through the instrumentality of the Secretary-General, a written statement of his views was transmitted to the Court, together with an annexed document. Some two months later and by leave of the President of the Court, Mr. Fasla transmitted by the same channel a corrected, but at the same time much amplified, statement of his views, together with further documents. Finally, within a further time-limit fixed by the President, he transmitted to the Court his written comments on the Secretary-General's written statement, and to these comments, signed by his counsel, there were appended a 'personal statement' by Mr. Fasla and additional documents. As to oral proceedings, by a letter of 6 October 1972 the United Nations and its member States were informed that it was not contemplated that public hearings for the submission of oral statements would be held in the case. Subsequently, by a letter dated 15 November 1972, that is, ***182*** prior to submitting his corrected statement, Mr. Fasla transmitted to the Court a request to be permitted to make an oral statement. On 25 January 1973 the Court decided not to hear oral statements and on the same date telegraphed its decision to the United Nations Legal Counsel. Mr. Fasla having renewed his request in a letter of 29 January 1973, the Court adhered to its decision not to hold a public hearing for the purpose of receiving oral

statements.
38. In advisory proceedings, as previously mentioned, it lies within the entire discretion of the Court to decide whether to obtain oral in addition to written statements. It may be true that in the present proceedings for the review of an Administrative Tribunal Judgment the questions submitted to the Court relate to a contentious case between a staff member and the Secretary- General. It may also be true that this aspect of the proceedings is accentuated by the fact that Article 11, paragraph 3, of the Tribunal's Statute provides that the Secretary-General shall either give effect to the opinion of the Court or request the Tribunal to convene specially in order that it shall confirm its original judgment, or give a new judgment, in conformity with the opinion of the Court. Nevertheless, the proceedings before the Court are still advisory proceedings, in which the task of the Court is not to retry the case but to reply to the questions put to it regarding the objections which have been raised to the Judgment of the Administrative Tribunal. The Court is, therefore, only concerned to ensure that the interested parties shall have a fair and equal opportunity to present their views to the Court respecting the questions on which its opinion is requested and that the Court shall have adequate information to enable it to administer justice in giving its opinion. The Court is satisfied that these requirements have been met in the present proceedings.
39. Again, the fact that under Article 11, paragraph 3, of the Tribunal's Statute the opinion given by the Court is to have a conclusive effect with respect to the matters in litigation in that case does not constitute any obstacle to the Court's replying to the request for an opinion. Such an effect, it is true, goes beyond the scope attributed by the Charter and by the Statute of the Court to an advisory opinion. It results, however, not from the advisory opinion itself but from a provision of an autonomous instrument having the force of law for the staff members and the Secretary-General. Under Article XII of the Statute of the ILO Administrative Tribunal the Court's opinion is expressly made binding. In alluding to this consequence the Court, in the Unesco case, observed:
'It in no wise affects the way in which the Court functions; that continues to be determined by its Statute and its Rules. Nor does it affect the reasoning by which the Court forms its Opinion or the content of the Opinion itself. Accordingly, the fact that the Opinion of the Court is accepted as binding provides no reason why the Request for an Opinion should not be complied with.' (I.C.J. Reports 1956, p. 84.)
***183** Similarly, the special effect to be attributed to the Court's opinion by Article 11 of the Statute of the United Nations Administrative Tribunal furnishes no reason for refusing to comply with the request for an opinion in the present instance.
40. The Court has repeatedly stated that a reply to a request for an advisory opinion should not, in principle, be refused and that only compelling reasons would justify such a refusal (see, e.g., Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco, Advisory Opinion, I.C.J. Reports 1956, p. 86; 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. 27). In the light of what has been said above, it does not appear to the Court that there is any compelling reason why it should decline to reply to the request in the present instance. On the contrary, as in the 1956 proceedings concerning the ILO Administrative Tribunal, the Court considers that it should not 'adopt in this matter a negative attitude which would imperil the working of the regime established by the Statute of the Administrative Tribunal for the judicial protection of officials' (I.C.J. Reports 1956, p. 86). Although the records show that Article 11 was not introduced into the Statute of the United Nations Administrative Tribunal exclusively, or even primarily, to provide judicial protection for officials, they also show that steps were, nevertheless, taken to ensure that the regime established by it should provide such protection. Moreover, it has so far been officials alone who have sought to invoke the regime of judicial protection established by Article 11. Accordingly, as already indicated, although the Court does not consider the review procedure provided by Article 11 as free from difficulty, it has no doubt that, in the circumstances of the present case, it should comply

with the request by the Committee on Applications for Review of Administrative Tribunal Judgements for an advisory opinion.

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41. The scope of the questions on which, therefore, the Court has now to advise is determined first, by Article 11 of the Statute of the Administrative Tribunal, which specifies the grounds on which a judgment of the Tribunal may be challenged through the medium of the advisory jurisdiction, and, secondly, by the terms of the request to the Court. Under Article 11 an application may be made to the Committee for the purpose of obtaining the review by the Court of a judgment of the Tribunal on any of the following grounds, namely that the Tribunal has:
(i) 'exceeded its jurisdiction or competence';
(ii) 'failed to exercise jurisdiction vested in it';
(iii) 'erred on a question of law relating to the provisions of the Charter of the United Nations'; or
***184** (iv) 'committed a fundamental error in procedure which has occasioned a failure of justice.'
Consequently, the Committee is authorized to request, and the Court to give, an advisory opinion only on legal questions which may properly be considered as falling within the terms of one or more of those four 'grounds'. Again, under Article 65 of the Court's Statute, its competence to give advisory opinions extends only to legal questions on which its opinion has been requested. The Court may interpret the terms of the request and determine the scope of the questions set out in it. The Court may also take into account any matters germane to the questions submitted to it which may be necessary to enable it to form its opinion. But in giving its opinion the Court is, in principle, bound by the terms of the questions formulated in the request (Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South West Africa, Advisory Opinion, I.C.J. Reports 1955, pp. 71-72; Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco, Advisory Opinion, I.C.J. Reports 1956, pp. 98-99). In the present instance, the questions formulated in the request refer to only two of the four 'grounds' of challenge specified in Article 11 of the Administrative Tribunal's Statute, namely, failure to exercise jurisdiction and fundamental error in procedure. Consequently, it is only objections to Judgement No. 158 based on one or other of those two grounds which are within the terms of the questions put to the Court.
42. The text of the request which is now before the Court has been set out at the beginning of this Opinion. The two questions which it contains read as follows:
'(1) Has the Tribunal failed to exercise jurisdiction vested in it as contended in the applicant's application to the Committee on Applications for Review of Administrative Tribunal Judgments (A/AC.86/R.59)?
(2) Has the Tribunal committed a fundamental error of procedure which has occasioned a failure of justice as contended in the applicant's application to the Committee on Applications for Review of Administrative Tribunal Judgments (A/AC.86/R.59)?'
The document mentioned in each question is Mr. Fasla's formal application to the Committee in which he set out his grounds of objection to Judgment No. 158 and his contentions in support of those grounds. Thus the questions are specifically limited to the grounds of objection and the contentions advanced by him in his application to the Committee. He also formulated four questions at the end of his application with the request that they be submitted to the Court. These questions referred only to two of the four grounds of objection envisaged by Article 11 of the Tribunal's Statute, namely failure to exercise jurisdiction and fundamental error in the procedure having occasioned a failure of ***185** justice; the other two grounds recognized in Article 11-excess of jurisdiction and error on a question of law relating to the provisions of the Charter-were not raised by the applicant before the Committee. The two grounds advanced by the applicant before the Committee are therefore identical in substance with those upon which the opinion of the Court has been requested.

43. In order to determine the scope of the questions put to the Court and the framework within which the Court has to give its opinion, it is necessary to have regard to Mr. Fasla's contentions before the Committee. As, however, the implications of these contentions can be appreciated only in the context of the claims presented by him to the Administrative Tribunal and of the disposal of those claims by the Tribunal, the Court must first set out his claims before the Tribunal and the Tribunal's decisions in regard to them.

44. Mr. Fasla instituted his proceedings against theSecretary-General before the Administrative Tribunal by an application, dated 31 December 1970, in which he requested it 'to order the following measures':

'(a) As a preliminary measure, production by the Respondent of the report by Mr. Satrap, Chief, Middle East Area Division, UNDP on his nvestigation of the UNDP office in Yemen in February 1969.

(b) As a preliminary measure, production by the Respondent of the report by Mr. Hagen, Consultant to the UNDP Administrator, on his investigation of the UNDP office in Yemen in March 1969.

(c) As a preliminary measure, production by the Respondent of the report by Mr. Hagen, UNDP Special Representative in Yemen, concerning the Applicant's performance, prepared at the request of the UNDP in the summer of 1969.

(d) Restoration of the Applicant to the status quo ante prevailing in May 1969, by extending the Applicant's last fixed-term appointment for a further two years beyond 31 December 1969, with retroactive pay of salary and related allowances; alternatively, a payment by the Respondent to the Applicant of three years' net base salary.

(e) Correction and completion of the Applicant's Fact Sheet which is intended for circulation both within and outside the UNDP, with all the required Periodic Reports and evaluations of work; alternatively payment by the Respondent to the Applicant of two years' net base salary.

(f) Invalidation of the Applicant's Periodic Report covering his ***186*** service in Yemen, prepared in September 1970; alternatively, payment by the Respondent to the Applicant of two years' net base salary.

(g) Further serious efforts by the Respondent to place the Applicant in a suitable post either within the UNDP or within the United Nations Secretariat or within a UN Specialized Agency; alternatively, payment by the Respondent to the Applicant of two years' net base salary.

(h) As compensation for injury sustained by the Applicant as the result of the repeated violation by the Respondent of Administrative Instruction ST/AI/115, payment by the Respondent to the Applicant of two years' net base salary.

(i) As compensation for injury sustained by the Applicant as the result of the continuous violation by the Respondent of his obligation to make serious efforts to find an assignment for the Applicant, payment by the Respondent to the Applicant of two years' net base salary.

(j) As compensation for injury sustained by the Applicant as the result of prejudice displayed against him, payment by the Respondent to the Applicant of five years' net base salary.

(k) As compensation for the emotional and moral suffering inflicted by the Respondent upon the Applicant, payment by the Respondent to the Applicant of one Yemen rial.

(l) As compensation for delays in the consideration of the Applicant's case, especially in view of the fact that no Joint Appeals Board was in existence during the first four months of 1969 since the Respondent had failed to appoint a Panel of Chairmen, payment by the Respondent to the Applicant of one year's net base salary.

(m) Payment to the Applicant of the sum of $1,000.00 for expenses in view of the fact that, although the Applicant was represented by a member of the Panel of Counsel, the complexity of the case necessitated the Applicant's travel from California to New York in May 1970 as well as frequent transcontinental telephone calls to the Applicant's Counsel before and after that date.

(n) As compensation for the damage inflicted by the Respondent on the Applicant's

professional reputation and career prospects as the result of the circulation by the Respondent, both within and outside the United Nations, of incomplete and misleading ***187*** information concerning the Applicant, payment by the Respondent to the Applicant of five years' net base salary.'

On 11 June 1971 a supplement to the application was filed with the Administrative Tribunal, whereby it was requested to order the following additional measures:

'(a) As compensation for the further delay in the consideration of the Applicant's case early in 1971, payment by the Respondent to the Applicant of one year's net base salary.

(b) Recalculation by the Respondent of the Applicant's salary and allowances in Yemen on the basis of the actual duration of the pplicant's assignment there, and payment to the Applicant of the difference between the recalculated amount and the amount the Applicant received.

(c) As compensation for the illegal suspension of the Applicant from duty, payment by the Respondent to the Applicant of five years' net base salary.'

45. Judgment was given by the Tribunal on 28 April 1972. In the body of the Judgment the Tribunal noted that certain of Mr. Fasla's requests had been met and made a number of findings, some of which were favourable and others unfavourable to his case. The precise terms of these findings are given later in this Opinion.

46. On 26 May 1972 Mr. Fasla submitted an application to the Committee, setting out his objections to the Judgment and asking the Committee to request an advisory opinion of the Court. In his application, as already mentioned, he objects that the Administrative Tribunal (1) failed to exercise jurisdiction vested in it and (2) committed fundamental errors in procedure which occasioned a failure of justice. He supports each of these objections by a number of contentions in regard to alleged defects in the Judgment. These contentions, to which further reference will be made later, he groups together under three main heads: compensation for injury to his professional reputation and employment opportunities; compensation for the costs incurred by him in presenting his claims to the Joint Appeals Board and the Administrative Tribunal; recalculation of his rate of remuneration while posted to Yemen. The contentions advanced before the Committee cover a wide area of the case before the Administrative Tribunal. Consequently, the Court finds no reason to adopt a restrictive interpretation of the questions framed in the request.

47. Under Article 11 of the Statute of the Tribunal, as already indicated, the task of the Court is not to retry the case but to give its opinion on the questions submitted to it concerning the objections lodged against the Judgment. The Court is not therefore entitled to substitute its own ***188*** opinion for that of the Tribunal on the merits of the case adjudicated by the Tribunal. Its role is to determine if the circumstances of the case, whether they relate to merits or procedure, show that any objection made to the Judgment on one of the grounds mentioned in Article 11 is well founded. In so doing, the Court is not limited to the contents of the challenged award itself, but takes under its consideration all relevant aspects of the proceedings before the Tribunal as well as all relevant matters submitted to the Court itself by the staff member and by the Secretary-General with regard to the objections raised against that judgment. These objections the Court examines on their merits in the light of the information before it.

48. Furthermore, as the Court pointed out in its Advisory Opinion in the Unesco case, a challenge to an administrative tribunal judgment on the ground of unauthorized assumption of jurisdiction cannot serve simply as a means of attacking the tribunal's decisions on the merits. Speaking of Article XII of the Statute of the ILO Administrative Tribunal, which recognizes only unauthorized assumption of jurisdiction and fundamental fault in the procedure as grounds for attacking the judgments of that tribunal, the Court said:

'The request for an Advisory Opinion under Article XII is not in the nature of an appeal on the merits of the judgment. It is limited to a challenge of the decision of the Tribunal confirming its jurisdiction or to cases of fundamental fault of procedure. Apart from this, there is no remedy against the decisions of the Administrative Tribunal. A challenge of a decision confirming jurisdiction cannot properly be transformed into a procedure against

the manner in which jurisdiction has been exercised or against the substance of the decision.' (I.C.J. Reports 1956, pp. 98-99.)
So too, under Article 11 of the Statute of the United Nations Administrative Tribunal a challenge to a decision for alleged failure to exercise jurisdiction of fundamental error in procedure cannot properly be transformed into a proceeding against the substance of the decision. This does not mean that in an appropriate case, where the judgment has been challenged on the ground of an error on a question of law relating to the provisions of the Charter, the Court may not be called upon to review the actual substance of the decision. But both the text of Article 11 and its legislative history make it clear that challenges to Administrative Tribunal judgments under its provisions were intended to be confined to the specific grounds of objection mentioned in the Article.

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49. Turning to the first question, the Court will now examine whether the Tribunal has failed to exercise jurisdiction vested in it, as contended in the application to the Committee.
***189** 50. Article XII of the Statute of the ILO Administrative Tribunal speaks only of a challenge to 'a decision of the Tribunal confirming its jurisdiction', and does not make any mention of a failure of the Tribunal to exercise its jurisdiction. Similarly, in the draft of Article 11 of the United Nations Administrative Tribunal's Statute recommended to the General Assembly by the Special Committee on Review of Administrative Tribunal Judgments, a challenge on this ground was contemplated only if the Tribunal had 'exceeded its jurisdiction or competence'. The words 'or that the Tribunal has failed to exercise jurisdiction vested in it' were added at the 499th meeting of the Fifth Committee on the proposal of the Indian delegation, who had explained that:
'According to the text of the proposed new article 11, a review might be requested on the ground that the Tribunal had exceeded its jurisdiction or competence. There might, however, be cases where the Tribunal had failed to exercise the jurisdiction it possessed under the law; cases of errors in the exercise of jurisdiction were also feasible. In Indian legislation reliefs analogous to review were granted both where a tribunal exercised jurisdiction not vested in it by law and where it failed to exercise jurisdiction vested in it by law, provision thus being made not only for cases of excess of jurisdiction but also for those of failure or neglect to exercise jurisdiction. (Emphasis added.)
This explanation appears to confirm that this additional ground for challenging a judgment was regarded as having a comparatively narrow scope; i.e., as concerned essentially with a failure by the Tribunal to put into operation the jurisdictional powers possessed by it-rather than with a failure to do justice to the merits in the exercise of those powers. It further appears that in accepting failure to exercise jurisdiction as an additional ground of challenge the General Assembly regarded it as eiusdem generis with cases where the Tribunal had exceeded its jurisdiction or competence; and the Fifth Committee thus seems to have viewed both excess and failure in the exercise of jurisdiction as essentially concerned with matters of jurisdiction or competence in their strict sense. In a more general way, the comparatively narrow scope intended to be given to failure to exercise jurisdiction as a ground of challenge is confirmed by the legislative history of Article 11, which shows that the grounds of challenge mentioned in the Article were envisaged as covering only 'exceptional' cases.
51. In the Court's view, therefore, this ground of challenge covers situations where the Tribunal has either consciously or inadvertently omitted to exercise jurisdictional powers vested in it and relevant for its decision of the case or of a particular material issue in the case. Clearly, in appreciating whether or not the Tribunal has failed to exercise relevant jurisdictional powers, the Court must have regard to the substance of ***190** the matter and not merely to the form. Consequently, the mere fact that the Tribunal has purported to exercise its powers with respect to any particular material issue will not be enough: it must in fact have applied them to the determination of the issue. No doubt, there may be borderline cases where it may be difficult to assess whether the Tribunal has in any true

sense considered and determined the exercise of relevant jurisdictional powers. But that does not alter the duty of the Court to appreciate in each instance, in the light of all pertinent elements, whether the Tribunal did or did not in fact exercise with respect to the case the powers vested in it and relevant to its decision.

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52. The first contention in the application to the Committee is that the Tribunal did not fully consider and pass upon the claim for damages for injury to professional reputation and career prospects. The claim referred to is that set out in plea (n) in the application to the Tribunal, in the following words:
'As compensation for the damage inflicted by the Respondent on the Applicant's professional reputation and career prospects as the result of the circulation by the Respondent, both within and outside the United Nations, of incomplete and misleading information concerning the Applicant, payment by the Respondent to the Applicant of five years' net base salary.'
In support of this contention Mr. Fasla invokes Articles 2 and 9 of the Tribunal's Statute, maintaining that under their provisions the Tribunal was competent and had jurisdiction to award compensation to him for such injuries; and that it failed to exercise such competence and jurisdiction in not awarding him either damages or specific relief. In support of that proposition he maintains that a claim to compensation for damage to his professional reputation and career prospects was specifically pleaded; that such a claim fell within the Tribunal's competence under Article 2, paragraph 1, of its Statute; that the Tribunal did not even discuss the claim, although it found that his personnel record and fact-sheet had been maliciously distorted; that the Tribunal had before it matters which evidenced the damage flowing from that distortion; that the damage was not remote but the direct and natural consequence of the distortion; that the malicious distortion of his personnel record and fact-sheet was a wrongful act attributable in law to the Secretary-General; and that the Tribunal, having taken cognizance of the wrongful act and yet having provided no remedy for the damage occasioned thereby, obviously failed to exercise its jurisdiction.
53. The validity of this contention cannot be adequately considered without taking account of all the claims submitted by the applicant to ***191*** the Administrative Tribunal and the latter's disposal of those claims. In all, as previously indicated, the applicant had presented no less than 17 separate pleas. Three of those were of a preliminary character, requesting the production of certain reports; the remaining 14 sought substantial relief in the form either of a specific remedy or of monetary compensation. As to the three pleas of a preliminary character, the Tribunal in its Judgement:
(i) noted that the respondent had produced the first report;
(ii) noted that the second report was in the applicant's 'official status file' and therefore available to the counsel of the parties; that a letter, which the applicant had explained he had had in mind when he requested the production of 'Mr. Hagen's report', had been supplied confidentially to the Tribunal; and that the Tribunal had made available to the applicant the few lines of the letter which it had held to be relevant;
(iii) stated that, the Tribunal having requested the production of the third report, the respondent had replied that it did not have such a report in the files of the body concerned; and that the Tribunal could only take note of that reply.
As to the pleas for substantial relief, the Tribunal gave two decisions in the applicant's favour, namely:
'1. The Respondent shall pay the Applicant a sum equal to six months' net base salary;
2. The periodic report prepared for the period June 1968 to March 1969 is invalid and shall be treated as such.'
In a third decision, while not upholding the applicant's claim to recalculation of his emoluments during his period of service in Yemen, the Tribunal took note in paragraph XV of its Judgment of the respondent's agreement, pursuant to a recommendation of the Joint Appeals Board, to make the applicant 'an ex gratia payment in the amount of any

losses that he could show he had suffered as a result of his precipitate recall from Yemen'. On this point, after declaring that the applicant was entitled to take advantage of the possibility thus offered, the Tribunal made formal provision for giving effect to that decision:

'3. Any requests for payment made in accordance with paragraph XV above shall be submitted, together with the necessary supporting evidence, by the Applicant to the Respondent, within a period of two months from the date of this judgment.'

The Tribunal concluded its Judgment with a comprehensive rejection of the applicant's other claims, stating that:

'4. The other requests are rejected.'

***192** 54. The first contention must also be considered in the light of three other factors. First, there was a considerable degree of overlap in the 14 claims to substantial relief, in the sense that a number of them appeared to be claims to different relief founded on the same act or omission. Yet the staff member did not indicate whether and, if so, to what extent the claims were to be considered as alternative or cumulative. Secondly, in its Judgement the Tribunal set out all his claims, recited the facts of the case at considerable length and gave a detailed summary of the contentions of both parties. Moreover, the recital of facts included a comprehensive account of the two proceedings before the Joint Appeals Board in which there had been extensive consideration of various aspects of the case. Thirdly, the Tribunal's own analysis of the case was substantial, even if it did not deal specifically with each of the claims presented. In its analysis it concentrated on what it considered to be the relevant issues and those in regard to which it found substance in these claims, namely (i) that the Staff Rules concerning periodic reports had not been properly complied with and that, by way of consequence, the commitment of the Secretary-General to make serious efforts to place the applicant in a suitable post had not been correctly fulfilled (paras. IV-VII of the Judgement), and (ii) that a report filed in 1970 as a result of the recommendations of the Joint Appeals Board was motivated by prejudice against the applicant (paras. VIII-XII). After that examination of the main contentions of the applicant concerning the violation of Staff Rules and the prejudice evidenced in the 1970 report on his performance in Yemen, the Tribunal, in paragraph XIII of the Judgement, examined the question of the damages to be awarded as compensation, in lieu of the specific performance of the obligations which the respondent had failed to observe. The remainder of the substantive part of the Judgement related to the additional claims filed in a supplementary application concerning recalculation of remuneration and alleged illegal suspension from duty (paras. XIV and XV), the claim for damages as a result of delays in considering the case (para. XVI) and, finally, the question of costs (para. XVII).

55. In organizing the structure of its Judgement, the Administrative Tribunal followed the logical sequence of examining the existence of violations of substantive law before entering into the question of compensation for damage. Article 2, paragraph 1, of the Tribunal's Statute gives it jurisdiction 'to hear and pass judgement 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'. This same paragraph adds: 'The words 'contracts' and 'terms of appointment' include all pertinent regulations and rules in force at the time of alleged non-observance, including the staff pension regulations.' A subsequent Article refers successively to the specific relief ***193** which may be granted by the Tribunal and to the award of monetary compensation to be paid in lieu of such specific relief (Art. 9). The Tribunal first determines the non-observance of contracts of employment or of staff regulations before it examines the question of rescission of a decision, or specific performance of an obligation. The latter questions in their turn take priority over the fixing of monetary compensation. The sequence followed by the Administrative Tribunal in the Judgement under consideration thus corresponds to the provisions of its Statute. It can hardly be denied, however, that in this particular case the structure adopted created the difficulty that some of the applicant's pleas, though covered by the general consideration of the basic questions of nonobservance of regulations, of rescission and of damage, were not expressly

mentioned or specifically dealt with in the paragraphs in which the Tribunal developed its reasoning and analysed what it deemed to be the pertinent issues.

56. To find that such a difficulty has arisen in the present case does not signify that, as contended by the applicant, there has been on the part of the Tribunal a failure to exercise its jurisdiction with respect to those pleas which were not expressly mentioned nor specifically dealt with in the substantive part of the Judgement. The test of whether there has been a failure to exercise jurisdiction with respect to a certain submission cannot be the purely formal one of verifying if a particular plea is mentioned eo nomine in the substantive part of a judgment: the test must be the real one of whether the Tribunal addressed its mind to the matters on which a plea was based, and drew its own conclusions therefrom as to the obligations violated by the respondent and as to the compensation to be awarded therefor. Such an approach is particularly requisite in a case such as the present one, in which the Tribunal was confronted with a series of claims for compensation or measures of relief which to a considerable extent duplicated or at least substantially overlapped each other and which derived from the same act of the respondent: the circulation of an incomplete fact-sheet annexed to the enquiry concerning new employment for the applicant. This act, which was identified by the Tribunal as the cause of the inadequate performance by the respondent of the commitment to seek new employment for the applicant, also constituted the basis for the claim that the applicant's professional reputation and career prospects had been damaged.

57. While the claim for damage to professional reputation and career prospects was couched by the applicant in broad terms, to the effect that it resulted from 'the circulation by the Respondent, both within and outside the United Nations, of incomplete and misleading information concerning the Applicant', the record shows that the only act attributable to the respondent which could fall within that description consisted precisely in that same distribution to the United Nations central recruitment service, to three specialized agencies, to two UNDP resident representatives, and to several other services of the United Nations, of a ***194** fact-sheet which, while containing information reflecting valid periodic reports, did not include statements in rebuttal by the staff member nor reports concerning other periods of employment, which, contrary to Staff Regulations, had not been prepared or incorporated. Since this act of the respondent was at the same time both the cause of the inadequate performance of the commitment to seek a new assignment and the source of the claimed harm to reputation and career prospects, Mr. Fasla himself, in his explanatory statement to the Administrative Tribunal, did not develop the argument in support of the two pleas separately. It was reasonable in these circumstances for the Administrative Tribunal, in one and the same part of its Judgement, to consider and dispose of all the allegations of injury to the applicant resulting from that particular conduct of the respondent.

58. In his application to the Committee, however, Mr. Fasla contends that the award of damages made by the Tribunal 'was solely in compensation for Respondent's failure to take all reasonable steps to fulfill its legal obligation to find another position for Applicant'. In short he refers to the particular plea filed by him as plea (i) in his application to the Tribunal (para. 44 above). Since, as already indicated, the Tribunal did not pronounce on each specific head of claim, but examined on a global basis and in succession the questions of violation of staff rules or regulations, of specific relief and of monetary compensation for the injury sustained, there is no suggestion in the terms of the Judgement that the Tribunal's decision awarding damages was connected with only one among the inter-related pleas filed by the applicant.

59. The preceding observations show that it was not unreasonable for the Tribunal to consider jointly and make a single award for the damage to the professional reputation and career prospects of the applicant together with the damage resulting from the inadequate observance of the commitment to seek new employment for him. The question however remains whether the Tribunal, in awarding damages, did in fact consider and take into account both aspects of his case. From the text of paragraph XIII of the Judgement it appears that in awarding damages the Tribunal based itself on the

following consideration among others:
'Having regard to the findings of the Joint Appeals Board in its report of 3 June 1970 (paragraph 45) and to the fact that UNDP refused to make further efforts to find an assignment for the Applicant after agreeing to correct the fact sheet ...' (Emphasis added.)
The reasoning of the Judgement thus incorporates by reference the findings of the Joint Appeals Board in paragraph 45 of its report. Paragraph 45 contains the following sub-paragraph:
195 '(e) UNDP's efforts to assign the appellant elsewhere were inadequate especially since the fact sheet was incomplete. It is the view of the Board that, as a result of these facts, the performance record of the appellant is incomplete and misleading and that this seriously affected his candidacy for a further extension of his contract or for employment by other agencies.' (Emphasis added.)
From the concluding sentence of this sub-paragraph, which the Tribunal reproduced in its Judgement, it is clear that in making the award the Tribunal considered and took into account, inter alia, the damage inflicted on the professional reputation and career prospects of the applicant by the circulation of the fact-sheet; for the Tribunal clearly recognized that the circulation of that fact-sheet had 'seriously affected his candidacy for a further extension of his contract or for employment by other agencies'. In short, the Tribunal applied its mind to the basic act of the respondent which gave rise to the claim for damages-the circulation of an incomplete fact-sheet- and not merely to one of its consequences, namely, that the efforts to seek a new position for the applicant had, for that very reason, not been fully adequate. Thus the Tribunal went to the root of the matter and, in accordance with its Statute (Art. 9), fixed the amount of compensation to be paid to the applicant in lieu of specific performance, taking into account the 'injury sustained' by him resulting from the refusal to circulate an appropriately corrected fact-sheet to potential employers.
60. It is necessary to add certain observations which confirm this conclusion. Article 9, paragraph 1, of the Tribunal's Statute, which governs the power of the Tribunal to award compensation, begins by providing that the Tribunal, if it finds that the application is well founded, 'shall order the rescinding of the decision contested or the specific performance of the obligation invoked'. An order of this kind normally constitutes the basic content of a decision of the Tribunal in favour of an applicant. The immediately following sentence of Article 9, paragraph 1, adds that:
'At the same time the Tribunal shall fix the amount of compensation to be paid to the applicant for the injury sustained should the Secretary-General, within thirty days of the notification of the judgement, decide, in the interest of the United Nations, that the applicant shall be compensated without further action being taken in his case; ...'
Thus, the damages to be awarded by the Tribunal are of a subsidiary character, in the sense that they are granted in lieu of specific performance. The power of the Tribunal to award damages in lieu of specific performance has been interpreted by the Tribunal as also empowering it to ***196*** award damages when it finds that it is not possible to remedy the situation by ordering the rescinding of the decision contested or specific performance of the obligation invoked.
61. In the present case the 'specific performance' which could have been ordered by the Tribunal was not merely that further, undefined, efforts should be made to obtain a position for the applicant but that those efforts should consist in the circulation to the personnel departments of the United Nations and specialized agencies of a completed and corrected fact-sheet giving a fuller picture of the applicant's past performance as an official of the United Nations. This is implicit in the statement made in paragraph XIII of the Judgement that in assessing damages the Tribunal had had regard 'to the fact that UNDP refused to make further efforts to find an assignment for the Applicant after agreeing to correct the fact sheet by taking into consideration the periodic reports which were previously missing ...'.
62. The Tribunal held in the present case that, in view of the negative position taken by the respondent as to the possibility or usefulness of making further efforts for obtaining a

new position for the applicant, compensation was due without waiting for a new decision by the Secretary-General within the 30-day period referred to in Article 9, paragraph 1. The payment of compensation to an applicant depends on a decision by the Secretary-General that no further action shall be taken in his case, and in this particular instance the Tribunal already had before it such a decision. It would have served no purpose and indeed not have been in the applicant's interest to await the repetition of that decision. In the circumstances, this was not an unreasonable way of applying Article 9, paragraph 1, of the Tribunal's Statute.

63. Compensation was therefore awarded, as the Judgement states, 'in lieu of specific performance', such compensation to constitute 'sufficient and adequate relief' for the injury sustained. It follows that the amount awarded as compensation did not merely seek to provide, as contended by the applicant, relief for the non-execution of the obligation to seek a new post for him, but was also intended to cover that particular form of restitution which would have consisted in the circulation of a completed and corrected fact-sheet. Such a circulation among the recipients of the original letters would have provided specific relief for the harmful effects resulting for the applicant from the previous circulation of the incomplete fact-sheet. This confirms that the award of damages was also intended to comprise compensation for the injury to the applicant's professional reputation and career prospects.

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64. In his application to the Committee the applicant asserts that the Tribunal's decision constituted a woefully inadequate judgement. This could be interpreted as a disagreement with the adequacy of the amount awarded. The hypothesis of a failure to exercise jurisdiction on account ***197*** of the extreme paucity of an award would only arise in the event of there being such a discrepancy between the findings of a tribunal and the remedy granted that the award in question could be viewed as going beyond the exercise of reasonable discretion. On such a hypothesis, the obvious unreasonableness of the award could be taken into account in determining whether there had been a 'failure to exercise jurisdiction', within the meaning given to this term by the Court in paragraphs 50 and 51 above; and it might lead to the conclusion that the Tribunal had not in substance and in fact exercised its jurisdiction with respect to the issue of compensation. But except in such an extreme case, once a tribunal has pronounced on the amount of compensation to be paid for a wrongful act, it has exercised its jurisdiction on the matter, regardless of whether it allows the full amount claimed or allows only in part the compensation requested.

65. In the present case the Administrative Tribunal found itself in the situation of having to translate the injury sustained by the applicant into monetary terms. In this respect the Tribunal possesses a wide margin of discretion within the broad principle that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. This power of appreciation of the Tribunal is subject to the rule provided for in the concluding words of paragraph 1 of Article 9 of its Statute:

'... such compensation shall not exceed the equivalent of two years' net base salary of the applicant. The Tribunal may, however, in exceptional cases, when it considers it justified, order the payment of a higher indemnity. A statement of the reasons for the Tribunal's decision shall accompany each such order.'

This rule does not require the Tribunal to state in every judgement whether or not it is confronted with an exceptional case, but only to do so in judgements in which it has decided to 'order the payment of a higher indemnity'. Moreover, even under this rule, the discretion given to the Tribunal is a wide one. If the Court were acting in this case as a court of appeal, it might be entitled to reach its own conclusions as to the amount of damages to be awarded, but this is not the case. In view of the grounds of objection upon which the present proceedings are based, and of the considerations stated above, the Court must confine itself to concluding that there is no such unreasonableness in the

award as to make it fall outside the limits of the Tribunal's discretion. This being so, the Tribunal cannot be considered as having failed to exercise its jurisdiction in this respect. In reaching this conclusion the Court has taken account of the fact that in paragraph XIII of the Judgement, when fixing the amount of compensation, the Tribunal referred to 'the circumstances of the case'. Regard must therefore be had to various circumstances ***198** of fact appearing from the documentation before the Tribunal which may have been relevant for its determination. Among them the following may be noted:
(1) The report on the applicant's service in Yemen, which the Tribunal invalidated, was not circulated, and remained in the UNDP Personnel Division.
(2) While the Joint Appeals Board qualified the performance record as 'incomplete and misleading', the Tribunal described the fact-sheet in its own words as 'incomplete, if not inaccurate' and the information as having 'serious gaps'. The three ratings circulated included a favourable one in which the applicant was described as 'an efficient staff member giving complete satisfaction', but also two in which he was described as 'a staff member who maintains only a minimum standard'.
(3) The Tribunal found that the applicant had raised no objection to, and had no grounds for contesting, the decision to grant him special leave with pay from 10 September 1969 till the expiration of his contract on 31 December 1969.
(4) The Judgement itself, which is a public United Nations document, vindicated in several respects certain claims of the applicant.
Account has also to be taken of the fact that the number of months of salary by reference to which the Tribunal determined the amount of its award was the same as the number of months of salary adopted by the Joint Appeals Board as the measure of the ex gratia payment which it had recommended in its report of 3 June 1970.

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66. The second contention in the application to the Committee is that the Tribunal failed to exercise its jurisdiction because, although it found that the respondent had not performed his legal obligations with respect to the applicant, it
'... nevertheless unjustifiably refused to fully consider Applicant's request for the reimbursement of the unavoidable and reasonable costs in excess of normal litigation costs involved in presenting his claims to the Joint Appeals Board and the Administrative Tribunal, and refused to order compensation therefor'.
The claim referred to is set out in plea (m) in the application to the Tribunal in the following words:
'Payment to the Applicant of the sum of $1,000.00 for expenses in view of the fact that, although the Applicant was represented by a member of the Panel of Counsel, the complexity of the case ***199** necessitated the Applicant's travel from California to New York in May 1970 as well as frequent transcontinental telephone calls to the Applicant's Counsel before and after that date.'
67. In support of his second contention Mr. Fasla invokes, inter alia, general principles of law and the case law of the Tribunal itself, as establishing its jurisdiction and competence to award costs to a successful applicant. He then maintains that the Tribunal failed to address itself fully to the question of costs: for the Judgement, although mentioning costs in a summary fashion, rejected a demand for counsel's fees which had never been made, but made no reference to the actual costs prayed for. Recalling his success before the Tribunal in obtaining an award of compensation and the invalidation of the periodic report on his service in Yemen, he maintains that these and other elements of the decision showed that he was justified in pursuing his claims. This being so, he further maintains that the Tribunal refused fully to consider his request for the reimbursement of expenses; for, without stating any standards or reasons, the Tribunal said simply that it saw no justification for the request and rejected it. As to the expenses in question, he refers to the complexity of the case, the long duration of the appellate process, the necessity of his residing in California and the consequential expenses involved in communicating and consulting with his counsel. These expenses, he maintains, were reasonable, could not

have been avoided otherwise than by extremely inefficient and ineffective means, and were in excess of normal litigation costs before the Tribunal. Referring to what he calls a consistent pattern in previous Judgements of awarding costs to successful applicants, he stresses that he was not claiming costs for the assistance of outside counsel such as had been disallowed in the more recent practice of the Tribunal. However, he maintains that the costs, other than counsel's fees, which he incurred were necessary, unavoidable and in excess of normal litigation expenses before the Tribunal; and that the Tribunal has previously found that it had jurisdiction to award such costs.

68. The claim to costs was mentioned by the Tribunal at the beginning of its Judgement among the applicant's claims to substantial relief. The Tribunal's decision in regard to costs was, no doubt, somewhat laconic (para. XVII of the Judgement):

'The Applicant requests payment of one thousand dollars for exceptional costs in preparing the case. Since the Applicant had the ***200*** assistance of a member of the panel of counsel, the Tribunal finds this request unfounded and rejects it.'

This decision has, however, to be read in the light of the history of the question of the award of costs by the Tribunal. Although not expressly empowered by its Statute to award costs, the Tribunal did so in some of its early cases on the basis of what it considered to be an inherent power. In 1950, this power was questioned by the Secretary-General, who contended that: (a) the Tribunal was without authority under its Statute to tax costs against the losing party and (b) even if the Tribunal decided that it had competence to assess costs they should be strictly limited and not include all types of actual costs. After consideration of the legal issues involved the Tribunal formally adopted on 14 December 1950 a statement of policy on the matter which, inter alia, provided:

'4. In view of the simplicity of the proceedings of the Administrative Tribunal, as laid down in its rules, the Tribunal will not, as a general rule, consider the question of granting costs to applicants whose claims have been sustained by the Tribunal.

5. In exceptional cases, the Tribunal may, however, grant a compensation for such costs if they are demonstrated to have been unavoidable, if they are reasonable in amount, and if they exceed the normal expenses of litigation before the Tribunal.

6. In particular, it will not be the policy of the Tribunal to award costs covering fees of legal counsel with respect to cases which do not involve special difficulties.' (Emphasis added.)

To this it may be added that the Secretariat has established a panel of counsel in disciplinary and appeal cases. The counsel, drawn from the Secretariat, are assigned to assist applicants as part of their official duties and receive secretarial assistance and other support services. This assistance is available to staff members without cost. As recognized by Mr. Fasla, it has been the normal practice of the Tribunal, since the creation of the panel of counsel, not to award costs for the assistance of outside counsel.

69. Mr. Fasla complains that the Judgement rejected a demand for counsel's fees which had never been made but did not mention the actual costs prayed for, namely his exceptional costs. But this reading of the Judgement does not appear to be correct. The Tribunal first recalled expressly that he had requested compensation for 'exceptional costs in preparing the case' and went on to state: 'since the applicant had the assistance of a member of the panel of counsel, the Tribunal ***201*** finds this request unfounded and rejects it' (emphasis added). This would seem to be simply a terse, and somewhat oblique, way of saying that the Tribunal did not find the case one for the award of exceptional costs. Furthermore, under the Tribunal's Statement of Policy adopted on 14 December 1950, referred to above, it is clear that the award of costs is a matter within its discretion; and that there is always an onus probandi upon the applicant to demonstrate that the costs have been unavoidable, reasonable in amount and in excess of the normal expenses of litigation before the Tribunal. The question of costs is therefore very much a matter for the appreciation of the Tribunal in each case.

70. In the circumstances the Court does not think that the contention that the Tribunal failed to exercise jurisdiction vested in it with respect to costs is capable of being sustained. The Tribunal manifestly addressed its mind to the question and exercised its jurisdiction by deciding against the applicant's claim. Therefore this contention turns out

to concern not a failure by the Tribunal to exercise its jurisdiction but an appeal against its decision on the merits. In so far as this contention is a challenge to the Judgement on the ground of any inadequacy in the motivation of the decision, it falls to be considered not in the present context of a failure to exercise jurisdiction but in that of the second question put to the Court as to whether there has been a fundamental error in procedure which has occasioned a failure of justice (see paras. 97-98 below.)

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71. The third contention in the application to the Committee is that the Tribunal failed to exercise its jurisdiction in that it did not direct the Secretary-General to recalculate the applicant's rate of remuneration while posted to Yemen on the basis of the actual duration of his assignment there. The claim referred to is set out in the supplementary application to the Administrative Tribunal, in the following words:
'(b) Recalculation by the Respondent of the Applicant's salary and allowances in Yemen on the basis of the actual duration of the Applicant's assignment there, and payment to the Applicant of the difference between the recalculated amount and the amount the Applicant received.'
In support of that contention Mr. Fasla invokes Article 9, paragraph 1, of the Tribunal's Statute. He refers to his posting to Yemen in September 1968 and his precipitate recall to Headquarters in May 1969; the payment of his salary and allowances while in Yemen at the lower rate of a staff member assigned to a post for longer than one year; the Secretary-General's admission before the Joint Appeals Board that they would have been recalculated if he had been assigned to another post within the ***202*** year; the Secretary-General's argument that the applicant had never been reassigned from Yemen; and the rejection of that argument by the Joint Appeals Board, which found that his duty station had been changed on 22 May 1969. The Tribunal, in Mr. Fasla's view, failed to draw the necessary legal conclusion from these circumstances and, by not granting the same form of recognition and remedy as in the case of the respondent's obligation to seek a new post for him, failed to exercise its jurisdiction.
72. The claim under this head was recited at the beginning of the Judgement. Subsequently the Tribunal summarized the history of this claim before the Joint Appeals Board, which made no recommendation on it, because it was not covered by the Staff Regulations or Rules or by administrative instructions, but recommended an ex gratia payment in the amount of any losses that the applicant could show that he had suffered as a consequence of his precipitate recall from Yemen. The Judgement also transcribed the dissenting opinion which the member of the Joint Appeals Board elected by the staff had made in support of the claim. After summarizing the applicant's and respondent's arguments on the question, the Tribunal devoted paragraph XV of its Judgement to dealing with this claim. The Tribunal set out the text of Staff Rule 103.22 (c), invoked by the applicant, and stated:
'The Tribunal observes that this text leaves the Respondent a margin of discretion with respect to the payment of an assignment allowance: it is possible for the allowance to be paid for a stay of less than one year. In addition, the text lays down a very strict rule: the subsistence allowance is payable only where an assignment allowance has not been paid. In the present case, however, the Applicant received an assignment allowance and is therefore not entitled, under the Staff Rules, to a subsistence allowance.'
In the light of this statement it is difficult to perceive the basis for the contention made in the application to the Committee that the Tribunal did not consider or discuss the matter, since it specifically dealt with this particular claim in paragraph XV of its Judgement and reached a concrete decision rejecting it as ill-founded.
73. In the same paragraph XV of the Judgement, the Tribunal also referred to the Joint Appeals Board recommendation for an ex gratia payment in the amount of any losses that the applicant could show to have resulted from his recall and to the fact that the Secretary-General had agreed to make such an ex gratia payment, and added:
'... in view of the above decision concerning the subsistence allowance, the Applicant is

entitled to take advantage of the possibility ***203*** offered by the Respondent within a reasonable period of time from this judgment ...' (emphasis added).
To give effect to this decision the Tribunal, in the operative part of the Judgment, provided that:
'3. Any requests for payment made in accordance with paragraph XV above shall be submitted, together with the necessary supporting evidence, by the Applicant to the Respondent within a period of two months from the date of this judgment.'
Having regard to the applicant's initiation of review proceedings, the Court is of the opinion that this term of two months should not be regarded as expired but should be considered to run only from the date when the Judgment becomes final in accordance with paragraph 3 of Article 11 of the Statute of the Administrative Tribunal.
74. Accordingly, the contention that the Tribunal failed to exercise its jurisdiction with respect to the claim for recalculation of the rate of remuneration is not sustainable on the face of the Judgment. The Tribunal manifestly addressed its mind to the applicant's claim, referred specifically to it and exercised its jurisdiction by deciding to reject it. The complaint thus again turns out to concern not a failure by the Tribunal to exercise its jurisdiction but an appeal against its treatment of the merits of the claim.

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75. In his application to the Committee, Mr. Fasla alleges that the Tribunal did not order the correction of his fact-sheet and that gaps in his employment record which were still in existence had not been filled. This allegation may be interpreted as a complaint that the Tribunal failed to exercise its jurisdiction with respect to plea (e) in the application to the Tribunal, which reads as follows:
'Correction and completion of the Applicant's Fact Sheet which is intended for circulation both within and outside the UNDP, with all the required Periodic Reports and evaluations of work; alternatively, payment by the Respondent to the Applicant of two years' net base salary.'
In the written statement of his views submitted to the Court, Mr. Fasla specifically complains that the Tribunal failed to exercise its jurisdiction with respect to this particular plea among others.
76. The Tribunal, while not mentioning this plea specifically, applied its mind to it by stating, in paragraph VIII of the Judgment:
'The preparation of a corrected fact sheet becomes meaningless ***204*** once UNDP decided not to take the necessary further steps to find the Applicant a new assignment.'
The obvious inference from the Tribunal's statement is that to allow the specific relief claimed would no longer serve any useful purpose. Thus to state its conclusion by implication is one of the ways in which a tribunal may, and not infrequently does, exercise its jurisdiction with respect to a particular plea.

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77. In his application to the Committee Mr. Fasla also contends that Article 9, paragraph 3, of the Tribunal's Statute imposes upon the Tribunal the duty to award compensation when the wrong cannot be remedied by the relief provided for in paragraph 1 of Article 9. In support of this contention he invokes the text of paragraph 3, which provides that, where applicable, 'compensation shall be fixed by the Tribunal'. After noting the use of the imperative 'shall', he submits that the correct construction of paragraph 3 deprives the Tribunal of any discretion to refrain from awarding compensation where the wrong cannot be remedied by the rescinding of the decision or the specific performance of the obligation. This is an interpretation to which the Court cannot subscribe. Paragraph 3 may not be interpreted in isolation from paragraph 1. The introductory words of paragraph 3, 'in all applicable cases', refer back to paragraph 1 and only comprise those cases in which compensation must be awarded under that first paragraph. This interpretation is confirmed by the text of paragraph 3 in other official languages. Thus the

paragraph does not impose an obligation or confer a power on the Tribunal to award compensation in circumstances other than those provided for in paragraph 1.

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78. The Court will now proceed to consider the basic contentions advanced by Mr. Fasla in the statement of his views submitted to the Court which concern the exercise of the discretionary powers of the administration and allege the existence in this case of improper motives constituting a misuse of power. It may be open to doubt how far these contentions, which were not fully adduced in the application presented to the Committee, fall strictly within the contentions referred to in the first question put to the Court. The Court, however, as it has previously stated, does not consider that it should adopt a restrictive interpretation of the question. It will therefore examine those contentions and, in deciding to do so, it takes particular account of the fact that in the application to the Committee, and with regard to the ground of failure to exercise jurisdiction, reference was made to 'misuse of powers with improper motive'.

79. In his statement of views Mr. Fasla contends that it was as a consequence ***205*** of his reporting serious administrative irregularities in the UNDP office in Yemen that he was recalled from his post there; he further contends that the failure of the Secretary-General to renew his fixed-term contract was 'an intentional or negligent consequence' of the efforts made by Mr. Fasla, particularly in a report dated 17 January 1969, to deal with the conditions existing in that office. He points out in this respect that, in taking this action and informing his superiors of what he felt was an unsatisfactory situation, he was fulfilling his duties under the Staff Regulations, since by accepting an appointment with the United Nations, he had pledged himself to discharge his functions and to regulate his conduct 'with the interests of the United Nations only in view'. He then asserts that the failure of the United Nations Administrative Tribunal to investigate the link between his efforts in the Yemen office and the decisions concerning his recall and non-renewal of contract constituted what he describes as the most fundamental failure of the Administrative Tribunal to exercise the jurisdiction vested in it.

80. The allegations thus advanced assume that the two basic administrative decisions which vitally affected Mr. Fasla in 1969, his recall from Yemen and the non-renewal of his fixed-term contract, were the reaction of the administration to the attitude which he had taken in denouncing serious administrative irregularities. This implies the assertion that he was persecuted not only for having exercised his rights but for having performed his obligations in the interests of the United Nations; it also implies that those administrative decisions were determined by improper or extraneous motivation.

81. The adoption by the General Assembly of the Statute of the Administrative Tribunal and the jurisprudence developed by this judicial organ constitute a system of judicial safeguards which protects officials of the United Nations against wrongful action of the administration, including such exercise of discretionary powers as may have been determined by improper motives, in violation of the rights or legitimate expectations of a staff member. In view of the existence of this system of judicial safeguards, and in line with the position now taken before the Court, it would have been the proper course for Mr. Fasla to have challenged before the United Nations Administrative Tribunal the validity of the two decisions, of recall and non-renewal, on the grounds alleged, namely, that they violated his rights, interfered with the performance of his duties to the Organization, and were inspired by improper motivation.

82. However, in his application to the United Nations Administrative Tribunal, Mr. Fasla did not request the Tribunal to rescind, on the grounds of illegality or improper motivation, the decisions concerning his recall from Yemen and the non-renewal of his fixed-term contract. Under the Rules of Procedure of the Tribunal each application must specify 'the decisions which the applicant is contesting and whose rescission he is requesting under Article 9, paragraph 1, of the Statute'. The pleas submitted to the Administrative Tribunal, transcribed in paragraph ***206*** 44 above, do not however refer to these two basic decisions, and this indicated that they were not disputed by the

applicant. Thus, with respect to the recall from Yemen, the specific plea submitted as plea (b) of the supplementary application only concerned certain economic consequences of his recall from Yemen. The other pleas for rescission or specific performance were submitted on the assumption that the original fixed-term contract had expired, since pleas (e) and (g) concerned the non- fulfilment of the obligation assumed by the Secretary-General to make efforts to seek a new position for Mr. Fasla. Prejudice was invoked not as a basis for the rescission of any administrative decision but as a ground for compensation (plea (j)). The only request for rescission with respect to which the claim of prejudice was relevant was plea (f), concerning the invalidation of the report prepared in September 1970. As to plea (d) its scope will be examined separately. All the other pleas claimed only compensation (pleas (h), (i), (k), (l), (m), (n), and pleas (a) and (c) of the supplementary application). In other words, the applicant was basing his claim before the Administrative Tribunal on the inadequacy of the efforts of the Secretary-General to obtain for him a new contract, but not on the illegality or improper motivation of the decisions to recall him from Yemen and not to renew his fixed-term contract.

83. In these circumstances, the Administrative Tribunal was justified in finding, as it did in paragraph III of its Judgment, that although the applicant had requested the Tribunal (in plea (d)) to order the Secretary- General to restore him to the status quo ante, such a claim was not based on the right to have his contract extended. In the same paragraph the Tribunal found that the request concerning further employment depended on the pleas that the Secretary-General be ordered to correct and complete Mr. Fasla's fact-sheet and make serious efforts to place him in a suitable post.

84. The explanatory statement accompanying the pleas confirms the correctness of this conclusion of the Tribunal. In the arguments then advanced in support of the pleas, frequent reference was made to irregularities in the Yemen office, but it was never asserted, as is now vigorously contended before the Court, that it had been as a consequence of the efforts displayed by Mr. Fasla to correct such irregularities that he had been recalled from Yemen and that his contract had not been prolonged. On the contrary, that explanatory statement mentioned that Mr. Fasla had requested on his own initiative to be recalled from Yemen before the expiry of his assignment.

85. Inasmuch as the applicant had not sought from the Administrative Tribunal the rescission of the decisions of recall and non-renewal on the grounds of their illegality and improper motivation, it is obvious that the Administrative Tribunal could not have been expected to go into these issues proprio motu, or proceed on its own account to an examination of ***207** or inquiry into these matters. While the Administrative Tribunal under its Statute and in accordance with its jurisprudence examines the allegedly improper motivation of an administrative decision, and under its Rules of Procedure may arrange any measures of inquiry as may be necessary, it results from its character as 'an independent and truly judicial body' (I.C.J. Reports 1954, p. 53) that it can only proceed to inquiries of that kind on the basis of a plea from the aggrieved party for rescission of the contested decision and a specific allegation by that party that that decision has been inspired by improper or extraneous motivation. Equally, it would not have been appropriate for the Court to proceed on its own to such an inquiry under Articles 48 to 50 of its Statute. The Court's abstention from carrying out an inquiry into the administrative situation in Yemen or into the motives of the decision to recall the applicant from there does not mean that, in review proceedings, the Court regards itself as precluded from examining in full liberty the facts of the case or from checking the Tribunal's appreciation of the facts. Such an inquiry would have been directed to facts and allegations invoked to substantiate claims and submissions not advanced by the applicant before the Administrative Tribunal. An inquiry into those matters could have no place in review proceedings designed to determine whether the Tribunal had failed to exercise its jurisdiction, a question which necessarily relates only to claims and submissions presented to the Tribunal.

86. Furthermore the documentation before the Tribunal permitted it to verify the motivation which had determined the decision of recall. After having received the applicant's denunciations of irregularities in the management of the Yemen office, the

administration had in February 1969 sent a senior official to visit that office and report on the measures to be taken. His report, the submission of which to the Tribunal was insisted upon by the applicant in his plea (a), and which contained favourable comment on Mr. Fasla's efforts in Yemen, dealt in its conclusions with the management of the Yemen office. On this point the report advised that Mr. Fasla could 'continue in charge of the office during the immediate period of [the Resident Representative's] absence'; at the same time, however, it recommended that 'in the interest of competent field representation and operation it would be advisable to move him out of the Yemen Arab Republic as well'.

87. These circumstances suffice to explain why the Court is unable to accept the contention that the Administrative Tribunal failed to exercise its jurisdiction in that it did not enquire into the situation in the Yemen office. No tribunal can be fairly accused of failure to have exercised the jurisdiction vested in it on the ground that it failed to make an inquiry or a finding of fact which was not required in order to adjudicate on the case presented to it, and which none of the parties asked it to make. One must bear in mind the principle previously recalled by the Court, that it is the duty of an international tribunal 'not only to reply to the questions as stated in the final submissions of the parties, but also to abstain from ***208** deciding points not indicated in those submissions' (I.C.J. Reports 1950, p. 402).

***

88. The Court must now take up the second question in the request for advisory opinion, which requires it to determine whether the Tribunal has committed a fundamental error in procedure which has occasioned a failure of justice as contended in the application to the Committee.

89. The contentions in the above document with regard to 'a fundamental error in procedure which has occasioned a failure of justice' may be summarized as follows. First, Mr. Fasla contends that the 'failure of justice' was apparent from the facts he had alleged with regard to failure to exercise jurisdiction and from the information contained in the annexes to his application; and that a woefully inadequate judgment had resulted from the failure of the Tribunal to utilize its established procedure and method of dealing with applications. Secondly, he contends that the Tribunal had not proceeded 'to fully consider and pass upon' various pleas and requests, contrary to its normal practice and to what he termed the well-established general principle that a court of justice must analyse and decide all claims properly brought before it, with a reasoned explanation of its conclusions and factual support therefor. Thirdly, he contends that the failure even to mention claims was a deviation from normal judicial procedure constituting fundamental error.

90. Under this question the Court has to determine, first, what is the meaning and scope of the provision in Article 11 which allows a judgement to be challenged on the ground 'that the Tribunal ... has committed a fundamental error in procedure which has occasioned a failure of justice'; and, secondly, in what respects, if any, the facts before it disclose such a fundamental error in procedure in the present case.

91. 'A fundamental fault in the procedure' is one of the two grounds of challenge contained in Article XII of the Statute of the ILO Administrative Tribunal, and it was in a similar form-'fundamental error in procedure'-that this ground was incorporated in the draft of a new Article 11 of the Statute of the United Nations Administrative Tribunal recommended to the General Assembly by the Special Committee on Review of Administrative Tribunal Judgments in 1955. The words 'which has occasioned a failure of justice' were introduced at the 499th meeting of the Fifth Committee on the proposal of the Indian delegation, who had stated that:

'Another ground for review provided in the proposed new Article 11 was the commission of a fundamental error in procedure. The ***209** use of the word 'fundamental' was intended to preclude review on account of trivial errors in procedure or errors that were not of a substantial nature. In order to make the intention clearer, the Indian delegation

would suggest that the phrase 'which has occasioned a failure of justice' should be inserted after the words 'fundamental error in procedure' in the text of the article.' The additional phrase was not, therefore, intended to alter the scope of this ground of challenge, still less to create an independent ground of objection, but merely to provide an indication as to the meaning of the word 'fundamental'; and in accepting the Indian proposal the Fifth Committee seems to have assumed that it did not involve any change in the substance of the original draft. One delegate indeed observed that 'a fundamental error in procedure clearly implied a failure of justice'.

92. It may not be easy to state exhaustively what is involved in the concept of 'a fundamental error in procedure which has occasioned a failure of justice'. But the essence of it, in the cases before the Administrative Tribunal, may be found in the fundamental right of a staff member to present his case, either orally or in writing, and to have it considered by the Tribunal before it determines his rights. An error in procedure is fundamental and constitutes 'a failure of justice' when it is of such a kind as to violate the official's right to a fair hearing as above defined and in that sense to deprive him of justice. To put the matter in that way does not provide a complete answer to the problem of determining precisely what errors in procedure are covered by the words of Article 11. But certain elements of the right to a fair hearing are well recognized and provide criteria helpful in identifying fundamental errors in procedure which have occasioned a failure of justice: for instance, the right to an independent and impartial tribunal established by law; the right to have the case heard and determined within a reasonable time; the right to a reasonable opportunity to present the case to the tribunal and to comment upon the opponent's case; the right to equality in the proceedings vis-a-vis the opponent; and the right to a reasoned decision.

93. Mr. Fasla, both in his application to the Committee and in his written statement and comments transmitted to the Court, to a large extent pleads failure to exercise jurisdiction and fundamental error in procedure as alternative or joint grounds upon which to formulate what appear to be essentially the same complaints concerning the Tribunal's handling of his case. In consequence, many of the considerations which apply to his contentions in regard to the former ground apply also to his contentions concerning the latter. For the most part, these contentions appear to be complaints against the Tribunal's adjudication of the merits of the claims, rather than assertions of errors in procedure in the proper sense of that term. In so far as they may be said to touch matters of procedure, they appear, with one exception, to be dealt with in the next paragraph, to express disagreement with the Tribunal's determinations of the procedure to be followed in the light of its appreciation of the facts ***210*** and merits of the case, rather than to allege errors in procedure within the meaning of Article 11. This is shown, for instance, in the complaint that the Tribunal failed to exercise its jurisdiction and committed an error in procedure when it declared relevant to the case only one part of the document production of which was requested by the applicant in his plea (b), and limited itself to taking note of the declaration of the respondent with respect to the document requested in plea (c). Subject to the one question which now requires separate examination, Mr. Fasla's contentions do not raise matters which constitute errors in procedure in the true sense of that term.

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94. The one exception is the complaint that the Tribunal's decisions rejecting the claims were not supported by any adequate reasoning. This complaint does, in the opinion of the Court, concern an alleged error in procedure in the proper sense of the term, and is of a kind to call for consideration under the provision in Article 11 relating to a fundamental error in procedure which has occasioned a failure of justice. The Secretary-General, in his written statement, contends that a failure to state the reason on which every part of a judgment of the Administrative Tribunal is based is not a ground included among serious departures from a fundamental rule of procedure, for although the Secretary-General explicitly mentioned the possibility of including this among the grounds for review when

Article 11 of the Tribunal's Statute was drafted, this was not done. The Court is unable to accept this contention. The fact that failure to state reasons was not expressly mentioned in the list of grounds for review does not exclude the possibility that failure to state reasons may constitute one of the errors in procedure comprised in Article 11. Not only is it of the essence of judicial decisions that they should be reasoned, but Article 10, paragraph 3, of the Tribunal's Statute, which this Court has found to be a provision 'of an essentially judicial character' (I.C.J. Reports 1954, p. 52), requires that: 'the judgments shall state the reasons on which they are based.'

95. While a statement of reasons is thus necessary to the validity of a judgment of the Tribunal, the question remains as to what form and degree of reasoning will satisfy this requirement. The applicant appears to assume that, for a judgment to be adequately reasoned, every particular plea has to be discussed and reasons given for upholding or rejecting each one. But neither practice nor principle warrants so rigorous an interpretation of the rule, which appears generally to be understood as simply requiring that a judgment shall be supported by a stated process of reasoning. This statement must indicate in a general way the reasoning upon which the judgment is based; but it need not enter meticulously into every claim and contention on either side. While a judicial organ is obliged to pass upon all the formal submissions made by a party, it is not ***211*** obliged, in framing its judgment, to develop its reasoning in the form of a detailed examination of each of the various heads of claim submitted. Nor are there any obligatory forms or techniques for drawing up judgments: a tribunal may employ direct or indirect reasoning, and state specific or merely implied conclusions, provided that the reasons on which the judgment is based are apparent. The question whether a judgment is so deficient in reasoning as to amount to a denial of the right to a fair hearing and a failure of justice, is therefore one which necessarily has to be appreciated in the light both of the particular case and of the judgment as a whole.

96. The general nature of the judgment in the present case has already been indicated. The applicant's claims are set out seriatim and every one of them is thus mentioned; there is an extensive review of what the Tribunal considered to be the pertinent facts; there is a substantial summary of what the Tribunal regarded as the pertinent parts of the proceedings before the Joint Appeals Board; there is a substantial summary of the arguments of both the applicant and the respondent; there is an extensive statement of the reasoning and the conclusions of the Tribunal in regard to those closely related matters and issues which it identified as requiring substantial examination. In selecting those matters and issues the Tribunal followed the pattern of the applicant's explanatory statement, which did not analyse each plea separately but concentrated on the substantive legal issues. The sequence in the Tribunal's reasoning thus corresponded in broad lines to the one followed by the applicant himself in developing his legal grounds in his explanatory statement. There is, finally, in the Judgment, an operative part making three affirmative findings and, in accordance with a usual practice of the Tribunal, rejecting all other requests in a single provision. No doubt a judgment framed in this manner relies to a certain extent on inference and implication for the understanding of its reasoning in regard to some particular issues. It is possible however to identify and determine with precision those parts in the reasoning of the Judgment where each one of the claims of the applicant is considered. In any event, the question at issue is not whether the Tribunal might have used different forms or techniques, or whether more elaborate reasoning might have been considered as preferable or more adequate. The question is whether the Judgment was sufficiently reasoned to satisfy the requirements of the rule that a judgment of the Administrative Tribunal must state the reasons on which it is based. Having regard to the form and content of the Judgment, the Court concludes that its reasoning does not fall short of the requirements of that rule.

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97. Particular consideration is required, however, of the decision rejecting ***212*** the claim for exceptional costs, which has already been described as somewhat laconic. The

Tribunal merely asserted that the claim for exceptional costs was unfounded, without indicating the reasons why it reached that conclusion. The applicant's complaint in this respect is that the Tribunal, without stating any standards or reasons, said simply that it did not see any justification for the request and flatly rejected it. In this respect, however, the Statement of Policy adopted by the Tribunal on 14 December 1950 should be taken into account, since it sets the standards applicable by the Tribunal on the subject. The declaration that the request for exceptional costs was unfounded must be understood, in the light of that general statement, as signifying that the applicant, upon whom lay the onus probandi, had not demonstrated that such exceptional costs had been unavoidable and reasonable in amount.

98. Account must also be taken of the basic principle regarding the question of costs in contentious proceedings before international tribunals, to the effect that each party shall bear its own in the absence of a specific decision of the tribunal awarding costs (cf. Article 64 of the Statute of the Court). An award of costs in derogation of this general principle, and imposing on one of the parties the obligation to reimburse expenses incurred by its adversary, requires not only an express decision, but also a statement of reasons in support. On the other hand, the decision merely to allow the general principle to apply does not necessarily require detailed reasoning, and may even be adopted by implication. It follows that on this point also the Judgment of the Administrative Tribunal cannot be said to be open to challenge on the basis of inadequate reasoning, as contended by the applicant.

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99. As to Mr. Fasla's request for costs in respect of the review proceedings, first before the Committee and afterwards before the Court, there is no occasion for the Court to pronounce upon it. The Court confines itself to the observation that when the Committee finds that there is a substantial basis for the application, it may be undesirable that any necessary costs of review proceedings under Article 11 of the Statute of the Administrative Tribunal should have to be borne by the staff member.

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100. After having stated its conclusions on the questions referred to it, the Court wishes to reaffirm the opinion which it expressed in paragraph 73 above, namely that Mr. Fasla is entitled, in accordance with paragraph XV of the Administrative Tribunal's Judgment, to a payment in the amount of any losses suffered as a result of his precipitate recall from ***213** Yemen, and that the period of two months fixed in this connection by the Administrative Tribunal, having been suspended for the duration of the review proceedings, is to be calculated from the date when the Judgment becomes final in accordance with paragraph 3 of Article 11 of the Statute of the Tribunal.

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101. For these reasons,
THE COURT DECIDES,
by 10 votes to 3,
to comply with the request for an advisory opinion;
THE COURT IS OF OPINION,
with regard to Question I,
by 9 votes to 4,
that the Administrative Tribunal has not failed to exercise the jurisdiction vested in it as contended in the applicant's application to the Committee on Applications for Review of Administrative Tribunal Judgements;
with regard to Question II,
by 10 votes to 3,

that the Administrative Tribunal has not committed a fundamental error in procedure which has occasioned a failure of justice as contended in the applicant's application to the Committee on Applications for Review of Administrative Tribunal Judgments.
Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this twelfth day of July, one thousand nine hundred and seventy-three, in two copies, one of which will be placed in the archives of the Court and the other transmitted to the Secretary-General of the United Nations.

(Signed) Manfred LACHS, President.

(Signed) S. AQUARONE, Registrar.

***214** President LACHS makes the following declaration:

While I am in full agreement with the reasoning and conclusions of the Court, there are two observations which I feel impelled to make.
1. That it should be possible for judgments of the United Nations Administrative Tribunal to be examined by a higher judicial organ is a proposition which commends itself as tending to provide a greater measure of protection for the rights involved. However, the manner in which this proposition has been given effect has raised doubts which I share. Indeed, I would go farther than the Court's observation that it does not consider the procedure instituted by Article 11 of the Tribunal's Statute as 'free from difficulty' (para. 40), for neither the procedure considered as a whole nor certain of its separate stages can in my view be accepted without reserve. Not surprisingly, the legislative history of the provisions in question reveals that they were adopted against a background of divided views and legal controversy.
There would, perhaps, be little point in adverting to this problem if the sole choice for the future appeared to lie between judicial control of the kind exemplified by the present proceedings and no judicial control at all. That, however, does not, in my view, have to be the case, for the choice ought surely to lie between the existing machinery of control and one which would be free from difficulty and more effective. I see no compelling reason, either in fact or in law, why an improved procedure could not be envisaged.
2. My second observation concerns the discrepancy between the two systems of review: one established by Article XII of the Statute of the ILO Administrative Tribunal and the other by Article 11 of that of the United Nations Administrative Tribunal. Each of them has been accepted by a number of organizations, mainly specialized agencies; and in the light of the co- ordination which should be manifest between these organizations, belonging as most of them do to the United Nations family, it is regrettable that divergences should exist in the nature of the protection afforded to their staff members. There can be little doubt that, in the interest of the administrations concerned, the staff members and the organizations themselves, the procedures in question should be uniform.

Judges FORSTER and NAGENDRA SINGH make the following declaration:

While voting in favour of the Opinion of the Court, we find that there are certain considerations which merit being mentioned, and hence, availing ourselves of the right conferred by Article 57 of the Statute read with Article 84 of the Rules of Court, we append hereunder the following declaration:

***215** I

The nature and character of the procedural channel for obtaining the advisory opinion of the Court vide Article 11 of the Statute of the United Nations Administrative Tribunal, it is said, raises issues concerning the appropriateness of the Committee on Applications for Review of Administrative Tribunal Judgments [FN1] which is a political body but still

authorized by the General Assembly to function as the fountain source for putting legal questions to the Court under Article 96 (2) of the Charter. That apart, there is also the question of equality of the Parties, namely in this case the Secretary- General and the official, in relation to their capacity to appear before the Court (Art. 66 of the Statute of the Court and the oral procedures). It may be relevant to mention here that in spite of the recommendation contained in paragraph 2 of General Assembly resolution 957 (X) of 1955, to the effect that neither member States nor the Secretary-General should make oral statements before the Court, the applicant official Mr. Fasla made a written request, vide his letter of 15 December 1972, to be allowed to make an oral presentation of his case to the Court. This request was repeated in writing on 29 January 1973. It was, however, the Court's decision not to hold any public sitting for the purpose of hearing oral statements which went to establish equality between the Parties in the present case. It is the prime concern of any judicial tribunal, whether sitting in appeal or in review proceedings, and whether giving a judgment or an advisory opinion, to see that all interested parties are given full and equal opportunity to present their respective viewpoints so that the dispensation of justice is based on all that information which is necessary and hence required for that supreme purpose. It may be that in the circumstances of the present case the decision to dispense with oral hearings was warranted since adequate information to enable the Court to administer justice was forthcoming but that cannot be said of each and every case that may come up to the Court seeking its advisory opinion under Article 11 of the Statute of the United Nations Tribunal. There can be, therefore, no question of any generalization regarding procedures being always regular in all the different circumstances of each and every case that may crop up under this particular category. It may even be granted that there is no general principle of law which requires that in review proceedings the interested parties should necessarily have an opportunity to submit oral statements to the review tribunal, but surely legal procedures are prescribed to cover all eventualities, leaving it to the review tribunal to exercise its discretion in the different circumstances of each case as to what is just and necessary. A judicial procedure cannot be held to be sound in every respect if, as in this case, fetters are placed on the Court as a review tribunal thereby ruling out oral statements altogether in order ***216** to maintain equality of the parties, although in the peculiar circumstances of any particular case oral hearings become necessary and are duly justified. Some

ANNEX 9:

Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment.

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2 of 12 DOCUMENTS

International Legal Materials

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41 I.L.M. 536

SECTION: JUDICIAL AND SIMILAR PROCEEDINGS

INTERNATIONAL COURT OF JUSTICE (ICJ): CASE CONCERNING THE ARREST WARRANT OF 11 APRIL 2000 (DEMOCRATIC REPUBLIC OF THE CONGO V. BELGIUM) *

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CASE CONCERNING THE ARREST WARRANT OF 11 APRIL 2000

(DEMOCRATIC REPUBLIC OF THE CONGO v. BELGIUM)

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of such exceptions.
57. The Congo, for its part, states that, under international law as it currently stands, there is no basis for asserting that there is any exception to the principle of absolute immunity from criminal process of an incumbent Minister for Foreign Affairs where he or she is accused of having committed crimes under international law.
In support of this contention, the Congo refers to State practice, giving particular consideration in this regard to the Pinochet and Qaddafi cases, and concluding that such practice does not correspond to that which Belgium claims but, on the contrary, confirms the absolute nature of the immunity from criminal process of Heads of State and Ministers for Foreign Affairs. Thus, in the Pinochet case, the Congo cites Lord Browne-Wilkinson's statement that "this immunity enjoyed by a head of state in power and an ambassador in post is a complete immunity attached to the [*551] person of the head of state or ambassador and rendering him immune from all actions or prosecutions . . . ."
According to the Congo, the French Court of Cassation adopted the same position in its Qaddafi judgment, in affirming that "international custom bars the prosecution of incumbent Heads of State, in the absence of any contrary international provision binding on the parties concerned, before the criminal courts of a foreign State."
As regards the instruments creating international criminal tribunals and the latter's jurisprudence, these, in the Congo's view, concern only those tribunals, and no inference can be drawn from them in regard to criminal proceedings before national courts against persons enjoying immunity under international law.

*

58. The Court has carefully examined State practice, including national legislation and those few decisions of national higher courts, such as the House of Lords or the French Court of Cassation. It has been unable to deduce from this practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity.
The Court has also examined the rules concerning the immunity or criminal responsibility of persons having an official capacity contained in the legal instruments creating international criminal tribunals, and which are specifically applicable to the latter (see Charter of the International Military Tribunal of Nuremberg, Art. 7; Charter of the International Military Tribunal of Tokyo, Art. 6; Statute of the International Criminal Tribunal for the former Yugoslavia, Art. 7, para. 2; Statute of the International Criminal Tribunal for Rwanda, Art. 6, para. 2; Statute of the International Criminal Court, Art. 27). It finds that these rules likewise do not enable it to conclude that any such an exception exists in customary international law in regard to national courts.
Finally, none of the decisions of the Nuremberg and Tokyo international military tribunals, or of the International Criminal Tribunal for the former Yugoslavia, cited by Belgium deal with the question of the immunities of incumbent Ministers for Foreign Affairs before national courts where they are accused of having committed war crimes or crimes against humanity. The Court accordingly notes that those decisions are in no way at variance with the findings it has reached above.
In view of the foregoing, the Court accordingly cannot accept Belgium's argument in this regard.
59. It should further be noted that the rules governing the jurisdiction of

national courts must be carefully distinguished from those governing jurisdictional immunities: jurisdiction does not imply absence of immunity, while absence of immunity does not imply jurisdiction. Thus, although various international conventions on the prevention and punishment of certain serious crimes impose on States obligations of prosecution or extradition, thereby requiring them to extend their criminal jurisdiction, such extension of jurisdiction in no way affects immunities under customary international law, including those of Ministers for Foreign Affairs. These remain opposable before the courts of a foreign State, even where those courts exercise such a jurisdiction under these conventions.

60. The Court emphasizes, however, that the immunity from jurisdiction enjoyed by incumbent Ministers for Foreign Affairs does not mean that they enjoy impunity in respect of any crimes they might have committed, irrespective of their gravity. Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility.

61. Accordingly, the immunities enjoyed under international law by an incumbent or former Minister for Foreign Affairs do not represent a bar to criminal prosecution in certain circumstances.

First, such persons enjoy no criminal immunity under international law in their own countries, and may thus be tried by those countries' courts in accordance with the relevant rules of domestic law.

[*552] Secondly, they will cease to enjoy immunity from foreign jurisdiction if the State which they represent or have represented decides to waive that immunity.

Thirdly, after a person ceases to hold the office of Minister for Foreign Affairs, he or she will no longer enjoy all of the immunities accorded by international law in other States. Provided that it has jurisdiction under international law, a court of one State may try a former Minister for Foreign Affairs of another State in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity.

Fourthly, an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction. Examples include the International Criminal Tribunal for the former Yugoslavia, and the International Criminal Tribunal for Rwanda, established pursuant to Security Council resolutions under Chapter VII of the United Nations Charter, and the future International Criminal Court created by the 1998 Rome Convention. The latter's Statute expressly provides, in Article 27, paragraph 2, that "immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person."

* * *

62. Given the conclusions it has reached above concerning the nature and scope of the rules governing the immunity from criminal jurisdiction enjoyed by incumbent Ministers for Foreign Affairs, the Court must now consider whether in the present case the issue of the arrest warrant of 11 April 2000 and its international circulation violated those rules. The Court recalls in this regard that the Congo requests it, in its first final submission, to adjudge and

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ANNEX 10:

Hermes, *United States Army in the Korean War* (1992).

UNITED STATES ARMY IN THE KOREAN WAR

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TRUCE TENT AND FIGHTING FRONT

by
Walter G. Hermes

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UNITED STATES ARMY
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Brig. Gen. Hal C. Pattison, Chief of Military History

Chief Historian	Stetson Conn
Chief, Histories Division	Col. Paul P. Hinkley
Chief, Editorial and Graphics Division	Col. Joseph S. Coulter
Editor in Chief	Joseph R. Friedman

. . . to Those Who Served

Foreword

This is the second of five volumes to be published in the series UNITED STATES ARMY IN THE KOREAN WAR. When completed, these volumes will present a comprehensive account of U.S. Army activities in what was once euphemistically termed a police action. *Truce Tent and Fighting Front* covers the last two years in the Korean War and treats the seemingly interminable armistice negotiations and the violent but sporadic fighting at the front.

The scene therefore frequently shifts from the dialectic, propaganda, and frustrations at the conference table to the battles on key hills and at key outposts. The author presents a solid and meaningful reconstruction of the truce negotiations; he develops the issues debated and captures the color of the arguments and the arguers. The planning and events that guided or influenced the proceedings on the United Nations side are thoroughly explained. The volume abounds in object lessons and case studies that illustrate problems American officers may encounter in negotiating with Communists. Problems encountered by the U.N. high command in handling recalcitrant Communist prisoners of war within the spirit and letter of the Geneva Convention are explained with clarity and sympathy.

Truce Tent and Fighting Front is offered to all thoughtful citizens- military and civilian- as a contribution to the literature of limited war.

Washington, D.C.
18 June 1965

HAL C. PATTISON
Brigadier General, USA
Chief of Military History

The Author

Walter G. Hermes received his M.A. from Boston University and his Ph.D. in History from Georgetown University.

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During World War II he served with the U.S. Army in radio intelligence and military government assignments. After the war he attended the University of Denver and the University of California at Los Angeles.

Dr. Hermes joined the Office of the Chief of Military History in 1949. For many years he served as Department of the Army representative on the Department of Defense Liaison Committee with the Department of State on the *Foreign Relations of the United States* series insofar as they covered World War II and the international conferences of that period. Dr. Hermes is at present a member of the Current History Branch of the Office of the Chief of Military History.

He has assisted Dr. Maurice Matloff in the preparation of the volume *Strategic Planning for Coalition Warfare, 1943-1944* in the UNITED STATES ARMY IN WORLD WAR II series, and has edited the volume by Maj. Robert K. Sawyer, *Military Advisors in Korea: KMAG in Peace and War* in the ARMY HISTORICAL SERIES.

Preface

This volume is offered as a contribution to the politico-military history of the Korean War. Unlike nearly all of the previous wars waged by the United States, the conflict in Korea brought no military victory; in fact, during the last two years of the struggle neither side sought to settle the issue decisively on the battlefield. In this respect the Korean War had no modern American counterpart. It resembled most the War of 1812 when the nation had also carried on a desultory war while it attempted to negotiate a peace with the British. More important fighting, in both cases, went on at the peace table than on the field of combat.

Although the action at the front from July 1951 to July 1953 was inconclusive, there was a definite interrelationship between the intensity of the fighting and the status of affairs at the truce meetings. Both the United Nations Command and its opponents tried with some success to induce more reasonable negotiating attitudes in their adversaries through the application of limited military pressure.

Under the command system operating during the Korean War, the U.S. Army was given executive responsibility for carrying out U.S. military policy in Korea and for negotiating the truce agreement. Thus, the volume crosses service and departmental lines. General Matthew B. Ridgway, Commander in Chief, Far East Command, and his successor, General Mark W. Clark, commanded U.S. Army, Air Force, Navy, and Marine forces as well as Republic of Korea units. As Commanders in Chief, United Nations Command, they also controlled ground, air, and naval forces contributed by some members of the United Nations for the prosecution of the war in Korea. Although the armistice negotiations were supposed to be strictly military in nature, political elements entered the discussions and the Army often had to participate in formulating and carrying out the policy adopted by the President and his advisors. Army officers, through Army channels, frequently handled not only military relations between the United States and the Republic of Korea, but economic and political affairs as well. The Army story in Korea, therefore, is more than a service account; in essence, it is the American story of the struggle for peace during the war.

For the focus of the volume, the activities of the theater commander were chosen as the most appropriate. From this intermediate point the author could shift to Washington for policy decisions that affected the war,

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or move easily to the truce tent or the fighting front in Korea to show how the policy was carried out. The theater commander served as a moderator between the world of policy and the world of action, leaving his imprint on both.

The unavailability of reliable documentation of the Communist Chinese and North Korean plans, objectives, and casualties has forced the author to rely upon the U.S. intelligence estimates for information in these areas. While the information contained in these estimates cannot be regarded as firm or precise, it was the best available when the volume was written.

Since the last two years of the war produced few large-scale ground operations, battlefront coverage has been selective. Major operations are, of course, described in some detail, but to attempt to cover the hundreds of hill actions, patrols, and raids would require an over-sized volume cluttered with monotonous detail. The emphasis, therefore, has been placed upon small-scale actions involving U.S. Army units that most typically portray the fighting of a given period.

No attempt has been made to do more than summarize the combat operations of the U.S. Navy, Air Force, and Marines during the last two years of the war, as these services have published, or are in the process of publishing, their own detailed accounts. Similarly, the Republic of Korea and many of the other participants in the United Nations Command have published, or presumably will publish at some future time, accounts of their participation. The contributions made by the other U.S. services and by the other nations of the United Nations Command in Korea deserve full consideration and credit, but the author felt it was quite proper to devote the majority of his attention to U.S. Army units in the combat portions of the volume.

The problem of dating the many radio messages exchanged between Washington and the Far East has been met by accepting the date on the document used. The time differences between the two areas meant that different dates were used in each place for the same message, but it was felt that any attempt to change all the dates to Washington time or to Tokyo time might lead to further confusion. In most cases the difference of a day meant little substantively and the messages can be identified and located by number as well as by date.

In the course of researching and writing this volume the author has received help from many sources, both within and without the Office of the Chief of Military History, and gladly acknowledges his indebtedness. He owes special debts of gratitude to Col. Joseph Rockis, former Chief of the Histories Division, OCMH, and to Dr. Maurice Matloff, Chief, Current History Branch, OCMH, for their steadfast confidence and support during the initial phases of the project. For their many helpful suggestions and wise counsel the author is also deeply grateful to Dr. Stetson Conn, Chief Historian, Dr. John Miller, jr., Deputy Chief Historian, Mr.

Billy C. Mossman, General History Branch, and Dr. Robert W. Coakley, General History Branch, all of the Office of the Chief of Military History, as well as to Mr. James F. Schnabel, JCS Historical Division, Mr. Wilber W. Hoare, JCS Historical Division, and Dr. Jules Davids, Georgetown University.

Without the cheerful and efficient documentary research assistance of Mrs. Lois Aldridge and Mrs. Hazel Ward of the World War II Division, National Archives and Records Service, the author's task would have been far more difficult. In the Office of the Chief of Military History the personnel of the

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General Reference Branch under Mr. Israel Wice and his successor, Mr. Charles F. Romanus, have provided services too numerous to mention.

The volume was edited by Mr. David Jaffe, whose interest and professional skill were welcomed throughout the writing and revision of the manuscript. Mrs. Marion P. Grimes performed yeoman service as assistant editor and Mrs. Frances R. Burdette ably assisted in the preparation of the manuscript for the printer. The index was prepared by Mr. Nicholas J. Anthony.

The author was fortunate in having the maps drawn under the direction of Mr. Billy C. Mossman, whose knowledge of the terrains and the records to be researched left little to be desired. The photographs were skillfully selected by Miss Ruth A. Phillips.

It is perhaps needless to say that any substantive errors that remain in the manuscript are solely the responsibility of the author.

In conclusion the author would be remiss if he failed to express his appreciation of the encouragement that he received throughout the writing of this volume from his wife, Esther Festa Hermes.

WALTER G. HERMES

Washington, D.C.
18 June 1965

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CHAPTER IV

A Time for Preparation

As the Korean War entered its second year, American policy had made a full turn. When the Communists had launched their attack in mid-1950, the U.S. objective had been to contain the enemy advance and to restore the *status quo*. As the battle situation improved, this modest goal had been expanded in September and October to the unification of all Korea under a democratic regime. With the advent of the Chinese Communist forces, the bright dream of unification quickly faded and the United States again focused upon the re-establishment of the prewar political situation.

The fluctuation of military fortunes at the front was reflected in the military plans. While the UNC forces were falling back toward Pusan under the enemy's initial onslaught, evacuation of Korea and a general withdrawal to Japan appeared imminent. The triumph at Inch'on had banished such pessimistic ideas and temporarily induced a feeling of aggressive confidence in the ability of the UNC troops to unify the country. But the Chinese reintroduced the possibility of evacuation as they drove the UNC units back in November and December. The difficulties of fighting a war across the Sea of Japan returned to plague the planners.

The barometric changes in plans as the battle skies clouded or cleared reached an equilibrium in the spring of 1951. As the fighting became stabilized close to the 38th Parallel and especially after the relief of General MacArthur in April, reliance on military victory in Korea had waned. The costs had become too high and the risks too great. Still the war continued and had to be prosecuted until a settlement was secured. This had turned the thoughts of the American leaders to the negotiation of an armistice. Barring Soviet entry into the conflict and the outbreak of a global war, a truce seemed to offer the best prospect of liquidating the Korean commitment of redressing the balance of U.S. military aid in favor of Europe and of rebuilding the strategic reserves at home.

War without victory posed a new and difficult set of questions to the American military leaders who had been taught that victory was the objective. With the inception of the armistice negotiations, they no longer sought to win by a knockout, but rather on points. They had to hurt the enemy enough to influence him to accept the UNC terms for a settlement, yet not enough to provoke an all-out counterattack and a possible widening of the struggle. The United States must win the decision, but not decisively.

Conduct of the War-The Washington Side

The determination of the ways and

means to attain a satisfactory decision in Korea rested ultimately with the President, of course. As Commander in Chief of the military forces of the United States, Mr. Truman required all but the most routine directives on the Korean War to pass through his office for his approval or rejection.[1] Since the United States had been given full power by the United Nations to form a unified command, Mr. Truman had no responsibility to clear his strategic decisions with any U.N. agency. *(Chart 1)* His close and complete control of important decisions and plans relating to Korea must be kept continually in mind, for even though his role in many cases consisted mainly of approval or disapproval, his was the final decision.

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The President's chief advisory group was the National Security Council (NSC), composed of the President, the Vice President, the Secretary of State, the Secretary of Defense, and the Chairman of the National Security Resources Board. Other members of the executive branch, such as the Secretaries of the Army, Navy, and Air Force, could be appointed by Mr. Truman to serve on the council but he chose not to do so. The principal duties of the NSC were to assess and appraise the objectives, commitments, and risks of the United States in relation to national security and then to advise the President on the most suitable course of action to be followed.[2]

On the civilian level in July 1951, the President's foremost assistant in defense matters was the Secretary of Defense, George C. Marshall.[3] Under Marshall were the three service Secretaries- Frank Pace, Jr., of the Army; Francis P. Matthews of the Navy; and Thomas K. Finletter of the Air Force- and the Joint Chiefs of Staff. General of the Army Omar N. Bradley was Chairman of the JCS with General J. Lawton Collins, Chief of Staff, U. S. Army, Admiral Forrest P. Sherman, Chief of Naval Operations, U.S. Navy, and General Hoyt S. Vandenberg, Chief of Staff, U.S. Air Force, as the service representatives.[4]

As members of the JCS, Collins, Sherman, and Vandenberg were the principal military advisors to the Secretary of Defense and the President and not subject to the jurisdiction of the Secretaries of the Army, Navy, and Air Force in such matters as the preparation of strategic plans and the strategic direction of military forces. In their service capacities as Chiefs of Staff or Chief of Naval Operations, they were responsible to the service Secretaries, however. General Bradley had no vote as chairman, but he did preside over the meetings and deliberations of the JCS and represented the group in the meetings with the Presi-

CHART 1- CHANNELS OF COMMAND, JULY 1951

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CHART 1- CHANNELS OF COMMAND, JULY 1951

a The U.N. Security Council had no command authority, but did receive biweekly reports from the U.N. commander.
b The Army Chief of Staff acted as executive agent for the Joint Chiefs of Staff.
c The UNC/FEC exercised operational control only over the air and naval forces under its command.
d Although Headquarters, U.S. Army Forces, Far East, had not been inactivated, it did not become operational until I October 1952.
e The Military Advisory Group for Korea was assigned to Eighth Army command. It continued to discharge its mission of assisting the ROK Army and provided liaison between the Eighth Army and the ROK Army.

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dent, the NSC, and the Secretary of Defense.5

To insure close co-ordination between the military and political officials who were responsible for preparing plans and positions of policy relating to the Korean War, Secretary Marshall had ordered the

resumption of informal consultations between State Department and Defense officials and instituted weekly meetings between representatives of the State Department and the JCS.6 Hence, proposed military actions with political implications were discussed with the State Department and cleared with the Secretary of State before being submitted to the President.

Below the Defense-JCS-State Department policy and strategic directive level came the unified commands. After World War II the JCS had created a number of unified commands on a geographic basis. These operated under the strategic command of the JCS who in turn delegated executive responsibility to the service which was considered to have primary interest in the command. In the case of the Far East Command (FEC), the Chief of Staff, U.S. Army, was given executive responsibility and within the Army General Collins had made the G-3 staff division his executive agent. The latter usually transmitted the decisions and instructions agreed upon at the higher levels to General Ridgway and also helped to formulate the Army position that General Collins presented to the JCS on matters affecting the Far East Command and its prosecution of the war.[7]

Therefore, if General Ridgway and his staff devised a plan or a course of action that they wished to have approved, the following procedure would customarily be followed. Upon receipt of the Far East Command recommendation, G-3 would pass it on to the joint Chiefs of Staff and to the other services for study. G-3 would then co-ordinate with interested staff divisions in the Army to prepare an official Army position that General Collins could present to his fellow members of the JCS. If the FEC recommendation transcended military matters, State Department officials would be consulted and their approval would be sought. Then the recommendation, perhaps in a form amended by the JCS and State, would go up to the Secretary of Defense for his comments before it finally reached the President's desk for final approval. The process appeared cumbersome, but if the need for decision was urgent, a consultation or meeting between the parties involved could often produce quick agreement on the position or positions to be set forth for the President. Thus, behind every important decision taken in the Korean War lay the staff mechanism- gathering information, preparing, co-ordinating, and assessing plans and policies, and presenting recommendations that were forwarded through channels up the military-political ladder to the President.

Not all of the plans and proposals emanated from the theater, however, since frequently the G-3 or JCS staffs initiated their own. These were usually co-ordinated with the Far East Command be-

fore they ascended the ladder for comments and suggestions.

The JCS Ponder

Within the staff mechanism a number of alternatives on the Korean War were prepared in the early spring of 1951 and the JCS presented them to Secretary Marshall. Unless there was a general war or a sudden great influx of Soviet volunteers in Korea that might jeopardize the UNC forces, the JCS believed that the UNC troops should stay in the peninsula. They recognized that military action alone would not solve the Korean problem and that there probably would not be any solution until world tensions relaxed. In the meantime the American forces should pursue their current course of exerting pressure upon the Communists in Korea in the hope that eventually a favorable political settlement might result that would not sacrifice the U.S. position on Taiwan or on a seat for Communist China in the United Nations. The JCS also felt that South Korean forces should be created in the interim to take over the major part of the military burden in Korea.[8]

If, however, the war should spread and the Communist Chinese expanded their actions outside Korea, the JCS were also prepared. In early June they directed the Commander in Chief, U.S. Pacific Fleet (CINCPAC), at Hawaii, to work out a plan for blockading the China coast in case the U.N. forces were compelled to evacuate Korea. Despite Ridgway's protest that CINCPAC would probably want naval reinforcements at a time when Ridgway would need every ship under his command to carry out the evacuation, the JCS refused to divide the responsibility for the planning of the blockade. The command organization in such an event would be settled on the basis of actual conditions, they maintained, and nothing would be taken away from Ridgway without specific JCS instructions.[9]

The naval blockade might also be a weapon if the truce negotiations broke down. Shortly after the conferees met at Kaesong in July, the JCS advised Marshall that increased military pressure would have to be applied upon the enemy if he would not come to terms. Although general war with China was to be avoided, they recommended that: the United States be kept ready for general war on relatively short notice; many of the restrictions imposed on Ridgway's ground and air operations should be lifted if the negotiations failed; and Japanese defense forces and South Korean military units should be developed, trained, and equipped as quickly as possible. The United States should immediately urge the other United Nations participating in Korea: to support a naval blockade; to bring additional political and economic pressure upon China; and to increase their forces in Korea.[10]

After the long recess over the incidents terminated, the JCS in early November revised some of these recommendations. For one thing, the Communist build-up of fighter strength in Manchuria during the summer and early fall ruled out the

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CHART 2- U.N. COMMAND/FAR EAST COMMAND, MAJOR GROUND FORCES, 1 JULY 1951

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CHART 2- U.N. COMMAND/FAR EAST COMMAND, MAJOR GROUND FORCES, 1 JULY 1951

Source: Hq Eighth Army, Command Report, ACofS, G-3, bk. 4, pt. I, 1 Jul 51; DOD General Officers Assignment List, I Jul 51, in OCMH files.

lifting of the restriction of "hot" pursuit of Communist planes across the Manchurian border. In July this would have been profitable; now the cost would be excessive. However, the JCS did believe that the growing Communist air strength had reached a dangerous point and the United States might be forced to move quickly and unilaterally against specific Chinese air bases if the scale of enemy air activity jeopardized the security of U.S. forces in Korea. To meet this contingency and to allow Ridgway more freedom in planning air and ground operations in the event the negotiations were ended, the JCS favored giving the U.N. commander broader powers. They realized that only substantial increases in men and equipment could produce a military victory, but the wider range of discretion would allow Ridgway to exert pressure as he saw fit with the forces at his disposal. Pointing out that the American public might grow weary of an indecisive war if the truce talks were not successful and might demand adoption of measures capable of securing military victory, the JCS recommended that the National Security Council reconsider a U.S. policy in case a negotiated settlement proved impossible.[11]

The general outlines of the JCS strategy were simple. Unless a global war broke out, the U.S. forces would remain in Korea and exert pressure upon the enemy to encourage him to negotiate. There would be no military victory in this limited war, but the U.N. commander would have considerable latitude in the use of the military forces under his command. Patience, perseverance, and pressure keynoted the U.S. position, but would these be enough to persuade the enemy to come to terms?

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Of Men and Arms

It was a formidable task that the JCS had given to General Ridgway and his United Nations Command. The colorful Ridgway, with his everpresent hand grenade, had proved himself an able combat commander and administrator. Not only was he responsible for the conduct of operations in Korea as Commander in Chief, United Nations Command (CINCUNC) and the defense of the Far East Command area as Commander in Chief, Far East (CINCFE), but also the administration of Japan as Supreme Commander, Allied Powers (SCAP), and of the Ryukyus as Governor of these islands. *(See Chart 1.)*

Most of the officers on Ridgway's staff performed multiple duties as he used them interchangeably in the UNC, FEC, and SCAP headquarters. Lt. Gen. Doyle O. Hickey, for example, was chief of staff for all three commands.

The ground weapon of the U.N. Command in Korea was the Eighth Army under General Van Fleet, which included ROK and UNC units participating in the war. Organized into 4 corps, the Eighth Army had a reported strength of 554,577 men at the end of June. Seven of its 17 divisions were American and the remaining 10 were ROK. In addition, there were 4 brigades, 1 separate regiment, and 9 separate battalions. *(Chart 2)* The breakdown in strength figures showed 253,250 U.S- troops, 28,061 other U.N. personnel, 260,548 ROK troops, and 12,718 Koreans who were assigned to serve with the U.S. units (Ko-

rean Augmentation to the U.S. Army [KATUSA]).[12]

During the Communist offensives in the spring of 1951 the Eighth Army had shown itself a highly skilled battle force capable of absorbing the stiff punches of the enemy and of dealing stern punishment in return. Although it did not have sufficient strength to insure a decisive military victory in Korea, it was fully competent to man the defense as long as the war remained limited.

Under the circumstances General Ridgway sought to strengthen the defensive power of his forces in Korea. With the battle lines fairly stable, he requested that his artillery capabilities be increased. The enemy, he pointed out to the JCS, was particularly susceptible to the potential of massed artillery fire when he attacked. If five 155mm. howitzer, four 8-inch howitzer, one 155 mm. gun, and two observation battalions were added to the Eighth Army's artillery, Ridgway felt that it could inflict even greater losses upon the enemy.[13]

There was little question over the desirability of this augmentation in Washington, but Ridgway's requirements were only a part of the picture. Actually the artillery increases when added to Ridgway's other requests would necessitate raising the FEC troop ceiling by 57,000 spaces if all were approved. As G-3 pointed out to General Collins, the only way that the Army could fill Ridgway's demands completely would be by increasing the over-all strength of the Army establishment. Since this was not practicable at the moment, G-3 suggested that by taking 5,000 men from the General Reserve and 5,000 from the shipment scheduled to strengthen the European Command, at least part of FEC's needs could be met.[14]

With the Chief of Staff's support, the JCS on 17 August approved an increase of five AAA battalions and four field artillery battalions for Ridgway's command. These along with other assorted units totaling over 13,000 men were to be shipped in the fall.[15] Thus by cutting back the General Reserve and

delaying the European buildup, the Army leaders in Washington tried to fill some of Ridgway's most urgent priorities.

The Washington staff was under no illusion insofar as enemy potential was concerned. It realized that dragging out the negotiations through the summer had allowed the Communists to build up their forces. At any time, the enemy could launch an offensive with a manpower superiority of up to 4 to 1 at the point of contact, lasting nearly a month, and using up to 46 Chinese and North Korean divisions and 1,100 aircraft. To oppose this offensive Ridgway could muster the 17 divisions in Korea, but would this be enough to halt the enemy threat? The situation in the United States was not particularly hopeful. Of the 7 Army divisions stationed at home only 3 were fully trained in September 1951. One of these, the 82d Airborne, was *the* strategic reserve; the other 2, the 28th and 43d Infantry Divisions, were scheduled

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to go to Europe in October and November. The 11th Airborne would finish its divisional training cycle in November and go into the strategic reserve, but the remaining 3-the 31st and 47th Infantry and the 1st Armored Divisions-would not be available until early 1952. Thus an emergency in Korea would mean that the European Command would again be delayed in reaching its full strength.[16]

The thinly spread U.S. forces had to cover strategic points around the globe in readiness for the broadening of the Korean War or for the outbreak of a new conflict. It was also natural that each major theater commander should suffer from the disease known in World War II as "localitis." Whenever the theater commander became so immersed in his own problems that he tended to overlook the worldwide responsibilities of the military services, he was liable to fall prey to this familiar malady. In fairness it should be noted that General Ridgway's case was moderate, but nonetheless he worked diligently to secure reinforcements, especially air and sea additions, during the summer of 1951. Ridgway was worried about the Soviet threat to Japan and in the event of an expanded war, he wanted to have a little extra air and naval strength to contain any Soviet drive and a firm commitment from the JCS that they would replace his air and naval losses. The JCS explained that his command could be built up only at the expense of other vital areas and that allocations in case a war with the USSR broke out would have to depend on world conditions at the time.[17] But this failed to satisfy Ridgway. In September he again expressed his concern lest the Russian reaction over the signing of the Japanese peace treaty and the uncertain situation in Germany lead to an attack upon Japan. Once more he asked for naval and air reinforcements in vain. The JCS evidently did not feel that his anxiety over Russian intentions warranted any major shifts in the deployment of the U.S. armed forces.[18]

As long as the international situation held firm and the enemy in Korea continued to be cautious in risking its air power, the JCS had a point. The Far East Air Forces, commanded by Lt. Gen.

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Otto P. Weyland, provided medium bomber support of operations in Korea with 99 B-29's of the Strategic Air Command based on Okinawa and Japan. For tactical air support, the Fifth Air Force, under Maj. Gen. Frank F. Everest, had a light bomber wing, three fighter-bomber wings, and two fighter-interceptor wings- all based on South Korean airfields-and a light bomber wing and a fighter-escort wing stationed in Japan. The bulk of the land-based 1st Marine Air Wing was under the operational control of the Fifth Air Force. In addition the Australians and South Africans had each furnished a squadron of fighters.[19] Although the type of plane varied from the propeller-driven F-51 Mustang to the F-86 Sabrejet, the UNC air forces enjoyed air superiority over Korea. Bombers and fighters, new and old, roamed the length of the peninsula virtually unchallenged except at or near the frontier along the

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Yalu.

Carrier-based naval air squadrons furnished additional tactical air support from the Sea of Japan and the Yellow Sea. On 1 July 1951, Task Force 77 of the Seventh Fleet ranged off the northeastern coast of Korea. Under Rear Adm. George R. Henderson, Task Force 77 contained three carriers, the USS *Princeton,* the USS *Bon Homme Richard,* and the USS *Boxer,* the battleship *New Jersey,* two heavy cruisers, the USS *Los Angeles* and the USS *Helena,* and eighteen destroyers. Planes from the carriers not only flew close support missions for the ground forces but also carried out reconnaissance and antisubmarine patrols and interdicted the North Korean railroad net.

In the Yellow Sea and east coastal waters off Korea, Task Force 95, commanded by Rear Adm. Ingolf N. Kiland, formed the U.N. Blockading and Escort Force. Headed by the carriers USS *Sicily* and H.M.S. *Glory,* this force consisted of 85 ships, many provided by other members of the United Nations and by South Korea. Naval units supplied gunfire support along the coast line, patrolled the offshore waters, and controlled the sea approaches to North Korea.

A third naval force, Amphibious Task Force go, under Rear Adm. George C. Dyer, stood by in Japanese and Korean waters to render support to any amphibious undertakings. In the meantime, Dyer's forces worked with the blockading UNC naval units.[20]

Neither the Chinese nor the North Koreans offered more than nuisance opposition to the UNC naval forces. Although the powerful Russian submarine fleet lurked in the background as a potential menace in case of a spreading of the war, the chief danger to the UNC ships lay in the numerous mines sown by the Communists along the coasts.

Unless there was a radical change in the global situation, the UNC air and naval strength seemed more than adequate to cope with the enemy. Exercising complete control of the Korean air and seaways, the U.N. Command's greatest vulnerability was on the ground.

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Developing the ROK Army

The major weakness in the ground forces under General Ridgway was qualitative rather than quantitative. Ten of the seventeen UNC divisions belonged to the ROK Army and for diverse reasons the South Korean troops had on occasion proved to be unreliable in time of crisis. Since the United States intended to place more responsibility for the defense of South Korea upon native forces whether the negotiations were successful or not, it became essential to improve the caliber of the ROK Army.

At least part of the blame for the condition of the ROK forces had to be shared by the United States. Partially because it had no desire to offend the USSR and partially because of a distrust of the political leadership in South Korea, the United States had supported the formation of a mobile, lightly armed constabulary in 1945 to preserve internal order during the occupation period rather than a hard-core defense establishment. Even after American troops had been withdrawn in 1949, the U.S. Military Advisory Group to the Republic of Korea had only 500 men to help train an army that quickly grew to 100,000 in 1950.[21]

The lack of adequate personnel to provide comprehensive coverage of the South Korean Army down to the battalion level and to fully support the Korean Army school system was but one problem. When the advisors attempted to explain tactics or to give the nomenclature of weapons, they were confronted by

the refusal of the Koreans to use Japanese and by the inadequacies of the Korean language, which had failed to keep pace with the technological development of weapons and warfare. Names and expressions had to be invented and the lack of standardization of nomenclature produced confusion and delay in training.

Since the defense assistance funds allocated to the Republic of Korea were limited in 1949-50, heavy equipment and weapons were not provided. As a result, when the war broke out, the ROK Army had little heavy armament and encountered great difficulty in coping with the North Korean tanks and artillery. Some ROK divisions had not even completed the company phase of their training by June 1950 and many soldiers were unfamiliar with their own weapons. To cap the tragedy, the leadership of the ROK Army from top to bottom suffered from political appointments and incompetency was rife from company to division level.

The North Korean invaders easily smashed the ROK Army and forced a complete rebuilding and reorganization of ROK forces. In the haste to stem the enemy advance, recruits were rushed into uniform, given weapons but little or no training, and then sent to the front to plug a gap in the line. Such hit-and-miss efforts to meet the emergency were the best that could be done under the circumstances, but the deficiencies in training, equipment, and leadership remained. By October 1950, however, MacArthur had 5 ROK divisions in action and 5 more in the process of activation and organization. He recommended that a postwar army of 10 divisions with a total strength of 250,000 men be authorized, and the De-

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partment of the Army and the President approved in early November.[22]

Under the impact of the Chinese Communists entry into the war the ROK Army suffered another catastrophe. The defects in leadership and training again caused defeat and disintegration of the ROK units and necessitated further reconstitution and rebuilding. Despite his doubts as to the value of South Korean troops, MacArthur clung to the ten-division ROK Army as sufficient to maintain order and repel aggression in the postwar period.[23]

Syngman Rhee and his government did not share MacArthur's misgivings over the fighting capability of the ROK soldier. After MacArthur's recall in April, they launched a campaign in the United Nations and in the United States to have an additional ten divisions organized and equipped with American arms. Unfortunately, the ROK request was poorly timed for on 22 April a ROK division broke and ran before inferior enemy forces.[24] This incident endangered the UNC line and caused General Van Fleet to urge Ambassador Muccio to take up the matter with Rhee personally.

Until the lack of leadership was remedied, Van Fleet warned, there should be no further talk about increasing the ROK forces. What the South Koreans needed most were good leaders, better training, and a greater desire to fight for their country.[25] Muccio handed Rhee a letter covering these points on 5 May.

Evidently Van Fleet's comments made little impression upon the ROK President, for less than two weeks later he informed the press that if the United States would equip his already well-trained divisions, U.S. troops could be withdrawn from Korea. Reaction in the Army against letting Rhee make such obviously false statements unchallenged was immediate. Ambassador Muccio was told to reiterate in the strongest terms the concern of the United States over the issuance of damaging and flagrant statements so contrary to the facts of the matter.[26]

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The reasons behind Rhee's conduct became somewhat clearer as the armistice negotiations opened in July. He and his government were pledged to continue the drive for Korean unification. With a military stalemate in the offing, the ROK Government feared that the UNC troops might withdraw and leave the Republic of Korea undefended. Despite assurances from Muccio and other official U.S. visitors to Seoul that no such course was contemplated, Rhee and his counselors remained skeptical.[27] ROK political opposition to the armistice and pressure in behalf of an expanded ROK Army represented their response to the challenge. If an armistice was negotiated, the ROK leaders probably wanted to be sure that they

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would be in a position to at least defend themselves and possibly to finish the task of unification on their own later.[28]

In the meantime, both Washington and FEC headquarters investigated the problem of improving the battlefield performance of the ROK Army. The Army G-3, Maj. Gen. Maxwell D. Taylor, visited the Far East Command in early May and spoke out in defense of the ROK forces. Everyone had been criticizing the South Korean Army for the lack of leadership, he reported to General Collins, but the hasty and inadequate training that was unavoidable under the circumstances and the absence of proper support units might have resulted in a loss of confidence under battle conditions. Basic training, he pointed out, often lasted only ten days for recruits and emphasis had been placed particularly upon keeping units in action. Little attention had been given to long-range planning for the creation of an effective ROK military force in a year or two.[29] Taylor's point was well taken, but the press of immediate needs had permitted no other course in the past.

In the Far East Command, General Ridgway ordered investigation of ways and means to bolster South Korean leadership. One way to accomplish this, Col. Gilman C. Mudgett, Eighth Army G-3, suggested, would be to set up a training command similar to the Replacement and School Command of World War II.[30] Ridgway and Van Fleet approved the training command concept and selected Col. Arthur S. Champeny to direct the program. After a quick survey in Korea, Champeny flew to Washington to look over the U.S. service schools and training methods. Since he felt that the South Korean Army needed infantry and artillery officers most, he recommended that groups of 150 to 200 ROK officers be assigned at a time to the Infantry and Artillery Schools in the United States. With G-3 approval of his plan, Champeny returned to Japan to work out the details. For fiscal year 1952, Champeny estimated that 150 infantry and 100 artillery officers could be sent to the United States to take a special twenty-week course. At the end of September 1951 the first students reported to the schools.[31]

While Champeny was busy establishing his Replacement Training and School Command in Korea, Ridgway forwarded his views on the ROK Army to General Collins on 22 July. The first requirement for any military organization, the FEC commander began, was an officer and noncommissioned officer corps-competent, aggressive, and loyal. There was no such group in the ROK Army and it would take a long time to develop one. If contemplated school, replacement, and training plans were carried out and if the war continued at its present tempo, the ROK Army might become completely effective in three years. Were the armistice to be signed,

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Ridgway continued, the task might be done in two years. He went on to point out that the ROK officer candidate course had been lengthened from eighteen to twenty-four weeks and that each ROK division would be given a nine-week rehabilitation program. By training ROK officers in U.S. service schools

and centralizing all ROK training installations, Ridgway hoped to make the results of the school system more satisfactory. However, he maintained, the Department of the Army would have to help, too. KMAG would need more personnel to man the training installations, and automatic weapons, artillery, and tanks would have to be provided for ROK units as they showed ability to use these profitably. The ten-division South Korean army had to develop its own service units and these would have to be equipped by the United States. Finally, Ridgway recommended that constant pressure be applied on the ROK Government to take strict disciplinary measures against corrupt, incompetent, and cowardly officers and government officials.[32]

During the summer of 1951 with the benefit of the lull on the battlefield that succeeded the opening of negotiations, Ridgway and his staff went ahead with

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their plans. New tables of organization and equipment for the ROK units were developed and the KMAG staff was expanded to 1,308 officers and men by the end of September.[33] The ROK school system was revised and by the first of October it was operating with a capacity of over 10,000 students. At the Replacement Training Center, Champeny, now a brigadier general, had facilities for 23,460 trainees. Schools for training infantry, artillery, and technical officers were in operation and the Korean Military Academy and the Command and General Staff School were due to resume courses in early 1952. All of the instruction at these schools was designed and conducted to instill leadership and improve the technical qualifications of the ROK students.[34] By and large there was a general feeling that definite progress had been made and that given time and training the ROK units would prove to be just as capable as the North Korean units.[35]

The future strength of the ROK Army was as yet undetermined, for ten divisions seemed to be all that the South Koreans could develop within two or three years. As General Taylor informed Secretary of the Army Pace in August, the long-range requirements depended on too many intangibles to be clearly estimated then. The outcome of the war, the political destiny of Korea, future U.S.-Korean policy, the success of the short-range program, and the ability of the United States to equip additional divisions in view of its global requirements would help shape the long-range plan.[36]

One of the by-products of the peace negotiations, therefore, was the provision of time to strengthen the ROK Army by proper training and instruction. During the summer interlude, although the Communist forces were also built up and became capable of major offensives, it was possible for Ridgway and Van Fleet and their staffs to devote considerable attention to the ROK Army task with some degree of success. At the same time, the two leaders interested

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themselves in a related problem- the United Nations forces fighting beside the ROK and U.S. troops in Korea.

Maintaining U.N. Support

When the war had broken out in June 1950, the United States had been anxious to secure the support of as many U.N. members as possible. It had welcomed contributions, large and small, in its desire to elicit military help and moral sustenance against the Communist aggression in Korea.[37] Gradually combat, support, and medical units from nineteen other U.N. countries joined the United States and the Republic

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of Korea. Ranging in size from a small battalion of 600 men to a brigade of 6,000, this heterogeneous collection had grown to over 28,000 ground troops by the end of June 1951.[38]

The United Kingdom, Canada, and Turkey had each shipped a brigade, and other members of the British Commonwealth, including Australia and New Zealand, had formed a fourth. Belgium-Luxembourg, Colombia, Ethiopia, France, Greece, the Netherlands, the Philippines, and Thailand provided battalions. From India, Norway, and Sweden had come medical and hospital units and Denmark had sent a hospital ship. Naval line forces were contributed by the United Kingdom, Australia, Canada, Colombia, the Netherlands, New Zealand, and Thailand and air squadrons by Australia, Canada, and the Union of South Africa.

Welding this complex group into a cohesive and effective war machine proved to be a formidable task. The forces of each nation arrived in different stages of combat readiness. Some, such as the British Commonwealth troops, presented few problems since they were well trained and well equipped, and soon set up their own supply lines and oriented their own units. Since the Commonwealth soldiers all spoke English, there were no linguistic difficulties or major communications problems.[39]

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But when the Philippine Combat Battalion arrived in September 1950, the need for a reception center to equip, train, and orient new units became apparent. The following month the U.N. Reception Center at Taegu opened and helped to prepare the Turkish, Thai, Indian, Dutch, French, Greek, Ethiopian, Belgian, Luxembourg, and Colombian forces for their advent into combat.

As soon as the U.N. units were judged ready, they were usually attached to U.S. outfits- the battalions to U.S. regiments and the brigades to U.S. divisions. The British Commonwealth forces were amalgamated into brigades and attached to the U.S. I Corps. The parent units provided administrative, logistical, and operational support and guidance. By working together on a long-term basis both parent and attached groups developed an *esprit de corps* that fostered a better team effort.

U.S. commanders used the U.N. troops according to their capabilities for defensive or offensive missions. Since the terrain was mountainous and the winter weather severe, some national forces- like the Greek and Turk-were easily

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acclimatized, while others, like the Thailanders who were from a flat, warm country, had more difficulty in adjusting themselves. Many of the U.N. military groups, such as the Filipino and Greek, had been trained by U.S. officers and had become accustomed to U.S. weapons, equipment, and tactical doctrine. Others had to become familiar with U.S. methods and machines and the linguistic barrier did not make this hurdle any easier.

Customs and traditions also played a role in forging the international army. Religious restrictions and national dietary habits made considerable accommodation of food supplies necessary. As Moslems, the Turks would eat no pork and the Indians who were Hindu would touch no beef. The French, Dutch, and Belgians liked more bread and potatoes than the Americans and the Thailanders had to have more rice and hot sauces. Eventually each nation secured satisfactory rations, but only after a good deal of improvisation and juggling of food stores.

Although the differences in diet, training, and equipment were obstacles, they were not insurmountable

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and after a period of trial and error, improvement usually resulted. There were several continuing problems, however, that were not so easily solved. Despite the fact that all of the United Nations involved in the Korean War had resisted the Communist aggression, there was a wide spread of opinion on the ways and means to bring the conflict to an end. President Truman had repudiated the MacArthur approach which had threatened an expansion of the war to the Chinese mainland, but there were strong elements in the United States that still insisted that there was no substitute for military victory.

The chief bone of contention was Communist China and several nations, such as Great Britain and France, feared that domestic pressure might lead the United States to pursue an aggressive policy of bombardment, blockade, and support for an invasion of the mainland by Chiang Kaishek's forces.[40] The initiation of the armistice talks may have allayed some of the fears, but the possibility that the discussions might fail remained. What the American reaction in such an event might be posed a ticklish problem, for neither the prospect of a long war of attrition nor of an expanded conflict against Communist China offered any occasion for cheer.

Another subject that kept raising its head concerned the size of the U.N. units in Korea. Although General MacArthur initially had suggested that units of approximately 1,000 men with equipment and artillery support be sent, both Ridgway and Van Fleet came to feel in the late spring of 1951 that the member nations should be encouraged to increase their forces to not less than a regimental combat team or brigade. Each regimental combat team or brigade should have its own integrated artillery, logistic, and administrative support and should be trained prior to its arrival in Korea.[41]

Without doubt this would have relieved U.S. units of the bulk of their responsibility for other U.N. forces, but the anticipation that an armistice would be negotiated soon changed the picture. On the eve of the armistice negotiations, Ridgway did a volte-face and recom-

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mended that no U.N. forces be materially increased until the results of the truce discussions became apparent.[42]

During the summer Ridgway had difficulty in even maintaining the current U.N. strength. Both the French and the Belgians had to make special efforts to provide replacements for their battalions. By August the French had rushed fillers to Korea and were at full strength, but the Belgian problem proved more complex. Since only volunteers could be sent overseas, the Belgians had to offer extra incentive pay and short tours of duty before they could secure the additional troops. These were airlifted in October to bring the Belgian battalion back to its normal complement.[43]

A somewhat unusual supply system sustained the UNC forces in Korea. When the first U.S. troops landed on the peninsula in 1950, a logistical command was established to provide base support. Later, as supply lines lengthened, an army service area and forward supply points were organized. Since Korea was in effect a theater of operations, the next step ordinarily would have been to set up a communications zone headquarters to take over rear area logistics and to permit the army commander to devote full time to frontline operations. But Ridgway as Eighth Army commander had insisted that his responsibility begin at the shore line and Van Fleet had made no effort to alter this arrangement. Thus, the Eighth Army commander exercised control over the Korean railroad net, rear area security, civil affairs, ROKA training, and prisoners of war as well as over his logistical support. The 2d Logistical Command, under Brig. Gen. Paul F. Yount, with headquarters at Pusan was responsible for direct logistical support and was the primary agency for placing requisitions upon the Japan Logistical Command. Through Pusan, the chief gateway to Korea, ran three different supply lines- one for the

United States and the majority of the UNC forces, a second for the British Commonwealth contingents, and the third for the ROK units. The United States system was the largest by far and provided the Commonwealth forces with perishable foods and petroleum products and the ROK forces with war materials in addition to the total support it gave to the American and other U.N. troops.[44]

Although the United States furnished the major portion of the supplies and equipment for most of the U.N. contingents as well as numerous service functions, it expected eventually to be reimbursed for these goods and services. The approach might differ in individual cases, but the problem of reimbursement continued throughout the war. And the Army had the task of keeping the books so that when the subject came up, it could present fair and reasonable estimates of the charges involved. The Eighth Army had to submit weekly and monthly reports on equipment, ammunition, and supplies furnished to the U.N. units, plus an estimate of handling charges. In the spring of 1951, Eighth

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Army attempted to set up a system whereby the bill could be figured out on the basis of so many dollars-per-man-per-day, but this was superseded in June. The Department of the Army decided to substitute a cost and replacement factor as the basis for compiling the amounts to be reimbursed.[45] The timing of the final settlement rested with the political and military leaders in Washington, of course, but whatever the system used to compute the bill or the method employed to collect it, the Eighth Army had to carry the administrative and bookkeeping burden. As long as the war lasted and the United States retained the responsibility for supplying its allies, this was a job that would have to be done.

All in all, the summer and early fall of 1951 proved to be a time for preparation. While the U.S. leaders considered broad plans for the prosecution of the war if the peace negotiations failed, General Ridgway and his staff sought to improve the combat efficiency of the forces in the United Nations Command and to intensify the program for build-

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ing a more reliable ROK Army. On the sidelines the U.N. countries with troops in Korea watched the developments at the conference table intently for the outcome would affect their own plans and preparations.

Yet despite the hum of activity, a note of uncertainty permeated the scene. The on-again, off-again character of the peace talks made all planning tentative. Although the United States was pursuing a policy of constant military pressure upon the enemy in Korea, its plans were flexible and opportunistic rather than firm at this point. In some ways the trends were reminiscent of the war against Japan in 1943-44. The United States was attempting to build up a native army in Korea even as it had sought to create a ground force in China. And though the United States was supplying the bulk of the resources and effective manpower, there were allies to be consulted and placated just as there had been in the Pacific war. Flexibility and opportunism had keynoted the mid-war period against Japan, too, but the final objective then had been unconditional surrender rather than a negotiated peace. Another point of similarity was the role of the Soviet Union waiting in the wings. Only this time it would play the villain's part instead of the friend in need if it entered the war.

The air of indecision as the United States and its allies awaited the results of the peace negotiations was reflected on the battlefield as well as behind the scenes. With the opening of the truce talks, action at the front had begun to take its cue from the course of events at Kaesong.

Notes

1 For an interesting discussion of the military conduct of the war, see the article, "Truman," by Wilber W. Hoare, Jr., in Ernest R. May, ed., *The Ultimate Decision: The President as Commander in Chief* (New York: George Braziller, 1960).

2 The composition and functions of the NSC are described in the *United States Government Organization Manual 1951-1952*, prepared by the General Services Administration, National Archives and Records Service, Federal Register Division (Washington, no date), p. 63.

3 General Marshall, after a distinguished career as Chief of Staff, U.S. Army, in World War II and service as Secretary of State, was recalled from retirement in September 1950, to replace Secretary Louis Johnson. A special waiver had to be passed by Congress on this occasion, since Marshall still held his General of the Army rank and the law barred military officers from holding the post of Secretary of Defense.

4 Admiral Sherman died of a heart attack on 22 July. He was replaced by Admiral William M. Fechteler on 1 August.

5 *U.S. Government Organization Manual, 1951-52,* pp. 116ff.

6 Hoare, "Truman" in *The Ultimate Decision,* p. 197. The State-Defense meetings had been discontinued under Secretary of Defense Johnson.

7 See Schnabel, Policy and Direction: The First Year, Chapter III.

8 Memo, Bradley for Secy Defense, 5 Apr 51, sub: Mil Action in Korea, in G-3 091 Korea, 167/4.

9 (1) Msg, JCS 92847, JCS to CINCPAC, 1 Jun 51. (2) Msg, CX 65297, CINCFE to JCS, 19 Jun 51. (S) Msg, JCS 80240, JCS to CINCFE, 29 Aug 51

10 Memo, Bradley for Secy Defense, 13 Jul 51, sub: U.S. Courses of Action in Korea. In OCMH.

11 Memo, Bradley for Secy Defense, 3 Nov 51, sub: U.S. Courses of Action in Korea. In OCMH.

12 DF, OCA to OCMH, 7 Oct 54, sub: ROK and U.N. Ground Force Strength in Korea: In OCMH.

13 Msg, CINCFE to DA, 23 Jun 51, DA-IN 7369. The nondivisional artillery assigned to Eighth Army on 1 July 1951 included seven 155mm. howitzer battalions, two 155-mm. gun battalions, and two 8-inch howitzer battalions.

14 Summary Sheet, Maj Gen Robinson E. Duff for CofS, 2 Jul 51, sub: Reevaluation of FA Requirements, in G-3 320.2 Pacific, 300.

15 Msg, G-3 to CINCFE, 22 Aug 51, DA-OUT 99608.

16 Memo, Maj Gen Reuben E. Jenkins for CofS, 12 Sep 51, sub: Reinforcement of the FEC, in G-3 320.2 Pacific, 60/23.

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17 (1) Msg, C 68161, CINCFE to JCS, 2 Aug 51, DA-IN 1426. (2) Msg, JCS 99220, JCS to CINCFE, 17 Aug 51.

18 (1) Msg, C 51095, CINCFE to JCS, 19 Sep 51, DA-IN 17897. (2) Msg, JCS 82084, JCS to CINCFE, 21 Sep 51.

19 USAF Hist Study No. 72, USAF Operations in the Korean Conflict, 1 November 1950-30 June 1952, pp. 84-89, 98-100.

20 COMNAVFE Comd and Hist Rpt, an. 29 to FEC Comd Rpt, Jul 51.

21 For a detailed account of the KMAG effort and the difficulties encountered, see Sawyer, *Military Advisors in Korea.*

22 (1) C 67296, CINCFE to DA, 24 Oct 50, DA-IN 4541 (2) CX 67400, CINCFE to DA, 25 Oct 50, DA-IN 4988. (3) Memo, Secy Army for the President, 1 Nov 50, sub: Logistic Support of Republic of Korea Army, G-8 KMAG file, folder 2, bk. 1, tab E.

23 Msg, C 59876, CINCFE to DA, 5 Apr 51, in UNC/FEC, Comd Rpt, Apr 51, G-8 sec, pt. III, tab 4.

24 CINCFE Presentation to Archibald S. Alexander, Under Secy Army, no date, in G-3 091 Korea, 187/7.

25 Ltr, Van Fleet to Muccio, 8 May 51, no sub, in G-3 091 Korea, 411.

26 JCS 1776/225, 7 Jun 51, title: President Rhee's (ROK) Statements.

27 Msg, 100488, Muccio to SCAP, 10 Jul 51, in FEC 387.2, bk. I, 11.

28 See Msg, 192311, Muccio to SCAP, 19 Jul 51, in FEC 387.2. bk. I, 24.

29 Memo, Taylor for CofS, 15 May 51, sub: Rpt of G-g Visit to FEC, in G-3 333 Pacific, 10.

30 Comment Sheet (sgd Mudgett), 4 May 51, sub: Troop Leadership School for Senior Korean Officers, in KMAG file AG 353, KCRC.

31 (1) Memo, Gen John E. Hull for Secy Army, 17 Jul 51, sub: Development of ROK Officers and Noncommissioned Officer Corps, in G-3 350.2 Korea, 4/5. (2) Msg, CINCFE to G-3, 2o Aug 51, DAIN 7542 (2) Summary Sheet, Maj Gen Reubin E. Jenkins for CofS and Secy Army, 2 Oct 51, sub: ROKA Replacement Training . . ., in G-3 350.2 Korea, 10/3.

32 Msg, CX 67484, Ridgway to Hull, 22 Jul 51, DA-IN 17555.

33 Sawyer, *Military Advisors in Korea,* p. 161.

34 (1) Msg, CX 50942, CINCFE to DA, 16 Sep 51, DA-IN 17089. (2) Summary Sheet, Jenkins for CofS, 2 Oct 51, sub: ROKA Replacement Training and School Comd Brochure, in G-3 350.2 Korea, 10/3.

35 (1) Memo, Alexander for Deputy Secy Defense, 5 Sep 51, sub: 'Training and Equipping the South Korean Army, in G-3 091 Korea, 354/2. (2) Memo, Jenkins for CofS, 14 Nov 51, sub: Rpt of Field Training, ROK Army, in G-3 333 Pacific, 15.

36 Memo, Taylor for Secy Army, 24 Aug 51, sub: Directives to CINCFE Respecting the ROK Force to be Developed, in G-3 091 Korea, 187/3.

37 The one exception had been the 33,000 troops offered by Chiang Kai-shek in June 1950. Because of the possibility of political complications with the Communist Chinese and the deficiencies in training and equipment of the Nationalist forces, President Truman decided to take the advice of his political and military advisors. He declined Chiang's proffer. See Harry S. Truman, *Memoirs,* 2 vols. (New York: Doubleday & Co., Inc., 1955) , vol. II, p. 343.

38 For a breakdown of U.S., U.N., and ROK ground forces at this period, see Appendix A-1, below.

39 A detailed account of the problems of coordinating the U.N. forces will be found in two FEC studies, one by Maj. Sam F. Gaziano and the other by Maj. William J. Fox, both entitled InterAllied Cooperation During Combat Operations. MSS in OCMH.

40 See Memo, D. A. (Acheson) for Bradley, 12 May 51, no sub, in G-3 091 Korea, 176.

41 Msg, CINCFE to DA, 1 Jun 5 1, DA-IN 19078.

42 Msg, CINCFE to JCS, 6 Jul 51, DA-IN 11527.

43 Msg, Duff to CINCFE, 6 Jul 51, DA-95739 (2) Msg, Jenkins to CINCFE, 1 Sep 51, DA-80536. (3) Msg, Eddleman to CINCFE, 23 Oct 51, DA 84922.

44 (1) Military History Detachment, 8086th Army Unit, Eighth Army, Monograph, Organization of the Korean Communications Zone, pp. 1-2. In OCMH. (2) Eighth Army, Monograph, Logistical Problems and Their Solutions, p. 20. In OCMH.

45 Fox, Inter-Allied Cooperation During Combat Operations, MS, pp. 167ff.

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